

Bartosz Makowicz (ed.)

Global Ethics, Compliance & Integrity

Yearbook 2018

CB

Publication Series

Global Ethics, Compliance & Integrity

Yearbook 2018

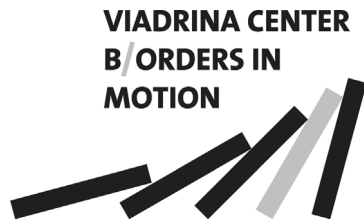
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This Yearbook 2018 consists of articles produced within the scientific project „Cross Cultural Compliance“. The project was initiated and conducted from 2015–2017 by Professor Bartosz Makowicz and Partners at the Viadrina Compliance Center, European University Viadrina Frankfurt (Oder) (www.compliance-academia.org) and was supported by Center B/ORDERS IN MOTION at the European-University Viadrina Frankfurt (Oder), Germany. The articles reflect the personal views and opinions of their respective authors, unless stated differently in the particular article. Authors intrested in submitting their texts for future editions of this Yearbook are kindly invited to contact the editor under makowicz@instituteofcompliance.com.



Bibliographic information of the German National Library

The German National Library lists this publication in the Deutsche Nationalbibliografie (German National Bibliography); detailed bibliographic data are available on the internet at <http://dnb.de>.

I S B N 978–3–8005–0009–3

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Typesetting: Lichtsatz Michael Glaese GmbH, 69502 Hemsbach

Printing and processing: WIRMachenDRUCK GmbH, Mühlbachstraße 7, 71522 Backnang

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A. Introduction

Prof. Dr. Bartosz Makowicz

This first edition of the Yearbook of Global Ethics, Compliance and Integrity focusing on “Cross Cultural Compliance” is the result of a number of projects, various discussions, conferences, workshops and international congresses on Ethics, Compliance and Integrity. At these events, industry representatives (usually chief compliance officers) repeatedly complained about the considerable challenges they faced when attempting to implement internationally uniform and reliable compliance management systems (CMS) within a global organization or group structure. Certainly, methods and standards on how to determine and manage risks in individual countries do exist. However, social and cultural borders or foreign culture and values may make it difficult to ensure not only compliance but also the integrity of all members of an organization / corporation.

Yet why is all this necessary? What does compliance have to do with values, ethics, culture and integrity? There is only one answer: everything! Human beings are at the center of any CMS along with their culture and underlying values. Human culture and values are formed by experiences, education, environment, religion and many other factors: these same values and culture determine whether a bribe has been accepted, environmental standards breached, interest rates manipulated or customers deceived. In all cases of non-compliance, values and the human culture therefore play a crucial role. In addition, human conduct and the values directing it are the subject of ethics, a branch of philosophy. A CMS cannot function effectively without a sound understanding of ethics and thereby the values and culture that prevail in the area where it operates. Is it not enough then for people to internalise the culture and underlying values? No! They must also ensure that their outward acts consistently accord with these values. It is at this point that integrity comes into play. Compliance and integrity may therefore be regarded as two sides of the same coin, whereas ethics represents a specialist discipline within these two areas. This explains the first of the two approaches in this work “Ethics, Compliance and Integrity”. The boundaries between these three terms are porous and complement each other.

The second approach deals with challenges where the boundaries are somewhat clearer. Nowadays, when national economies are so closely interwoven, it would be wrong to adopt a single approach to Ethics, Compliance and Integrity; rather developments should be viewed from a global perspective. Once a CMS has been implemented in one part of the organization or extended to a part located in a different culture, one must consider the differing ethical and moral rules, the culture and the values of its inhabitants. Otherwise, the system will be re-

A. Introduction

jected and produce nothing more than undesirable side-effects, thereby resulting in attempts at evasion.

