

Anti-Corruption Compliance in Europe, Mexico, Brazil, and China

**Legal Issues Council
Original Equipment Suppliers Association**

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Agenda

- Brief Introduction – Jonathan Nelms (Washington)
- New Developments and Enforcement Trends in the EU and Russia – Tristan Grimmer (London)
- Mexico: A New Focus on Corruption – Jonathan Adams (Mexico City)
- Brazil: FIFA, the “Car Wash,” and More – Bruno Maeda (Sao Paulo)
- China: Cracking Down from Top to Bottom – Simon Hui (Shanghai)

Introduction: Anticorruption Enforcement Worldwide

- Ten years (give or take) of heavy FCPA enforcement
- The world catches on and catches up
- Which leads to more FCPA enforcement...
- Compliance fatigue
- Why you cannot afford compliance fatigue
- Today's speakers

United Kingdom

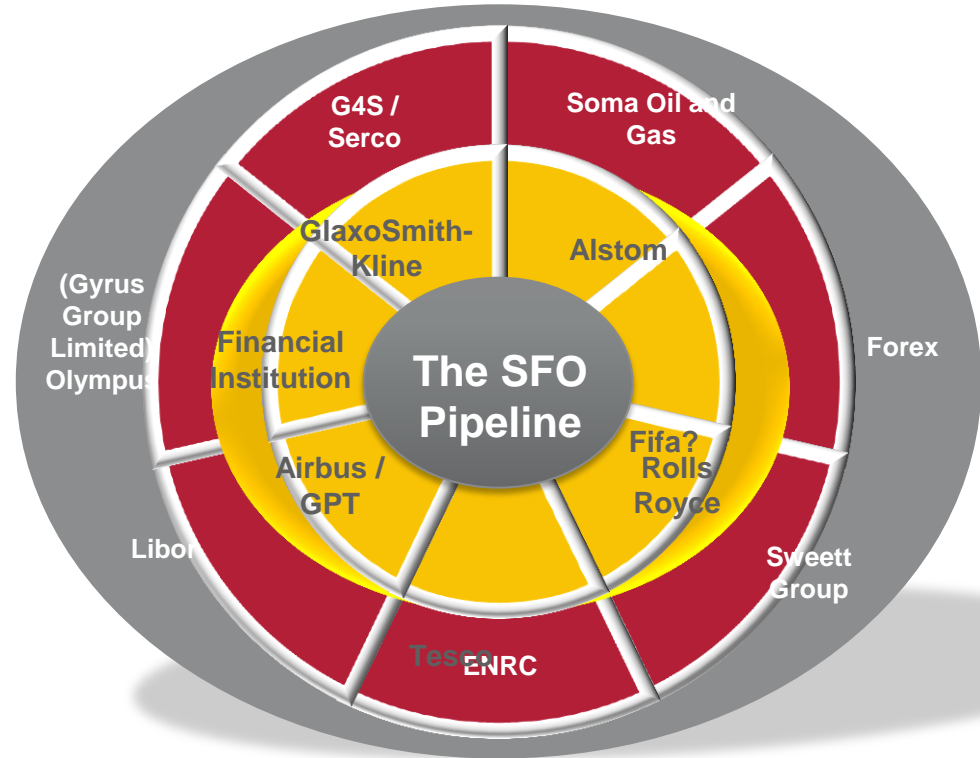


Serious Fraud Office (SFO) Case Pipeline

The SFO Case Pipeline | The Past Year

In the past year we have seen...

- The first conviction in the Libor investigation with further trials and charges expected this autumn
- The first individual conviction under the Bribery Act by the SFO (**Sustainable AgroEnergy**)
- The first corporate conviction for foreign bribery by the SFO (**Smith & Ouzman**)
- Investigations opened in respect of Tesco, Soma Oil and Gas, forex manipulation etc.



