

Corporate and Company

Corporate Liability

Anti-bribery Laws in Europe: A Review of Developments in 2008 & 2009

Contributed by

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The United States is usually considered to be the world's leading policeman in terms of investigating and prosecuting companies and individuals for bribery offences under the Foreign Corrupt Practices Act 1977 (FCPA). However, over the past number of years, we have witnessed an increase in the number of investigations and prosecutions for anti-bribery offences brought by European authorities. This article will take a look at developments in the United Kingdom, France, and Germany. It will also consider the U.S.' approach to European companies and will conclude with a practical section offering advice on due diligence and red flags.

Overview of Enforcement Action in Europe

There have been an increasing number of investigations and prosecutions in 23 European countries over the past four years.¹ However, this trend is not consistent amongst all of the countries. For instance, nine of the countries surveyed had never had a single reported prosecution² and four had never had a single investigation.³ The anti-bribery enforcement was concentrated in 14 countries⁴ and, taken together, their year on year prosecutions more than doubled. Six countries⁵ were particularly active and had a four-fold increase in prosecutions.

In addition to enforcement at the European level, European companies were also subject to investigation and prosecution by the U.S. under the FCPA. According to public sources, at least 17 European businesses were involved in FCPA investigations or prosecutions in 2008, including companies of considerable size such as AB Volvo, Magyar Telekom, and Royal Dutch Shell.

The case of Panalpina, a Swiss international freight forwarding company, is illustrative of how other companies can be brought into an investigation through the investigation of another company. In its 2008 accounts, Panalpina disclosed that it had been required by the U.S. authorities in 2007 to produce documents relating to services rendered as customs agents in Nigeria for two specific customers. This had arisen from an investigation

and plea agreement between the U.S. and one of its customers, and related to allegedly improper payments by Panalpina to Nigerian officials to secure preferential treatment.⁶ This led to further subpoenas in 2007 for information on Panalpina's services to customers in Nigeria, Kazakhstan and Saudi Arabia. By 2008, at least nine other companies were implicated. Panalpina subsequently suspended part of its operations in Nigeria, costing it CHF23.8 million in EBITDA.⁷ It also suffered substantial costs in relation to the U.S. investigation, together with the cost of conducting and implementing a review of its compliance regime.

There were at least seven cases in 2008 of major companies which had been subject to parallel investigations in multiple jurisdictions (including Europe). In one such case there were investigations in France, Switzerland and Brazil, involving activity in Bahrain, Hong Kong, Liechtenstein, Singapore, Thailand and Uruguay. The Siemens case is another good example of investigations in multiple jurisdictions. Siemens was initially investigated for bribery in Italy and Switzerland. However, this resulted in further investigations in at least 18 jurisdictions.⁸

The Siemens case is also a good example of the risks involved. In December 2008, it announced a settlement of some of its risks for \$1.6 billion. In addition, its total costs to date appear to be over \$2.9 billion.⁹ It has also been debarred from certain contracts; has been subjected to an independent monitor for four years; and has been involved in civil litigation, not to mention the diversion of its management in dealing with all these matters. The punishments suffered by Siemens in 2008 are at record levels.

Developments in the UK

Most people would be forgiven for not knowing about the UK's existing statutory framework for dealing with bribery offences.¹⁰ This is because the UK's historical record for fighting corruption has been poor. This is set against a background of continual criticism from the Organisation for Economic Cooperation and Development (OECD) of the UK's failure to comply with its obligations under the Anti-Bribery Convention.¹¹ This was echoed in November 2008 when the Law Commission condemned the current law for being out-dated and, in some instances, unfit for purpose.¹²

However, the UK made progress in 2008. In September 2008, the UK had its first conviction for foreign bribery¹³

involving the payment of bribes by the Managing Director of CBRN Team Ltd, a UK security company, to a Ugandan government official.¹⁴ In the same month, the case against Shinder Singh Gangar, Alan White, and Nigel Heath was concluded, with the conviction of Heath for conspiracy to commit corruption in the UK which involved a conspiracy to corrupt the U.S. Attorney General and/or the U.S. Justice Department to lift a freezing order over bank accounts containing investor money which had been obtained through a Ponzi-Fraud. Gangar and White were convicted earlier in the year for the same offence.