This work takes up the challenge of creating a constantly updated compendium of expert knowledge on Ethics, Compliance and Integrity. The contributions contained in this first edition have been produced by over 44 experts from different continents and countries, diverse cultures and corners of the world with the common aim of promoting Ethics, Compliance and Integrity by means of effective and efficient CMS. They share valuable knowledge, techniques, experience, practice and methods. In this book, you will find practical contributions divided into seven chapters (besides this brief introduction). These have been produced as part of the “Cross Cultural Compliance” series of conferences which have taken place in Frankfurt, Bangkok and Hamburg over the past three years. The authors are not just lawyers but also renowned economists, philosophers, psychologists, communication experts, practitioners, consultants, public officials and other experts. This is the only way of doing justice to the interdisciplinary dimension of Ethics, Compliance and Integrity.

Starting with this introduction (Chapter A), several contributions deal with the future of compliance (Chapter B). The main part of the book (Chapter C) investigates challenges in the fields of compliance and integrity which arise in respect of the cross-border implementation of CMS. We then focus on the most common risks for global compliance in the field of corruption (Chapter D). Despite sophisticated anti-corruption systems, the preventive instruments of international organizations and the efforts made by the international community in this field, corruption still remains a wide-ranging phenomenon in many states. CMS standards (Chapter E), attempt to take account of cross-border differences and diverse cultures, on the one hand, and the efforts towards creating uniform solutions on the other. The last three chapters deal with more practical subjects: namely, the preferred methods of CMS (Chapter F), especially intercultural communication and whistle-blowing systems, which are heavily influenced by cultural aspects (Chapter G). The final chapter concerns Ethics, Compliance and Integrity in international trade (Chapter H).

We have therefore adopted in this book a rounded and self-contained concept which nevertheless retains a degree of flexibility. We will expand and update the work at regular intervals. We herewith invite interested authors and experts from the world of Ethics, Compliance and Integrity to submit their proposals for contributions. We will also ensure that similar works feature high-quality contributions in order to promote the development of Ethics, Compliance and Integrity in the long term.

It has been an honor and pleasure to have worked with the hundred or so contributors to this work. Thanks are due not only to the numerous authors but also to

the proof-reader Christopher Dallimore, the publisher and its team, translators and friends, my team from the Viadrina Compliance Center and all partners, sponsors and supporters who have enthusiastically helped with organizing the Viadrina Compliance Congresses! In particular, I would like to thank the Center “B/Orders In Motion” at the European University Viadrina Frankfurt (Oder) for providing financial support for the “Cross Cultural Compliance” project which gave rise to the contributions in this work with its long-lasting and sustainable results!

I am delighted that this project given rise to a global community of so many distinguished experts from all over the world and sincerely hope that this work will serve to promote the interdisciplinary and global research and practice of Ethics, Compliance and Integrity from the perspective of international organizations in the long term.

Professor Bartosz Makowicz

Frankfurt (Oder), 21st November 2018

B. Challenges and Future of Compliance

I. The future of Compliance

Dr. Rainer Markfort

The 4th Viadrina Compliance Congress brings together experts from many different countries to discuss ideas on what the future of compliance will bring and what we can do to contribute to its development in our communities. Before looking ahead, we should start with an analysis of the status quo even though, at first glance, this may not seem very encouraging. By gaining a clear view of where we come from, we can better understand the deficiencies we encounter today (1.). Today, numerous business and social factors are driving the need for a more sophisticated approach to compliance. We must be patient as this evolution will take time (2.). However, only through our own initiative and commitment will we ensure the prospects of success for compliance in the future (3.)

1. Where does compliance stand today?

In Germany, compliance first emerged in 2005. Before then, no one had heard the word “compliance” except bankers and doctors. Daimler then became the subject of investigation by the US Department of Justice (DOJ) and the Stock Exchange Commission (SEC). One year later, the same happened to Siemens and since then a similar fate has befallen a series of large and small companies. Scandal after scandal followed and there were times when almost every day the newspapers were reporting about corruption, fraud, breach of antitrust regulations, manipulation of interest rates and other economic crimes taking place within many respected companies.