The SFO Case Pipeline | High Risk Jurisdictions

Airbus/GPT bribery allegations relate to conduct in Saudi Arabia, Romania and Austria

Sweett Group bribery allegations relate to conduct in the United Arab Emirates and Morocco

Alstom bribery allegations relate to conduct in Singapore, Brazil, Italy, Zambia, Poland, Mexico, Latvia, Tunisia, India and Malaysia

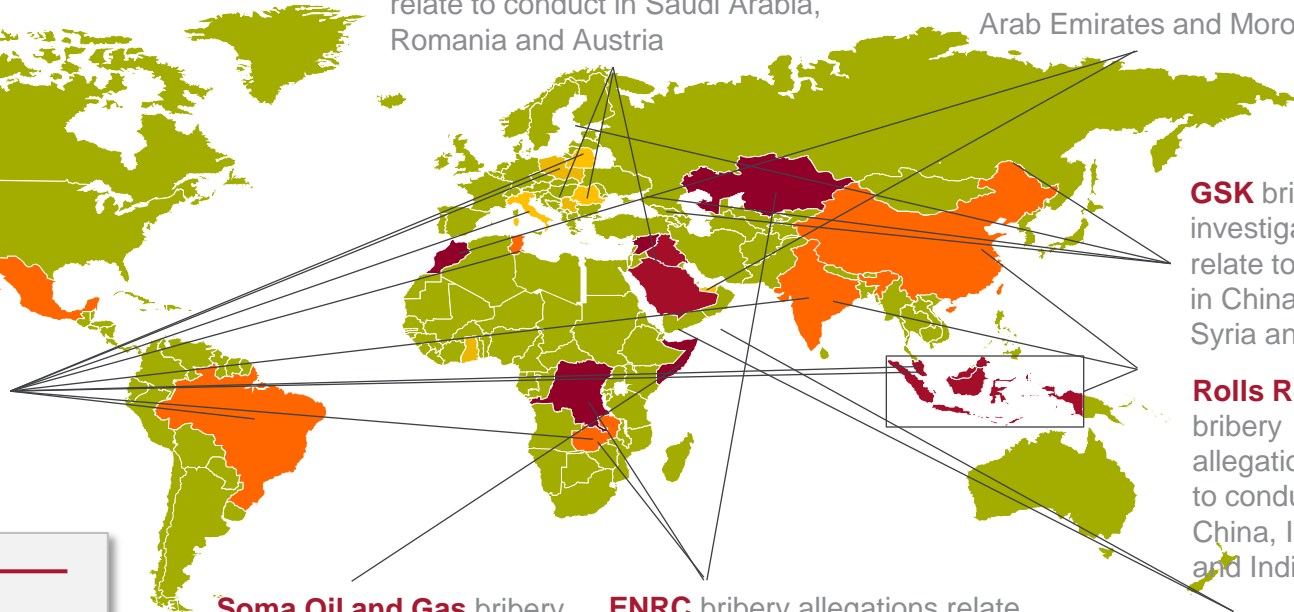
GSK bribery investigations relate to conduct in China, Poland, Syria and Iraq

Rolls Royce bribery allegations relate to conduct in China, Indonesia and India

Soma Oil and Gas bribery allegations relate to conduct in Somaliland

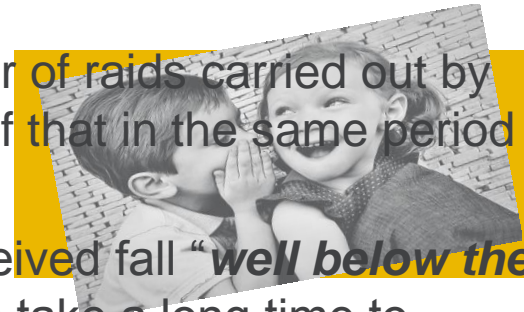
ENRC bribery allegations relate to conduct in Kazakhstan, Zambia and the DR Congo

Financial Institution bribery allegations relate to conduct in Saudi Arabia and Qatar



The SFO Case Pipeline | Too Few or Too Many Investigations?

- In April 2015, it was reported that the SFO had received more than 2,500 reports of suspected fraud or corruption in 2014, but that it had “insufficient resources” to follow up on most of them
- It was further reported in August 2015 that the number of raids carried out by the SFO in the year ending 31 March 2015 was half of that in the same period in 2014
- David Green responded that most of the “tip-offs” received fall “**well below the SFO take-on criteria.**” He also noted that SFO cases take a long time to conclude



David Green comments: “[t]he sheer quantity of data is vast; obstacles, technical or legal, must be overcome. Claims of privilege may have to be tested. Witnesses and suspects must be identified. Some individuals and some companies choose to cooperate, others choose not to do so. But we get there... the SFO will not give up and walk away or act in a way which rewards obduracy.”



