Current developments in global anti-corruption law and policy — synergies between anti-corruption and antitrust compliance for in-house teams

7 June 2012
Current developments in global anti-corruption law and policy — synergies between anti-corruption and antitrust compliance for in-house teams

Seminar/Webinar

7 June 2012
4:30 – 6:00 p.m.  CET
90 minutes

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Tab 1: Agenda
Current developments in global anti-corruption law and policy — synergies between anti-corruption and antitrust compliance for in-house teams

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Agenda

I. Introduction and Presentation ................................................. 4:30 – 5:30 p.m.

II. Synergies between anti-corruption and antitrust compliance for in-house teams

   ▪ The in-house perspective
   ▪ The US perspective
   ▪ The UK perspective

Panelists:
Annette Schild, Partner, Arnold & Porter LLP
Guido De Clercq, Deputy Secretary General of the Group GDF SUEZ
John Nassikas, Partner, Arnold & Porter LLP
Kathleen Harris, Partner, Arnold & Porter (UK) LLP

III. Discussion and Questions & Answers.................................5:30 – 6:00 p.m.

Attending this seminar qualifies you 1.5 accredited CPD hours - Ref 2616/ARPO

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Tab 2: Presentation Slides
Current Developments in Global Anti-Corruption Law and Policy — Synergies Between Anti-Corruption and Antitrust Compliance for In-house Teams

Panelists:
Annette Schild, Partner, Arnold & Porter LLP
Guido De Clercq, Deputy Secretary General, GDF Suez
John Nassikas, Partner, Arnold & Porter LLP
Kathleen Harris, Partner, Arnold & Porter (UK) LLP

Guido DE CLERCQ
Deputy Secretary General
GDF SUEZ

The views and opinions expressed herein are exclusively those of the author and do not necessarily reflect the view of GDF SUEZ, its affiliates or its management.
1. COMPARATIVE APPROACHES – WHAT DOES COMPLIANCE MEAN?

Compliance is defined:

- less as a system of programs to maintain ethical values, but
- rather as a system of programs the goal of which is to achieve such a behaviour by the company, its employees and its related parties, that
  - the legal requirements;
  - the expectations, requirements and objectives set by compliance enforcement agencies, acting as guardians of the legal requirements in certain legal domains (e.g. antitrust, anti-corruption), subject to judicial review, and
  - the internal rules based on such requirements

are actually and entirely complied with by the company, its employees and related parties, in such a manner that infringements are avoided at all.


1. COMPARATIVE APPROACHES – SIMILARITIES

- Rules inspired by the same values
- Strong enforcement focus
- Strong enforcement agencies
- “behavioral offences” → change to a compliant “behaviour”
  - Corruption
  - Cartels
- Self monitoring and self assessment of conduct;
- For each legal domain: define steps and characteristics of management approach to prevent and detect infringements
- Compare to health & safety approach
  - How to do business without human casualties;
  - How to do business without “compliance” casualties.
1. COMPARATIVE APPROACHES – KEY FEATURES

✓ Behaviour “to be compliant” → a compliance enforced approach
  1. Obedience with law;
  2. The manner to achieve this obedience – “to do lists”

✓ A compliance enforced approach set by strong compliance enforcement agencies with articulated interests, objectives and policies
  - Focus on prevention and detect infringements;
  - Mirror this policy focus, objectives, etc. in company’s internal compliance programs / policies
  - Create a mandatory reference framework that is of a nature to assure effectiveness of the compliance program: the result should be no infringements of the rules as interpreted by agencies in the light of their policies

✓ Behaviour driven by compliance may ultimately contribute to realization of corporate values

2. COMPLIANCE ENFORCED APPROACH

✓ Enforcement = key feature of compliance approach;

✓ Compliance enforced approach challenges more and more prevailing legal concepts;

✓ Need for judicial review by courts;

✓ Illustrations:
  - Mandatory corporate compliance programs under responsibility of a third person (in the framework of deferred prosecution agreements) vs under responsibility of management with reporting duty.
  - Extensive interpretation of “parental liability” sanctioning “those who instructed” and “those who took part in the infringement” vs corporate governance.
− Absence of “those who instructed” (i.e. Company) in case of criminalization and especially the provisions in criminal law of imprisonment of executives, employees: individual criminal sanctions through far reaching notions of control such as “control persons” and “willful blindness” but at the exclusion of a criminal liability of the company.

− Enforcement agencies focus on “cooperation credit” resulting from self-disclosure of corporate wrong doings and cooperation with government investigations vs “compliance credit” which is not considered as critical even if it should be considered as key to the company’s effort to foster change.

• Italy: Decree 231;
  UK: Bribery Act;

• “Judges should exercise judicial oversight of DPAs and other settlement agreements filed with the courts to ensure that such agreements indicate on their face the consideration of the FSGO (Federal Sentencing Guidelines for Organizations) criteria for “effective compliance and ethics program” and other FSGO factors in the development of the Settlement’s terms.” … “Judges should not supplant the prosecutor’s judgment with their own approach, but rather would verify the consideration of FSGO factors.”

3. FIGHT BRIBERY THROUGH ENHANCED TRANSPARENCY

1. Bribery of public officials: primary form of corrupt transactions.
   State capture by sector:
   Use contributions to public officials to shape and influence the underlying rules
   of the game (i.e. legislation, policies, rules and decrees).
   Reaches beyond effort to secure a particular deal.
   Framework governing a sector / an economy is guided by a particular interest.

2. IMF – Code of Good Practices on Fiscal Transparency
   Advising member states on promoting good governance through appropriate
   anti-corruption legal framework and fiscal transparency;

3. Initiatives by industry

4. Extractive Industries Transparency Initiative (EITI)
   • E & P Countries
   • Requirements focus on resource revenue transparency
   • Validation to become a compliant country
     • every 5 years independent assessment regarding how the
       requirements in the EITI rules have been met
     • EITI board oversees / reviews all validation reports
   • World bank = administration of EITI Multi-Donor Trust Fund
   • Publications by E & P companies on payments by states on revenue
   • Stakeholders: governments / Extractive Industry Companies / Service companies /
     multilateral organizations / Investors / financial organisation / NGO’s
   • Focus: publication / audit / accounting → Transparency
   • List of countries
3. FIGHT BRIBERY THROUGH ENHANCED TRANSPARENCY

5. Disclosure of certain payments made by natural resource companies to governments for commercial development of oil, natural gas or minerals

- Declaration of G8 Summit – Deauville – May 2011:
  
  Commitment “to setting in place transparency laws and regulations or to promoting voluntary standards that require or encourage oil, gas and mining companies to disclose the payments they make to governments”

- Section 1504 of the Dodd – Frank Wall Street Reform and Consumer Protection Act (2010):
  
  - Section 1504 requires issuers engaged in the commercial development of oil, natural gas, or minerals to disclose, in their annual reports filed with the SEC, certain payments made to the US or a foreign government.
  
  - Payments covered by the disclosure requirements include taxes, royalties, fees (including license fees), production entitlements, bonuses and other material benefits that the SEC “Consistent with the guidelines of the extractive industries transparency initiative (to the extent practicable) determines are part of the commonly recognized revenue stream for the commercial development of oil, natural gas, or minerals”.

