Linklaters

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Financial Crime Update.

Jurisdictions across the globe are increasingly recognising the need to adopt a consistent approach to corruption issues. This month's issue of Financial Crime Update is dominated by new legislative initiatives which nonetheless look familiar. The new law under debate in Australia mirrors the step taken recently by the European Union to increase corporate transparency. In France and Luxembourg new measures are being adopted to close potential loopholes in information security. The fight against corruption in Asia continues with the proposal of new measures against the bribery of foreign public officials. Meanwhile, in the UK, the Serious Fraud Office ("SFO") continues its drive towards enforcement with several new high profile investigations being announced. However, all this progress must be set against the background of the latest Transparency International report that over half of the signatories to the OECD anti-corruption convention are taking no meaningful enforcement action at all.

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Global News

Only four countries actively enforcing OECD anti-bribery convention, TI report finds

Transparency International has published its annual report assessing the progress made by the 41 signatories to the OECD Convention on Combating Foreign Bribery in enforcing the convention. The report, "Exporting Corruption", has found that 22 signatories, including Japan, the Netherlands, South Korea, Russia, Spain, Belgium, Mexico, Brazil, Ireland, Poland, Turkey, Denmark, Czech Republic, Luxembourg, Chile and Israel have done little or nothing to enforce the convention. In fact, only four OECD countries - the UK, the US, Germany and Switzerland - were found to be enforcing the convention in an active way, that is, initiating investigations into both substantial and less serious instances of foreign bribery, leading to prosecutions and court convictions. While moderate enforcement is demonstrated by Italy, Canada, Australia, Austria and Finland, others, including France, Sweden, South Africa and New Zealand, were only

enforcing the convention in a "limited" way, deemed insufficient to act as a deterrent.

"*As a result, the convention's fundamental goal of creating a corruption-free level playing field for global trade is still far from being achieved*," the report said.

The full report is available here.

Investigations and decisions

UK: SFO opens investigation into accounting practices at Tesco plc

The SFO confirmed in a press release issued on 23 October 2014 that it had commenced a criminal investigation into accounting practices at Tesco plc. The investigation stems from allegations by a whistleblower that its half year profits had been overstated by £263 million. Eight senior managers have been suspended and the chairman, Sir Richard Broadbent, has resigned. It is possible that the supermarket's profits have been overstated for some years.

An investigation begun by the Financial Conduct Authority has been halted following the SFO's decision. However, it is likely that the investigation will take many months, if not years, to complete, with a vast amount of accounting and other electronic information to be reviewed.

Tesco said it that had been "co-operating fully" with the SFO and would continue to do so.

UK: First SFO trial under the Bribery Act begins

The trial of four defendants, the first involving charges brought by the SFO under the Bribery Act 2010, began at Southwark Crown Court on 8 October 2014. The allegations concern the use of a biofuel investment company, Sustainable AgroEnergy which, it is alleged, operated as Ponzi scheme. The SFO alleges that the defendants took money out of the company to fund a lavish lifestyle, using new investors' money to pay existing investors' returns.

The previous prosecutions under the Bribery Act have all been brought by the Director of Public Prosecutions and concerned minor offences under the Bribery Act relating to driving penalties, licensing offences and the attempted bribery of a university tutor.

The background to the case is set out in the SFO's press release, here.

UK: 13th person charged in connection with Libor rigging allegations

A further individual has been charged by the SFO in connection with the Libor rigging scandal, bringing the total charged in the UK so far to 13. A former employee at the brokers Tullett Prebon, Noel Cryan, is alleged to have conspired to defraud in 2009. He is the first employee from the broking house

to be charged over the scandal and will appear before Westminster magistrates' court on 11 November 2014 to face the charge formally. It is possible that his case may be joined to those of five other former brokers, scheduled for trial in September 2015.

This follows the guilty plea by an as yet unnamed former senior banker to a charge of conspiracy to defraud in the Libor matter, reported in the September 2014 edition of Financial Crime Update.

The SFO has published a press release setting out details of the latest charge.

UK: Weavering trial commences

The trial of Magnus Peterson, the founder of Weavering Capital UK, a Mayfair-based hedge fund, began at Southwark crown court on 13 October 2014. Peterson is accused by the SFO of 16 fraud-related charges after Weavering Capital collapsed in 2009, losing £380 million of investors' money. The SFO alleges that Peterson ran the fund dishonestly, hiding its losses from would-be investors and using money inputted by them to pay existing investors. He is also accused of forging documents to give clients a false impression of the fund's performance and of falsely claiming the fund operated a low-risk trading strategy.

