Debevoise & Plimpton

FCPA Update
December 2014
Volume 6
Number 5

# FCPA Update

A Global Anti-Corruption Newsletter

Also in this issue:

13 Small Country, Big Punch: The Netherlands' Anti-Bribery Prosecution of SBM Offshore

24 Transparency International's 2014 Corruption Perceptions Index

39 The UK FCA Provides New Guidance on Managing Bribery and Corruption Risk in Commercial Insurance Broking

Click here for an index of all *FCPA Update* articles

If there are additional individuals within your organization who would like to receive *FCPA Update*, please email ssmichaels@debevoise.com or pferenz@debevoise.com.

## Alstom's $772 Million FCPA Settlement: The Wages of Late Cooperation and Other Lessons of the Settlement

On December 22, 2014, in the largest FCPA corporate criminal resolution in history, French company Alstom S.A. and three of its subsidiaries pleaded guilty to or settled via deferred prosecution agreements several FCPA-related charges. Alstom S.A. agreed to pay up to $772,290,000 in fines, after a more-than four and a half year investigation into alleged use of consultants to make improper payments to foreign officials who were able to influence the engagement of Alstom with respect to projects in the power generation, power transmission, and transportation sectors.[1]

Continued on page 2

1. *See* DOJ Press Rel. 14-1448, Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery [hereafter "DOJ Press Release"].

**Alstom's $772 Million FCPA Settlement: The Wages of Late Cooperation and Other Lessons of the Settlement**

Continued from page 1

The Alstom resolution is the largest FCPA settlement with the U.S. Department of Justice ("DOJ") and ranks second in total monetary terms only to that reached with Siemens AG in 2008, which involved a $450 million settlement with the DOJ and a $350 million civil FCPA settlement with the U.S. Securities and Exchange Commission ("SEC").[2]

Parent company Alstom S.A. pleaded guilty (with a plea agreement) to a two-count information charging criminal violations of the books and records and internal controls provisions of the FCPA, and its Swiss services subsidiary, Alstom Network Schweiz AG pleaded guilty (also with a plea agreement) to one count of conspiring to violate the anti-bribery provisions of the FCPA.[3] Two U.S. Alstom subsidiaries, Alstom Power Inc. and Alstom Grid Inc., entered into deferred prosecution agreements related to charges they conspired to violate those anti-bribery provisions.[4]

"While the SEC has not said why it has not brought charges against Alstom, and, given the statements by Alstom and DOJ, such charges do not seem likely, the fact that Alstom S.A. delisted its securities from U.S. exchanges in August 2004 – over a decade ago – is likely a key factor[.]"

The lack of an SEC resolution is one of the more noticeable features of the Alstom case, in which Alstom S.A. pleaded guilty to criminal violations of the FCPA's books and records and internal controls provisions, which are concurrently enforced civilly by the SEC. While the SEC has not said why it has not brought charges against Alstom, and, given the statements by Alstom and DOJ, such charges do not seem likely, the fact that Alstom S.A. delisted its securities from U.S. exchanges in August 2004 – over a decade ago – is likely a key factor affecting the lack of SEC filings.

One thing seems clear. At least in the view of DOJ, Alstom paid a price for its decision (1) not to self-report evidence of bribery that, according to the DOJ, the Company was aware of for many years, and, then, (2) not to cooperate promptly in investigating the issues until charges were brought against Alstom employees.[5] As Deputy Attorney General James M. Cole stated, DOJ's intent was to send "an unmistakable message to other companies around the world: that this

Continued on page 3

2. *See* SEC Press Rel. 2008-294, SEC Charges Siemens AG For Engaging in World-Wide Bribery (Dec. 15, 2008), http://www.sec.gov/news/press/2008/2008-294.htm [hereinafter "SEC Siemens Press Release"].
3. DOJ Press Release, note 1, *supra*.
4. *Id.*
5. *Id.*

**Alstom's $772 Million FCPA Settlement: The Wages of Late Cooperation and Other Lessons of the Settlement**

Continued from page 2

Department of Justice will be relentless in rooting out and punishing corruption to the fullest extent of the law, no matter how sweeping its scale or how daunting its prosecution."[6] How much Alstom paid for not self-reporting and weakly cooperating initially remains to be seen,[7] though comparison with the Siemens case[8] suggests the amount may be large.

Some of the costs in terms of lost cooperation credit may not yet have been realized. Assuming the Alstom settlement is accepted by the United States District Court for the District of Connecticut, where a sentencing hearing is scheduled for June 2015, Alstom will be dealing with the DOJ on compliance issues for years. At a minimum, for a three-year period Alstom must self-report to the DOJ any "credible evidence . . . that possible corrupt payments or possible corrupt transfers of property or interests may have been offered, promised, paid, or authorized" on its behalf "or that related false books and records have been maintained."[9] Alstom has a corporate monitor by reason of a 2012 Negotiated Resolution Agreement with the World Bank, so, under its plea agreement, Alstom will not need to retain a second monitor unless it fails to "satisfy the monitoring requirements of the World Bank." If Alstom does so fail, a second monitor will be required for another three-year period.[10]

Alstom's DOJ resolution also comes amidst multiple investigations by at least seven other nations, including bribery-related money-laundering charges settled by Swiss regulators in late 2011 for 31 million Euro[11] and pending charges by the U.K. Serious Fraud Office against Alstom Network UK and Alstom Power Ltd., the last of which were lodged the same day DOJ announced its resolution.[12] As noted by the DOJ, three Alstom employees and another employee of an Egyptian state-owned entity had already pleaded guilty to FCPA-related offenses. The earliest of the individuals to do so, David Rothschild, U.S. domestic concern Alstom Power, Inc.'s former vice president of regional sales, did so more than two years ago, on

Continued on page 4

6. *Id.*
7. As noted by the DOJ, Alstom's failure to self-report and to cooperate throughout, together with "the breadth of the companies' misconduct, which spanned many years, occurred in countries around the globe and in several business lines, and involved sophisticated schemes to bribe high-level government officials," combined with "Alstom's lack of an effective compliance and ethics program" and prior criminal misconduct, led to the record criminal settlement. *Id.*
8. DOJ Press Rel. 08-1105, "Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines" (Dec. 15, 2008), http://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html [hereinafter, "DOJ Siemens Press Release"]; SEC Siemens Press Release, note 2, *supra*.
9. Alstom S.A. Plea Agreement [hereinafter "Plea Agreement"] Exhibit 4 at ¶ 1, *United States v. Alstom S.A.*, No. 3:14-cr-00246-JBA (D. Conn. filed Dec. 22, 2014)..
10. Plea Agreement Exhibit 4 at D-3, *United States v. Alstom S.A.*, No. 3:14-cr-00246-JBA (D. Conn. filed Dec. 22, 2014).
11. *See* Trace Compendium – Alstom, https://www.traceinternational2.org/compendium/view.asp?id=109.
12. *See* Main Justice-Just Anti-Corruption, "UK Unit of Alstom Faces Fresh Corruption Charges," http://www.mainjustice.com/justanticorruption/.

**Alstom's $772 Million FCPA Settlement: The Wages of Late Cooperation and Other Lessons of the Settlement**

Continued from page 3

November 2, 2012.[13] Another employee, Lawrence Hoskins, Alstom's former senior manager for the Asia region, was charged in July 2013 and awaits trial.[14] The prospect that further trials may yield more evidence against Alstom remains.

Although there are many lessons that can be taken from the Alstom matter, in this article we focus on four: (1) how the schemes identified in the DOJ's charging instruments illustrate well-known challenges and lessons of anti-bribery compliance – and suggest new themes in the DOJ's enforcement strategy; (2) how the resolution affects the calculus for self-reporting to the DOJ and cooperating in investigating anti-bribery offenses that could lead to an FCPA prosecution, and, more specifically, what "cooperation" means in the eyes of the DOJ; (3) how a non-U.S. company that de-listed its securities a decade ago from U.S. securities exchanges came to agree to pay the largest FCPA criminal fine in history for charges that relate to the books and records and internal controls provisions of the statute that apply solely to issuers; and (4) how the case illustrates the complexity and risks to multinational companies from laws and investigations in multiple countries.

## The Bribery Schemes Alleged and the Themes of DOJ's Concerns

The bribery schemes outlined in the DOJ's charging documents involved contemplated or actual payments to foreign officials responsible for or influential with respect to power generation projects in Indonesia, Saudi Arabia, and Egypt, power transmission projects in Egypt and the Bahamas, and transportation projects in Taiwan.[15] Virtually all of the allegedly improper payments involved one or more Alstom business units or subsidiaries "retaining consultants purportedly to provide consulting services on behalf of the companies, but who actually served as conduits for corrupt payments to the government officials."[16] The allegations set forth evidence of various weight and thus the case demonstrates how large FCPA cases can devolve into a review of evidence of violations that are both more and less important, and why a company in the midst of an FCPA investigation can find almost any expenditure subject to intense scrutiny.

For example, the charging instruments allege that Alstom made provisions in its budgets for Saudi power projects that allegedly required "Saudization" of project employees through programs apparently allocating ten percent or more of the employee positions to local residents.[17] Such localization requirements have been

Continued on page 5

13. *See* DOJ Press Release, note 1, *supra*.
14. *Id.*
15. *See* Information [hereinafter "Alstom S.A. Information"] at ¶¶ 25-142, *United States v. Alstom S.A.*, No. 3:14-cr-00246-JBA (D. Conn. filed Dec. 22, 2014).
16. DOJ Press Release at 2, note 1, *supra*.
17. Alstom S.A. Information at ¶ 71.

**Alstom's $772 Million FCPA Settlement: The Wages of Late Cooperation and Other Lessons of the Settlement**

Continued from page 4

the bane of in-house legal departments and compliance officers for years in not just the Middle East but also other jurisdictions, and present recurring difficulties under the FCPA to the extent the host country transparently imposes such requirements in an effort to train local citizens or simply to "spread the wealth." Although it is not at all clear that payments even to marginally qualified local citizens should be subject to prosecution in cases of transparent localization programs, the evidence cited by DOJ that Alstom business units acceded to demands by Saudi officials to hire individuals "strongly recommended by our client, *i.e.*, friends and family," would have rendered any effort to fight the localization-based charges an uphill battle.[18]

"The allegations set forth evidence of various weight and thus the case demonstrates how large FCPA cases can devolve into a review of evidence of violations that are both more and less important."

Similarly, DOJ cited payments proposed or made to other Saudi officials to induce them to issue a payment certificate, never alleging whether that issuance was discretionary or not, an issue potentially critical to whether the payment is an exempt facilitating payment.[19] Because the charges, however, related to violations of the books and records and internal controls provisions of the FCPA, it probably was not necessary for DOJ to clarify these points given that even facilitating payments, while lawful under the FCPA, must be properly controlled and accurately recorded.

DOJ also alleged that contributions made to an Islamic charity were mis-booked as project expenses, another example of U.S. authorities prosecuting charitable contributions under the FCPA,[20] while still other allegations addressed entertainment of a Saudi foreign official through a visit to New York City involving shopping, dining, and a Broadway show, purportedly at the same time the official was being called on to resolve certain unspecified "commercial issues."[21] While not materially different from other travel-and-entertainment charges brought recently, these allegations illustrate that, even in a case of alleged broad, systemic misconduct, the DOJ does not abjure from charging less serious conduct when making its case.

Continued on page 6

18. *Id.*
19. *Id.* at ¶¶ 72, 84.
20. *Id.* at ¶ 61.
21. *Id.* at ¶ 99.

