

A Changing Face

11 April 2019 by Gareth Thomas



Regulators and prosecutors are actively using all the means at their disposal to bring about successful anti-corruption cases

Most countries, if not all, have had laws prohibiting bribery and corruption domestically for decades. Over the last ten years, many countries have strengthened this legislation, driven, to a large extent, by the Organisation for Economic Co-operation and Development (OECD).

In 1997, OECD member countries and five non-members (Argentina, Brazil, Bulgaria, Chile and Slovenia) signed a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) which came into force in 1999. This agreement extended the reach of national legislation by obliging signatories to introduce laws to prohibit the bribery of foreign public officials. Supported initially by just 15 countries, there are now 44 signatory countries.

Legislation such as the United Kingdom's Bribery Act, France's Loi Sapin II, Germany's Criminal Code and Chile's Criminal Code were all introduced, at least in part, to demonstrate these countries' commitment under the OECD Anti-Bribery Convention.

For many years, the US Foreign Corrupt Practices Act (FCPA) was regarded as the gold standard in anti-bribery legislation, however, new laws introduced over the last ten years have been helping to raise the bar. The UK's Bribery Act includes a provision that makes failure to prevent bribery a corporate offence. Laws in many civil law countries, such as France's Loi Sapin II, prescribe the compliance requirements that companies must introduce. Recent amendments to Chile's Criminal Code complete its Anti-Corruption Statute by expanding criminal liability for legal entities. The EU directive on non-financial and diversity disclosure requires European companies with over 500 employees to publish details of the controls they have in place to prevent corruption.

Robust Controls

While enacting legislation is clearly fundamental to the prevention of corruption, it is robust prosecution that will really drive change. Speaking at the International Forum on Ethical Business Conduct in November 2018, OECD Secretary General

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result, many businesses are striving to ensure that robust anti-corruption controls are firmly in place and properly embedded.

Various authorities around the world have published guidance on what is required to comply with anti-bribery and corruption (ABC) legislation. Guidelines and other initiatives, such as Transparency International's Business Principles for Countering Bribery and the World Economic Forum's Partnering Against Corruption Initiative, have been developed to assist and support businesses in their fight against corruption. Further, many organisations have invested considerable sums in ABC compliance programmes.

In the UK, attention has been focussed on the new director of the Serious Fraud Office, Lisa Osofsky, to see if a new approach to prosecution is likely to emerge. Speaking at the annual Cambridge Symposium on Economic Crime, Osofsky made it clear that her primary goal is to make the UK 'a high-risk place for the world's most sophisticated criminals to operate', declaring that she would support others to do likewise in their respective jurisdictions.

Undoubtedly, Osofsky intends to build on the SFO's trajectory of prosecution and will be deploying all the resources at her disposal to bring strong cases forward. Clear priorities for the SFO have emerged over the last six months which include:

- Improved cross-border cooperation
- Greater use of technology in investigations
- Continued use of DPAs and other tools

Cross-border Cooperation

The nature of the offences being investigated by prosecutors means that they rarely, if ever, touch upon a single jurisdiction. Consequently, working with law enforcement partners both domestically and internationally is regarded as vital to building strong and successful cases. While the Department of Justice (DoJ) has long been a collaborative partner of the SFO, Osofsky's background as a monitor who has also worked at both the Department of Justice (DoJ) and the Federal Bureau of Investigation, has strengthened connections with a raft of regulators and law enforcement agencies.

In addition, international liaison and investigations adviser Peter Pope, a partner at Jenner & Block, is on a year-long secondment to the SFO, charged with building and consolidating relationships with authorities in other jurisdictions.

What this means, in effect, is that evidence can be more easily and quickly obtained from an overseas jurisdiction investigating a related case. This should be regarded as a positive that will dissuade those suspected of criminal wrong-doing, be they individuals or corporates, from thinking they can play one enforcement authority off against another. Businesses should note this sharing of information and understand that if they report in one jurisdiction, they are not just reporting to a single authority.

While this does bring challenges, not least the fact that the cooperating jurisdictions may have very different legal systems and there is obviously a need to agree which authority is taking the lead, we have already seen considerable advantages from the prosecutor's perspective. The Rolls-Royce DPA, which involved a three-way settlement between authorities in the US, Brazil and the UK, is a good example of how co-ordinated enforcement actions can bring forward successful cases.

As more countries take active steps to strengthen their anti-corruption laws and empower their prosecution authorities, this collaborative approach is set to continue. And it won't just be with prosecution authorities. Regulators are seen to be valuable allies, as too are non-governmental organisations who also have a wealth of knowledge and information.

Use of Technology

Already in use, technology looks set to revolutionise investigations still further. Following the deployment of a pilot artificial system in the Rolls-Royce case, the SFO is now using OpenText Axcelerate to automate its document analysis, saving

needed for prosecution.

While these technologies are already being used in civil cases as well as by bank and financial regulators such as the Securities and Exchange Commission and the UK's Financial Conduct Authority, they are not in widespread use for anti-corruption prosecution. That looks set to change with researchers as far afield as Spain, Ukraine and Mexico developing technology to help investigators.

DPAs and Other Tools

Once regarded as a US-only phenomenon, DPAs are now being used in the UK, France, Australia, Canada and Singapore. While the criteria for reaching an agreement will vary from country to country, they are increasingly being seen as a valuable weapon in the prosecutor's armoury and may well be introduced in more jurisdictions as countries evaluate their anti-corruption enforcement.

In the UK, they will only be offered if appropriate and in the public interest. What this means in practical terms for businesses is that a company will need to demonstrate that proactive efforts have been taken to reform and that this is backed by evident commitment at the most senior level.

At a recent GoodCorporation discussion on the anti-corruption landscape it was made clear that DPAs would not be awarded to recidivists or those who fail to cooperate. This lack of certainty around the granting of a DPA has contributed to a general unwillingness of businesses to report, however there is a sense that this is changing as more companies are starting to sense that a failure to report may not be in their best interests.

On its part, the SFO is keen to make DPAs effective and to make companies feel able to self-report, with this in mind it is possible that further guidance on what 'cooperation' with the SFO means may be published.

In addition to DPAs, the SFO will be seeking to use all the tools at its disposal to obtain a prosecution. This will include existing tools such as Unexplained Wealth Orders and the call for new tools, such as an expansion of the 'failure to prevent' offences to cover business crimes more widely in the UK. Failure to prevent creates a high bar and as the recent change to anti-corruption legislation in France demonstrates, may well be adopted in more international jurisdictions.

An Evolving Landscape

Anti-corruption prosecution is developing at pace. Civil society no longer views corruption as a necessary means of greasing the wheels of commerce. Regulators and prosecutors alike are proactively seeking to use all the means at their disposal to bring about successful cases. Businesses need to keep abreast of legislative changes, particularly those operating in multiple jurisdictions. In T

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