Linklaters

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Financial Crime Update.

The publication this month of Transparency International's Corruption Perceptions Index ("CPI") for 2012 is a reminder that, despite apparently far-reaching legislation enacted across the globe, corruption remains a pernicious and damaging force in many jurisdictions. Notwithstanding the clamour that greeted the UK's new Bribery Act, it is notable that the UK remains outside the top 10 least corrupt countries in the CPI, due in part to repeated corruption scandals amongst the political elite. These sentiments are echoed amongst the business community where there is concern that governments, of both developed and developing economies, are not doing enough to combat bribery issues generally, and in particular facilitation payments, in emerging markets.

In this edition we consider recent investigations and decisions and include a special focus on the guidance recently issued on the Foreign Corrupt Practices Act in the US.

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Global news

Transparency International's CPI 2012 - uncomfortable reading for some

Transparency International's (TI) Corruption Perceptions Index (CPI) for 2012 was published on 5 December 2012. The index ranks 176 countries and territories around the world based on how corrupt their public sector is perceived to be, on a scale from 0 (perceived to be highly corrupt) to 100 (perceived to be very clean). Denmark, Finland and New Zealand remain top of the index as the least corrupt countries in the CPI, scoring 90 each. TI attributes this to their strong access to information systems and rules governing the conduct of those in public positions. Afghanistan, North Korea and Somalia, where there is a lack of accountable or effective government, languish at the bottom with a score of only 8. In fact, two thirds of states in the index score below 50. TI considers that transparency and accountability are key to reducing corruption and has repeatedly stressed the need for governments to integrate anti-corruption measures into all aspects of their administration and decision-making processes.

The UK has failed to improve upon its position in the 2011 CPI, scoring 74 and falling one place to 17th, joint with Japan. TI cites "repeated political corruption scandals" as being responsible for the UK's continuing failure to achieve a top ten ranking. While acknowledging the government's efforts to improve transparency and noting the passing of the Bribery Act 2010, TI considers there to be a "worrying complacency at the heart of UK politics" and warns that the UK will not be able to rise higher in the CPI rankings until it addresses these issues.

The majority of EU states come in the top 50. However, Greece has fallen from 80th position in last year's CPI to 94th this year, with a score of 36. Only Kosovo and Albania, both EU hopefuls, come lower. TI notes that it has consistently warned that European states need to take a tougher line to combat corruption in the public sector as part of tackling the current financial crisis.

World Bank - Global enforcer?

The World Bank is investigating alleged corruption in over 100 companies, including several British multinationals, according to a report in the UK Times on 17 December 2012. Stephen Zimmerman, a top anti-corruption official with the World Bank, was reportedly meeting with David Green, QC, director of the UK's Serious Fraud Office ("SFO"), to discuss ways to increase co-operation between domestic law enforcement agencies and international organisations. It is particularly the case in some developing jurisdictions, where the domestic way of life includes bribery and favours, that an anti-corruption culture is not supported or practised by local authorities to the extent needed effectively to tackle the issue.

The World Bank's increased focus on driving out corruption in international contracts was noted in November's Financial Crime Update. It is well-placed to promote the prevention and deterring of corruption, having both political clout and a global presence. Ultimately it can, and will, withdraw funding from projects if local governments fail to tackle corruption. Earlier this year it suspended its £1.2 billion funding of the Padma Multipurpose Bridge in Bangladesh following findings of high-level corruption amongst government officials, executives and private individuals connected to the project and the failure of the Bangladeshi government effectively to tackle the issue. Such is the importance of the bridge to the economy and people in Bangladesh, the local government has now agreed to implement anti-corruption measures proposed by the World Bank, in return for the anticipated resumption of funding.

Policy and practice

Australia: Increase in penalties for money laundering offences

The Australian Government has announced a significant increase in the maximum penalties for a range of offences under the Commonwealth Criminal Code, including the money laundering offences.

From 29 December 2012, corporations will be subject to the following maximum penalties in Australia:

- for dealings with proceeds of crime worth $1m or more which the corporation believes to be the proceeds of crime: $1.275m fine (up from $825,000);
- where the corporation is reckless as to whether the property or money is proceeds of crime: $612,000 (up from $396,000);
- where the corporations is negligent as to whether property or money is proceeds of crime: $255,000 (up from $165,000);
- for dealings with property or money worth $100,000 or more which is reasonably suspected to be the proceeds of crime: $153,000 (up from $99,000).

