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International Corporate Crime Conference Report

Anti-corruption, compliance, enforcement and ethics



On 15th April 2016, CMS hosted a conference on International Corporate Crime, bringing together key figures from global business, academia, law enforcement and regulation. The event covered a broad range of topics on corporate crime from the latest academic research on ethics, enforcement and deterrence, to considerations of legal privilege across international jurisdictions and building global compliance programmes in multi-national institutions. This report provides a briefing on the key topics discussed during the day.

Foreword – Omar Qureshi

Allegations of fraud, corruption, money laundering, tax evasion and other forms of financial crime involving senior public figures and companies are becoming almost commonplace by their regularity. There are phenomenal levels of activity in this area, with seemingly no industry or sector immune from scandal. In recent years, issues have affected financial services, telecoms, energy and construction, life sciences, international sporting bodies and many more, spawning multi-national investigations characterised by levels of cooperation between regulators and other authorities rarely seen before.

As a result, fraud and corruption are now much higher on the public, political and enforcement agendas than previously and these issues are keeping industries of professionals busy, trying to keep up not only with the flow of allegations and increasingly sophisticated methods of hiding the wrongdoing, but also with fast-changing laws and processes designed to enable the authorities to uncover and prosecute with less bureaucracy.

We are seeing stronger rhetoric, tougher sanctions, with bigger financial penalties, debarments, and the advent of the corporate monitor. We are also seeing increasing use of settlement arrangements with corporates, in order to resolve cases more quickly, extract appropriate financial penalties and compensation, force the corporate to clean up their act for the future and help the investigators to pursue the individuals behind the wrongdoing.

Meanwhile, as corporates seek effective ways to encourage an ethical business culture, they struggle to deal with the harsh realities in some jurisdictions where corruption is rife. They also struggle with the effect of their improved controls – namely better trained staff who are more willing to speak up and report red flags when they see them, leaving the corporate with the difficulty of having to investigate those reports.

It is not only formal prosecution authorities and regulators that corporates have to be alive to. Companies involved in projects funded by the multilateral development banks can face further investigation and sanctions from those banks where bank-financed projects are affected. Those additional sanctions can be triggered by convictions or agreements with regulators and other authorities.

Against this backdrop, we have seen the publication of numerous reports focusing on and analysing compliance culture. In a recent Kroll/Ethisphere Institute report (*'Year of Global Expansion and Enforcement – 2016 Anti-Bribery and Corruption Benchmarking Report'* (9 March 2016)) which surveyed almost 270 senior

executives working in ethics and compliance across a range of industries and across the world, they found:

- 40% of respondents believed their organisation's corruption risk would increase this year (predominantly due to global expansion plans, increased engagements with third parties and increased enforcement activity of existing regulators)
- Less than half thought their company's leadership was highly engaged in anti-corruption efforts, with 59% unable to confirm whether the board (33%) or CEO (26%) were involved.

Governments are also undertaking substantial reforms of their existing anti-corruption laws. We have just published the 4th edition of CMS' Guide to Anti-Bribery and Corruption Laws, which summarises the laws in 34 jurisdictions around the world. Five of the original 26 countries featured in the 3rd edition have made substantial reforms of their existing anti-corruption laws (the Netherlands, Portugal, Romania, Switzerland and in the last two years Ukraine), while 9 of the original 26 countries have increased their penalties.

What is clear from this study is that there is no common standard, even within relatively harmonized regions. Not all countries outlaw private sector bribery, not all penalise bribe recipients, defences vary and there can be wide variations in penalties. These differences present additional risks and complexities for businesses operating internationally. It is insufficient to assume that compliance with US or UK requirements will keep you safe further afield.

Today's societies take corporate behaviour more seriously than ever, while brand names and reputation carry a tangible value that can be listed as an asset on a balance sheet. Many businesses are taking steps to build ethical cultures and should be applauded for this. However, as the insights from this conference prove, whether your company's intentions are benevolent or otherwise, corporate activity is scrutinised more heavily and the media spotlight is much brighter and faster moving than ever before. One of today's panellists, Richard Thomas who is a Member of the Committee on Standards in Public Life, cut through the noise with one, clear question: 'Could it stand the 'Daily Mail test'?'.

Keynote – Professor Christopher Hodges, University of Oxford

How do we construct a system that encourages people and corporates to do the right thing?

