Anti-Corruption Committee News

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IBA2016 18–23 SEPTEMBER WASHINGTON DC

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IN THIS ISSUE

Contributions to this newsletter are always welcome and should be sent to the Newsletter Officer, David Hamilton, at **david.hamilton@shlegal.com**.

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This newsletter is intended to provide general information regarding recent developments in anti-corruption law. The views expressed are not necessarily those of the International Bar Association.

From the Co-Chairs

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Welcome to the IBA Anti-Corruption Committee's first newsletter for 2016.

The year promises to be full of exciting activities and developments. With this newsletter, there are several updates from across the world on anti-corruption developments and cases.

We have numerous projects on the go for this year and into future years. They include two new subcommittees, dealing with the Drivers of Corruption and Double Jeopardy. They complement the great work started by the irrepressible Ed Davis in the Asset Recovery Subcommittee, now chaired by Yves Klein. Please do not hesitate to contact the chairs if you are interested in becoming involved in the Subcommittees' work.

The founding officers of each of the new Subcommittees are as follows:

Double Jeopardy Subcommittee

- Ms Francesca Petronio of Paul Hastings in Milan, Italy (Chair)
- Prof Kath Hall of the Australian National University in Canberra, Australia (Chair)
- Mr Maximiliano D'Auro, Partner, Beccar Varela, Buenos Aires, Argentina (Junior Vice-Chair)
- Ms Sophie Scemla, Partner, Eversheds, Paris, France (Senior Vice-Chair)
- Mr Marc Henzelin, Partner, Lalive, Geneva, Switzerland (Officer)

Drivers of Corruption Subcommittee

- Prof Kath Hall of the Australian National University in Canberra, Australia (Chair)
- Prof Tina Søreide, Norwegian School of Economics, Bergen, Norway (Senior Vice Chair)
- Ms Anesta Weekes QC, Essex Court Chambers London, United Kingdom (Junior Vice Chair)
- Mr Leopoldo Pagotto, Watanabe Trench Rossi, São Paulo, Brazil (Officer)
- Ms Jitka Logesová, Partner, Kinstellar, Prague, Czech Republic. (Officer)
- Mr Stephane Brabant (CSR Committee Nominee)

Officers for 2016-2017

Our new officers for 2016 and 2017 have been busy preparing for the year's events. Besides your humble co-chairs and the chairs of each subcommittee, we have the following officers:

- Bruno Cova – Senior Vice Chair
- Leah Ambler – Junior Vice Chair
- Ed Davis – Regional Officer North America
- Eoin O'Shea – Regional Officer West Europe
- Sevi Firat – Regional Officer Central/East Europe
- Ibtissem Lassoued – Regional Officer, Middle East
- Taek Rim (Terry) Oh – Regional Officer, North Asia
- Melisa Uremovic – Regional Officer, South East Asia
- Maximiliano D'Auro – Regional Officer, Latin America
- Olumide Akpata – Regional Officer, Africa
- Leopoldo Pagotto – Secretary
- Jitka Logesova – Membership Officer
- Saskia Zandiah – Website Officer
- David Hamilton – Newsletter Officer
- Nicola Bonucci – International Organisations Liaison Officer.

We also have numerous Country Representatives which report to the Committee on anti-corruption developments across the globe. We are always looking out for new Country Representatives so if you are interested and your country does not have a representative, please let us know.

Committee Events for 2016

The Committee has some great activities for this year. They include the following:

- the 14th annual anti-corruption conference at the OECD in Paris on 15–16 June 2016 where our guest speakers will be the Romanian Chief Prosecutor, Laura Kövesi, the Chief Prosecutor in Operation Carwash, dominating the Brazilian landscape, Deltan Dallagnol and the Chair of Transparency International Turkey, Ms Oya Özarslan;
- ongoing work on the President's Judicial Integrity Initiative;

- submissions to the Australian Government on reforms to Australia's foreign bribery laws and the introduction of an Australian deferred prosecution agreement scheme;
- work with the Afghanistan Independent Bar Association on developing anti-corruption guidelines for the Afghan legal profession (sponsored by the IBA and the German Government International Development Authority;
- being involved in up to 12 sessions across the full conference week at the IBA Annual conference in Washington between 18 to 23 September 2016 including our ever popular Global Anti-Corruption Update session;
- hosting a North Asia regional anti-corruption conference in Seoul, South Korea in early November 2016; and
- ongoing work through each subcommittee.

For the Washington conference, stay tuned for when the Criminal Law section dinner will be held. In addition, we will be holding an open Committee meeting, probably straight after the Global Update session.

We encourage you all to attend these conferences, meet the Committee officers and become involved in the Committee's work. Where there are any policy initiatives that you think the Committee can help promote in your country or region, contact the co-chairs as the Committee can look at making submissions on legal reform, drawing upon the depth of skills from all our members.

And as always, keep your ideas and articles coming for the Committee and our newsletter.

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From the Editor

Welcome to the first newsletter of 2016, and the first of my tenure as editor. I was delighted to be appointed to serve as the Newsletter Editor for the IBA Anti-Corruption Committee, and wish in particular to thank James Tillen for the nomination.

I am also extremely grateful to all the contributors who have ensured this newsletter's success. The variety of articles, spanning six continents (I was alas unable to find a contributor for Antarctica), is testimony to the ubiquity of corruption. There is not a single jurisdiction in which corruption is not a clear and present danger.

It is therefore unsurprising that this newsletter is packed with new legislative initiatives to counteract corrupt activities, whether in the public or private sectors. Colombia, Ethiopia, New Zealand, Switzerland, Thailand and the United Kingdom have all adopted, or are in the process of adopting, new anti-corruption-related legislation.

One of the principal developments in this regard is the introduction of deferred prosecution agreements in the UK, and the first deployment of this tool in the case of ICBC Standard Bank in November 2015. We have three articles which centre on this case, each looking at it from different angles, variously asking whether the DPA process is, in fact, fair, whether DPAs or civil settlements represent a better way forward, and whether cooperation with the authorities (a necessary factor in the granting of a DPA) is in fact as straightforward as might first appear.

In addition, we have contributions from numerous jurisdictions which tell a tale of expanding anti-corruption regimes, which move beyond the confines of the public sector and now cover private, commercial transactions and entities. This shift is complimented by the inexorable move towards pinning criminal liability upon corporate entities, a concept once foreign to many countries.

We also have an interesting piece which considers the interplay between corruption and gender: does corruption affect women and men differently?

It would be remiss of me not to thank my predecessor, Saskia Zandieh, now the IBA Anti-Corruption Committee's Website Officer, for her sterling work over the past couple of years. I will endeavour to maintain the newsletter's high standards over the coming months.

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Anti-Corruption Committee sessions

Monday 1045 – 1230

Cartels and corruption

Presented by the Antitrust Committee, the Anti-Corruption Committee and the Healthcare and Life Sciences Law Committee

This programme will consider the interplay between cartels and other forms of corrupt conduct, such as bribery, market manipulation and fraud.

Monday 1045 – 1230

Regulatory, compliance and enforcement challenges in the Arab region

Presented by the Arab Regional Forum, the Anti-Corruption Committee, the Corporate Counsel Forum and the Litigation Committee

Regulatory, compliance and enforcement challenges in the Middle East. One challenge of globalisation is ensuring compliance with the regulatory regimes of host countries and establishing compliance programmes that meet best practices recommended by various international organisations. This session will examine the regulatory frameworks that most affect business in the Middle East:

- What are the regulatory risks of doing business in the Middle East?
- How do businesses manage export controls, anti-corruption and anti-money laundering challenges in the region?
- What is the role of local, international and multinational enforcement agencies?
- Do arbitration centres have a role to play?

All this and more will be discussed during the Arab Regional Forum's primary event of the year.

Monday 1430 – 1730

Mock trial: what were you thinking? The criminal trial of a multinational company and its CEO on corruption and fraud charges

Presented by the Criminal Law Section

This interactive criminal trial looks at the potential liability of a corporation and its CEO, charged with numerous counts of foreign bribery, conspiracy, money laundering and criminal breach of trust.

The session will examine key issues of:

- jurisdiction of US courts over foreign corporations and their officers;
- the criminal liability of a corporation and that of individual directors, officers and employees in the organisational setting;
- the liability of a corporation and its CEO for conduct of foreign subsidiaries and their agents;
- the availability of plea bargaining to reduce or eliminate the criminal exposure of the corporation and/or corporate of officers; and
- avoiding the unexpected: anticipating and responding to parallel criminal and regulatory proceedings in multiple jurisdictions.

Tuesday 1045 – 1200

Enabling technology and defeating devices technology, crooks and whistleblowers. The employer's dilemma of alienating or embracing whistleblowers

Presented by the Employment and Industrial Relations Law Committee, and the Anti-Corruption Committee

New technology may make it easier for corporate fraud and embezzlement to occur. However, when an employee reports detected corporate transgressions, the employer's response becomes equally as important as the substance of the charge. This session will focus on how employers treat the whistleblowing employee. If the employer disagrees with the whistleblowing employee's perception of what constitutes a corporate transgression, does the employer treat the employee as a rogue employee? Or, is the more prudent approach to embrace the employee until the completion of a thorough investigation. This session will also include as a speaker a former employee who was a whistleblower.

Continued overleaf

Wednesday 1045 – 1230

Public disclosure of payments to governments and indigenous peoples

Presented by the Securities Law Committee and the Anti-Corruption Committee

Many jurisdictions, including the United States, the European Union and Canada, have recently moved towards transparency measures in the extractive sector, requiring oil, gas and mining companies to publicly disclose payments they make to governments and in some cases indigenous peoples. The programme will discuss these new measures and key considerations for businesses, governments, securities lawyers and compliance advisers.

Wednesday 1045 – 1230

The impact of illicit financial flows on Africa's development and what African bar associations should recommend to their members and governments in response to the illicit financial flows

Presented by the African Regional Forum and the Anti-Corruption Committee

Illicit financial flows take a number of forms. The effect has been to deprive affected countries of funds needed to support developmental programmes. This has resulted in rich African countries, the majority of whose inhabitants are poor. The countries are rich in resources but the wealth is not being enjoyed by the majority of the people who live in them.

It is estimated that without illicit financial flows, Africa would not require aid. Consequently, curtailing or eliminating illicit financial flows has the potential to lift millions of Africans out of poverty and under-development.

The session will examine the nature, extent and consequences of the problem, and how African lawyers and bar associations should respond to it.

Wednesday 1430 – 1730

Double and triple jeopardy: does the punishment fit the crime?

Presented by the Corporate Counsel Forum and the Anti-Corruption Committee

This session will look at the fact that corporations are often held accountable to different regulators and different enforcement agencies around the world for a single infringement (bribery/corruption/antitrust), often in an entirely different part of the world. Is this really an application of the rule of law by all the principles as we know them, or rather regulator opportunism?

Thursday 1045 – 1200

International organisations and the fight against corruption: implementation and policy trends

Presented by the Anti-Corruption Committee, the International Organisations Subcommittee and the Public Law Section

International organisations play an important role in fighting corruption in the public and private sectors. This session will examine the role of international organisations, their strengths and weaknesses, and trends for policy development in targeting bribery, corruption, money laundering and illegal commercial conduct.

Thursday 1430 – 1730

Human rights due diligence: preparing for a legal obligation

Presented by the Corporate Social Responsibility Committee and the Anti-Corruption Committee

The aim of this panel is to assist lawyers in understanding human rights due diligence (especially through supply chain contracts) in preparation for such due diligences to become a legal obligation. The United Nations adopted a framework on business and human rights in 2011, the United Nations Guiding Principles on Business and Human Rights (UNGP). One of the pillars of the UNGP is the responsibility of business to respect human rights. In connection with this responsibility, the UNGP entail a human rights due diligence requirement. Unlike traditional due diligence that deals with risks to a company, human rights due diligence is connected with risks to affected stakeholders (other than the company itself). Although the UNGP are non-binding as such, states assume a role in ensuring the enforcement of the obligations entailed in the UNGP. Thus lawyers should be familiar with human rights due diligence as it is becoming increasingly important. The session focuses on human rights due diligence (as well as enacted or proposed legislation on the topic) and provides insights how to implement effective human rights due diligence (in supply chains).

Friday 0930 – 1230

Global anti-corruption update

Presented by the Anti-Corruption Committee

This yearly and very popular session will review the current trends and developments in anti-corruption policy, investigations and enforcement from around the world in an engaging round table dialogue with world experts.

To find out more about the conference venue, sessions and social programme, and to register, visit **www.ibanet.org/Conferences/Washington2016.aspx**. Further information on accommodation, tours and excursions during the conference week can also be found at the above address.

FEATURES

ALBANIA

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From totalitarianism to parliamentary democracy: Albania's great transition

It was Samuel P Huntington, the late American political scientist, who observed that the death of a dictator does not guarantee the emergence of democracy. A prime exemplar of this maxim is Albania, which from 1944 to 1985 existed under the communist regime of Enver Hoxha. Only through painfully slow reform, mainly dictated by political developments abroad and grassroots movements at home, did the country transition from totalitarianism to parliamentary democracy. Moreover, it has been far from plain sailing since Albania arrived at a democratic system.

After Germany invaded Yugoslavia in 1941, Hoxha, the son of a cloth merchant, became a figurehead for the anti-Fascist movement in Albania. Aided by Yugoslav communists, Hoxha founded the Albanian Communist Party (later renamed the Party of Labour) and ruled the Albania with an iron fist until his death, revolutionising the country's economy and eliminating perceived threats to his collectivist ideals (including private landowners, Christian and Muslim clerics and disloyal party officials).

Hoxha's successor, Ramiz Alia, sought to maintain his political progenitor's Stalinist legacy. However, Alia's premiership, which began in 1985, faced increasingly vocal intellectual and political dissent as the effects of Mikhail Gorbachev's democratising reforms rippled from the USSR through Eastern Europe. Gorbachev's policies of *glasnost* (openness) and *perestroika* (restructuring) not only sowed the seeds of the USSR's demise, but prompted calls for Alia to engage in political and economic reform in Albania.

Reform, however, proceeded, at least initially, at a glacial pace. Albania, engulfed by economic crisis, was in serious straits. And yet the country's constitution of 1976 prohibited the government from seeking financial aid from, among others, capitalist countries. This policy of self-sufficiency contributed to a refusal by Alia to engage with West Germany when it offered economic assistance. The tide was nevertheless turning and, following Nicolae Ceaușescu's execution during the Romanian Revolution of 1989, Alia recognised the importance of a radical change in domestic and foreign policy.

One of the key elements of Albania's rapprochement with the West was its belated accession to the Helsinki Declaration. Originally signed in 1975 by 35 states including the US, Canada and all European states bar Albania, the Helsinki Declaration sought to reduce tensions between the Soviet and Western blocs. In return for a formal recognition of Soviet hegemony in Eastern Europe, including the inviolability of borders and non-interference in internal affairs, the Declaration committed the USSR to respecting human rights, to expanding contacts between Eastern and Western Europe, to allowing freedom of travel and to the free flow of information across borders. Hoxha, in characteristically trenchant fashion, denounced the Declaration as anti-Soviet and refused to participate.

Sixteen years later, in September 1991, Alia reversed this position and committed Albania to the Declaration. Six months prior to this important step change in foreign policy, Alia's party had won the first pluralist elections to take place in the country since the communists had assumed power. And yet by March 1992 communist rule was at an end, the Democratic Party having triumphed in national elections following a damaging general strike and considerable social unrest. Alia resigned as president and was succeeded

by Sali Berisha, the first democratically-elected leader of Albania since the 1920s.

The course of democracy, however, did not run smooth. The transition from dictatorship to democratic republic was, as could have been anticipated, a rocky one. After all, the Albanian people had not known anything other than authoritarian rule for almost 50 years. While this subject could form the basis of hundreds of articles, the purpose of this brief piece is to focus on the judicial reforms which followed democratisation. As will be shown, those who hoped that the new political system would mean an end to corruption were sorely disappointed.

Judicial reform was among the highest priorities under Berisha's government. Out went all the experienced judges and prosecutors who were tainted by the erstwhile communist regime. In their place came inexperienced, young practitioners whose qualifications, controversially enough, amounted to a six-month judicial training course which the government established and oversaw.

This wholesale binning of the old in favour of the new, however, has done little to clean up the judicial system. Quite the contrary, Albania has witnessed a number of high profile corruption cases involving these new generations of judges and prosecutors.

