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810 Criminalization Trends in Europe, the Middle East and Asia: Effects on US Business

Hans-Hermann Aldenhoff
Managing Partner, Germany
Simmons & Simmons

Michael-Bryant Hicks
Associate General Counsel
Beckman Coulter, Inc.

James Kwan
Partner, Commercial Litigation
Simmons & Simmons

Faculty Biographies

Hans-Hermann Aldenhoff

Hans-Hermann Aldenhoff is a partner in Simmons & Simmons' Düsseldorf, Germany offices. Mr. Aldenhoff is also managing partner of the Düsseldorf and Frankfurt offices and head of Simmons & Simmons' contentious division.

Mr. Aldenhoff heads the labor and litigation departments, covering both contentious and non-contentious employment work and litigation. One particular field of expertise is white-collar crime defense and prevention, where Mr. Aldenhoff advises corporations on all labor and criminal law related proceedings against former management or third parties, as well as on corporate compliance issues.

Michael-Bryant Hicks

Michael-Bryant Hicks is associate general counsel with Beckman Coulter, Inc., a manufacturer and distributor of medical diagnostics and research instruments based in Fullerton, CA. Mr. Hicks manages Beckman Coulter's legal matters across Asia and Latin America, including corporate transactions and compliance. In recent years, he has also managed the development of the company's FCPA compliance program across Asia and Latin America.

Prior to joining Beckman Coulter, Mr. Hicks practiced as a mergers and acquisitions lawyer with the law firms Mayer, Brown, Rowe & Maw, LLP and Vinson & Elkins, LLP.

Mr. Hicks received a BA from the University of North Carolina and is a graduate of Yale Law School.

Introduction

- White Collar Crime on the Rise?
- Compliance on the Rise?
- Criminalisation on the Rise!
- General Trends
- The In-house Perspective

White Collar Crime on the rise? Typical Offences

- Theft
- Fraud
- False Accounting
- Insider Dealing
- Corruption / Bribery
- Money Laundering
 - Primarily a collateral issue
- Breach of Trust
- Cartels
- Environmental Pollution

White Collar Crime on the rise? – Europe

- Mannesmann
 - Breach of trust
- Volkswagen
 - Breach of trust
- Siemens
 - System of secret cash reserves for bribery payments abroad (€49m)
 - First verdict: Sentence for managing director (breach of trust); Federal High Court is most probably going to confirm the verdict
 - €650m paid to counsels investigating corruption allegations
 - New salary scheme for managers:
 - Managers obliged to hold shares (50 – 300% of fixed annual salary) to let them feel stock market losses in cases of bad (corruption) company news
 - Bonus for complying with anti-corruption guidelines
 - Increase of staff members in compliance positions (490 vs. 86 in 2006)

White Collar Crime on the rise? The Middle East

■ Corruption Perception Index for Middle East

Country /Territory	Global Country Rank	Regional Country Rank	CPI Score 2007
United Arab Emirates	34	3	5.7
Saudi Arabia	79	8	3.4

White Collar Crime on the rise? The Middle East cont'd

- UAE
 - Nakheel (Government Owned Developer)
 - Investigation ongoing into official who accepted bribes
 - Dubai Ports Authority
 - Conviction (27 years) of Former Head of DPA for corruption and embezzlement

White Collar Crime on the rise? Asia

■ Corruption Perception Index for Asia

Country /Territory	Global Country Rank	Regional (APAC) Country Rank	CPI Score 2007
Singapore	4	2	9.3
Australia	11	3	8.6
Hong Kong	14	4	8.3
Japan	17	5	7.5
Taiwan	34	6	5.7
Malaysia	43	8	5.1
South Korea	43	8	5.1
China	72	12	3.5
India	72	12	3.5
Thailand	84	14	3.3
Philippines	131	22	2.5
Indonesia	143	25	2.3

White Collar Crime on the rise?