Counsel for the SFO alleged that Peterson had artificially boosted the apparent success of Weavering Capital's flagship fund, the Cayman Island-registered Macro Fixed Income, by the use of fraudulent documents and false financial instruments. Peterson is alleged to have paid himself performance fees of over £7 million.

The losses at Weavering Capital were first investigated by the SFO under director Richard Alderman but the case was dropped in 2011. David Green, his successor, reopened the investigation in July 2012.

Peterson has pleaded not guilty on all counts. The trial is expected to last for 12 weeks.

Policy and practice

UK: SFO requests 75% increase in funding while defending current funding model

It has been reported that the SFO has requested an increase in its funding of 75%, or £26.5m, on top of its annual budget of £32.2m to fund specific "blockbuster" investigations such as Libor, Barclays/Qatar and Rolls-Royce and pay for the £4.5m settlement to the Tchenquiz brothers agreed earlier this year. Last year, the SFO requested an additional £24m on top of its annual budget. The SFO's funding has been sharply reduced in recent years. The continued requests by the agency for increased funding have led to criticism that the cuts were too severe.

Speaking at Pinsent Masons' Regulatory Conference on 23 October 2014, director David Green commented that *"[t]his is an important, if not a pivotal time for the SFO*." He confirmed the current method of funding for the SFO and repeated that no case would be turned down through lack of resources. He also reiterated his opinion that the SFO should not be subsumed into the National Crime Agency, as has been suggested recently, highlighting the need for a "*visibly independent investigator and prosecutor*" in fraud and corruption cases and arguing that that was "*crucial to judicial confidence, to business confidence in London as a level playing field, and to public confidence in the investigation and prosecution of major economic crime involving our flagship enterprises*." Home Secretary Theresa May is reported to be considering plans to abolish the SFO, sending its investigation team to join the National Crime Agency and assigning its prosecutors to the UK's Crown Prosecution Service. The plan is opposed by many commentators and lawyers in the field, who argue that having investigators and prosecutors working together strengthens their position.

David Green's speech is available here.

Legislation

Australia: Parliament considering mandatory disclosure of payments by extractive companies to foreign governments

On 27 October 2014, the Australian Greens introduced a bill into the federal parliament that, if passed, would establish mandatory disclosure of payments made by Australian-based extractive companies to foreign governments. The bill is intended to improve transparency and accountability of Australian extractive companies and would bring Australian reporting standards for extractive companies in line with EU, UK and US standards.

The Corporations Amendment (Publish What You Pay) Bill 2014 would amend the Australian corporations law to require Australian public and large proprietary companies and their subsidiaries engaged in extractive industries such as oil and gas, mining and native forest logging to disclose payments to foreign governments of over AUD100,000 on a country-by-country and project-by-project basis in a dedicated report each financial year. These reports would be published on the Australian Securities and Investments Commission's website and accessible to the public. Any misleading reports would be subject to the current regime governing the accuracy of financial statements.

The Financial Services Council of Australia and the Australia Council of Superannuation Investors have welcomed the bill as providing a greater source of information for investment risk assessment.

A copy of the bill is available here.

France: New measures to protect confidential business information

On 16 July 2014, a bill was introduced in Parliament, intended to remedy the absence of ad hoc legislation on the protection of confidential business information. Although French law protects manufacturing secrets, it has so far been silent on the broader issue of confidential business information. The protection of such information has so far depended on general concepts such as theft, breach of trust, industrial espionage, or breach of contractual confidentiality agreements, depending on the situation. However, none of these concepts actually ensured an adequate protection for all confidential business information.

Among other things, the proposed law provides:

- the following definition of the notion of confidential business information: any information (i) that is not generally known or easily accessible to a person operating in a sector which usually deals with this kind of information, (ii) that is part of the scientific or technical potential, strategic position or commercial or financial interests of its owner and therefore has an economical value, and (iii) that is the object of reasonable measures of protection;
- that the accessing or disclosure of confidential business information (or the attempt to do so) by an individual without authorisation, as well as making improper use of such information, is a criminal offence (*délit*) and may be punished by a fine of €375.000 and a three-year prison sentence.

Hong Kong: Macau to legislate against bribery of foreign public officials

Amid the flurry of anti-corruption investigations and prosecutions by Mainland Chinese authorities against companies and public officials, Macau – one of China's two Special Administrative Regions – is looking to extend its anti-corruption legislation to cover the bribery of foreign public officials and officials of public international organisations.

The "Regime of Prevention and Repression of Corrupt Acts in External Trade" Bill (available in Chinese and Portuguese only), which is currently undergoing scrutiny by Macau's Legislative Assembly, would facilitate compliance with the United Nations Convention Against Corruption. China ratified the UN Convention in 2006 and the Convention applies equally to Macau and Hong Kong.

