



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

Anti-bribery & corruption: the fight goes global

Commercial Fraud Commission

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General Report

2 September 2015

General Reporters:

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1 LIST OF COUNTRIES AND NATIONAL REPORTERS

For the purposes of this working session, 15 National Reports were handed in for the following jurisdictions and by the following authors (listed in the order of each jurisdiction's ranking on the **2014** *Corruption Perceptions Index* published by Transparency International, with its **2008** ranking in brackets):

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2 INTRODUCTION

The last time the Commercial Fraud Commission organised an Annual Congress working session on the topic of anti-bribery & corruption (“ABC”) was at the 2008 Congress in Paris. Since that time there have been very significant developments in the ABC landscape across (and between) many jurisdictions, and it is fair to say that ABC enforcement activity has “gone global”. This has manifested itself in unprecedented fines (and other sanctions) being imposed against various multinational corporations and an increasing pipeline of individuals being prosecuted. At the same time – triggered by this enforcement environment and new laws – many corporations have put in place more sophisticated ABC systems and controls. Finally, the general public’s attention has been focussed on the scourge of corruption by high profile scandals and developments, with the US indictment of FIFA officials being only the latest example.

The General Reporters for this working session have sought to elicit – from each National Reporter – a snapshot of current law, practice and key developments relevant to ABC enforcement in their respective jurisdictions. What has emerged from this exercise is that bribery and corruption are being taken increasingly seriously across the board, with the scope and sophistication of legislation demonstrating an upward trend. This is in line with the increasingly global nature of ABC enforcement (and the increasingly international nature of business with the opportunities for bribery and corruption that go with it): jurisdictions across the world appear to be striving to meet (and create) a “global standard” of enforcement.

There is an undeniable link between the levels of corruption in a particular country, and the ease of doing business there, with higher levels of corruption creating a more challenging environment for business. For the purposes of generating discussion at the working session, we have compared each country’s 2014 ranking on the Transparency International *Corruption Perceptions Index* to its 2015 ranking on the World Bank’s *Ease of Doing Business Index*.

Country	CPI Rank (score)	Ease of Doing Business
<i>Finland</i>	3 (89)	9
<i>Norway</i>	5 (86)	6
<i>Switzerland</i>	5 (86)	20
<i>Germany</i>	12 (79)	14
<i>UK</i>	14 (78)	8

<i>Belgium</i>	15 (76)	42
<i>USA</i>	17 (74)	7
<i>France</i>	26 (69)	31
<i>Cyprus</i>	31 (63)	64
<i>Poland</i>	35 (61)	32
<i>Spain</i>	37 (60)	33
<i>Hungary</i>	47 (54)	54
<i>Brazil</i>	69 (43)	120
<i>Guatemala</i>	115 (32)	73
<i>Russia</i>	136 (27)	62

The correlation is clear. Those countries which are perceived to have lower levels of official corruption tend to be more attractive and efficient places to do business. But reality is more complicated than colourful charts, and it cannot be forgotten that in many cases it is corporations or individuals hailing from “clean” jurisdictions who are the ones paying bribes or engaging in other unethical conduct in jurisdictions that are perceived to be “corrupt”. In such circumstances, it is not always obvious who is the corrupter and who is being corrupted.

For this reason, the trend is for nation states to put in place rigorous ABC laws that apply not only in their own territory, but on an extraterritorial basis, and which apply in equal measure to bribe givers and bribe takers and to corporations and individuals, for whom custodial sentences are generally available. This General Report will seek to “take the temperature” of global ABC enforcement and identify key trends, similarities and differences which emerge from our 15 National Reports.

3 THE LEGAL FRAMEWORK

The legal frameworks in place across the 15 jurisdictions we reviewed are very diverse, both in terms of (a) the form the law takes (statutes, regulations and/or common law); and (b) the way that bribery/corruption is defined in a conceptual sense. However, there are common themes and approaches which emerge.

Before exploring the key points that came out of the National Reports, it is helpful to ascribe a plain English meaning to the words “bribery” and “corruption.” According to Transparency International:¹

- “bribery” is the “*offering, promising or giving of an advantage as an inducement for an action which is illegal, unethical or a breach of trust*”;² and
- “corruption” is the “*abuse of entrusted power for private gain*”.