In June 2015, the Albanian press reported that police had arrested Rasim Doda, a judge in the southern town of Saranda, on suspicion of soliciting bribes for favourable decisions. Following an investigation by Albania's Prosecution Office for Serious Crimes ('POSC'), a specialist department under the jurisdiction of the General Prosecutor, the case was sent for trial. During the trial at first instance the court heard from a Hasan Bushi, who had been party to a lawsuit before Mr Doda. In his evidence, Mr Bushi testified that he and Mr Doda had met prior to the conclusion of the lawsuit. In the course of this meeting, Mr Doda allegedly showed Mr Bushi a draft written judgment which found against Mr Bushi's opponent and required that he be paid 88m Albanian leks (around US$700,000). Mr Doda is then alleged to have written '80000' on the palm of his hand, which Mr Bushi understood to be Mr Doda's attempt to solicit an €80,000 bribe in return for his favourable judgment. The trial continues.

Mr Doda's case is merely the latest in a string of recent suspensions, arrests and prosecutions for corrupt activity. For example:

- In November 2015, Petrit Vulaj, the District Attorney for Fier in southwest Albania, was arrested on suspicion of soliciting bribes. The POSC alleged that Mr Vulaj had, in exchange for a substantial sum, assured a defendant charged with causing death by dangerous driving that he would not have to spend time in jail. In the event, the court did not accept Mr Vulaj's submissions that the sentence should be suspended and imposed an 18-month prison sentence. The defendant, Elton Xhemali, was unhappy that his bribe had not secured his freedom. He therefore attempted to reclaim the money through two associates and publicly admitted to the scheme. All three were charged with bribing a public prosecutor, while Mr Vulaj was remanded in custody and currently awaits trial.
- In April 2015, the High Council of Justice suspended Osman Aliu, a judge in the central city of Kavaja, following allegations that he had failed to declare numerous overseas money transfers and had unlawfully released dozens of individuals.
- In December 2014, the High Council of Justice also dismissed from office the former Judge and President of Puke District Court, Shtjefen Lleshi, who was at the time on trial on charges of abuse of office. Mr Lleshi was specifically alleged to have accepted bribes in exchange for releasing certain individuals from prison. During the criminal investigation it was discovered that Mr Lleshi had acted in concert with the Puke District prosecutor and several other court officials. The court at first instance eventually sentenced Mr Lleshi to three years, a sentence which the Court of Appeal upheld in December 2015.

And so it goes on. Haxhi Giu, the District Attorney for Kruja, a town in north-central Albania, was arrested in December 2015 on suspicion of accepting bribes in exchange for sentence reduction. The case bears an uncanny resemblance to that of Mr Vulaj, centring on another charge of causing death by dangerous driving.

Finally, we have the case of Dhimiter Pojanaku, Judge of the Pogradec Judicial District Court. Mr Pojanaku was arrested in April 2014 on suspicion of having accepted bribes in exchange for not pursuing cases. A civil judge, but better known in Albania for his poetry, Mr Pojanaku was alleged in one instance to have resigned from a case in order to prevent one of the parties losing at trial. Mr Pojanaku was sentenced in December 2014

to five years in prison. He was subsequently dismissed from his judicial office by the High Council of Justice in April 2015.

According to a study by Transparency International, 80 per cent of Albanians believe that judges and prosecutors are the more corrupt officials in the country. The individuals cited above are merely a sample of the total number of judicial appointees mired in scandal.

Many of the corruption investigations which have led to arrests, prosecutions and convictions have, however, been initiated by the media. Special investigative programmes in which journalists delve into suspect cases, interviewing claimants, defendants and court staff to get at the truth, are among the principal means through which illicit dealings are brought to light. While this is a valuable service, the media can oftentimes only uncover the tip of the iceberg. Much more lies beneath the surface. Indeed, one might ponder why so many judges in Albania enjoy lavish lifestyles in multimillion euro estates. Where does this money come from? It is unfortunate that investigations into the declaration of assets have hitherto resulted in very little disciplinary action.

So what is being done to effect a clean up? Over the past few years, the Council of Europe's Venice Commission (officially the 'European Commission for Democracy through Law') has been working towards a comprehensive reform of Albania's judicial system. The Venice Commission, composed of independent constitutional law experts, has worked alongside the Albanian Parliament to craft amendments to the Constitution of Albania, its Electoral Code and draft laws covering a host of different areas.

Draft proposals for judicial reform are currently in their final stages and it is anticipated that they will shortly be submitted to the Albanian Parliament for approval. These proposals include the establishing of a Disciplinary Tribunal of Justice, which will be responsible for reviewing cases of disciplinary breaches and taking disciplinary measures against members of the judiciary. It is hoped that this will strengthen accountability with the judiciary and reduce political interference in decisions to dismiss miscreant officials.

There is also the question of quality. Specifically, Albania needs judges and prosecutors of considerably higher calibre if true progress is to be made. Court hearings can currently last up to three years, which is excessive whichever way you cut it. The inability to quickly and efficiently tackle and solve legal issues remains one of the principal shortcomings in our judicial system. Disciplinary tribunals will not cure this ill. It can only be dealt with through intensive, high-quality training (theoretical and practical) over a sustained period of time.

The sheer breadth of powers which prosecutors may exercise is also a concern. If the proposed reforms go ahead, prosecutors will have absolute discretion to launch investigations. But how susceptible are prosecutors to corrupt influences? If the cases above are anything to go by, the answer is pretty clear. Under the existing system, the Attorney-General is responsible for instituting proceedings and he, and he alone, bears direct responsibility for their success or failure. Is this, perhaps, not a more sensible approach?

Finally, any reforms will also need to tackle the inconsistencies between Albania's two investigative agencies, the General Prosecutor and the Ministry of Interior Affairs, representing the judicial and political power blocs. There have been instances in recent years where disagreements between the two bodies have frustrated justice. The most notorious example is the killing of four protestors at an anti-government rally on 21 January 2011, all four dying of gunshot wounds. To date, no one has been charged in connection with the deaths. The General Prosecutor's investigation, which commenced shortly after the incidents, came under fire from government representatives (including the Ministry of Interior Affairs) for a perceived lack of impartiality.

In January 2015, the Albanian Prime Minister, Edi Rama, expressed profound exasperation that the justice system had failed the victims and laid the blame squarely at the door of then-Prime Minister, Sali Berisha. Berisha, for his part, denied complicity and blamed 'irresponsible politicians' who wanted to 'violently overthrow the head of a government, a government which was elected with the votes of the Albanian people'. The protest 'registered in history as a coup d'état against constitutional institutions'.[1]

However, a former Albanian President, Bamir Topi, saw politics rather than the justice system as the principal culprit. Speaking about the tragic events of 21 January 2011 he said: 'Nobody can accuse the justice system today. This seems a paradox, seeing how the justice system functions in Albania. Today, all political sides are to be

accused… there hasn't been a political trial of 21 January and this political trial must be made in parliament. The fact that everyone keeps quiet today shows that there's no reason for accusing the justice system, because unfortunately, justice is once again being used by politics.'[2]

Division, finger-pointing and politicking have, therefore, hampered the effective investigation and resolution of a seismic national event; and this is by no means the only example. Until such times as the political classes cease their partisan posturing, it is difficult to see how reforms to the judicial system in Albania will succeed.

We have come a long way since the days of Hoxha, of communist dominion and Soviet ideology. There remains, however, much to do to ensure that Albania has a judicial system of which to be proud.

Notes

1 www.balkaneu.com/21-january-2011-protest-claimed-lives-political-stances-years/

2 *Ibid.*

Argentine situation concerning anti-corruption legislation

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Analysing corruption is a complex matter, touching a wide variety of disciplines such as psychology, sociology, politics and economics. A lot has been discussed and written about its causes, its consequences and the best tools to fight against it. Some of these aspects remain highly controversial; however, now more than ever there seems to be a consensus that corruption has devastating effects. It reduces efficiencies and increases inequality, preventing the political, social and economic development of countries where corruption is rampant; in the area of international investment, it incentivises the use of unethical means to acquire new businesses, to the detriment of those who want to play fair; for the international community as a whole, it is a source of illegal funds that may end up feeding money laundering and terrorism financing activity.

The prevention and control of corruption, both in the public and private sector, have gained an unprecedented role on the international scene. International organisations have carried out important initiatives that resulted in conventions such as the Inter-American Convention against Corruption ('IACAC') and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ('OECD Convention'). A lot of countries have passed anti-corruption domestic legislation, very often with an extra-territorial reach. Companies all around the world have developed and implemented ambitious compliance programmes and codes of ethics.

In South America, where corruption has always been a big issue, countries like Brazil, Colombia and Chile have followed the path, enacting new anti-corruption legislation and creating new enforcement agencies. In the case of Brazil, the Petrobras scandal speaks for itself about how a judicial investigation into corruption may end up becoming an unprecedented political crisis.

Argentina is very often perceived to be a country with significant levels of corruption. However, the fight against corruption was totally absent in the political agenda during the 12 years of Cristina Kirchner's administration. There were no relevant political or legislative initiatives in this regard. Many corruption cases came to light, and some of them were deeply investigated by the press. Nevertheless, enforcement agencies remained dormant, and judges and prosecutors were not really active in investigating and punishing corruption. Virtually no one went to jail. And, most worryingly, for many years public opinion seemed to tolerate the status quo with an air of resignation.

In December 2015, the Argentinean Government changed. The new president, Mauricio Macri has promised to make the fight against corruption one of the

main political goals of his administration. Compelled to reduce budget deficit and rampant inflation, the new government has implemented a set of unpleasant economic measures, such as a sudden increase in utility bills, a dramatic reduction in subsidies and the firing of thousands of public officers. As a way to alleviate the pain imposed by such sacrifice, Macri has promised that he will not tolerate any act of corruption in his government and has guaranteed that the judiciary will be free of any political interference when investigating corruption. In this context, federal judges and prosecutors have started to blow the dust off corruption cases involving public officers of the previous administration and businessmen who had close ties with them.

Regarding new legislation, there have been announcements that a set of anti-corruption bills is about to be sent to Congress. Among them, there is great expectation surrounding the creation of a leniency programme specifically for anti-corruption investigations. It is true that Argentina does not have modern, comprehensive anti-corruption legislation and that new laws could facilitate the fight against this social evil. On the other hand, Argentina has signed and ratified many anti-corruption conventions and public corruption has always been a criminal offence in the Argentinean Criminal Code, which punishes bribes to both domestic and foreign public officials. Lack of enforcement, rather than lack of legislation, has therefore been the main impediment to the eradication of corruption.

Stars seem to have aligned for Argentina to start a serious combat against corruption. In the international arena, the context could not be better; in addition to several multilateral initiatives to coordinate anti-corruption efforts, information that has emanated from scandals such as Petrobras in Brazil or the Panama Papers sheds light on the deep roots of corruption and the urgent need to tackle it. On a domestic level, public opinion indicates a realisation that a significant proportion of the austerity measures that the new government has had to implement are the consequence of years of unsound public policies, very often tainted by corruption.

It now remains to be seen if the Macri administration makes good on its promises to make the fight against corruption a government priority; if the opposition parties that currently control Congress support some key initiatives to improve anti-corruption legislation; and, last but not least, if enforcement agencies, judges and prosecutors get rid of political speculation and start enforcing the law effectively. I think there are reasons for hope.

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A legal evaluation on the business model of 'buy medical consumables, get medical equipment free' under Chinese law

The business model of 'buy medical consumables, get medical equipment free' (the 'model') presently pervades China (though it is, in fact, a global phenomenon). Pursuant to this model, pharmaceutical companies offer hospitals free medical equipment in exchange for the hospitals' procurement and use of their medical consumables (medical reagents included), and ultimately have the cost of medical equipment compensated through the sale of consumables. Where hospitals do not purchase medical consumables from the pharmaceutical companies, or if the hospitals'

procurement quantities fail to match the scale previously agreed, the pharmaceutical companies will reclaim the equipment or demand usage fees.

Whether this Model constitutes commercial bribery under the Anti-Unfair Competition Law of the People's Republic of China (the 'Anti-Unfair Competition Law') remains controversial. This article analyses this issue on the basis of the existing laws and our related experience. We hope this article will prove to be a catalyst for a more informed and substantial discussion.

The definition of commercial bribery and its elements

Commercial bribery is forbidden by Article 8 of the Anti-Unfair Competition Law. Paragraph one of Article 8 provides that, '[u]ndertakings shall not commit bribery by offering properties or by other means to sell or acquire products. Offering rebates off the accounting book to the transacting party shall be deemed bribe-offering and the transacting party's accepting of the rebates shall be deemed bribe-taking'.

Defined by Article 2 of the Interim Norms on Forbidding Commercial Bribery (the 'Interim Norms'), commercial bribery means 'undertakings bribe the transacting party by offering properties or by other means for the purpose of acquiring or selling products'.

The essence of commercial bribery, as is highlighted by the Central Leading Group for Controlling Commercial Bribery in its Opinions on Correctly Understanding the Limit of the Policy in Implementing the Combatting Commercial Bribery Project, lies in '[the undertaking] employing the methods of offering or taking objects of value in violation of the principle of fair play for the purpose of acquiring or offering business opportunities or other benefits'.

Based on the above rules and policies, four elements must be established before commercial bribery is established.

(1) The subject committing bribery is an undertaking that sells or acquires products or services. As prescribed by the Answer of the State Administration of Industry and Commerce to the Inquiry on Whether Anti-Unfair Competition Law Applies to Non-Profit Medical Institutions, said undertakings include both profit and non-profit organisations.
(2) Property or other objects of value are offered or accepted. As provided in the Answer of the State Administration of Industry and Commerce to the Inquiry on the Legal Nature of the Conduct of Advertising Beers by Repurchasing Beer Bottle Capsules, offering properties or other objects of value to any party, not only the direct transacting party but a third party with direct influence on the sale of products, constitutes bribery.
(3) The purpose underlying bribery is to sell or acquire products, namely to acquire or offer existing or potential business opportunities.
(4) The legal interest harmed is fair market order. In nature, commercial bribery is a type of unfair competition, which means it inevitably harms fair market order.

As expounded below, we think the Model satisfies each of the four elements.

The model constitutes commercial bribery

Both the pharmaceutical company and the hospital are subjects governed by the Anti-Unfair Competition Law

The two parties involved in the Model are pharmaceutical companies and hospitals. Pharmaceutical companies as for-profit organizations are evidently undertakings within the jurisdiction of the Anti-Unfair Competition Law. As to public hospitals, they are also subject to the penalties prescribed by the Anti-Unfair Competition Law as long as they accept bribes in the sale of medicines or other medical supplies, according to the Answer of the State Administration of Industry and Commerce to the Inquiry on Whether Anti-Unfair Competition Law Applies to Non-Profit Medical Institutions.

Pharmaceutical companies pay hospital properties

Although purported to be a donation, the medical equipment offered by pharmaceutical companies is not gratuitous. As per Article 3 of the Interim Norms for the Administration of Medical Institutions' Acceptance of Social Donation, donation and sponsorship must be at-will and gratuitous, free from conditions that may influence the fair play of the market, and without arrangements making the donation a quid pro quo for the product purchase.

Under the Model, the equipment offered to hospitals would be reclaimed by pharmaceutical companies if a hospital were

to purchase medical consumables elsewhere or fail to meet the scale of purchase agreed on before. Therefore, the medical equipment offered is not gratuitous, but a form of payment to the hospital.

As provided in Article 2 of the Interim Norms, it will be an act of bribery for undertakings to give property to a transacting party, either in the name of promotion fee, advertisement fee, sponsorship, research fund, service fee, consultation fee or commission, as long as it is recompense for the sale of products.

Thus, the so-called 'get medical equipment free' is not a donation in its true sense.

The model is arranged for opportunities to sell medical consumables

Some medical equipment can last a considerable period of time, with many items lasting more than ten years before becoming obsolete. In order to enjoy equipment without charge under the Model, hospitals have to purchase medical consumables from the pharmaceutical company throughout the duration of the equipment's lifetime. This being the case, the pharmaceutical company not only acquires a business opportunity for the year in which the medical equipment is tendered, but secures purchase orders for the future and thereby maintains high and steady profits.

The model harms the fair market order

Harm to fair market order is not only an element for commercial bribery but also a clear indicator of unfair competition. All competition, whether fair or otherwise, almost inevitably enhances the business opportunity for one but diminishes that for another. It is, however, important when evaluating whether a business model impinges upon fair market order not simply to consider this dynamic, but also the existing law, principles of good faith and well-established moral codes.

As a result, to appraise whether the Model concerned jeopardises fair market order, we must put it against the whole legal framework that surrounds government procurement and that of the open tendering and bidding processes.