Revealing the findings of his new book *Law and Corporate Behaviour*, Professor Hodges hopes to be part of creating just such a system and he explained to guests at the CMS Corporate Crime Conference that legal and regulatory regimes can deliver positive outcomes by taking a different approach.

The product of many years' research at the centre for Socio-Legal Studies at Oxford University, Professor Hodges' conclusions are that we should support individuals' choices by focusing on personal values and emotional responses to fairness and proportionality, rather than purely economic calculations. He questions in particular whether enforcement approaches based largely on punishment as a deterrent truly have a place in the modern world.

'Preconceptions tend to move,' he said. *'The basic questions are: why do people obey rules, why do people break rules and how can we do something about it internally within organisations or outside within society through regulators, enforcement agencies or legislators?'*

Individual and corporate behaviour, said Professor Hodges, have been guided for decades by a 'default mechanism' that associates particular terminologies with desired outcomes. In many ways, this accounts for the enduring link between deterrence and punitive enforcement which characterise so many of our legislative and regulatory systems.

However, this approach ignores the question of behaviour, he said. Citing the Nobel Prize-winning psychologist and economist Daniel Kahneman whose research into behavioural science has been developed further in his own work, Professor Hodges asked: *'What drives people to do what they do? At a theoretical level, deterrence has its basis in tort law, criminal law and economics, with the latter assuming a rational individual would internalise cost and therefore do the right thing to avoid being penalised.'*

'But professors of criminology have told me about deterrence. They say; 'we know that it doesn't work. We've known for years. The question is, what do we do?'

Given this received wisdom, it follows that there should at least be some evidence to support the punitive approach having an effect on behaviour. However, using examples of 'private enforcement' in the form

of the US litigation system and 'public enforcement' such as policy from the European Commission Directorate General on Competition, Professor Hodges said he has searched to no avail.

'I looked for empirical evidence of how these two systems actually affect what people do and whether you get the right outcomes. The entire US legal system based on class actions and private enforcement of law through damages has an economic rationale within which deterrence is used time and again; when you look for evidence that it actually affects people in relation to what they ought to be doing in a regulatory or behavioural context, there is very little available. It's a mirage.'

Professor Hodges then explained how a comparison of UK regulators' practices revealed at one extreme, a harsh enforcement driven approach, while others appear to be taking a more supportive stance.

'Within the former group you have the Competition and Markets Authority, the Financial Conduct Agency and OffComm. At the opposite end of the scale there are others who support their 'membership' without resorting to enforcement action so often. For example, the Civil Aviation Authority is completely different, as is the MHRA (Medicines and Healthcare Products Regulatory Agency), the Health and Safety Executive and Food Standards Agency (FSA). The latter recently issued a statement saying they want to support companies 'doing the right thing' and that those businesses should be recognised. It added that action will be taken against those who don't, but interestingly, the statement doesn't mention deterrence but says 'where businesses demonstrate that they can prioritise food safety and authenticity, they will benefit from reduced regulatory scrutiny.'

He added how the FSA's approach is indicative of a trend amongst other regulators. *'In March 2016, the regulator of the water sector in England and Wales, Offwat, issued a consultation on enforcement in which it repeatedly used 'changing behaviour' as a means of ensuring customers are protected. One could validly ask, shouldn't we be consistent about this?'*

A few regulators have got there already, he said. *'The Civil Aviation Authority (CAA) has a no-blame system designed to continually circulate information about how the industry is learning. This includes scenarios like near misses between aircraft and encourages admissions by parties of their own culpability. If you translate this to the NHS, no one would ever say anything about a near miss because they are worried about the blame culture. The US CAA switched between a prosecutorial enforcement regime and a supportive enforcement*

regime and the reporting of incidents absolutely mirrored this change. When they were prosecuting everyone, they received absolutely no information and vice versa. The no-blame culture is absolutely critical but unfortunately I don't see this in the NHS' criminalisation of the Duty of Candour, or the Senior Persons' Regime within financial services.'

In conclusion, Professor Hodges asked the audience to consider how do we embed an ethical culture in everything we do?

'It is necessary to develop a culture which maximises compliance with the rules and the risk of wrongdoing being identified,' he said. 'This means constant questioning and feedback reporting which may create a collision debate between profit and ethical practice, but reduces the reliance on isolated whistle-blowing.'

The regulators' response

Graham Russell MBE, director of regulatory delivery at the Department of Business, Innovation and Skills explained why his office welcomes Professor Hodges' stance.

