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Cross Border Investigations: Current and Future Developments

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1. Cross-border investigations and subsequent criminal prosecutions and civil settlements are in their infancy. The slow development and extension of the concept of corporate criminal liability and the creation of the tools that allow for strong civil recovery of assets have created another grey area on the line between civil and criminal misdeeds and punishment.

2. There are many areas in which cross-border investigations are necessary: be it cartel investigations, money laundering, antitrust issues, market manipulation to name a few. One of the most topical areas is that of corruption and bribery investigations where there seems to be a synthesis of all the issues that are raised by cross border investigations. This area will therefore be the focus of this short paper.

3. This area seems set to grow as more countries adopt a concept of corporate criminal liability and extend (or introduce) anti-corruption acts, in recent weeks Brazil and Russia have moved towards creating anti-corruption regimes and the perceived self-interest shown by the political class in India in not passing the Anti-corruption Acts there at the very end of 2011 has caused outrage. 2011 was the year that corruption came to the fore across the globe: be it the Arab Spring, Chinese transport accidents due to corruption leading to substandard construction practices, the Indian hunger strike, ipaidabribe.com or many others, civil society has lost its patience with bribery, corruption and other unethical business practices.

4. It would seem that global investigations and settlements are going to play an even greater part in the justice system. Cross- border investigations require many networks and forms of evidence gathering to be utilised in order to achieve the level of knowledge required that allows for the correct strategy to be devised. Investigations will rely upon international or bilateral agreements and protocols and local knowledge and expertise.

5. The United States was for many years the only jurisdiction that pursued corruption on a global scale under the auspices of the Foreign Corrupt Practices Act 1977 (FCPA). Thus the Department of Justice FCPA model has become accepted or almost expected as the norm across global investigations: exhaustive investigations after a self-reporting or whistle-blowing incident, fines (that seem to be ballooning with half billion dollar settlements being reached), no admittance or liability or culpability and an on-going monitoring relationship with the authorities.

6. One has to question whether the threat of the cross-border investigation and resultant negotiations and settlement have become too powerful. We also need at address what the aim of the investigation is, justice or revenue? The fines that are now being imposed represent the largest in the Department of Justice's history with 8 out 10 of the largest ever being imposed in 2010 and 2011 settlements.

7. Yet many of those corporations admitted no culpability or guilt in the settlement and only one executive is being pursued in the courts. This pattern is often repeated across jurisdictions: where a company accepts a civil punitive outcome from an investigation and then pursues criminal action against individuals, be they directors or executives in that organisation. This requires investigations to always maintain the dual requirements of civil and criminal standards of proof, procedure and the substance of offences.

8. The pre-eminence of the DoJ/FCPA model has raised a number of issues not least whether the United States would be happy to be the secondary or tertiary jurisdiction in an investigation and whether they would see as fully binding a settlement that had not originated in the US. Jurisdictional issues between the US and UK are governed by the 2007 'Agreement for Handling Criminal Cases with Concurrent Jurisdiction Between the United Kingdom and the United States of America' which gives no overt primacy to either jurisdiction.

9. Other jurisdictional issues in cross border cases are often decided at a local level between police forces. This raises the important human element in cross border investigations: not those being investigated but those who are doing the investigating. Decisions have to be taken about the strategic approach to local representation and counsel: does one plump for an international big hitter with offices in every possible jurisdiction that might become involved or does one engage local counsel with their specific expertise.

10. It also highlights the controversial elements of extradition regimes. There has long been a public furore surrounding the Extradition Act 2003 UK-US extradition requirements with many a notable case. For global investigations and those persons subject to them, one of the real concerns is the extreme length of sentences imposed for financial and business crimes in the United States, far greater than UK terms, yet this cannot be a bar to extradition.

11. For the nine executives and agents of Siemens who were charged in December 2011 out of the investigation that also resulted in the Siemens AG settlement ($800 million in 2008) who are all foreign nationals who will have to be

extradited: this will be a an interesting indicator of the global reach of cross-border investigations.

12. The European Union has developed some exceptionally strong tools that are at their disposal for cross border investigations: the European Arrest Warrant and the European Account Preservation Order. Both of these tools aim to facilitate the justice systems within the European Union by making the process more efficient and not allowing people or their assets to evade the law.

13. The European Arrest warrant highlights one of the problems found throughout cross-border investigations: definitions. The discrepancies that can be found in the definitions of offences, in the civil and criminal standards of proof, and procedure and process.

14. The FCPA and its enforcement agencies currently find themselves under pressure from a variety of sources. The US Chamber of Commerce has hired the former Attorney General Michael Mukasey to argue for the narrowing of the act with the removal of corporate liability and a reduction of the legal liability of firms that arises out of their acquisitions. Whether this effects global investigations remains to be seen: obviously if the FCPA were to be narrowed in scope this could reduce the number of investigations that occur, though one suspects that books and records violations would be used to fill the gaps.