The model circumvents the supervision of the Government Procurement Law, harming the fair market order

As we have explained above, under the model, medical equipment is not given free of charge, but rather in consideration of the hospital's purchase of medical consumables. In the model concerned, the pharmaceutical company recoups the cost of the equipment from subsequent consumable sales, while the hospital acquires ownership of the equipment by paying the prices for the medical consumables. Thus, the hospital's acquisition of the medical equipment is actually government procurement in all but name.

The Government Procurement Law applies to all fiscally funded procurements of products or services that are provided in the centralised procurement catalogue, or whose purchase prices or quantifies exceed the limits.

In the hospital procurement scenario, the hospital's funds are generated by government spending. Moreover, medical equipment is listed by several provinces in their centralised procurement catalogues and its purchase price exceeds the limit set by each province. Therefore, most of the hospital's procurements of medical equipment are governed by the Government Procurement Law.

Strict limitation has been set by the Government Procurement Law on government procurement's method and procedure. For example, items in the centralised procurement catalogue must be purchased through a central procurement platform established by the government.[1] To take another example, any procurement exceeding the limit set by the government must be made by means of open tendering and bidding.[2]

Therefore, hospitals must purchase medical equipment via the centralised procurement platform if the equipment is listed in the centralised procurement catalogue. The same applies to the large scale and expensive equipment whose price exceeds the limit set by the government.

However, the purchase of medical equipment under the model concerned bypasses the centralised procurement procedure by means of the 'buy medical consumables, get medical equipment free' arrangement, and therefore circumvents the strict supervision installed by the Government Procurement Law. As illustrated below, such

circumvention inevitably impinges upon fair market order.

First, the rules about procurement procedure flow from broader principles transparency, fairness and good faith. Circumvention of such rules will therefore contravene these principles.

Secondly, one of the underlying purposes for the enactment of the Government Procurement Law was to promote the integrity of the government and to put all government procurements under the spotlight. Since the funds for medical equipment purchases arise from government spending, we believe that they should also be supervised through the process of centralised procurement. Otherwise, we risk creating room for corruption.

Finally, the circumvention inevitably puts those pharmaceutical companies that comply with the Government Procurement Law in a disadvantageous position, which is not conducive to a healthy and competitive market environment.

The hospital's reliance on the 'free' medical equipment easily results in the failure of the open bidding system

In addition to medical equipment, the purchase of medical consumables is also part of government procurement. According to the Administration of Health's Notice on Further Enhancing the Administration of Medical Device Procurement, medical consumable purchases must be made through open bidding processes via the centralised procurement procedure. They must also be administered by the Administration of Health.

At present, hospitals are required to submit their tender documents to the procurement platform, and pharmaceutical companies submit their bids. The platform, after accessing the companies' credentials and bidding materials, then chooses several companies as 'winners', from which hospitals will have to purchase their consumables. Yet, if a hospitals relies on the 'free' medical equipment offered by a pharmaceutical company, it then has to purchase medical consumables from said company in order to avoid having to relinquish the equipment. Therefore, a hospital may not purchase medical consumables from a bid-winning company even though that company offers more competitive prices and greater quality of product. As such, the model's operation may ultimately render the centralised procurement process an empty formality.

Based on the foregoing, it is our opinion that the model damages fair market order.

Conclusion

Although we consider that the model constitutes commercial bribery under the existing legal framework, it is important to note that its emergence has much to do with loopholes in the existing statutory and administrative framework.

First, the model's operation to some extent eases the tension between demands that the healthcare system should expand and hospitals' increasingly overstretched budgets. The price for one piece of medical equipment is often much higher than a hospital's budget, especially that of a grassroots clinic or a remote medical station. At the same time, healthcare demand is continuously expanding. The model's operation therefore makes it possible for more hospitals to equip themselves with more facilities and for patients to enjoy better treatments.

Secondly, we urgently need to consider how drug prices might be lowered. At present, the centralised procurement process is insufficiently detailed in informing pharmaceutical companies of the precise quantity of medication that is required. These companies therefore face a considerable challenge in pitching their prices correctly. Under the model, however, pharmaceutical companies enter into agreements with hospitals whereby they will provide equipment in consideration for the purchase of specific quantities of medication and other consumables.

In conclusion, while the model's operation constitutes commercial bribery under the existing legal framework, it is arguable that its existence plugs a number of the gaps created by the centralised procurement process. The model's deficiencies, as set out above, will need to be effectively regulated through legislation and enforcement. Pharmaceutical companies and hospitals also have an important part to play in ensuring that patients receive the best healthcare possible while maintaining fair competition and market integrity.

Notes

1 See Art 18, Government Procurement Law.
2 See Art 27, Government Procurement Law.

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Colombia reinforces the fight against corruption: Law 1778 of 2016 assigns administrative liability to legal entities for acts of local and transnational bribery

Colombia has been on the road to join the Organization for Economic Cooperation and Development (OECD) for the past few years. Following the OECD's initial assessment of Colombia's anti-corruption legislation, it noted that the country's legal infrastructure did not adequately address bribery of foreign public officials. It therefore requested that the Colombian government work on a draft bill, which could be accepted as compliant with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

Pursuant to that purpose, Colombia's Transparency Secretary drafted and proposed Bill No C 159 of 2014 (the 'Bill') to the Colombian Congress. The Bill proposed a new regime of effective and proportionate deterrents and sanctions to govern Colombia's anti-corruption framework (applying both to individuals and corporations). After conducting its corresponding debates in the Colombian Congress in February 2016, the Congress issued Law 1778 of 2016, which now establishes the administrative liability of legal entities for acts of transnational and local corruption.

Law 1778 also grants additional powers to the Superintendent of Companies (the 'Superintendent') to investigate and punish legal entities that, in the context of business transactions, give, offer or promise foreign public officials money or any other benefit in exchange for the official performing, omitting to perform or delaying acts related to their duties and in connection with a business or international transaction. The offering or promising of such an incentive may be made by employees, contractors, directors or partners (whether of the company itself or of a subordinate entity).

One of the more important features of Law 1778 is its division between personal liability of natural persons on the one hand and administrative liability of legal entities on the other. The Superintendent does not therefore need to wait for a criminal investigation to conclude – or for the misconduct to fall under the Criminal Procedure Code – to be able to investigate and sanction a legal entity.

Official guidance accompanying Law 1778 made it clear that in cases of M&A and spin-off transactions, the buyer could inherit the target's administrative liability if it failed to confirm the target's compliance with applicable anti-corruption regulations.

According to Law 1778, the Superintendent is now entitled to impose several sanctions, including:

- financial penalties of up to 200,000 times the minimum monthly wage (equalling approximately COP137.9bn or US$44.7m);
- debarment to contract with the Colombian government for a period of 20 years;
- publication of the sanction in wide-circulation media and on the website of the sanctioned legal entity;
- prohibition from receiving official incentives or subsidies from the government for a period of five years; and
- registration of the administrative sanction in the commercial registry of the relevant legal entity.

As noted above, Law 1778 is not limited to transnational bribery. The powers described above are also applicable to acts of local bribery, allowing the Superintendent to impose the same sanctions to Colombian legal entities when they commit bribes within the Colombian territory.

In addition, the Colombian Congress has also recognised that there are certain steps that corporations can take to mitigate potential sanctions. Chief among these are:

- the creation, implementation and effective

monitoring of transparency programmes and business ethics codes;
- adequate due diligence procedures; and
- cooperation with the authorities, including the disclosure of evidence relating to misconduct by, for example, employees and directors.

Quite apart from assisting corporations in gaining credit from the authorities, effective compliance programmes can be invaluable in assisting companies to identify problem areas and to quickly react to issues as they arise. They also provide target companies with a means of collating and communicating information promptly and efficiently in the context of M&A transactions, and buyers with a more accurate picture of what they are actually inheriting.

It is said that prevention is better than cure. In the case of Law 1778, it certainly appears that the Colombian government would like to see companies nip corruption in the bud before it has a chance to infect their businesses. To that end, Colombian companies and foreign companies operating within Colombia must face up to the challenge of performing adequate risk analyses and conducting due diligence processes in respect of their own operations, as well as establishing standards of conduct, which they expect of themselves and others. Corporations must adapt to this new culture before risks materialise. They must also adapt their contractual controls and ensure that the 'tone from the top' empowers the entire company, including its directors, employees, contractors and agents, with the tools necessary to counteract corruption-related risks.

Finally, a word of advice to anyone who wishes to invest in Colombia: Law 1778 is a watershed moment in Colombia's fight against corruption, and those involved in the country must take their responsibilities under the new framework seriously or run the risk of substantial financial and reputational damage. You can never be too careful.

What does the new Ethiopian anti-corruption legislation mean for the private sector?

ETHIOPIA

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The problem of corruption is universal in nature. It touches every country in some shape or form, and represents a clear and present threat to economies, political and judicial authorities, businesses and citizens worldwide. Transparency International estimates that low-income countries lose US$1tn a year on account of corrupt activities. In Ethiopia, the fight against corruption was bolstered in 2015 by the Federal Parliament's enactment of the Corruption Crimes Proclamation No. 881/2015 (the 'New Corruption Proclamation').

As is well-known, Ethiopia is a signatory to the United Nations Convention against Corruption (UNCAC), adopted by the UN General Assembly on 31 October 2003. It is also a signatory to the African Union Convention on Preventing and Combating Corruption, also adopted in 2003. The New Corruption Proclamation is, at least in part, designed to bring Ethiopia's anti-corruption laws in line with these international conventions.

The new Corruption Proclamation is a welcome development in Ethiopia's crackdown on corrupt activity, expanding into the private sector where the previous regime, governed by the 1994 criminal code (the 'Code'), focused on government offices and enterprises. Under the Code, Ethiopia criminalised both active and passive bribery of domestic public officials. Active bribery of foreign public officials and officials of public international organisations were also criminalised, albeit these provisions have not resulted in any prosecutions to date.

Under the *ancien* regime, however, there was no statutory framework to govern,

or authority to prosecute, private sector corruption (albeit the National Bank had, and continues to have, a mandate to regulate and enforce against financial institutions, and the Financial Intelligence Centre is responsible for prosecuting money laundering offences). Ethiopia has, therefore, joined a growing number of jurisdictions that have expanded their anti-corruption frameworks beyond the public sector.

The body responsible for investigating and prosecuting corruption crimes at a federal level is the Federal Ethics and Anti-Corruption Commission (FEACC), established in 2001. The FEACC, in turn, has a network of nine regional ethics and anti-corruption commissions which deal with lower-level cases. The New Corruption Proclamation confers upon the FEACC the power to investigate and prosecute corruption committed by 'public organisations'. This concept, defined in Article 2(4), includes:

> 'any organ in the private sector which in whatever way administers money, property and any other resource collected from members or from public or any money collected for the benefit of public which include appropriate company.'

The New Corruption Proclamation defines 'appropriate company' as any private limited company which is established through the contribution of shares by public organisations and includes joint ventures established by such a company in association with others.

While the New Corruption Proclamation clearly does not capture all private sector entities, it is certainly a step in the right direction. Indeed, official commentary published alongside the law suggests that the list of entities caught by the new legislation may be expanded in the future to include private sector organisations and employees more generally. Any expansion will only follow research undertaken by the FEACC. Watch this space…

Even as currently drafted, the New Corruption Proclamation should give corporates pause for thought. This includes foreign companies which may, for example, conduct business within Ethiopia in partnership with public entities via private joint venture concerns.

The New Corruption Proclamation covers a broad range of offences, including abuse of power, bribery and facilitating bribery, maladministration, misappropriation and possession of 'unexplained property'. The concept of 'unexplained property' has been around for some time, with the Code criminalising what is often called illicit enrichment (an activity explicitly referenced in Article 20 of UNCAC). The offence was incorporated into Article 419 of the Code, and provides:

> '(1) any public servant, being or having been in a public office, who:
>
> (a) maintains a standard of living above that which is commensurate with the official income from his present or past employment or other means; or
>
> (b) is in control of pecuniary resources or property disproportionate to the official income from his present or past employment or other means, shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be punished, without prejudice to the confiscation of the property or the restitution to the third party, with simple imprisonment or fine, or in serious cases, with rigorous imprisonment not exceeding five years and fine.'

By bringing this offence into the private sector, albeit in a limited way, the New Corruption Proclamation has undoubtedly augmented the FEACC's firepower. One must hope that the political will is there to ensure that these new powers do not remain unexercised. It is also to be hoped that company directors and senior managers will be held to account for their actions. Corporate culture is largely driven from the top of an organisation, with boards and senior committees responsible for policies, procedures, training and installing ethical practices within their companies. It will be interesting to see how matters develop over the coming months and years. The time for talking is over; we now require action.

Finnish anti-bribery regime in a cross-border context

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Following the international trend, criminal liability risks for bribery offences have heightened for Finnish companies. The bribery cases in Finland are still few in number, but current case law gives some guidance on where the trend is heading and in interpreting Finnish anti-bribery legislation.

This article analyses recent Finnish case law regarding cross-border bribery risks for private companies and their representatives. Bribery risks typically relate to interaction by a private company representative and a public official, as the threshold of what is considered bribery is significantly lower compared to pure private-sector interaction. In addition, under the Finnish Criminal Code, the definition of a foreign public official is subject to interpretation.

Finnish anti-bribery regime in brief

The Finnish Criminal Code has separate provisions for bribery in the private sector (Chapter 30, sections 7–8a) and the public sector (Chapter 16, sections 13–14 and Chapter 40, sections 1–4a). Under the Finnish Criminal Code, it is prohibited to receive, accept and give bribes. The threshold of what is considered bribery is significantly lower in the public sector than in the private sector. Giving, promising or offering a benefit to a public official is considered a bribe if the benefit is *likely to influence* a public official in his or her duties – as opposed to actually influencing a public official. According to recent case law, the most complex issues relate to the definition of a foreign public official.

A company can be criminally liable for a bribery offence when an offence is committed in a company's business operations. This is the case, for example, when a company's management or employee has committed the offence. In addition to a corporate fine, a company can be ordered to forfeit illegal proceeds gained through the offence.

Finnish companies are increasingly adopting compliance programmes based on the UK Bribery Act and Foreign Corrupt Practices Act due to their vast applicability.

Applying Finnish anti-bribery laws to cross-border bribery cases

Finnish anti-bribery laws apply to a bribery offence committed outside Finland if the offence has a sufficient connection to Finland. A connection is established, for example, if the offence is committed by a Finnish company's management or employee.

To the most significant bribery cases in Finland belong that involving the Finnish defence equipment contractor Patria and its operations in Egypt.[1] Patria's executives were charged with giving alleged bribes to local Egyptian executives who worked for the Egyptian state-owned military corporation organised under the Ministry of Defence Industry of Egypt. The case has gained significant media attention as the first large scale cross border corruption scandal in the Finnish anti-bribery scheme. Eventually, bribery charges against Patria's executives and the prosecutors' claims for imposition of corporate fine were dismissed.

However, based on the ruling, it was clear that the Finnish anti-bribery laws were applicable and the offence was considered to be committed in Finland even though the actual giving of the alleged bribes took place in Egypt. According to the ruling, the payments were made in Finland from the Finnish bank accounts of the Finnish company on the grounds of a decision made in Finland.

The Finnish anti-bribery laws are not, however, applied to a bribery offence committed abroad when the offence does not have a sufficiently close connection to Finland. For instance, the Finnish anti-bribery laws would not necessarily be applied if a company's foreign agent or supplier has, without any contribution by the company, bribed a foreign public official outside Finland even if the event benefited the company.

Bribery risks related to foreign public officials

Under the Finnish Criminal Code, the definition of a *foreign* public official is broader

than the definition of a (national) public official. By virtue of the Finnish Criminal Code, foreign public officials include persons who exercise public authority on behalf of foreign states and employees of the state-owned companies.

In the Patria's Egypt case, Patria's executives were considered foreign public officials as the Egyptian company was state-owned and manufacturing military-related equipment for the state's needs. In addition, the Court of Appeal held that the Egyptian executives exercised actual decision-making power and rendered public service. However, the Court of Appeal ruled that, as such, Patria and its executives were found not guilty of bribing foreign public officials. The subjective intent was lacking as Patria's executives could not have foreseen that executives of foreign corporation to be deemed public officials. This was mainly due to the fact that although Patria is a majority state-owned company, its executives or employees are not considered national public officials under the Finnish Criminal Code.

