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The UK response to bribery:

How do we measure up on a global scale?

The Bribery Act 2010 came into force with a fanfare in July 2011. Bringing the UK's outdated laws up to the standard required by its OECD commitments, the UK Government promised a zero tolerance approach to bribery and corruption. With blanket bans on facilitation payments and corporate criminal liability for companies that failed to prevent bribery, the Bribery Act made the UK's anti-bribery laws some of the strictest in the world. Yet two and a half years on, we have yet to see the first corporate prosecution.

Together with the recently announced closure of the National Fraud Authority, the UK's commitment to tackling bribery and corruption is now in question.

Hannah Nichols and Emma Gordon of Eversheds' Fraud & Investigations Group take a look at the recent developments in bribery and corruption enforcement in the UK compared to the prosecution records of the US, China and Russia.

What is the UK doing?

The lack of a corporate prosecution under the Bribery Act does not indicate a lack of action in the UK. The strict direction of the Serious Fraud Office (SFO)'s new director, David Green, is evident from its current investigations into at least 15 companies for bribery or corruption and important recent developments may help to bolster prosecution efforts. For example, a current SFO investigation into allegations of bribery in China and Indonesia by one of Britain's largest corporates received a financial boost in January 2014 with the announcement that the SFO had received special "blockbuster" funding from HM Treasury in the "low millions of pounds". This is only the third time that such funding has been granted and enables the SFO to investigate allegations of foreign bribery in respect of which it may otherwise not have resource.

Corporate prosecutions are not the only measure of the UK's appetite for enforcement. In August 2013, charges were brought under the Bribery Act against four individuals (including three directors) at Sustainable AgroEnergy plc in connection with selling "bio-fuel" investment products in Cambodia with a value of approximately UK£23 million. Although perhaps surprising that the company itself has not been charged in connection with these offences, it has nonetheless been under investigation since November 2011. The fact that its assets have been frozen and a receiver appointed may suggest that the SFO bas not yet finished with Sustainable Agro Energy. In any event, the charges mark a distinct sea change from the three previous Bribery Act prosecutions, which concerned low level bribery by individuals and were dealt with by way of prosecutions by the Crown Prosecution Service rather than the SFO.

February 2014 also saw the introduction of the UK's Deferred Prosecution Agreement (DPA) regime. A new tool in the fight against economic crime, they widen the scope for enforcement against companies involved in fraud, money laundering, bribery and corruption. A DPA is a public, voluntary and transparent agreement between a prosecutor and an organisation whereby prosecution can be deferred if certain conditions (such disgorgement of profits, payment of fines, cooperation with prosecution of individuals and implementation of a compliance programme) are met. Contrary to the current position that there is no legal obligation to self-report for bribery or corruption, the regime encourages self-reporting, creating an additional concern for businesses inadvertently caught up in a corruption investigation.

But how does the UK measure up on the global stage when it comes to enforcing its bribery legislation?

The US threat continues to widen

The strong prosecution record of the US in respect of corruption continued last year, with the Foreign Corrupt Practices Act (FCPA) remaining a key focus for US prosecutors. The number of FCPA enforcement actions rose to 27 in 2013 and high profile prosecutions against corporates and executives continued to bit the headlines. FCPA enforcement actions against household names such as Ralph Lauren Corporation and Diebold brought in fines of more than US$1.1billion.

The largest US prosecutions of the last year were against a French multi-national oil giant and a global lightweight metal engineering company, which were ordered to pay the US Department of Justice (DOJ) and Securities and Exchange Commission (SEC) fines totalling US$398 million and US$384 million, respectively, in order to resolve charges relating to overseas bribery. The cases are significant not only because the fines represent the fourth and fifth largest FCPA penalties ever levied, but because they marked the first coordinated action by US law enforcement agencies with their French and Australian counterparts, respectively, in respect of major foreign bribery cases.

Of course collaboration with overseas prosecutors is nothing new for the US, which bas worked with the SFO to investigate a number of high profile UK bribery cases. Meanwhile, the increasingly global reach of US prosecutors bas already been well demonstrated through coordinated investigations with China, Costa Rica, Germany, Greece, Hungary, India, Israel, Italy, Korea, Liechtenstein, Nigeria, Norway, Poland, Russia and Switzerland. The message to multinational companies operating in the US is very clear bribery will not be tolerated and prosecution in another jurisdiction is no bar to duplicative proceedings in the US.

In addition to corporate prosecutions, two 2013 judicial decisions of the Southern District of New York have sought to further extend the personal jurisdiction of the FCPA. In SEC v Elk Straub, the judge held that even a remote connection to the US was sufficient to bring the defendant within prosecutiorial jurisdiction. Straub was an executive of a Hungarian telecoms company, involved in a bribery scheme wholly outside the US. The court found that the submission of signed management letters to its US auditors, confirming that executives of the company were unaware of any violations of US law, was sufficient to bring Straub (and his fellow executives) within jurisdiction.