SFO Toolbox

The SFO Toolbox | DPAs

Are They a “Get Out of Jail Free” Card?

- Transparency International UK wrote an article fearing that big companies would start “***paying to escape prosecution for alleged corruption***” and that “***the SFO should not be manoeuvred or intimidated into a DPA by powerful companies backed by big money and big law firms***”
- David Green stated that such concerns were “***premature and unfounded***” and that a DPA would in no sense be “***the product of a backroom deal***” and that they were designed to avoid “***collateral damage to innocent parties occasioned by the prosecution of a company***”
- In particular, it is worth noting that:
 - A judge must give authority for DPA negotiations to progress;
 - A judge must certify that a DPA is in the interests of justice;
 - The final application for approval will “*always*” be in public; and
 - DPAs may contain onerous conditions



The SFO Toolbox | Sentencing Guidelines

- Sentencing Guidelines outline revised fining methodology:
 - Base fine set by reference to culpability and harm
 - Revised to reflect aggravating and mitigating factors
 - Further refined to reflect fining objectives and proportionality
 - Reduction for guilty plea
- Defined steps which will be used as a framework for sentencing, but judiciary has significant discretion regarding application



Note statements in *Innospec*: “The level of fines in cartel cases is now very substantial and measured in terms of millions. It is self-evident that corruption is much more serious in terms of both culpability and harm caused... I approach sentencing on the basis in this case that a fine comparable to that imposed in the US would have been the starting point...”

The SFO Toolbox | Sentencing | Recent Examples

Past twelve months have demonstrated enthusiasm for hefty sentences of individuals

- In **January 2015**, Magnus Peterson, the boss of a collapsed hedge fund, was sentenced to **13 years** in prison for a \$537m fraud
- In **February 2015**, in the **Smith & Ouzman** case, two men received **3 year** and **18 month terms of imprisonment** respectively. The judge commented that the men's behaviour was "***cynical, deplorable and deeply antisocial... suggesting moral turpitude***"
- In **June 2015**, two former employees of Edinburgh Council and two directors of a construction company received jail sentences ranging from **2 years and 3 months** to **4 years and 4 months** for giving and receiving bribes in the form of cash payments and "hospitality" for being allocated maintenance and repair contracts
- In **August 2015**, Tom Hayes, described as the "*ringmaster*" in the manipulation of Libor was sentenced to **14 year terms of imprisonment**. Hayes stated that rigging was so rife that "*not even Mother Teresa wouldn't manipulate Libor if she was trading it.*" Green noted that "***alleged industry practice, arguments about 'permissible range', 'no one told me not to' and 'why pick on me' provide no defence in law***"
- Though it's not all good news for the SFO:
 - See *Evans v SFO* where the SFO was ordered to pay the costs of three solicitors for wrongly trying to prosecute them on conspiracy charges
 - See its 2014 report where the SFO announced that it had obtained confiscation orders for £26 million from criminals in the preceding year, but had only recovered £13 million



Russia, EU

Other Key Developments | Russia (1)

Key bribery risks

- “Krysha” system
- State owned enterprises and ambiguous structures
- Rigged public tenders
- Offshore payment schemes
- Regulatory extortion and corporate “reiderstvo”
- Recommended agents and consultants
- Territorial allocation by distributors

Landscape is changing...