The same problem regarding the definition of a foreign public official arose in a Finnish maritime and energy technology manufacturer Wärtsilä's case.[2] Wärtsilä along with its manager were charged on giving alleged bribes to the CEO of a majority state-owned electricity distribution company in Kenya in order to induce the CEO to act in Wärtsilä's favor in negotiations for a Kenyan power plant project. All charges against Wärtsilä and the manager were finally dismissed due to the lack of evidence. The Court of Appeal, however, held that the CEO was a foreign public official as defined in the Finnish Criminal Code. This was due to the fact that the company was state-owned and the CEO exercised public authority. Contrary to the ruling in Patria's Egypt case, the Court of Appeal ruled that the former manager of Wärtsilä was aware of the CEO's status as a foreign public official.

The Court of Appeal also interpreted the definition of foreign public official in a case regarding Patria's operations in Croatia.[3] Patria's executives were charged on giving alleged bribes to a chairman of the board of a Croatian majority state-owned military equipment manufacturer. The prosecutor claimed imposing a corporate fine on Patria. The Court ruled that a general director of a Croatian majority state-owned company exercised public authority and was thus considered a foreign public official. However, all bribery charges against Patria's executives were dismissed. Thus, the claims against Patria were likewise dismissed.

Closing remarks

As the recent case law shows, the definition of a foreign public official has been under scrutiny. Recently, the OECD has had concerns regarding the difficulties Finland may have encountered in effectively enforcing its anti-bribery laws against the bribery of foreign public officials as the charges have been to a large extent dismissed.

It is most likely that the Finnish authorities will get more active in investigating the potential violations of anti-bribery laws in the future which potentially results in new domestic bribery cases. Therefore, Finnish companies' bribery risks does not only relate to the international anti-bribery regimes.

Notes

1 The Turku Court of Appeal, R 11/176428.
2 The Vaasa Court of Appeal, R 13/503.
3 The Turku Court of Appeal, R 15/1050.

Implications of corruption for gender

INDIA

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Introduction

Corruption (defined in its simplest form as 'the misuse of public power by elected politician or appointed civil servant for private gain') has been high on the reform agenda of national governments across the regions of the globe for decades. It is a global phenomenon and a major obstacle to development and economic growth. It is both a major cause and a result of poverty around the world. It occurs at all levels of society, including:

- local and national governments;
- civil society;
- judiciary functions;
- large and small businesses; and
- the military.

Beyond the conflicts that corruption causes, it is one of the biggest obstacles to achieving the United Nations' Millennium Development Goals (MDGs – which provide 'a framework for development planning for countries around the world, and time-bound targets by which progress can be measured'). While all societies suffer from corruption's weakening of the efficiency, effectiveness and probity of the public sector, corruption has well-known differential impacts on social groups, with those within the poorest stratum of society among its greatest victims. Corruption reduces resources for poverty reduction and development and deprives the disadvantaged of advancement opportunities.

However, neither research nor policy has paid sufficient attention to corruption's differing impacts on women and men. Unaddressed questions include:

- Do women suffer more from corruption than men;
- Do women face different forms of corruption than men;
- Do women in public office have different propensities to engage in corruption or face different opportunities; and
- Do the answers to these questions support changes in anticorruption policy or advocacy strategies?

Objectives and methodology

This article primarily aims to examine the relationship between gender equality and corruption; and gender differences in attitudes to and opportunities for corruption. Within this research framework, it seeks to answer questions such as: do women suffer more from corruption than men; and do women face different forms of corruption than men?

Data for this article (which is primarily qualitative in nature) has been obtained from books, research reports, government publications and internet resources. Also, relevant information has been presented to indicate challenges in measuring gendered impacts of corruption.

Gendered impact of corruption

Women's relative lack of political and economic leverage reduces their ability to demand accountability or to highlight their specific experiences of and concerns about corruption. It is pertinent to investigate how corruption affects women and men differently and how it exacerbates gender-based asymmetries in empowerment, access to resources and enjoyment of rights.

There has been increasing attention paid to corruption's differential impacts on the well-being and capabilities of women and men. This shift has occurred in the wake of emerging evidence that corruption can disproportionately affect poor women and girls, particularly in their access to essential public services, justice, security and in their capacity to engage in public decision-making. In growing recognition of how corruption affects women and girls, development practitioners are expanding traditional definitions of corruption to 'include actions that are disproportionately experienced by women, such as sexual extortion and human trafficking'.

Most research on the gender-differential effects of corruption addresses three areas of women's and men's relationships to public officials:

- access to public services and financial resources;
- application of the rule of law in advancing rights and providing protection from abuse; and
- access to decision-making, including political participation as citizens, legislators and civil servants.

Challenges of measuring gendered impact of corruption

Most anti-corruption strategies are based on internationally recognised aggregate measures of corruption. These measures review existing rules against corruption and measure perceptions of corruption, but do not examine corruption's direct impact on citizens. In addition, because these measures fail to disaggregate by sex or income group, they are unable to capture corruption's gender or poverty dimensions.

For example, standard tools do not measure the frequency with which poor women versus poor men pay bribes to access services or measure the impacts of corruption-related service unavailability. Current measures are inadequate to generate the evidence required to formulate policy responses that address women's and men's different experiences of corruption (or are responsive to the needs of subgroups of women and men). There are four commonly used and internationally accepted corruption measurement tools, all of which are gender-blind; none include gender as a relevant element. The tools are:[1]

- public opinion surveys;
- public sector diagnostics;
- private sector surveys; and
- multi-country tools.

Gender differences in attitudes to and opportunities for corruption

Attitudes towards corruption

Transparency International's Global Corruption Barometer (which compiles public opinion surveys from approximately 54,000 individuals in 69 countries) asks citizens how corruption affects their lives and businesses. Responses are scored according to people's perceptions of corruption in public services and in political, judicial and market institutions.[2] The 2008 United Nations Development Fund for Women (UNIFEM) analysis of data explored gender differences in perceptions and found a statistically significant difference between women and men in almost all regions of the world, with women generally perceiving higher levels of corruption than men.

Feminising public space as an anti-corruption strategy

Findings that show gender differences in tolerance for corruption have been folded into discussions about the causes of corruption, and have been used to argue that higher levels of women's public and political participation can lead to lower levels of corruption. Debate on the issue began in 1999 with the publication of a report that, drawing inspiration from psychological and other analyses of gender differences in selfishness, found a correlation between low levels of corruption and more women in government.[3]

Other researchers support findings that it is a country's political and governance system rather than policy-makers' gender that determines corruption levels. The authors of a UNDP report on corruption in the Asia-Pacific region found no discernible reduction in corruption levels in countries that have been run by female presidents or prime ministers.[4] To take a specific example from Africa, evidence emanating from Tanzania indicates that 'merely bringing more women into key decision-making roles in public service does not tangibly improve the situation if accountability structures and systems are not also reformed'.[5]

Gendered opportunities to participate in corruption

The gendered opportunity structure of corruption provides an alternative explanation for lower observed levels of corruption among women in public office; and lower levels of overall corruption in institutions in which women have attained a 'critical mass'. Corrupt activities may run in networks (typically all male). Significantly, women may be excluded from opportunities to engage in or benefit from corrupt activities due to:

- being relative 'newcomers' to these relationships and networks;
- cultural limitations that prevent, or at least limit, women from interacting with men who are outside of their own ethic or familial circles; and

- their having more restricted access to the networks and arenas through which corrupt dealings are organised.

This is not to say that there are no examples in which female-dominated bureaucracies have been guilty of widespread corruption. For example, Karnataka, India, witnessed a significant corruption scandal in the 1990s in which a largely female-run health agency, which provided infant and maternal health services, was embroiled in a large procurement scandal involving contracts for the supply of baby food.[6] It may well be, therefore, that women's participation in corrupt activities may not actually be dependent upon gender-based propensities for probity, but rather on whether opportunities for corruption present themselves.

Gendered experience of, and engagement in, corruption

A gendered experience of and engagement in corruption implies a need for gender-specific approaches to fight corruption. Corruption affects women differently from men. Women's relatively low socio-economic status in many jurisdictions means that they generally engage in corrupt exchanges in different institutions than men; for example, paying bribes for the provision of basic public services rather than for business opportunities and licences.

To the extent that women, especially poor and socially excluded women, have lower incomes and weaker property and other rights than men, the direct per-transaction cost of corruption may be lower, yet the amount they pay may represent a larger share of their income. And this is before one considers the horrors of sexual exploitation, to which women are disproportionately exposed around the world, and the corruption that is endemic therein.

Strategies to mainstream gender into existing UNIFEM and UNDP initiatives on anti-corruption

The United Nations Convention against Corruption (UNCAC) was the first global legally binding anti-corruption instrument. It obliges its 144 States Parties to:

- adopt preventative measures;
- criminalise corruption offences;
- ensure international cooperation around anti-corruption programming; and
- conduct asset recovery.

Issues of inequality, human rights and fairness are integrated throughout the Convention, reaffirming the core values of honesty; respect for the rule of law and accountability; and transparency in development assistance. These are all values that promote non-discrimination, gender equality and equal opportunities for all. However, though the UNCAC addresses a number of forms of corruption, it does not specifically address the relationship between gender and corruption or the associated potential policy and programming implications.

The UNDP and UNIFEM are committed to building good governance systems that prevent corruption and advance gender equality. Both bodies are mandated to promote gender equality through the Convention on the Elimination of All Forms of Discrimination against Women and the Beijing Platform for Action. Gender equality is understood not only as critical to achieving women's human rights, but also to the achievement of a wide range of anti-poverty and developmental goals, including the MDGs. Likewise, 'quality governance' (represented by effective, efficient and equitable resource generation, allocation and management) is a precondition for achieving the MDGs. 'Gender-sensitive good governance' would ensure that public resources are spent effectively and efficiently on public services that build human capital in a gender-equal way, reduce corruption (in particular, sexual extortion), and prevent other abuses of women's human rights.[7]

Programming priorities

While the UNDP and UNIFEM both have records of involving women and integrating gender into governance and political reforms, 'integrating gender into anti-corruption programming' is an emerging area. A number of governance initiatives are beginning to address the gendered impacts of corruption. There are two challenges in developing gender-sensitive anti-corruption policies:

- to ensure that anti-corruption initiatives address the forms of corruption that affect women more than, or in different ways to, men; and
- to ensure that women are fully included and engaged in anti-corruption and good governance efforts, whether within civil society or within the public sector.

Mainstreaming gender equality into anti-corruption policies and programmes

Mainstreaming gender equality into anti-corruption policies and programmes means assessing any planned action's implications for women and men, thereby ensuring the design, implementation, monitoring and evaluation of policies and programmes reflects both women and men's concerns. This, in turn, would help in ensuring that both men and women would benefit equally.

Access to information

A critical concern with respect to gender and corruption is access to information. Awareness of and information about public spending patterns and availability of public services, knowledge of women's human rights and the impacts of corruption is extremely limited in many jurisdictions, particularly among socially excluded or politically marginalised groups.

Promoting the public's right to information is a strategic entry point for UNDP and UNIFEM gender and corruption programming.[8] Establishing an enforceable right to information has been shown to deepen democracy because it:

- exposes corruption;
- strengthens transparency in political and administrative cultures; and
- shifts control over information from powerful state actors to citizens.

Conclusion

Gender roles and relations mean that women are more likely than men to have restricted access to the resources, information and connections they need to avoid paying bribes, or indeed to benefit from paying them. Corruption along the route to power reinforces the dominance of those already in power. In most contexts, where corruption is prevalent, those in power are men.

Corruption affects women and men differently. Like men, women face pressure to pay bribes when they interface with public-sector actors in low-accountability contexts. In addition, because of existing gender discrimination in laws and in practice, women have fewer opportunities than men to:

- obtain an education;
- own land or other productive assets;
- receive credit; or
- earn wages equal to men.

These factors, as outlined above, increase women's vulnerabilities to corruption and exacerbate its impacts. In addition, women constitute the majority of the global poor and remain a minority in decision-making bodies, which adds to corruption's differential and disproportionate impacts on women.

Another issue of concern is corruption and grassroots women. ('Grassroots women' are women living and working at the community level in poor and marginalised rural and urban areas.) Corruption has a negative impact on grassroots women's empowerment and participation. As primary caretakers of their households and communities, grassroots women experience corruption in enrolling their children in schools, denouncing physical abuse against family members, etc. Considering this within the context of women's position in society, corruption impacts them disproportionately.

Thus, understanding corruption from the perspective of women and raising the visibility of their local strategies to address misuse of power is central to prevent and reduce corruption. In summary, there are 'gender-specific approaches to fighting corruption'.

Notes

1 United Nations Development Programme, 'Primer on Corruption and Development: Anti-Corruption Interventions for Poverty Reduction, Realization of the MDGs and Promoting Sustainable Development', Democratic Governance Group, Bureau for Development Policy, December 2008d.
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3 D Dollar, R Fisman and R Gatti, 'Are Women Really the 'Fairer' Sex? Corruption and Women in Government' (2001) 46 Journal of Economic Behavior & Organization 423.
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5 M Seppänen and P Virtanen, 'Corruption, Poverty and Gender: With Case Studies of Nicaragua and Tanzania' (2008) Report prepared for the Ministry for Foreign Affairs of Finland, Helsinki.
6 A Sengupta, 'Embedded or Stuck? The Study of the Indian State, Its Embeddedness in Social Institutions and State Capacity' (1998) Unpublished M Phil thesis, University of Oxford.
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New Zealand updates its anti-corruption and AML laws

NEW ZEALAND

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New Zealand is often held up internationally as a beacon of low corruption, with generally high standards of governance, public institutions and strong rule of law. For many years, New Zealand has sat comfortably high in international estimations, usually listed amongst the top 3 nations on the annual Transparency International index (and other like surveys) as a relatively low corruption jurisdiction.

However, no country is immune from bribery and corruption, especially in an era of increased international travel, trade, and changing migration demographics. As such, one threat New Zealand has had to its fortunate position is complacency, along with weak, outdated legal measures against corruption. Recognising this risk, a welcome and overdue update to our anti-corruption laws was passed by parliament towards the end of 2015, in the form of the Organised Crime & Anti-Corruption Legislation Bill.

The changes are more in the nature of a 'modernising makeover', rather than a radical reform. Indeed, some commentators would have liked the new legislation to go further, and replicate stronger, more detailed compliance and enforcement measures such as those found in the UK Bribery Act 2010. All the same, it does pull New Zealand closer to international legal best practice.

In large part, the law reforms arose in response to international rebuke by the OECD, in publishing its Phase 3 Report (2013) on New Zealand's levels of compliance with the OECD Convention on Combating Bribery of Foreign Public Officials. The Bill included making a number of technical amendments to criminal laws as recommended in earlier OECD reports, finally ratifying into domestic law the United Nations Convention Against Corruption 2003 and other related international criminal instruments, and updating provisions to deal with modern scourges such as human trafficking, and passport fraud or cross-border identity related offences.

Some specific anti-corruption legal fixes and gap-filling

The Bill amended 12 other statutes, in particular the Crimes Act and Anti-Money Laundering & Countering Financing of Terrorism Act. To highlight some of the technical, but still important, updating aspects:

- The definition of 'crime involving dishonesty' was updated in the Crimes Act 1961 to ensure that all bribery and secret commission offences were covered, with the result that people convicted of corruption offences can be prevented from holding certain positions of trust in the community, and be subject to penalties including up to seven years' imprisonment.
- The foreign bribery offence in the Crimes Act now no longer contains a dual criminality requirement. This ensures that New Zealand can effectively prosecute foreign bribery under local statute, regardless of whether it was an offence in the country in which the conduct actually took place.
- The definitions of 'business', 'employee', and 'routine government action' were also updated to ensure the foreign bribery offence applies to bribery in relation to the provision of international aid and more clearly to corporate activities, and for trading businesses abroad to try to limit the scope for the facilitation payments exception to become open to abuse.
- New offences were created to address gaps in the pre-existing anti-corruption framework, so that it is now explicitly a criminal offence to accept, obtain, offer or attempt to arrange a bribe involving a foreign public official in New Zealand or a body corporate domiciled here. Further, it is now a specific offence to accept a bribe in return for trading in influence over an official.
- The obligations of companies who might be drawn into foreign bribery were clarified, in particular by changing Companies Act rules to ensure record-keeping of any small facilitation payments (routine minor payments intended to speed up an action or process to which the payer is

already entitled) in a consistent manner. Additionally, the Income Tax Act 2007 is amended to ensure that no bribes can be made tax deductible.

- Additional measures are created so that New Zealand can provide seamless cross-border assistance in corruption investigations and prosecutions by using existing Mutual Assistance in Criminal Matters Act processes.