Less than a fortnight later the case of SEC v Sharef et al saw similar charges against Herbert Steffen dismissed on the basis of no jurisdiction. Steffen was an executive of a German company, who, with six others, was part of a scheme that involved bribery of Argentinian officials. The only link to the US was the submission of signed Sarbanes-Oxlcy letters, which falsely represented the company' s financial statements. Steffen appealed jurisdiction on the basis that he had not signed the statements. The appeal succeeded. The two decisions are ostensibly contradictory and the lack of certainty will offer no comfort to foreign nationals facing personal enforcement action under the FCPA. Indeed, the lack of guidance could well be intended as a deterrent, demonstrating the long-arm reach of the FCPA, even for foreign nationals with no ties whatsoever to the US.

A busy year in China

The culture of offering lavish gifts and hospitality within the ordinary course of business is commonplace in China, leading many to categorise it as a high risk jurisdiction. Yet bribery is no longer an accepted part of doing business in this part of the world. Enforcement action is now a very real prospect in China with anti-corruption identified as one of the new Chinese administration's priority initiatives. In addition to a number of judicial interpretations and administrative regulations, which have helped to clarify Chinese anti-bribery laws, there has been a highly visible attack on corruption highlighted by high profile prosecutions of senior government officials and corporates.

For example, the Supreme People's Court and the Supreme People's Procuratorate issued an interpretation of the Application of Law for Handling Criminal Bribery Cases, concerning self-reporting. Although not obligatory in China, the recent interpretation suggests that self-reporting should result in prosecutonal leniency. The move mirrors that seen in the UK where the existence of a self-report is one of the factors to be considered in assessing whether a DPA would be more appropriate than a formal prosecution. However, it is important to note that the exact degree of leniency offered in China remains unquantified in the absence of any publicly reported self-reporting cases.

High profile prosecutions also feature heavily, with the most influential prosecution of the last year being Bo Xilai. Having been found guilty of bribery, corruption and abuse of power, he was stripped of all of his public duties, sentenced in September 2013 to life imprisonment and ordered to forfeit all his personal property. At the same time, the administration has focussed on high profile commercial bribery prosecutions. In July 2013, a bribery investigation into one of the largest global pharmaceutical companies led to dozens of its senior employees being raided and arrested in relation to alleged bribes paid to Chinese travel agencies dating back as far as 2007. The case is still pending but it is widely expected that the company in question will receive criminal fines of up to RMB20 billion (US$32 billion) with personal criminal sanctions levied against senior officials, including the company's in-house counsel and general manager of the Chinese subsidiary involved.

From Russia with love

Rated I 27th out of 175 countries in Transparency International' s Corruption Perceptions Index 2013, Russia has typically been seen as a high risk jurisdiction. However, perhaps in response to the global influx of businesses looking to invest there, Russia has taken several major steps forward in upholding international anti-bribery standards. It became the 39th signatory to the OECD anti-bribery convention in early 2012 and tightened up anti-bribery laws in 2013.

For example, a recent amendment to the Federal Law On Countering Corruption has established an obligation on companies to develop and apply active measures to prevent corruption. Similar in nature to the UK Ministry of Justice guidance on "adequate procedures" under the Bribery Act, Russian companies must now designate an anti-corruption officer and implement effective anti-bribery procedures and a code of ethics. The big difference between the UK and Russia is that whilst adoption of "adequate procedures" for the prevention of bribery in the UK affords a complete defence to a section 7 prosecution, in Russia there is no automatic release of liability or provision for leniency on the basis that a company has complied with the prescribed anti-corruption measures.

The Russian Supreme Court has also recently issued formal guidance on court practices in relation to bribery and corruption cases. This guidance has helped to clarify certain areas of Russian anti-bribery law, confirming, amongst other things, that liability for bribery attaches even if the bribe is not paid in return for a specific action or omission. This includes, for example, a "thank you" bribe, paid after the event and not promised in advance. The Court also clarified that for bribery of state officials, there must be a personal advantage or enrichment to the official or his relatives for criminal liability to attach. A bribe paid knowingly to a state-owned institution, for example, would not attract criminal liability in Russia, provided that neither a public official nor his family were personally enriched. This appears to be a troublesome distinction to make in practice.

A lack of publicly reported foreign bribery cases makes it difficult to assess the force with which the newly clarified Russian laws are being put into effect. We suspect it is only a matter of time before Russia makes a big international splash with a high profile anti-corruption prosecution to reinforce its commitment to overturning its historical reputation as a highly corrupt jurisdiction.

How does the UK measure up?

Whilst the lack of any corporate prosecution leaves it lagging behind some other countries in respect of the message it sends to domestic and international businesses, the UK still has some of the strictest anti-bribery laws in the world and a good story to tell in terms of what is happening behind the scenes.

With more cases likely to be brought to the attention of the SFO through self-reporting, more SFO investigations underway and additional tools available to make prosecution easier, perhaps we can expect to see an exponential rise in the number of corporate economic crimes being prosecuted in the UK over the coming year. The real UK message is .. watch this space", not .. we've lost our appetite".

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