**Alstom's $772 Million FCPA Settlement: The Wages of Late Cooperation and Other Lessons of the Settlement**

Continued from page 5

By and large, however, the evidence cited by DOJ, to which Alstom stipulated as part of its plea agreement, was of a substantially more serious nature. Citing dozens of emails and other documents, the DOJ alleged repeated ignorance of red flags, such as deviations from standard form consultancy contracts in order to expedite large up-front payments to consultants, lack of due diligence indicating that consultants were qualified for the work entailed by the consultancy agreements, and hiring of consultants despite affirmative evidence of their lack of qualifications.[22]

Among other documents, the DOJ cited an internal email that allegedly described a consultant's role as being to "take care of the guy," *i.e.* an Indonesian government official,[23] while still other allegations stated precisely how identifiable payments were paid by a consultant to an Egyptian foreign official (who has since pleaded guilty in a related money laundering prosecution in the District of Maryland) via a Swiss bank account.[24] One Alstom employee email even allegedly criticized another employee trying to insist on compliance with company policies regarding proof of services rendered by consultants, stating that if the compliance-insisting employee "'wanted to have several people put in jail [she] should continue to send emails as [she] had earlier in the day' and further instructed her to delete all e-mails regarding the consultant."[25] Other allegations in the charging instruments cited resistance to compliance, and even corrupt schemes to evade the FCPA by avoiding the retention of consultants who might be paid on U.S. soil or with U.S. dollars.[26]

Against this background, it is perhaps no surprise that in its charges against Alstom S.A., DOJ repeated in nearly every described scenario the lack of testing, that is auditing, monitoring, and similar checking designed to assure that policies and procedures, which Alstom appeared to have had in place on paper, were being followed, and then escalating violations of policies where they were not.[27] The DOJ's insistence on testing and escalation of the results thereof as a way of distinguishing compliance programs that exist only on paper from robust compliance programs is perhaps the essential operational lesson of the case for in-house compliance functions.

Continued on page 7

22. *Id.* at, *e.g.*, ¶¶ 31, 79, 93.
23. *Id.* ¶ 55.
24. *Id.* ¶¶ 86-90.
25. *Id.* ¶ 102.
26. *Id.* ¶¶ -119-20 (consultant resisted signing contract with standard representations); *id.* at ¶ 32 (citing an "unwritten policy to discourage, where possible, consultancy arrangements that would subject Alstom to the jurisdiction of the United States").
27. *See, e.g., id.* ¶¶ 61, 112.

Alstom's $772 Million FCPA Settlement: The Wages of Late Cooperation and Other Lessons of the Settlement

Continued from page 6

## The Impact of Alstom's Alleged Non-Self Disclosure and Non-Cooperation and the Dynamics of Prosecuting Former Foreign Private Issuers Under the FCPA

While DOJ has been criticized for a lack of transparency in identifying the degree of credit both self-disclosure and genuine cooperation can generate for a corporate defendant, the government went out of its way in the Alstom matter to send yet another signal that those rewards are real, almost inviting a comparison to the Siemens AG matter that was likewise resolved in the waning days of the calendar year, six years ago, also with a corporate parent plea agreement to internal controls and books and records charges.

As stated in the plea agreement with Alstom S.A.: "[t]he Defendant failed to voluntarily disclose the conduct even though it was aware of related misconduct at Alstom Power, Inc., a U.S. subsidiary, which entered into a resolution for corrupt conduct in connection with a power project in Italy several years prior to the Department reaching out to Alstom regarding its investigation," and "[t]he Defendant initially failed to cooperate with the Department's investigation, responding only to the Department's subpoenas to the Defendant's subsidiaries."[28] While the DOJ gave some credit to Alstom for its "thorough cooperation" once several employees were charged, DOJ's language stands in contrast to the DOJ's statements in its Sentencing Memorandum regarding Siemens AG, noting Siemens' "exceptional cooperation."

In terms of the fines levied, a comparison of the two resolutions at least correlates in important ways with the DOJ's different view of Alstom and Siemens.

In Alstom's case, the parties stipulated the gain from the misconduct, and, thus the basis for calculating the fine, to be $296 million, resulting in a maximum statutory fine of four times that amount, or $1.184 billion, under 18 U.S.C. § 3571, *i.e.*, double the "gross gain" for each of the two counts of the information.[29] In Siemens, the parties stipulated a "loss" calculation (based on alleged payments) of $843,500,000,[30] with a resulting maximum statutory fine (using the same method) of $3.37 billion.

The stipulated Sentencing Guidelines fine range for Alstom (with an offense level of 37 and culpability score of 9) was calculated at between $532.8 million and $1.0656 billion), whereas the stipulated Sentencing Guidelines fine range for

Continued on page 8

28. Plea Agreement ¶¶ 18(a)(1) and (2).

29. *See id.* at ¶ 15.

30. *See* Plea Agreement ¶¶ 4-6, *United States v. Siemens AG,* No. 1:08-cr-367-RJL (D.D.C. filed Dec. 15, 2008).

**Alstom's $772 Million FCPA Settlement: The Wages of Late Cooperation and Other Lessons of the Settlement**

Continued from page 7

Siemens (with an offense level of 44 (largely driven by the higher amount of loss) and a culpability score of 8) was between $1.35 and $2.7 billion. As can be seen below, Siemens' actual fine was significantly lower on a proportionate basis, and Siemens, a company multiple sizes of Alstom's in head count in the relevant period, also was successful in resolving its U.S. anti-bribery matter in two years, at least half the time or less taken by Alstom, which remains under investigation in several jurisdictions.

| | Agreed Fine | Percent of Statutory Maximum | Percent of Guidelines Maximum | Percent of Guidelines Minimum |
|---|---|---|---|---|
| Alstom S.A. | $772,290,000 | 65.2 percent | 72.5 percent | 145.0 percent |
| Siemens AG | $450,000,000 | 13.3 percent | 16.7 percent | 33.3 percent |

But whether the above figures show a genuine commitment to the concept of "cooperation credit" remains to be seen for a number of reasons. One factor, for example, that may have led DOJ to seek a proportionately larger fine from Alstom was Siemens' simultaneous settlement with German prosecuting authorities. Other than its Swiss subsidiary's money-laundering-related charges that were resolved in

"This period for investigation, especially given the breadth of internal controls and books and records offenses, as well as intra-corporate conspiracy charges that can be brought against individuals, subsidiaries, and parent firms alike, can thus significantly limit the projected 'benefits' of de-listing from U.S. exchanges[.]"

2011, Alstom has not yet paid a significant price overseas for the alleged misconduct, and DOJ's action could well be viewed as a nudge to the French authorities, which have been reportedly investigating Alstom, with no judicial results, since 2007.

What is relatively clear, though, is that Alstom's decision to de-list from U.S. securities exchanges in August 2004 did not materially shield the company. With a five year statute of limitations, which can be enlarged for up to three years upon application to a U.S. court in the event evidence is sought from outside the United States, or suspended with tolling agreements, U.S. prosecutors retain a considerable amount of time to investigate and lodge charges. The likelihood of charges for

Continued on page 9

**Alstom's $772 Million FCPA Settlement: The Wages of Late Cooperation and Other Lessons of the Settlement**

Continued from page 8

a large company like Alstom, which sells in a number of markets, has many thousands of employees, and hence many thousands of sources of evidence, is especially significant, particularly where there are systemic issues.

This period for investigation, especially given the breadth of internal controls and books and records offenses, as well as intra-corporate conspiracy charges that can be brought against individuals, subsidiaries, and parent firms alike, can thus significantly limit the projected "benefits" of de-listing from U.S. exchanges and no longer being subject to provisions of the FCPA that apply to foreign private issuers. Exiting U.S. capital markets, in sum, does not shield past conduct from prosecution, at least not for many years.

Indeed, perhaps the greatest irony in the Alstom matter (as well as several other cases involving foreign issuers) is that a principal benefit Alstom S.A. received from the DOJ was the ability to plead to internal controls and books and records offenses, which are applicable solely to issuers under the 1934 Securities Exchange Act, instead of to primary anti-bribery offenses, thereby avoiding mandatory debarment under the EU procurement directive.[31] Should evidence be adduced in the future that Alstom S.A. has violated the FCPA's anti-bribery mandates through conduct that even in part takes place in the territory of the United States, the company may not have that option.

## The Relationship of the U.S. Settlement to Parallel Proceedings

The DOJ resolution also reinforces the risks and complexity arising from the fact that a multinational firm like Alstom is subject to multiple transnational and local anti-bribery laws as well as development bank and other third-party regulation.

Indeed, the DOJ took cognizance of at least one set of parallel proceedings, *i.e.*, those at the World Bank, adopting a measured approach in respect to the always-important issue of whether to appoint a corporate monitor, deferring to the earlier World Bank settlement and the monitor appointed there.

In addition, although both Alstom S.A. and the company's Swiss service entity, Alstom Network Schweiz AG, which was held responsible for its inadequate performance in compliance roles, were required to accept the most serious kind of DOJ disposition, namely, a guilty plea, the DOJ's resolution demonstrated regard

Continued on page 10

31. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Recital 1, Official Journal L 134, 30/4/2004, p.114-240. Directive 2004/17/EC is complementary and pertains to procurement in water, energy, transport and postal services. *See* Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, Official Journal L 134 , 30/04/2004, p. 1-113.

**Alstom's $772 Million FCPA Settlement: The Wages of Late Cooperation and Other Lessons of the Settlement**

Continued from page 9

for the complexity of remediating a former foreign private issuer, and, specifically a French one that has to contend with the French blocking statute. Thus, although Alstom S.A. and Alstom Network Schewiz AG are required to self-report misconduct for a three-year period, if self-reporting specific evidence would violate the French blocking statute, the company is allowed to self-report to French authorities and to give notice to DOJ,[32] an arrangement that may make it more difficult for Alstom to avoid prosecution in its home country. No similar protection was given regarding the Swiss blocking statute.

At a more general level, the agreement leaves open the role, if any, that French investigative authorities have played, or may play in the future, with respect to these allegations. Alstom is, after all, a large and iconic French company, although the latter status is changing with the prospective sale of much of its business to General Electric. Entirely missing from the DOJ's filings or press release is any specific reference to cooperation by French authorities, or any mention of the position those authorities have taken, or may take, with respect to Alstom.

This is in stark distinction to the last two FCPA-related agreements signed by the DOJ with large French companies. In connection with the Alcatel agreement of 2010, the DOJ made a point of expressing its appreciation for the cooperation provided by the French Ministry of Justice, the High Court *(Tribunal de Grand Instance)*, and the inter-ministerial Central Service for the Prevention of Corruption.[33] In connection with the even larger Total resolution signed in May 2013, the DOJ likewise expressed its "deep appreciation for the cooperation and partnership of French law enforcement authorities."[34]

In contrast, the Alstom press release expresses appreciation for the cooperation of the law enforcement authorities in a number of countries, including the United Kingdom (where various charges against two Alstom subsidiaries remain pending), Indonesia, Italy, Germany, and others, but is noticeably silent about France.

Even in those situations in which the DOJ has acknowledged "cooperation" by French authorities, it is unclear what, in fact, such cooperation amounted to, or what it may have signaled about the future risks in France. The Total agreement,

Continued on page 11

32. *See* Plea Agreement Exhibit 4.

33. DOJ Press Rel. 10-1481, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), http://www.justice.gov/opa/pr/alcatel-lucent-sa-and-three-subsidiaries-agree-pay-92-million-resolve-foreign-corrupt.

34. DOJ Press Rel. 13-613, French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme (May 29, 2013), http://www.justice.gov/opa/pr/french-oil-and-gas-company-total-sa-charged-united-states-and-france-connection-international.

**Alstom's $772 Million FCPA Settlement: The Wages of Late Cooperation and Other Lessons of the Settlement**

Continued from page 10

for example, did not give Total any protection against future investigation by French authorities for the precise acts the company acknowledged in its agreement with the DOJ; in 2013 Total disclosed that a French investigating magistrate had informed it that the company was formally under investigation *(mis en examen)* and in a quarterly statement issued in the fourth quarter of 2014 it disclosed that the investigating magistrate had bound the company over for trial on corruption charges, which could take place in 2015.[35] If that trial proceeds, it may raise questions whether Total's agreement with the DOJ offers it any protection against multiple prosecutions under the principle of *ne bis in idem,* the rough equivalent of a double jeopardy protection.

"[W]ith additional charges pending in the United Kingdom and investigations ongoing elsewhere, it appears that Alstom will be facing uncertainty for some time as a result of anti-bribery matters."

Whether Alstom may face future investigation and prosecution in France is unclear, but at a minimum the absence of any mention of French participation in the DOJ outcome underscores the degree to which French efforts to investigate overseas corruption appear to be out of step with efforts in the United States and other countries. In any case, with additional charges pending in the United Kingdom and investigations ongoing elsewhere, it appears that Alstom will be facing uncertainty for some time as a result of anti-bribery matters.