Apart from foreign and public official bribery provisions, New Zealand's main law concerning corruption in the private sector and civil actions remains the somewhat archaic Secret Commissions Act 1910. While its previous small, almost trivial, penalty regime has been overhauled to bring sanctions into line with public sector bribery and fraud offences (maximum of seven years' jail), the rest of this creaking statutory regime survives largely in current form.

Many useful amendments to the Anti-Money Laundering laws were also made, including provisions allowing and requiring in future full reporting to the Police Financial Intelligence Unit of all cash transactions and wire transfer transactions made through regulated entities (over prescribed dollar thresholds).

Facilitation or routine payments in foreign trade

One particularly contentious issue that New Zealand policy-makers had to grapple with during passage of the new legislation concerned facilitation payments. Our law historically had a facilitation payments exception, which has been open to misinterpretation and possibly abuse. Parliament has taken an approach to significantly cut back the scope of this defence/exception and clarify some of its definitions. In the eyes of many commentators and practitioners during consultation on the proposals, it would have been preferable to abolish this confusing and questionable defence altogether. A Supplementary Order Paper brought by an individual Opposition Member of Parliament to amend the Bill criticised the continued existence of such a defence, saying it serves merely:

> '… to legalise facilitation or "grease" payments made to foreign public officials to facilitate such activities as the granting of permits or licenses, the provision of utility services, and the loading or unloading of cargo.

These "grease" payments are bribes, no matter their size, and help maintain a culture in some overseas jurisdictions where low-level corruption is permitted and accepted as normal practice when working in some overseas jurisdictions.

Internationally, New Zealand is seen as a leader in public sector ethics and transparency. The outlawing of the controversial and unethical practice of facilitation payments will help uphold this international perception.'

Unfortunately, in the parliamentary political process, such sentiments eventually went unheeded. Legitimate concerns were raised about potentially putting export business at a disadvantage when many other competing trading nations permit some form of routine payments. So a facilitation payments exception remains available under the new law, albeit with additional restricted definitions. This could be seen as a missed opportunity for New Zealand to become a legislative leader on such areas, rather than sticking largely with the tried and traditional.

Overall, however, the changes are at least a solid step forward in retaining legal tools to protect the country's mantle as one of the least corrupt jurisdictions.

Commercial bribery an *ex officio* crime in Switzerland

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At the end of September 2015, the Swiss Parliament amended the Criminal Code; namely it added Articles 322^{octies} and 322^{novies}, thereby making commercial bribery an *ex officio* crime in Switzerland. The new provisions, which will likely enter into force on 1 July 2016, are a paradigm shift given that commercial bribery is currently considered a criminal offence only under the Federal Act on Unfair Competition and is prosecuted only upon complaint by a competitor.

As a consequence of these changes in the Criminal Code, any person who offers, promises or gives an employee [...] in the commercial sector an advantage which is not due to him/her, or offers, promises or gives such an advantage to a third party, in order to cause the employee to carry out an act in connection with his/her professional activity, which is contrary to his/her duty or dependent on his/her discretion, is liable to a custodial sentence of up to three years or to a monetary penalty. In minor cases, the act is pursued only upon complaint.[1]

Active (ie, the offering of undue advantages) and passive (ie, the acceptance of undue advantages) bribery in the private sector will become crimes, which must be investigated by the competent prosecution authorities if there is sufficient suspicion for misconduct.

Regarding corporate offences, Article 102 of the Swiss Criminal Code has been amended as well: in cases of active commercial bribery by employees, the undertaking is criminally liable if it has failed to take all necessary and adequate measures required to prevent commercial bribery (criminal offence of organisational deficiency). Accordingly, undertakings under investigation have to prove that they had adequate compliance measures in place to (generally) prevent crimes such as (inter alia) commercial bribery. Undertakings convicted under Article 102 of the Criminal Code are subject to fines of up to CHF 5m and disgorgement of illicit profits.

The tightening of Switzerland's anti-bribery laws is taking place in an environment of increased enforcement. In September 2015, the Swiss Federal Police introduced an anti-corruption reporting platform which invites the public to report actual or suspected corruption.[2] Also, Swiss banks – propelled by the FIFA and Petrobras investigations – are making more suspicious activity reports related to possible corrupt payments. According to the public statements of officials, the Office of the Attorney-General is now receiving more information regarding actual or suspected corporate corruption and it explicitly invites undertakings to self-report actual or suspected corruption.

Revision of Swiss anti-money laundering legislation

Swiss anti-money laundering legislation has been tightened by the Federal Act of 2012 on the implementation of the Revised FATF Recommendations against Money Laundering. The revised law entered into effect on 1 January 2016.

The new legislation is based on the principle of a risk-based approach in order to adequately prevent and detect money laundering related activities. One of the consequences is that in specific cases, persons outside the financial sector are subject to the Anti-Money Laundering Act (the 'AMLA'). More precisely, persons trading with goods and thereby accepting payments of more than 100,000 Swiss Francs in cash now have to comply with the AMLA's due diligence duties and have to report suspicious activities to the competent authority, the Money Laundering Reporting Office Switzerland ('MROS'). If a cash payment of more than 100,000 Swiss Francs occurs, the trader has to identify the contractual party and the beneficial owner and establish documentary evidence. In case there is suspicion of money laundering, additional investigations into the business background are necessary. If the suspicion is confirmed, a report must be filed with MROS.

Another crucial change relates to financial intermediaries' reporting duty to MROS in case of qualified tax offences committed after 1 January 2016, which now qualify as

predicate offences to money laundering. With respect to direct taxes, a qualified tax offence occurs if the avoided tax exceeds 300,000 Swiss Francs per fiscal year (Article 305bis (1) of the Swiss Criminal Code). These rules also apply to tax offences committed abroad.

In the past, financial intermediaries had to immediately freeze assets reported to MROS. Under the new law, financial intermediaries must only freeze accounts if MROS informs the financial intermediary that the report has been forwarded to public prosecution authorities (Articles 9 and 10 AMLA). Accordingly, pending such information, customer orders can be executed even if the underlying assets were reported to MROS. An exception applies to assets linked to terrorist activities, which must be immediately frozen.

Under the new anti-money laundering law, the term 'politically exposed person' ('PEP') has been extended to include leading members and senior executives of intergovernmental organisations or international sports associations (Article 2a AMLA). On the one hand, business relationships with foreign PEPs or PEP-related parties are always considered as increased-risk business relationships and have to be further investigated by the bank. On the other hand, business relationships with domestic PEPs or parties related to them and with PEPs of international organisations as well as international sports associations, are only subject to increased duties in case of further risk factors such as high cash flows from and to the account and unusual transactions.

Finally, it is worth noting that the Swiss Parliament recently rejected a proposal of the Swiss Government according to which financial intermediaries would have had the duty to examine whether clients are tax compliant.

Notes

1 The procedural requirement of a criminal complaint only applies in minor cases, ie, if – according to the parliamentary debate – the amount at stake is less than a few thousand Swiss Francs.

2 New anti-corruption reporting platform, Press Release Office of the Swiss Attorney-General, 15 September 2015 https://fedpol.integrityplatform.org/index.php.

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Recent developments in Thai anti-corruption laws and enforcement

The enforcement of anti-corruption laws in Thailand has historically focused on the liability of officials; however, there are important indicators of greater scrutiny of private party dealings with government agencies.

Thai anti-corruption laws criminalise the giving of a benefit to an official with an intent to induce such an official to act or fail to act *in a manner contrary to his or her function* (section 144 of the Criminal Code and section 123/5 of the Organic Act on Counter-Corruption).

Officials face much tougher restrictions on their ability to wrongfully demand, accept or agree to accept a payment *regardless of whether their subsequent exercise or non-exercise of their official function is wrongful or not* (section 149 of the Criminal Code, section 123/2 of the Organic Act on Counter-Corruption and section 6 of the Act on Offences Committed by Officials of State Organisations or Agencies). For this reason, prosecutors have typically pursued the offending official and, on occasion, sought to enjoin the private party giver of the benefit as a 'supporter' of the offence, liable for two-thirds of the principal's penalty (under section 86 of the Criminal Code).

The pursuit of the 'official' as principal and private party as 'supporter' was evident in a recent case involving state enterprise, MCOT, and allegations that an MCOT official was paid a bribe of THB744,659 (approximately US$21,276) in order to conceal the use of advertising slots, and therefore deprive MCOT of advertising revenue, for the benefit of Rai-som Co. Ltd (the '*MCOT Case*'). On 29

February 2016, the Criminal Court sentenced the MCOT official to 20 years' imprisonment for breaching section 6 of the Act on Offences Committed by Officials of State Organisations or Agencies, which mirrors the wording of section 149 of the Criminal Code. The owner of Rai-som Co. Ltd, a well-known TV host, Mr Sorayuth Suthassanachinda, and the company's financial officer, were also sentenced to two-thirds of the official's sentence, being 13 years and four months in prison, as supporters to the MCOT official's offence.

An interesting point to note from this case is that, because the bribe was given in six separate cheques, the Criminal Court treated the giving of each cheque to the MCOT official by the private party as a separate offence; this amounted, therefore, to six offences in total. Ironically, as Thailand does not have a commercial bribery statute, an arrangement similar to the MCOT case with a privately owned channel would not have created such difficulties for the TV presenter.

Future prosecutions may move away from treating private parties as supporters of the commission of a bribery offence, particularly given the amendments made in section 123/5 of the Organic Act on Counter-Corruption, which came into effect on 10 July 2015. The new section 123/5 imposes liability on a juristic person (eg, a corporate) where the offender has committed an offence in the interests of such juristic person:

> 'In case the offender under paragraph one is a person related to a juristic person and commits [the offence] for the benefit of the juristic person, whereby the said juristic person does not have appropriate internal control measures to prevent the commission of the offence, such juristic person shall be liable under this Section and shall be punished with a fine from one time but not exceeding two times the damages incurred or the benefits gained.'

This provision introduces into Thai law the defence of having 'appropriate internal control measures to prevent the commission of the offence', which is a significant advance towards recognising the importance of internal corporate compliance measures. With, as yet, no indication as to how the defence will be interpreted, it is more important than ever for companies to examine the internal compliance measures they have in place – for example, documented policies and employee training, as well as standard wording in all agreements with third-party service providers such as customs brokers.

The new section 123/5 of the Organic Act on Counter-Corruption has also turned the attention of regulators to how private parties interact with 'foreign state officials' and 'international Organisation officials', thus criminalising the giving of a benefit to such officials in order to act in a manner contrary to their functions. The stated aim of the amendments is to meet Thailand's obligation to implement the United Nations Convention against Corruption.

This trend toward strengthening the anti-corruption regime in Thailand, together with the recent tendency of the Criminal Court to target private parties, suggests that business operators in Thailand should revisit their internal control measures.

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Turkey's brief history of FCPA investigations

Turkey has been involved in a handful of Foreign Corrupt Practices Act 1977 (FCPA) investigations over the past decade. The investigations have concerned various sectors, including healthcare, agriculture, consumables and defence. Most of the investigations related to parent companies' operations in Turkey through their affiliate, a third-party agent or both.

Turkey is a popular emerging market where most of the globally known multinational companies are present through local affiliates. Local affiliates established by smaller foreign companies may, in some cases, have more dependent corporate structures where the high-level officers have dual responsibilities and control over both the parent company and the local affiliate. Some companies choose to enter the market by acquisition of a local entity, whereas others choose to conduct their business through third parties like distributors, agencies, customs consultants and other representatives.

If Turkey's FCPA investigations have taught us anything, it is that each of these business models are equally exposed to corruption risks.

In some cases it is the parent company that instructs the local affiliate to engage in corrupt activity, while in others the parent company discovers improper conduct by its affiliate or third party agent. The parent company's internal compliance programmes, and the manner in which it deals with the allegedly corrupt acts, play a significant role in the authorities' determination of corporate liability.

Smith & Wesson Holding Corporation

In July 2014 we witnessed a case involving Smith & Wesson Holding Corporation, a global firearms brand. Smith & Wesson's international sales team instructed a third-party agent in Turkey, among other jurisdictions, to secure contracts through improper payments to government officials. While these payments did not secure the contracts as intended, Smith & Wesson nevertheless found itself facing FCPA charges by the US Securities and Exchange Commission (SEC).

Despite the company's failure to generate business through its corrupt enterprise, the payments made with the requisite intent, as well as the company's attempt to hide the illicit payments as legitimate business expenses, were found to have violated the FCPA. Moreover, the SEC found that the company lacked adequate systems to prevent these corrupt activities, deeming these deficiencies to be further FCPA violations.

The lack of adequate procedures to combat corruption risks is worth emphasising. Although Smith & Wesson had a basic corporate policy prohibiting bribery, the company's failure to implement systems that ensured that it practised what it preached was ultimately catastrophic, and acted as an aggravating factor in the SEC's consideration of actual corrupt conduct.

This case demonstrated that merely having a basic corporate policy prohibiting the payment of bribes without implementing a reasonable system of controls to bring the policy to life is not sufficient and is even punishable under the FCPA. The investigation resulted with the parent company's responsibility and a fine of US$2m. The Turkish parties involved in the case were not subject to any sanctions under Turkish jurisdiction.

Delta & Pine Land Company

An older, but no less significant, case involving Delta & Pine Land Company (an agricultural concern) also saw the parent entity sanctioned for not only knowing of, but approving, its local affiliate's corrupt practices. The SEC found that Turk Deltapine Inc (a US company engaged in the production and sale of cottonseed in Turkey and an affiliate of Delta & Pine), made improper payments to officials at the Turkish Ministry of Agricultural and Rural Affairs in order to receive various governmental reports and certifications, which were necessary to retain and operate

business in Turkey. The improper payments were discovered by the company following an internal investigation. However, not only was there no disclosure to, or cooperation with, the authorities, the company actually transferred the improper payments from the affiliate to third-party agents by means of an inflated invoice scheme. The SEC eventually imposed a financial penalty of US$300,000 on Delta & Pine.

Early disclosure

While Delta & Pine represents one extreme, where companies take steps to conceal misconduct, there have also been cases where timely and effective detection and disclosure of an affiliate's improper acts have resulted in the parent company avoiding liability.

For example, a particular multinational giant active in many sectors initiated its own internal investigation on the basis of information it received about its Turkish affiliate's involvement in bribery, bid-rigging and other inappropriate payments in connection with Turkish government entities. The company voluntarily disclosed to both US and Turkish officials the thorough investigation it conducted and its cooperation resulted in no liability for the company in either jurisdiction.

M&A transactions

The improper acts of a Turkish company can be a deal-breaker for an international transaction. As per the disclosure to the public in late 2012, in a recent case concerning the acquisition of Talecris Group by Spanish pharmaceuticals giant Grifols SA, Talecris had a distributor in Turkey, which became a particular focus (alongside operations in Brazil, China, Georgia and Iran) during Grifols' pre-acquisition due diligence. Even though the public information in relation to the outcome of these investigations is limited, the fact that the agreement with the Turkish distributor was terminated upon conclusion of the due diligence exercise suggests that red flags may have been raised in respect of the Turkish distributors' operations. This underscores the importance of potential buyers in M&A transactions doing their homework before signing on the dotted line. In purchasing a company, one inherits its liabilities as well as its assets, potentially including networks of third-party agents – caution is advisable.

In light of the profile of FCPA investigations involving Turkey, when a company makes the strategic decision to sell its products within or through Turkey, it must ensure that the right internal controls are not only in place but operating properly. It is also significant to establish company-wide FCPA compliance and audit programmes sufficient to detect and prevent FCPA misconduct at companies' globally dispersed business units. (This is by no means limited to Turkey). A strict due diligence process prior to acquisition is a must. Additionally, although Turkish law remains inadequate in providing immunity and/or awards to whistleblowers, encouraging whistleblowing and adopting the principle of being open to listening the actors in their business flow, would be valuable in mitigating the risk of exposure to FCPA proceedings. Last but not least, self-initiation of investigations and cooperation with authorities should always be given serious consideration by companies as spontaneity is a valued trait among US and Turkish authorities.

UNITED KINGDOM

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The Standard Bank DPA – the first of many?

Standard Bank recently entered into the UK's first Deferred Prosecution Agreement ('DPA') with the UK's Serious Fraud Office (SFO) following a self-report by the Bank to the SFO in relation to bribery offences.

DPAs were introduced into UK law in February 2014 by the Crime and Courts Act 2013 (the 'Act') and on 30 November 2015 the Standard Bank agreement was the first to receive judicial approval. As such, the case offers the first indication of how the DPA process will work in the UK and under what circumstances agreements are likely to be offered.