'The UK Government really welcomes what Chris has done. Since 2008, growth in the UK economy has been a real priority; exports, productivity, everything. When you walk into the lobby of our department, you will see a statement that says 'we believe business is a force for good in society'. Growth, employment, prosperity and health all stem from business.'

The question, asked Graham, is whether regulation has a place in the drive for growth?

'When BIS researched this we identified three ways in which it does,' he said. 'Firstly, reducing the cost of business, secondly an acknowledgement that done well, regulation can deliver confidence and a sense of control for businesses. Finally, we found that fair competition and a level playing field were possible as a result of good regulation.'

Having identified these elements, Graham explained how the department is acting to enable them.

First up was its 'one in, two out' policy under the general principal that 'less regulation is better'. *'This was launched during the 2010-2015 government and is being taken forward by the Business Impact Target which by 2020 will have removed £10bn worth of regulatory cost from business in the UK,' he added.*

To achieve confidence and control, the department has created 'The Regulators Code', which seeks to provide a framework for how regulators should engage with those they regulate, through the design of common standards, transparency and risk based approaches. *'Alongside this, we've also legislated for the 'Growth Duty','* Graham explained. *'We believe that in addition to all the oversight responsibilities, regulators should have a duty to promote growth. They succeed when their sectors succeed.'*

The third action is arguably the most controversial and Graham agreed with Professor Hodges' analogy of civil aviation as a means to opening responsibility up to companies themselves. *'We need a self-regulation based approach. If we simply wait for things to go wrong and then try to impose penalties, frankly no one will be there to discuss it.'*

Richard Thomas CBE, Member of the Committee on Standards in Public Life and former Information Commissioner, also gave a positive response to the future direction of regulators in the UK. *'In my experience, regulators are far more tolerant where there is evidence of good ethical behaviours. Companies may have got things wrong but they can show that by trying to get things right they will receive better treatment than those who are wilful, cavalier, repeat offenders.'*

Richard urged regulators to encourage an ethical approach by businesses to fulfil their obligations. *'As I read the evidence gathered together by Professor Hodges, the message I received is that most companies want to get it right. There may be ignorance or uncertainty but there is also enlightened self-interest which is increasingly coming to the fore and that is a very powerful driver for compliance. I agree that deterrence and punishment have fairly limited effectiveness and can lead to confrontation, litigation and a huge drain on resources; from both sides – I can't tell you how 'under resourced' most regulators feel.'*

The Committee on Standards in Public Life will issue a report in autumn 2016 on this topic. *'The direction of travel is that regulation fundamentally needs to be effective and ethical,'* explained Richard. *'Regulators need to be independent of government and political interference; they need to be engaged with absolute clarity about their role and they need to be open in their approach. We are leaning towards regulators being the 'voice of authority', rather than the policeman.'*

Richard added that the Committee will also highlight the risks inherent to encouraging regulators towards a largely ethics-based regime. *'Independence and objectivity has to be maintained and while Chris Hodges has spoken primarily about the carrots, we do need some sticks and we have to acknowledge that sometimes you need to make an example. Sometimes you need to name and shame and impose a little hardnosed crime and punishment.'*

'Where behaviour is wilful, unscrupulous, or grossly negligent; this is where this approach must be maintained.'

He concluded by pointing out how transparency is also a powerful sanction. Regulated sectors can 'clean themselves up' when the spotlight shines across everyone.

'One of the first freedom of information cases I handled involved a restaurant and someone wanted the Environmental Health Agency report assessment. The EHA refused to disclose the information on the grounds of commercial confidentiality. The Information Commission overruled this decision and it is now absolutely standard practice for this information to be published openly.'

Law and Corporate Behaviour: A summary

Professor Hodges' book, based on many years of research into approaches across various developed and sophisticated legal and regulatory systems around the world, considers the evidence of how law, regulation and other techniques affect (or fail to affect) the behaviour of corporations, and offers conclusions on the legal structures and enforcement approaches required to support good corporate behaviour.

Professor Hodges concludes that enforcement approaches based on punishment to achieve deterrence (on the assumption that corporates are economically rational actors and can control their employees' and agents' behaviour) rarely affect future behaviour. The effect of fines or damages is dissipated through insurance and prices and becomes a 'cost of doing business'. Entities cannot 'control' the behaviour and actions of all employees any more than public or private enforcers can. Findings from cognitive and behavioural psychology on why people follow rules suggest a different approach would be more effective: supporting individuals' choices by focusing on personal

values, and emotional responses to fairness and proportionality (including shame and reputation), rather than economic calculations. Focus should be on norms that correspond to individuals' internal value systems, made, supported and enforced in a fair, consistent and proportionate manner.

