On the take

THE REACH OF ANTI-CORRUPTION LAWS IS GROWING. **JO RICKARDS** EXPLAINS WHY TREASURERS NEED TO ASSESS THEIR CORPORATE VULNERABILITY AND TAKE ACTION.

Executive summary

- **For some time the UK has lagged behind the US in terms of its ability, or willingness, to bring about prosecutions in corporate corruption cases. The US has led the way in corruption issues and now sees itself as the world's police force in terms of anti-corruption and regulatory enforcement.**

Against a backdrop of corporate scandals, with those involving Samsung and Siemens just two of the most recent examples to hit the headlines, we have, in recent years, witnessed a surge in corruption prosecutions and enforcement proceedings against both companies and their executives. An announcement that a company is being investigated for corruption can hugely affect its business, with the inevitable knock-on consequences for shareholders, executives and employees. And when corruption or fraudulent activity is uncovered in one area, it may trigger a widespread assumption that it is indicative of malpractice elsewhere in the company.

The increase in anti-corruption enforcement makes prevention an even higher priority than before. The World Bank has said it will implement the recommendations of the Volcker Report and create an independent advisory board composed of international anti-corruption experts and a consulting unit to help bank staff guard against fraud and corruption hitting their projects. It is clear that there has been a shift in emphasis to the identification of risks and strengthening of corporate governance in this area.

Although the UK government terminated the investigation of the Serious Fraud Office (SFO) into the sales of weapons to Saudi Arabia by BAE under the Al Yamamah contract, it is still committed to enforcing UK and international anti-corruption measures. At present, the SFO has 19 cases under inquiry and has secured an extra £22m to fund three years of investigations into the abuses of the UN oil-for-food programme by UK companies.

Furthermore, the Law Commission has suggested a new approach to amending the UK's long-standing anti-corruption legislation. In its *Reforming Bribery* consultation document, the Commission recognises the fragmented complex and uncertain nature of the UK's anti-corruption laws.

DIFFERENT APPROACHES The model for modern efforts to combat the bribery of foreign public officials is the Foreign and Corrupt Practices Act, a US law passed in 1977. This was as a response to what was known at the time as the Lockheed scandal: over 400 US listed companies were prepared to confess to bribing foreign officials at some time or other. This persuaded the US legislature that this type of corruption should not only be discouraged by administrative measures on the part of US financial watchdog the Securities and Exchange Commission (SEC), but also that it should be made a serious criminal offence. In the past 31 years there have been many prosecutions by the US authorities and numerous enforcement proceedings taken by the SEC.

In the years that followed the passage of the Foreign and Corrupt Practices Act, US companies complained loudly that while they were subject to stringent sanctions for bribing foreign officials, their non-US competitors had no such deterrent. This complaint led to the convening of a specialist committee at the Organisation for Economic Co-operation and Development (OECD) in the early 1990s; by 1997 it had agreed on a convention to prevent the corruption of foreign public officials and a body of recommendations to support that convention. This instrument became effective in 1999; today, 37 countries are signatories to it.

CRITICISM FOR THE UK The UK was one of the earliest signatories but was then heavily criticised by pressure groups, including Transparency International, for domestic laws that did not seem to coincide with the requirements of the OECD convention. Although denying this, in 2001 the UK government tagged some sections on to the Anti-Terrorism Crime and Security Act, passed in the wake of 9/11, to ensure that the bribery of foreign public officials could be dealt with on an extra-territorial basis.

The OECD convention permits peer-group monitoring among its

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members. There have now been two full-scale reviews by the Bribery Working Group, usually consisting of two other member countries, and on both occasions the UK has been severely criticised for failing to bring a single prosecution under the 2001 Act and for its decision to frustrate the inquiry into BAE Systems.

It was against this background of dissatisfaction that the UK government decided to introduce legislation in 2003, but its Bribery Bill failed to make much progress because the legislators thought it misconceived, difficult to understand and did not address all the problems anyway. Eventually, against this barrage of criticism, the government withdrew its bill. The Law Commission will now draft a new one which may be introduced into parliament at the end of this year or the beginning of next. It will then become a political football which may or may not be kicked to the back of the net during the life of the present parliament.

At the moment, the UK has a poor reputation for enforcing anti-corruption laws in connection with the bribery of foreign public officials, although it has a reasonably good record of facilitating prosecutions for commercial bribery, often referred to as private corruption, and certainly as a society the UK scores highly as a corruption-free community.

DEVELOPMENTS IN THE US Although the UK may have launched very few prosecutions, following the reforms of the OECD, the US amended the Foreign and Corrupt Practices Act to give US law enforcement a much wider reach. It is no longer just US issuers that are subject to the Act, but also any company or individual doing business in the US, using the wires or the mail.

It has been said that sending or receiving email from the US, using phones or professional advisers in the US, including financial advisers, is enough to establish jurisdiction by the US over any individual. Lest this be doubted, bear in mind the robust recent efforts by the US government to seek and secure the extradition of a number of UK nationals for a variety of different alleged offences, very often with only tenuous links to the US.