## Conclusion

The resolution in the Alstom case makes clear several points about FCPA enforcement, going forward. One, it is long past the time when companies can rely on "paper policies" to avoid serious fines and criminal consequences under U.S. law. Second, although still somewhat undefined and hard to calculate, the risks of not self-reporting potential misconduct and then robustly cooperating – which in DOJ's view means more than complying with lawful subpoenas – can be substantial. Three, while there are potential enforcement risk-reducing benefits to de-listing

Continued on page 12

35. *See* www.total.com/sites/default/files/atoms/files/3t14-annexes.pdf.

**Alstom's $772 Million FCPA Settlement: The Wages of Late Cooperation and Other Lessons of the Settlement**

Continued from page 11

from the United States, these can be ephemeral for many years to come. Fourth and finally, the resolution of a U.S. anti-bribery investigation may mark settlement of only one risk point in a global enforcement environment that poses complex and overlapping challenges.

**Sean Hecker**

**Andrew M. Levine**

**Karolos Seeger**

**Bruce E. Yannett**

**Frederick T. Davis**

**Steven S. Michaels**

*Sean Hecker, Andrew M. Levine, and Bruce E. Yannett are partners, and Steven S. Michaels is a counsel, in the New York office. Karolos Seeger is a partner in the London office. Frederick T. Davis is of counsel in the Paris office. They are members of the Litigation Department and the White Collar Litigation Practice Group. The authors may be reached at shecker@debevoise.com, amlevine@debevoise.com, kseeger@debevoise.com, beyannet@debevoise.com, ftdavis@debevoise.com, and ssmichaels@debevoise.com. Full contact details for each author are available at www.debevoise.com.*

# Small Country, Big Punch: The Netherlands' Anti-Bribery Prosecution of SBM Offshore

On November 12, 2014, the Dutch Public Prosecutor's Office ("Openbaar Ministerie") and Netherlands-based oil platform services company SBM Offshore N.V. ("SBM") announced an out-of-court settlement for $240 million (193 million Euros) related to bribery allegations involving SBM sales agents in Brazil, Equatorial Guinea and Angola.[1] This resolution is believed to be the fourth largest anti-corruption corporate resolution by any country in 2014 – and atypical for the Netherlands, which has consistently faced criticism for its weak foreign bribery enforcement practices.[2]

At the same time, SBM announced that the U.S. Department of Justice ("DOJ") had closed its own inquiry into the allegations and would not be prosecuting the company.[3] SBM CEO Bruno Chabbas commented in a company press release:

> SBM welcomes the conclusion of all discussions with the Dutch and U.S. authorities. We have been open, transparent and accountable throughout this difficult process which has addressed issues from a past era. We can now focus on the future, secure in the knowledge that we have put in place an enhanced compliance culture which embeds our core values.[4]

This optimism regarding the future may have been premature. Following reports of the settlement, Minister Jorge Hage, then Brazil's Comptroller General of the Union, announced that an inquest launched in April was to be followed by

Continued on page 14

1. *See* Adam Dobrik, "Dickinson: The Key Moment in SBM Offshore," *Global Investigations Rev.* (Nov. 13, 2014), http://globalinvestigationsreview.com/article/1994/dickinson-key-moment-sbm-offshore; "Dutch SBM Offshore Sticks to Revenue Forecast After Settlement," *Reuters América Latina* (Nov. 13, 2014), http://lta.reuters.com/article/idLTAL6N0T310320141113; Press Release, Openbaar Ministerie, SBM Offshore N.V. Settles Bribery Case for US$240,000,000 (Nov. 12, 2014), https://www.om.nl/actueel/nieuwsberichten/@87201/sbm-offshore-settles/ [hereinafter "OM Press Rel."]; Press Release, SBM Offshore, SBM Offshore Achieves Settlement with Dutch Publish Prosecutor's Office over Alleged Improper Payments. United States Department of Justice Closes Out the Matter (Nov. 12, 2014), http://www.sbmoffshore.com/?press-release=sbm-offshore-achieves-settlement-dutch-public-prosecutors-office-alleged-improper-payments-united-states-department-justice-closes-matter [hereinafter "SBM Settlement Press Rel."]; Cara Salvatore, "Dutch Drilling Giant Pays $240M to Settle Bribery Probe," *Law360* (Nov. 12, 2014), http://www.law360.com/articles/595524/dutch-drilling-giant-pays-240m-to-settle-bribery-probe. In this article, all references to dollars are to U.S. dollars.
2. *See* "Items of Interest from the Recent Dutch Enforcement Action Against SBM Offshore," *FCPA Professor* (Dec. 1, 2014), http://www.fcpaprofessor.com/items-of-interest-from-the-recent-dutch-enforcement-action-against-sbm-offshore.
3. SBM Settlement Press Rel.
4. *Id.*

**Small Country, Big Punch: The Netherlands' Anti-Bribery Prosecution of SBM Offshore**

Continued from page 13

a full-blown investigation. He further expressed the view that a resolution in Brazil would be far more expensive for SBM given the value – 20 billion reais – of the Brazilian contracts at issue.[5] Indeed, media in Brazil have been regularly reporting on aspects of various investigations of SBM, and the status of official inquiries related to the company is highly fluid and evolving.[6]

"With respect to the Dutch settlement, what is notable was the willingness of the Openbaar Ministerie, at least in this instance, to accept a non-criminal resolution as a means of addressing the country's anti-corruption objectives."

With respect to the Dutch settlement, what is notable was the willingness of the Openbaar Ministerie, at least in this instance, to accept a non-criminal resolution as a means of addressing the country's anti-corruption objectives.[7] That resolution, however, included a substantial financial payment, notwithstanding that the company self-initiated (and self-disclosed) its investigation. Meanwhile, the DOJ, which has long used settlements as a means of "extract[ing] compliance reforms from companies,"[8] chose to abandon its own probe, likely due to the strong domestic-enforcement outcome in the Netherlands and the possible lack of provable U.S. nexus. Leslie Caldwell, Assistant Attorney General of the DOJ's Criminal Division, has indicated, for example, that the United States may choose not to prosecute when "the center of gravity... is in another country."[9] But SBM, a long-time partner of Brazilian state-controlled oil firm Petrobras, now faces the prospect of having to pay another substantial financial penalty to a third enforcement agency, Brazil's Office of

Continued on page 15

5. *See* Samantha Valle & Peter Millard, "SBM Bribery Probe in Brazil Puts Petrobras Work at Risk," *Bloomberg* (Nov. 13, 2014), http://www.bloomberg.com/news/2014-11-13/sbm-bribery-probe-in-brazil-puts-petrobras-work-at-risk.html; Salvatore, note 1, *supra*. ; Adam Dobrik, "Brazilian Authorities Join SBM Offshore Investigation," *Global Investigations Rev.* (Feb. 17, 2014), http://globalinvestigationsreview.com/article/90/brazilian-authorities-join-sbm-offshore-investigation; Dobrik, note 1, *supra*; "Brazil's Anti-Corruption Comptroller Hage Resigns," *Reuters* (Dec. 8, 2014), http://www.reuters.com/article/2014/12/08/brazil-petrobras-idUSL1N0TS10S20141208.
6. *See* José Casado et al., "Petrobras Assinou Contrato Em Branco Com Empresa Holandesa," *O Globo* (Dec. 15, 2014), http://oglobo.globo.com/brasil/petrobras-assinou-contrato-em-branco-com-empresa-holandesa-14833389.
7. *See* OM Press Rel.
8. Rahul Rose, "Caldwell: Settlement A 'More Powerful Tool' Than Convictions," *Global Investigations Rev.* (Dec. 3, 2014), http://globalinvestigationsreview.com/article/2121/?utm_medium=email&utm_source=Law+Business+Research&utm_campaign=5094527_GIR+Headlines&dm_i=1KSF,316YN,E9U8QV,AWKBE,1.
9. "Transcript: Leslie Caldwell Q&A at the American Conference Institute's 2014 FCPA Conference," *Main Justice: Just Anti-Corruption* (Nov. 19, 2012), http://www.mainjustice.com/justanticorruption/2014/11/19/assistant-attorney-general-leslie-caldwell-answers-questions-at-fcpa-conference; *see also* U.S. DOJ "Principles of Federal Prosecution of Business Organizations at 9-28.300(a)(9) (noting the availability of alternative remedies as a factor to be considered in determining whether to bring charges against a corporation).

**Small Country, Big Punch: The Netherlands' Anti-Bribery Prosecution of SBM Offshore**

Continued from page 14

the Comptroller General ("CGU").[10]

It is possible that the three SBM probes mark significant new directions for the three enforcement agencies involved. Where Openbaar Ministerie, the DOJ, the CGU, and other regulators go from here in their anti-corruption efforts will be matters on which the compliance community will be focusing in 2015 and beyond. At a minimum, the Netherlands' resolution and the related matters highlight the increasing potential for high-impact parallel anti-corruption investigations and resolutions by multiple affected countries.

## SBM's Self-Initiated Investigation

On April 10, 2012, SBM announced that it had opened an internal investigation into "alleged improper payments to government officials."[11] SBM voluntarily reported its investigation to the Openbaar Ministerie and the DOJ in April 2012, and continued to "dialogue" with those authorities directly.[12] Indeed, "[t]he extent of the internal investigation was determined in consultation with the Openbaar Ministerie and the [Dutch Fiscal Intelligence and Investigation Service ("FIOD")]."[13] The company also posted publicly-available updates on its website as the investigation progressed.[14]

The full investigation was conducted over two years by outside law firms and forensic accountants, and involved interviews with current and former SBM employees and board members, as well as the analysis of hard drives, other electronic data, and documents.[15] On March 28, 2013, SBM announced that the investigation was focusing on its activities in certain African countries, as well as one country outside Africa, between 2007 and 2011, and that "there were indications that some payments were made to sales agents, which appeared to have been intended for government officials."[16]

On April 2, 2014, SBM announced the results of its investigation. It identified the countries involved as being Equatorial Guinea, Angola and Brazil, and disclosed that the aggregate commissions paid to sales agents between 2007 and 2011 totaled $200 million.[17] SBM also provided an overview of its findings by country and the remedial measures it had taken to prevent future violations, which include: establishing a compliance department; enhancing its due diligence

Continued on page 16

10. *See* Valle & Millard, note 5, *supra*.
11. Press Release, SBM Offshore, SBM Offshore Findings of Internal Investigation (Apr. 2, 2014), http://www.sbmoffshore.com/?press-release=sbm-offshore-findings-internal-investigation [hereinafter "SBM Investigation Press Rel."].
12. *See id.*; Dobrik, note 1, *supra*.
13. OM Press Rel.
14. Internal Investigation, SBM Offshore, http://www.sbmoffshore.com/investor-relations-centre/internal-investigation-updates.
15. *See* SBM Investigation Press Rel.; OM Press Rel.
16. SBM Investigation Press Rel.
17. *Id.*

**Small Country, Big Punch: The Netherlands' Anti-Bribery Prosecution of SBM Offshore**

Continued from page 15

program, sales agent approval procedure, internal financial controls, and internal audit function; stopping and then reviewing all payments to all agents; terminating agents; implementing a new template sales agency agreement with anti-corruption warranties and a new payment system for sales agents; increasing annual training courses for staff; and launching the SBM Offshore Integrity Line, a hotline.[18]

SBM also announced on April 2, 2014 that it was "discussing the disclosure of its findings with the Openbaar Ministerie, whilst simultaneously continuing its engagement with the [DOJ]."[19] SBM's announcement of its $240 million out-of-court settlement with the Openbaar Ministerie followed on November 12, 2014.[20]

The Openbaar Ministerie's own press release on the recent Dutch disposition explained that the $240 million settlement consisted of a $40 million fine and $200 million in disgorgement.[21] On top of the settlement money, SBM also agreed to provide the Openbaar Ministerie with access to information about its continued implementation of its new and enhanced compliance policies upon request.[22] The Openbaar Ministerie disclosed that, in addition to SBM's internal investigation, "the FIOD conducted its own investigation under the direction of the Openbaar Ministerie," during which "[a]dministration was seized, witnesses and other persons involved were interviewed and mutual legal assistance was requested from countries involved."[23] SBM cooperated throughout both investigations and "always g[ave] full disclosure to the Openbaar Ministerie and the FIOD."[24]

On a final note, the Openbaar Ministerie added that investigation into the involvement of particular individuals, likely not of Dutch nationality, was ongoing, and that it would "cooperate fully with the countries that have jurisdiction to prosecute the natural persons involved."[25] Thus, with the exception of this limited continuing involvement, the Dutch investigation of SBM has reached an end.

