A Brief Overview of Recent Developments in the International Fight Against Bribery & Corruption

2013 saw an intensified global campaign against bribery and corruption, led chiefly by the USA and which is rapidly gained momentum.

There has been greater international co-operation focusing on global business transactions, both historic and current, and a spate of high level investigations which have affected household names such as Walmart, Rolls-Royce, GlaxoSmithKline, News International, Johnson & Johnson, Formula One, ENRC, and JP Morgan, to name but a few.

The World Bank Sanctions list is at its highest level for eight years and, up to July 2013, had blacklisted some 250 various companies/entities. It banned Canadian engineering group SNC-Lavalin from tendering for ten years, a record ban in relation to a bridge building project in Bangladesh.

However, in their 9th Progress Report (published October 2013), Transparency International are firmly of the view that enforcement levels of the OECD Anti-Bribery Convention 1997 are still poor, and identified certain countries in particular who 'could do better' e.g. Belgium, New Zealand, Ireland and Russia, amongst others.

Political Consequences

The Chinese five-year plan, announced in 2012 and focusing on public officials and both domestic bribery and that of international businesses working in China, has undermined the Chinese culture of gift giving, has also highlighted the scale of corruption within the pharmaceutical industry, and focused the attention of US regulators on the practice of hiring the offspring of the Chinese elite (the 'Chinese Princelings' scandal), by US businesses such as JP Morgan.

This campaign has resulted in the Chinese authorities (MPS and NDRC) imposing huge fines at unprecedented levels, and a series of arrests of high profile Chinese commercial and political figures, which has resulted in terms of life imprisonment or worse.

The Turkish judicial investigation into bribery and corruption has led to allegations concerning the construction industry and ruling Turkish politicians, which threatens the very fabric of Turkish society and economy.

The other major political aspect concerns the long reach of the FCPA which seems to know no bounds; this has prompted many Wall Street commentators to complain that the aggressive approach taken by US regulators has resulted in 'tit for tat' reactions by other countries.

More International Co-operation between the Authorities

Reference to this has been made earlier, but warrants further attention here.

The increasing international trend of criminalising foreign bribery has brought with it more foreign legislation in this field, as well as more focus on technology, mutual legal assistance and increased importance of corporate liability.

Most of the major international investigations have been US-centric and US regulators have played prominent roles into the relatively recent investigations of Siemens (working with the Germans), Innospec, and BAE Systems (working with the UK), for example. This multi-jurisdictional approach is

certain to continue, but it brings with it not just potential Americanisation of the process (for example the issues of non- and deferred-prosecution agreements, and also the escalating importance of whistleblowers and the payment thereof) but also US-style financial penalties.

International co-operation between the authorities does not end with the investigation, but increasingly we are witnessing more multi-jurisdictional civil settlements in eye watering sums. Just consider the money laundering civil settlements against the banks over the last two years.

Compliance

This has all led to a radical change of approach towards financial compliance and the now central importance of General Counsel and his/her compliance and legal teams.

Top quality compliance and a complete change of corporate culture (from the board down) are vital to defending a company against investigation, sanction and censure. Corporates who have ignored this have suffered acute reputational damage, withdrawal from certain markets, and huge penalties.

Compliance teams have faced 'uphill battles' when trying to convince their boards about the necessity of expensive compliance systems and controls, though, in fact, the management having more information about the company's processes can mean that the company can make more money and run more efficiently.

Part of the compliance process will involve keeping up to date with other new legislation in other jurisdictions and understanding the similarities and differences between those, the FCPA, and the Bribery Act 2010.

Over the last year we have seen tough new anti-bribery legislation in Brazil (which, for the first time, imposes corporate liability for corruption using civil and administrative remedies, NOT criminal, and fines up to 20% of the company's preceding annual gross revenues in Brazil), draft legislation forthcoming in Mexico and India, and amending legislation in Germany and Canada, to mention but a few examples.

Themes in New Legislation & Settlements with the Authorities

The FCPA is not without its critics and in many ways the Bribery Act 2010 differs from it and has a broader and longer reach. The 2010 Act incorporates a strict liability offence relating to the absence of adequate AB&C procedures and, unlike its US counterpart, will not sanction facilitation payments or require a corrupt intent.

Self-reporting by the corporate is an important mitigating factor when dealing with US regulators and will be in the UK. The real issue in this country will be persuading General Counsel to self-report. Having attended a recent conference in the City where the majority of GCs stated that they were unlikely to self-report (a further minority stated that they would only self-report on a limited basis), this is going to be a real problem for the authorities here.

Most GCs know of the likely cost of a major internal corporate investigation that will either precede or follow a self-report, and they are not confident that the UK authorities have either the budget or the staff to mount a fully successful Bribery Act prosecution. In fact the SFO track record with these prosecutions has been slow and poor, largely because of budgetary considerations.

The authorities both in the US and the UK are relying on whistleblowing information to assist them with their investigations. The DOJ/SEC and the SFO/FCA report receipt of record levels of whistleblowing reports in recent years.

The Dodd-Frank Act in the US allows for whistleblowers to be rewarded for their information and the government are considering offering financial rewards in the UK, though very probably not on the same scale as the recent SEC award of $14 million in October 2013, to an unidentified whistleblower!

There are two forthcoming developments which will change the UK bribery and corruption landscape: the final Sentencing Guideline on Corporate Crime Offences by the Sentencing Council for England and Wales, and Deferred Prosecution Agreements (DPAs), the use of which will be allowable next month when the Crime and Courts Act 2013 comes into force. We are still waiting on the final Code of Practice on DPAs, expected very soon.

Certainly the fines referred to within the Sentencing Council's consultation document are designed to hurt corporate offenders, though they are not on anything like the same scale as those handed down in the US. Last year the SEC/DOJ between them levied just under $3 billion in corporate fines. Recently a UK Parliamentary Committee complained that the consultation document did not go far enough and demanded higher penalties to be enforced.

The future years will bring more of the same international enforcement against bribery and corruption, thanks to the persistence of Transparency International and the lucrative fines that such enforcement actions are earning.