- Anti-bribery initiatives growing in strength and momentum, with increasing focus on enforcement:
 - Over 160 corruption related cases brought against companies 2011-2014
 - Kremlin launched anti-corruption campaign in Fall 2012
 - Growing recognition that compliance is good for business
 - Russian courts started recording and publishing statistics on criminal corruption cases in 2013

Other Key Developments | Russia (2)

- Russian anti-bribery legislation
 - Code on Administrative Violations (2008):
 - Criminal Code
- New legislation strengthening legal support for ethical business:
 - **Article 13.3, Law No. 273 “On Combatting Corruption” (January 2013)**
 - Organisations must develop and take certain prescribed measures to prevent corruption
 - **The Supreme Court’s Resolution on Court Practice in Bribery Cases and Other Corruption Crimes (July 2013)**
 - Russia’s Answer to the DOJ/SEC FCPA Guidance
 - Compare FCPA and the U.K. Bribery Act re charitable donations – be cautious
 - **Ministry Of Labor Recommendations on Combatting Corruption (November 2013)**
 - Organisations must adopt and communicate to employees a local anti-corruption policy

Other Key Developments | Spain (1)

- Spanish Criminal Code provides for criminal liability for legal entities for selected number of crimes (public and private corruption, money laundering, environmental crimes, etc...)
- Spanish Criminal Code establishes that if:
 - The directors of a company have adopted a compliance program that meets the legal requirements under Spanish law;
 - The supervision of the program is entrusted to a company's body or individual with authorized powers of initiative and control (Compliance Body);
 - The officers or the employees have not committed a crime by intentionally violating the Compliance Program; and
 - The Compliance Body has not neglected its duties of supervision, surveillance and control;
- The **company** will be **exempted from criminal liability** for the crimes committed (including corruption offences) by its officers and employees

Other Key Developments | Spain (2)

Six elements of a Compliance Program under Spanish Criminal Code:

- Risk assessment of the crimes that should be prevented.
- Standards and controls to mitigate any criminal risks detected.
- Financial management system in place to prevent the identified crimes (i.e., resources of the Compliance Body/officer).
- Obligation to report to the Compliance Body any violation of the standards and controls (whistleblowing channel).
- Disciplinary system to sanction the violation by officers and employees of the Compliance Program.
- Periodical review of the Compliance Program, making the necessary adjustments when serious violations occur or when the company undergoes organizational, structural or economic activity changes.

Other Key Developments | France (1)

Landscape is changing:

- Anti-bribery initiatives growing in strength and momentum:
 - Recent laws aimed at enhancing sanctions and prosecution of bribery and increasing transparency of public life (2013)
 - Bill of law regarding duty of vigilance (*devoir de vigilance*): adopted by French National Assembly in March 2015 - in review of French Senate in October 2015
 - Bill of law to come regarding anti-bribery (future “Sapin Law II”) expected in 2016: contemplated creation of a new anti-corruption authority in charge of detection and prevention of corruption and having sanctioning powers
 - Ministerial announcements regarding continuous improvement of anti-bribery legislation and intention to enhance fight against bribery related offences
 - French Central Service for the Prevention of Corruption (“SCPC”) March 2015 Guidelines for the Reinforcement of Prevention of Corruption in Commercial Transactions

Other Key Developments | France (2)

- French anti-bribery legislation
 - Criminal Code
- New legislation strengthening sanctions and enforcement
 - **Law No. 2013-1117 on “Fight against tax fraud and large economic and financial crime ” (December 2013) and Law No. 2013-1115 regarding Financial Public Prosecutor (December 2013)**
 - Increase of applicable sanctions
 - Leniency measures extended to corruption related offences
 - Measures to protect whistle-blowers
 - Possibility for certain associations to bring claims in anti-corruption matters as civil parties
 - Creation of new prosecuting authority, Financial Public Prosecutor, for certain complex corruption related offences (implemented by decree and circular of January 2014)
 - **Law No. 2013-907 on public sector transparency (October 2013):** Introducing notable transparency measures (declaration of assets and interests)
 - **Decree of October 25, 2013 :** Creation of a specialized investigation office - Central office for the fight against corruption and financial and tax offences (“OCLICIFF”)

Mexico

Mexico: Corruption in the Media

November 2014.
House of
President's Wife
from government
contractor

February 2015.
Peña orders
investigation

August 2015.
Peña exonerated



Mexico: Corruption in the Media

March 2015.
Director of Conagua
caught on social
media for personal
helicopter ride

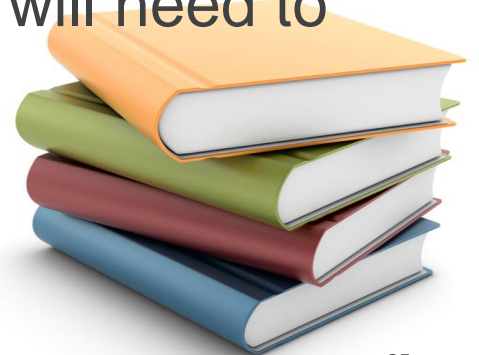
April 2015.
Korenfeld resigns
Conagua after
media pressure



Legislation Update

Constitutional Amendment on Anti-Corruption

- Approved by States May 20, 2015
- Published May 27, 2015
- Importance: Coalition for Change.
- The devil is in the details of the laws that will need to be enacted over the next year.