15. The reaction of Assistant Attorney General Lanny Breur … *'at this crucial moment in history, watering down the Act…would send exactly the wrong message…we may together have no greater mission than to work towards eradicating corruption across the globe…'* suggests that there will be resistance to any such move.

16. The greater pressure seems to be currently coming from the actions of NY District Judge Jed S. Rakoff who threw out the Citigroup SEC agreement in November 2011. The judge did not hold back on his criticism of the processes of non-prosecution and deferred prosecution settlements

> *'Although this would appear to be tantamount to an allegation of knowing and fraudulent intent…the SEC, for reasons of its own, chose to charge Citigroup with negligence….*
>
> *Since then the Court has spent long hours trying to determine whether in view of the substantial deference due to the SEC in matters of this kind, the court can somehow approve this problematic Consent Judgement. IN the end, the Court concludes that it cannot approve it because the Court has not been provided*

> *with any proven or admitted facts upon which to exercise even a modest degree of independent judgement.'*

Judge Rakoff concludes

> '*…A court, whilst giving substantial deference to the views of an administrative body vested with authority over a particular area, must still exercise a modicum of independent judgement in determining whether the requested deployment of its injunctive powers will serve, or disserve, the public interest. Anything less would not only violate the constitutional doctrine of the separation of powers but would undermine the independence that is the indispensable attribute of the federal judiciary.'*

17. The SEC is currently appealing the judgement to the Second District Court of Appeal and it would be suggested that if there is an alteration to the manner in which settlements and final outcomes are allowed to be reached this will impact on the undertaking of cross-border investigations.

18. It highlights two important elements of settlements and the routes taken to achieve them: Certainty and the role of the judiciary. Certainty allows for companies to undertake investigations and self-reporting safe in the knowledge that the final outcome will be lessened in intensity because of these actions. Yet there was a notable absence of major corporate plea agreements with the SFO in 2011 because of the uncertainty created by Lord Justice Thomas' anger at being asked to rubber stamp the sentence imposed in the Innospec settlement.

19. The role of the judiciary in plea bargains and settlements has been given attention and there seems to be a consensus emerging that they should be involved at the earliest opportunity.

20. The Select Committee report endorsed the proposal from the Director of the SFO that

> '*in cases of complex financial crimes involving plea bargaining, there should be the possibility of taking a proposed resolution to a Judge before the criminal justice process had been engaged by a formal charge.'*

And recommended that the Government respond to this proposal.

21. The Government hopes to publish prospective legislation on UK plea agreements in the coming months and fully acknowledges the attraction of the large revenue stream that plea agreements opens up. There has yet to be an

official restatement from the judiciary on their position but one can imagine that trying to balance the concept of justice, sentencing being the discretion of the courts and the desire to create this money saving and making mechanism in a time of economic strain will not be an easy one.

22. The Bribery Act widened the jurisdictional reach of the UK authorities and therefore should we be expectant for rise in cross-border investigations. The jurisdictional leap of the Bribery Act to encompassing third party relationships and actors within business relationships could be suggested to be interfering with domestic jurisdiction over bribery.

23. The recent case of *Tenaris* demonstrates the jurisdiction creep that is occurring within FCPA actions. Tenaris was bidding for a series of contracts in 2006 / 7 to supply OAO with pipeline for use in oil and gas production in Uzbekistan. OAO was a subsidiary of the state-owned holding company of Uzbekistan's oil and gas industry. Therefore OAO was an agency of the government and its employees were foreign public officials.

24. Tenaris was introduced to an agent that would help them…by showing them confidential bid information…they entered an agreement with the agent to use its services on bid M-07-53 (Jan 2007ish) and agreed to pay the agent a 3.5% commission. They were awarded the contract. They entered another 3 bids, with the services of the agent and were successful in all three partially due to the use of the competitor information.

25. They paid the agent for the services on all four bids. '*The conduct of the OAO officials in providing Tenaris with confidential bid information and allowing Tenaris'* then-regional sales personnel to resubmit revised bids was in violation of the OAO officials' '*lawful duty and was done in order to assist Tenaris in obtaining or retaining business*.'

26. Tenaris were alerted to the conduct by a third party and self-reported to the DoJ and the SEC. These negotiations resulted in a non-prosecution agreement with the DPA and a fine of $3.5m and the agreement of the first SEC DPA, coupled with a fine of 5.4mUSD.