At the same time, it is necessary to develop a culture which maximises both compliance with rules and the risk of wrongdoing being identified: constant spontaneous questioning and feedback reporting rather than a need for isolated whistle-blowing should be the culture. This requires regulation to be repositioned as a more collaborative system between all those involved. Maximising spontaneous reporting of information for which an individual might be embarrassed or criticised (or sued or prosecuted) cannot be achieved unless a 'no blame' culture applies; this is an approach that has been very successful in civil aviation safety, Nordic injury compensation schemes and consumer ADR.

Formal enforcement action should be restricted to rare and serious cases. The focus should be on (i) improving regulatory systems which focus on supporting future compliance and rectifying harm caused and (ii) supporting internalised ethical cultures within corporates based on an evolving best practice approach in setting ethical standards.

Professor Hodges recommends that (1) governments should now (i) ensure that the policies of all enforcement agencies are designed to support compliance and target unethical individuals and cultures and (ii) improve the efficiency of dispute resolution systems and (2) business leaders should now proactively work together and create a core group to adhere to and act as exemplars of ethical business conduct and to support the promulgation of ethical trading. Businesses that demonstrate that they trade and behave ethically should benefit from a new relationship with regulators and stakeholders.

Enforcement and prosecutions

Panelists: **Ben Morgan**, Joint Head of Bribery & Corruption, Serious Fraud Office, UK

Matthew Queler, Deloitte Financial Advisory Services LLP, former Assistant Chief, FCPA Unit, US Department of Justice

Mark Rainsford QC, 33 Chancery Lane, London

Dr Olivier Thormann, Head of Economic Crime, Swiss Attorney General's Office

Moderators: **Bernhard Lotscher**, Partner CMS Switzerland

Arkadiusz Korzeniewski, Partner CMS Poland

When is an enforcement agency able to compel parties to reveal privileged information? Can the 'fruit of the poisonous tree' be used by investigators pursuing a case? Can deferred prosecution agreements provide enforcement agencies and corporates with an opportunity to draw a line under criminal actions with a single, binding, global solution?

Corporates and their advisors may encounter these scenarios in a bribery and corruption context, in particular, and it is essential to understand the variables in play.

Issues of jurisdiction can play a crucial role in what type of response is required and in relation to the treatment of privilege. Panellists discussed how certain countries can and will compel disclosure, while others may require stricter conditions to be met.

A useful example is provided by the 2013 UK Supreme Court ruling in *R (Prudential PLC – Appellants) v Special Commissioner of Income Tax (respondents)*. In this case, the Court rejected by a majority of 5-2 Prudential's argument that legal advice by qualified professionals like accountants is protected by legal professional privilege in the same way as advice given by members of the legal profession.

Members of the panel raised a number of questions in response to this, in particular whether the lack of protection afforded to non-legal advisers following the Prudential judgment would place individuals in a position where they could claim a breach of their Article 6 ECHR Act right to a fair trial.

It also emerged during the discussion how corporates under investigation elsewhere around the globe may experience subtle differences in the way third party advice is treated in relation to privilege. Those in the US, will discover that advice from an accountant or other professional provided directly is not privileged, but if

given to a lawyer in direct pursuit of his or her duties to render legal advice, the information will be protected. This protection can also be applied when investigators acting under a search warrant inadvertently gather privileged information.

Stolen information that is handed over to investigators is understandably a feature of the corporate criminal landscape. Enforcement agencies frequently receive flash drives or other data from anonymous sources and this raises questions as to whether evidence such as this should be labelled as 'fruit of the poisonous tree'; either to be used or disregarded as tainted in some way.

From an enforcement agency's point of view, the question is one of responsibility in the pursuit of justice. The panel consensus was that every piece of evidence has to be assessed on its own merits and in jurisdictions across Europe and the US, valuable information can be used even if it has been illegally obtained. The crucial point is whether the state or enforcement agency has itself played a role in obtaining tainted evidence. Any suggestion of wrongdoing will certainly render such information inadmissible.