Constitutional Amendment on Anti-Corruption

- Anti-corruption Law Overhaul Mandated
 - No more political immunity for common crimes
- *Sistema Nacional Anticorrupción*
- *1. Secretaría de la Función Pública*
 - Venerable institution. Positive message to keep it.
 - More independence. Now subject to Senate confirmation
 - Investigates corruption by public officials (administrative)

Constitutional Amendment on Anti-Corruption



- 2. *Auditoría Superior de la Federación.*
 - Audits government funds application. Now current, not only past
- 3. Special Anti-Corruption Prosecutor
 - Investigates criminal side (mostly individuals)
- 4. *Tribunal Federal de Justicia Administrativa*
 - Judges on corruption
 - Administrative fines against officials, individuals and companies in systematic cases (dissolution, intervention).

Constitutional Amendment on Transparency

- *Sistema Nacional de Transparencia.*
 - February 7, 2014 Constitutional Reform
- National Transparency Institute, sucesor to Federal Transparency Institute (from Fox Administration).
 - Now has independence
 - More agencies covered: from 246 to 734 (judicial, legislative, unions, states, municipalities)



Criminal Liability for Companies?

- Federal District Criminal Code December 18, 2014
- Criminal Liability for Companies, when crimes committed for their benefit. Art 27bis Federal District Criminal Code
 - eliminates intent requirement
 - includes lack of proper controls
 - no requirement of individual being prosecuted
 - credit for cooperation in investigation (Art. 27bis Quintus), reparation, establishing preventive programs
 - no precedent yet; controversial implementation

Brazil

Overview of Brazilian Anti-Corruption Laws

- New Anti-Corruption Law in force since January 2014
 - Include: bribe of public official, fraud in public procurement settings, bid rigging and other illegal conducts
 - Committed against local and foreign Public Administration
 - Strict liability of legal entities
 - No need to demonstrate corrupt intent
 - Government need only to show that the prohibited acts were committed in the interest or in the benefit of the company
 - Express recognition of compliance programs and cooperation as mitigating factors
 - Possible resolution through leniency agreements

Enforcement Environment

- Operation Zelotes (2015)
- Prosthesis Mafia (2015)
- Fifa-related cases (2015)
- Operation Car Wash (2015)*
 - 716 proceedings initiated
 - 28 plea agreements
 - 105 arrests
 - 356 search and seizures
 - Charges brought against 143 individuals
 - 53 international cooperation requests



Enforcement Environment

- Increased enforcement of anti-corruption laws (including money laundering and procurement laws)
 - Arrests of high-level executives
 - Investigations affecting high-level public officials
 - High impact on affected companies (e.g., reputation, financing, debarment/suspension)
 - Pressure from civil society / increased levels of public opinion awareness
- Significant increase in cooperation with foreign authorities
- Substantial increase of companies adopting compliance program

Regulation of the Anti-Corruption Law

- Guidance on compliance programs
 - Parameters for evaluation of compliance programs
 - FCPA compliance programs may need to be adapted
- Definition of criteria for calculation of sanctions
 - Specific percentages of reduction for mitigating factors
 - Importance of leadership, cooperation and compliance programs
- Settlements / leniency agreements
 - Pre-requisites and conditions
 - Full cooperation / identification of other involved parties

