

TROUBLE AT HOME FOR OVERSEAS BRIBES CORRUPTION

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In *Syriana*, the forthcoming Hollywood film, a US lawyer is investigating irregular payments by a US oil company to secure concessions in Kazakhstan.

Danny Dalton, one of the oil company directors, tells the lawyer: "Corruption? Corruption ain't nothing more than government intrusion into market efficiencies in the form of regulation . . . We have laws against it precisely so we can get away with it. Corruption is our protection . . . Corruption is how we win."

The attitude of this fictitious character is not so far from the complacency with which many multinational businesses have approached the issue of bribery and corruption of overseas foreign officials. For some, paying bribes has been an integral part of doing business in certain overseas jurisdictions. In the film, the lawyer responds to Dalton: "You broke the law."

In reality, breaking the law has not resulted in many prosecutions for these offences.

In 1997, the Organisation for Economic Co-operation and Development convention on bribery was signed by 36 countries in an attempt to combat corruption. Since then, according to data from Transparency International, the corruption watchdog, the number of successful prosecutions for foreign bribery and corruption has been low. The US has been the most active jurisdiction, bringing 35 cases since 1998 and 17 serious investigations. France has had three foreign bribery cases and although Germany has brought only one case, it has conducted 12 serious investigations.

The UK's tally is dismal. There have been no prosecutions for bribing foreign officials overseas (since the convention came into force in UK law in 2002) and there have been only four serious investigations.

Given the high level of investment by UK companies in China and Indonesia and press allegations of corruption, the OECD deems the UK's lack of prosecutions "surprising". China and Indonesia are high on Transparency International's corruption index, which ranks perceived corruption in 150 countries using expert assessments and opinion surveys. "Surely it is realistic to expect some degree of prosecutorial activity in at least a few cases?" the OECD said in its assessment of the UK in 2005. This apparent lack of commitment to prosecute and the failure of the Corruption Bill in 2003 (it was rejected by lawyers, regulators and businesses as unworkable) could encourage UK businesses to sit back and relax. Paul Lomas, a litigation partner at global law firm Freshfields Bruckhaus Deringer, says this would be a mistake: "If businesses are not concerned, they should be."

In the US, Chris Curran, a Washington-based partner at global law firm White & Case and an expert on the Foreign Corrupt Practices Act (US legislation that makes bribing overseas officials illegal), says US general counsel are concerned about the ramifications of bribery allegations for good reason.

“There are few other areas where a single employee in a multinational organisation can with one instance of misjudgment create huge embarrassment and substantial liability, even criminal liability, for the whole corporation.”

In 2004, the US and European subsidiaries of ABB Group, the Swiss-Swedish engineering group, were prosecuted for allegedly making illicit payments of \$1.1m to government officials in Nigeria, Angola and Kazakhstan between 1998 and 2003. The fines

(including criminal ones) were in excess of Dollars 15m. At the end of last year, the UK’s Home Office responded to the OECD’s criticisms and invited suggestions on how to “tidy up existing law”. The consultation paper also proposed expanding the powers of the Serious Fraud Office and suggested that the failure to prosecute foreign bribery cases was due more to difficulties in “securing evidence in cases overseas, particularly in developing countries”, than the “fragmented” nature of the laws on bribery.

Roger Best, a litigation partner at Clifford Chance in the UK, agrees that gathering evidence in overseas bribery cases is tough for prosecutors. “How do you go about getting bank records for someone in China?” he asks. He also points to the difficulty of proving corporate liability for corruption. Company directors are not criminally liable as individuals unless they are proved to have directly sanctioned a corrupt payment.

Although the FCPA has existed in the US since 1977 and prosecutions have been more numerous since the Act was altered to reflect the provisions of the OECD convention in 1998, evidential problems pose similar challenges for US regulators.

“Enforcement people in the US are not that equipped yet to ferret out improper conduct in corporations,” comments Mr Curran. “The enforcers are not out there investigating like Eliot Ness - they are mainly waiting for the phone to ring from a whistleblower or a competitor or a self-reporter.”

In spite of this relative passivity among the enforcers, the FCPA has still been more successful in bringing prosecutions than the comparable UK legislation. Peter Burrell, a litigation partner at UK law firm Herbert Smith, says this is largely because of plea bargaining, which is a well-established procedure in the US.

“If you confess to the SFO in the UK, they have to decide whether to prosecute you, and they can’t agree the fine as that is a matter for the court. The (US’s) more sophisticated pre-trial process effectively allows the companies to proceed with a greater degree of certainty as to the outcome.”

Lawyers say there is a spider’s web of reasons why UK businesses (or companies with UK listings) cannot remain sanguine about overseas bribery.

The risk of being caught and prosecuted for this offence has significantly but subtly increased. Mr Burrell points out that auditors have been under greater whistle-blowing pressure since the UK’s Proceeds of Crime Act 2002 came into effect. The threshold for reporting is low and is generally based on whether there are reasonable grounds to suspect payment of a bribe. This may in many cases be just a one-off payment, for example to reward unusual but legitimate consulting services. The Act also strengthened the law on money laundering so if the company’s internal compliance system finds evidence of corrupt

payments, the management team is under more pressure to report the bribe to avoid money laundering charges.

Furthermore, Mr Burrell says he has noted complaints by companies that may have suffered in overseas markets because of corrupt activities of competitors. While whistleblowing from this type of source has not been common, the OECD found that 16 per cent of reports in UK foreign bribery cases came from competing companies.

Other UK legislation has also tightened the noose. Mr Best points to the Extradition and Judicial Co-operation Act, which came into force in 2003. It joins the UK to a Europe-wide simplified extradition procedure, simplifies the procedure with non-EU countries and in some cases allows suspects in the UK to be extradited without prima facie evidence from the requesting state. In essence, UK company executives under investigation can now be moved around by law enforcers far more easily, thus reducing the problems in gathering evidence.

Other lawyers point to more general trends such as convergence of world standards, increased investment in emerging markets and the fact that more UK companies have US listings, which makes them subject to the provisions of the FCPA.

The OECD UK report notes that public opinion on overseas corruption is hardening as people become more aware of the impact multinationals have on developing countries. It cites the example of a large UK beverages company that has instituted a policy of “zero tolerance”, which does not draw a distinction between bribes or facilitation payments. The latter are generally not considered to be corrupt by regulators as they are usually low in value and used to enable everyday business activities.

There is also the pressure of the UK’s lack of prosecutions. Many lawyers believe it is only a matter of time before the regulators feel under pressure to make an example.

The biggest danger facing multinationals doing business in emerging markets tends to be presented by their foreign agents or local business managers who are used to a large degree of autonomy and are keen to show a profit. Staff who win contracts for the board back home by doing “whatever it takes” have become a potent risk for multinationals.

The OECD’s country assessment reports have found that smaller companies show little awareness that bribery of overseas officials is now against the law. While bigger companies may be better informed and have the requisite global compliance programmes in place, lawyers say the need to show these programmes are more than dusty manuals on an office shelf is essential.