The panel then turned to the topic of deferred prosecution agreements (DPAs). Although established as an enforcement tool in the US, the first ever DPA in the UK was made between Standard Bank and the UK Serious Fraud Office. It resulted in significant financial penalties and future compliance obligations, the terms of which were made public owing to their need for Court approval, in accordance with the requirements of the DPA scheme.

Enforcement agencies who utilise DPA-type resolutions have been on a charm offensive with their global counterparts in recent years. The belief is that DPAs allow corporates under investigation to engage with the consequences of their actions, thus mitigating shareholder risk and demonstrating honesty and

integrity. The *quid pro quo* from enforcement agencies is to ensure co-operation is a guarantee that investigations will be put to bed much quicker, in a way that can allow the corporate to limit any unintentional collateral damage.

There are mixed views about their potential, particularly when considered in a global context. Some observers point to the fact that if a corporate is accused of a crime that is not confined to a single jurisdiction and they accept a DPA, they may be unable to invoke the principle of double jeopardy or receive the protections guaranteed by the International Covenant on Civil and Political Rights. Therefore, the process of negotiating a DPA must be embedded in a wider strategy guaranteeing seamless coordination of the defence work in all jurisdictions concerned, in order to achieve solutions as widely encompassing as possible.

In conclusion, the panel discussion underscored that concepts aiming to protect the rights of individuals and corporates vis-à-vis enforcement bodies, such as privilege, *nemo tenetur*, 'fruit of the poisonous tree' doctrine or *ne bis in idem*, whilst being recognized as core elements of due process in the UK, US and Switzerland, have a different notion in each jurisdiction. The existing divergence entails important risks for those who are subject to an investigation in multiple jurisdictions, but also significantly complicates cross-border law enforcement efforts.

Looking beyond the law – Compliance

Panellists: **Mark van Ernst**, Assistant General Counsel Pain Relief and Respiratory Health, GlaxoSmithKline Consumer Healthcare

Gaon Hart, Global Anti-Bribery & Corruption Policy and Education Lead, HSBC Bank

Joe Smith, Director and Counsel – EME Head of Financial Crime Legal, Barclays Bank PLC

Ruth Steinholtz, Founder, Aretework

Moderators: **Dian Brouwer**, Partner, CMS Netherlands

When the UK Bribery Act came into force, with its new corporate offence of failing to prevent bribery and its accompanying Government guidance on developing 'adequate procedures' to prevent bribery, observers frequently noted 'there's nothing in there a corporate shouldn't already be doing anyway'.

However, influencing global business culture in dozens, if not hundreds of countries, can be a challenging process. Corporates are increasingly obliged to promote a homogenous framework of ethics and compliance and ensure these practices permeate international boundaries and modify entrenched customs and behaviours.

Panellists at the CMS Corporate Crime Conference explained how companies around the world are grappling with these realities and pointed out a range of tools and approaches which are being adopted to help progress a more ethical business culture over one which demands rigid compliance.

There was a broad consensus that more regulation will most likely fail to fix the problems that legislation like the FCPA and the Bribery Act have been created to address. Therefore, policies and approaches that focus on helping employees to do the right thing are appearing on global corporate compliance agendas.

For example, sales people in industries that are highly exposed to bribery and corruption, such as construction and healthcare, should be incentivised by the 'quality' of interactions they have with potential customers. The process, panel members agreed, should discourage short termism and a purely sales-driven bonus culture in favour of encouraging those employees to 'walk away' from bad deals.

Understandably, there remains a fair degree of scepticism among some people that such a framework could succeed around the globe in the sometimes overwhelming face of greed. Panellists discussed examples of corporate behaviour which most of us would understand; networking and corporate entertainment.

When does this constitute an unfair advantage? Industries such as financial services have clamped down particularly hard, with sectors like banking implementing rigid compliance programmes which mandate employees to report not only the financial cost, but the real cost or value of attending an event, corporate hospitality or any other scenario which could be considered as paying for an advantageous position. Without this formal, written justification and approval from compliance teams, the cost simply will not be sanctioned.

Some panellists suggested this approach, while draconian to many, is the very definition of a rules-based system that works because it ensures 'compliance by design'. Others disagreed and suggested that too much focus on compliance itself could result in more unethical behaviour, as employees feel they are not trusted and that a focus on ethics and values could, when spread across an entire corporate culture, be sufficiently robust to bring about compliance as a result. The key to this approach is to create a culture driven by strong ethical values as that will benefit employees as well as the company and to ensure that people's complaints about unethical behaviour are dealt with in an open and transparent way and retaliation not allowed.