Continued on page 17

18. *Id.*; *see also* OM Press Rel.
19. SBM Investigation Press Rel.
20. *Id.*
21. OM Press Rel.
22. *See id.*
23. *Id.*
24. *Id.*
25. *Id.*

Small Country, Big Punch: The Netherlands' Anti-Bribery Prosecution of SBM Offshore
Continued from page 16

## Openbaar Ministerie's Use of Out-of-Court Settlements

### A. The Options Under Dutch Law

The Dutch enforcement action against SBM was settled pursuant to article 74 of the Dutch Criminal Code.[26] According to the OECD, the Openbaar Ministerie "has broad discretionary powers to settle cases out of court" pursuant to article 74 and its Directive on Large and Special Transactions.[27] Out-of-court settlements do not require an admission of wrongdoing, but such an admission may be required by the Openbaar Ministerie under the terms of the settlement.[28] "The right to prosecute lapses once the conditions set in a particular case have been met."[29]

"According to the OECD, the Openbaar Ministerie 'has broad discretionary powers to settle cases out of court' pursuant to article 74 and its Directive on Large and Special Transactions."

As noted by the OECD, under article 74, settlement is not an option if an action involves a serious offense punishable by imprisonment for more than six years.[30] As such, foreign bribery offenses under articles 177 (bribery of public officials), 177a (bribery not in violation of official duty), and 178(1) (bribery of a judge to exert influence) of the Criminal Code, because they are punishable by prison sentences under six years, may be settled.[31] However, an offense under article 178(2) (bribery of a judge to obtain conviction), which is punishable by up to nine years in prison, must be prosecuted in court.[32]

The Directive further provides that settlement may not be used – without justification – in cases of public concern.[33] If a case is of public concern and the Openbaar Ministerie wishes to make a settlement offer to the defendant, the Board of Procurators General must

Continued on page 18

26. *Id.*
27. OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the Netherlands*, at 30 (Dec. 2012), http://www.oecd.org/daf/anti-bribery/Netherlandsphase3reportEN.pdf [hereinafter "OECD Report"].
28. *See id.* at 22; *Getting the Deal Through: Government Investigations 2015* 53 (David M. Zornow & Jocelyn E. Strauber, eds., 2014).
29. OECD Working Group on Bribery, *The Netherlands: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, at 67 (June 2006), http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/36993012.pdf.
30. OECD Report at 30; *see* Wetboek Online, "Article 74, Penal Code," http://www.wetboek-online.nl/wet/Wetboek%20van%20Strafrecht/74.html (last visited Dec. 11, 2014).
31. *Id.* at 30, 63; International Association of Anti-Corruption Authorities, "The Netherlands Criminal Code (Extract)," http://www.iaaca.org/Anti-Corruption Laws/ByCountriesandRegions/N/Netherlands/201202/t20120221_808975.shtml (last visited Dec. 22, 2014).
32. *Id.*
33. OECD Report at 30.

**Small Country, Big Punch: The Netherlands' Anti-Bribery Prosecution of SBM Offshore**

Continued from page 17

submit the proposed "transaction" to the Minister of Security and Justice, who will then either approve the transaction or submit the case to court.[34]

Finally, the Directive provides that where the "high fixed penalty" exceeds 50,000 Euros (approximately $62,000), the Openbaar Ministerie must issue a press release disclosing the parties involved, the amount of the fine, and information about the offense.[35]

### B. Reported Practice to Date in the Netherlands

As of December 2012, "there ha[d] been no out-of-court settlements for foreign bribery cases" in the Netherlands.[36] However, in July 2008, the Openbaar Ministerie did enter into out-of-court settlements with seven companies for their alleged payment of kickbacks in connection with the United Nations Oil-for-Food Program in Iraq.[37] The companies had been charged with violating sanctions legislation and not foreign bribery offenses.[38] The largest settlement paid out in relation to the Oil-for-Food actions was less than $500,000, and the average settlement amount was in excess of $200,000 – that is, those companies paid considerably less than the $240 million to be paid by SBM.[39]

The Netherlands has come under fire for its weak anti-bribery enforcement in the past. In a 2014 report, Transparency International found that there was "little or no enforcement" of the OECD Anti-Bribery Convention in the Netherlands.[40] The OECD reached the same conclusion in its December 2012 report on the Netherlands: "Since the entry into force of its 2001 foreign bribery legislation, the Netherlands has not prosecuted any cases of foreign bribery."[41] The OECD expressed particular concern over the lack of investigating activity and the limited resources deployed for this purpose: "Out of 22 foreign bribery allegations received by the Dutch law enforcement authorities, 14 have not triggered the opening of any investigations, in part due to a lack of resources."[42]

The OECD, which would clearly like to see the Netherlands

Continued on page 19

34. *See id.*
35. *See id.*
36. *Id.*
37. *Id.* at 22.
38. *Id.*
39. *See id.*
40. Transparency International, *Exporting Corruption Progress Report 2014: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery*, at 5 (Oct. 23, 2014), http://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2014_assessing_enforcement_of_the_oecd. the Netherlands ratified the OECD Convention in 2001 and implemented domestic corruption legislation later that same year. OECD, "Steps taken by the Netherlands to implement and enforce the OECD Convention" (Oct. 2006), http://www.oecd.org/netherlands/netherlands-oecdanti-briberyconvention.htm.
41. OECD Report at 9.
42. *Id.* at 5.

**Small Country, Big Punch: The Netherlands' Anti-Bribery Prosecution of SBM Offshore**

Continued from page 18

complete prosecutions which result in convictions,[43] has expressed concern about the potential use of settlements as a tool for anti-bribery enforcement. It has declared its intention to follow up with the Netherlands about "the use of out-of-court transactions for foreign bribery offen[s]es, as governed by article 74 of the Dutch Penal Code, to ensure that they result in the imposition of effective, proportionate and dissuasive sanctions."[44]

### C. Factors That Appear to Have Motivated the Dutch Authorities

As indicated by the SBM matter, the Openbaar Ministerie seems determined to address the above concerns. In its press release about the SBM settlement, it provides a list of reasons why the settlement reached was an "appropriate outcome" for the enforcement action:

- SBM Offshore itself brought the facts to the attention of the authorities, including the Openbaar Ministerie, SBM Offshore itself investigated the matter and agreed to fully cooperate with subsequent criminal investigations by the Openbaar Ministerie and the FIOD;
- [T]here has been a new Management Board since 2012;
- [A]fter it became aware of the facts, the newly established Management Board of SBM Offshore, at its own initiative, has taken significant measures to improve the company's compliance; and
- [A]s noted in SBM Offshore's press release, the current Management Board and Supervisory Board regret the failure of control mechanisms in place in the past.[45]

It concludes the press release by writing: "With this matter, the Netherlands shows that it takes action against foreign corruption . . . . In the eyes of the Openbaar Ministerie, out-of-court settlements involve punishment, restoration, and prevention. In that context, the Openbaar Ministerie also takes into account the positioning of the suspected company and the measures the company has taken at its own initiative."[46]

With the SBM settlement, the Netherlands has taken a definitive position in favor of the use of settlements, at least in instances of self-disclosure and substantial cooperation, to address foreign bribery offenses. Given the Openbaar Ministerie's lack of resources (as found by the OECD), this stance may be pragmatic as well as principled.[47] The Openbaar Ministerie's increased willingness to explore a non-criminal outcome where a "company has taken

Continued on page 20

43. *See id.* at 51.
44. *Id.* at 60.
45. OM Press Rel.
46. *Id.*
47. *See* OECD Report at 5, 22.

**Small Country, Big Punch: The Netherlands' Anti-Bribery Prosecution of SBM Offshore**

Continued from page 19

[investigative measures] at its own initiative" relieves it of always having to mount a full-blown investigation and deploy its scarce resources while still allowing it to extract substantial monetary sanctions.[48]

## The Implications of DOJ and CGU Decisions Related to SBM

The DOJ's decision to abandon its inquiry into SBM – potentially the most significant aspect of the recent announcement – could be based on a number of rationales.

First, it may be that, during the internal investigation, the DOJ and the Openbaar Ministerie became aligned in such a way that the DOJ no longer was of the view that there was any need to remain involved once the first settlement had been reached. One of SBM's lawyers indicated that "SBM Offshore's decision to simultaneously notify Dutch and US authorities at the beginning of its internal investigation set the tone for how the case unfolded."[49] He believed that "the decision allowed SBM Offshore to establish credibility with prosecutors" and simultaneously "allowed the US and Dutch enforcement officials to talk to each other with the same knowledge of the situation and allowed them to each make an informed decision about how best to proceed."[50]

Indeed, the DOJ has shown interest in successful collaboration on anti-bribery enforcement in the past. For instance, it worked with Germany to investigate and settle the action against Siemens and offered China help to "stand up enforcement and compliance programs."[51] As Marshall Miller, the Principal Deputy Assistant Attorney General for the Criminal Division of the DOJ, said in remarks delivered in September: "[W]e have dramatically increased our coordination with foreign partners when they are looking at similar or overlapping criminal conduct – so that when we engage in parallel investigations, they complement, rather than compete with, each other."[52] In line with this sentiment, when asked about the DOJ's

"The DOJ's decision to abandon its inquiry into SBM – potentially the most significant aspect of the recent announcement – could be based on a number of rationales."

Continued on page 21

48. OM Press Rel.
49. Dobrik, note 1, *supra*.
50. *Id.*
51. Doreen Edelman & John Calender, "Growing Foreign Prosecutions under FCPA-Style Laws," *Law360* (Aug. 4, 2011), http://www.law360.com/articles/261960/growing-foreign-prosecutions-under-fcpa-style-laws.
52. Marshall L. Miller, Principal Deputy Assistant Attorney General for the Criminal Division, Remarks at the Global Investigation Review Program (Sept. 17, 2014), *available at* http://www.justice.gov/criminal/pr/speeches/2014/crm-speech-1409171.html.

**Small Country, Big Punch: The Netherlands' Anti-Bribery Prosecution of SBM Offshore**

Continued from page 20

attitude towards leaving anti-corruption enforcement to foreign partners and the SBM case, Assistant Attorney General Leslie Caldwell responded:

> In talking with our foreign counterparts, the default position is not, "The United States is going to prosecute this, and thank you very much for your help." It's, "Where does it make sense to prosecute this?" We're not in the business of trying to double-punish companies. So sometimes the center of gravity in a case is in another country; it makes sense to do the case there. It's probably no secret to say sometimes there's a bit of negotiation involved. But our default position is not, "We get the case, and you can have the table scraps." We really feel like we are genuine partners with these countries, and it's often appropriate for cases to be prosecuted sometimes in both places, sometimes different people in different countries.[53]

Second, the DOJ may have been swayed by the size of the settlement secured by the Dutch, perhaps coming to the view that the penalty paid abroad was so significant that it was unjust to invoke notion of dual sovereignty, under which the United States retains the discretion to prosecute crimes notwithstanding the international law concept of *ne bis in idem*, a form of "international" double jeopardy.

Third, the DOJ may simply have been of the view that there was not enough evidence based on SBM's internal investigation or an insufficient jurisdictional hook to bring an FCPA enforcement action against the company. Although SBM's securities trade on U.S. exchanges via American depository receipts over the counter, it has filed correspondence with the U.S. Securities and Exchange Commission stating that it is exempt from registration under Section 12(g) of the Securities Exchange Act.[54] If its exemption is effective, SBM may not be required to file annual and other periodic reports under Section 15(d) of the Securities Exchange Act, and would thus not be an "issuer" for purposes of FCPA jurisdiction.[55]

At any rate, the decision is somewhat surprising coming from the DOJ, which has generally not stood down entirely in the face of similar cases of self-reported misconduct, usually initiating a case but making adjustments to penalties sought.

Whatever the reasoning behind the decision, the DOJ has given those who would accuse it of

Continued on page 22

53. "Transcript: Leslie Caldwell," note 9, *supra*.

54. *See* SEC, "EDGAR Search Results: SBM Offshore N.V. CIK#: 0001398043," http://www.sec.gov/cgi-bin/browse-edgar?company=sbm+offshore&owner=exclude&action=getcompany (last visited Dec. 20, 2014); 17 C.F.R. § 240.15d-3; BNY Mellon, "DR Profile: SBM Offshore," http://www.adrbnymellon.com/dr_profile.jsp?cusip=78404D109 (last visited Dec. 20, 2014).