3. FIGHT BRIBERY THROUGH ENHANCED TRANSPARENCY

- This information must be provided in an interactive data format, including:
  
  - the type and total amount of such payments made for each project relating to the commercial development of oil and gas;
  
  - the type and total amount of such payments made to each government;
  
  - for each payment the following information:
    - total amounts of the payments, by category;
    - the currency used to make the payments;
    - the financial period in which payments were made;
    - the business segment of the issuer that made payments;
    - the government that received the payments, and the country in which the government is located;
    - the project of the issuer to which the payments relate
    - any other information that the SEC considers necessary or appropriate in the public interest or for the protection of investors;

- Section 1504 delegates substantial discretion to SEC, which is to issue new rules to implement this Section and to provide further definition with respect to the new disclosure requirements;

- Effective beginning with the annual report for the first fiscal year ending on or after the first anniversary of the date on which the SEC issues final rules implementing Section 1504.
3. FIGHT BRIBERY THROUGH ENHANCED TRANSPARENCY

Interaction between FCPA and Section 1504:

- **FCPA**:
  - Imposes prohibition-based restrictions on payments from business to foreign governments;
  - limits the type of payments that can be made to foreign officials and governments;
  - does not require that companies disclose payments that are FCPA compliant.

- **Section 1504**:
  - creates a hybrid prohibition- and disclosure-based scheme governing payments to foreign governments for those companies that engage in commercial development of oil, natural gas or minerals;
  - Quid? Will this lead to increased compliance costs (in addition to FCPA compliance costs):
    - Internal costs of establishing appropriate disclosure procedures;
    - costs of having to publicly disclose payments made to foreign governments.

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3. FIGHT BRIBERY THROUGH ENHANCED TRANSPARENCY

  - Article 1 (5) modifies Article 6 of the Directive 2004/109/EC and introduces a new obligation for listed entities who are “active in the extractive or logging of primary forest industries” to disclose in a separate report on an annual basis payments to governments in the countries in which they operate.
  - The same obligation is imposed in the draft replacing the Accounting Directives, on unlisted large and public interest entities.
  - The payments will be reported on a country by country basis and broken down by project, where payments are allocated to specific projects.
3. FIGHT BRIBERY THROUGH ENHANCED TRANSPARENCY

- The total of each of the following types of payment to each government should be reported:
  - (1) production entitlements;
  - (2) taxes on profits;
  - (3) royalties;
  - (4) dividends;
  - (5) signature, discovery and production bonuses;
  - (6) licence fees, rental fees, entry fees and other considerations for licences and/or concessions;
  - (7) other benefits to the government concerned, including payments in kind.

- The disclosure should be made where material to the recipient government. The concept of materiality will be defined by the EU Commission.

- Where payments are made to a government in a country where the public disclosure of such payments is clearly prohibited by criminal legislation, the company will need to state that it has not reported payments and to disclose the name of the government concerned.

4. EVOLUTION FROM COUNTRY / BUSINESS SECTOR RISK APPROACH TO GLOBAL RISK APPROACH

- HIGH RISK TERRITORIES - TRANSPARENCY INTERNATIONAL – CORRUPTION PERCEPTIONS INDEX
  - WORLD MAP
  - FULL TABLE AND RANKING OF COUNTRIES / TERRITORIES

- UK BRIBERY ACT STANDARD – A GLOBAL RISK APPROACH
4. EVOLUTION FROM COUNTRY / BUSINESS SECTOR RISK APPROACH TO GLOBAL RISK APPROACH

FULL TABLE AND RANKING OF COUNTRIES / TERRITORIES

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### 4. EVOLUTION FROM COUNTRY / BUSINESS SECTOR RISK APPROACH TO GLOBAL RISK APPROACH

**UK BRIBERY ACT STANDARD – A GLOBAL RISK APPROACH**

- A commercial organization should adopt a risk based approach to manage bribery risks. This risk based approach recognizes that the bribery threat to an organization varies across:
  - Jurisdictions;
  - Business sectors;
  - Business partners;
  - Transactions.

- Hence, risk assessment procedures should be proportionate to the risks faced by an organization: i.e. proportionate to its size and structure and to the nature, scale and location of its activities.

- This risk assessment addresses both external and internal risks, as illustrated by Section 3.5 of the Ministry of Justice Guidance on the Bribery Act.
5. A GLOBAL RISK APPROACH FORMS A CONSTITUTIVE PART OF A COMPLIANCE PROGRAM

- A truly risk based approach integrating a specific and differentiated assessment of internal and external non-compliance risks should constitute the roadmap in order to prevent and mitigate the identified risks.

- A risk assessment is only one of a series of actions or programs that constitute a compliance program.

Other actions include:
- Board and Top Level Management Commitment;
- Written Policies and Procedures, Standards, Tools;
- Communication, Education, Training;
- Monitoring, Oversight, Due Diligence, Investigations;
- Enforcement.
5. A GLOBAL RISK APPROACH FORMS A CONSTITUTIVE PART OF A COMPLIANCE PROGRAM

✓ A compliance program can be defined as a system of programs the goal of which is to achieve such a behaviour by the company, its employees and its related parties, that:

1. the legal requirements;
2. the expectations, requirements and objectives set by compliance enforcement agencies, acting as guardians of the legal requirements in certain legal domains (e.g. antitrust, anti-corruption), subject to judicial review, and
3. the internal rules based on such requirements

are actually and entirely complied with by the company, its employees and related parties, in such a manner that infringements are avoided at all.

✓ Compliance programs are in essence legal compliance programs. Companies are being required to adopt measures which require companies and their employees to follow the law and regulations – as read by the enforcement agencies. From that point of view and since they address obedience with law as well as the manner to achieve this obedience, these programs have obtained a compulsory status.

This test is, in my reading, to be achieved through:

− The definition of a set of internal company objectives mirroring a.o. the compliance objectives defined by the legislator and enforcement agencies;
− The identification and implementation of actions in order to meet (1) these objectives and (2) the operational and organizational requirements and expectations of the enforcement agencies.
I. Key FCPA Enforcement Trends
Top Eleven Enforcement Trends

1. Large financial penalties
2. Industry-wide sweep investigations
3. Increased prosecution of non-US companies
4. Increased prosecution of individuals
5. Interpretation of “foreign official”
6. Aggressive enforcement tactics
7. Expansive legal theories
8. Increased international cooperation
9. Continuing scrutiny of business combinations
10. Self-disclosure and cooperation
11. Extradition

Trend 1: Large Financial Penalties

- Large criminal fines and civil penalties reaching hundreds of millions of dollars

Total FCPA Penalties by Year (in millions)
Trend 2: Industry-Wide Investigations

- Coordinated enforcement activity over the past few years resulting in large fines against more companies
  - **Pharmaceutical and medical devices** (J&J, Merck & Co. Inc, Eli Lilly and Co., Smith & Nephew)
  - **Oil and gas** (Panalpina, Bonny Island, Hercules Offshore, Inc.)
  - **Sovereign Wealth Funds** (Citigroup, Inc., Blackstone Group, Goldman Sachs)

Trend 3: Increased Prosecution Of Non-U.S. Companies

### Top 10 FCPA Settlements (in millions)

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<td>Magyar Telekom (2011)</td>
<td>0</td>
<td>95</td>
</tr>
<tr>
<td>Alcatel-Lucent (2010)</td>
<td>0</td>
<td>137</td>
</tr>
<tr>
<td>Daimler AG (2010)</td>
<td>0</td>
<td>185</td>
</tr>
<tr>
<td>JGC Corporation (2011)</td>
<td>0</td>
<td>218.8</td>
</tr>
<tr>
<td>Technip (2010)</td>
<td>0</td>
<td>338</td>
</tr>
<tr>
<td>Snamprogetti (2010)</td>
<td>0</td>
<td>365</td>
</tr>
<tr>
<td>BAE (2010)</td>
<td>0</td>
<td>400</td>
</tr>
<tr>
<td>KBR/Halliburton (2009)</td>
<td>0</td>
<td>579</td>
</tr>
<tr>
<td>Siemens (2008)</td>
<td>0</td>
<td>800</td>
</tr>
</tbody>
</table>
**Trend 4: Increased Prosecution Of Individuals**