This idea brought the discussion back to the topic of what does corporate integrity look like from one country to the next and how such a practice of speaking up could be made acceptable in cultures that would traditionally struggle to do so. To varying degrees, the panel accepted that trust between employees and their employers still has a way to go before workers across the globe can feel fully confident in the words of an 'integrity helpline' that says 'speak up, you are protected'. However, at least one panellist suggested that the key to this is strong ethical leadership, resulting in employees who are proud of their company, and who know that 'doing the right thing' is everyone's responsibility.

Protecting the public purse – Multilateral Development Banks

Panelists: **Duncan Smith**, Deputy Head of Fraud Investigations at the European Investment Bank
Chiawen Kiew, Principal Investigations Manager at the European Bank for Reconstruction and Development
Leo Martin, Founder and Director, GoodCorporation

Moderators: **Omar Qureshi**, Partner, CMS UK

The integrity of the supranational MDBs is protected by a range of investigatory and enforcement powers whose long arms can reach down multiple tiers of the supply chain, uncovering corrupt or collusive practices and fraud of all shapes and sizes.

Handling as they do a reserve of public finance which is invested in support of the development aid and cooperation policies of their state-owned masters, the Multilateral Development Banks have a fiduciary and moral duty to root out fraud and corruption in the projects they finance.

Taking 'fraud' and 'corruption' as two broadly defined risk factors, the banks are targeted by corporates and individuals using various techniques. Duncan Smith explained: *'Some of the most common forms of fraud are misrepresentation of a bidder's qualifications, lying about experience and product substitution (failure to deliver the specified goods or services). Corruption is more targeted, but the proceeds are usually generated by a fraud committed on the same project. As the largest financer of infrastructure projects in Europe, EIB is exposed to risks of corruption and construction fraud.'*

Chiawen Kiew added how collusion can manifest in the form of public tenders for EBRD funds which may involve kickbacks and cartel-like behaviours. *'For example, you might receive, say, five bids on a tender; four of them are virtually identical with a price that is very high. One single bid is much cheaper and stands clearly above the others.'*

Their jurisdiction covers any project that has been financed or is intended to be financed by one of the banks and their investigatory powers are largely contractual. *'We have no subpoena powers like national authorities,'* added Chiawen, *'Most of the banks' investigative powers stem from audit clauses in the contracts they issue. Depending on the perception of risk, the EBRD can also require these clauses to be replicated further down the supply chain to ensure consistency and oversight is maintained.'*

One of the key measures taken in recent years by the MDBs has been the 'Covenant of Integrity' which

alongside audit rights in the finance contract, grants the banks and their auditors the right to inspect the records of the contractor, supplier or consultant in connection with any bank-financed contract. *'The reason for requiring this as a condition of eligibility is that agents and payments to consultants tend to be a vehicle via which bribes are paid,'* confirms Chiawen. *'If there is an allegation of corruption, it's very helpful to know where to look.'*

While the banks find themselves in a position where much of their investigatory activity and powers are reactive, panellists agreed that in many instances and jurisdictions, there is a palpable need for change. This is resulting in a steady stream of individuals coming forward to the MDBs with witness testimony.

The banks have a reputational risk of their own which is guarded carefully and is a key motivator behind their commitment to clamping down on corruption. Infrastructure projects in developing countries are a prime example of MDB-funded works, where any connection to corrupt or fraudulent practices would be severely damaging. *'If you take the recent tragedy in Kolkata when the half-finished motorway flyover collapsed, causing the deaths of more than 20 people and trapping 150 more; neither the EIB nor EBRD funded this project but any connection to any wrongdoing that may emerge would be hard to shake off.'*

Both Chiawen and Duncan confirmed that the MDBs' investigations are largely reactive and depend on outside sources to prompt action. However there is an exception in the EIB's case in the form of Proactive Integrity Reviews. *'This process looks for high risk projects which are not subject of allegations. It analyses their procurement and financial payment processes and any red flags raised can lead to full scale investigations and referrals to enforcement agencies. The World Bank has a similar scheme.'*

Ironically, these referrals do not always sit kindly with national or regional enforcement bodies as Duncan Smith explained: *'It isn't always easy to make a referral. On one occasion we made a referral to a group of prosecutors about a very high profile investigation involving ourselves*

and other MDBs. Not only did they minute the discussions that we thought were confidential; the discussions were leaked to a newspaper the following day.'

