

Recent developments in EU suggest increased 'FCPA-style' enforcement of foreign bribery laws

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Enforcement of the US Foreign Corrupt Practices Act has increased dramatically in recent years. The FCPA prohibits the bribery of foreign public officials, and has a very broad international scope. The Department of Justice and the Securities and Exchange Commission have brought record numbers of cases, resulting in substantial fines, penalties and prison sentences. As a result, FCPA compliance is now one of the largest risks facing international companies and their employees. In contrast, European anti-corruption enforcement has been mixed, and many non-US companies have not considered anti-corruption to be a core part of their legal and regulatory compliance obligations. Recent developments, however, have suggested that the EU-US enforcement gap may now be closing. Enforcement authorities in two of the "big three" EU member states - the UK and Germany - have recently concluded substantial cases, and major legal reforms are expected in the near future which are likely to help facilitate enforcement.

Aggressive FCPA enforcement is the new norm

The FCPA prohibits corrupt payments to "foreign" (i.e., non-US) government officials to obtain or retain "business". It applies to three types of persons: (1) issuers of publicly traded securities in the United States ("issuers"); (2) US corporate entities and US citizens; and (3) any person, including non-US citizens and corporations, that takes any act to further a prohibited payment on US soil. The FCPA also contains accounting and internal controls requirements that provide separate bases for liability. These provisions are interpreted extremely broadly. Payments to secure "business" do not just relate to contract procurement; even small payments to expedite routine tasks, such as customs and visa clearances, can violate the statute. "Foreign officials" are not only high-level ministers; even low-level state employees such as customs and immigration officials are included. The Department of Justice and the SEC are similarly aggressive with respect to their jurisdiction, asserting that even slightest contact with US soil activates the statute. Consequently, many non-US companies who engage in business or otherwise have financial links to the United States have been the subject of FCPA enforcement actions, increasingly so in recent years.

In total, over 130 FCPA cases are reportedly under investigation at the Department of Justice and/or the SEC, targeting a diverse range of industries. Huge fines and penalties have been imposed against US and non-US companies, including a record \$800m fine levied against Siemens AG and certain subsidiaries in late 2008 (German prosecutors have imposed fines of roughly the same magnitude in the case, totaling approximately \$1.7bn). An increasing number of individuals are being prosecuted, including non-US citizens who work for non-US companies. For these reasons, companies that are subject to the FCPA generally have made anti-bribery one of their central compliance functions.

European enforcement efforts

In contrast to the FCPA, European enforcement has been sporadic. A decade ago, bribes to foreign government officials were not prohibited in many EU jurisdictions, and in some cases were tax-deductible. The relevant UK legislation was archaic, dating back to the late 19th and

early 20th centuries, and had not been applied to a single overseas corruption case. Recent developments have suggested, however, that the US-EU enforcement gap may be closing. In Germany, Siemens has agreed to pay an amount approaching \$1bn in fines to German authorities to settle various proceedings. Truckmaker MAN Group also recently agreed to pay a €150.6m fine to settle allegations that it had made over €51.6m in suspicious payments to foreign officials to secure contracts. Numerous other bribery-related investigations are pending. A similar shift appears to be occurring in the UK. Whereas two years ago the UK was routinely criticised for having brought no prosecutions despite ongoing high-profile investigations, the Serious Fraud Office has declared enforcement a new priority, and has expanded its resources and activities in the area. Dozens of investigations are now reportedly underway.

At the time of writing, four enforcement actions against UK companies for foreign bribery offences have been concluded. In July 2009, for instance, Mabey & Johnson Ltd entered a criminal guilty plea, and agreed to pay £6.6m in fines and other costs, implement a corporate compliance programme and engage an external compliance monitor in connection with corrupt payments in Ghana and Jamaica. In addition to being the first SFO corporate prosecution for overseas corruption, the case represented one of the first plea agreements under the Attorney General's "Guidelines on Plea Discussions in Cases of Serious or Complex Fraud". That process will be familiar to FCPA practitioners, as most FCPA enforcement actions are the product of settlements.

The July 2009 the public release of the SFO's "Approach of the Serious Fraud Office to Dealing With Overseas Corruption" also signaled the SFO's intent to increase enforcement and borrow heavily from the Department of Justice's and the SEC's FCPA practice: encouraging corporate self-reporting in return for potential civil disposition, relying on outside counsel to conduct internal investigations, adopting compliance and remediation measures common in FCPA settlements, and other parallels. One relevant example is Balfour Beatty plc's 2008 settlement, in which it paid £2.25m to settle charges of accounting irregularities associated with business activities in Egypt. Like many FCPA cases and the Mabey & Johnson settlement, Balfour Beatty plc agreed to engage an independent monitor and implement significant compliance reforms. Another is Aon Ltd, which the FSA fined £5.25m in January 2009 for its failure to implement effective anti-bribery controls, in connection with suspicious payments in Eastern Europe.

Continued convergence?

2010 may see the enforcement gap continue to narrow. According to its July 2009 release, the SFO intends to work closely with the Department of Justice, which may result in more UK cases. The December 1, 2009 announcement that Robert John Dougall, a former vice president of DuPuy International, had been formally charged by the SFO with overseas corruption offences resulting from a referral from the Department of Justice is an early indication of this approach.

The most important pending UK development is the draft Bribery Bill, which is expected to be enacted during the current Parliament. The bill would replace the existing patchwork of antiquated (and in many respects confusing) legislation by comprehensively re-defining both domestic and foreign bribery offences. The bill also creates a new corporate criminal liability - directly applicable to companies - for failure to prevent bribery by a company's employees or agents. The new offence includes an affirmative defence for the corporate crime if the company had "adequate procedures" to prevent bribery, which would not apply if senior company personnel were involved in the alleged misconduct. In contrast to the FCPA, the bill would continue to prohibit so-called "facilitating payments" (payments of relatively small amounts to

obtain the performance by government officials of routine, non-discretionary actions). The English legal professional privilege law would remain untouched, potentially posing difficulties in joint Department of Justice-SFO investigations, as the SFO has indicated it will require waiver for companies to receive full "cooperation credit" in settlement (a controversial practice the department abandoned a few years ago).

Increased cooperation

Recent developments suggest that European anti-corruption enforcement is on the rise. Increased UK resources are being devoted to the issue, and German authorities appear poised to continue their efforts. To what extent the major European trading nations will make further attempts at reform remains to be seen, but the prospect of increased cooperation between US, UK and German authorities suggests a further convergence of enforcement efforts in the years to come.

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