The increases also apply to the maximum penalties applicable to individuals convicted of an offence and to the money laundering offences for money or property worth less than $1m.

The penalty increases are said to form "part of the government's commitment to cracking down on serious and organised crime". The move reflects a broader trend in Australia of increased focus on enforcement actions relating to foreign bribery offences. It also follows a significant increase in the maximum available penalties for the Commonwealth bribery offence in 2010, when the pecuniary penalties for the offence of bribing a foreign or Commonwealth public official were increased dramatically to the following:

- for individuals, a maximum fine of $1 million (increased from $66,000);
- for corporations, the maximum penalty was increased from $330,000 to the greatest of:
- $11 million (now $17m, following the recent penalty unit increase outlined above);
- three times the value of any benefit obtained that is reasonably attributable to the offence; and
- if the court cannot determine the value of that benefit, 10% of the annual turnover of the corporation during the 12 months prior to the offence.

Hong Kong: China to step up efforts to tackle corruption

In his first speech as General Secretary of the Communist Party in November, Xi Jinping, who is expected to assume China’s presidency next year, specifically highlighted corruption as crucial challenge facing the party. The Chinese authorities have since announced a number of measures which target official corruption. These include new guidelines intended to reduce bureaucratic extravagances, for example, by controlling the scale of meetings

and delegations and banning banquets and ribbon cutting ceremonies without prior approval. According to media reports, Guangdong Province will also implement a pilot programme in three counties requiring officials and their families to disclose details of their assets. Such information will be made publicly available and subject to scrutiny. This system is expected to be extended to the whole of Guangdong Province in 2014. While these developments are indicative of a new policy drive to tackle official corruption, it remains to be seen whether the Chinese government will take more wide ranging legislative action to address this issue. The measures are nevertheless timely. In Transparency International's recently released Corruptions Perception Index 2012, China fell from 75th to 80th among those countries perceived to have the least public sector corruption.

UK: SFO open letter confirms approach to facilitation payments

On 6 December 2012 the Serious Fraud Office ("SFO") published an open letter on its website regarding its approach to facilitation payments. In it, director David Green QC confirms the "absolute prohibition" on facilitation payments, "regardless of their size or frequency". He notes that the SFO is working with the Foreign and Commonwealth Office ("FCO") and other UK government departments to spread the word that individuals and companies using facilitation payments in the course of their business risk criminal prosecution in the UK under the Bribery Act 2010. Where a UK person or business is asked to make a facilitation payment in the course of business overseas, they are encouraged to contact their local embassy, high commission or consulate who will inform the FCO. The FCO should then pass the information on to the SFO, who will decide how to proceed.

The need for increased action by government to assist UK businesses to resist requests for facilitation payments has been highlighted recently by organisations representing the commercial sector. Businesses consider that they are being left to interpret the Bribery Act by themselves and are critical of the government's efforts to take action to reduce corruption, particularly in high risk jurisdictions. They have requested that UK government be more robust with the governments of high risk countries and use the full range of its diplomatic resources (influence, education, loans and foreign aid) to promote the importance of anti-corruption initiatives. David Green's letter suggests that the SFO, at least, is encouraging UK state representatives overseas to take more action in this regard.

US: SEC whistleblower report reflects increase in informant activity

On November 15, 2012, the U.S. Securities and Exchange Commission ("**SEC**") released its second Annual Report on the Dodd-Frank Whistleblower Program. The report details SEC activity as to whistleblower tips, tip processing and whistleblower incentive awards made during the 2012 fiscal year. Because the 2011 report only included seven weeks of activity, the

2012 report serves as the SEC's first ever year-long examination of the recent program.

The 2012 report reflects an overall increase in domestic and cross-border whistleblower activity. In total, the SEC received 3,001 whistleblower tips that were eligible for award under the program. For each SEC enforcement action that results in monetary sanctions exceeding $1 million, a notice of covered action is posted. While the SEC posted 143 notices of covered action during the 2012 fiscal year, the SEC does not make any determination that a whistleblower tip led to an investigation or that a tipster will receive an award. It is the whistleblower's responsibility to apply for an award within 90 calendar days of the posting. During the fiscal year of 2012, the SEC made its first award under the program, with the whistleblower receiving 30 percent of the amount collected in the enforcement action. The majority of these tips identified alleged violations of U.S. securities laws in one of the following three categories: (1) corporate disclosures and financials; (2) offering fraud; and (3) market manipulation.