There are areas of difference between the MDBs in terms of their ability to sanction different types of conduct. One notable example is that the EBRD can make decisions based on judicial findings in other countries. This was enabled prior to the MDBs' multilateral Cross Debarment Regime and means if there has been a finding in any other jurisdiction, the EBRD can take a 'summary' approach, as long as the judgement had some sort of 'nexus' or interest to it.

'This is an intentionally amorphous test so that we can be as flexible as we need to be,' said Chiawen. 'For example we might know that Entity X has been convicted for corruption in Mexico and this organisation now wants to bid on a project that the EBRD is funding. We can rely on these third party findings and exclude them. We have recently relied on a guilty plea to debar an entity that had received an EBRD loan, but of course it is an extraordinary power and we only use it where it's absolutely necessary.'

As mentioned before, the Cross Debarment Agreement has attempted to harmonise these powers, but there are caveats as Duncan explained: *'The uniform framework which in 2006 harmonized definitions and investigation procedures was signed by the six International Finance Institutions (World Bank, EBRD, EIB, Asian Development Bank, Inter-American Development Bank and African Development Bank). As a result of that, harmonisation convergence amongst the banks was taken forward to the Cross Debarment Agreement, which was signed by five of those – but not the EIB – in 2010.'*

Duncan continued to explain how the EIB opted against signing the agreement owing to the litigation risk it posed to the bank itself by being subject to ECJ jurisdiction. However, it does have an alternative route available. *'Our exclusion procedures allow us to request the underlying evidence and if we consider a case impacts EIB operations, we can take a decision based on evidence we have in our files which can then be used to justify the exclusion decision if challenged at the European Court of Justice.'*

Debarment is not the only sanction available to the MDBs and one recent example shows some new teeth in the EBRD's enforcement arsenal. November 2015's updated Enforcement Policy and Procedures included an expanded list of prohibited practices and the introduction of 'restitution' amongst its possible enforcement actions so that diverted funds or the amount benefited from as a result of the prohibited practice, can now be called upon.

The EIB doesn't have this power, but does have the ability to instruct a compliance monitor, a power which it shares with other IFIs such as the World Bank. The EBRD may include compliance monitoring requirements in settlement arrangements.

Monitoring is a relatively new concept and neither of the European banks has imposed or included a compliance monitoring requirements on more than a few occasions so far. However, Leo Martin, founding director of GoodCorporation, explained that corporates have been subject to these enforcement actions by the World Bank and the United States Armed Forces, amongst others, after findings of bribery and corruption.

'These 'conditional debarment programmes' involve quite a set monitoring framework, where the offending corporate is measured at the beginning, middle and end of a set time period. We measure the ethics and compliance programme based on a number of indicators such as ensuring that robust anti-corruption policies and systems are in place and that they are well communicated internally and externally. We are also asked to survey employees to measure 'ethical culture' and to track over the period of the monitorship, to show that it is improving.'

Leo added how the demand from MDBs is for an independent measurement that can show how over time, the corporate is responding to gaps in compliance and making improvements.

'For example, there may be a policy on conflicts of interest, but no one ever declares them. A company that is responding well might put in place a register of conflicts which people are actively encouraged to use. We score those processes in different high risk locations of the company, re-measuring at those target points outlined by the lending party's conditional debarment programme and at the end, hopefully the corporate will be in a position to be able to bid again for contracts.'

The Multilateral Development Banks find themselves at the sharp end of regimes and cultures in which bribery and corruption often prevail. This is in their DNA and literally, it 'comes with the territory'. Nevertheless, these institutions have never been more important in supporting the development goals of the governments that fund them and as such their powers over enforcement are only likely to increase as time goes by. If powers such as restitution of ill-gotten gains prove useful to the EBRD, these could equally be adopted by other MDBs. Corporates with a financial interest in development programmes supported by the banks should redouble their efforts to ensure that integrity becomes the watchword when bidding for cherished public capital.