The US is by no means sanguine about the UK's lack of prosecutorial success. Indeed, no sooner did the UK government spike the investigation into BAE than the US government took up the responsibility and is now conducting its own investigation into exactly the same incidents and facts. The outcome of this investigation is unlikely to be known for a while, but the US continues to fulfill the role of the world's police force when it comes to anti-corruption and indeed other regulatory enforcement matters.

Apart from the US, other signatories to the OECD have been reasonably active. Germany has had to deal with the discovery of wholesale misconduct at Siemens, leading to at least €1.3bn being paid away unlawfully. The company is the subject of enquiries in Germany, where it has already made a financial settlement, in Switzerland, Liechtenstein, Italy, Greece, China and the US. Siemens is listed on the New York Stock Exchange and so is well within the grasp of the SEC and the Department of Justice. There have also been corruption allegations made against Volkswagen and it was recently announced that South Korea's Samsung has become the subject of a massive anti-corruption inquiry. China itself acknowledges that it has an inordinately difficult problem with corruption, as has Russia.

It should be borne in mind that the Corruption Perceptions Index (CPI), which is published every year by non-governmental organisation Transparency International, is not simply an academic exercise, but a genuine attempt to measure corporate risk in dealing with particular parts of the world.

At one end of this barometer would be a country like Norway, where the risk is deemed to be quite low, and at the other end of the spectrum are countries such as Nigeria and Kazakhstan, where risk is said to be extremely high. Transparency International also publishes a Bribe Payers Index (BPI), which has allowed it to evaluate the supply side of corruption and rank the 30 leading exporting countries according to the propensity of their companies to bribe foreign public officials.

The incoming head of Transparency International, Cobus de Swardt, has called for more stringent governmental intervention and regulation of this kind of conduct, and has said Transparency International will be relentless in pursuing governments to rigorously enforce the OECD convention.

A mention should also be made here of the United Nations Convention against Corruption, which has been signed by almost all the countries in the UN. This seeks to eventually become the

umbrella international instrument covering corruption and bribery, funding of political parties, buying and selling of political influence and so on. There is a hope that one day the convention will create a universal standard to which all countries not only pay lip-service, but which they will rigorously enforce domestically.

Some optimism may be derived from the fact that, while almost 10 years ago it was virtually unknown for former heads of state ever to be brought to justice for delinquency while in office, recent times have seen the successful conviction of a number of heads of state before the Hague Court.

A head of state is presently on trial in Sierra Leone for crimes against humanity, the former head of state of Argentina is the subject of an extradition request, while the former head of state of Chile is about to go on trial. It may well be that the likes of Presidents Suharto, Abacha, Mobuto, and others who are alleged to have raided their countries' coffers, will also go on trial, either in their own countries, or perhaps in an international tribunal with an extended jurisdictional remit.

INCREASED PROSECUTIONS But back to the US, which has had the longest track record in prosecuting corruption, and over the last six or seven years has shown a muscularity hitherto unknown in pursuing US corporate defaulters. Whereas previously the number of cases going to prosecution in a year was quite low, there are now numerous examples of prosecutions of company executives and employees and an equal number of prosecutions, or deferred prosecutions by agreement, against US corporations.

Perhaps more significant is the level of penalties that are being imposed. A combined civil and criminal monetary penalty of $44m was imposed on Baker Hughes for alleged corrupt payments in

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connection with obtaining an oilfield services order in Kazakhstan, and for other delinquent conduct in Kazakhstan, Angola, Indonesia, Nigeria and Russia.

Swiss company ABB was fined $10.5m in 2004, with an additional $5.9m disgorgement of profits. Criminal fines were later imposed in 2007 against the three former ABB subsidiaries, known as the Vetco Gray entities, and these eventually totalled $26m. This large figure was said to follow a display of leniency by the US authorities.

Siemens of Germany may possibly expect the doubtful distinction of becoming the most heavily fined foreign corporation doing business in the US.

ANTI-CORRUPTION SET TO WIDEN THE NET In conclusion, it must be emphasised that a number of recent surveys have found that senior executives of non-US companies that have joint agreements with the US, that trade inside and outside the US, trade in dollars, have email and other traffic with the US, and use US financial skill and muscle, still feel they are unaffected by US legislation and jurisprudential policy. However, the policy of the US is to take action wherever it believes the interests of the US have been or may be prejudiced. This is a very wide remit and, it would be a very brave corporate executive indeed who chose to ignore this fact.

Anti-corruption measures are not set to decrease; if anything they will increase in number and severity. The number of cases coming to light is likely also to be more numerous as the anti-money laundering pursuit of the so-called politically exposed persons gains momentum in the years to come. Politically exposed persons have money to launder because they have received corrupt payments. Banks and other financial institutions will increasingly report their suspicions of the new-found wealth of these individuals, their families and close associates. This will inevitably lead back to the bribe-payers. Treasurers should assess their corporate vulnerability, and to have in place compliant, adequate and appropriate anti-money laundering and anti-corruption policies.

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