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Anti-Corruption Law: Corporate Defences, Imputed Liability and Claim Fustration
Current Trends in “North-South” Anti-Corruption Investigations: How Can Internal Investigation Help?

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Why Internal Investigation in N-S Perspective?

- Intl Trade about 30% in OECD (with EU around 50% of GDP)
- A growing body of international law aimed at companies
  - UN Convention against corruption
  - Council of Europe Criminal Law and Civil Law conventions
  - OECD Conv. ABFOIBT (whew)
  - COE convention on money laundering (Conv LSS&C PC)
  - FATF guidelines
- Growing law enforcement co-operation in practice
  - sharing of intelligence, customs data, financial data
  - (3rd pillar)

30% of Ernst & Young firms still report experience with C
Internal Investigation to Reduce Regulatory Risk

58 counts of breach of trust
Imputed liability + respondeat superior
Corporate liability vs. personal liability
Int. Invest causes failure of “aggregation test”

Slush funds
- Italian accounts
- Swiss accts.
- Innsbruck, Austria - Raiffeisen acct.
- Dresdner Bank (Zurick)
- Kuwait

Shell Companies
- Tetre Inc. (Puerto Rico)
- 3 US companies
- Krhoma (Vienna)
- Caribbean shell companies

$500m “out of control”

Due diligence?
Liability as accessory?
Prosecutorial forebearnace?
Acting fraud offences

Assistance with defence (lower prob. of harsh convictions)

Qui tam and EU rewards for stool pigeons
Internal Investigation: Defense Against Increasing Criminal Action?

- **Criminalisation of legal persons**
  - companies may hold criminal liability even in jurisdictions without leg. def. criminal liability?
  - Internal invest defeats “one mind” doctrine?
  - Part of “due diligence” and defence against *ex-post* complicity?
  - Est. defence based on extortion and coercion?

- **As part of risk-based internal audit**
  - defeats “inchoate offences”?
  - reduces liability for accounting weaknesses? (under art. 12 UNCAC)

- **Clearly the future: Shifts reg. burden onto private sector...**

*Ceux qui s’accuse, s’excuse (ou excusé)....*
Internal Investigation: Mitigates Civil Liability?

- Exciting (and under-applied) area from public policy point of view
  - criminal bias in intl conventions
- Big risk area for businesses and law enforcement agencies alike
  - huge payments in recent days (Russia)
- Implementation of “approved” anti-corruption programme
  - as defense against negligence claims?
  - as method of recouping damages in case corp is liable?
  - **IRONY**: tax deduct for corrupt to tax deduct for anti-corrupt?

Does “Making Whole” Have a Dissuasive Effect in non-US jurisdictions?
Regulatory Risk related to “Third Generation Legal Instruments”

- **2.5 gen. instruments: SOX and move to regulatory remedies**
  - anti-corruption invading business law (SOX and Biz Law instruments)
  - banking law (know your customer, suspicious transactions reports, etc)
  - Amendments to Political Party finance laws, asset disclosure laws etc increase risks of paying bribes
  - emergence of “negligence fines”?
  - process as important as result?

- **Article 63 of UN Convention -- “illicit gains”**
  - assets held by company staff
  - assets by company govt counterparts
  - “hook” for criminal investigation
  - tide toward reversal of burden of proof?
  - will this include confiscation of corp assets?

**Final shot: Will qui tam encourage denouncements along supply chain for $$$?**