

Global trends in anti-corruption: is the OECD levelling the playing field?



BY BRIDGET
PETHERBRIDGE
counsel,
WilmerHale



BY ALISON
GEARY
associate,
WilmerHale

THERE CAN SURELY BE FEW ENTERPRISES carrying on a business in the UK who remain unaware of the provisions of the UK Bribery Act 2010 (the Bribery Act). That such enterprises may be prosecuted in the UK courts for their failure to prevent bribery committed on their behalf, however far flung the location, has been the hot legal topic for at least 18 months.

Indeed, the UK, in the form of the Serious Fraud Office (SFO), has now come further in line with the requirements and recommendations of the Organisation for Economic Co-operation and Development (OECD), announcing on 9 October 2012 that there will no longer be any presumption in favour of civil settlement for those organisations that self-report breaches of the Bribery Act; nor will there be any further confidentiality agreements on offer to those seeking settlement. Both changes are in accordance with the concerns and recommendations of the OECD working group, which reported in March this year on the UK's progress towards compliance with the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention) and found it lacking in the SFO's then predilection for non-criminal disposals and lack of transparency.

UK organisations operating overseas should, however, be careful not to succumb to Bribery Act-induced myopia and fail to heed the extent to which other jurisdictions are now implementing OECD-led anti-bribery legislation. The movement to eradicate bribery and corruption is moving towards a truly comprehensive global regime, such that any entity operating in overseas markets must pay close regard not just to their home country legislation, and often the far-reaching legislation of the US, but also to that of the local markets they operate in – even in countries that have, until now, been seen as the 'wild west' of business compliance.

While the trend may present additional complications for organisations seeking to implement a comprehensive, global anti-bribery package, it should provide some comfort to those who are concerned that the Bribery Act has hampered the competitiveness of UK businesses operating in more difficult markets where corruption

has, in the past, been a universal and necessary fact of doing business. As local regimes start to bite, the ultimate goal of requiring all market participants to play by the rules will begin to gain traction. Those that, when confronted with the requirements of the Bribery Act, ask the inevitable question, 'But what about my competitors from "X" country?' should feel reassured that those competitors, wherever domiciled, will have to clean up their act too.

In this article we examine this global trend in the context of three markets that currently enjoy high volumes of foreign direct investment, but that are widely viewed as hotbeds of corruption and bribery. Brazil and Russia, the powerhouses of the BRIC countries, and Colombia, one of the up-and-coming CIVETS countries,¹ respectively score 2.4 (rank 143 out of 183 countries), 3.8 (rank 73) and 3.4 (rank 80) on a scale of 0 (highly corrupt) to 10 (very clean) in Transparency International's 2011 Index of Corruption Perceptions. All have, however, significantly developed their anti-corruption regimes recently in an effort truly to integrate into global markets and eradicate the terrible costs of corruption to their local populations. All three demonstrate that the OECD's influence is being felt on a global scale, not just at the SFO.

BRAZIL

Brazil, while not a member of the OECD, is a signatory to the Convention, meaning that its anti-corruption regime is subject to review by the OECD. Most recent criticisms have focused on its lack of provisions to hold companies liable for foreign bribery.² Transparency International's 2012 progress report on the implementation of the Convention also noted the lack of provisions relating to bribery in the private sphere and recommended stronger sanctions for breaches of current provisions, as well as protection for whistleblowers.³ Focus has inevitably intensified given Brazil's hosting of the FIFA World Cup in 2014 and the Olympic Games in 2016, and the large infrastructure projects that these events will bring in their wake.

Events inside Brazil have also brought corruption issues into focus. In October this year, José Dirceu (Chief of Staff to former president Luiz Inácio Lula da Silva from 2003 to 2005) was convicted by the

'UK organisations operating overseas should be careful... to heed the extent to which other jurisdictions are now implementing OECD-led anti-bribery legislation.'