Enforcement actions against individuals by DOJ and SEC: 2007-2011

<table>
<thead>
<tr>
<th>Year</th>
<th>Enforcement Actions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>14</td>
</tr>
<tr>
<td>2008</td>
<td>16</td>
</tr>
<tr>
<td>2009</td>
<td>24</td>
</tr>
<tr>
<td>2010</td>
<td>35</td>
</tr>
<tr>
<td>2011</td>
<td>16</td>
</tr>
</tbody>
</table>

**Trend 5: Interpretation Of “Foreign Official”**

- In four recent cases, federal courts have agreed with DOJ's expansive interpretation that employees of state-owned entities can qualify as foreign government officials under the FCPA
Trend 6: Aggressive Enforcement Tactics

  - 22 defendants in military products industry arrested in massive sting operation, using 150 FBI agents, wiretaps, a cooperating witness, and undercover agents posing as agents of foreign government officials
- DOJ seeks prison sentences for persons convicted of FCPA offenses
  - Joel Esquenazi, former president of Terra Telecommunications Corporation, sentenced to the longest prison term in an FCPA case: 15 years imprisonment (2011)

Trend 7: Expansive Legal Theories

- Tenaris S.A. (2011)
  - SEC and DOJ alleged jurisdiction under the FCPA based on a single wire transfer through an intermediary bank in the US
- Panalpina World Transport (Holding) Ltd. (2010)
  - Panalpina was charged as an “agent” of its US-listed customers, Shell Nigeria Exploration and Production Co. Ltd., Tidewater Marine International, Inc., Transocean, Inc., Pride International, Inc., Global SanteFe Corp., and Noble Corp
Trend 8: Increased International Cooperation

- Anti-corruption enforcement is increasingly global in nature, as prosecutors advance a global effort to combat corruption
  - **Johnson & Johnson** (2011)
    - Entered into a US$77 million global settlement with US and UK enforcement agencies
    - J&J cooperated with the US government’s investigation and provided information about other companies in the pharmaceutical industry
  - **Innospec Inc.** (2010)
    - Settled corruption charges with US and UK enforcement agencies, committing to retain a compliance monitor jointly approved by US and UK authorities
    - DOJ, the SEC, the US Treasury Department’s Office of Foreign Assets Control (OFAC), and the UK Serious Fraud Office (SFO) worked together to reach a US$40.2 million global settlement

Trend 8: Increased International Cooperation (cont.)

- Corruption investigations can begin in non-US jurisdictions or expand beyond the US
  - **Siemens AG** (2008)
    - The blockbuster Siemens investigation began in Germany, with Siemens eventually entering into large settlements with the US and German governments
  - **BAE Systems** (2010)
    - The BAE investigation began in the UK, with BAE ultimately agreeing to settle with DOJ and the SFO
  - **Bizjet & Lufthansa** (2012)
    - Both the U.S. subsidiary, Bizjet, and its indirect parent company, Lufthansa Technik of Germany, settled with the DOJ for bribes paid in Latin America
Trend 9: Continuing Scrutiny of Business Combinations

- Recent settlements continue to emphasize the importance of due diligence in joint ventures, mergers, and other business combinations
    - U.S. company eLandia acquired LatinNode, another U.S. company, in 2007
    - After the acquisition, eLandia learned that Latin Node had paid bribes of approximately $2.2 million to public officials, including officials of state-owned telecommunications companies in Honduras and Yemen
    - Even though none of the payments occurred after acquisition, the DOJ still prosecuted, and eLandia had to write off the investment

Trend 10: Voluntary Self-Disclosure and Cooperation

- Disclosures about possible FCPA violations are voluntary but may foster positive relations with enforcement agencies
- Prosecutors in FCPA cases may take into account positively a company’s:
  - disclosure of wrongdoing,
  - willingness to cooperate, and
  - pre-existing compliance program
- DOJ and SEC encourage voluntary disclosure, including through published guidelines
**Trend 11: Extradition**

- Because most countries are parties to the 2003 Convention Against Corruption, countries do not have to rely on judgments about whether bilateral extradition treaties include “fraud” or “corruption”
- The U.S. government has sought extradition successfully for FCPA violations
  - Jeffrey Tesler and Wojciech Chodan, U.K. nationals, were arrested in the U.K. and extradited to the U.S. for helping KBR and its partners pay $182 million in bribes to Nigerian officials

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**II. Building an Adequate Anti-Corruption and Antitrust Compliance Program to Reduce Liability**
Antitrust Compliance Guidance

- Goal of an antitrust compliance program should be the creation of a culture of compliance at all levels of operation.
- An effective compliance program increases the chances of early detection of violations and thus of being the first company to self-report and qualify for leniency under the Division’s leniency program.
- Even if a company is not the first to approach the Division with information about antitrust violations, early cooperation can result in plea agreements that recommend reduced penalties under the Sentencing Guidelines.

Anti-Corruption Guidance

- No formal guidance from DOJ or SEC on the FCPA, although DOJ criminal division head promised at a November 2011 FCPA conference “detailed new guidance” in 2012.
- Guidance on the FCPA has thus far been provided through Opinion Procedure Releases, Deferred Prosecution Agreements (DPAs), and Non-Prosecution Agreements (NPAs).
DOJ / SEC Guidance: Elements of an Effective Anti-Corruption Compliance Program

- Guidance from recent Deferred Prosecution Agreements
  - Individualized risk assessment
  - Explicit written compliance code, policies and procedures, and internal controls
  - Culture of compliance with senior executive responsibility and commitment
  - Communication and training
  - Due diligence for third parties and other high risk interactions, including standardized contractual provisions
  - Designated compliance infrastructure
  - Confidential reporting system and effective disciplinary measures
  - Monitoring and auditing
  - Periodic review and testing


- U.S. Attorney’s Manual, Title 9, Chapter 9-28.800: Corporate Compliance Program
  - Questions the government will ask:
    - Is the compliance program well designed?
    - Is the program being applied earnestly and in good faith?
    - Does the company’s compliance program work?
    - Is it more than a “paper program”?
    - Has the company established corporate governance mechanisms that can effectively detect and prevent misconduct?
    - Do the company’s directors exercise independent review over proposed corporate actions?
    - Are internal audit functions conducted at a level sufficient to ensure their independence and accuracy?

- U.S. Attorney’s Manual, Title 9, Chapter 9-28.800: Corporate Compliance Program
  - Questions the government will ask:
    - Have the directors established an information and reporting system reasonably designed to provide management and directors with timely and accurate information sufficient to allow an informed decision regarding compliance with the law?
    - Has the company allocated adequate staff and resources to its compliance efforts?
    - How prompt was the disclosure of wrongdoing?