In April 2008, Richard Alderman was appointed as the new director of the Serious Fraud Office (SFO). The SFO increased its resources for tackling corruption, and appointed a new Head of Anti-Corruption. In October 2008, the SFO announced a settlement with Balfour Beatty for £2.25 million in a case involving payments by a subsidiary for a \$130 million UNESCO project to rebuild the Alexandria Library in Egypt. The SFO used new powers under the Proceeds of Crime Act 2002, and obtained a Civil Recovery Order to claw back the unlawful proceeds.

In November 2008, the Law Commission published its final report on bribery, which included a comprehensive draft Bill, recommending the repeal of the current law and the introduction of two new general offences of paying and receiving a bribe, and a specific offence of bribing a foreign official. Notably, these offences would also apply to foreigners resident in the UK. It also recommended the introduction of a new corporate offence of negligently failing to prevent bribery.¹⁵ For more than a decade now, the UK Government has been considering reforming its anti-bribery laws and on 25 March 2009, the Government finally put forward a draft Bribery Bill which closely follows the recommendations and draft proposals made by the Law Commission.

Progress continued in 2009 with the Financial Services Authority imposing a record £5.25 million fine on Aon Ltd for systems and controls deficiencies which failed to detect suspicious payments made to overseas third parties.

However, it has not all been positive news. In July 2008, the House of Lords held that the SFO had been justified in ending its investigation on grounds of national security into the alleged improper payments by BAE Systems Plc relating to a £43 billion Saudi arms agreement. This caused the Government to consider introducing reforms which would give clear statutory grounds to the Attorney General to stop an investigation on national security grounds and to remove judicial review. It is not clear whether or not this will become law.

Given the current economic climate, it is unclear what priority fighting corruption will be given on the Government's agenda. Although the Government's publication of the draft Bribery Bill in March 2009 was a positive sign, it is not clear whether this move was a genuine attempt to reform the law or a way of appeasing its critics at the OECD.

Developments in France

According to the French Authorities, there are currently 19 judicial investigations and 16 preliminary investigations pending. This represents a significant increase over the past couple of years in terms of the number of investigations in France. Most of these investigations are concentrated in the oil and gas, arms and military, and construction and engineering sectors.

France made corruption a criminal offence when it implemented the OECD Anti-Bribery Convention by the Act of 30 June 2000 and the reform Act of 13 November 2007. Consequently, the following offences are punishable:

- Unlawfully proffering, at any time, directly or indirectly, any offer, promise, donation, gift or reward, in order to induce a person holding public authority, discharging a public service mission, or vested with a public electoral mandate;
- Carrying out or abstaining from carrying out an act pertaining to an office, duty, or mandate, or facilitated by this office, duty or mandate; and
- Abusing real or alleged influence with a view to obtaining distinctions, employments, contracts or any other favourable decision from a public authority or the government.

In relation to individuals, there is a sanction of up to 10 years imprisonment and a fine of up to €150,000. Companies may also be found criminally liable, thereby incurring a fine which is up to five times the amount for which an individual is liable. There are also very heavy additional penalties for legal entities such as:

- Prohibition for a maximum of five years from participating directly or indirectly in the professional activity in which, or as a result of which, the offence was committed;
- Judicial surveillance;
- Closure of the branch or branches of the company which have been used to commit the offence;
- Exclusion from the market place / public procurement;

- Prohibition from IPOs; and
- Prohibition from writing cheques other than those which allow for their own funds to be drawn or certified cheques and disallowing the use of credit cards.

