



CAN JUSTICE BE ACHIEVED THROUGH SETTLEMENTS?

Settlements can provide an important channel to hold companies to account for wrongdoings and resolve foreign bribery and other cases without resorting to a full trial (civil or criminal), or contested administrative proceeding.

Yet, their deterrent effect can be questionable if they are not transparent, and do not provide effective, proportionate and dissuasive sanctions and if there is no judicial process. Finally, there should be reparations for the victims of the offence.

There has been an increasing global trend of companies and governments settling cases of corporate crime out of court, including corruption scandals in banking and other sectors.¹ Settlements have come to be an important tool in the arsenal of law enforcement agencies. In many cases, they have helped to boost enforcement of foreign bribery laws, improve corporate compliance, and enable prosecution of cases.

Yet while settlements mean more companies are being sanctioned for wrongdoing, they come with a price. Society is often left with the impression that companies may be getting off too lightly in spite of the high fines. For banks alone, fines from settlements hit US\$ 56bn in 2014. Nevertheless, these penalties still represent a small share of the sector's overall profits raising questions about their deterrent effect.²

When settlements are used, related sanctions should be effective, proportionate and a deterrent. At a minimum, settlements should cover the estimated profit from the wrongdoing. In addition, the process should be transparent: from the justification for the settlement and its terms through to its implementation. Finally, there should be reparation for the victims of the offence.

Settlements are problematic when they involve cases where corruption has been systemic and pervasive over a long period of time and in cases where senior management was involved. For this reason, Transparency International believes that the strongest deterrent to corruption would be to prosecute companies and individuals using a mix of penalties, including prison terms, when appropriate. Furthermore, senior management should be removed in cases where it condoned corrupt behaviour or failed to exercise due diligence.

THE ISSUE

PROTECTION VS. SETTLEMENT

The use of settlements has several benefits and drawbacks. Settlements help to move forward corruption cases to the sanctioning phase. Corruption cases, especially those with an international dimension, often require complex and resource-intensive investigations. In many countries the justice system is overburdened. Settlements allow prosecutors to weigh different issues - the strength of their evidence, the likelihood of conviction and the resources needed. Since settlements also are generally more favourable for companies when they cooperate, companies have an incentive to self-report and disclose information, potentially also about offences not yet under investigation. Finally, settlements have helped to scale-up the number of sanctions for alleged foreign bribery which in turn has resulted in improved corporate compliance.²

Still, the use of settlements for bribery and corruption cases has a number of drawbacks. Settlements may send the wrong message that companies are buying their way out of more serious punishment. There is a latent risk that fines become an acceptable cost of doing business (see side bar).³ Furthermore, some settlement cases that were reached despite strong evidence created concerns that the process is circumventing the role of the courts and that some companies are considered "too big to prosecute".⁴ Another concern arises from the very nature of a settlement: it is an agreement that seeks to provide benefits for both sides. This is done by offering a company reduced penalties and/or limiting negative exposure that prosecution could have brought. Through settlements companies are spared lengthy public trials, the risk of long-term reputational damage, possible prison terms for individuals, and potentially lasting negative impacts on their share price. This raises questions about the deterrent effect of such arrangements.⁵ Also, a concern is that the practice of high monetary fines as part of settlements means that shareholders bear the burden of wrong doing rather than senior management or the individuals responsible within the company. In most cases senior management who might have condoned corrupt behaviour or failed their oversight duty get away with impunity. Moreover, the fines paid often do not find their way back to the country where the corrupt act happened (see side bar).

Where settlements are used, there must be a threshold test to determine when they are a better alternative to prosecution. Considerations include:

- the nature and seriousness of the offence,
- the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by management;
- the corporation's history of similar misconduct (i.e. past criminal, civil, and regulatory actions against it);
- the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation;
- the existence and effectiveness of the corporation's existing compliance program and related actions (prior to current case);⁶
- collateral consequences as a result of prosecution;⁷ and
- the ability of prosecuting individuals responsible for the corporation's alleged wrong-doing.

Transparency International believes that prosecutions rather than settlements should be the preferred option when cases meet any of the following criteria:

- misconduct is serious, pervasive, long-lasting and has global consequences;
- the misconduct includes complicity by top management;
- the company does not cooperate with the investigation;
- and the authorities have strong evidence to successfully pursue the case in court.