Shockwaves rippled through the German Automobile Club ADAC (by far the largest NGO in Germany in terms of members) when manipulations of inquiries and fraud came to light. The same happened to FIFA, the only difference being that many had harbored suspicions regarding FIFA officials whereas the German Automobile Club was a somewhat ‘holy’ institution.

The amounts that corporations were paying in penalties consistently increased and society became used to reading about fines in the billions being imposed. At the same time, the reputation of these corporations were destroyed. Once upon a time, the name “Deutsche Bank” was synonymous with strength and glory. But what is left now?

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A whole industry is constantly demonstrating what happens when compliance merely means applying the rules set by the regulator. The banking sector claims that it has practiced compliance for over 20 years. However, a closer look shows that this is only true in specific areas. Some of the biggest scandals in the past, which led to enormous penalties, have occurred in banks. So it appears there has been no value-based compliance for a long time and this may still be true today.

Today, many of Germany's large corporations have established compliance organizations, appointed compliance officers, implemented anti-corruption and anti-trust policies and trained their employees accordingly. Some of them did so after they experienced corruption and other criminal scandals and were forced to act owing to the pressure of investigative authorities and the public debate. Astute companies were quick to take these measures in order to avoid such situations.

After the initial phase of corporations tackling compliance, a big German corporation was repeatedly fined for breaching anti-trust rules. It responded by implementing a state-of-the-art Compliance Management System. This was one of the first tested by external auditors according to IDW PS 980, a newly developed standard. The accountants certified the Compliance Management System as being adequate, implemented, and effective. It may therefore be surprising to learn that this same corporation was again subjected to high fines owing to a new breach of anti-trust rules! How could this happen? Then it was announced that the board member responsible for legal matters and compliance had to quit his job for a personal breach of the compliance rules. This case clearly demonstrates that compliance requires more than policies and procedures.

It does appear surprising that compliance scandals happen again and again. Did the compliance function fail to achieve its aims? Were there deficiencies in the company's policies or training? In view of these examples, we may have to admit that compliance is still in its infancy and, in this sense, needs time to develop.

2. Does compliance have a future?

Quite a few people are of the opinion that compliance is just hype and that it will fade away. The burden of compliance bureaucracy could endanger and challenge a company's competitiveness. Some argue that, in most countries of the world, business does not work without bribes and it is not the company's responsibility to make the world a better place to live.

A keynote speaker is not a prophet but he may dare a prognosis: Compliance has a future and will not vanish! The reason is that, today, compliance is no

longer simply an issue between the authorities on the one hand and corporations on the other. Compliance is far more than this because public opinion has changed dramatically in the past years.

Twenty years ago, tax fraud was viewed as a trivial offence. Bribery and corruption, especially in foreign countries, was a legitimate means of obtaining business. In Germany and other countries bribes were even tax deductible. The biggest mistake in breaking anti-trust rules was to be seen to have been caught. Today, this is different: penalties and damages have increased as has the pressure resulting from investigations. Most of all, however, the corporation's reputation suffers to such an extent that it influences the value of products and the company as a whole. Here, we see that public opinion has a really dramatic impact which leads to change.

Back in the 70s or 80s, the laws for the protection of the environment were tightened with the support of a strong social movement. At that time, a breach of environmental laws was viewed as a trivial offence, at least within the business community. Some entrepreneurs ignored the stricter rules and argued that following these rules would endanger their business and that they were responsible for creating jobs in society. Today, nobody would dare to suggest that environmental crime is a trifling affair.

One can therefore predict that compliance will undergo a comparable evolution and, for this reason, has a future. How long will it take? Probably one generation of managers. Recently, a study showed that managers' business attitudes are mainly influenced by their experiences during their first years in business. This finding may not be all that surprising. However, it does show that we must be patient: it may be difficult to convince today's director that corruption is evil. When this director was a young sales person early in his career, he might have used petty cash to obtain business. However, a young business person today, who has gained his first business experience against the backdrop of compliance scandals and internal investigations, will certainly have a different attitude when he becomes a manager or director.