The Act of 13 November 2007 added to the investigative powers of French prosecutors and judges by allowing them to use investigative means which were only previously used to combat more serious crimes (such as drug trafficking). These powers include:

- Extended surveillance: police officers may extend to the whole national territory the surveillance of persons or the surveillance of the transport of goods;
- Infiltrations where the use of assumed identity is possible;
- Interception of correspondence, voicing and capturing of images are authorised; and
- Seizure of assets to guarantee the payment of the fines incurred is also authorised.

French criminal law is competent to handle all offences punishable by imprisonment whether committed by a French Citizen or a foreigner outside France where the victim is a French national at the time of the offence. Furthermore, the Act of 13 November 2007 provides protection for whistleblowers through the French Labour Code (in the wake of Sarbanes Oxley implementation).

In terms of recent cases, in December 2007 the Indian government scrapped a \$600 million deal to acquire 200 helicopters after allegations of corruption in the bidding process. In July 2008 a French firm was cleared over an Indian Submarine deal worth €2.4 billion to buy six submarines (an Indian pressure group alleged that New Delhi was shielding Indian middlemen who took commissions to clinch the deal). Also in 2008, it was reported that investigations were under way concerning alleged ALSTOM-related payments of hundreds of millions of dollars in bribes to secure contracts in Asia and Latin America. The representatives questioned confirmed that the company used slush funds. Furthermore, in December 2007 the French Supreme Court applied the 1980 Blocking Statute for the first time, which strengthens the conditions under which evidence to be used in foreign litigation can be obtained in France (the decision is one aspect of the Executive Life Case).

Developments in Germany

According to figures provided by Transparency International, Germany has experienced a considerable increase in investigations and prosecutions of foreign bribery cases in the last two years.¹⁶ The German Federal Court of Justice (*Bundesgerichtshof*) also delivered two noteworthy decisions in 2008.

In the first case, managers of a German conglomerate had bribed officials of the state-owned Italian energy company to secure a multimillion Euro deal. They used a network of bank accounts registered in the name of letterbox companies, which were hidden from the regular accounting system, and a slush fund – thereby violating the conglomerate's official anti-bribery regulations. The *Bundesgerichtshof*¹⁷ did not convict the defendants for the actual payment of the bribe due to jurisdictional reasons. However, it ruled that one of the defendants (owing to his senior position) had breached his fiduciary duty *vis-à-vis* the conglomerate by running such a secret payment system, irrespective of the defendant's plan to transfer the money back into the regular accounting system at a later date, or whether his action benefited the company. Therefore, the mere maintenance of a secret payment system was in itself a criminal breach of trust *vis-à-vis* the company.

The second case concerns the CEO of a public utility company who had sent ticket vouchers for the FIFA World Cup 2006 to, amongst others, the prime minister, five ministers of the state of Baden-Württemberg, and to a state secretary at the Federal Environment Ministry in Berlin. The court of first instance acquitted the defendant of bribing public officials via his sponsoring concept. The *Bundesgerichtshof*¹⁸ upheld this finding, but made clear that the CEO was very close to having overstepped the line. The court elaborated on the requirements for establishing criminal liability. There has to be a "*quid pro quo*" relationship between the advantage and the future or previous activity of a public official in the course of an official duty; the granting of the advantage has to be aimed at exerting influence over a future activity or for rewarding a previous activity; the activity need not be specified – a general goodwill referring to future activities will suffice.

The fact that the public utility was one of the main sponsors of the World Cup and that it was possible that the motivation for sending the ticket vouchers was the marketing effect of the politicians' presence in the utility's lounge during the soccer matches – other than influencing them in the utility's favour, prevented the defendant from being convicted. Nevertheless, companies should take note of the judgment in relation to their sponsoring projects.

In the wake of recent events, such as the two cases exemplified, considerable public attention was focused on

bribery in Germany. However, given the decentralised structure of the police and the judiciary in Germany and the current political distribution of power, it appears unlikely that the central register of companies involved in bribery or the extension of the competences of the *Bundeskriminalamt* (Federal Criminal Police Office) asked for by some lobbyists will be passed by the German parliament in the near future. However, there has been significant legislative activity on whistleblower protection.