U.S. Sentencing Guidelines § 8, Part B: Remediing Harm from Criminal Conduct and Effective Compliance and Ethics Program

- Compliance program must satisfy seven minimum requirements in order to qualify for mitigation under U.S. Sentencing Guidelines
  1. Clearly established compliance standards and procedures to prevent and detect criminal conduct;
  2. Assigning overall responsibility to oversee compliance to high-level executives knowledgeable about the compliance program;
  3. Exercising due care not to delegate responsibility to employees who have a propensity to engage in illegal conduct;
  4. Taking reasonable steps to communicate and provide effective training on standards and procedures to all employees;
  5. Taking reasonable steps to achieve compliance with standards, including monitoring and auditing, periodic evaluation, and a system for reporting misconduct without fear of retaliation;
  6. Consistent enforcement of standards through appropriate incentives and disciplinary mechanisms;
  7. Taking reasonable steps when an offense occurs to respond and to prevent future violations.
Business Case for Effective Antitrust and Anti-Corruption Compliance Programs

- Prevent violations of antitrust and anti-corruption law
- Early detection of violations enables early decision of whether to disclose voluntarily / report promptly to enforcement authorities
  - For antitrust violations, possible to receive amnesty
  - For FCPA violations, may receive reduced fines, more leniency
  - Company / counsel credibility
  - Prosecutorial discretion
- It makes business sense
  - Reduce liability and litigation risk
  - Protect company reputation
  - Mitigate damages

Use “Common Sense”

- Typical jury instruction:
  
  You were chosen as men and women of diverse backgrounds, of different educational experience, and you are expected to use your common sense.
  
  In applying that common sense, you are permitted to draw inferences from facts which you find to have been proved by the evidence, such reasonable inferences as to you would seem justified.

- If a case goes to trial, ultimate trier of fact is a regular person using his/her common sense

- In far more common situations, where the case is in effect litigated in conference rooms and correspondence, common sense remains an important concept on both sides of the table

- Act in good faith; keep your credibility
The Common Objective of Antitrust and Anti-corruption Legislation
Creating the conditions for free markets to flourish

Cartels
- The Cartel Offence - Section 188 Enterprise Act 2002
- The Chapter I Prohibition – Section 2 Competition Act 1998
- Article 101 Treaty on the Functioning of the European Union

The OFT: ‘When markets are working well, good businesses benefit too.’

Bribery
- Substantive bribery offences – Section 1, 2 and 6 Bribery Act 2010
- The failure to prevent bribery offence – Section 7 Bribery Act 2010

Ken Clarke: ‘Addressing bribery is good for business because it creates the conditions for free markets to flourish.’

Bid-rigging in the context of Public and Private Procurement – Factual Synergy
- Horizontal bid-rigging arrangement – Section 188(2)(f) Enterprise Act 2002
- Vertical element involved in bribing person involved in procurement – Section 1/6 Bribery Act 2010
Synergy between Liability under Antitrust and Anti-corruption Legislation

Liability of Corporate Bodies

- Chapter I Prohibition – Section 2 Competition Act 1998 and Article 101 TFEU:
  Musique Diffusion Francais v Commission – ‘it is not necessary for there to have been action by, or even knowledge on the part of, the partners or principal managers of the undertaking concerned; action by a person who is authorized to act on behalf of the undertaking suffices.’

- Failure to prevent bribery offence – section 7 Bribery Act 2010:
  Section 7(1): ‘A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person ...’
  Section 8 (3): ‘A may (for example) be C’s employee, agent or subsidiary.’

Liability of Individuals

- The Cartel Offence - Section 188 Enterprise Act 2002
- Substantive bribery offences – Section 1, 2 and 6 Bribery Act 2010
- Offence of body corporate with consent or connivance of senior officer – Section 14 Bribery Act 2010

Synergy between Law Enforcement of Antitrust and Anti-corruption Legislation

More Aggressive Legislation

- Proposal to remove ‘dishonesty’ from the Cartel Offence
- Bribery Act 2010

Parallel Trans-Atlantic Enforcement Actions

- Marine Hose Cartel
- DePuy, MW Kellogg, BAE and Innospec

Prosecutorial Agencies Actively Encouraging Reporting

Serious Fraud Office:
- SFO Confidential
- Corporate self reporting – civil recovery

Office of Fair Trading:
- Leniency programme
- OFT reward programme
Synergies between Antitrust and Anti-corruption compliance regimes

- Core Commitment to Compliance
- Risk Identification
- Risk Assessment
- Risk Mitigation
- Review

Anti-corruption Compliance Guidance – Ministry of Justice/March 2011
- Principle 1 – Proportionate procedures
- Principle 2 – Top-level commitment
- Principle 3 – Risk assessment
- Principle 4 – Due diligence
- Principle 5 – Communication (including training)
- Principle 6 – Monitoring and review

The Importance of a Robust Corporate Antitrust and Anti-Corruption Compliance Programme

A robust corporate compliance programme can help:
- Stop infringements from occurring
- Detect those infringements that occur so that a company may respond appropriately by
  - Making an early application for leniency
  - Self-reporting pre-emptively
- Provide a full defence to the failure to prevent bribery offence (‘adequate procedures’)
- Mitigate the level of penalty for an infringement of the Chapter I Prohibition (‘adequate steps’)

55 56
Wider Implications

• Increased compliance
  ➢ Put competition compliance higher up the corporate agenda
  ➢ Encourage a more proactive approach

• Additional impetus for leniency
  ➢ Criminal immunity more worth having if risk of prosecution is perceived as real

• Overlap of offending
  ➢ Money laundering and offences under the Fraud Act

• Bribery Act
  ➢ Implications, DPA’s and Self reporting

Key challenges for the private sector

- Strict liability under the failure to prevent bribery offence circumvents the limitations on corporate liability under the identification doctrine
- The extensive jurisdictional reach of the failure to prevent bribery offence means that companies (overseas and domestic) may face prosecution for bribery outside the UK
- The challenges involved with complying with overlapping and sometimes contradictory anti-corruption regimes in different jurisdictions
- Implementing effective “adequate procedures” in order to engage the full statutory defence
- Implementing effective systems and controls in order to fulfill the FSA’s Principles for Businesses and Systems and Controls Handbook
- The ramifications of the Public Contracts Regulations 2006
- Identifying the most effective methods for preventing bribery in your organisation/industry
- Embedding adequate procedures to prevent bribery in a robust and user-friendly overall compliance program
- Managing the risks involved with business in high-risk jurisdictions
Any questions?

Current Developments in Global Anti-Corruption Law and Policy — Synergies Between Anti-Corruption and Antitrust Compliance for In-house Teams

Panellists:
- Annette Schild, Partner, Arnold & Porter LLP
- Guido De Clercq, Deputy Secretary General, GDF Suez
- John Nassikas, Partner, Arnold & Porter LLP
- Kathleen Harris, Partner, Arnold & Porter (UK) LLP
Tab 3: Moderator/Speaker Biographies
Annette Luise Schild
Partner

Annette Schild is a partner in the antitrust and competition practice group where she concentrates her practice in merger and acquisition transactions. Having worked in Brussels, Washington DC, and New York, Ms. Schild has successfully defended numerous companies in investigations of their proposed mergers by the EU, German, and French competition authorities. Ms. Schild has also advised on numerous other high-profile matters, including cartel investigations, antitrust complaints, horizontal and vertical collaborations, commercial arrangements, and intellectual property matters. Among other industries, Ms. Schild has gained significant experience in the nuclear, aerospace, power generation, (petro)chemical, new media, mining, and medical industries. Ms. Schild regularly lectures on EU competition law issues and is a co-author of the Munich and the Brussels commentaries on European and German competition law. She is fluent in German, French, and English.