3. How can we improve the prospects of compliance?

Compliance must become attractive! Compliance must add value to those who run the business and make profits for their company. Compliance should support and promote business and not hinder it. However, compliance is still rarely viewed in this way.

Today, most managers understand that they may be held liable for the misconduct of their employees. However, they may still claim that in foreign markets they could lose business to competitors who are less rigorous with regard to

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compliance. Sales persons and people from procurement departments are unhappy about the amount of training and e-learning. They are annoyed and frustrated about having to check company policies on gifts and hospitality when they want to invite a business partner for lunch. They blame compliance for the bureaucratic hurdles they have to overcome before they can start business with a new partner. So what can we do?

Let's look at the example of third party checks, often referred to as "Business Partner Due Diligence". For business, the integrity check is not the most important thing when starting a new relationship. For people on the front line, it is more important to understand whether a new business partner will be able to deliver quality and whether he has good financial standing so that he might survive a longer business relationship or a challenging project. Now, if the Compliance Department were able to provide exactly this information at this very early stage (i.e. immediately after the first contact has been made), all stakeholders would be fine. The company's decision-makers would have relevant information available for their business decisions and the Compliance Department would be involved at a very early stage and might be in a position to check for potential risks. Business and compliance working hand-in-hand are much better at supporting compliance than policies and controls.

When management takes compliance seriously and entrepreneurial decisions are guided by values then compliance can be a useful tool for good leadership. People are much more creative, effective and, ultimately, productive when they work in an environment that reflects their own values and principles. A management that uses compliance as a leadership tool need not fear liability owing to their employees breaking the law.

Finally, compliance will support competition. Brand, reputation, sustainability and corporate social responsibility are becoming increasingly important as they represent a substantial part of the added value of a product. In such an economic environment, compliance is a competitive advantage. In today's world, a product or company's value will, to a certain extent, be determined by good compliance. However, writing down a set of core values won't be enough. What we need (as in all other areas of business), is specific implementation, best practice, and support. At the same time, not every company has to reinvent the wheel. The wider stakeholders in the economy should come together to establish common rules for good business.

This was exactly the idea and goal when, in November 2012, German corporations, university professors, accounting and law firms took the initiative and founded the German Institute for Compliance, DICO. Today, DICO has more than 200 members, more than half of which are corporations from all sectors and industries. Over 200 individuals are personally engaged in six committees

and 11 working groups. They discuss and develop guidelines, working papers and training materials on various topics such as business partner compliance, internal investigations, qualifications, compliance certificates and quality management. Other working groups cover healthcare compliance, data privacy, anti-trust and export control. They formulate opinions and develop proposals for legal initiatives. By this means, DICO protects the stakeholder interests to avoid bureaucratic and excessive laws and regulations. On the other hand, DICO members can rely on proposals and models that they have developed collaboratively.

This is the best way to ensure compliance. We are taking the initiative, developing our own ideas and not waiting for the legislator to intervene. Let us take compliance into our own hands, work together to further its development and improve compliance's prospects of success in the future.

II. Some Challenges for Cross-Border Compliance Across Europe

Pierre-Antoine Badoz

Orange is a telecom operator and services provider formerly known as “France Telecom”, the French incumbent. Since its creation, it has widely expanded geographically and now has a large international footprint. In Europe, it provides mass market telecom services in France, Belgium, Luxembourg, Moldova, Poland, Romania, Slovakia and Spain. In Africa and the Middle East, it offers services for mass market customers in 21 countries from Egypt to Ivory Coast, Jordan, Madagascar, Morocco and Senegal, to name but a few. Orange also provides telecom services for business customers in more than 200 countries and territories through its Orange Business Services subsidiary: cross-border issues are a daily challenge at Orange!