European Companies under the FCPA

In 2008, we observed two distinct trends – the levying of record penalties and the targeting of individuals for prosecution. These two trends are expected to continue for the foreseeable future. The new administration in Washington is committed to increase enforcement efforts against white collar crime, and anti-corruption is an area that will remain one of the top enforcement priorities.

As to penalties, as mentioned above, the U.S. imposed staggering penalties on Siemens and Kellogg, Brown and Root (KBR). These cases also demonstrate the extraordinary cooperation that now exists between U.S. and European enforcement authorities, which will only grow as they continue to work together towards the same goals. The large penalties have continued into 2009 with KBR agreeing to pay a \$402 million criminal fine and, along with its former parent company, Halliburton, to pay \$177 million in disgorgement of profits.

The U.S. has made it clear that the increased targeting of individuals for FCPA violations “was no accident.” In 2008, the U.S. indicted or took pleas from more than a dozen people for FCPA violations. These individuals included Jack Stanley, the former CEO of KBR. Stanley pleaded guilty to violating the FCPA, and faces a sentence of seven years under the plea agreement. He also agreed to pay disgorgement of \$11 million.

The prosecution of individuals is continuing into 2009. The U.S. recently indicted two UK citizens – Jeffrey Tesler and Wojciech Chodan – for their alleged participation in paying bribes related to KBR’s involvement in securing contracts related to a liquefied natural gas facility in Nigeria (connected to the Stanley prosecution mentioned above). Chodan worked for a UK subsidiary of KBR, but is alleged to have acted as an agent of a U.S. domestic concern because he reported to Stanley and other KBR employees. Tesler was said to be an agent of an issuer, which was a member of the joint venture. The U.S. is currently trying to extradite both men.

Finally, the U.S. has recently brought another weapon to bear in its anti-corruption fight – the use of a forfeiture action to recover the alleged bribe money (\$3 million) that

is currently sitting in a Singapore bank account. The money is alleged to have been the proceeds of foreign corruption – the actual bribe money paid to the son of the former prime minister of Bangladesh to obtain government contracts. This action represents a significant leap in enforcement tactics by the U.S.. Although the FCPA does not apply to the foreign official who receives the bribe, this action is aimed at recovering the money that was used as the bribe and is supposedly in that person’s pocket.

Red Flags & Due Diligence

Given the risk of huge fines, prosecution, and legal and other advisory costs, it is important that businesses identify issues early on and address them. Below is a non-exhaustive list of red flags which should make companies reconsider their position.

- Large and numerous end-of-year adjustments;
- Foreign operations managers received unusual bonuses;
- Inconsistent invoicing or over-invoicing;
- Transactions recorded as “cash” or cheques drawn to cash;
- Agent refuses to confirm that he/she understands anti-bribery laws and will comply;
- Request that the payment be paid in a third country or to a third party;
- Large Commission, retainer, or fee requests;
- Customer or agent is owned or controlled by government official;
- Customer or agent is owned or controlled by relative of government official; and
- Requests for extravagant gifts.

To avoid falling foul of anti-bribery legislation, businesses should ensure that they have effective compliance programmes in place and that their employees are trained on a regular basis. Businesses should also carry out due diligence checks and maintain accurate and up to date due diligence files on agents and other consultants that they wish to use. Businesses should also conduct yearly internal audits and compliance reviews.

Companies merging or acquiring other businesses should, when carrying out due diligence exercises, pay particular attention to the seller’s history of compliance with anti-bribery legislation. In particular, buyers should review past audits, any due diligence files on relationships of special concern (joint ventures, commercial agents, foreign business partners, and foreign subsidiaries), and

compliance policies. Unless appropriate representations and warranties are inserted into the sale and purchase documentation, any liabilities will pass to the buyer.