In many legal regimes, “corruption” is an umbrella term that encompasses various crimes or forms of wrongdoing, including bribery. For example, this is (more or less) the case in Belgium, Finland, France, Spain, the UK and the US. Other legal regimes appear to conceive of bribery as the act of giving a bribe, whereas corruption is the act of receiving a bribe (e.g. Brazil); or call an act “corruption” if it involves a public authority and “bribery” if it involves the private sector (Poland); or treat the terms as interchangeable (Norway). In addition, many National Reports referred to associated crimes which may go by other names, but which fall into the same broad family of wrongdoing: e.g. Trading or Trafficking in Influence (Norway and France); Misappropriation of Public Funds (France); Granting of an Advantage (Switzerland); Embezzlement and Abuse of Trust (various); Illicit Enrichment and Influence Peddling (Guatemala); Abuse of Authority (Guatemala); Wilful Neglect of Duty (Spain); Official Misconduct/Malfesance in Office (Brazil); Money Laundering (various); the prohibition of Kickbacks, Racketeering and Wire Fraud (US); Extortion (various). In most jurisdictions, there are various specific defences available to the accused, although not in Germany, Belgium, France and Brazil. There are also numerous examples of civil and regulatory offences and/or causes of action relating to bribery & corruption that are discussed in more detail in each National Report.

Public and private sector bribery & corruption

Almost all of the jurisdictions surveyed criminalise both “public” and “private” (or “commercial”) bribery & corruption. Notable exceptions to this include Brazil and Guatemala where only “public” bribery/corruption is criminalised. Moreover, specific and notable conditions apply to Switzerland and Germany. In Switzerland, bribery in the private sector is not criminally sanctioned by the Swiss Criminal Code, but is regulated by the Unfair Competition Act which requires a complaint to be lodged by a party and a link between the offence and the notion of unfair competition. This has led to criticisms and (as at the date of this report) the Swiss Parliament is considering a draft amendment to the Swiss Criminal Code to address the criticisms. In Germany, the offence for private bribery is focussed on protecting free market competition, whereas abstract concepts such as this are irrelevant to the public bribery offence. In addition, payments which are

¹ Transparency International, *Diagnosing Bribery Risk*, July 2013.

² This is the definition of “active” bribery – “passive” bribery is “the accepting or soliciting of an advantage as an inducement for an action which is illegal, unethical or a breach of trust.”

intended to cultivate or facilitate business are criminal if one party is a public official, whereas they are not if both the active and passive party are private persons acting in commercial practice.

The UK is also notable in that its general bribery offences (sections 1 and 2 of the Bribery Act 2010) may be used to prosecute both public and private sector bribery, but the UK has also introduced a distinct “stand alone” offence (section 6) for bribery of a foreign public official.

Extraterritoriality

It was confirmed that almost all of the jurisdictions surveyed have ABC laws which may be enforced on an extraterritorial basis against a country’s own citizens or corporations, although in some cases this is qualified (e.g. extraterritoriality only applies to “public” corruption offences; prosecutions are subject to the rules of double criminality; etc.). The notable exception is Switzerland where the law does not have, in principle, any extraterritorial effect. However, the position of Swiss legal writers, confirmed by recent case law (the famous Ben Ali family’s case), is to adopt a wide interpretation of “place of commission” which can lead to a prosecution (of the bribe giver or recipient) even where the only link with Switzerland is the existence of a Swiss bank account from which – or to which – the bribe was paid.

The extraterritorial reach of US and UK law (particularly over companies with only limited links to those jurisdictions) is very significant and notable, although the US and UK approach this concept in different ways. The US asserts extraterritorial jurisdiction over US citizens and companies, as well as foreign companies who are “issuers”,³ or any natural or legal person who, directly or indirectly, engages in any act in furtherance of a corrupt payment (or an offer, promise or authorisation to pay) while in the territory of the US. The long arm of US law therefore applies to most foreign companies who list their shares on the NYSE or Nasdaq, and in the case of unlisted companies may often hinge on certain (arguably extreme) interpretations of what it means to be acting “in the territory” of the US – whether by sending an email, text or fax that transits a US-based telecommunications system, by using US dollars (clearing through a US bank), etc. In addition, the US asserts jurisdiction over foreign co-conspirators, aiders and abettors and agents of issuers or US companies, even if those foreign parties do not engage in any relevant act in the territory of the US.