Elements of a Compliance Program

1. Commitment of high management and board members to the program
2. Policies and procedures applicable to everyone at the company
3. Policies and procedures applicable to third parties (suppliers, service providers, intermediaries, etc.)
4. Periodic training
5. Periodic risk assessment
6. Accurate and complete books and records
7. Internal controls to assure the reliability of financial statements
8. Specific procedures related to public procurement and interaction with government officials
9. Independence, structure and authority of the compliance function
10. Channels to report irregularities openly and broadly disseminated among employees and third parties, and mechanisms to protect good-faith whistleblowers
11. Application of disciplinary measures in case of wrongdoing
12. Procedures to immediately stop irregularities detected and to take measures to remediate damages caused
13. Due diligence on third parties
14. Due diligence in corporate and M&A transactions
15. Continuous monitoring of the program
16. Transparency in political contributions

Evaluation of Compliance Programs

Profile Report

Indicate the sectors and countries in which it has business

Present its organisational structure

Provide the number of employees

Specify and contextualise the interactions with public and foreign administration

Describe its corporate structure

Inform if it is a small size company

Compliance Report

Inform the structure of the compliance program, indicating which and how the parameters set forth in Decree 8.420/2015 have been implemented

Demonstrate how the compliance program's operations are integrated into the activities of the legal entity

Demonstrate how the compliance program worked in the prevention, detection and remediation of the violation under investigation

China

China-Trends and Developments

- Increase in the number of prosecutions against bribe payers.
 - In 2013, the Chinese authorities prosecuted 5155 individuals for paying bribes which represents an increase of 18.6 % over the previous year.
 - In 2014, the Chinese authorities prosecuted 7827 individuals for paying bribes.



Trends and Developments

- Enforcement actions against foreign MNC corporations
 - GSK prosecution: first bribery prosecution against a MNC by Chinese authorities
 - Investigations targeting MNCs with close business relationship with SOEs or government officials
- Specific industries:
 - oil & gas
 - pharma
 - automobiles & shipping
 - media & public relations
 - banking



Trends and Developments

- An increase in the number of whistleblower reports
 - easy access for filing reports (e.g. mobile phone app)
 - a government agency used to receive approx 300 tips-offs per day
 - this number is increased to 1067 after the launch of the new app



Trends and Developments

- Government agencies actively taking enforcement actions
 1. Administration for Industry and Commerce (AIC)
 2. Public Security Bureau (PSB)
 3. Central Commission for Discipline & Inspection (CCDI)
 4. Joint Task Force
- Conduct unannounced inspections at corporate/private premises to maximize the collection of evidence



International Cooperation in Enforcement

- Operation “*Fox Hunt*” (2014)
 - 500 fugitives / USD 500 million in assets returned
- Operation “*Sky Net*” (2015)
 - Targeting fugitives in US, UK, France, Canada, New Zealand, Australia, Thailand, HK, and Singapore
- Successful co-operations with overseas enforcement authorities
 - Australia assisted China in the extradition and seizure of assets of corrupt officials (Oct 2014)
 - US indicted ex-Chinese government official (March 2015)
 - Singapore returned No. 2 “*Sky Net*” fugitive official to China after local prosecution and imprisonment (May 2015)

International Cooperation in Enforcement

- Recent Meeting between President Obama and President Xi where both sides agree to enhance practical cooperation in:
 - Corruption prevention,
 - Detecting embezzled public funds,
 - Exchanging evidence,
 - Combating transnational bribery,
 - To discuss the mutual recognition and enforcement of forfeiture judgements.



Legislative Developments

- Amendment to PRC Criminal Law
 - Add a new crime of offering bribes to former government officials, relatives of or any person close to incumbent or former government officials;
 - this can be committed by an individual and/or an entity
 - Add monetary fines to all individuals convicted of corruption/bribery-related crimes
 - Raise threshold requirement for bribe-givers punishment



Legislative Developments

- “*Name and Shame*”
 - New Regulations requiring governmental authorities to publish names of those companies which have received administrative penalties
 - May trigger the “black-list” rule preventing a corporate offender from participating in government procurement projects
- New Legislation Focusing on Bribery and Corruption
 - Anti-corruption law possible to be promulgated in 2015



Global Compliance News

- **Global Compliance News (GCN)** is a news platform providing up-to-date information on compliance-related topics such as new legislation, important court decisions as well as decisions by public authorities that may have an impact on companies.
- **How to keep up-to-date through Global Compliance News:**
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 - You can also keep up-to-date through GCN by:
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