Brazilian Supreme Court on charges of using public funds to buy support from opposition parties in congress, otherwise known as the Mensalão ('big monthly payment') scandal.

Brazil's anti-corruption regime has been subject to a number of significant developments in recent years. Legislative efforts to combat corrupt activities have included the Brazilian freedom of information law of 16 May 2012. By obliging the government to publish key information, respond to citizens' requests to access non-classified information and declassify information after a fixed period, light may be shed on any suspected government corruption. Brazil's October 2012 election was also the first since its 'clean record' law became effective, preventing individuals convicted of a serious criminal offence from running for public office.

The Brazilian legislature is currently considering a bill that could dramatically change Brazil's anti-corruption regime in line with its Convention commitments. The draft bill proposes direct civil and administrative liability for commercial organisations by making them responsible for the acts of their representatives from which they benefit.⁴ The bill specifically covers bribery of both foreign and domestic officials. It is intended that tough financial penalties will accompany any finding of liability. However, the draft bill contains provisions to give credit to organisations that have a compliance programme in place, voluntarily disclose wrongdoing and co-operate with regulators. These provisions echo the so-called 'adequate procedures defence' in the Bribery Act.

The chairman of the special committee reviewing the bill, Carlos Zarattini, recently stated his intention that the bill 'become law by the end of the year'.⁵

RUSSIA

Russia is a recent signatory of the Convention and is currently following an agreed roadmap to accession to the OECD. Prior to signing the Convention on 17 February 2012 Russia had already made significant reforms to its anti-corruption laws, beginning shortly after the election of (former) President Medvedev in July 2008 with the adoption of the National Plan to Counteract Corruption (the National Plan).

'OECD-led legislation should provide some comfort to those who are concerned that the Bribery Act has hampered the competitiveness of UK businesses operating in more difficult markets.'

The first step in implementing the National Plan was a suite of reforms, introduced in 2009, revising Russia's civil, criminal and administrative codes relating to the bribery of public officials. Despite the significant reforms made by the 2009 revisions, Russia's anti-corruption regime still lacked elements required under the Convention. Most notably, the bribery of foreign officials was not prohibited. This issue was addressed in 2011, with the introduction of further reforms which applied Russia's anti-bribery laws extraterritorially to bribes paid to non-Russian public officials.

The 2011 legislation introduced a number of other notable changes by extending the prohibition to bribery in the private sphere and making corporates liable for payments made on their behalf or in their interest. However, unlike the Bribery Act and the proposed Brazilian legislation, there is no available 'adequate procedures defence'. Nor is there any exception for facilitation payments as found in the US Foreign and Corrupt Practices Act.

The 2011 legislation also substantially increased the penalties for corruption offences. Under the previous regime, fines were limited to three times the amount of the bribe, subject to a prescribed minimum of RUB1m (approximately US\$350,000). The revised law establishes a scale of penalties depending on the value of the bribe paid, with the minimum fine for bribes over RUB20m being set at RUB 100m (approximately US\$3.2m at the time of writing). While there is a cap on the maximum fine for individuals, there is no such cap on the administrative fine for companies.

Much like the Bribery Act, there has, to date, been little enforcement action under Russia's new regime. However, the ongoing investigation into government defence contractor Oboronservice may provide clues as to Russia's position on enforcement going forward. Moreover, the 2011 legislation has paved the way for greater co-operation between Russian authorities and their counterparts in other countries. The legislation directs

NOTES

- 1) BRIC: Brazil, Russia, India, China. CIVETS: Columbia, Indonesia, Vietnam, Egypt, Turkey, South Africa.
- 2) OECD, 'Brazil: Phase 2, Follow-Up Report On The Implementation Of The Phase 2 Recommendations', June 2010.
- 3) Transparency International, 'Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention Progress Report 2012'.
- 4) Although the convention requires criminal sanctions to be put in place, such sanctions are not consistent with the legal status of corporations in Brazil. Article 3(2) of the convention allows for sanctions to be non-criminal in such situations provided they are effective, proportionate and dissuasive.
- 5) www.trust.org/trustlaw/news/qa-brazilian-lawmaker-zarattini-on-anti-bribery-bill/.