More than 10 per cent of program-eligible tips received by the SEC over the past fiscal year originated from outside the United States – coming from 49 different source countries. In 2012, the number one foreign source of tips came from the United Kingdom, followed by Canada and India. With the rise in cross-border whistleblower complaints, multinational corporations are pressed to establish or tailor internal policies and procedures that are sufficiently comprehensive and flexible to accommodate the complexities that arise in managing cross-border whistleblower complaints.

The full text of the report can be found here.

Investigations and decisions

France: Investigation of Havas directors held to be "unfair"

On 15 November 2012, the Nanterre Criminal Court of First Instance dismissed the trial of three former directors of *Havas*, Alain de Pouzilhac, Jacques Herail and Thierry Meyer, for misuse of corporate assets, on the grounds that the investigations had violated the parties' rights to a fair trial.

In 2007, Bolloré, the new head of the Havas group (one of the largest global advertising groups) filed three complaints on behalf of Havas. He claimed that Ponzilhac, Herail and Meyer had misused tens of millions of Euros of the company's assets and provided over 600 exhibits to support these claims.

In view of the complexity of the case, the Public Prosecutor could have simply carried out a short preliminary investigation. If prosecutions were justified, he could have transferred the case to the investigating judge, who would then have undertaken a neutral and objective investigation, the parties would have appointed legal counsel and been given access to the investigation file. However, the Public Prosecutor decided to keep control of the investigation, which lasted over three years, himself. The Court found that this resulted in:

- two of the accused being questioned by police officers without the assistance of a lawyer, contrary to the Law of 14 April 2011 regarding custody. The third, Pouzilhac, was only heard as a witness, although nothing justified the parties' differing treatment;
- no access to the file being granted to the parties' lawyers, although the Court noted that, "*for reasons unexplained to this day*", Pouzilhac was given access to one of the investigation reports, "*without the exhibits, though essential*";
- witnesses not being called, despite being cited by all the accused.

Parties to a preliminary investigation do not have the same rights as when the enquiry is led by the investigating judge (in particular, they have no access to the court file). However, the Court held that this was only justified because the parties in the two procedures were in different situations, thus inferring that in the present case, the parties to the Public Prosecutor's investigations were *de facto* in the same situation as if an investigating judge had been appointed. As a consequence, the Court held that there had been a violation of the parties' right to a fair trial and the principle of equality of arms, as well as the right to the assistance of legal counsel, pursuant to both the French Penal Code and Article 6 of the ECHR. The Court further held that these failures could not be resolved at the judicial stage, as it would entail an onerous and expensive counter-investigation by the parties, contrary to the fundamental principle of French criminal law that it is for the Prosecutor to prove guilt and not for the suspects to prove their innocence.

Following the Court's decision, it seems Pouzilhac has indicated that he will sue Bolloré for false accusations (*dénonciation calomnieuse*).

UK: SFO gets busy

Details have emerged this month of several investigations currently being conducted by the Serious Fraud Office ("SFO").

Rolls Royce intermediaries accused of bribery

Following media reports, on 6 December 2012 Rolls Royce confirmed that it had forwarded evidence of possible bribery and corruption by intermediaries in Indonesia and China, and other unnamed jurisdictions, to the SFO for further investigation. Allegations of wrongdoing, including an alleged payment of £12.5 million to the son of former Indonesian president Suharto, were raised by a former employee of Rolls Royce. The allegations relate to contracts for the supply of aircraft engines to Garuda, the Indonesian state airline, entered into in the early 1990s.

To emphasise how seriously it is treating the matter, Rolls Royce is to appoint an "independent senior figure" to review its compliance regime and report to the ethics committee.

The SFO has yet to confirm whether it has launched a formal investigation. However, the US Department of Justice has also been made aware of the allegations.

Weavering Capital – criminal charges brought against former director

On 14 December 2012 the SFO formally charged Swedish financier, Magnus Peterson, with fraud, forgery and false accounting relating to the collapse in 2009 of Weavering Capital, a London–based hedge fund. An initial investigation by the SFO into Weavering's collapse (in which investors lost more than $530 million) was dropped by former SFO director Richard Alderman on the ground that there was no reasonable prospect of conviction. The matter was re-opened by David Green QC on becoming director in April this year, as part of his review of SFO cases.