Comparison of enforcement procedures for the EIB, EBRD and the World Bank

	EIB	EBRD	World Bank
Types of Prohibited Practices/ Conduct	Coercive Practice Collusive Practice Corrupt Practice Fraudulent Practice Obstructive Practice	Same as EIB plus: Misuse of the Bank's resources Theft	Same as EIB
Possible sanctions	Reprimand letter Exclusion of up to 5 years on any one count of Prohibited Conduct Conditional non-exclusion Exclusion with conditional release Instruction of a compliance monitor	Rejection for proposal for award of contract Cancellation of a portion of the EBRD's finance allocated to the Respondent Reprimand letter Debarment Conditional non-debarment Debarment with conditional release Restitution of diverted funds or the amount representing the economic benefit received from the Prohibited Practice	Reprimand letter Conditional non-debarment Debarment Debarment with conditional release Restitution or Remedy, whereby the sanctioned party is required to make restitution to the Borrower or to any other party or take actions to remedy the harm done by its misconduct Appointment of an independent monitor
Ability to suspend contract awards/ entering into agreements with the Bank pending full investigation	Yes – if is highly likely an investigation would be successfully completed and result in a Notice of Exclusion Proceedings being presented within one year and that the Respondent would be excluded for a minimum of no less than 2 years. Maximum temporary suspension period: 1 year.	Yes – where necessary to protect the EBRD's interests or reputation, other EBRD counterparty interests or to ensure the integrity of an ongoing EBRD procurement process.	Yes – If it is highly likely an investigation would be successfully concluded within one year and if the appropriate sanction would have been debarment for a minimum of at least 2 years. Initial duration of suspension: 6 months (subject to an extension of a further 6 months).
Automatic temporary suspension?	No	No	Yes – where the recommended sanction includes a minimum debarment of more than 6 months.
Burden & Standard of Proof	'Sufficient evidence' to establish that it is more likely than not that the Respondent engaged in Prohibited Conduct.	'Sufficient evidence' to support a finding that, more likely than not, the suspected Prohibited Practice was committed.	'Sufficient evidence' to show it is more likely than not that the Respondent engaged in a Sanctionable Practice.
Limitation period for investigation	10 years from the date the Prohibited Conduct took place, or in cases subject to criminal prosecution/conviction, 5 years after final judgement in the case.	10 years from the date the Prohibited Practice took place.	10 years from the date the Sanctionable Practice occurred.
Ability to sanction affiliates	Yes	Yes	Yes
Is there a right of appeal?	Yes – the decision can be appealed to the Court of Justice of the EU.	Yes – the Respondent can challenge the decision of the Enforcement Commissioner by appealing to the EBRD's Enforcement Committee. No external appeal.	Yes – the Respondent can challenge the decision in its Notice to the Sanctions Board. However, the Sanctions Board's decision is final and without appeal.
Is settlement permitted?	Yes	Yes	Yes
Subject to cross-debarment regime?	No	Yes	Yes
Will the decision be disclosed?	May refer to appropriate national and/or EU authorities, other international or multinational organisations or bodies financing a project.	Debarments will be published on the Bank's website. Non-debarment sanctions need not be published on the website but may be disclosed to third parties. May refer to government authorities, co-financiers or other international organisations, including other MDBs.	Information relating to the sanctioned parties and decisions of the Sanctions Board are publicly disclosed and may be distributed to other persons within the World Bank Group as determined by the Sanctions Board Chair.

Contact details

The CMS contacts listed below were speakers at the conference. If you would like further detail on the outcomes of their panels, please get in touch.

Alternatively, get in touch with your usual CMS contact who will be more than happy to answer or redirect any specific questions you have.

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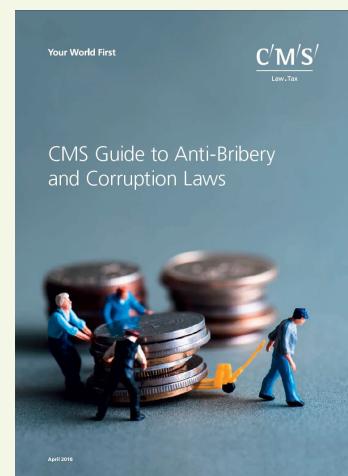
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CMS has recently published the 4th edition of our CMS Guide to Anti-Bribery & Corruption Laws.

CMS has over 100 specialist Corporate Crime lawyers internationally who have contributed to this Guide which summarises the main aspects of anti-corruption laws applicable in 34 countries by answering the following key questions:

- What are the key offences?
- Who can be liable and when?
- What are the penalties?
- What are the defences?

Download via <http://www.cms-lawnow.com/aczone> or request a copy by emailing lucy.brockwell@cms-cmck.com









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