

Long WORKSHOP REPORT FORM

Number and title of workshop: WS 4.1 Settling Foreign Bribery Cases: A Deterrent or a Dodge?

Coordinators: Nancy Boswell, President & CEO, Transparency International USA

Date and time: Wednesday, November 10, 2010, from 5.30 pm to 7.30 pm

Moderator: Nancy Boswell, President & CEO, Transparency International-USA

Rapporteur: Shruti Shah, Senior Policy Director, Transparency International-USA

Panellists (Name, institution, title):

- **Mark F. Mendelsohn**, Partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP (Former Deputy Chief of the Fraud Section, Criminal Division, United States Department of Justice)
- **Richard Alderman**, Director of the Serious Fraud Office (SFO), Government of United Kingdom
- **Elena A. Panfilova**, Director, Transparency International Russia

Summary

According to the World Bank, over a trillion dollars are paid in bribes annually, undermining development, distorting business competition and impeding foreign investment. Although most of the world's governments are now parties to multilateral conventions prohibiting foreign bribery, implementation – and particularly enforcement – of foreign bribery laws is still inadequate.

Moreover, recent cases show that prosecutors are increasingly using settlements over prosecutions as a way to resolve cases. While settlements have many advantages, they are intended for use in the context of a vigorous enforcement regime. Recent settlements have raised questions whether they will have the deterrent impact necessary to stem foreign bribery.

Issues raised and discussed were:

- The potential risk that the increasing use of settlements may lead to prosecuting authorities halting investigations prematurely and “outsourcing” their responsibilities to law firms selected by companies;
- The impact of settlements on investigations in jurisdictions where the bribes were paid;
- The impact of settlements on transparency and the availability of information on the cases;
- The extent to which US and UK authorities assist other countries by providing evidence of bribes taken by corrupt officials;
- The various elements of a major settlement action (deferred prosecution, remediation, monetary penalties, debarment, and imposition of monitors);

- Whether more information can be made public and proactively provided to authorities in jurisdictions where the bribery occurred;
- The rights of the victims of corruption; and
- Other tools available to address foreign extortion in the absence of prosecution in the countries where the bribes were paid. These include denying visas to corrupt officials and issuing bilateral demarches.

Looking at range of settlements elements from the perspectives of leading prosecutors and NGOs from the US, UK and Russia, this IACC workshop explored advantages and disadvantages of using settlements.

Summary of presentations

Mark Mendelsohn and **Richard Alderman** began the session by providing brief backgrounds on US Foreign Corrupt Practices Act and the UK bribery Act, respectively.

The discussion then turned to the enforcement regimes in each country. Mark noted that the US criminal justice system is built on plea bargaining. Plea bargaining typically involves an agreement whereby the prosecutor offers the defendant the opportunity to plead guilty, usually to a lesser charge or to the original criminal charge with a recommendation of a lighter than the maximum sentence. Mark then set out the essential elements of deferred prosecution agreements (DPAs) and non prosecution agreements (NPAs) in the US. A key element in each is a statement of facts that sets out, in some detail, the underlying conduct. Another element involves instituting corporate reforms and putting in place a corporate compliance program that is in line with evolving practice. For DPAs, there also is an indictment filed in court which is a matter of public record.

Richard, noting that “the SFO is at a much earlier stage than the DOJ in developing case law,” emphasized that judges in the UK have the final say when it comes to resolving a case through a settlement. The issue remains as to how much information about a case should be made public and that the SFO is still exploring the appropriate level of disclosure. Richard expressed the view that the term “settlement” gives the wrong impression in that it suggests a less desirable outcome. If there is sufficient evidence to prosecute and the SFO can prove all charges in a case, it will proceed with a prosecution. However, given the costs and time involved in doing so, settlements may be appropriate and satisfactory if a company will agree to plead guilty to the main part of the offense and if the public interest is protected. As noted, the judge would have the final say before a settlement could be concluded.

Richard and Mark agreed that alternatives to conviction are particularly important in the context of debarment, which may not be the appropriate remedy in every case. Richard acknowledged that this is an issue of some concern in the UK because a corruption conviction in the EU effectively debars a party from participating in public procurement.

Elena Panfilova discussed the impact of settlements in countries such as Russia, which she termed as “systemically corrupt.” She noted that the FCPA “makes miracles happen” in the way it affects behaviour, but that all companies in Russia “pay [bribes] in one way or the other.” She said that while some companies develop strong compliance systems, they find it difficult to fight “traditional voluntary corruption.” She related the case of Swedish furniture giant IKEA, where a low level employee or agent allegedly paid bribes that resulted in senior executives losing their jobs.

Elena also discussed the Daimler FCPA case, whose revelations about bribes came as no surprise to anyone in Russia. The more important question was whether Russian officials would conduct a follow-up investigation, particularly after TI Russia and several thousand concerned citizens demanded it. The government ultimately did investigate, but determined that there had been “no misconduct” on the part of Russian officials. Elena expressed concern was that a statement of facts accompanying a settlement, absent the names of the extorting officials, may have little impact in countries like Russia where there is no credible threat of prosecution. When bribes takers are not punished, it sends the wrong message and emboldens the corrupt officials to continue extorting, she noted.

Main Outputs

The participants gained a good understanding about the elements of settlements, the potential benefits of settlements and the challenges associated with them.

They also gained an understanding about how such agreements in the US generally require companies to admit wrongdoing, pay often heavy penalties, co-operate in ongoing investigations (which can lead to separate criminal prosecution of individuals), implement anti-bribery compliance programmes, and engage an independent compliance monitor for up to three years to ensure implementation and to report back to the government on its findings.

The participants also gained an appreciation for the challenges associated with settlements such as their impact on investigations in jurisdictions where the bribes are paid, the issues of transparency and the availability of information about individual cases, and the need to address the rights of the victims.

Recommendations, Follow-up Actions

Potential follow up actions include:

- Conducting a comparative study on the perspectives of different stakeholders from different countries on the benefits and the challenges associated with settlements of foreign bribery cases; and

Working towards identifying guiding principles on how settlements can be used more effectively by law enforcement and civil society to promote corporate integrity, and to address the concerns of the victims.

Highlights

- Expressing frustration on the absence of investigations and convictions in Russia, **Elena Panfilova** noted that only a “miracle” could explain how “there can be bribe givers but no bribe takers.”
- Elena also termed Russia as “systemically corrupt” and said that “there are no companies in Russia which do not pay in one way or another.”
- **Richard Alderman** said that the question of how to compensate victims of corruption was an important issue and that an important part of the SFO policy was to “direct money back to the people who have suffered”.