The Act provides for DPAs to be offered by prosecutors to corporate defendants. The terms are to be negotiated between the relevant prosecutor and the offending organisation, within a framework set out in the Act and subject to the approval of the Court. The agreement includes payment of a financial penalty and the publication of a 'Statement of Facts' which sets out the details of the offence and constitutes a full admission on the part of the corporate of all the facts and matters contained therein. The SFO has made clear that DPAs will only be offered to corporates which self-report early, as in the case of Standard Bank, and cooperate fully with its investigation.

Factual background

The offence relates to a single transaction in 2012–13 by which the Government of Tanzania engaged Standard Bank and its sister company, Stanbic Bank Tanzania Ltd ('Stanbic'), to raise funds on its behalf by way of a sovereign note private placement. The initially agreed fee was 1.4 per cent of funds raised. However, the deal progressed sluggishly until this was increased in late 2012 to 2.4 per cent with the addition of one per cent to be paid to a local partner, or consultant, Enterprise Growth Markets Advisers Limited ('EGMA') which had as its director, and one of its three shareholders, Mr Harry Kitilya, a serving member of the Government of Tanzania.

Following the introduction of EGMA into the structure, the deal progressed more quickly and, finally, in March 2013, US$600m was raised, of which US$6m was paid to a Stanbic bank account held by EGMA. The funds were rapidly withdrawn in a small number of large cash withdrawals, allegedly with the connivance of Stanbic staff. Shortly after the alarm was raised in relation to the cash withdrawals, Standard Bank self-referred the matter to the SFO.

The predicate offence of bribery was alleged to have been committed by employees of Stanbic rather than Standard Bank (none of these individuals has yet faced prosecution). However, Standard Bank's own employees were found to have failed to identify the transaction as carrying a high risk of bribery, to ask the appropriate questions about the role of EGMA in the transaction or to identify the connection with Mr Kitilya as a relationship with a politically exposed person (PEP). Instead, Standard Bank was found to have placed reliance upon Stanbic to conduct the appropriate due diligence in relation to the transaction and, as such, was itself criticised for failure to put in place adequate procedures to prevent bribery.

The offence

Not only was this the UK's first DPA, but also the first financial penalty imposed in relation to an offence under section 7 of the Bribery Act 2010 (the 'Bribery Act') which created the offence of 'failure of commercial organisations to prevent bribery'. That the organisation in question was at the relevant time a fully-owned subsidiary of South African Standard Bank Group, and that the alleged predicate offence took place in Tanzania, illustrates the truly global reach of the Bribery Act and the UK authorities' willingness to pursue a case in which the only nexus with the jurisdiction was the fact that the offending organisation maintained a UK presence (through a branch).

'Adequate procedures'

It is a defence to a section 7 Bribery Act allegation for the organisation to show that it

had 'adequate procedures' in place to prevent bribery by associated persons. In January 2014, Standard Bank settled an enforcement action by the Financial Conduct Authority (FCA) by making admissions regarding the inadequacy of the application of its due diligence procedures for transactions and relationships involving PEPs. The concession in a regulatory context of the inadequacy of its financial crime prevention procedures might arguably have inhibited Standard Bank's ability to employ the 'adequate procedures' defence in any criminal proceedings. Further, the DPA is itself the outcome of a negotiated settlement and, as such, is unlikely to present the complete picture. Nevertheless, the Statement of Facts, in setting out precisely why Standard Bank's procedures were unacceptable, provides us with an indication of what the prosecutor might regard as adequate.

Although Standard Bank had in place at the time of the offence an anti-bribery and corruption policy, it was found to be inadequate in a number of material respects and, to the extent that the policy would have been adequate, insufficient staff training had been undertaken to ensure that Standard Bank's employees understood when and how it should be applied in practice.

Standard Bank's policy attempted to address the issue of bribery by its agents and contained a statement that the policy was applicable to all business transacted 'in the name of or on behalf of the Bank'.[1]

However, it was found that insufficient guidance was provided on whether this included the particular circumstances of this transaction, in which a third-party consultant was directly engaged by a sister company of Standard Bank and payments made to that third party by another company within the group rather than directly by Standard Bank itself.

There was a training programme in place to disseminate Standard Bank's anti-bribery and corruption policy but this was also found to be ineffective. As part of its investigation, the SFO interviewed staff members in relation to the training that they had received. Excerpts of a number of the interview transcripts are set out in the Statement of Facts and would surely have made sobering reading for Standard Bank's compliance team. In response to questions about the online tutorials that staff had been required to undertake, interviewees offered replies such as, 'It was a fun challenge to see how quickly you could pass them,' and 'I can't remember exactly when I did one of those'.[2]

The takeaway points for other organisations are, first, that the work of framing their anti-bribery and corruption policies must include consideration of all scenarios in which bribery might possibly occur and the policy itself should explicitly address all of these. Secondly, however well-drafted the policy, it will be of absolutely no use unless it is properly disseminated and understood by all staff: training that amounts to little more than a tick-box exercise will be very unlikely to provide sufficient grounds to mount an 'adequate procedures' defence to a section 7 Bribery Act allegation.

Financial penalty

The financial penalty agreed between Standard Bank and the SFO was US$16.8m (denominated in US Dollars since this was the currency in which the transaction was executed). This represented a starting point of 300 per cent of the fees accrued by Standard Bank in relation to the transaction, reduced by one-third to reflect early admission of liability. This is in line with the framework set out in the Act, which states that any penalty should be 'broadly comparable to the fine that a court would have imposed' upon conviction following an early guilty plea. However, it seems that other considerations were also at play. Leveson LJ's judgment stated that the US Department of Justice (DOJ) had confirmed that the financial penalty was 'comparable to the penalty that would have been imposed had the matter been dealt with in the United States' and that, if the matter were resolved in the UK, the DOJ would close its inquiry. In this context, Leveson LJ commented that, 'in the circumstances, there is nothing to cast doubt on the extent to which these aspects of the proposed approach are fair, reasonable and proportionate'. It will be interesting to see whether such considerations will have any influence on the agreed penalty under a UK DPA in any future cases involving offences for which the US penalty could potentially be markedly higher.

In addition to the penalty itself, the terms of the DPA require Standard Bank to pay US$6m compensation plus interest of US$1,046,196.58; disgorgement of profit of US$8.4m; and costs of £330,000. Standard Bank is also required to agree to commission, at its own expense, an independent review of its anti-bribery and corruption controls. This requirement is outside the scope of any

criminal sanction that a court would impose upon conviction and the cost of the exercise could be significant.

The first of many?

The Standard Bank case was particularly suited to settlement via a DPA. The case was relatively simple, involving a single transaction rather than a course of wrongdoing over a longer period. In addition, the corporate offence under section 7 of the Bribery Act is one of strict liability and has been deliberately framed to overcome some of the evidential difficulties in establishing corporate criminal liability in most other English law offences. Both of these factors likely assisted Standard Bank's advisers in quickly reaching the conclusion that there was a case to answer and, therefore, enabled them to self-report within a very short period of the wrongdoing having been discovered. Where the wrongdoing is more complex or the probability of successful prosecution more difficult to assess, it is likely that any self-report would be made significantly later (if at all). Whether the SFO would consider this as full cooperation, and a factor tending towards disposal via a DPA, remains to be seen.

Standard Bank's subsequent acquisition by ICBC inevitably also played a role in the SFO's decision to offer a DPA in this case: the fact that the governance of the organisation had changed since the alleged offence was committed is likely to have allayed many of the usual concerns about rooting out deeper cultural problems within an offending organisation.

A high degree of cooperation with the prosecutor is a prerequisite to the process of negotiating a DPA and includes the disclosure of relevant material prior to receiving any assurance that the offer of a DPA will be forthcoming.

The particular circumstances in which the Standard Bank DPA was made, including the fact that the self-report was made much earlier than would be possible in the majority of cases, mean that it does not necessarily provide more widely applicable lessons. Indeed, given the fact that the financial penalty imposed pursuant to a DPA will be in line with that which would have been imposed upon conviction following an early guilty plea, it is difficult to see what most corporates would have to gain from self-reporting at all rather than waiting for the prosecution to present its case before considering what, if any, admissions it should make.

Legal advisers will have to carefully consider whether many organisations will find themselves in circumstances in which the Standard Bank approach would be advisable.

Notes

1 SFO v Standard Bank PLC, Statement of Facts, p 41.

2 *Ibid*, pp 50 and 54.

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DPAs: ensuring public confidence and third-party fairness

The first Deferred Prosecution Agreement (DPA) in the UK has been much celebrated.

At the time, the Serious Fraud Office (SFO) stated that '[t]his landmark DPA will serve as a template for future agreements'.[1] But the DPA is not perfect. Less than a year later, there is a petition to reopen the DPA, and concerns have been expressed about the DPA procedure. This article explores two of these concerns: the transparency of the investigation process and the potential unfairness in the naming of third parties.

Background

On 30 November 2015, the first DPA in the UK was approved by the court.[2] It related to the failure of Standard Bank PLC to take reasonable steps to prevent an associated organisation, Stanbic Bank Tanzania Limited (Stanbic), and two named Stanbic executives, Bashir Awale and Shose Sinare, from committing bribery. The Government of Tanzania was raising funds by way of a sovereign note private placement. Standard Bank and Stanbic stood to gain very

substantial fees from a mandate to raise those funds. After negotiations had begun, the fees were increased from 1.4 per cent of the gross proceeds raised (US$600m) to 2.4 per cent of the proceeds. One per cent of that fee was paid to a 'local partner', whose chairman and directors were closely connected with the Government of Tanzania. The 'local partner' was simply a vehicle for the transfer of corrupt payments to officials in order for Standard Bank and Stanbic to win the lucrative contract of organising the placement.

Under the terms of the DPA, Standard Bank had to pay over a total of US$31.2m (fine, compensation and disgorgement of profit).

As regards culpability for bribery, the judgment stated:

> 'The SFO has reached the conclusion that there is insufficient evidence to suggest that any of Standard Bank's employees committed an offence: whilst a payment of US$6m was made available to EGMA, the evidence does not demonstrate with the appropriate cogency that anyone within Standard Bank knew that two senior executives of Stanbic intended the payment to constitute a bribe, or so intended it themselves.'

Thus the blame for the bribery was placed squarely on the two senior executives of Stanbic. These two individuals, Bashir Awale and Shose Sinare, were named in the DPA and in the court's preliminary and final judgments.

The case appeared to be straightforward and the court expressed the view that the approach taken by the parties 'should create the benchmark against which future such applications may fall to be assessed'.

Then in March 2016, the *Independent* (and other media sources) reported that Shose Sinare, who had been named as a Stanbic senior executive involved in bribery, was suing ICBC Bank (Standard Bank's successor in title) and Stanbic in Tanzania for 'ruining her career and any other finance-related business' by alleging that she participated in the bribery scheme. In addition she claims the bank misrepresented that it was not aware of the 'local partner' involvement, when in fact it was aware before signing the deal and wrongly told the SFO that she had resigned from her position to avoid cooperation in an internal investigation. The newspaper report stated that more than 1,000 people (in Tanzania) had signed a petition calling for the SFO to reopen the investigation. The SFO issued a statement, which said 'The SFO conducted an independent investigation into the matters self-reported to us by Standard Bank Group. We have now concluded the case into those matters that fall within the UK's jurisdiction'.

We are not aware of any evidence that supports Shose Sinare's allegations, but the circumstances in which they have arisen does give rise to two legitimate general concerns, namely the level of transparency in the investigative process leading to a DPA, and the fairness of naming a person as being guilty of bribery in circumstances where that person has not been tried for that offence and has had no opportunity to make counter representations either to the SFO or the court.

In considering these points of general principle, we are not suggesting that the investigative process in this case was in fact flawed or that there is any merit in Shose Sinare's allegations. We are looking at issue of principle and highlighting concerns that arise out of the structure of the DPA procedure.

Transparency of the investigative process

The first concern about the DPA is the transparency of the investigative process undertaken by the SFO.

The starting point is that before the SFO opens a DPA negotiation, it must apply a two-stage test, the evidential stage and the public interest stage. These concepts are well known to those who practise in criminal law in England and the Full Code Test at the evidential stage states that:

> 'Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.'

However, in relation to a DPA a much lower evidential stage test is permitted. The DPA Code of Practice states as follows:

> 'i. either:
> (a) the evidential stage of the Full Code Test in the Code for Crown Prosecutors is satisfied or, if this is not met, that
> (b) there is at least a reasonable suspicion based upon some admissible evidence that P has committed the offence, and there are reasonable grounds for

> believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the Full Code Test.'

The difference between the two tests is a clear and obvious one. If there are reasonable grounds to suspect that a company has committed an offence, then discussions may begin. From a pragmatic perspective, this approach has several attractions. First, it gives the company a chance to 'own up' at a very early stage and secondly, it saves the public from the costs of a Full Code Test investigation. However, there are two significant drawbacks to applying this much lower test. First, the reduced level of investigation required to satisfy the test may mean that the true level of criminality is not revealed. Secondly, an individual who for whatever reason is not to be prosecuted in England for a bribery offence may be named and shamed as having committed a bribery offence purely on the basis of a 'reasonable suspicion' that they have done so. Such a decision may not damage the company, but it may cause great damage to the reputation of that individual.

In the Standard Bank case, the preliminary judgment set out the process that was followed. The chain began with a report by staff at Stanbic to Standard Bank. Standard Bank then instructed its lawyers to carry out an internal investigation. The court noted that Standard Bank's detailed internal investigation had been sanctioned by the SFO and that Standard Bank fully cooperated with the SFO from the earliest possible date by, among other things, providing a summary of first accounts of interviewees, facilitating the interviews of current employees, providing timely and complete responses to requests for information and material and providing access to its document review platform. Its report was sent to the SFO, which reviewed the material obtained and conducted its own interviews.[3] The lower evidential stage 'reasonable suspicion' test was then applied, in accordance with the DPA Code of Practice.[4] The DPA was entered into on the grounds that that there was a reasonable suspicion, based on some admissible evidence, that Standard Bank had failed to prevent bribery.

There is nothing unusual in a company carrying out an internal investigation and reporting its findings to an investigator. However, it is vital for public confidence for the process to demonstrate that the investigator itself has carried out a sufficiently thorough and transparent investigation, so as to ensure that the full extent of any criminality has been revealed and that those who will be named as having committed acts of bribery are in fact guilty of those acts. The choice of law firm to carry out the internal investigation will be a matter for the company concerned, but again from the public perspective, it is vital that such a law firm will be seen as carrying out an independent and wholly objective investigation. This issue has been highlighted recently in a report in *The Times*,[5] referring to an internal investigation commissioned by BHP Billiton into a major environmental disaster in Brazil. It appears that the law firm appointed by BHP has close commercial links to it, causing Greenpeace Brazil to comment that, given the commercial links, 'the investigation cannot be considered independent'.

Here, it should be borne in mind that the SFO or any other person 'charged with the duty of conducting an investigation' is obliged under the Criminal Procedure and Investigations Act 1996 (CPIA) Code of Practice 2015 to look for evidence that points away from, as well as towards, a suspect (whether corporate or individual). The CPIA Code of Practice 2015, paragraph 3.5 states: 'In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect.'

These duties do not apply to an investigation conducted by external or internal lawyers. Further, there are investigative powers available to the SFO that are not available to a law firm, including the use of mutual legal assistance.

An agreed statement of facts is a vital component of the DPA procedure and is published as part of it. Under the procedure, the courts will consider very carefully in each case whether a DPA is in the interests of justice and whether its terms are 'fair, reasonable and proportionate'. However, the judge will not ordinarily be in a position to look behind the statement of facts, unless there is something obvious within it that does not add up. Such an under-representation occurred in the most striking way in the BAE case, where Mr Justice Bean in his sentencing remarks expressed himself as 'astonished' to find that the prosecution opening said it was no part of the Crown's case that any part

of any payments had in fact been used for corrupt purposes. The judge commented: 'On the basis of the documents shown to me it seems naïve in the extreme to think that [the intermediary] was simply a well-paid lobbyist'.[6] Similar concerns over the adequacy of a statement of facts was expressed by the Supreme Court of Victoria in a regulatory case heard in 2012.[7]

The judge's function is to test the agreement, but not the underlying evidence. It follows that there is a clear need for the investigation leading to the DPA not only to be thorough and independent but to be seen to be so: the necessary element of transparency.

This need is all the more pressing in a case where the investigator is proceeding on the basis of 'reasonable suspicion' of the commission of an offence, rather than there being sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. This is especially true in circumstances where a judge is being invited to accept on the basis of the statement of facts that there is no – or insufficient – evidence of complicity by any other persons.