Asia

- Increased criminal prosecutions driven by:
 - rapid Asian economic growth and attendant business activity
 - increased enforcement of FCPA and Country-Specific Anti-Corruption Laws
 - increased enforcement budgets at Dept of Justice and international government agencies (e.g. Supreme People's Procuratorate in China)
- FCPA
 - DOJ called 2007 "landmark year" in FCPA enforcement – 29 FCPA actions in 2007, up from 15 in 2006. Largest FCPA judgment ever against Baker Hughes, Inc \$44 million.
 - DOJ and SEC have extended FCPA enforcement to foreign subsidiaries and increasingly against individuals, including foreign national executives
 - Increased enforcement of internal controls and recordkeeping provisions of FCPA
 - "Bundled" prosecutions occurring as FCPA charges combined with other charges

White Collar Crime on the rise?

Asia

- AGA Medical Corporation (FCPA June 2008) – Assessed \$2 million criminal penalty for payments to Chinese government officials.
- DPC (Tianjin) Ltd. (FCPA September 2007) – Chinese subsidiary of DPC paid \$1.6 million in commissions to doctors and lab personnel at government hospitals in China.
- Chinese Supreme People's Procuratorate Prosecutions
 - 19,963 cases of commercial bribery
 - 35,255 cases charging misuse of public funds
 - 13,929 cases of bribing government officials
 - Execution of Chinese SFDA Official

White Collar Crime on the rise?

Asia cont'd

- Other cases: China
 - Shanghai Maosheng International Group
 - Alleged embezzlement of RMB 4.3 billion from a highway project in Zhejiang
 - China Commodity Spot Exchange
 - Executive absconded with RMB 200 million of investors' deposits
 - IBM
 - Executive at IBM found guilty of paying US\$225,000 to sales agent who helped bribe former Chairman of major bank

White Collar Crime on the rise?

Asia cont'd

- Other Countries Where Anti-Corruption Prosecutions on Rise
 - Taiwan
 - Alleged money laundering (US\$21m) scandal implicating family of former Taiwanese President
 - Hong Kong
 - July 2008: first criminal conviction (6 months' imprisonment plus fine) for insider dealing under new regulations
 - Japan
 - Livedoor
 - Executive convicted (2½ years imprisonment) of masterminding network of decoy investment funds to manipulate earnings

Compliance on the rise? Europe

- BASF
 - Compliance guidelines
 - Reporting obligations for gifts → €40
 - Compliance seminars
 - Bonus system
 - Compliance hotline to independent lawyers

Criminalization on the rise! Europe

- EU: Money-laundering Directive (2005)
- EU: Environment Directive (2008)
 - Criminal liability for companies
 - Some countries (e.g. Italy) have “criminal responsibility” of companies; in other countries (e.g. Germany) only pecuniary fines but not “criminal responsibility”

Compliance on the rise? Asia and the Middle East

- No Set Compliance Safe Harbor
- Increasing levels of awareness BUT still lag behind more developed nations (especially the USA)
- E.g. Simmons & Simmons / Control Risks Corruption Survey 2006:
 - Compliance measures by Hong Kong companies increased in the period 2002 to 2006 BUT still significantly lower than US companies
- Evolution of industry standard in compliance programs including:
 - Increased training in Asian subsidiaries by high-level executives
 - Distributor Management – tighter controls on distributor business practices, mandatory anti-corruption training, required ethics certifications
 - Reduction in complexity of subsidiary transactions to avoid appearance of impropriety
 - Consulting contracts with individuals tied to government in disfavor
 - Increased internal auditing measures focused on FCPA recordkeeping and internal controls compliance

Criminalization on the rise! Asia and the Middle East

- Increasing adherence to international conventions
- E.g. United Nations Convention Against Corruption
 - countries ratified include:
 - China (including Hong Kong)
 - Indonesia
 - Philippines
 - South Korea
 - UAE

Criminalization on the rise! Asia and the Middle East cont'd

- Dubai
 - Local laws include criminalization of active and passive bribery of public officials
 - Although bribery of foreign public officials not covered
 - Dubai Government announced on 18 August 2008 that fighting corruption and bribery is top priority – a zero tolerance approach
- Saudi Arabia
 - Similar anti corruption laws to Dubai, but includes foreign public officials
 - Saudi Arabia Government announced in May 2008 creation of first Government unit to fight corruption