55. *See* 15 U.S.C. §§ 78dd-1(a), 78c(a)(8), 781, 78o(d); 17 C.F.R. § 240.15d-3; *see also* "Understanding Issuers," *FCPA Professor* (Blog) (Feb. 22, 2010), http://fcpaprofessor.blogspot.com/2010/02/understanding-issuers.html.

**Small Country, Big Punch: The Netherlands' Anti-Bribery Prosecution of SBM Offshore**

Continued from page 21

being aggressively extraterritorial or indifferent to the concerns of companies facing multiple probes and multiple settlements reason to reconsider their opinions.

On the news of the Dutch settlement and the DOJ's withdrawal from the field, SBM stock surged 20 percent.[56] However, that direction reversed with the announcement of the Brazilian investigation: SBM stock slid 4.1 percent the next day.[57]

It is unclear what can be expected from Brazil in relation to SBM. Minister Hage has left the CGU and enforcement of Brazil's new anti-corruption law is just starting.[58] While SBM has stated publicly that its internal investigation yielded "red flags" but no "credible evidence" of improper payments in Brazil,[59] Dutch prosecutors indicated that they "uncovered evidence that SBM Offshore's payments to their sales agent in Brazil were passed on to Brazilian government officials, following a mutual legal assistance request sent to an unnamed country, which was not Brazil."[60] Prosecutors in Brazil reportedly have requested the additional evidence from the Openbaar Ministerie.[61]

In addition to a potential monetary penalty, the CGU has threatened that the investigation could result in SBM being "banned from future Petrobras contracts" – a significant threat to SBM, which currently has more than 20 billion reais in contracts with Petrobras for eight platform leases.[62]

SBM has said that it is discussing the progress of the Brazilian investigation with the CGU and other relevant authorities and indicated that "[i]t's in the interest of all parties to complete the investigations as quickly as possible, and the [Dutch] settlement... will help achieve that."[63]

## Conclusion

The outcome in the Dutch SBM matter, combined with DOJ's determination to close its inquiry, is but one data point, but may signal a new and important trend in FCPA enforcement, illustrating a potentially increased willingness of U.S. authorities to defer to other jurisdictions in an era of limited U.S. government resources and repeatedly-stated concerns over U.S. prosecution of extraterritorial activity. While the still-pending investigations

Continued on page 23

56. Anthony Deutsch, "SBM Offshore Shares Jump as $240 Mln Bribery Case Settled," *Reuters* (Nov. 12, 2014), http://www.reuters.com/article/2014/11/12/sbm-offshore-settlement-idUSL6N0T218B20141112.
57. Valle & Millard, note 5, *supra*.
58. *See* "Comptroller Hage Resigns," note 5, *supra*.
59. Press Release, SBMOffshore, Update Following Media Reports on Brazil (Nov. 26, 2014), http://www.sbmoffshore.com/?news=update-following-media-reports-brazil-2. See also OM Press Rel.
60. Dobrik, note 1, *supra*.
61. *See id.*
62. *Id.*; Valle & Millard, note 5, *supra*.
63. Valle & Millard, note 5, *supra*.

**Small Country, Big Punch: The Netherlands' Anti-Bribery Prosecution of SBM Offshore**

Continued from page 22

against SBM in Brazil, which have received considerable attention, need to crystallize before a final assessment of the case's impact on cross-border anti-corruption enforcement can be genuinely assessed, the recent settlement with the Dutch authorities and case-closure by the United States suggests greater attention may need to be paid by multinationals to even the smallest nations that have enacted trans-national anti-bribery laws.

**Sean Hecker**

**Andrew M. Levine**

**Taz R. Shahabuddin**

*Sean Hecker and Andrew M. Levine are partners,and Taz R. Shahabuddin is an associate, in the New York office. They are members of the Litigation Department and the White Collar Litigation Practice Group. The authors may be reached at shecker@debevoise.com, amlevine@debevoise.com, and trshahabuddin@debevoise.com. Full contact details for each author are available at www.debevoise.com.*

# Transparency International's 2014 Corruption Perceptions Index

Transparency International recently released its 2014 Corruption Perceptions Index ("CPI"), "based on expert opinion from around the world."[1] Marking its twentieth edition this year,[2] the CPI remains an important benchmark for anti-bribery compliance professionals. But as seasoned in-house counsel and compliance professionals have long known, it measures only the *perception* of corruption and is not a statistical measure of arrests, prosecutions, the frequency of alleged bribery, or the size of alleged bribes; nor is it a precise measure of going-forward bribery risk in a particular jurisdiction.

Specifically, the CPI aggregates data from twelve international surveys examining, among other things, local governance, economic and investment risk, and executive opinion.[3] These surveys consider factors such as government accountability as well as implementation of effective anti-corruption initiatives, and are relevant in many ways to companies seeking to comply with and assess the risks of conduct barred by statutes such as the FCPA and UK Bribery Act.[4]

The CPI's longstanding pedigree is well recognized. Nevertheless, businesses that rely on the CPI are considering increasingly whether the CPI is "the only game in town" when it comes to assessing corruption risk. The answer, of course, is it is not.

This article first analyzes the new figures reported in the 2014 CPI, comparing them to the prior CPIs, and then considers ways in which multinational firms can best utilize these figures in assessing corruption risk, whether in connection with general risk assessments or particular transactions. Despite ongoing anti-corruption enforcement efforts worldwide and growing attention to corruption risks, the CPI showed few significant year-over-year changes and little overall improvement in the global level of perceived corruption. Once again, more than two-thirds of the 175 countries ranked in 2014 scored below 50 on a scale of 0 ("highly corrupt") to 100 ("very clean").[5] As is typical, there are some individual movements of country risk perception within the CPI that warrant comment.

Continued on page 25

1. *See* Transparency International, "Corruption Perceptions Index 2014," at 2 (2014), http://files.transparency.org/content/download/1856/12434/file/2014_CPIBrochure_EN.pdf [hereinafter "Transparency International"].
2. Transparency International Press Rel., Corruption Perceptions Index 2014: Clean Growth at Risk (Dec. 3, 2014), http://www.transparency.org/cpi2014/press.
3. *See* Transparency International, "Corruption Perceptions Index 2014: Full Source Description," at 1 (2014), http://files.transparency.org/content/download/1842/12378/file/2014_CPISources_EN.pdf.
4. *See id.*
5. *See* Transparency International, note 1, *supra* at 2.

**Transparency International's 2014 Corruption Perceptions Index**

Continued from page 24

This year's precipitous drop in China's CPI ranking – a decline of 20 spots – despite a well-publicized anti-corruption campaign perhaps more than ever raises questions about the reliability of the CPI as a measure of country bribery risk. Using the case of China as a point of departure, we look beyond the CPI rankings and explore some of the other tools and reports available to companies. In our estimation, although the CPI remains an important touchstone, companies striving to develop best-in-class compliance programs must recognize the limitations and drivers underlying the CPI rankings and take into account other information, all while appreciating the importance of carefully reviewing a company's particular circumstances when conducting risk assessments and allocating compliance resources.

## I. The 2014 TI CPI Scores and Rankings

The 2014 CPI is based on data for each country, as in 2013, and offers a region-by-region comparison based on the average score of each individual country within a region.[6] Although there are inherent limitations in attempting to draw conclusions from differences in survey results from one year to the next, several patterns emerge.

"In our estimation, although the CPI remains an important touchstone, companies striving to develop best-in-class compliance programs must recognize the limitations and drivers underlying the CPI rankings and take into account other information[.]"

### *(i) EU and Western Europe*

The rankings for the European Union and Western Europe remained largely unchanged as the survey participants and sources continue to regard Western Europe with low perceived corruption risks. Led by Denmark, which retained the highest ranking due to a near-perfect 92 point score, twelve Western European countries are ranked among the top 20 nations.

European Union member states outside of Western Europe saw continued improvement. Among the Baltic States, Estonia improved from 28th to 26th, Lithuania rose from 43rd to 39th, and Latvia gained six spots from 49th to 43rd. The Czech Republic and Slovakia scored above 50 out of 100 in 2014, improving rankings from 57th to 53rd and from 61st to 54th accordingly.

Only five out of thirty-one countries in the "EU and Western European" region scored below 50 out of 100: Croatia (48) and Bulgaria, Greece, Italy, and Romania (each 43).[7] Bulgaria and Greece, however, are moving in a positive direction, with

Continued on page 26

6. *See id.* at 5.

7. Transparency International, note 1, *supra* at 4.

**Transparency International's 2014 Corruption Perceptions Index**

Continued from page 25

Bulgaria moving up in the rankings from 77th to 63rd and Greece rising from 80th to 63rd. Greece had also risen in the rankings by fourteen spots in 2013,[8] suggesting that perceptions of corruption in Greece have dramatically improved since that nation's economic crisis and bailout.

*(ii) Eastern Europe and Central Asia*

Once again, the "Eastern Europe and Central Asian" region lagged far behind Western Europe and the EU, with only one country, the Republic of Georgia, scoring above 50 and placing in the top 50 countries, at 50th (moving up from 55th in 2013). Transparency International credited Georgia's continued democratization as "creating new opportunities to address corruption risks."[9] The other 18 countries of the region did not fare well in 2014 and some saw large declines: Turkey (falling from 53rd to 64th), Montenegro (falling from 67th to 76th), Serbia (falling from 72nd to 78th), Bosnia (from 72nd to 80th), and Russia (falling from 127th to 136th). Turkey's decline comes amid Turkish leader Recep Tayyip Erdogan's transition from Prime Minister to President. Erdogan's government has been criticized for increased consolidation of power in the Turkish Presidency, government corruption and purges of the judiciary.[10]

Kazakhstan and Kyrgyzstan each improved their scores by 14 points, but their overall rankings still remain low overall, at 126th and 136th respectively. Ukraine's ranking slightly improved from 144th to 142nd. With the adoption of five new anti-corruption laws in October 2014 by Ukraine's new parliament, there is hope (and room) for further improvement in 2015.[11] Russia, by contrast, slid in the rankings (now at 136th from 127th) and is once again the lowest-ranked G20 member.

*(iii) The Americas*

The United States gained two spots from last year and now shares 17th place with Barbados, Hong Kong, and Ireland. However, the United States still ranks below the following G20 members: Canada (10th); Australia (11th), the host of the 2014 G20 Summit in Brisbane; Germany (12th); and The United Kingdom (14th). During the Brisbane Summit, the G20 adopted "High Level Principles on Beneficial Ownership Transparency," hailed as a "good start" in light of diverse and "challenging" circumstances existing in various G20 member countries.[12]

Continued on page 27

8. *See* Transparency International, "Corruption Perceptions Index 2013," at 3 (2013), http://www.transparency.org/whatwedo/pub/corruption_perceptions_index_2013; Transparency International, "Corruptions Perceptions Index 2012," at 3 (2012), http://www.issuu.com/transparencyinternational/docs/cpi_2012_report/5?e=2496456/2010281.
9. *See* Transparency International, Corruption by Country/Territory: Georgia, http://www.transparency.org/country/#GEO.
10. *See* "Erdogan Battles 'Assassins' in Power Struggle over Turkish Courts," *Reuters* (Sept. 9, 2014), http://www.reuters.com/article/2014/09/09/us-turkey-judiciary-idUSKBN0H416H20140909.
11. *See* "Ukraine Enacts Anti-Corruption Laws to Promote Government Accountability," *Jurist* (Oct. 15, 2014), http://jurist.org/paperchase/2014/10/ukraine-enacts-anti-corruption-laws-to-promote-government-accountability.php.
12. *See* Transparency International, "Six Things to Know: New G20 Beneficial Ownership Principles," (Nov. 17, 2014), http://www.transparency.org/news/feature/six_things_to_know_new_g20_beneficial_ownership_principles.