27. Non US-companies are subject only to territorial jurisdiction which requires the government to prove that actions where whilst in US territory…Tenaris 'made use of the means and instrumentalities of interstate commerce ' in making a 'same day transfer of approximately $32,140.67 through an intermediary bank' in NY to the agent acting on their behalf. This was the only jurisdictional connection asserted: the use of US Dollars to undertake a transaction. If

extrapolated widely, though some might say ad absurdum, it would seem that engaging in the global financial system and undertaking dollar transactions is enough for the US to claim jurisdiction.

28. This adds another uncertainty to a cross-border investigation: aside from the obvious point of who has jurisdiction, there is the question of what actions need to be looked at because they could, even in the smallest of senses, be deemed criminal or of interest by different authorities.

29. The recent actions of the Serious Fraud Office in their successful civil recovery from the shareholders of Mabey and Johnson has raised concerns about the nature and certainty elements of settlements and plea bargains. The parent company of Mabey and Johnson (the sole shareholder) agreed to pay £131, 201 in recognition of sums it received through share dividends from contracts won through unlawful conduct.

30. The Serious Fraud Office called it '*the final act in an exemplary model of self-reporting and co-operative resolution*,' however the action has raised concerns that settlements will not yield a final result for shareholders and investors, but that they themselves will be pursued for gains that were made as a result of actions they had little or any direct control over. These fears would not have been allayed by the comments of Richard Alderman, the outgoing Director of the SFO:

> '*…shareholders who receive the proceeds of crime can expect civil action against them to recover the money. The SFO will pursue this approach vigorously… shareholders and investors in companies are obliged to satisfy themselves with the business practices of the companies they invest in. This is very important and we cannot emphasise it enough. It is particularly so for institutional investors who have the knowledge and expertise to do it. The SFO intends to use the civil recovery process to pursue investors who have benefitted from illegal activity. Where issues arise, we will be much less sympathetic to institutional investors whose due diligence has clearly been lax in this respect.*'

31. As cross-border investigations, and their results develop, it would seem that there will be a need to give serious consideration to the design of a sophisticated mechanism that will provide investor certainty at the settlement stage to ensure that there is no detrimental effect to UK Plc from a lack of capital investment due

to a hypothetical fear of repercussions and recovery as some period has passed, or the expense of wide-ranging and deep due diligence, yet allows for the SFO to recover from those shareholders who have allowed their eyes not to see what the hand was doing.

32. As cross-border investigations grow in scope and geographical reach, there will have to be renewed focus on victims. The International Development Select Committee report 'Financial Crime and Development' published in November 2011, focused on the agreement between the SFO and BAE Systems and the delay in payment of the agreed ex gratia payment of £30million for the benefit of the people of Tanzania, a class of victim from the unlawful conduct that occurred.

33. Companies in the cross hairs of cross border investigations occupy the position of being both the victim and perpetrator in a settlement situation. However it would seem that the definition and identification of victims in corruption and other such cases that involve cross-border investigations is more subtle and based on a number of factors such as where did the alleged unlawful conduct take place, where were its effects felt, what were its effects, what losses were suffered etc.

34. Consequential to that is the concept of redress: what is acceptable redress, and for whom. The payment to the Government of Tanzania, it was politely suggested, had been delayed due to fears that the money would not reach the agreed destination: not an unreasonable fear considering it had been found that there had been serious corruption within the political regime in Tanzania.

35. The challenge that victims and the making of amends poses will ask some uncomfortable questions especially when an investigation has been prompted by or uncovered public institution corruption or public official bribery. The Select Committee seemed to suggest the involvement of government aid and development departments to navigate this potentially complex area

> *'BAE Systems acknowledges that it does not have the expertise to ensure that its ex gratia payment is used effectively for development purposes…in any future payments of the kind, we recommend that DFiD be involved in providing advice on the expenditure of funds at an early stage.'*

36. Cross-border investigations also allow for asset recovery in third countries to be improved and those who have benefitted to be pursued. This would seem to be a necessary aspect of any investigation and outcome: to ensure that all those who are found to have indulged in unlawful conduct, especially those who knowingly receive unlawful benefit are investigated and recovery made.

37. Cross-border investigations are attractive for many reasons. For the enforcement authorities they are far more cost-effective than lengthy police investigations and trials: much of the cost of the investigation and legal proceedings is shouldered by the corporation itself. There is an ability to conduct what some have dubbed 'pay-as-you-go' enforcement allowing the enforcement agency to expend a minimum of their own funds: the Mabey and Johnson settlement had three distinct phases: the company plea agreement; the prosecution of the individual directors and then the civil shareholder agreement.

38. However there are issues remaining looking to the future of settlements, not only those outlined above but the difficulties that arise in systems and states where there is a lack of separation of powers and independence of institutions, the current hazy relationship between plea agreements and whether they engage of debarment provisions in European legislation, and whether plea agreements allow for justice to be seen to be done.

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