Earlier this year Mr Peterson lost a High Court case brought by the liquidators of Weavering, in which the judge, Mrs Justice Proudman, found that certain share swaps carried out by the fund's management "were indeed shams". Damages of $450 million were awarded against Mr Peterson and other former Weavering directors. Mr Peterson will appear at Westminster Magistrates Court on 7 January 2013.

Four charged in Nigerian corruption case

Three men and a woman, all British nationals, have been charged (on 17 December 2012) with conspiracy to corrupt, following a two-year investigation into the tax affairs of Swift Technical Energy Solutions Ltd, a Nigerian subsidiary of the Swift Group of companies which provides workers for the oil and gas industries.

It is alleged that employees or agents of Swift paid bribes to Nigerian tax officials in 2008-2009 to avoid, reduce or delay paying tax on behalf of workers placed by Swift. The charges result from an investigation by the SFO working with the City of London Police. The defendants will appear in court again on 22 February 2013. The Swift Group itself is not facing criminal charges and is assisting the SFO in the investigation.

First arrests in Libor investigation

On 11 December 2012 the SFO announced that it had arrested three men in connection with the investigation into the manipulation of Libor and carried out searches of their homes. The three have since been named as a former trader with Citibank and UBS and two employees of RP Martin, an interdealer broker. These are the first arrests by the SFO since it confirmed it would be investigating whether criminal charges should be brought against individuals as a result of the fixing of Libor rates, although all three have been released on bail but without charge, pending further investigation.

Up to 20 international banks are thought to be under investigation both in the UK and the US, with settlement deals concluded recently by several banks, including Barclays and UBS.

US: Major US sanctions and money laundering settlements

Last week, US government officials announced two major settlements with European financial institutions of allegations of sanctions and money laundering violations. On December 10, as part of a combined $327 million settlement with various federal and local government regulators, the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") announced a $132 million agreement with Standard Chartered Bank ("SCB") to settle its potential liability for alleged violations of U.S. sanctions by its London and Dubai offices in connection with transactions involving Sudan, Iran, Burma, and Libya.

The allegations relate to the "stripping" of critical information from payment messages that were routed through US banks during the time period of 2001 to 2007. As a result of these "stripping" practices, the government officials allege, millions of dollars were routed through U.S. banks for or on behalf of sanctioned parties. The settlement agreement requires SCB to establish and maintain policies and procedures to minimize the risk of recurrence of such violations.

The following day, on December 11, the U.S. Department of the Treasury announced settlements with HSBC Holdings plc (with its affiliates, "HSBC") amounting to $875 million – the largest collective settlement in the department's history. The collective settlement was reached by the Financial Crimes Enforcement Network ("FinCEN"), the Office of the Comptroller of the Currency ("OCC"), and the Office of Foreign Assets Control ("OFAC"). Penalties assessed by FinCEN and OCC will be satisfied by a single payment of $500 million to the Treasury Department, while OFAC requires an additional $375 million payment to the Department of Justice. In total, more than $1.9 billion in penalties were assessed against HSBC.

The HSBC settlement relates to allegations of violations of US anti-money laundering regulations dating back to 2002, primarily in Mexico. In addition, HSBC settled apparent violations of U.S. sanctions in connection with dealings involving Iran, Burma, Sudan, Cuba, and Libya. According to the allegations, both HSBC's London head office and Dubai branch altered payment messages so that U.S.-sanctioned entities and locations were not evident, resulting in approximately $430 million being routed through U.S. banks for or on behalf of U.S.-sanctioned parties. The settlement agreement requires HSBC to establish and maintain procedures to minimize the risk of recurrence of such violations. The full text of HSBC's settlement agreement with OFAC can be found here.

In addition, the UK FSA, working closely with the US authorities, has made a number of requirements of HSBC to prevent similar failings occurring in the future. Details of the FSA's requirements are given in the agency's press release.

Legislation

US: Selected highlights from the recent DOJ/SEC FCPA Guidance

As highlighted in the November edition of the Financial Crime Update, on November 14, 2012, the Criminal Division of the US Department of Justice (**"**DOJ**"**) released A Resource Guide to the U.S. Foreign Corrupt Practices Act (the "Guide"), which provides detailed explanations of the provisions of the Foreign Corrupt Practices Act ("FCPA") and examines the approach of the DOJ and US Securities and Exchange Commission ("SEC") to FCPA enforcement. Linklaters has previously issued an analysis of the Guide. Here, we feature three topics on which the Guide has shed significant light: (1) the DOJ opinion procedure; (2) successor liability in the M&A context; and (3) effective FCPA compliance programs.