Representative Matters

- BASF in the EU merger control procedure in connection with its $3.8 billion acquisition of Cognis, a chemicals producer for the pharmaceutical, food-and-beverage and dietary-supplement markets as well as cosmetics and cleaning-product industries. Previously in the EU merger control procedures relating to its unsolicited tender offer for Engelhard and its €2.7 billion acquisition of Degussa Construction Chemicals. Also in connection with a significant cooperation agreement.

- AREVA in two appeals to the General Court against European Commission decisions as well as in several matters under Article 101 of the EC Treaty and equivalent national laws, its acquisition and subsequent sale of the transmission and distribution business, and a joint venture with Urenco in the uranium enrichment technology area.

- Paramount Pictures Corporation in several merger control and other procedures in the EU, France and Germany, in its acquisition of DreamWorks and in a procedure under Article 101 of the EC Treaty.

- A Middle-Eastern sovereign wealth fund in several acquisitions of industrial participations in the merger control proceedings before the European Commission and in multiple other jurisdictions.
- Merrill Lynch in worldwide merger control proceedings in its merger with Bank of America
- Société Générale in a merger of its brokerage activities with those of Calyon Financial
- Siemens in its acquisition of Austrian VA Technologies AG and its US$3.5 billion acquisition of UGS Corporation, a leading supplier of Product Lifecycle Management software and services
- Glatfelter Corporation in its acquisition of the Lydney wetlaid fibre business, and its acquisition of MPL
- eMusic in its relationship with certain European collecting societies
- Eramet in various acquisition procedures

**Rankings**

- Chambers Global 2012 for Competition/European Law: Belgium
- PLC Which lawyer? 2012: Recommended for EU Competition
- Ranked by JUVE for German competition law as one of very few law firms without a German office.

> "Respected practice in antitrust at a highly respected US firm. The former Shearman lawyers who joined the firm in Brussels in 2009 were integrated very successfully thanks to their strong international focus."

Strengths: International practice, very respected in the US.

Recommended lawyers: Annette Luise Schild ("I esteem her greatly", - client; "enviably good contacts in France", - competitor)

- Chambers Europe: Europe’s Leading Lawyers for Business 2011 for Competition/European Law
- The Legal 500 EMEA 2011 for Competition
- The International Who's Who of Competition Lawyers 2011
- Chambers Global: The World's Leading Lawyers for Business 2011 for Competition/European Law
- JUVE Handbook 2010
- Global Competition Review's "Women in Antitrust" 2009

**Professional and Community Activities**

- Member, American Bar Association, Section of Antitrust Law
- Member, International Bar Association
- Member, Studienvereinigung Kartellrecht
- Member, Forschungsinstitut für Wirtschaftsverfassung und Wettbewerb e.V.
- Member, Tönissteiner Kreis

**Books**

**Articles**

**Presentations**

**Multimedia**
Guido De Clercq

Guido De Clercq is Deputy Secretary General of the Group GDF SUEZ, where he oversees the Group’s global compliance policies and organization. Between 2008 and 2011, he was Group GDF SUEZ’s General Counsel and before that he was the International General Counsel of the Group SUEZ. At the start of his career, Guido was assistant professor at the Faculty of Law of the University of Leuven (Belgium) and also private practitioner. He regularly speaks and publishes on compliance matters.
John N. Nassikas  
Partner

John Nassikas is a partner in Arnold & Porter LLP’s white collar defense practice group where he concentrates on complex parallel criminal and civil litigations and internal corporate investigations. Mr. Nassikas, who holds the lead coordinating role for the firm’s national and international white collar practice, advises and defends companies, executives, and foreign governments in criminal investigations and prosecutions, particularly in the areas of healthcare fraud, financial fraud, antitrust, and SEC enforcement. He has defended companies and individuals in significant federal and state investigations throughout the United States and internationally. Mr. Nassikas has extensive experience in federal grand jury practice and trial work both as a former federal prosecutor and as a defense attorney. He deals regularly with United States Attorney Offices and the US Department of Justice (DOJ) on matters including healthcare fraud, antitrust, public corruption, government contracts, the Foreign Corrupt Practices Act (FCPA), and financial fraud investigations.

From 1991 to 1995, Mr. Nassikas was an Assistant United States Attorney for the Eastern District of Virginia. As an Assistant United States Attorney in the Criminal Division, he was responsible for major felony prosecutions, from grand jury through trial and appeal, in areas including financial, telecommunications, and government contracts fraud, violent crime, organized crime, and narcotics trafficking.

Mr. Nassikas is a frequent speaker at events such as the ABA Health Care Fraud Conference, the Institute for International Research Clinical Research Conference, the American Conference Institute Medical Device Conference, and conferences on First Amendment issues. He has been a visiting law school lecturer on criminal law and an instructor of continuing legal education courses at the Federal Bar Association and elsewhere on corporate criminal law topics. He has also written on the international aspects of criminal defense work.

Representative Matters

- Leads defense teams in complex medical device and pharmaceutical company parallel criminal and civil investigations.
- Leads defense teams in large criminal antitrust and SEC enforcement probes of the airline, electronics, and healthcare industries and the financial markets.

Contact Information

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555 Twelfth Street, NW  
Washington, DC 20004-1206

Practice Areas

White Collar Criminal Defense  
Litigation  
Antitrust/Competition  
Government Contracts  
Congressional Investigations  
National and Homeland Security  
Securities Enforcement and Litigation  
Foreign Corrupt Practices Act (FCPA) and Global Anti-Corruption

Education

JD, University of Virginia, 1984  
BA, magna cum laude, Yale University, 1981

Admissions

District of Columbia  
Virginia  
Supreme Court of the United States  
US Court of Appeals for the District of Columbia Circuit  
US Court of Appeals for the Fourth Circuit  
US District Court for the District of Columbia  
US District Court for the District of Maryland  
US District Court for the Eastern District of Virginia
Won historic victory in 2009 for one of the two defendants in the so-called "AIPAC [American Israel Public Affairs Committee] Espionage Act case," which The Washington Post editorial page sharply criticized as "dangerous aggrandizement of the government's power" in its efforts to impose secrecy in the name of national security on private citizens. This unprecedented First Amendment case has been the subject of numerous editorials and opinion pieces in The Washington Post, The Wall Street Journal, and other major newspapers. The Fourth Circuit in February 2009 issued a landmark ruling in favor of the two former AIPAC foreign policy advocates on both Classified Information Procedures Act (CIPA) issues and evidentiary standards under the Espionage Act for speech/conduct covered by the First Amendment, and DOJ followed within months by dismissing the 10-year investigation and prosecution on the eve of trial.

Has defended an array of individuals, including government officials, lobbyists, doctors, lawyers, accountants, and corporate executives and managers, investigated by federal and state prosecutors nationwide.

**Rankings**

- Washingtonian’s "Best Lawyers" 2011 for White Collar
- Chambers USA: America's Leading Lawyers for Business 2011 for Litigation: White-Collar Crime & Government Investigations

**Professional and Community Activities**

- Former Chairman, Criminal Law Committee of the District of Columbia Bar Association

**Articles**


**Presentations**


Advisories

- "US Supreme Court Narrows Scope of "Honest Services" Mail and Wire Fraud." Jul. 2010.