the Russian authorities to provide legal assistance to foreign agencies and puts in place a process for requesting information from foreign agencies to facilitate domestic investigations. This important addition, combined with the visit of Richard Alderman

new legislation containing 140 separate articles aimed at tackling corruption. The new law contains a raft of provisions involving procedural as well as substantive changes, but there are some key developments.

the corruption pervading locally procured projects. There are also provisions in the new legislation preventing those convicted of corruption offences contracting with the state in future.

'Colombia, having enacted its anti-bribery legislation almost simultaneously with the UK, has been quicker to take significant enforcement action.'

(who was at that time Director of the SFO) and Lanny Breuer (the assistant attorney general for the criminal division of the US Department of Justice) to Russia in April 2011, suggests that Russia may have a greater part to play in international enforcement in the future.

COLOMBIA

Colombia has become a market of considerable interest to UK corporates and investors, following the easing of the security situation there. The presence of huge natural resources continues to attract multinationals, and government plans to invest 3% of GDP in upgrading infrastructure are accompanied by a substantial interest in UK expertise in public-private partnerships. However, Colombia has long been plagued by corruption and this has reduced certain sectors such as health and public works to crisis point.

Now keen to benefit from its many natural advantages and the hard-won easing of its security issues, Colombia is working towards membership of the OECD and in November 2011 was invited to join the OECD Working Group on Bribery, a precursor to signing the Convention. It is against this backdrop that, in July 2011, President Santos of Colombia approved

For the first time, criminal liability will extend to corruption in the private as well as public arena. Penalties for private corruption will range from four to eight years' imprisonment, extending to six to 10 years if the entity in question suffers economic detriment. Corporates as well as individuals will now incur criminal liability for corruption offences. The offence of bribing a foreign public official is also criminalised for the first time, carrying a penalty of nine to 15 years' imprisonment. Previously widely used measures such as suspended sentences or sentences to be served at home will end, to be replaced by imprisonment.

Measures to eradicate corruption in public procurement include prohibitions on donors to election campaigns subsequently contracting with successful candidates, and former senior officials entering private sector concerns that contract with government for two years upon leaving office. The practice of moving from government office to executive levels in contracting companies, known as 'the revolving door', has been responsible for considerable scandal in the past and has led to the setting up of a National Infrastructure Agency (*Agencia Nacional de Infraestructura*), in an attempt to eradicate

There is no doubt that Colombia is serious about taking its place in the global economy. Further legislative developments planned for 2014 will impose international standards of auditing and accounting, with the aim of further reducing the scope for corrupt conduct. Perhaps most tellingly, Colombia, having enacted its anti-bribery legislation almost simultaneously with the UK, has been quicker to take significant enforcement action. A former mayor of Bogota and three members of a construction 'dynasty' are already serving jail sentences under the provisions of the 2011 legislation. This sits in stark contrast with the one conviction secured by the UK authorities to date under the Bribery Act of a magistrates court clerk who received a four-year prison sentence for receiving bribes in the course of his duties dealing with motoring offences.

It is clear that many of the fastest growing economies, led by the OECD, have begun to step up their anti-bribery measures in a concerted effort to stamp out corrupt practices that threaten to jeopardise their position on the world stage. While it is the Bribery Act that has attracted most attention in recent months, it may not be long before it becomes simply one of many anti-bribery regimes interacting with its overseas counterparts to outlaw corruption wherever, and by whomever, it is practised. This would allow companies complying with the Bribery Act to enjoy a somewhat levelled playing field without actually needing to blow the whistle themselves.

*By Bridget Petherbridge, counsel, and Alison Geary, associate, WilmerHale.
E-mail: bridget.petherbridge@wilmerhale; alison.geary@wilmerhale.com.*