
The devil is in the detail: call for global standards for corporate settlements in foreign bribery cases

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Yesterday saw the OECD host an [Anti-Bribery Ministerial meeting](#) in Paris to discuss how to strengthen the implementation of its Anti-Bribery Convention. In the run up to the meeting, the respective heads of Corruption Watch UK, Transparency International, Global Witness and the UNCAC Coalition each signed an open [letter](#) dated 10 March 2016, addressed to the OECD's Secretary General. Headed, "*Global Standards for Corporate Settlements in Foreign Bribery Cases*" the letter merits close examination.

Reflecting the signatories' concerns that the increasing use of corporate settlements as the primary means for resolving foreign bribery cases may not offer effective, proportionate and dissuasive sanctions, the letter calls for the OECD to develop a set of, "*global standards for corporate settlements based on best practice*." The letter then lists fourteen principles that it is suggested the global standards be based on. The majority of the principles merely recite what is already provided for in the [DPA Code](#) (issued by the DPP and the Director of the SFO) but one in particular, principle seven, stands out:

"Prosecution of individuals should be the standard practice and settlements must preclude companies from paying directly or indirectly for fines and legal fees of individuals implicated in the case."

Whilst few would dispute that the indemnification of misconduct-related fines should be prohibited, the statement as it relates to legal fees is remarkable and raises serious ethical, legal and practical concerns.

Firstly, the Director of the SFO and the Director of Public Prosecutions both exercise statutory, public prosecutorial functions. As such, they are bound to act, "*at all times in accordance with the highest ethical standards and in the best interests of justice... based on a scrupulous adherence to the rule of law.*"¹ If adopted, principle seven would ride roughshod over any such scrupulous adherence, mandating as it does that as part of a corporate settlement, any implicated individuals must have their legal funding (where covered by their employer) withdrawn, in order to facilitate their successful prosecution.

It should be remembered that, at the stage of the criminal process that principle seven calls for legal funding to be cut, any “implicated individual” may not yet be the subject of a formal criminal investigation, let alone have been charged with any offence. At best, this is an example of muddled thinking; at worst it is legally and ethically repugnant: straining the presumption of innocence to breaking point and promoting the prosecution of poorly represented defendants.

Secondly, from a practical perspective, the prosecution of individuals with limited and ineffective legal representation is in the interests of neither defendants nor prosecutors. An implicated individual who has had the opportunity to review the relevant documents and facts with a lawyer, and take advice on the pros and cons of cooperation, is likely to provide more reliable information as part of any prosecution. Moreover, a trial involving properly prepared and represented defendants will be less likely to expose the prosecutor to abuse of process arguments.

Thirdly, and perhaps most intriguingly, principle seven, as with all 14 principles listed in the letter, is purported to have “*emerged from the lessons learned from use of settlements over the past decade*”. It would be enlightening to learn in which of the settlements reached over the previous ten years the company has been expressly precluded, by the terms of the settlement itself, from paying the legal fees of any implicated individuals.

Far from delivering real deterrence and effective sanctions, it is submitted that principle seven proposes measures that, if adopted, would prove wholly ineffective, disproportionate and unethical. It ought to be revisited and redrafted as a priority.

¹ Protocol between the Attorney General and the Prosecuting Departments, July 2009.

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