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DISPUTE RESOLUTION ALERT

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ISSUE

CORPORATE INVESTIGATIONS:

**HAVE YOU NOTICED THE GLOBAL CHANGE IN
COMBATING CORRUPTION?**

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Have you noticed the impact of recent changes on the global landscape and the effect thereof on the fight against corruption?

The International Organisation for Standardisation has drafted a new international standard to define best practises for managing the risks of corruption and bribery. Currently in draft form but already approved by a majority of voting members a few months ago, the Anti-Bribery Management Systems Standard ISO 37001 is scheduled for release shortly. ISO 377001 will allow companies to obtain certification from accredited third parties that their management systems meet its requirements and they will be able to point to certification as a means of assuring their customers, businesses associates and potential investors that they are taking reasonable steps to prevent bribery. Directors and offices may also look to certification as an affirmation that appropriate compliance measures are in place. Producing an ISO certificate will not establish a defence to prosecution for bribery in a US court in terms of the Foreign Corrupt Practices Act, 1977 (FCPA) but it may influence regulators' decisions whether to bring charges or not. What an ISO certificate will do is help a company demonstrate that it has taken reasonable steps towards combating bribery. It could also be useful when a company argues for mitigation of sentence and possibly prevent strict liability, thereby avoiding the full force of the UK Bribery Act. Different jurisdictions

have differing standards when it comes to legislation combating corruption, the ISO standard therefore cannot be used as a platform for global uniformity. Will this standard become a widely used tool? Perhaps, but what is certain is it will provide further impetus to the global fight against corruption especially in countries where bribery has become culturally engrained.

More countries are joining the anti-corruption initiative by aligning their legislation with standards set by international bodies such as the Financial Action Task Force (FATF), the European Commission and the Organisation for Economic Co-operation and Development (OECD). Releasing a draft bill earlier this year, referred to as Sapin II, France is one such country. If adopted, this legislation will have far reaching corruption reform consequences for French entities and for foreign groups. Criticised in 2014 to up its game, France's current regime does not place any obligation on French companies to take affirmative steps to prevent corruption and falls far below the standards set by the UK Bribery Act and the US FCPA. This legislative initiative will be a major change in the international dynamics regarding the fight against corruption and help France to counter its reputation of being slow in implementing effective anti-corruption measures.



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The Basel Institute has recently issued a comparative analysis illustrating how some countries may draw fire and criticism based on the lack of effectiveness of their anti-money laundering legislation.



Germany also raised the bar, when its Act to Combat Corruption in the Healthcare Sector came into force during June this year after years of controversial debate. "Passive bribery in the health sector" has now become a criminal offence and "active bribery in the health sector" has intensified compliance risks for companies in the health care sector. The Act's new wording closes a legal loophole arising out of a court ruling in 2012 but goes further by bringing doctors and other members of state-organised healthcare professions under the scrutiny of prosecution authorities (International Law Office 24 July 2016).

The Basel Institute has recently issued a comparative analysis illustrating how some countries may draw fire and criticism based on the lack of effectiveness of their anti-money laundering legislation, even if they comply with international standards. The Basel AML index, a tool used to risk rate countries for compliance purposes, clearly illustrates that while certain countries may meet legislative anti-money laundering standards, they are left vulnerable to criminals who abuse a range of corporate structures and legal arrangements available in those jurisdictions. The Basel AML index builds on typologies and methodologies introduced by the FATF in 2012 in terms of which a number of countries have been evaluated. The FATF standard is shifting up and raising the bar from its traditional assessment of technical compliance, focussing more on actual effectiveness of the legislative framework of each country. (FCPA Blog 28 Sept 2016).

Meanwhile, looking at the scoreboard, the US Securities and Exchange Commission (SEC) reported having filed a record 868 actions against companies, executives and others in the year to date. In addition, the SEC indicated that its whistle blower programme has given out \$57 million to 13 whistle blowers, more than has been give out in all previous years combined. (Law 360 11 Oct 2016, S Bishop)

Another initiative that is growing momentum is anti-corruption collective action and specifically the industry initiative. It has been reported that three leading companies in the metals technology industry namely Danieli & C. Officine Meccaniche Spa Technologies Ltd, SMS GmbH and Prime Metals, all headquartered in Europe and all manufacturers of the plants, machine and other related technical solutions for the industries that produce steel and non-ferrous metals such as copper, lead, aluminium and zinc, have recognised the importance of a dynamic and well-implemented compliance management system and are keen to develop their respective approaches in future, striving for best practices wherever possible. The Basel Institute on Governance has facilitated this collective action and these three companies have signed a memorandum of understanding setting out their respective anti-corruption commitments and proposed actions to promote their anti-corruption principles. Given the extent of FCPA enforcement internationally, it is to be expected that industries are deciding to take it onto themselves to clean up their house. This development is likely to gain popularity in

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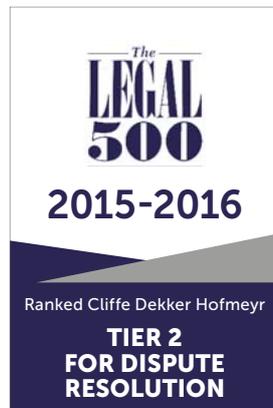
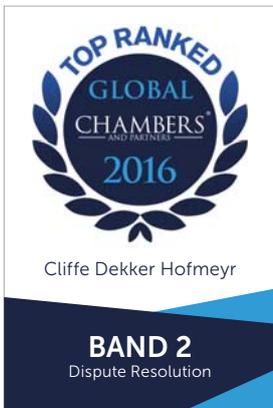
More and more countries and industries to go beyond signing international instruments by taking practical steps in order to ensure effective combatting of corruption.

other industries as the global fight against corruption gains momentum (FCPA Blog 29 Sep 2016).

It is clear that the initiative of the international bodies such as the World Bank, the FATF and the OECD is motivating more and more countries and industries to go beyond signing international instruments by taking

practical steps in order to ensure effective combatting of corruption which remains one of the world's biggest challenges on a systemic level in that it hinders economic growth and investment and provides a feeding ground for social inequality.

Willem Janse van Rensburg



CHAMBERS GLOBAL 2011–2016 ranked us in Band 2 for dispute resolution.

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