

# Regulatory Developments to Enhance the Private Sector Role in Fighting Corruption

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# Introduction (1)

- More states are enforcing anti-corruption law.
- More companies recognise that they have a vital role to play in working with governments.
- There is a key opportunity for companies and states to work together in fighting corruption.

# Introduction (2)

Issues for states-

- Do they have the right tools?
- What should be the balance between prevention and enforcement?
- How should they work with companies that want to be proactive and report violations?

# Introduction (3)

Issues for companies-

- Are they at risk of sanctions in multiple states for the same violation?
- What incentives and disincentives are there if they want to work with states?
- How proactive should they be?

# How Proactive Should Companies Be?

(1)

- Many modern global companies recognise that they must investigate credible reports of violations and remedy them.
- When should the company report what it has found to the authorities?

# How Proactive Should Companies Be?

## (2)

- Does the state encourage self-reporting?
- What are the advantages and disadvantages to states and companies?
- Will the authority pass the self-report on to other states?

# How Proactive Should Companies Be?

(3)

- What role does leniency play?
- Is there a case for immunity as in cartel cases?
- How can leniency be granted?

# How Proactive Should Companies Be?

## (4)

- What is the role of an internal investigation?
- Should states allow companies to investigate and then share the results with the authorities?
- Can the report be used for the purposes of a negotiated settlement?



# Multi-Jurisdictional Enforcement (1)

- How does this arise?
- This will become very significant as more states take action.
- The principles have not been worked out yet. International leadership is needed.

# Multi-Jurisdictional Enforcement (2)

- What is a global settlement?
- What is a coordinated settlement?
- They can be very powerful and cost effective if states can enter into them.

# Multi-Jurisdictional Enforcement (3)

Parallel cases-

- UNCAC/OECD Convention provide important general guidance.
- What should happen if two or more states want to take action for the same violation?
- How should the role of the demand state be recognised and proper restitution given?

# Multi-Jurisdictional Enforcement (4)

- Does a company have any defence against multiple enforcement actions?
- Does double jeopardy apply?
- Do interim sanctions have a role to play?

# Settlement Mechanisms (1)

- Should alternatives to traditional enforcement be available to recognise a company's standard of compliance and its cooperation?
- Should compliance be available as a defence or mitigation?

# Settlement Mechanisms (2)

What alternatives have been used so far in the US?

- Deferred Prosecution Agreements (DPAs)
- Non Prosecution Agreements (NPAs)
- Declinations

# Settlement Mechanisms (3)

- Alternative mechanisms have been used in 83% of corporate FCPA resolutions in the US since 2004.
- They are regarded as a vital part of the US attack on corporate corruption.
- There is no formal conviction and debarment for a company.

# Settlement Mechanisms (4)

What alternatives have been used so far in some other states?

- Civil Recovery
- Abbreviated or summary criminal cases.
- Agreement between the company and Government.



# Settlement Mechanisms (5)

There are major advantages to states and companies with self-reporting, cooperation and negotiated resolutions-

- It is very cost effective.
- It brings more cases to light.
- It is much quicker than traditional enforcement.

# Preliminary Study

- The draft has much more detail about these issues.
- More information is needed from states and companies.
- Today's discussion is very important for taking the issues forward. International leadership is essential.



# Self-Reporting (1)

- This is a regular part of the dialogue between states and companies in other areas.
- It is increasingly used in corruption cases by states and institutions such as the World Bank.
- 50% of corporate resolutions in the US in 2012 derived from self-reporting.

# Self-Reporting (2)

What are the features of a self-reported case?

- A full and unprompted disclosure to the authorities.
- A full internal investigation followed by negotiations with the authorities.
- Agreed penalty and asset forfeiture.
- An alternative resolution such as a DPA.

# Self-Reporting (3)

What are the advantages to states-

- Cost effective and saves resource.
- Companies will improve compliance processes.
- States will discover more cases.

# Self-Reporting (4)

What are the advantages to companies?

- Self-reporting plus cooperation can lead to an alternative resolution and leniency.
- The resolution is quicker than through the traditional criminal or administrative process.

# Self-Reporting (5)

What are the issues for companies?

- Is there a legal obligation to self-report?
- Is there a real benefit?
- When should the self-report be made?



# Self-Reporting (6)

- Will the self-report be passed on to other states?
- Should the company be proactive and self-report to other states?

# Self-Reporting (7)

What are the criticisms of self-reporting?

- It should not lead to an alternative to traditional enforcement.
- There is insufficient transparency in the process.

# Self-Reporting (8)

How does the World Bank deal with this?