**Transparency International's 2014 Corruption Perceptions Index**

Continued from page 26

Elsewhere in the Americas, 68% of countries scored below 50 out of 100. Brazil, with 43 points, moved up three spots to 69th, despite a number of recent corruption scandals and the risks inherent in large-scale public works projects posed by the 2014 World Cup and the 2016 Summer Olympics.[13] Mexico and Bolivia, with 35 points each, also gained three spots and now share 103rd place with Moldova and Niger. Ecuador, which had jumped 16 spots in 2013, has dropped eight places to 110th. Venezuela and Haiti once again find themselves at the bottom among countries in the Western hemisphere, tying for 161st place with Guinea-Bissau and Yemen.

*(iv) Asia-Pacific*

The Asia-Pacific region includes a wide spectrum of nations, from among the very best in terms of perceived corruption, New Zealand (2nd), Singapore (7th), and Australia (11th), to the most risky, including Afghanistan (172nd) and North Korea (174th). Asia's two major economies also find themselves on different sides of the spectrum of perceived corruption risk. Japan improved three spots to 15th overall, while China recorded the biggest drop among surveyed nations in 2014 – falling 20 places from 80th to 100th. In recent years, Chinese authorities have announced a vigorous campaign against corruption, but, as discussed below, that campaign has failed to alter perceptions of corruption risk in China.

Among other notable changes in the Asia-Pacific region, India improved its ranking from 94th to 85th as the new government of Prime Minister Nerendra Modi has set out to fulfill campaign promises of rooting out local corruption and improving India's overall business climate.[14] India still lags behind many of its G20 counterparts, such as South Korea, ranked at 43rd this year, up from 46th in 2013. Nevertheless, India is perceived as more business-friendly compared to some of its neighbors, such as Nepal (126th), Pakistan (126th), and Bangladesh (145th).

*(v) Middle East and North Africa*

The Middle East and North Africa continue to be perceived as extremely high-risk areas for corruption, with 84% of countries having a score below 50 in 2014.[15] Many nations saw large improvements in the rankings which are very difficult to explain in context. Syria saw its score improve by three points and its ranking improve from 168th to 159th, despite an ongoing civil war in which large sections of the country have been occupied by the Islamic State.[16] Egypt improved its score by five points

Continued on page 28

13. *See* "Brazil on Edge as World Cup Exposes Rifts," *The New York Times* (June 9, 2014), http://www.nytimes.com/2014/06/10/world/americas/apprehension-and-apathy-compete-with-excitement-in-world-cup-host-brazil.html.
14. *See* "All Eyes on Modi's Re-make of India," *Barrons* (Dec. 4, 2014), http://blogs.barrons.com/asiastocks/2014/12/04/all-eyes-on-modis-re-make-of-india/.
15. Transparency International, note 1, *supra* at 4.
16. *See* "Three Years of Strife and Cruelty Puts Syria in Free Fall," *The New York Times* (Mar. 17, 2014), http://www.nytimes.com/2014/03/18/world/middleeast/three-years-of-strife-and-cruelty-put-syria-in-tailspin.html.

**Transparency International's 2014 Corruption Perceptions Index**

Continued from page 27

and made a significant twenty-spot jump in the rankings, from 114th to 94th, amid a dramatic change in government and ongoing political instability.[17] Elsewhere in the Middle East, Saudi Arabia, the region's only G20 member, Bahrain, and Jordan improved their rankings and now share 55th place. The United Arab Emirates remains the region's leader at 25th, up from 26th in 2013.

*(vi) Sub-Saharan Africa*

Finally, sub-Saharan Africa ranked the lowest out of any surveyed region, with 92% of the countries in that region scoring below 50 in 2014.[18] Botswana was the region's highest ranked country at 31st (dropping from 30th a year ago). South Africa, the region's sole G20 member, improved five spots to 67th. Elsewhere in the region, Tanzania dropped eight places to 119th, and Kenya dropped nine places to 145th, as both nations lost two points in their overall scores. Recent discoveries of oil and natural gas in East Africa have led to questions about whether the regions' governments are capable of handling a potentially vast inflow of wealth and investment.[19] Besides Kenya, seventeen other countries in the region ranked below 130th place, with Somalia (174th) tying North Korea for the lowest ranking in the world and Sudan (173rd) in a close second-to-last.

"[S]ub-Saharan Africa ranked the lowest out of any surveyed region, with 92% of the countries in that region scoring below 50 in 2014."

## II. Is China's CPI Ranking a Mistake?

Perhaps the most noteworthy story emerging from the release of the 2014 CPI relates to China's precipitous drop in the rankings. Front-page articles in *The New York Times* and other major newspapers have explored whether the reduced ranking was justified in light of the high-profile campaign, personally championed by Chinese Premier Xi Jinping, against corruption in China, culminating in the recent arrest of the former internal security chief and Politburo member Zhou Yongkang.[20]

Continued on page 29

17. *See* "Egypt Faces a New, Harsher Kind of Repression," *USA Today* (Nov. 23, 2014), http://www.usatoday.com/story/news/world/2014/11/23/egypt-police-state-mubarak/19266761/.
18. Transparency International, note 1, *supra* at 4.
19. *See* "Oil and Gas Discoveries Near Africa's East Coast to Soon Drive Billions in Investments: PWC," *International Business Times* (Sept. 4, 2014), http://www.ibtimes.com/oil-gas-discoveries-near-africas-east-coast-soon-drive-billions-investments-pwc-1678534.
20. *See* "China Arrests Ex-Chief of Domestic Security in Graft Case," *The New York Times* (Dec. 5, 2014), http://www.nytimes.com/2014/12/06/world/asia/zhou-yongkang-china-arrests-former-security-chief.html.

**Transparency International's 2014 Corruption Perceptions Index**

Continued from page 28

The anti-corruption campaign has also publicly ensnared one major Western company in recent months, as pharmaceutical maker GlaxoSmithKline was fined nearly $500 million for alleged bribery by local executives.[21] In addition, anecdotal evidence has emerged of a vastly different atmosphere and official culture in China in the wake of Xi's anti-corruption efforts, including a more difficult business climate for sellers of ultra-luxury goods and curbs on spending at formal party functions.[22]

The seeming disparity between a high-profile campaign against corruption and sweeping changes in the political culture in China on the one hand, and perceptions of higher corruption risks in China on the other, may lead corporate counsel to question the accuracy of the CPI as a measure of corruption risk. Are there truly *more* opportunities for corruption today than there were before Xi Jinping took office in 2012?

Transparency International defends China's ranking in part by arguing that the decline reflected a perception among experts and business professionals of China's anti-corruption campaign being "incomplete, politically motivated and opaque."[23] In particular, Transparency International pointed to China's score on the World Justice Project's Rule of Law Index,[24] which also declined in 2014, and argued that China faces a problem of "[t]oo much stick, not enough transparency."[25]

This defense, however, raises questions as to whether the CPI is an accurate reflection of true "corruption risk" or instead reflects a meta-analysis of various surveys that are designed to analyze "good government" metrics at a more general level. If, for example, the CPI is a reflection of Western perceptions of good government practices, transparency, and legal standards in the surveyed nations, corporate counsel should carefully scrutinize the reports that emerge of year-over-year changes in national rankings in the CPI as not necessarily reflecting actual on-the-ground changes in the risk of corruption activity faced by businesses seeking to operate internationally. That does not mean the CPI is unimportant, as lack of governmental structures such as a truly independent judiciary are highly important

Continued on page 30

21. *See* "China Fines GlaxoSmithKline Nearly $500 Million in Bribery Case," *The New York Times* (Sept. 19, 2014), http://www.nytimes.com/2014/09/20/business/international/gsk-china-fines.html.
22. *See* "Elite in China Face Austerity Under Xi's Rule," *The New York Times* (Mar. 27, 2013), http://www.nytimes.com/2013/03/28/world/asia/xi-jinping-imposes-austerity-measures-on-chinas-elite.html?pagewanted=all.
23. *See* "China Loses Ground in Transparency International Report on Corruption," *The New York Times* (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/world/asia/china-loses-ground-in-transparency-international-report-on-corruption.html?_r=0.
24. *See* "2014 Rule of Law Index," *World Justice Project*, http://worldjusticeproject.org/rule-of-law-index.
25. "Five Reasons Corruption Is Getting Worse in China," *Transparency International* (Dec. 3, 2014), http://blog.transparency.org/2014/12/03/five-reasons-corruption-is-getting-worse-in-china/.

**Transparency International's 2014 Corruption Perceptions Index**

Continued from page 29

to investment decisions and business models. But it does suggest that the CPI's utility in anti-corruption compliance may be somewhat limited.

Transparency International acknowledges that "a perfect correlation between measures of street-level bribery and the Corruption Perceptions Index should not be expected" and argues that the index "measures more than just bribery and includes other corrupt practices, such as nepotism, kick-backs and influence-peddling."[26] Transparency International also argues that "there is no robust evidence to suggest . . . a foreign elite bias" in the survey results.[27] Noting that the CPI correlates highly with another survey published by Transparency International, the Global Corruption Barometer, which purports to measure individual reports of bribery through household surveys, Transparency International argues that this denotes "a close relationship between expert perceptions and the reality for people on the ground."[28]

Further light may be shed by the TRACE Matrix, a new survey of "business bribery risk" developed by the Rand Corporation and TRACE International, which purports to rely upon sixty-four indicators in measuring four different "domains" of anti-corruption activity: "(1) business interactions with the government; (2) anti-bribery laws and enforcement; (3) government and civil service transparency; and (4) capacity for civil service oversight."[29] The TRACE Matrix gave China an overall risk score of 66, where lower numbers indicate less corruption risk – ahead of Brazil (69), India (80), and Kuwait (77), all of which ranked higher than China in the 2014 CPI.[30] Interestingly, China's "domain" score for anti-bribery laws and enforcement was low (21), where again a lower score represented tougher anti-bribery enforcement, and purported to reflect better anti-bribery enforcement than many Western European nations ranked highly by the CPI. China's overall score reflected its poor measurements for government transparency and civil service oversight, rather than a lack of anti-corruption enforcement activity.

Corporate counsel and business leaders seeking to rely on any of these surveys should be aware that there are a number of different data points purporting to measure relative corruption risk in different countries. Beyond the CPI and the TRACE Matrix, there is also the International Business Attitudes to Corruption survey by the organization Control Risks, which surveys in-house counsel and

Continued on page 31

26. *See* "Putting Public Sector Corruption on the Map," *Transparency International* (December 3, 2014), http://blog.transparency.org/2014/12/03/putting-public-sector-corruption-on-the-map/.
27. *See id.*
28. *See id.*
29. *See* Rank Corporation, "Business Bribery Risk Assessment," at 9, 16 (2014), http://www.rand.org/content/dam/rand/pubs/research_reports/RR800/RR839/RAND_RR839.pdf.
30. Rand Corporation, note 25, *supra* at 41-57.

**Transparency International's 2014 Corruption Perceptions Index**

Continued from page 30

compliance staff at hundreds of companies as well as private practice attorneys.[31] Additionally, the Foreign Bribery Report published by the Organization for Economic Cooperation and Development ("OECD") examined 427 bribery cases in OECD member countries since 1999 in order to measure and describe patterns of transnational corruption.[32]

## III. Conclusion

Last year, we noted that "the CPI rankings should be only one of several key data points for managers seeking to evaluate corruption risk."[33] This conclusion remains apt in 2014. Businesses ought to consider synthesizing results from different surveys on corruption activity in order to gain a broader and more holistic understanding of the available data. Although the CPI rankings remain an important benchmark for evaluating corruption risk, headlines regarding China's decline in the rankings underscore the need to carefully scrutinize what the CPI survey data actually shows, and what year-over-year changes reveal, if anything, about a country's risk environment.

Any company that relies too heavily on the CPI as a barometer of corruption risk may be looking at an incomplete picture of a global problem – a picture that is strongly influenced by beliefs and perceptions about transparency and judicial oversight. Those perceptions, in turn, may not necessarily be linked to the underlying risk of corrupt business activity in any given country.