Conclusion

The record number of investigations in 2008 will inevitably lead to even higher numbers of prosecutions in 2009 and 2010. As the Siemens and Halliburton cases show, the risks of getting caught can be very damaging. Despite this, companies do not appear to be prepared. In December 2008, Transparency International published its "Bribe Payers Index" survey. It asked 2,742 executives in 26 countries whether they were aware of the OECD's Anti-Bribery Convention. Three-quarters of all executives surveyed indicated that they were not familiar with the Convention. Alarming, 85 percent of these executives worked in Western Europe and/or the U.S. Only 3 percent of all executives were "moderately" familiar, and 2 percent were "very" or "extremely" familiar with the Convention. These results show a surprising lack of awareness of the law in this area. Given the high stakes involved, companies must be prepared before it is too late.

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¹ Institutional Shareholder Services, *Accountability Goes Global: International Investors and U.S. Securities Class Actions 1* (May 2007); *In re Network Assoc., Inc., Sec. Litig.*, 76 F. Supp. 2d 1017 (N.D. Cal. 1999).

² Institutional Shareholder Services, at 2.

³ *Id.* at 2.

⁴ *Id.* at 4.

⁵ NAPF Sets out Potential Rewards of Taking Part in Class Actions – National Association of Pension Funds, Press Release of 15 March 2007, available at <http://www.napf.co.uk>.

⁶ See e.g., *Morrison v National Australia Bank Ltd.*, 547 F.3d 167, 171 (2d Cir. 2008).

⁷ *Ibid.*

⁸ *In re Alstom SA Sec. Litig.*, No. 03 Civ. 6595 (VM), U.S. Dist. LEXIS 67675, at *12 (S.D.N.Y., 27 August 2008); *In re Vivendi Universal, S.A. Sec. Litig.*, 242 F.R.D. 76, 105-06 (S.D.N.Y. 2007).

⁹ When Opting Out Is Really Opting In – RiskMetrics Group, 7 November 2007, available at <http://slw.riskmetrics.com>.

¹⁰ See Green Paper on Consumer Collective Redress – European Commission, 27 November 2008.

¹¹ The Economist, *Collective litigation in Europe 4* (2007).

¹² Rachael Mulheron, Civil Justice Council, *Reform of Collective Redress in England and Wales: A Perspective of Need 15* (2008).

¹³ John Sorabji, et al., Civil Justice Council, *Improving Access Through Collective Actions – Developing a More Effective and Efficient Procedure for Collective Actions 21* (12 December 2008).

¹⁴ *Litigation and Business: Transatlantic Trends 7* – Lloyd's of London, November 2008.

¹⁵ *Litigation fund launch targets up to 160 mln stg.* – Reuters, <http://uk.reuters.com> (last visited 4 February 2009).

¹⁶ Ted Allen, RiskMetrics Group, *Europeans Take A More Active Role in U.S. Cases* (Dec. 4, 2006), available at <http://blog.riskmetrics.com/2006/12>.

¹⁷ Rob Polak, *Approval of International Class Action Settlements in the Netherlands, Int'l. Comparative Legal Guide to Class & Group Actions 2009 13* (2008).

¹⁸ U.S. Dep't of the Treasury, *Report on U.S. Portfolio Holdings of Foreign Securities 3* (October 2008).

¹⁹ *Id.* at 7.

²⁰ *Id.* at 4.

²¹ Lisa LaMotta, *EADS in a Tailspin*, *Forbes.com* (13 June 2008), available at <http://www.forbes.com/2008/06/13>; James Quinn, *EADS Faces New U.S. Lawsuits over Airbus Insider Trading*, *Telegraph.co.uk* (17 June 2008), available at <http://www.telegraph.co.uk/finance>.

²² See e.g., *In re China Life Sec. Litig.*, No. 04 Civ. 2112 (TPG), 2008 WL 4066919, at *9 (S.D.N.Y. 3 September 2008) (using effects test to find jurisdiction over claims by U.S. residents who purchased securities on Hong Kong exchange).

²³ Fay Hansen, *D&O Goes Global*, *Business Finance* (1 September 2006).