The DOJ opinion procedure

With respect to the DOJ opinion procedure, the Guide explains that parties seeking to obtain an opinion should take the following steps: First, parties must be certain that their question relates to actual, prospective conduct. While an executed contract is not a prerequisite, the opinion procedure is not designed for hypothetical questions or purely historical conduct. Second, the requestors should check that they qualify as either an issuer or domestic concern. Third, the request must be in writing and result in a full and true disclosure. Materials disclosed to the DOJ, however, will not be made public without the consent of the requestor. Fourth, the request must be signed, with the signatory certifying that the disclosure is true and complete. Lastly, the Guide states that the DOJ will evaluate the request and issue an opinion within 30 days.

The Guide notes that opinions are publicly available and can be accessed on the DOJ's website, which organizes FCPA opinions by subject. Since 1993, there have been 36 such releases. Based on the enforcement policy of the DOJ, the opinions evaluate and state whether the prospective conduct violates either the issuer or domestic concern anti-bribery provisions of the FCPA. If the opinion concludes that the proposed conduct would not violate the FCPA, a rebuttable presumption is created that the requestor's conduct detailed in the request is in compliance with the FCPA. For the business community, the opinions provide valuable, non-binding guidance.

Successor liability in the M&A context

With respect to the issue of successor liability in the M&A context, the Guide makes clear that when a company merges with or acquires another company, the successor company generally assumes the predecessor's liabilities, including any violations of the FCPA. The Guide emphasizes the need for companies that are acquiring or merging with another company to conduct extensive pre-acquisition/merger due diligence and post-acquisition/merger improvement of compliance programs and internal controls.

While it is clear that the government is committed to enforcement of the FCPA, the Guide provides that in certain circumstances, the DOJ and SEC

have declined to take action against successor companies where such companies have voluntarily disclosed FCPA violations and have subsequently remedied such conduct and agreed to cooperate with the government.

The Guide provides two practical tips to reduce risk in the mergers and acquisitions context. First, a company may seek an opinion from the DOJ in anticipation of a potential acquisition; second, a company should conduct risk-based FCPA and anti-corruption due diligence as noted above. The Guide makes a number of recommendations as to specific steps companies should undertake in their diligence process in the mergers and acquisition context, including: conducting thorough risk-based FCPA and anti-corruption due diligence on potential new business acquisitions; ensuring that the acquiring company's code of conduct and compliance policies regarding the FCPA and other anti-corruption laws apply as quickly as is practicable to newly acquired businesses or merged entities; training directors, officers, and employees of newly acquired businesses and merged entities, and when appropriate, training agents and business partners on the FCPA; conducting an FCPA-specific audit of all newly acquired or merged businesses as quickly as practicable; and disclosing any corrupt payments discovered as part of due diligence of newly acquired entities or merged entities.

An effective FCPA compliance program

With respect to an effective FCPA compliance program, although the Guide recognizes that there is no one-size-fits-all program, it details what the DOJ and SEC consider "hallmarks" of effective compliance programs. Establishing an effective compliance program is particularly important as both the DOJ and SEC consider the adequacy of a company's program in deciding (1) whether to take enforcement action against a corporation for potential FCPA violations and (2) the nature of any potential resolution should an enforcement action be commenced. The enumerated hallmarks do not provide new advice especially for large, multinational corporations, but rather serve as a reminder of "best practices."

The Guide emphasizes that in evaluating a company's compliance program, the government will ask three questions: (1) whether the company's compliance program is well-designed; (2) whether it is being applied in good faith; and (3) whether it works. The Guide adds that an effective compliance program includes a commitment from senior management that results in a "culture of compliance"; clear anti-corruption policies, codes of conduct and procedures; officers with sufficient compliance authority, autonomy, and oversight; risk assessments based on the industry and markets within which the company operates; continuing training and advice; incentives and disciplinary measures; due diligence of third parties; confidential reporting and internal investigation; and periodic testing and review of the effectiveness of the compliance program.

Although it does not announce new FCPA priorities or positions, the Guide does provide clarification about certain provisions of the FCPA, and provides useful insight into approaches to enforcement by the US government.

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