- There is a detailed statement of policy for its Voluntary Disclosure Program.
- There are incentives to self-report.
- The Bank keeps the self-report confidential except in limited circumstances.

# Leniency (1)

- What is leniency?
- Leniency in corruption cases is mitigation and not immunity.
- Leniency can encourage self-reporting and cooperation.

# Leniency (2)

What are the different mechanisms?

- Cartel type immunity? Should this be available in corruption cases?
- Immunity where evidence is given against another. This is usually seen in organised crime cases.

# Leniency (3)

What are the issues for companies?

- Will there be a formal verdict against the company with debarment consequences or will there be an alternative settlement?
- Does the leniency policy set out clearly what benefit the company will receive?

# Leniency (4)

How is this applied by active enforcers?

- In the US leniency is relevant to the fine and the type of alternative settlement .
- In the UK leniency was given through a civil settlement. This has ended. Leniency is now given through the level of the fine.

# Leniency (5)

- In Germany leniency is given through sanctions in the administrative court. There are no alternative settlements.
- In Switzerland leniency is taken into account in setting the sentence. Leniency can be given through summary punishment but the details are not clear.



# Internal Investigations (1)

- When should the company commence an investigation?
- What is the trigger for this?

# Internal Investigations (2)

- When should the company disclose the results of the investigation to the authorities?
- Should the company investigate and take the necessary remedial action but not disclose this to the authorities unless asked?
- What happens if the company does not disclose?

# Internal Investigations (3)

What are the issues for the company?

- What approach is the authority likely to take?
- What are the cost implications if the authorities want a much wider investigation and if they want to impose a monitor?

# Internal Investigations (4)

- Will disclosure be the trigger for interim sanctions?
- Does the company have a complete legal defence to the allegation?

# Issues About Multi-Jurisdictional Enforcement (1)

- What would a true global settlement look like?
- What are the advantages of global or coordinated settlements to companies-
  - Certainty and finality.
  - Cost saving.

# Issues About Multi-Jurisdictional Enforcement (2)

What are the advantages of global or coordinated settlements to states?

- A more effective investigation because of agreed cooperation with other states.
- Coordinated pressure on the company.
- Cost saving.

# Issues About Multi-Jurisdictional Enforcement (3)

What stands in the way of these settlements?

- Does the enforcement authority have the legal power to enter into a settlement?
- Can the authority negotiate a penalty?
- What level of judicial involvement is needed?
- How do the courts work together?

# Issues About Multi-Jurisdictional Enforcement (4)

- What principles should states use in deciding if more than one state should take enforcement action?
- Should the demand state have any primacy over the bribery violation and any asset forfeiture?
- How can the demand state obtain proper restitution?



# Issues About Multi-Jurisdictional Enforcement (5)

What defence does a company have against multiple sanctions?

- How does double jeopardy apply?
- Should credit be given for asset forfeiture in other states?

# Sanctions during Investigation (1)

- Some countries have interim sanctions but make little use of them.
- Powerful interim sanctions are used in Italy.
- A company can avoid interim sanctions in Italy by compensating for the damage and putting in place proper compliance processes.

# Sanctions During Investigations (2)

- US, UK and World Bank experience.
- Implications for self-reporting.
- Questions of legal process.

# Compliance as Defence or Mitigation (1)

- A defence means that no offence was committed. Mitigation means that the offence was committed but that the penalty is mitigated.
- The US uses mitigation. Brazil has recently introduced the mitigation approach. The UK and some other states use a defence. Which is more effective?

# Compliance as Defence or Mitigation (2)

The US DOJ is firmly opposed to a compliance defence.

- It could encourage compliance as a paper exercise.
- Criminal trials will become battles between experts on compliance procedures.

# Compliance as Defence or Mitigation (3)

What is the position in states with a compliance defence?

- Italy has a defence of Organisational Model.
- In Australia a company is liable if it failed to maintain a corporate culture that required compliance.

# Compliance as Defence or Mitigation (4)

- In the UK there is an offence under the Bribery Act of failing to prevent bribery. There is a defence if the company had adequate procedures to prevent bribery.

# Compliance as Defence or Mitigation (5)

- States looking at compliance as mitigation need to look at the range of cases that would be criminalised.
- The US has a mitigation approach with very wide criminal liability. This is moderated in practice by alternatives to prosecution and by exemption of facilitation payments.



# Alternative Settlements (1)

- When would an alternative to traditional enforcement be appropriate?
- What are the problems in enforcement action against companies? Is the so called Arthur Andersen effect still relevant?
- Would an alternative help in fighting corruption?

