Ports & Terminals

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CLAMPDOWN ON CORRUPTION

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Is the first corporate prosecution under the UK Bribery Act just around the corner?, asks HFW's Daniel Martin.

In the August 2011 edition of Port Strategy, HFW discussed the global implications of the UK Bribery Act which came in to force on 1 July 2011. The article focussed on the very wide drafting and ambitious territorial application of the Act. In particular, it considered the impact on ports internationally, both from a port operator's and a port user's perspective.

The article considered the treatment which activities such as promising an incentive to stevedores to discharge a vessel in a timely manner, giving a bottle of whiskey to a customs official to avoid delays, or offering a large box of cigarettes to a port agent so as to receive special treatment could receive under the new Act.

Two and a half years later, what impact has the UK Bribery Act had and what lessons can be drawn by port operators and port users?

Even its most fervent supporters would accept that, at least to date, the impact of the UK Bribery Act has been relatively limited. However, there have been recent signs from enforcement agencies in the UK that things may be about to change, reinforcing the need for vigilance.

The entry into force of the Act resulted in a flurry of revised Codes of Conduct and a tightening of rules on corporate hospitality, in some cases making companies reluctant to engage in even normal and reasonable corporate hospitality, which the Ministry of Justice has always stressed was not the intention of the Act.

As such, we have seen corruption move higher up the corporate agenda, but many have said that the Act will only be treated seriously if companies see that it has teeth and is being actively enforced.

While we are still awaiting the first corporate prosecution under the Act, there have been indications from the Serious Fraud Office (SFO) recently that the position may change before too long.

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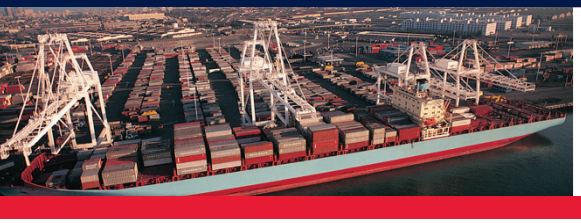

In October 2013, David Green, the director of the SFO, said the following: "More generally, the SFO currently has some 13 cases involving 34 defendants (two of which are corporates) in the Court system awaiting their trial. Eight of these trials are listed after April 2014." In the same month Alun Milford, the general counsel of the SFO, said that "about half of our operational resource is engaged in corruption-related casework".

Individual focus

There have also been developments which, while short of a corporate prosecution, show that Courts and enforcement agencies are looking closely at incidents of corporate bribery.

In August 2013, four individuals connected with Sustainable AgroEnergy plc were charged with offences under the Act of making and accepting a financial advantage. There appears to be no corporate prosecution against Sustainable AgroEnergy for failing to prevent corruption.

In October 2013, Smith & Ouzman Ltd and four individuals were charged with offences under the Prevention of Corruption Act 1906 (the offences took place between November 2006 and December 2010, so before the Act came into effect) in connection with alleged corrupt payments to win business in Mauritania, Ghana, Somaliland and Kenya.

Most recently, in a decision at the end of November, a survey company was criticised by the English High Court

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because its surveyors contemplated bribing officials in Mumbai. The case did not turn on the bribery allegations and the court stressed that no bribes were paid. It is worth highlighting that, even if bribes had been offered or paid, all of the conduct occurred in the Spring of 2010, before the Act was passed. Nevertheless, the case is a useful reminder that, as a matter of English law, facilitation payments are bribes, however they are described (the relevant emails talked about "suitably greasing the authorities", paying "administrative charges", providing "perks" and making "gratis payments", all of which appeared to be euphemisms for bribes).

As an example, a payment by a shipowner, shipowner's agent or ship's master to an official to speed up the clearance of a vessel into a port (in circumstances where no official fast track service is available) is likely to be considered an offence under the Act.

All of the above demonstrates the importance of vigilance and adopting (and enforcing) adequate procedures to prevent bribery. While everyone eagerly awaits the first corporate prosecution, no one wants to find that they are in the unenviable position of being forever known as the first company to be prosecuted. Just ask Munir Patel, the first individual to be prosecuted under the Act, who is inevitably mentioned in any discussion of the Act.

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