The lack of evidence pointing to awareness or involvement by any Standard Bank employees was key to the DPA. In approving the DPA, the judge noted:

> 'The SFO has reached the conclusion that there is insufficient evidence to suggest that any of Standard Bank's employees committed an offence; whilst a payment of US$6m was made available to EGMA, the evidence does not demonstrate with the appropriate cogency that anyone within Standard Bank knew that two senior executives of Stanbic intended the payment to constitute a bribe, or so intended it themselves.'[8]

This point was so important that the judge reinforced it: 'Further, I repeat: the evidence does not reveal that executives or employees of Standard Bank intended or knew of an intention to bribe'.[9]

While the statement of facts is clear that the SFO questioned the Standard Bank deal team (who denied any knowledge), the DPA is unclear whether the SFO questioned the named Stanbic executives or other culpable individuals on this point. As the judge and the SFO both relied on the insufficiency of evidence pointing to the Standard Bank team, from a transparency perspective, the DPA should have set out in detail the investigative procedures that the SFO undertook to ensure that this evidence did not, in fact exist. This would provide the judge and the public with confirmation of the independence and thoroughness of the SFO investigation.

The need for the investigating authority to question the company's internal investigation is a point that the US authorities have explicitly set out in the US Attorneys' Manual, and recently reiterated in a speech by Assistant Attorney General Leslie Caldwell. When assessing a company's own investigation, DOJ attorneys are expected to 'vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals'.[10] In November 2015, Assistant Attorney General Leslie Caldwell repeated the point: 'The Criminal Division, meanwhile, will conduct its own investigation. We will pressure test a company's internal investigation with the facts we gather on our own, and we will consider the adequacy of an internal investigation when we evaluate a company's claim of cooperation'.

What is missing from this DPA, and the UK process, is the evidence or confirmation that the SFO has indeed 'pressure tested' the company investigation, beyond asking the Standard Bank team itself.

Potential unfairness: naming of third parties

The DPA procedure does not have any mechanism by which a person named in a DPA as having committed a criminal offence may make representations to the prosecutor or the court before (or after) a DPA is published. This is markedly different from the position in regulatory proceedings brought by the Financial Conduct Authority (FCA). Under section 393 of the Financial Services and Markets Act 2000 (FSMA), if in the opinion of the FCA any of the reasons contained in a decision notice are prejudicial to a third party, the FCA must serve that party with a notice. That party may then make representations to the FCA and, if the matter remains unresolved, may then refer the issue to the Tribunal.

It is obvious that the naming of a person as being guilty of bribery may be very damaging to that individual. In the Standard Bank case, the court took the following approach in

respect of the naming of individuals in the published DPA:

> 'Having considered the matter following argument, I am also satisfied that the Statement of Facts which would then enter the public domain should identify those who are named in the proposed indictment, those said to be the recipients of the US$6m paid to EGMA and the head of the corporate team responsible in the Bank, that is to say, the Head of Global Debt Capital Markets, (although, in his case, I emphasise that it is not suggested that there is sufficient evidence to justify his prosecution and nothing I have said should be read as implying the contrary). That is the policy I have followed in this judgment.'[11]

The judge decided that the Stanbic executives should be named, on the basis that they were named in the proposed indictment. However, it is important to remember that they were named on the basis of the lower evidential test of 'reasonable suspicion', which falls well short of the Full Code evidential test. The position remains that such a person is named publicly as having committed a criminal offence and has no opportunity to clear their name. It seems likely that this issue simply was not thought about when the DPA procedure was drafted, as it seems on its face irrational to protect the reputational rights of a third party in regulatory proceedings under the FSMA, but not in circumstances where a person is said by a prosecuting authority to be guilty of a criminal offence. Basic principles of fairness would dictate that proper consideration needs to be given to the position of third parties who are named in DPA proceedings. The interests of transparency justify the naming of those involved, but the interests of fairness require that those named should have an opportunity to counter those allegations, along the lines of the third-party notice procedure under the FSMA.

Conclusion

The DPA procedure is controversial and many observers have expressed concern that they may result in significant under-prosecution of those involved in criminal conduct or blame the wrong individuals, because the investigation was halted once the stage of 'reasonable suspicion' was reached. If the DPA procedure is to gain and hold the trust of the public, it must be fair to all those involved, including the victims of corruption. Not only must the investigation process in fact be independent and rigorous, it must be seen to be so: a vital requirement of transparency.

Notes

1 SFO News Release 'SFO agrees first UK DPA with Standard Bank' www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-Standard-bank.
2 SFO and Standard Bank PLC, Southwark Crown Court, U20150854. Sir Brian Leveson, President of the Queen's Bench Division.
3 Preliminary judgment, paras 29 and 30.
4 Preliminary judgment, para 17.
5 'Lawyers in mine deaths inquiry "too close to BHP"', *The Times* (London, 11 April 2016) www.thetimes.co.uk/tto/business/industries/naturalresources/article4730816.ece
6 *R v BAE Systems PLC*, Southwark Crown Court, 21 December 2010.
7 *Australian Securities and Investment Commission v Paul John Ingleby* S APCI 2012 0160.
8 Preliminary judgment, para 26.
9 Preliminary judgment, para 46.
10 US Attorneys' Manual, s 9-28.210.
11 Preliminary judgment, para 65.

Corporate settlements in the spotlight: call for global standards to be applied

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The need for global standards for corporate settlements in foreign bribery cases

A coalition of non-governmental organisations (NGOs) has called for global standards for corporate settlements in foreign bribery cases, with a view to ensure that settlements provide effective, proportionate and dissuasive penalties and lead to a degree of standardisation among Organisation for Economic Co-operation and Development (OECD) member countries. The recommendations, which were agreed at the OECD Anti-Bribery Convention in March 2016, focused on transparency, the accountability of culpable individuals and the clear admission of corporate wrongdoing.

It is proposed that settlements should only be made available where a company has genuinely selfreported, cooperated fully and where the detailed terms of the settlement have been submitted to a public hearing. The recommendations also require companies to cooperate with authorities in other jurisdictions and it is suggested that settlements should not preclude further legal actions in jurisdictions that are not party to the settlement (subject to the *ne bis in idem* principle).

A further suggestion was that the company identify the officials who received the bribes and the employees who offered them. This is a controversial suggestion, particularly where those parties may wish to have some form of right of reply or ability to be heard in the process, which at present is not a part of most settlement regimes, such as Deferred Prosecution Agreements (DPAs) or civil recoveries in the UK. Likely to be more contentious still are recommendations that propose that compensation to victims should be based on an assessment of the full harm caused by the corruption and should form part of the settlement. The right to representation by victims at settlement hearings, including being heard on compensation, was also proposed.

Corporate settlements are part of the landscape now in the UK and the US; a tool in a broader enforcement strategy in which prosecution also plays an important role. Because of this, the NGOs felt that when a case was concluded through the use of a settlement agreement, those settlements should be executed on a proper legislative basis with judicial oversight, which includes proper scrutiny of the evidence.

The suggestion of global standards remains just an NGO recommendation for now, but it certainly makes sense in what is an increasingly complex legal environment for international companies that discover corruption and want to do the right thing. The trick will be tying every jurisdiction into the settlement, but if victims are involved in the process, this could avoid a lot of the follow-on litigation that arises in these types of cases.

Effect on the UK

A previous OECD report in 2013 set out concerns about over-reliance on civil settlements in the UK and their lack of transparency, which they felt did not permit a proper assessment of how effective or proportionate they were. There was also judicial criticism in the case of *Innospec* about whether civil sanctions were appropriate where serious criminality was involved, leading to civil settlements falling out of favour and paving the way for DPAs, which were introduced early in 2014.

As the UK Bribery Act reaches its fifth year in force, a divergence of approach has appeared where the Serious Fraud Office (SFO) has moved away from civil settlements, but they are increasingly used in Scotland to resolve cases involving corporate defendants in corruption cases.

Scotland is a separate jurisdiction from England and Wales. As Scottish prosecutors do not have the ability to use DPAs (as the SFO can) they are turning to civil recovery settlements under the Proceeds of Crime Act 2002, which still applies in both jurisdictions.

This allows law enforcement agencies to recover a company's assets if these were obtained through criminal conduct, without having to secure a criminal conviction.

Following a self-report in June 2015, the Scottish Crown Office agreed a civil recovery order in September 2015 with Brand-Rex Ltd – a company that develops cabling solutions for network infrastructure and industrial applications – for failing to prevent bribery under section 7 of the Bribery Act. The company self-reported in relation to an independent installer, who had passed on to a customer the benefit of an incentive scheme, which was aimed at Brand-Rex's installers and distributors. Under the terms of the civil recovery order, Brand-Rex was ordered to pay £212,800, which was based on the company's gross profit from the misuse of the incentive scheme.

A few months later, Scottish prosecutors entered into another civil recovery settlement with Braid Group (April 2016) for £2.2m, after the logistics company also self-reported evidence of bribery involving two 2012 freight forwarding contracts secured by its Scottish subsidiary.

Prior to the introduction of DPAs, the SFO made greater use of civil recovery settlements in England to resolve cases of corporate liability for corruption. Under former director Richard Alderman, between 2008 and 2012, the agency used civil recovery settlements to resolve cases against companies including: Mabey Engineering (Holdings) Ltd (2012); Macmillan Publishers Ltd (2011); DePuy International Ltd (2011); MW Kellogg Ltd (2011); AMEC Plc (2009); and Balfour Beatty Plc (2008).

When current SFO director David Green took office, he set out his intention to put an end to this trend for civil settlement: 'A perception has emerged that we are more inclined to settle than prosecute… I think there is a need to rebalance the focus between prosecution and civil settlement.'[1] Since David Green took office, there has only been one corporate civil settlement finalised – Oxford Publishing Ltd, (2012) – which was commenced under his predecessor. Reiterating his views in March 2013, David Green said: 'We investigate and prosecute: civil settlement is still alive and well, in the right circumstances but we are not there to offer deals and a special easy path for white collar criminals.'[2]

With the exception of the recommendations about victim involvement in the settlement process, the NGO recommendations are largely consistent with the way in which DPAs are arrived at in England and Wales.

Deferred Prosecution Agreements

The ability to resolve a case by virtue of a DPA was given to the Crown Prosecution Service and the SFO under the provisions of Schedule 17 of the Crime and Courts Act 2013 – available from 24 February 2014. In England, in November 2015 the SFO resolved its first section 7 case by way of a DPA with Standard Bank Plc (now known as ICBC Standard Bank Plc), which related to the activities of a subsidiary in Tanzania. As a result of the DPA, Standard Bank will pay financial orders of US$25.2m (£17.49m) and will be required to pay the Government of Tanzania a further US$7m (£4.86m) in compensation. The bank has also agreed to pay the SFO's reasonable costs of £330,000 in relation to the investigation and subsequent resolution of the DPA. Standard Bank also agreed to be the subject of an independent review of existing anti-bribery and corruption controls, policies and procedures regarding compliance with the Bribery Act and other applicable anti-corruption laws.

Civil settlements in their current form are unlikely to continue to be used in Scotland if the recommendations of the NGOs are applied by OECD members in the future. At the very least, the way in which the settlements are done will need to have a greater degree of transparency and accountability. Under the current regime, a company is not required to admit wrongdoing and that too is at odds with the proposals. Scotland has not pressed for the power to enter into DPAs to resolve corporate cases in their jurisdiction and has reserved its position with no plans of its own to legislate.

There are however significant advantages to civil recoveries, which mean they should not be discarded altogether. With some alterations, in England, Wales and Scotland, they could be made to comply with the transparency and other recommendations sought by the NGOs. Using the civil recovery regime results in a faster outcome than a DPA. In order to enter a DPA the prosecutor has to apply the two-stage test in the Code for Crown Prosecutors and be satisfied that the evidence is sufficient to provide a realistic prospect of conviction and that a prosecution is in the public interest. This means extensive investigation by the SFO, even where the

company has self-reported. There is a backlog of self-reports in England and Wales, which require investigation by the SFO under the DPA route. The Treasury has had to subsidise the SFO through blockbuster funding in order to investigate these and their other cases. It takes time and money to get to this stage and may not always be a good use of resources when there is a suitable alternative method of resolution.

In Scotland, the Crown Office reports that a case can usually be settled within a year, and this is because the amount of investigation needed for a case to be the subject of a civil recovery order is a good deal less than that necessary for consideration of the two-stage test.

Civil recovery settlements are equally effective (in terms of deterrence and penalty) to DPAs and they can share a number of features such as corporate monitors, financial penalties and compensation as part of the package. Corporate defence lawyers have called for civil recovery orders to continue to be used by the SFO because they now seem unwilling to use them at all. If the OECD decides that there should be global standards it seems likely there will be amendments to the civil recovery regime whereby settlements become more transparent but retain the fleetness of foot, in terms of speedy resolution that the DPA lacks. There will be cases where civil recovery is an appropriate solution and not a soft option, and the SFO will still be at liberty to prosecute or enter into DPAs in other cases as they see fit. As long as the decision-making is transparent and the remedy equitable, there will be a strong public interest in the SFO implementing the full range of remedies, and no one is going to criticise them for that.

Notes

1 S Bowers, 'David Green, new SFO director, plans to focus on key cases in strategy switch' *The Guardian* (London 1 May 2012) www.theguardian.com/law/2012/may/01/david-green-sfo-director.

2 Speech by David Green at the Serious Fraud Office's Fraud Lawyers Association (March 2013) www.sfo.gov.uk/2013/03/26/inaugural-fraud-lawyers-association.

United States: significant uptick in FCPA enforcement reflects shift in enforcement strategy and DOJ announces new pilot programme

UNITED STATES

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The pace of enforcement activity under the US Foreign Corrupt Practices Act (FCPA) increased sharply in the first three months of 2016, resulting in the highest number of first-quarter enforcement actions since 2007. This uptick in enforcement by both the US Securities and Exchange Commission (SEC) and the US Department of Justice (DOJ) reflects many of the priorities articulated by the agencies in the last year. The DOJ's focus on high-value corporate settlements and prosecutions of individuals, coupled with its decision not to bring parallel FCPA actions alongside several FCPA settlements by the SEC, appears to reflect a conscious DOJ strategy to focus more on individual enforcement and to decline enforcement actions against corporate entities under certain circumstances. Conversely, the SEC entered into a significant number of corporate enforcement dispositions with lower-value settlements, all but one of which were resolved using administrative proceedings.

The DOJ's corporate dispositions this quarter include a Deferred Prosecution Agreement (DPA) with Dutch telecoms company VimpelCom Limited, and a guilty

plea by its wholly owned Uzbek subsidiary Unitel LLC – both related to conduct in Uzbekistan. In related proceedings, VimpelCom settled with the SEC and the Dutch Public Prosecution Service, for a total combined resolution (DOJ, SEC, and Dutch authorities) amount of $795m. The DOJ noted that it had reduced VimpelCom's criminal penalty 45 per cent below the bottom of the applicable sentencing guidelines fine range for the offence, even though the company did not voluntarily disclose, as a result of the company's extensive cooperation with the government's investigation.

The SEC's enforcement activity in the first quarter of 2016 also includes settlements with three technology companies – SAP SE, Qualcomm Incorporated, and PTC, Inc (the latter in parallel with its two Chinese subsidiaries' settlement with the DOJ) – and with three pharmaceutical companies – SciClone Pharmaceuticals, Inc, Nordion (Canada) Inc and Novartis AG. Notably, the SEC's actions against these three healthcare companies follow closely on the heels of other actions against healthcare companies late last year and Olympus' $22.8m settlements with the DOJ to resolve an FCPA enforcement action based in Latin America stemming from the sale of medical devices. Considered together with the approximately 18 ongoing investigations of medical device and pharmaceutical companies, it appears that the healthcare industry is again becoming a focus for the US enforcement agencies. The SEC also entered into another corporate settlement with Las Vegas Sands Corp, relating to its activities in China and Macao.

Both the DOJ and SEC have continued to pursue enforcement actions targeting individuals, with the SEC entering its first DPA with an individual. As part of its settlement with PTC on 16 February 2016, the SEC announced that it had entered into a DPA in November 2015 with Yu Kai Yuan, a former sales executive of PTC's Chinese subsidiaries in 2015. The SEC's individual enforcement actions this quarter, both of which involved administrative proceedings, include a settlement with former Nordion employee Mikhail Gourevitch related to a corporate settlement with his employer, and another with Ignacio Cueto Plaza, the CEO of LAN Airlines. On the DOJ side, an owner of several US energy companies and one of his former employees pled guilty in connection with a bribery scheme involving contracts with Petroleos de Venezuela, Venezuela's state-owned, state-controlled energy company. On 20 April 2016, the DOJ announced another individual plea under the FCPA, with Dmitrij Harder admitting to bribing an official at the European Bank for Reconstruction and Development (EBRD) to influence the official's actions in favour of Harder's company and its clients.