Newsletters

Kathleen Harris
Partner

Kathleen Harris is a London-based partner in the firm's White Collar Criminal Defense practice group where she represents companies in a wide range of industries, and individuals in criminal investigations and compliance matters involving allegations of complex economic fraud, bribery, money laundering, and tax and investment fraud. She is an accomplished litigator with extensive knowledge of and experience in matters involving risk assessments, investigations, and prosecutions under the UK Bribery Act, Proceeds of Crime Act, Prevention of Corruption Act, and the Serious Organised Crime and Police Act of 2005 (SOCPA), as well as experience of statutes providing investigative powers. Kathleen has broad experience advising government ministers on the development and implementation of policy and fraud strategy, and leading complex overseas enquiries and analyses.

Before joining Arnold & Porter LLP, Kathleen served as Head of Fraud Business Group and Head of Policy at the Serious Fraud Office (SFO) (2008-2011), Senior Strategic Policy Adviser in the Attorney General's Office (2007-2008), and held positions in HM Revenue & Customs (HMRC) and the Department of Works and Pensions in the United Kingdom. Kathleen has led the prosecution of organisations involved in high-profile bribery investigations, complex financial crime, and tax evasion. At the SFO, she supervised and provided strategic oversight to a number of high-level investigations and prosecutions. Kathleen revamped the agency's critical policy function, headed the domain responsible for investment fraud, and was responsible for the SFO's use of the Regulations of Investigatory Powers Act (RIPA) and its responses to Freedom of Information (FOI) and Data Protection Act (DPA) requests. She played a key role in developing seminal guidelines on critical issues, including plea negotiations, civil remedies, civil recovery, and corporate prosecutions. At the Attorney General's Office, she provided comprehensive legal and policy support, including providing specialist support for the Jessica de Grazia review, resulting in a major reorganisation of the SFO.

Kathleen has worked closely with law enforcement agencies both in the UK and internationally, including the SFO, the Attorney General's Office, the Crown Prosecution Service, HMRC, the Ministry of Justice, the US Department of Justice, and the US Securities & Exchange Commission, on all aspects of investigatory and fraud strategy. In 2010, Ms Harris was one of the official UK Examiners assigned to monitor the US government's compliance with its obligations under the Organisation for Economic Co-operation and Development (OECD) convention.
Representative Matters

- Current adviser on Criminal Matters for the Management and Standards Committee of News Corp.
- Representing an individual suspected of corruption in the Turks and Caicos Islands.
- Conducting anti-corruption risk assessment for large corporations who have a presence in the UK.
- Advising a corporation on how to comply with the Data Protection Act when transferring data overseas.
- *R v. BAE Systems Plc.* In connection with the prosecution of a global defence company, fully managed successful outcome of Judicial Review challenging the lawfulness of the plea agreement, and was responsible for managing counsel, drafting response to the claim, and handling correspondence amidst intense media scrutiny.
- *JJB/Sports Direct.* Led the investigation into potential corporate criminal liability.
- Advised on the early investigative planning by the SFO following an international bank collapse.
- Led team in examining the approach to global offending following the *R v. Ineospec* judgment, and was responsible for making suggestions to the government for changes to the plea negotiation framework.
- Advised in the updating of the Code for Crown Prosecutors, used by prosecutors to decide whether criminal proceedings should be instituted.
- Advised the Board for the former Inland Revenue in a number of Hansard and serious civil cases.
- Advised and prosecuted in relation to a number of large tax evasion cases involving complex overseas enquiries, analysis of large volumes of data, and knowledge of the law of restraint and confiscation.
- Advised and successfully prosecuted a multihanded conspiracy to defraud in relation to a charity which had high-profile patrons.
- Led investigation for the first UK Carbon Trading investigation by HMRC with a potential loss of over £2 billion.

Professional and Community Activities

- Vice-chair, Eastbury Farm School, Northwood Middlesex
- Member, Employed Bar Committee for The Bar Council of England and Wales

Articles


- Kathleen Harris, Andrew Varner and Samuel M. Witten. "Know thy target" *The Deal* September 30, 2011.


**Presentations**


**Advisories**


**Multimedia**


- Kathleen Harris and Christopher R. Yukins. "VIDEOCAST: Government Contractor Compliance with the UK Bribery Act: New Directions or a Familiar Trajectory?" July 25, 2011. *also available as a Podcast*


**Newsletters**


Tab 4: Practice Overview
We are an international law firm at the intersection of business, law, and regulatory policy, serving clients whose business needs require US, European, or cross-border regulatory, litigation, and transactional services. We have:

- More than 800 lawyers working in offices located in key hubs of financial, government, business, technology, and regulatory activity
- A sophisticated understanding of rapidly changing global business environments, serving our clients’ interests in North America, Latin America, Europe, and Asia
- A global team which includes highly regarded former prosecutors and trial lawyers from the Serious Fraud Office (SFO), Office of Fair Trading (OFT), Department of Justice (DOJ), and the Securities and Exchange Commission (SEC).
- A well-established network of global and local experts who seamlessly assist “on the ground” in multiple jurisdictions.
- Deep expertise and resources across the firm enabling us to work as a team to provide a solutions-based approach for clients.
Anti Bribery and Corruption

Companies and executives face a challenging anti-corruption enforcement environment with US, UK, and other international authorities devoting unparalleled resources to investigate and prosecute companies, senior executives and directors for violations of the US’s Foreign Corrupt Practices Act (FCPA), the UK’s Bribery Act, and other anti-bribery regulations. Arnold & Porter is at the forefront in global anti-corruption defense, adept with issues under the FCPA and the UK Bribery Act, and other anti-bribery laws and regulations. Our anti-corruption team conduct and advise on:

- Internal investigations to identify and remediate any concerns of misconduct for clients including parallel jurisdiction investigations.
- Implementation and ongoing management of complex compliance programmes
- External law enforcement investigations
- Self Reporting and negotiations with Law Enforcement both in the UK and US

Economic Crime – Corporate and Internal Investigations

Our London-based team led by Kathleen Harris are experienced in handling major and complex allegations against corporate and individual suspects of all criminal offences, in particular fraud, corruption and money laundering. Clients benefit from the teams experience working within the Law Enforcement agencies within the UK including the Serious Fraud Office. We routinely handle matters ranging from:

- Criminal defense work acting for corporate clients and individuals charged with fraud and corruption offences
- Representing corporate and individuals facing criminal and regulatory investigation
- Advising corporate clients on systems and procedures to mitigate the risk of liability for fraud, corruption, money laundering and regulatory action
- Advising clients on self referral to law enforcement bodies

Our insider’s perspective, means we have developed stellar reputations for defending companies and individuals against government tactics.
Cartels

We take a multidisciplinary approach to cartels with both our global Antitrust and our Anti-corruption teams in response to increasingly coordinated efforts of antitrust and anti-corruption authorities including the European Commission, Office of Fair Trading and the Department of Justice. Members of our team have gained first-hand experience working within these authorities in this particular area of the law and can therefore advise on a comprehensive defence strategy. We act for companies and their officers on matters relating to the following:

- Applications for leniency
- Criminal enforcement under the Competition Act
- Regulatory competition enforcement
- Chapter 1 prohibition
- EU Commission Investigations

FCPA

Arnold & Porter have counseled and represented public and private companies, US- and foreign-based issuers, multinational financial institutions, board committees, officers, directors, and employees in a diverse range of industries on the FCPA and other anti-corruption matters. We have FCPA and anti-corruption experience in all regions of the world, including Asia, Latin America, the Middle East, Africa, and Europe.

