

Uncle Sam's giant octopus

The UK should brace itself for aggressive US anti-corruption tactics, say **Gary Summers** and **Sue Thackeray**

IN BRIEF

- As companies undergo greater globalisation, the extra-territorial reach of national economic regulation, particularly from the US, is increasingly impacting on life in the UK boardroom, eg BAE Systems is the subject of an anti-corruption probe by the US Department of Justice.
- The current fast-track extradition arrangements between the US and UK mean senior executives are at risk when doing transactional or banking business with the US.
- According to research at the World Bank Institute in 2004, more than US\$1,000bn is paid in bribes each year.

British corruption law is somewhat antiquated and dispersed around several different statutes and common law principles.

These are the common law offences of bribery and misconduct in public office, the Public Bodies Corrupt Practices Act 1889 (PBCPA 1889) and the Prevention of Corruption Acts, Acts dealing with specific mischief such as the Sale of Offices Act 1809, the Honours (Prevention of Abuses) Act 1925, and the Representation of the People Act 1983, ss 107, 109 and 111–115.

"UK extradition laws are a mere sluiceway to showcase trials across the Atlantic"

The extra-territorial ambit of the UK law was strengthened in the Anti-terrorism Crime and Security Act 2001 (ACSA 2001). Two changes were made. First, ACSA 2001, s 108 amended the existing statutory offences to ensure that:

- The common law offence of bribery extends to people holding public office outside the UK. The government takes the view that the law, with effect from 14 February 2002, now clearly covers the

bribery of foreign office holders such as judges, MPs and ministers.

- The corruption offences in PBCPA 1889 and the Prevention of Corruption Acts cover (respectively) the corruption of foreign public officials and foreign "agents" in the public or private sector.

Second, ACSA 2001, s 109 gives the courts in England, Wales and Northern Ireland extra-territorial jurisdiction over bribery and corruption offences committed abroad by UK nationals and bodies incorporated under UK law. It thus enables bribery offences, when committed by UK nationals and bodies incorporated under UK law, to be prosecuted in the UK, wherever those offences take place.

Despite these changes, most informed experts agree that the UK law needs to be codified by means of a new Act which clarifies and simplifies the law.

The Organisation for Economic Co-operation and Development (OECD), unhappy with the way that the UK government involved itself in the Serious Fraud Office's decision to drop planks of its investigation—impacting on Saudi Arabia—into alleged corruption at BAE, is presently investigating the UK's legislative infrastructure and the government is likely to face increased international pressure to codify and effectively enforce the law.

A renewed enforcement zeal is promised. However, historically it is plain that the response of the UK enforcement authorities in this area has been woeful and it is from concerted action emanating from across the Atlantic that UK corporations and their executives have most to fear.

HISTORY OF FOREIGN CORRUPT PRACTICES ACT 1977

The US Foreign Corrupt Practices Act 1977 (FCPA) was enacted in wake of investigations by the US Security Exchange Commission

(SEC) which revealed that hundreds of US companies had paid bribes totalling more than \$300m to foreign government officials, politicians and political parties.

All US citizens and firms, including foreign companies whose shares are quoted on the New York Stock Exchange (NYSE), are subject to the FCPA. Its anti-bribery provisions make it unlawful to bribe foreign officials to obtain or retain business. "Foreign official" includes any officer or employee of a foreign government or any person acting in an official capacity. Also included are foreign political parties, candidates for foreign political office and any intermediaries where it is known that the payments are destined for such officials.

Later amendments by the International Anti-bribery and Fair Competition Act in 1998 bring the FCPA into line with the broader terms of the OECD's Convention on Bribery to make it plain that it is a crime to make or offer payments to any foreign official to secure "any improper advantage". The definition of a public official was expanded to include officials of public international organisations, eg the UN, the World Bank and the International Monetary Fund.

TERRITORIAL AMBIT

The territorial ambit of the FCPA was widened to include all foreign people—including agents and employees of US businesses regardless of nationality—who commit an act in furtherance of a foreign bribe while in the US and include the acts of US businesses and nationals in furtherance of unlawful payments that take place wholly outside the US. A wire transfer passing through a US bank would be sufficient to found US jurisdiction.

Coupled with principles of vicarious liability of the company for the acts, actions and state of mind of management, agents and intermediaries around the world, it is easy to see why multi-national companies, with US links, are coming to regard corruption as one of their biggest corporate risks.

IMPLICATIONS FOR COMPANIES AROUND THE WORLD

The FCPA has three broad implications for US companies as well as any other public company listed on the NYSE:

- Its anti-bribery provisions outlaw the making of illicit payments to foreign officials for commercial benefit.

- Its accounting provisions require public companies to make and keep books and records that accurately reflect the transactions of the corporation and put in place strict accounting controls aimed at uncovering and deterring corruption.
- The company itself, as well as employees, is at risk of prosecution for infringement of the FCPA's provisions anywhere in the world. Recently the US attorney general has announced that to give greater pause to the management of organisations, for every case brought against a corporation there will be a parallel case brought against individuals. No doubt it is hoped that the jailing of individuals will bring the message home.

US ENFORCEMENT STATISTICS

In 2002, a total of 29 separate cases had been prosecuted by the Department of Justice (DoJ) for contravening the FCPA's anti-bribery provisions and 12 injunctive actions brought by the SEC for violation of its accounting provisions. At that stage 34 companies had been prosecuted for activities covering 34 countries—26 non-OECD countries, five OECD countries and three non-OECD countries but signatories to the Bribery Convention. The value of bribes paid to foreign officials ranged from \$16,000 to \$9.9m and the value of fines paid by companies from \$10,000 to \$21.8m.