**Sean Hecker**
**Andrew M. Levine**
**Steven S. Michaels**
**Alexander Dmitrenko**
**Neal S. Shechter**

*Sean Hecker and Andrew M. Levine are partners, Steven S. Michaels is a counsel, and Alexander Dmitrenko and Neal S. Shechter are associates in the New York office. They are members of the Litigation Department and the White Collar Litigation Practice Group. the authors may be reached at shecker@debevoise.com, amlevine@debevoise.com, ssmichaels@debevoise.com, admitrenko@debevoise.com, and nsshecht@debevoise.com. Full contact details for each author are available at www.debevoise.com.*

Continued on page 32

31. *See* Control Risks, "International Business Attitudes to Corruption" (2014), https://www.controlrisks.com/en/services/integrity-risk/international-business-attitudes-to-corruption-2014.
32. OECD, OECD Foreign Bribery Report (2014), http://www.oecd.org/corruption/oecd-foreign-bribery-report-9789264226616-en.htm.
33. Sean Hecker, Andrew M. Levine, Steven S. Michaels & Neal S. Shechter, "Transparency International's 2013 Corruption Perceptions Index," at 11, *FCPA Update*, Vol. 5, No. 5 (Dec. 2013), http://www.debevoise.com/insights/publications/2013/12/fcpa-update (follow "Download PDF" hyperlink).

**Transparency International CPI Rankings and Scores: Comparison of 2014 to 2013 Ranks and Scores**

| Country | 2014 Rank | 2014 Score | 2013 Rank | 2013 Score | Change in Rank from 2013* | Change in Score from 2013** |
|---|---|---|---|---|---|---|
| Denmark | 1 | 92 | 1 | 91 | 0 | 1 |
| New Zealand | 2 | 91 | 1 | 91 | -1 | 0 |
| Finland | 3 | 89 | 3 | 89 | 0 | 0 |
| Sweden | 4 | 87 | 3 | 89 | -1 | -2 |
| Norway | 5 | 86 | 5 | 86 | 0 | 0 |
| Switzerland | 5 | 86 | 7 | 85 | 2 | 1 |
| Singapore | 7 | 84 | 5 | 86 | -2 | -2 |
| Netherlands | 8 | 83 | 8 | 83 | 0 | 0 |
| Luxembourg | 9 | 82 | 11 | 80 | 2 | 2 |
| Canada | 10 | 81 | 9 | 81 | -1 | 0 |
| Australia | 11 | 80 | 9 | 81 | -2 | -1 |
| Germany | 12 | 79 | 12 | 78 | 0 | 1 |
| Iceland | 12 | 79 | 12 | 78 | 0 | 1 |
| United Kingdom | 14 | 78 | 14 | 76 | 0 | 2 |
| Belgium | 15 | 76 | 15 | 75 | 0 | 1 |
| Japan | 15 | 76 | 18 | 74 | 3 | 2 |
| Barbados | 17 | 74 | 15 | 75 | -2 | -1 |
| Hong Kong | 17 | 74 | 15 | 75 | -2 | -1 |
| United States | 17 | 74 | 19 | 73 | 2 | 1 |
| Ireland | 17 | 74 | 21 | 72 | 4 | 2 |
| Uruguay | 21 | 73 | 19 | 73 | -2 | 0 |
| Chile | 21 | 73 | 22 | 71 | 1 | 2 |
| Austria | 23 | 72 | 26 | 69 | 3 | 3 |
| Bahamas | 24 | 71 | 22 | 71 | -2 | 0 |
| United Arab Emirates | 25 | 70 | 26 | 69 | 1 | 1 |
| France | 26 | 69 | 22 | 71 | -4 | -2 |

** Rank improves if the number in this column increases in value*

*** Score improves if the number in this column increases in value*

Continued on page 33

**Transparency International CPI Rankings and Scores: Comparison of 2014 to 2013 Ranks and Scores** *(cont.)*

| Country | 2014 Rank | 2014 Score | 2013 Rank | 2013 Score | Change in Rank from 2013* | Change in Score from 2013** |
|---|---|---|---|---|---|---|
| Estonia | 26 | 69 | 28 | 68 | 2 | 1 |
| Qatar | 26 | 69 | 28 | 68 | 2 | 1 |
| Saint Vincent and The Grenadines | 29 | 67 | 33 | 62 | 4 | 5 |
| Bhutan | 30 | 65 | 31 | 63 | 1 | 2 |
| Botswana | 31 | 63 | 30 | 64 | -1 | -1 |
| Cyprus | 31 | 63 | 31 | 63 | 0 | 0 |
| Portugal | 31 | 63 | 33 | 62 | 2 | 1 |
| Puerto Rico | 31 | 63 | 33 | 62 | 2 | 1 |
| Taiwan | 35 | 61 | 36 | 61 | 1 | 0 |
| Poland | 35 | 61 | 38 | 60 | 3 | 1 |
| Israel | 37 | 60 | 36 | 61 | -1 | -1 |
| Spain | 37 | 60 | 40 | 59 | 3 | 1 |
| Dominica | 39 | 58 | 41 | 58 | 2 | 0 |
| Lithuania | 39 | 58 | 43 | 57 | 4 | 1 |
| Slovenia | 39 | 58 | 43 | 57 | 4 | 1 |
| Cape Verde | 42 | 57 | 41 | 58 | -1 | -1 |
| Malta | 43 | 55 | 45 | 56 | 2 | -1 |
| Korea (South) | 43 | 55 | 46 | 55 | 3 | 0 |
| Seychelles | 43 | 55 | 47 | 54 | 4 | 1 |
| Latvia | 43 | 55 | 49 | 53 | 6 | 2 |
| Hungary | 47 | 54 | 47 | 54 | 0 | 0 |
| Costa Rica | 47 | 54 | 49 | 53 | 2 | 1 |
| Mauritius | 47 | 54 | 52 | 52 | 5 | 2 |
| Malaysia | 50 | 52 | 53 | 50 | 3 | 2 |
| Georgia | 50 | 52 | 55 | 49 | 5 | 3 |

** Rank improves if the number in this column increases in value*

*** Score improves if the number in this column increases in value*

Continued on page 34

**Transparency International CPI Rankings and Scores: Comparison of 2014 to 2013 Ranks and Scores** *(cont.)*

| Country | 2014 Rank | 2014 Score | 2013 Rank | 2013 Score | Change in Rank from 2013* | Change in Score from 2013** |
|---|---|---|---|---|---|---|
| Samoa | 50 | 52 | | | | |
| Czech Republic | 53 | 51 | 57 | 48 | 4 | 3 |
| Slovakia | 54 | 50 | 61 | 47 | 7 | 3 |
| Rwanda | 55 | 49 | 49 | 53 | -6 | -4 |
| Lesotho | 55 | 49 | 55 | 49 | 0 | 0 |
| Bahrain | 55 | 49 | 57 | 48 | 2 | 1 |
| Namibia | 55 | 49 | 57 | 48 | 2 | 1 |
| Saudi Arabia | 55 | 49 | 63 | 46 | 8 | 3 |
| Jordan | 55 | 49 | 66 | 45 | 11 | 4 |
| Croatia | 61 | 48 | 57 | 48 | -4 | 0 |
| Ghana | 61 | 48 | 63 | 46 | 2 | 2 |
| Cuba | 63 | 46 | 63 | 46 | 0 | 0 |
| Turkey | 64 | 45 | 53 | 50 | -11 | -5 |
| Oman | 64 | 45 | 61 | 47 | -3 | -2 |
| The FYR of Macedonia | 64 | 45 | 67 | 44 | 3 | 1 |
| Kuwait | 67 | 44 | 69 | 43 | 2 | 1 |
| South Africa | 67 | 44 | 72 | 42 | 5 | 2 |
| Italy | 69 | 43 | 69 | 43 | 0 | 0 |
| Romania | 69 | 43 | 69 | 43 | 0 | 0 |
| Brazil | 69 | 43 | 72 | 42 | 3 | 1 |
| Bulgaria | 69 | 43 | 77 | 41 | 8 | 2 |
| Senegal | 69 | 43 | 77 | 41 | 8 | 2 |
| Greece | 69 | 43 | 80 | 40 | 11 | 3 |
| Swaziland | 69 | 43 | 82 | 39 | 13 | 4 |
| Montenegro | 76 | 42 | 67 | 44 | -9 | -2 |
| Sao Tome and Principe | 76 | 42 | 72 | 42 | -4 | 0 |

** Rank improves if the number in this column increases in value*

*** Score improves if the number in this column increases in value*

Continued on page 35

**Transparency International CPI Rankings and Scores: Comparison of 2014 to 2013 Ranks and Scores** *(cont.)*

| Country | 2014 Rank | 2014 Score | 2013 Rank | 2013 Score | Change in Rank from 2013* | Change in Score from 2013** |
|---|---|---|---|---|---|---|
| Serbia | 78 | 41 | 72 | 42 | -6 | -1 |
| Tunisia | 79 | 40 | 77 | 41 | -2 | -1 |
| Bosnia and Herzegovina | 80 | 39 | 72 | 42 | -8 | -3 |
| El Salvador | 80 | 39 | 83 | 38 | 3 | 1 |
| Mongolia | 80 | 39 | 83 | 38 | 3 | 1 |
| Morocco | 80 | 39 | 91 | 37 | 11 | 2 |
| Benin | 80 | 39 | 94 | 36 | 14 | 3 |
| Burkina Faso | 85 | 38 | 83 | 38 | -2 | 0 |
| Jamaica | 85 | 38 | 83 | 38 | -2 | 0 |
| Peru | 85 | 38 | 83 | 38 | -2 | 0 |
| Trinidad and Tobago | 85 | 38 | 83 | 38 | -2 | 0 |
| Zambia | 85 | 38 | 83 | 38 | -2 | 0 |
| Sri Lanka | 85 | 38 | 91 | 37 | 6 | 1 |
| India | 85 | 38 | 94 | 36 | 9 | 2 |
| Philippines | 85 | 38 | 94 | 36 | 9 | 2 |
| Thailand | 85 | 38 | 102 | 35 | 17 | 3 |
| Liberia | 94 | 37 | 83 | 38 | -11 | -1 |
| Armenia | 94 | 37 | 94 | 36 | 0 | 1 |
| Colombia | 94 | 37 | 94 | 36 | 0 | 1 |
| Panama | 94 | 37 | 102 | 35 | 8 | 2 |
| Gabon | 94 | 37 | 106 | 34 | 12 | 3 |
| Egypt | 94 | 37 | 114 | 32 | 20 | 5 |
| China | 100 | 36 | 80 | 40 | -20 | -4 |
| Algeria | 100 | 36 | 94 | 36 | -6 | 0 |
| Suriname | 100 | 36 | 94 | 36 | -6 | 0 |

** Rank improves if the number in this column increases in value*

*** Score improves if the number in this column increases in value*

Continued on page 36

**Transparency International CPI Rankings and Scores: Comparison of 2014 to 2013 Ranks and Scores** *(cont.)*

| Country | 2014 Rank | 2014 Score | 2013 Rank | 2013 Score | Change in Rank from 2013* | Change in Score from 2013** |
|---|---|---|---|---|---|---|
| Moldova | 103 | 35 | 102 | 35 | -1 | 0 |
| Bolivia | 103 | 35 | 106 | 34 | 3 | 1 |
| Mexico | 103 | 35 | 106 | 34 | 3 | 1 |
| Niger | 103 | 35 | 106 | 34 | 3 | 1 |
| Djibouti | 107 | 34 | 94 | 36 | -13 | -2 |
| Argentina | 107 | 34 | 106 | 34 | -1 | 0 |
| Indonesia | 107 | 34 | 114 | 32 | 7 | 2 |
| Malawi | 110 | 33 | 91 | 37 | -19 | -4 |
| Ecuador | 110 | 33 | 102 | 35 | -8 | -2 |
| Ethiopia | 110 | 33 | 111 | 33 | 1 | 0 |
| Kosovo | 110 | 33 | 111 | 33 | 1 | 0 |
| Albania | 110 | 33 | 116 | 31 | 6 | 2 |
| Dominican Republic | 115 | 32 | 123 | 29 | 8 | 3 |
| Guatemala | 115 | 32 | 123 | 29 | 8 | 3 |
| Mali | 115 | 32 | 127 | 28 | 12 | 4 |
| Côte d´Ivoire | 115 | 32 | 136 | 27 | 21 | 5 |
| Tanzania | 119 | 31 | 111 | 33 | -8 | -2 |
| Vietnam | 119 | 31 | 116 | 31 | -3 | 0 |
| Mozambique | 119 | 31 | 119 | 30 | 0 | 1 |
| Sierra Leone | 119 | 31 | 119 | 30 | 0 | 1 |
| Belarus | 119 | 31 | 123 | 29 | 4 | 2 |
| Mauritania | 124 | 30 | 119 | 30 | -5 | 0 |
| Guyana | 124 | 30 | 136 | 27 | 12 | 3 |
| Nepal | 126 | 29 | 116 | 31 | -10 | -2 |
| Togo | 126 | 29 | 123 | 29 | -3 | 0 |
| Azerbaijan | 126 | 29 | 127 | 28 | 1 | 1 |