Our capabilities include:

- Counseling companies on the establishment of operations in Red Flag FCPA countries
- Counseling on all aspects of FCPA compliance and day-to-day practical business needs worldwide.
- Conducting FCPA due diligence in connection with corporate acquisitions and other business combinations
- Conducting FCPA compliance investigations, including review of allegations of FCPA violations by company employees, sales representatives, and other third parties
- Representing companies and individuals before the DOJ and the SEC against allegations that the FCPA has been violated
Representative matters: White Collar Crime

- Retained by the Management & Standards Committee (MSC) of News Corporation to assist in relation to the News of the World phone hacking case, police payments investigation and other relevant connected issues at News International.

- Advice to a number of pharmaceutical companies on the implications of the UK Bribery Act and on upgrade of appropriate compliance procedures.

- Advice to a multi-national pharmaceutical company on issues surrounding allegations concerning the provision of inappropriate inducements to health professionals in Eastern European markets. Conducting a full internal inquiry on the company’s behalf of such allegations and lack of compliance with company procedures by certain employees and distributors.

- Representing individuals in relation to the TCI corruption allegations.

- Advised a range of companies in different sectors including pharmaceutical, shipping, financial services, retail, media and telecoms.

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Tab 5: Supporting Materials
The Extraterritorial Reach of the FCPA and the UK Bribery Act: Implications for International Business

Business in today’s world is global, and anti-corruption enforcement is as well. Given the extraterritorial reach of the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act (Bribery Act), multinational corporations with connections to the United States and the United Kingdom are becoming increasingly aware of the risks of enforcement of these two statutes by the US and UK authorities. Many companies operating or headquartered outside of the United States are questioning how these laws may be applied to their conduct, and, if so, what course of action they should take to protect themselves from liability.

Recent statistics reflect the global nature of enforcement. In 2011, 72 percent of the financial penalties in FCPA cases were assessed by US authorities against non-US companies, even though these companies comprised only 41 percent of those investigated. In the past two years, 16 of the 36 corporate FCPA enforcement cases—nearly half—have involved non-US parent companies. Nine of the 10 largest penalties to date imposed by US authorities for alleged FCPA violations were levied against foreign companies. Additionally, in 2011, there was a record number of non-US individuals charged with crimes in the United States—of the 18 individuals charged in 2011, 12 were non-US citizens.

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While enforcement of the Bribery Act is just getting underway in the aftermath of the law’s July 2011 effective date, the UK’s Serious Fraud Office (SFO) has made clear that the law will be enforced broadly on a worldwide scale.6

This Advisory highlights key principles of extraterritorial jurisdiction of the FCPA and the Bribery Act that multinational corporations should consider in connection with their international compliance efforts.7

**Overview of Offenses Under the FCPA**

The FCPA, enacted in 1977, consists of two general categories of offenses:

- **Its anti-bribery provisions** prohibit making—or offering to make—a corrupt payment to a foreign (i.e., non-US) government official for the purpose of securing an improper advantage or obtaining or retaining business for or with, or directing business to, any person.

- **Its books and records provisions** require foreign or domestic issuers of securities who are registered on US stock exchanges to comply with its additional provisions on recordkeeping and internal accounting controls. Books and records of covered entities must accurately and fairly reflect transactions (including the purposes of an organization’s transactions), and covered entities must devise and maintain an adequate system of internal accounting controls.

**Extraterritorial Jurisdiction Under the FCPA**

The FCPA applies broadly to numerous categories of US and non-US persons and businesses, and in many cases can give rise to liability even where the corrupt act takes place entirely or mostly outside the United States. There are three key extraterritorial features of the law.

First, US persons and businesses are prohibited from undertaking corrupt conduct that violates the FCPA anywhere in the world. Such US persons and businesses include US citizens and resident aliens, as well as businesses organized under US law or with a principal place of business in the United States. In addition, these US persons and businesses may be considered responsible for the activities of their officers, directors, employees, and third-party agents (regardless of their citizenship), as well as of their foreign subsidiaries.8 The FCPA thus applies to the activities of US persons, including companies, around the world.

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6 The Director of the UK’s Serious Fraud Office, Richard Alderman, has commented that the Bribery Act’s extraterritorial jurisdictional provision is a crucial means by which the SFO intends to address his primary concern that the Bribery Act would otherwise “put ethical U.K. companies at a disadvantage with the consequential effect on their employees.” Richard Alderman, Director, Serious Fraud Office, Remarks at the Third Russia & CIS Summit on Anti-Corruption Conference (Mar. 16, 2011), available at: http://www.sfo.gov.uk/about-us/our-views/director%27s-speeches/speeches-2011/3rd-russia-cis-summit-on-anti-corruption-conference,-moscow.aspx.


8 For example, the Justice Department entered into a deferred prosecution agreement with the US company Johnson & Johnson in 2011 for conduct undertaken by its subsidiaries and agents in Greece, Poland, and Romania. Keith M. Korenchuk, Kirk Ogrofsky, Samuel M. Witten, Benjamin H. Walffisch, Arnold & Porter LLP, “Advisory: J&J Agrees to Pay US$78 Million to Settle Allegations of Payments Made to European Healthcare Providers” (April 2011), available at: http://www.arnoldporter.com/public_document.cfm?id=174698&key=J1J. To cite another example, Pride International (Pride) signed a deferred prosecution agreement with the Justice Department to settle allegations that three of Pride’s subsidiaries, located in Mexico, Venezuela, and India, falsified records to disguise bribe payments made to non-US government officials by their employees abroad. While the actions were essentially taken by the overseas entities, the falsified records were consolidated into Pride’s annual report. US Dept of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties, available at: http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html. Thus, violations of the FCPA’s books and records and financial control provisions can also lead to liability for subsidiaries. The SEC has similarly imposed civil liability on parent companies where foreign subsidiaries of the parent falsified books and records. For example, the SEC filed an enforcement action against Nature’s Sunshine Products, Inc. and two of its officers, relying heavily on false accounting records created by Nature’s Sunshine’s subsidiary in Brazil in connection with payments made to Brazilian officials. US Securities & Exchange Commission, SEC Charges Nature’s Sunshine Products, Inc. With Making Illegal Foreign Payment, available at: http://www.sec.gov/litigation/litreleases/2009/lr21162.htm.
Second, any issuer of securities on a US stock exchange, whether the issuer is a US or non-US company, or any officer, director, employee, or third-party agent of such issuer or any stockholder thereof acting on behalf of such issuer, is prohibited from using the US mails or any means or instrumentality of US interstate commerce for corrupt conduct anywhere in the world. For example, companies that are listed on the New York Stock Exchange will find themselves subject to the FCPA even though their headquarters and principal place of business are located elsewhere.

Third, non-US persons are prohibited from using US mails or any means or instrumentality of interstate commerce or doing any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value corruptly to a foreign official. Thus, liability under the FCPA does not end with US persons and business or issuers of securities on US exchanges, but also includes individuals of any citizenship that take any action while in the United States in furtherance of a corrupt payment to a foreign government official. In today’s matrixed business world with worldwide electronic communication and intertwined financial transactions, the reach of the FCPA can extend quite far. Accordingly, non-US companies may find themselves subject to the FCPA because some business activity that relates to the misconduct has a US connection, even though this connection is not great.

In addition to liability under the FCPA, non-US persons and companies could be liable for conduct outside the United States that constitutes ancillary offenses under US criminal law, such as conspiracy or aiding and abetting. For example, if a non-US person who is not otherwise expressly covered under the FCPA assists a covered US person in consummating a corrupt act under the statute, the non-US person might in some circumstances be subject to US prosecution for providing that assistance.