Contrast the position to January 2007: there have been a multitude of recent cases and record fines of \$44m—the combination of fines and profit disgorgement—handed to a subsidiary of Baker Hughes. Baker Hughes has entered into a two-year deferred prosecution agreement with the DoJ and agreed to hire a monitor (an experienced law practice) to review its current compliance practices relevant to corruption issues. Following the case, the use by Baker Hughes of third party intermediaries has reduced by 80%.

RISKS

A range of risks need to be balanced by the board. These include:

- Multiple litigation in several countries.
- Administrative sanctions.
- Civil actions.
- Damage to the company's reputation.
- Damage to brand and image rights.
- Loss of senior management.

Corporations now have to ask themselves whether the short-term financial

benefits of participating in corrupt business relationships is worth the long-term risk of contracting a corruption virus which may reveal itself in the years ahead, impacting on the corporation's integrity, growth curve and tendering capability, thereby rendering it a leper to multi-national compliant business entities.

RED FLAGS

Organisations such as Transparency International, the World Bank and Ftse4 are leading the way in guidance for corporations seeking to manage their global corruption risk.

The following risk factors are highly relevant:

- Doing business in countries with low ratings on the Transparency International Corruption Perceptions Index and/or World Bank Governance Indicators list.
- High risk industries, eg oil and gas producers; oil equipment, services, and distribution; chemicals; industrial metals; mining; construction and materials; aerospace and defence; and utilities.
- Companies involved with government contracts and/or where a government licence is required.
- Where intermediaries and/or consultants require payments in cash.
- Payment to a country other than the intermediary's country of personal and/or business residence.

BALANCED SOLUTIONS

The vicarious liability of a corporation for the corrupt use of its funds by intermediaries is one of the biggest contemporary corporate risks.

There has been a rash of recent DoJ enforcement cases in high risk industries in the last five years. Corporations in these fields may deal with hundreds of intermediaries around the world.

It is only natural for developing countries to want to develop local entities and use local people as part of the infrastructure of their engagement with a multi-national corporation.

The principal difficulty is that the corporation's relationships with intermediaries prior to and during the project are much more capable of being "business dressed" than a naked bribe. This is a high risk area.

BEING RESPONSIBLE

The responsible corporation needs to bring the following characteristics to bear in its compliance programmes:

- good due diligence procedures;
- a compliance culture and not just a dusty manual on a shelf in head office;
- a strong foundation of financial control underpinning the compliance programme;
- transparent and accountable controls on the delegation of authority; and
- third party payment controls.

For board members and senior executives who fail to manage these risks, personal criminal liability and prison sentences are likely in the US. We have seen from the recent extradition of the "NatWest Three" that UK extradition laws are a mere sluiceway to showcase trials across the Atlantic.

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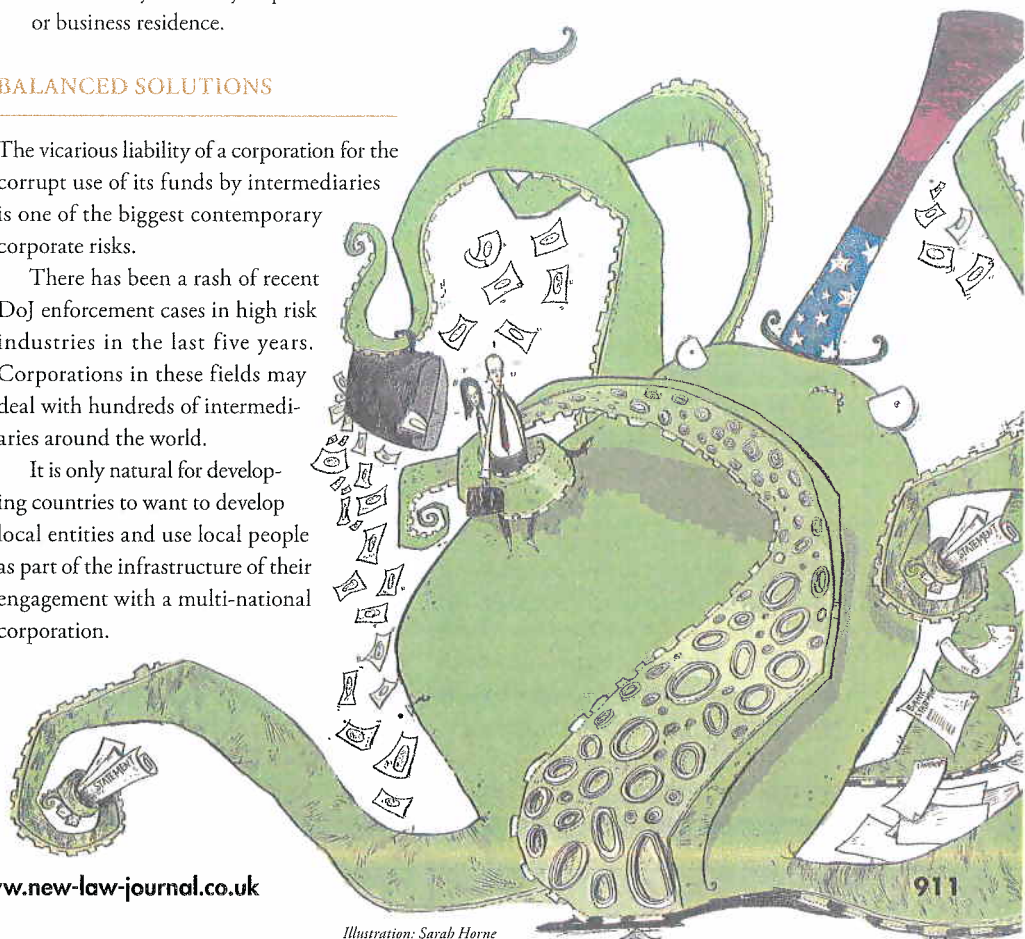


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