** Rank improves if the number in this column increases in value*

*** Score improves if the number in this column increases in value*

Continued on page 37

**Transparency International CPI Rankings and Scores: Comparison of 2014 to 2013 Ranks and Scores** *(cont.)*

| Country | 2014 Rank | 2014 Score | 2013 Rank | 2013 Score | Change in Rank from 2013* | Change in Score from 2013** |
|---|---|---|---|---|---|---|
| Gambia | 126 | 29 | 127 | 28 | 1 | 1 |
| Pakistan | 126 | 29 | 127 | 28 | 1 | 1 |
| Honduras | 126 | 29 | 140 | 26 | 14 | 3 |
| Kazakhstan | 126 | 29 | 140 | 26 | 14 | 3 |
| Timor-Leste | 133 | 28 | 119 | 30 | -14 | -2 |
| Madagascar | 133 | 28 | 127 | 28 | -6 | 0 |
| Nicaragua | 133 | 28 | 127 | 28 | -6 | 0 |
| Lebanon | 136 | 27 | 127 | 28 | -9 | -1 |
| Russia | 136 | 27 | 127 | 28 | -9 | -1 |
| Cameroon | 136 | 27 | 144 | 25 | 8 | 2 |
| Iran | 136 | 27 | 144 | 25 | 8 | 2 |
| Nigeria | 136 | 27 | 144 | 25 | 8 | 2 |
| Kyrgyzstan | 136 | 27 | 150 | 24 | 14 | 3 |
| Comoros | 142 | 26 | 127 | 28 | -15 | -2 |
| Uganda | 142 | 26 | 140 | 26 | -2 | 0 |
| Ukraine | 142 | 26 | 144 | 25 | 2 | 1 |
| Bangladesh | 145 | 25 | 136 | 27 | -9 | -2 |
| Kenya | 145 | 25 | 136 | 27 | -9 | -2 |
| Laos | 145 | 25 | 140 | 26 | -5 | -1 |
| Papua New Guinea | 145 | 25 | 144 | 25 | -1 | 0 |
| Guinea | 145 | 25 | 150 | 24 | 5 | 1 |
| Central African Republic | 150 | 24 | 144 | 25 | -6 | -1 |
| Paraguay | 150 | 24 | 150 | 24 | 0 | 0 |
| Congo Republic | 152 | 23 | 154 | 22 | 2 | 1 |
| Tajikistan | 152 | 23 | 154 | 22 | 2 | 1 |

** Rank improves if the number in this column increases in value*

*** Score improves if the number in this column increases in value*

Continued on page 38

**Transparency International CPI Rankings and Scores: Comparison of 2014 to 2013 Ranks and Scores** *(cont.)*

| Country | 2014 Rank | 2014 Score | 2013 Rank | 2013 Score | Change in Rank from 2013* | Change in Score from 2013** |
|---|---|---|---|---|---|---|
| Democratic Republic of The Congo | 154 | 22 | 154 | 22 | 0 | 0 |
| Chad | 154 | 22 | 163 | 19 | 9 | 3 |
| Myanmar | 156 | 21 | 157 | 21 | 1 | 0 |
| Zimbabwe | 156 | 21 | 157 | 21 | 1 | 0 |
| Cambodia | 156 | 21 | 160 | 20 | 4 | 1 |
| Burundi | 159 | 20 | 157 | 21 | -2 | -1 |
| Syria | 159 | 20 | 168 | 17 | 9 | 3 |
| Angola | 161 | 19 | 153 | 23 | -8 | -4 |
| Venezuela | 161 | 19 | 160 | 20 | -1 | -1 |
| Guinea-Bissau | 161 | 19 | 163 | 19 | 2 | 0 |
| Haiti | 161 | 19 | 163 | 19 | 2 | 0 |
| Yemen | 161 | 19 | 167 | 18 | 6 | 1 |
| Eritrea | 166 | 18 | 160 | 20 | -6 | -2 |
| Uzbekistan | 166 | 18 | 168 | 17 | 2 | 1 |
| Libya | 166 | 18 | 172 | 15 | 6 | 3 |
| Turkmenistan | 169 | 17 | 168 | 17 | -1 | 0 |
| Iraq | 170 | 16 | 171 | 16 | 1 | 0 |
| South Sudan | 171 | 15 | 173 | 14 | 2 | 1 |
| Afghanistan | 172 | 12 | 175 | 8 | 3 | 4 |
| Sudan | 173 | 11 | 174 | 11 | 1 | 0 |
| Korea (North) | 174 | 8 | 175 | 8 | 1 | 0 |
| Somalia | 174 | 8 | 175 | 8 | 1 | 0 |
| Saint Lucia | | | 22 | 71 | | |
| Brunei | | | 38 | 60 | | |
| Equatorial Guinea | | | 163 | 19 | | |

** Rank improves if the number in this column increases in value*

*** Score improves if the number in this column increases in value*

# The UK FCA Provides New Guidance on Managing Bribery and Corruption Risk in Commercial Insurance Broking

The UK Financial Conduct Authority ("FCA") has issued an update to its 2010 Thematic Review "Managing bribery and corruption risk in commercial insurance broking."[1] continuing its robust approach to the monitoring of, and enforcement against, bribery and corruption risks within the insurance broking sector.

The Review found that, despite improvements in the management of bribery and corruption risk, many brokers' internal systems and controls remained deficient. Insurance brokers, who are subject to FCA oversight if they operate in the UK, irrespective of their size or level of sophistication, should heed the FCA's update and ensure that their anti-bribery and corruption processes meet the regulator's latest expectations.

## The Thematic Review

The Review examined the compliance culture at 10 medium to small sized brokers, nine of which were Lloyd's brokers. Five brokers were also the subject of the original 2010 Review. Having extensively examined the brokers' internal anti-bribery and corruption systems and controls, the FCA concluded that some progress had been made, but most brokers still failed adequately to manage the risk of bribery and corruption.

**Particular deficiencies noted included:**

- Over half of the files the FCA reviewed did not accurately record basic information regarding third parties engaged by the broker.[2]
- Whilst employee training was offered, it was rarely tailored to the specific roles the employees played in the business.[3]
- Most brokers had commercial intelligence databases at their disposal to assist with due diligence, but many brokers failed to use them on a routine basis.[4]
- Management responsible for monitoring bribery and corruption risks often had a paucity of information and, in some cases, lacked the requisite expertise effectively to oversee the risk management exercise.[5]

Continued on page 40

1. *See* FCA, Managing Bribery and Corruption Risk in Commercial Insurance Broking (Nov. 2014), http://www.fca.org.uk/static/documents/thematic-reviews/tr14-17.pdf
2. *Id.* at p.9.
3. *Id.* at p.12.
4. *Id.* at p.9.
5. *Id.* at p.12.

**The UK FCA Provides New Guidance on Managing Bribery and Corruption Risk in Commercial Insurance Broking**

Continued from page 39

Having assessed the situation, the Review provides guidance to brokers on how to manage bribery and corruption risks. In particular, the FCA stressed the need for a holistic assessment of risk across brokers' businesses, in addition to on-going and tailored management of bribery and corruption risk in respect of individual third parties in the insurance supply and sales chains.

"[T]he FCA stressed the need for a holistic assessment of risk across brokers' businesses, in addition to on-going and tailored management of bribery and corruption risk in respect of individual third parties in the insurance supply and sales chains."

## The Need for a Holistic Assessment of Risk

The FCA recommends that brokers identify and assess both external and internal risks to measure their organisation's risk profile as a whole.

As to external risks, the FCA called upon brokers to expand the scope of their risk assessments. Brokers should look beyond the immediate third parties they deal with, such as sub-brokers, producing brokers and agents, and consider the risk profile of all those in their "insurance supply chain". Simply assessing the bribery and corruption risks posed by the next entity along is insufficient.[6]

Internally, brokers must examine both the trading and non-trading aspects of their business.[7] For example, brokers should consider the role that remuneration structures[8] and recruiting processes can play in advancing or retarding anti-bribery and anti-corruption initiatives.[9] Brokers should move away from bonus schemes determined by business generation alone and consider the suitability of job applicants to working in an industry where bribery and corruption risks exist.

The FCA's broad approach offers clear benefits to brokers. Assessing both internal and external bribery and corruption risk not only improves the quality of brokers' internal controls but also the cost effectiveness of those measures. All organisations have finite resources and if brokers adopt the FCA's approach, they will be better placed to determine how to allocate them most efficiently.[10]

Continued on page 41

6. *Id.* at p.9.
7. *Id.* at p.16.
8. *Id.* at p.12.
9. *Id.* at p.12.
10. *Id.* at p.8.

**The UK FCA Provides New Guidance on Managing Bribery and Corruption Risk in Commercial Insurance Broking**

Continued from page 40

## The Need for Individual Assessment

This broad assessment of risk should not, however, come at the expense of the robust analysis of risks posed by individual third parties. The latter is key to the holistic assessment exercise: if individual assessments are inaccurate, the holistic assessment will suffer accordingly.

The Review found that risk assessments performed on third parties engaged by brokers were frequently inadequate.[11] Analysis too often focussed on single factors such as the jurisdiction in which the third party operated. Where brokers did consider multiple factors, they often failed to collate them to make an overall risk assessment.

The FCA has indicated that it expects that due diligence be adapted to the particular circumstances of each case: for example, higher-risk intermediaries should receive greater attention, and be brought to the attention of more senior levels of management, than lower risk intermediaries. But such risk weightings should inform internal processes and not simply form the basis of a box-ticking exercise.

The FCA's clear message is that there is no "one size fits all" for due diligence. Broking firms will be expected to meet high standards, which will require significant engagement within the business at all levels.

## The Future

The FCA shows no signs of reducing its focus on the commercial insurance broking sector. However, to help improve the management of bribery and corruption risks in all regulated industries, the FCA has launched a consultation on updating its guidance on financial crime to provide regulated entities with further examples of good practice.[12]

"The FCA shows no signs of reducing its focus on the commercial insurance broking sector."

Brokers should consider not only the Review but also the FCA's and FSA's previous actions, including the Final Notices issued against Aon, Willis, JLTS and Besso, which together imposed fines totalling over £14 million.[13] The FCA expects all market participants to read and act upon its guidance and enforcement action, and fully address

Continued on page 42

11. *Id.* at p.9.
12. *See*, FCA GC14/7 Proposed guidance on financial crime systems and controls (14 Nov. 2014), http://www.fca.org.uk/news/guidance-consultations/gc14-07-proposed-guidance-on-financial-crime-systems-and-controls
13. *See* FSA Final Notices re: Aon Ltd, http://www.fsa.gov.uk/pubs/final/aon.pdf; Willis Ltd, http://www.fsa.gov.uk/pubs/final/willis_ltd.pdf; JLT Speciality Ltd, http://www.fca.org.uk/your-fca/documents/final-notices/2013/jlt-specialty-limited; and Besso Ltd, https://www.fca.org.uk/static/documents/final-notices/besso-limited.pdf

**The UK FCA Provides New Guidance on Managing Bribery and Corruption Risk in Commercial Insurance Broking**
Continued from page 41

and engage with all bribery and corruption risks that arise in the course of business.

**Karolos Seeger**

**Matthew Getz**

**Robert Maddox**

**Alex Parker**

*Karolos Seeger is a partner, Matthew Getz and Alex Parker are international counsel, and Robert Maddox is an associate, in the London office. They are members of the Litigation Department and the White Collar Litigation Practice Group. The authors may be reached at kseeger@debevoise.com, mgetz@debevoise.com,aparker@debevoise.com, and rmaddox@debevoise.com. Full contact details for each author are available at www.debevoise.com.*

## FCPA Update

FCPA Update is a publication of Debevoise & Plimpton LLP

919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

London
+44 20 7786 9000

Paris
+33 1 40 73 12 12

Frankfurt
+49 69 2097 5000

Moscow
+7 495 956 3858

Hong Kong
+852 2160 9800

Shanghai
+86 21 5047 1800

www.debevoise.com