According to the legislative brief for the Bill, the Macanese government regards it as highly important that it fulfils its obligations under the UN Convention by implementing appropriate legislative measures, in light of the increasing volume of cross-border and inter-governmental activities. The proposed offences under the Bill, which are modelled on Macau's existing anti-bribery legislation, prohibit the offering or promising of monetary or non-monetary advantages to foreign public officials or officials of public international organisations in order to obtain or retain external trade transactions or other inappropriate benefits. "Foreign public officials" is

defined to include any person who carries out or assists in carrying out executive or judicial duties for a foreign country or region. It also includes individuals who carry out duties for public enterprises, state-owned enterprises, enterprises which are majority-funded by the state and so on. "Officials of public international organisations" is also broadly defined and includes any person who is appointed to carry out, who carries out, or who assists in carrying out any activity for a public international organisation, regardless of whether he is remunerated for doing so. Corrupt acts conducted both in and outside Macau would be caught by the offences, provided that the person offering or promising the bribe is found to be in Macau.

The Bill also provides for corporate liability, although a firm might be able to rely on the statutory defence that the culpable individual was acting contrary to "clear orders or instructions" of the firm. The sanctions to which a firm might be subject are wide-ranging and severe and include criminal fines, court-ordered dissolution, ban from conducting specific activities for up to 10 years and permanent closure of business premises.

It has been reported in the local media that the Bill is likely to be passed by the Legislative Assembly by the end of this year, although questions raised during the deliberation of the Bill regarding the extradition of the bribing parties who are outside Macau's territory remain unanswered.

Luxembourg: Digital data theft recognised in new law

Until recently the Luxembourg Criminal Code (the "Code") did not recognise that digital data could be stolen and did not, therefore, sanction the theft of digital data.

However, the legislator has now adopted the law of 18 July 2014 on cybercrime, published on 25 July 2014, which amends the Code. This modification is essentially a response to the approval of the Council of Europe Convention on Cybercrime of 23 November 2001 and its Additional Protocol on the criminalisation of acts of a racist and xenophobic nature committed through computer systems, dated 28 January 2003.

In particular the law amends Articles 461 et seq. of the Code by introducing the notion of the "electronic key", which includes passwords, digital signatures, certificates such as those of the Luxtrust type and digital identifiers. Thus, Article 461(1) now provides that whoever fraudulently removes an asset or an electronic key that does not belong to them is guilty of theft.

This initiative constitutes the first step towards the recognition of digital data theft and aims to protect computer systems, preventing the interception or attempted interception of digital data. The law can be seen as a response to profound changes brought about by the digitalisation, convergence and continuing globalisation of computer networks, with such networks being increasingly used to commit criminal offences.

As the recognition of digital data theft is a very recent phenomenon in Luxembourg law, case law is still scarce on the issue and actual trends remain difficult to establish. To date, the only public court judgment recognizing the theft of digital data was handed down prior to the introduction of the law of 18 July 2014.

In that case, (decision of 3 April 2014, no. 17/2014), the Luxembourg Court of Cassation recognised the illegal downloading of digital data as a criminal offence for the first time, holding that Article 461 of the Code, which sanctions the offence of theft, does not distinguish between the tangible and intangible nature of the asset that forms the subject of the theft.

However, it is arguable that the amendment to the Code could in fact be regarded as a restriction of the principles stated in this judgment. The Court of Cassation construed the term “asset” in article 461 of the Code as referring to both material and intangible assets. By adding the words “electronic key” to its definition, the Legislator now seems to be specifying the exact type of intangible data concerned. This is likely to reduce significantly the broader interpretation of the term "asset" originally provided by the Court of Cassation.

Other news

ICAI produces report on DFID’s approach to anti-corruption and its impact on the poor

On 31 October 2014 the Independent Commission for Aid Impact (“ICAI”) published a report on the UK Department for International Development’s (“DFID”) approach to fighting corruption around the world. The report considers whether DFID’s anti-corruption activities are reducing the negative effects of corruption, in particular as experienced by the world’s poorest, who are the ultimate beneficiaries of DFID’s development programmes. The report concludes that while DFID recognises corruption as a critical development challenge, DFID has not developed an approach equal to the challenge, nor has it focussed its efforts sufficiently on the poor. The report, the production of which was led by attorneys in Linklaters’ International Governance and Development Practices on behalf of ICAI, includes five recommendations to support DFID’s future work on anti-corruption.

The full ICAI report can be accessed here.

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