

4) Recommendation

For a company doing business abroad, especially in jurisdictions where corruption may be widespread, the Daimler case should serve as a forceful reminder of the importance of robust anti-corruption programs and of having a strategy for dealing with potentially suspect transactions.

a) The Need for Robust Compliance Programs

For multinational companies, one of the best defenses against the risks of anti-corruption enforcement is to establish robust compliance programs to help their employees deal with the pressures of doing business in difficult jurisdictions—without clear guidance and the right “tone from the top”, they may succumb to those pressures, with potentially disastrous consequences for both the company and the individuals involved.

b) Internal Investigations and Rewards for Cooperation

When confronted with a transaction that may potentially have been corrupt, companies must act quickly to determine all relevant facts in order to ensure that any improper acts have been stopped and to allow for considered decision-making regarding whether and how to report any violations to the relevant authorities.

It can be in the interest of a company that has violated the FCPA or other applicable anti-corruption laws to self-report its violations in order to receive reduced penalties as a result of cooperation.

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Cross-border Reinsurance Undertakings from Switzerland into the European Union

Reference: CapLaw-2010-33

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On 1 February 2010, the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) acknowledged on behalf of its members the equivalence of Swiss reinsurance supervision with Directive (EC) 2005/68 on Reinsurance (EU Reinsurance Directive). CEIOPS has examined whether Swiss legislation on the supervision of reinsurance is equivalent to the EU Reinsurance Directive based on a catalogue of criteria produced and published by CEIOPS. This recognition reinforces cooperation between the supervisory authorities of the EU and Switzerland and is highly welcomed by FINMA.

However, the recognition of equivalence does not have a relaxing impact on the conditions for a Swiss reinsurance company to undertake cross-border reinsurance activity in the EU. The recognition does in particular not have the effect that Swiss reinsurance companies obtain passporting rights under the EU Reinsurance Directive as it is the case between member states of the EU. Such relaxation between Switzerland and the EU would require a respective agreement between the EU and Switzerland (comparable to the agreement between the EU and Switzerland on direct insurance, excluding life insurance, in force since 1 January 2003). Therefore, under current law, if a Swiss reinsurance company wishes to undertake cross-border reinsurance business into one or several member states of the EU, it has to carefully assess under the reinsurance regulation of each member state whether such activity is allowed and, if so, under what restrictions. In some EU member states the reinsurance regulator provides for a respective confirmation, whereas in others only legal opinions provided by local law firms may be available. The regulations may vary from (i) allowing to undertake reinsurance activity without the need for any license, registration or other requirements to comply with and without any limitations to observe (e.g., with respect to visits, direct approaching/solicitation, use of local brokers, etc.), to (ii) a general prohibition to undertake reinsurance activity unless a licensed subsidiary or branch would be set up in the respective member state.

It remains to be seen whether this inadequate situation (not only for Swiss reinsurance companies, but also for EU insurance companies having the need to also locally diversify the hedging of their risks) will be reassessed and the single market for reinsurance will also become accessible for Swiss based reinsurance companies in the near future.

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