On the policy front, on 5 April 2016, the DOJ announced a new FCPA pilot programme intended to encourage companies to voluntarily disclose violations and cooperate with the agency. Under the terms of the programme, the DOJ announced that it would require companies to meet four criteria to be eligible for the maximum cooperation credit under the US sentencing guidelines: voluntary self-disclosure of FCPA violations; full cooperation with the DOJ; appropriate remediation measures; and disgorgement of all profits resulting from the FCPA violation. Notably, the pilot programme references the Yates Memo (issued by the DOJ on 9 September 2015 and announcing an increased focuses by the DOJ on individual prosecutions) and incorporates its requirement of full cooperation by companies to assist DOJ investigations with respect to related individual wrongdoing by their executives or employees. If a company takes all these steps, the Fraud Section 'may accord up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range' and 'generally should not require appointment of a monitor'. In addition, where a company fulfils those same conditions, 'the Fraud Section's FCPA Unit will consider a declination of prosecution'. Although most aspects of the pilot programme have been in place for some time, the programme itself and its accompanying publicity will be the primary focus in investigations of companies in the DOJ's enforcement pipeline for the next year.

The next steps towards the achievement of a true level playing field in foreign bribery cases

UNITED STATES

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The Organisation for Economic Cooperation and Development (OECD) Convention against Bribery[1] (the 'Convention') was adopted to level the playing field among companies of member countries (State Parties) doing business abroad. More specifically, by requiring each State Party to criminalise the corruption of foreign officials in order to obtain a business advantage, the Convention aimed to restore competition between State Party companies present in foreign jurisdictions. Further to the Convention's entry into force, an efficient monitoring system based on successive rounds of examination was carried out to oversee its implementation by State Parties. On 16 March 2016, the OECD Working Group on Bribery formally launched the fourth round of examinations, which will aim at addressing weak judicial enforcement in State Parties. With more than half of them having yet to conclude a single foreign bribery case in their jurisdiction[2], the issue certainly deserves scrutiny. But attention should also be given to the challenges that have appeared as a consequence of more enforcement. In fact, while many countries lag behind, others have significantly increased the pace of enforcement, shedding light on two issues that must be addressed in order to maintain an equal prosecutorial risk and therefore achieve a level playing field: access to settlements; and competing jurisdiction over foreign bribery cases.

The first factor of inequality unveiled by increased enforcement is uneven access to pre-trial agreements, or settlements. Notwithstanding the substantive debate on the benefits versus disadvantages of these instruments, the problem is that settlements are more advantageous for bribe payers than traditional justice and that they are much easier to access in certain jurisdictions than others. With settlements, individuals and companies benefit from shorter proceedings, lower legal fees and limited exposure. Oftentimes, they don't have to admit guilt and the fines and penalties to pay are lower than what they would have been if ordered by a court.

The conditions to obtain such a deal vary significantly across State Parties. For instance, in the United States, enforcement authorities resort almost automatically to settlements to resolve foreign bribery allegations. By contrast, access to a settlement in the United Kingdom is contingent upon the defendant's cooperation with the Serious Fraud Office (SFO), while in France, where the procedure does not exist, it is simply not an option. Since settlements are kinder on alleged bribe payers than traditional justice, the fact that they are more easily accessible in some countries than others de facto tilts the playing field.

The second factor of inequality among defendants is competing jurisdictional claims over foreign bribery cases. In the current enforcement landscape, companies or individuals who bribe foreign officials can fall under the jurisdiction of several countries and therefore face the risk of being prosecuted more than once for the same underlying conduct. But for various reasons, the risk which alleged bribery offenders face with respect to multiple prosecutions is far from uniform.

First, State Parties' rules pertaining to jurisdiction over foreign bribery cases are asymmetric. In the US for instance, the Securities and Exchange Commission (SEC) is responsible for civil enforcement of the Foreign Corrupt Practices Act 1977 (FCPA) in respect of any person who issues securities on US stock exchanges. This includes a significant number of non-American companies.

For the sake of argument, let's compare this with the French system. In France, the Public Prosecutor's Office *(Ministère Public)* alone

has enforcement authority, and its territorial jurisdiction is limited to conduct that physically occurs within France. Therefore, while a French company that bribes a foreign official in a third country could be prosecuted in the US, the French prosecutor would have no such jurisdiction over an American company. Adding to this issue is the fact that only some State Parties have rules against international double jeopardy (meaning that they would therefore forego prosecution of an alleged bribe payer if another country had previously ruled over the same underlying conduct). Here again, a difference in standards can be a source of unequal treatment among defendants. Let's take the example of two companies that are exposed to prosecution in the same two countries. Country A recognises international double jeopardy and Country B does not. Depending on where the companies are respectively prosecuted first, the situation could turn out very differently for them. One could be sanctioned twice, if it was first prosecuted by Country A, and the other could be shielded from that risk, if it was first prosecuted by Country B.

To address these challenges, several experts have been advocating for the creation of a supranational court that would have exclusive jurisdiction over foreign bribery cases[3]. The idea is certainly worth exploring, even though many obstacles would have to be overcome for this court to come to life. Indeed, while several international fora have been created in the past to address human rights violations, one ruling over white-collar crime matters would be unprecedented. Not only would it require countries to surrender jurisdictional authority over cases on which they actually have the capacity to rule, it would also deprive a few of them of the lucrative fruits of settlements. Assuming that creating this court would take years, a series of solutions should be found in the short term.

Some believe that the option to settle foreign bribery allegations should be available in all State Parties. Their main arguments are the proven efficiency of settlements (c. 69 per cent of foreign bribery cases have been resolved through settlements since the Convention came into force[4]), and the fact that they encourage self-reporting and voluntary disclosure.[5] However, some stakeholders remain skeptical as to the quality of justice that they deliver. In fact, settlements are commonly criticised for being too lenient of bribe payers, lacking transparency, and being subject to insufficient juridical review.[6] In France, after much speculation over the possible introduction of settlements in a bill that will be presented by the government to the Parliament during the summer of 2016[7], the *Conseil d'Etat*, France's highest administrative court, advised the government to strike it down.[8] This decision did not come as a surprise. Experts have said in the past that the adoption of American-style pre-trial agreements in France would not only be in contradiction with the foundations of the criminal justice system, they would also hurt societal and ideological opinions.[9] Notwithstanding the example of France in particular, the criticisms that settlements commonly receive are valid and it would be unreasonable to impose them on countries that, justifiably, have been reluctant to use them. That being said, the OECD's Director of Legal Affairs, Nicola Bonucci, recognised that: 'a common approach on this issue would certainly be a plus'.[10]

One option to achieve this common approach could be to impose higher standards on settlements in those OECD countries that use them. Currently, rules pertaining to settlements, including the conditions of access and criteria to determine the amount of the fine, vary from one country to another. Imposing high standards on settlements based on good practices and clear outcomes would have positive ramifications, and probably increase the use of settlements across State Parties. At the outset of the 2016 OECD Ministerial Meeting, Corruption Watch, the UNCAC Coalition, Transparency International and Global Witness came together to call for the adoption of global standards for corporate settlements in foreign bribery cases.[11] The standards advocated by the four organisations are quite high and if such standards were to be adopted, their level of strictness would ultimately be for the parties involved to decide. But the idea is nonetheless valid. Higher standards would increase the quality of settlements and temper the image of settlements as being a 'sweet deal' for alleged bribe payers in the eyes of their opponents. For this purpose, in addition to transparency and judicial scrutiny, it seems important that access to settlements be a privilege rather than a right, one that bribe payers can benefit from only if they fully cooperate with enforcement authorities. Ultimately, those standards might make settlements more challenging to access and less advantageous for alleged bribe payers in

some State Parties, but they might become accessible in a larger number of them. Evidently, strong political will is needed for a country to adopt settlements, but raising the bar in countries that already resort to them could be an important first step towards a broader use of these instruments.

Measures should also be taken to address the consequences of asymmetric jurisdiction rules on the one hand, and conflicting rules against international double jeopardy on the other. It is unrealistic to believe that these issues could be regulated in the Convention in order to achieve a common approach in all the State Parties. Rules pertaining to jurisdiction are often reflective of judicial systems' fundamental features and, for this reason, are probably not up for discussion. In addition, the adoption of rules against international double jeopardy in all State Parties might lead to undesirable outcomes. A public consultation conducted by the Working Group on Bribery in preparation of the 4th phase of compliance monitoring[12] showed that many stakeholders are in favour of recognition of the principle across all State Parties. Their main argument is that the risk of being prosecuted and sanctioned more than once for the same conduct is a strong deterrent to self-disclosure and cooperation with enforcement authorities. While the argument is valid, this measure would have substantial setbacks, including the risk of forum-shopping. Indeed, if bribe payers knew that they could only be prosecuted once for their conduct, they would be inclined to rush to the most lenient jurisdiction. In addition, it would result in the situation where the quickest country to prosecute reaps all the fruits of a trial or a settlement, even though it might have much less connection with the case than another country, one that would have to forego prosecution.

Issues raised by asymmetric jurisdiction rules and conflicting double jeopardy standards could be addressed, at least in part, with a revision of Article 4.3 of the Convention, following which: 'When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.' The Article could be reviewed to provide a binding mechanism to determine the appropriate jurisdiction country when several of them have competing claims over a case. The nationality of the respective participants, as well as the existence of appropriate sanctions in their countries of nationality should be key factors in that determination. In addition, in order to temper the effect of multiple prosecutions, the Article could require that countries pursuing a case that was previously pursued in another jurisdiction factor in the fines and penalties imposed on the alleged bribe payer and partially offset the ones that it will in turn order. This measure would help alleviate the adverse effects of double jeopardy while avoiding the setbacks of strict rules against it.

These few measures would help achieve a level playing field among companies of State Parties doing business abroad. Facing prosecution for bribing a foreign official is a risk for companies and individuals, one that should be high in order to work as a strong deterrent, but also even among alleged bribe payers, regardless of which country has jurisdiction over their case. The OECD should engage in a reflection on how to make this risk even. On par with issues pertaining to enforcement, a better harmonisation of standards to which alleged bribers are held is important to achieve the true level playing field ambitioned by the Convention. Facilitation payments, for instance, are still not considered bribery in some member countries. The Convention should take a stronger stand on those grey areas. Finally, while all the big players in international trade were State Parties when the Convention was adopted nearly 20 years ago, this is not the case any more. In order for the Convention to remain relevant, it is crucial that countries like India and China join the party.

Notes

1 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997.
2 OECD Foreign Bribery Report, *An Analysis of the Crime of Bribery of Foreign Public Officials*, 2014.
3 Mark L. Wolf, The Case for an International Anti-Corruption Court, Governance Studies at BROOKINGS, July 2014.
4 OECD Foreign Bribery Report, *An Analysis of the Crime of Bribery of Foreign Public Officials*, 2014
5 G20 Anti-corruption Working Group Note prepared by the OECD; Enforcement of Foreign Bribery Offenses, p. 4.
6 See Judge Rakoff's criticism of settlements in 'Justice Deferred is Justice Denied', The New Yorker Review of Books, 15 February 2015.
7 *Projet de loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique.*
8 The opinion of the *Conseil d'Etat* can be found at the following address: www.conseil-etat.fr/Decisions-Avis-Publications/Avis/Selection-des-avis-faisant-l-objet-d-une-communication-particuliere/Projet-de-loi-relatif-a-la-

transparence-a-la-lutte-contre-la-corruption-et-a-la-modernisation-de-la-vie-economique.

9 Antoine Garapon and Pierre Servan Schreiber, *Deals de Justice*, pub. 2013.

10 www.reuters.com/article/corruption-transparency-idUSL2N16N1FC.

11 http://uncaccoalition.org/en_US/get-involved/what-can-you-do/.

12 The Compilation of responses from the public consultation on the parameters for Phase 4 is available here: http://www.oecd.org/daf/anti-bribery/OECD-ABC-Responses-Phase4.pdf

Meet the Officer

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How did you get into law/your area of practice? Why did you become a lawyer?

As a young man, I wanted to become the commanding officer of a ship of the Italian Navy, which I couldn't do because my eyesight was not perfect (this might be indicative of my age – crow's nests and good field glasses must clearly have been the favourite long-distance enemy-spotting equipment). Being devoid of any ability with numbers, the law became my only possible refuge. Ironically, I did serve in the Navy as part of my military service – and I did that as a lawyer. And I am now very happy to have taken to the law.

If you were not a lawyer, what would you do?

Run a farm, or a restaurant.

What advice would you give to someone new to your area of practice/ new to your jurisdiction/ new to being a lawyer?

The law exists as an attempt to cure the imperfection of human beings; never forget the psychological element.

How has your role changed post-financial crisis?

The financial crisis has been a blessing to our profession, obliging it to shed complacency and overcapacity. We have all had to re-think what we do, and how we do it. There is no time to rest on laurels, and one has to constantly focus on identifying new services and alternative ways to provide services.

What area of your work do you enjoy the most? The least?

What I enjoy most in my work is to be given the opportunity to identify and implement solutions to ever-shifting issues, and the ability to do that with great people of different backgrounds and skills. I do not enjoy having to deal with those lawyers who put their ego ahead of their client's interest.

What are the current challenges facing your area of practice?

Companies are constantly exposed to the risk of wrongdoing, by one of their employees or one of their business partners, or because of an external attack. New fronts are constantly opening, helped by the continuously evolving legal standards, the development of new technologies, the opening of new markets. Keeping track of all this and being able to stay a step ahead is the challenge that we face.

What has been the biggest challenge of your career?

Undoubtedly dealing with the Parmalat fraud, at $15.3bn still the largest fraud ever in Europe. I was the chief legal advisor of the administrator appointed by the Italian government to investigate the fraud and restructure the company, and had to face a situation for which no-one could ever be prepared. We managed, lots of money was recovered, no innocent employee lost his job, and the company fully recovered and continues to be – now under the control of Lactalis – a global player in the dairy industry.

How did you overcome it?

Accepting the fact that success would depend on making as few mistakes as possible rather than doing everything right, knowing that it was a unique and extraordinarily useful professional experience, and applying whatever sense of humour I have to the situation.

What are the ethical issues facing your area of practice?

Practicing in the area of internal investigations requires very tough calls, which often have to be made on the basis of incomplete information and under the glare of media attention. Should the presumption of innocence prevail, or should an employee be thrown under the bus?

If you could put together a wish list of changes you would bring about in the profession, or to your area of practice, what would you include?

The legal profession is changing every day, and we are changing with it. The vast majority of these changes come not from the fiat of a regulator, but from market pressure. If there is one change I would like to see imposed by a regulator is to introduce legal privilege for in-house counsel in those jurisdictions where it is not granted.

What do you do in your free time? / How do you relax?

I am a keen gardener, and I enjoy cooking. I also read a lot, mostly about history of the 20th century.

What were your parents' professions, and did they have an opinion on your chosen career path?

Both my parents were doctors. They never commented on my professional choices. I guess that was their way to avoid the embarrassment of having a lawyer in the family.

The International Bar Association's Human Rights Institute

The International Bar Association's Human Rights Institute (IBAHRI), established in 1995, works to promote and protect human rights and the independence of the legal profession worldwide. The IBAHRI undertakes training for lawyers and judges, capacity building programmes with bar associations and law societies, and conducts high-level fact-finding missions and trial observations. The IBAHRI liaises closely with international and regional human rights organisations, producing news releases and publications to highlight issues of concern to worldwide media.

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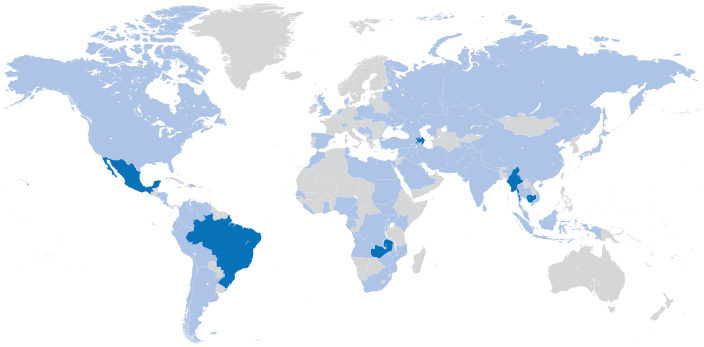

Our work around the world

Work carried out in 2015 | Work carried out prior to 2015