In all other cases, settlements are a viable option with the proviso that they respect the principles of transparency, due process, accountability and reparation for the victims. Each element is elaborated in the next section.

CASE STUDY – THE FOREX MANIPULATION CASE

Two recent settlements for conspiring to manipulate foreign currency markets raise interesting questions about the nature and impact of settlements.

The November 2014 settlement, relating to Libor, was the first coordinated settlement between British, American and Swiss regulators who fined five banks (Citigroup, HSBC, JPMorgan Chase, RBS and UBS) a combined US\$4.3 billion. The May 2015 settlement, on forex, resulted in a total of US\$5.6bn in fines for Bank of America, Barclays, Citigroup, JP Morgan Chase, RBS and UBS.

Neither settlements precluded prosecution of individuals, which is still outstanding, and only four of the banks pleaded guilty. No CEO or senior figure in these banks has resigned or been dismissed as a result of these scandals.

Since the forex scandal took place after the previous Libor settlements with some of the same banks, it raises serious questions about their deterrent effect. And seemingly large fines actually led to a rise of share prices in some cases.

WHO PAYS AND WHO GETS THE MONEY?

Settlement fines are borne by the banks' shareholders – in the case of formerly bailed out banks these include tax payers - with management and other culprits getting away with impunity in many cases.

Settlements often occur in countries that are major financial or commercial centres where the companies are based and not where the crime occurred. A World Bank study looking at 395 settlements in foreign bribery cases showed that while these cases resulted in a total of US\$ 6.9 billion in monetary sanctions only 3.3 per cent of the monies were returned to the countries where the alleged corruption happened.¹⁴

RECOMMENDATIONS

When settlements are pursued, the following elements must be respected for them to be considered to effectively sanction and deter corruption.

GENERAL:

- Settlements should require companies to acknowledge wrongdoing and admit to relevant facts.
- Settlements are appropriate in cases where the company has self-reported the wrongdoing and should be used to incentivise such self-reporting.
- Settlements should be reached if the company genuinely cooperates with the investigation.
- Settlements must not be influenced by factors that fall outside of the case. These include economic influence, the potential effect upon relations with another state, or the natural or legal persons involved.⁸

TRANSPARENCY:

- Settlements must be made public.
 - This includes their terms and justification, the nature of the offence and other violations of law as well as a statement of relevant facts and how the company has met the terms of the settlement.
- The facts surrounding the case should be made public. This can provide lessons learnt for the prevention of similar wrongdoings in the future.

DUE PROCESS:

Court approval

- All settlements, including their detailed terms, should be submitted to judicial review and public hearing.
 - This review should enable a judge to form an opinion on the extent of the violation and on whether the settlement is in the public interest. It should occur prior to concluding the settlement.
- The terms of the settlements and the judicial review should take into account the views of other affected stakeholders, such as competitors, as well as those of the government or civil society organisations in other affected countries (i.e. where the bribes were paid or sought).⁹

Evidence-sharing with other jurisdictions

- Settlements must not preclude further legal actions in other jurisdictions that are not parties to the settlement subject to applicability of the *non bis in idem* principle (double jeopardy). Authorities should make all relevant evidence available to their counterparts in other relevant jurisdictions.

ACCOUNTABILITY:

- Settlements should provide for effective, proportionate and dissuasive sanctions.
- Settlements must at a minimum cover the estimated profit from the wrongdoing¹⁰ reflecting the full value of benefits accrued as a result of the wrongdoing¹¹ in addition to monetary sanctions. Sanctions should include confiscation of the profit from the corrupt deal and the proceeds of bribery.
- Compliance with the terms of the settlement should be monitored by the government agency that negotiated the settlement.

Sanctions

- Settlements with companies (i.e. legal persons) should not preclude the prosecution of individuals. Where evidence is sufficient, criminal prosecution of individuals should be the standard practice.
- Fines levied on individuals should not be covered by the company, a corporate indemnity or third parties. These stipulations should be made part of the settlement.

PREVENTING FUTURE WRONGDOING

Settlements should have a deterrent effect and induce long-term improvements to a company's compliance program. This can be done in various ways, such as through the appointment of an independent expert monitor.