Orange revenues totalled € 40 billion in 2015 with 156 thousand employees serving more than 252 million customers worldwide; 16 million of them are using “Orange Money”, a mobile wallet service.

Orange strategy focuses on the quality of networks and services and reasserts Orange’s international ambitions in Europe and MEA countries as well as its commitment to continued expansion in mobile financial services and “connected objects”.

Looking at Orange’s strategy and assets through the “lens of compliance” makes one realise that each of them involves specific ethics or compliance risks and challenges, as shown in figure 1 below.



Fig. 1: Our Ethical and Compliance challenges

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Orange strategy is supported by business development and M&A activities with potentially “non-fully compliant” targets in countries which are not necessarily Transparency International’s leaders (according to its “Corruption Perception Index”). In addition, Orange’s expansion in the internet of things and mobile financial services may lead to personal data protection and security issues or banking compliance challenges with the focus on anti-money laundering and counter-financing terrorism (AML/CFT).

The Orange brand needs to be protected against reputational risks while stakeholders’ trust in its ethical values must be continuously reinforced along with the awareness of every Orange employee in sharing, promoting and acting in accordance with these values. Other “must haves” are training employees whose activities may expose them to corruption risks, knowing every customer as required by both banking and telecom regulations and making proper due diligence vis-à-vis intermediaries and partners.

Last but not least, its international footprint exposes Orange to an ever increasing number of national and international laws and regulations involving corruption, sanctions, anti-trust, privacy, technical requirements, tax, environmental issues, etc. It also exposes Orange to differences in “cultural approaches to the rule of law”.

Recently, various compliance issues concerning the telecom sectors have arisen, examples of which are listed below:

- Vimpelcom, the Russian operator is a subsidiary of Telenor, the Norwegian incumbent, which is listed on NASDAQ and registered in the Netherlands. In February 2016, it was fined \$795 million for having paid a \$114 million bribe to an Uzbekistani public agent in order to obtain its mobile license in Uzbekistan.
- A source reported that this action was “*a precursor for a much larger settlement coming down the line with TeliaSonera*” as Telia, the Swedish and Finnish incumbent, faces investigations by the US Department of Justice and Swedish prosecutors. It announced its withdrawal from all central Asian countries and suffered the dismissal of its CEO, CFO, legal director and several other top managers.
- Meanwhile, the American judiciary is working overtime with more than 80 ongoing FCPA investigations, five of which concern telecom operators or suppliers.
- In addition, the US is pragmatically investing part of the fines in recruiting FCPA prosecutors and FBI agents. In 2015, it also rewarded whistleblowers with more than \$ 54 million. In the same year, Ms Yates, Deputy Attorney-General of the DoJ wrote a famous memo requesting American prosecutors to focus their efforts on the personal liability of managers.

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- MTN, the South African telecom giant, was recently fined the equivalent of \$ 5 billion and recently reached agreement with Nigerian authorities to pay close to \$ 1.7 billion for “missing a deadline to disconnect unregistered customers”.

These examples show that compliance is indeed a very hot topic in telecoms!

At Orange, we therefore deployed a comprehensive compliance programme back in 2012, leveraging our previous anti-fraud and anti-corruption programmes. We used a “classical” 6-step approach to comply with the requirements of various guidelines (including the FCPA and the UKBA). Each of these steps raises very practical issues when deployed across our footprint, as can be seen from figure 2 below.