By comparison, the extraterritorial jurisdiction of the Bribery Act 2010 applies primarily to legal or natural persons who have a “close connection” to the UK (as defined in the statute). Moreover, the section 7 corporate offence has a wider jurisdictional reach than the general offences, applying not only to UK incorporated companies and partnerships, but also to non-UK companies and partnerships if it can be shown that the non-UK

³ Companies that have a class of securities registered under section 12 of the Exchange Act or who are required to file periodic and other reports under section 15(d) of the Exchange Act.

company or partnership “carries on business” (or part of a business) in the UK. Guidance from the Ministry of Justice provides some further detail on what it means to carry on business in the UK, for example by noting that just because a foreign business has listed its shares on the London Stock Exchange, this does not (of itself) amount to carrying on business in the UK.

Exemptions & safe harbours

Few of the jurisdictions surveyed provide statutory or other exemptions or safe harbours, with the well-known “facilitation payment” exemption in the US Foreign Corrupt Practices Act being relatively unique in this regard. Having adequate procedures in place to prevent bribery can provide a limited defence to certain offences in the UK and Germany.

In several jurisdictions – such as Finland, the UK and Belgium – a gift of reasonable value (or reasonable corporate hospitality) are transactions which do not necessarily contravene bribery laws, however the legislation does not specify any monetary or other limit on the value of any gift or hospitality. The issue will always be one of proportionality and what is reasonable in the particular context.

Furthermore, the Spanish Federation of Municipalities and Provinces has released some guidelines against corruption in the Public Administration, which can be regarded as “soft” law. The guidance states that gifts may be permissible provided they do not exceed “the limits of the habits and customs of basic courtesy by entities and persons”.

Financial regulatory system

In the majority of cases, whilst ABC laws obviously apply to financial institutions, the topic of bribery & corruption is not directly addressed by the financial regulatory systems of the surveyed jurisdictions. Rather, the focus tends to be on anti-money laundering compliance and suspicious activity reporting activities. The UK stands out as imposing a relatively onerous obligation on banks and other financial institutions to have adequate systems and controls in place to mitigate financial crime risk, including bribery & corruption risk. Indeed, in the FCA’s⁴ Business Plan for 2015/16, financial crime was among the top seven risks identified by the FCA in its risk outlook. The importance of firms having systems and controls designed to prevent financial crime will be a key area of focus for the UK regulator this year, with ABC being an area of particular interest.

4 CORPORATE CRIMINAL LIABILITY

The majority of jurisdictions surveyed recognised the concept of corporate criminal liability in the context of ABC, with Brazil being a notable exception and Russia’s and Germany’s liability in this regard being limited to the imposition of administrative fines.

⁴ UK Financial Conduct Authority.

In both Russia and Germany there are legislative initiatives to introduce corporate criminal liability, although it is not certain whether these will be adopted. In addition, there is an on-going debate in the United Kingdom regarding the current framework for corporate criminal liability (both in terms of the common law and the section 7 Bribery Act offence) – and suggestions for reform – but no concrete legislative action as at the time of writing. Penalties for corporates vary by jurisdiction and by offence, but can be as severe as including dissolution and exclusion from public procurement exercises (for example in Spain, Hungary and Norway).

In most of the jurisdictions surveyed, corporate criminal liability does not require that any private person is convicted of a crime as well; however, it may need to be demonstrated that an identifiable individual agent or director was acting within the scope of his/her employment/mandate. A notable exception for not requiring the identification of a natural person connected to the legal entity is Belgium.

5 MUTUAL LEGAL ASSISTANCE / CO-OPERATION

All of the jurisdictions surveyed are parties to a wide range of treaties and conventions regarding mutual legal assistance and co-operation, as well as various formal and informal arrangements that operate to facilitate the exchange of information and evidence between different domestic agencies, as well as cross-border exchange with other national and international authorities.

Illustrations of such co-operation are given, in particular, in the national reports submitted for the US, Germany and Poland.

6 CASES

The national reports include a fascinating array of cases which illustrate examples where: (a) the jurisdiction's laws were enforced on an extraterritorial basis; (b) there was a degree of co-operation/assistance provided by one jurisdiction to another; and/or (c) penalties were imposed by multiple jurisdictions, in relation to the same set of facts.