# Alternative Settlements (2)

What is the US experience?

- 83% of corporate FCPA resolutions since 2004 have used alternatives.
- ‘DPAs have had a truly transformative effect on particular companies and on corporate culture across the globe.’

# Alternative Settlements (3)

What are the US alternatives?

- Deferred Prosecution Agreements (DPAs).  
A prosecution is deferred (subject to court approval) if the company-
  - Pays a fine
  - Cooperates and admits the facts.
  - Agrees to improve compliance and if necessary to accept monitoring.

# Alternative Settlements (4)

- Non Prosecution Agreements (NPAs). The DOJ can decide not to prosecute so that the company can show its good conduct during the term of the DPA. Companies will pay fines and disgorgement of profits and will agree to improve compliance. Court approval is not needed.

# Alternative Settlements (5)

- Declinations. The DOJ declines to take enforcement action. This decision can recognise the efforts made by the company to ensure compliance. This became well known as a result of the Morgan Stanley declination.

# Alternative Settlements (6)

What is the difference between NPAs and declinations? Possible differences are-

- The company need take no further action to improve processes under a declination.
- A declination recognises what the company has done to ensure compliance.

# Alternative Settlements (7)

What are the advantages to the US authorities of alternatives?

- They are much less resource intensive than a contested trial.
- They have a major impact on corporate compliance.

# Alternative Settlements (8)

What are the advantages to companies of the US alternatives?

- A resolution is possible more quickly and with more certainty than the full criminal process.
- There is no criminal conviction and debarment.



# Alternative Settlements (9)

What are the criticisms of the US approach?

- Large corporations can buy their way out of trouble.
- The role of the judges is too limited.
- There is no effective challenge to the DOJ.

# Alternative Settlements (10)

What is the UK experience?

- Civil recovery orders were used to recover assets obtained as a result of criminal actions. This alternative was criticised because-
  - Criminal processes should be used.
  - Judges should have a bigger role.
  - There was insufficient transparency.

# Alternative Settlements (11)

- An agreement was reached with British Aerospace to plead guilty to a non-corruption offence and to pay £30 million (less the UK fine) to the people of Tanzania. The figure of £30 million was approximately equivalent to the value of the contract.
- This mechanism was widely criticised.

# Alternative Settlements (12)

There is now legislation for UK DPAs. The essential features are-

- The judge will be involved in deciding if a DPA is appropriate and on the terms of the settlement.
- The company will have to pay a fine and put proper compliance policies in place.

# Alternative Settlements (13)

Siemens settled an investigation in Greece by paying the Government €270 million consisting of -

- €90 million to help fight corruption;
- €80 million to pay Government debts
- €100 million by investing in Greece.

The settlement needs Parliamentary approval.

# Alternative settlements (14)

Switzerland has a procedure for a summary punishment order. This is negotiated with the individual or company. In the Alstom case –

- The company was sanctioned for corporate negligence and fined CHF 38.8 million (€31 million).
- There is no court involvement.

# Alternative Settlements (15)

There are a number of relevant issues for states to consider including-

- What is the extent of prosecutorial discretion;
- How can states demonstrate the potential of alternatives in fighting corruption;
- What happens in cases of administrative rather than criminal liability?

# Other International Comparisons (1)

Colombia- How does the High Level Reporting Mechanism work?

- The object is to deal with the demand for bribes in public procurement.
- Companies can refer demands to the Government at a level above the agency concerned.



## Other International Comparisons (2)

- The reports can be dealt with speedily and in a non-bureaucratic manner.
- The company can continue to be involved in the procurement process without breaching its ethical standards.
- HLRM launched on 2 April 2013.

## Other International Comparisons (3)

The Philippines- the role of Integrity Pledges.

- 2000 companies have signed an Integrity Pledge with the Government. This sets out their commitment to fighting bribery.
- Companies have agreed to refrain from doing business with those who have unethical business practices.

## Other International Comparisons (4)

- There is very strong public and political support for anti-corruption.
- Perceptions of the Philippines are changing.

# Other International Comparisons (5)

There is new legislation in Brazil-

- The Clean Companies Act creates strict administrative liability for companies involved in corruption.
- There is no compliance defence. Compliance is mitigation only.

## Other International Comparisons (6)

- There is leniency for companies that self-report, cooperate and provide evidence against others.
- Sanctions include suspension of operations, seizure of assets and debarment.
- There is strong public support.

# Other International Comparisons (7)

## Developments in Chile-

- There was new legislation in 2009 to impose criminal liability on companies.
- Leniency programmes, self-reporting, internal compliance programmes and negotiated settlements are being developed.