Criminalization on the rise! Asia and the Middle East cont'd

- China
 - Anti Money Laundering Law (January 2007) and related regulations
 - Amendment VI to PRC Criminal Code, Article 7 (June 2007)
 - PRC Criminal Code, Article 163 (March 1997)
 - New draft criminal law:
 - Higher accountability (and sentences) for public officials (and their relatives / close friends) who use their position to take bribes
 - Increased insider dealing penalties (up to 10 years' imprisonment)
 - 22 June 2008: announcement of 5 year plan to prevent and punish corruption

Criminalization on the rise! Asia and the Middle East cont'd

- Hong Kong
 - Prevention of Bribery Ordinance
 - Criminalisation of Insider Dealing
 - September 2007: Mutual Legal Agreements entered into with 21 jurisdictions to return overseas any proceeds from corruption, during trafficking and money laundering
- Japan
 - Financial Investments and Exchange Law to strengthen corporate accountability
- Singapore
 - Prevention of Corruption Act of Singapore Chapter 241 (1960)

General Trends

- Extension of criminal law provisions
- Extension of powers of national and international authorities
- Increased extraterritorial application of anti-bribery laws
- Trend towards harmonization of anti-corruption laws
- More and more directives of the EU influence the national criminal law systems
- Necessity not only to comply with national but also with international provisions
- Changed public point of view: Bribery is no longer a peccadillo
- 95% of companies with more than 500 employees want to strengthen their codes of conduct; more personnel for compliance control

General Trends II

- Overview: Relevant sources of law
 - International treaties (OECD Convention 1997 on Combating Bribery of Foreign Public Officials in International Business Transactions)
 - National penal codes

Practical Guidelines

- Drafting of Rules of Compliance
 - Clear anti-corruption guidelines:
 - Take/make no presents/presents exceeding a *specified* amount (e.g. €50; not: to a *reasonable* amount – too indefinite for employees)
 - Make no presents at all to the public sector
 - Reporting obligations
 - Introduction of compliance tools (such as whistleblowing hotlines etc.)
 - Assignment of third parties
 - Careful selection (check on background, ...)
 - Careful drafting of contracts
 - Documentation
 - Control

Practical Guidelines II

- Generally:
 - Drafting a company code
 - Do's and Don'ts
 - Delegation of duties to qualified personnel
 - Setting up clear responsibilities
 - Joint responsibilities (never “in the same line”)
 - Reporting duties
 - Information of employees
 - (Independent) control
 - Sanctions

Practical Guidelines III

- Problem: Criminal liability of the members of the management level when violating organizational duties
- Necessity to Act
 - Negative reputation
 - Stock market losses
 - High fines
 - Imprisonment/Monetary penalties for managers
 - Civil damages claims
 - Consequences under employment law (warnings, dismissals)

The In-House Experience

- Managing FCPA and Anti-Corruption compliance program across dozens of countries in healthcare, one of the most scrutinized industries.
- Anti-Corruption laws unavoidable in any industry because of greater government regulation and ownership of businesses: public hospitals, government stakes in exploitation of natural resources.
- Find greatest risk in business partners
 - intermediaries with customers (distributors, agents, consultants, etc.)
 - obligatory minority equity partners – often have relationships in government

The In-House Experience Cont'd

- Keys to Minimize Risk
 - Create a formal compliance program using U.S. Federal Sentencing Guidelines as a guide. (United States Sentencing Commission, **Guidelines Manual**, ¶ 8A1.2, comment. (n. 3(k)) (Nov. 1997). See also U.S.S.G. ¶ 8C2.5(f)). Courts imposing sentences seek to mitigate by asking whether compliance program stood a reasonable chance of preventing corruption. Common elements of reasonable program:
 - Involvement of high-level corporate officers
 - Rigor in due diligence of partners
 - Regular monitoring and certifications
 - Mechanism for reporting violations (anonymous hotline)
 - Swift punishment for violators
 - Develop industry-specific measures to prevent corruption
 - Minimize complexity of business models – transactions that are understood easily outside of company are seen as most ethical