The increasingly common reality is that US enforcement agencies can make use of these extraterritorial provisions of the FCPA to exert jurisdiction on the basis of actions as slight as registering American Depository Receipts, sending incriminating emails, or making a transfer to a US bank account. Companies also face significant risks related to third-party agents who act on their behalf in dealing with foreign governments.

Another major consideration is that if an investigation is started by the US government, a company subject to that investigation may try to raise the lack of jurisdiction as a defense. In that context it is likely that an investigation into the underlying conduct will proceed, with considerable defense costs being incurred while jurisdictional arguments are raised. From a practical perspective, therefore, the uncertainty of ultimately prevailing on a defense based on jurisdictional grounds will likely result in a negotiated settlement, particularly if there is underlying conduct that appears improper. In short, jurisdictional arguments will not prevent the costs and operational disruption of an investigation from being incurred.

Thus, it is crucial that multinational corporations, whether operating in the United States or not, take into consideration the potential liability under the FCPA to which their operations may be exposed.

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10 For example, the Justice Department asserted extraterritorial jurisdiction over Bridgestone, a Tokyo-based manufacturer, regarding FCPA violations based on emails sent between Japan and the United States in connection with a bribery scheme. US Dep’t of Justice, Bridgestone Corporation Agrees to Plead Guilty to Participating in Conspiracies to Rig Bids and Bribe Foreign Government Officials: Company Agrees to Pay $28 Million Criminal Fine, available at: http://www.justice.gov/opa/pr/2011/September/11-crm-1193.html.

Overview of Offenses Under the UK Bribery Act

The Bribery Act came into force with enormous fanfare on July 1, 2011. Much of the commentary in relation to the Bribery Act agonizes over what is perceived to be its broad jurisdictional reach.

The Bribery Act creates three offenses which seek to capture actual acts of bribery: bribing another person, being bribed, and bribing a foreign public official (collectively "the Bribery Offenses"). In addition, the Bribery Act creates an entirely new offense for commercial organizations that fail to prevent bribery.

Extraterritorial Jurisdiction of the Bribery Offenses Under the Bribery Act

In summary, the Bribery Act extends jurisdiction to both offenses committed in the UK and those committed elsewhere that retain a "close connection" to the UK.

In cases where the Bribery Offenses are committed in whole or in part in the UK, the nationality or place of incorporation of the culprit is irrelevant. In this regard, the Bribery Act is not, in any way, new or controversial. It accords with both the general criminal law of the UK, which is usually concerned with conduct within the jurisdiction, and the pre-existing bribery legislation, which was brought into force in 2002 and later repealed and replaced by the Bribery Act. Under the Bribery Act, senior officers of a corporate body who are implicated in the commission of the Bribery Offenses are guilty of the same offense.

The jurisdictional reach of the Bribery Offenses is wider when the criminal conduct is committed by individuals or corporate bodies with a "close connection" to the UK.

Extraterritorial Jurisdiction of the Failure to Prevent Bribery Offense Under the UK Bribery Act

While prosecution of the Bribery Offenses largely relies on conventional principles of jurisdiction, the Bribery Act also creates an entirely new offense that broadly expands the Bribery Act’s extraterritorial reach: the criminalization of a commercial organization’s failure to prevent bribery. Liability for the actions of another in the context of a serious criminal offense like bribery is unusual in the UK, but it is an important part of the new offense under the Bribery Act.

Under the Bribery Act, once it is established that a commercial organization carries on a business or part of a business in the UK (regardless of where it is incorporated), if an "associated person" (for example, an employee, agent, or subsidiary) bribes another person or a foreign public official for its benefit, the organization may be guilty of the offense unless it can demonstrate that it had adequate procedures in place to prevent such conduct.

Importantly, it does not matter if the "associated person" has no connection with the UK or that the offense took place abroad. This means that, theoretically, a parent company incorporated in Australia whose agent based in Vietnam bribes a Chinese official for the parent’s benefit would still be subject to prosecution under the Bribery Act.

13 Id. § 1.
14 Id. § 2.
15 Id. § 6.
16 Id. § 7.
17 Id. § 14.
18 Id. § 12(2)(c).
19 Id. § 12(4).
20 Id. § 12(3).
21 Id. § 12(4)(g).
22 Defined in section 8 of the Bribery Act.
could be prosecuted in the UK because its subsidiary is located in London, regardless of the fact that the subsidiary is uninvolved in the offense.

In this way, the jurisdictional reach of the offense of failure to prevent bribery is broader than the jurisdictional reach of the Bribery Offenses, in that the former extends to overseas commercial organizations that carry on a business or part of a business in the UK whereas the latter are restricted to entities with a “close connection” with the UK, as described above.

Therefore, with regard to the offense of failure of a commercial organization to prevent bribery, there has, indeed, been a significant extension of jurisdiction under the Bribery Act, well beyond both the general criminal law of the UK and the pre-existing legislation. Given this extensive scope, there is clearly potential for multinational corporations to find themselves subject to concurrent scrutiny by the UK authorities under the Bribery Act and the US authorities under the FCPA. It is important to note that there are significant differences as to what may constitute an offense under the Bribery Act and the FCPA, therefore corporate clients must ensure that their anti-corruption measures satisfy both jurisdictions.

It remains to be seen whether the SFO will succeed in utilizing its extensive new jurisdictional reach under the Bribery Act by prosecuting overseas commercial organizations with a presence in the UK for failure to prevent bribery outside the jurisdiction. As previously mentioned, the SFO has certainly expressed bullish intentions in this regard and, when asked whether they would investigate and prosecute companies that have a limited connection to the UK, the SFO is quoted as saying:

We welcome the ability to investigate and prosecute companies carrying on part of a business here, irrespective of where they are registered. It is part of creating a world level playing field which would see those companies having to adhere to the same international standards of our own companies and the international community.23

In this climate, multinational corporations with a presence in the UK would be well-advised to take the precautionary step of ensuring the adequacy of their compliance procedures. In other words, they should ensure to implement an effective anti-corruption compliance program.

This is particularly important in light of the fact that the SFO has recently taken steps to enhance their intelligence gathering faculties, which may indicate that such words are not mere prosecutorial puff. On November 1, 2011, the SFO launched a new service for confidential reporting of suspected fraud or corruption. In a message to potential whistleblowers, SFO Director Richard Alderman said,

I want people to come forward and tell us if they think there is fraud or corruption going on in their workplace. Company executives, staff, professional advisors, business associates of various kinds or trade competitors can talk to us in confidence.

Conclusion

Global companies must be vigilant and acutely aware that both the FCPA and the Bribery Act may have direct impacts on their operations, even if they only have limited activity in the United States or the United Kingdom. As evidenced above, non-US companies have frequently been the targets of US enforcement actions. While the Bribery Act is relatively new, similar enforcement trends in the United Kingdom seem likely. For these reasons, global businesses should strongly consider the implementation of effective anti-corruption programs in order to reduce the risk of violating either anti-corruption statute by preventing,

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detecting, and responding to improper conduct. Asserting jurisdictional defenses is simply not likely to create a successful defense once a government enforcement authority has determined that it will proceed to prosecute under any of the rationales for extraterritorial jurisdiction outlined in this Advisory. Implementing and maintaining an effective anti-corruption program remains a prudent and recommended course of action to decrease corruption risks.

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