If an independent monitor is installed, regulators should ensure the following:

- S/he is independent & competent,
- There is predictability of the costs incurred,
- S/he operates using established anti-corruption standards,
- S/he reports findings to law enforcement authorities.

The decision on what type of arrangement is appropriate should be made based on the seriousness of the offense, duration and pervasiveness of the misconduct.

- Debarments or voluntary restraints (from public procurement, concessions or subsidies) should be considered and linked to acknowledging liability.
- Sanctions should also include, where relevant, disqualification from particular commercial activities (temporary or permanent), placement under judicial supervision, and forfeiture or disgorgement of profits.¹²

Prevention

- Settlements should require the corporation to commit to reviewing and strengthening its compliance program and include relevant monitoring arrangements (see side bar, pg. 3).
- The company should publish a report on how it has met the terms of the settlement.

Prosecution of intermediaries

- Settlements should allow for the prosecution of intermediaries (i.e. lawyers, accountants, corporate service providers) who facilitated the corrupt act.

REPARATION FOR VICTIMS

- Settlements should provide for compensation to those harmed by the offense, including victims in other countries, wherever possible.
- If possible, part of the fines paid or profits reimbursed could be reserved for anti-corruption work by independent actors and disbursed under the management of an entity independent from the corporation and from the government that received the bribe.

Notes

¹ Note: TI's principles for settlements apply to the offences covered by the UN Convention against Corruption, including foreign bribery and money laundering as well as to collusion and tax fraud. See: www.keepeek.com/Digital-Asset-Management/occd/governance/consequences-of-corruption-at-the-sector-level-and-implications-for-economic-growth-and-development_9789264230781-en#page9.

² Financial Times (Martin Arnold, 26 Dec. 2014): Bank settlements hit \$56bn in most expensive year on record. www.ft.com/intl/cms/s/0/baa2d2c0-89c2-11e4-9dbf-00144feabdc0.html#axzz3SfA4zUEG.

² Kaal, Wulf A. and Lacine, Timothy A.: The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2486570.

³ Recent academic work by Karpoff, Lee and Martin suggests that settlement fines would need to increase by 9.2% in the US, which currently levies the highest fines for corporate bribery, to significantly deter further corruption. This is in the context where there is only a 6.4% probability of being caught for foreign bribery in the US. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1573222.

⁴ For example, in the investigation of the BNP Paribas money laundering case US Attorney General, Eric Holder stated in reaction to criticism that “a company’s size will never be a shield from prosecution or penalty”, www.washingtonpost.com/business/economy/no-company-is-too-big-to-jail-holder-says-of-justice-dept-probes/2014/05/05/e133e49c-d45f-11e3-aae8-c2d44bd79778_story.html.

⁵ Possible sanctions are listed in the recommendations part.

⁶ Issues to consider are: the corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or improve an existing one, replace responsible management, discipline or terminate wrongdoers, pay restitution, and cooperate with relevant government agencies.

⁷ Issues include whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution.

⁸ OECD Anti-Bribery Convention, Art. 5

⁹ This depends on the legal framework of a country, but victims or other parties in the case should not be in a worse position than in any case that is prosecuted.

¹⁰ OECD Anti-Bribery-Convention, Art. 3

¹¹ This should include the strategic commercial advantage secured as a result of the wrongdoing, including the benefits of gaining market position and minimizing tendering costs and the possibility of gaining future contracts as a result of winning an initial contract on the basis of bribery or wrongdoing in line with the OECD report on the “Identification and Quantification of the Proceeds of Bribery”.

¹² For example, the Japan International Cooperation Agency temporarily suspended a trade company from its procurement actions based on a settlement with the US Department of Justice. <http://en.tempo.co/read/news/2014/04/07/056568638/JICA-Bans-Marubeni-from-Projects-Over-Bribery>.

¹⁴ See: StAR, “Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery” (2013). Even where there has been an agreement to return funds, in many cases reparation procedures were ultimately not successful. In the BAE settlement on bribery of a Tanzanian government official, BAE agreed to make an ex-gratia payment of £29.5m for education projects in Tanzania. However, BAE initially tried to set up its own committee for disbursement of the funds and when it finally disbursed the funds, the Tanzanian government ultimately did not use the funds for education. www.theguardian.com/global-development/poverty-matters/2011/jun/23/bae-tanzania-compensation-educationm.

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