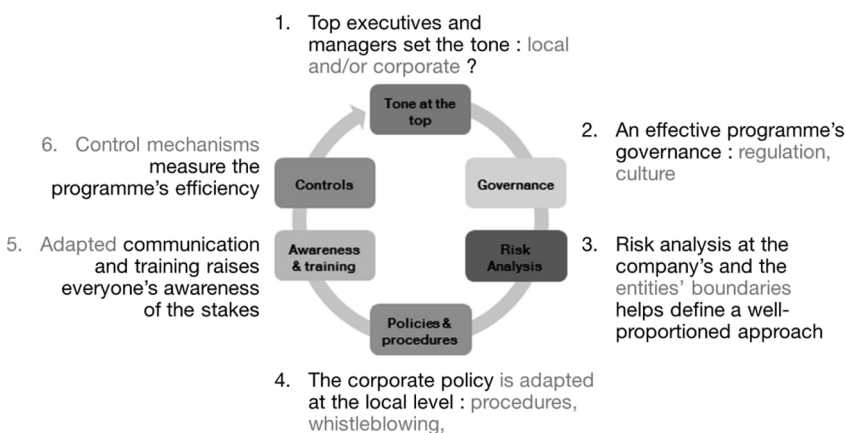


Fig. 2: Our Ethical and Compliance challenges

Let's take the example of step 1 “tone from the top”: to start with, there is the very practical language issue as 6 different languages (Flemish, French, Polish, Slovak, Spanish and Romanian) are spoken within our European Business-to-Customer footprint. This number more than doubles within our European Business-to-Business footprint and more than doubles once again within our worldwide footprint where many employees speak neither French nor English.

There is also the important issue of the person who carries the message: should it be the local CEO, the Division Executive Committee member or our Group CEO? The answer is not obvious, as the impact of the message is not necessarily commensurate with the speaker's position within the organisation as the following example shows.

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At the end of 2015, our CEO and every ExCom member signed a short message renewing our Group's commitment of "zero tolerance towards corruption". This message was then sent to every manager in our Group, both in France and abroad (over 14,000 to be precise). When travelling and asking managers about this message, I discovered that not all of them outside France remembered having received it (contrary to the situation in France). After discussing this finding, one of our Chief Compliance Officers decided to duplicate the initiative within her local organisation. A similar commitment was then signed by the country CEO and local management committee and subsequently disseminated through the organisation with positive feedback and very high recognition ratio.

Governance is key for Compliance and sometimes full of tricky issues such as:

- Controlled entities and minority shareholders: owing to their position, minority shareholders must sometimes show strong conviction and marshal excellent arguments to increase local management's and other shareholders' awareness of compliance risks and convince them to deploy a robust and effective compliance programme.
- M&A and cultural misunderstanding: telcos, and especially incumbents, tend to have a strong corporate culture with centralised management which may conflict with one another or with the less structured new entrants.

Risks obviously depend on the country Orange operates in: the Customer Perception Index ranking of Orange European countries of operation ranks from 10 in Luxembourg to 103 in Moldova, not to mention some of our African or Middle-Eastern operations which hover around the bottom of Transparency International's ranking. Resources, due diligence, training, communication, every aspect of our compliance programme needs to be adequately adapted to the country in question – and to our local business. Adequate adaptation is essential: having insufficient controls in a difficult and complex environment is obviously problematic but having an overly strict and burdensome programme in a low risk environment would also be counterproductive. This will be the case if the procedure appears too complex or if operational staff does not understand why strict due diligence and training is necessary. This situation runs the risk that the procedure will not be followed adequately. Complaints may also be made about the time, resources and ultimately money being wasted on an apparently useless bureaucratic procedure, thereby undermining the support of management which is essential for compliance.

Policy and procedures: this is really where we need group policies but also local procedures to make sure that they are effectively enforced. I will illustrate my point with 2 examples. The first one concerns whistleblowing, which is an extremely sensitive issue in some countries (e.g. Belgium and France) owing to the fact that it is widely seen as denunciation. Accordingly, we rely not only on

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the alert mechanism but also on our networks of HR advisors, ethics advisors and compliance officers, respected employees or managers that people trust and are prepared to rely on for alerts.

The second issue concerns the procedures to enforce our gift and entertainment policy, which has to be adapted to the local culture. At Orange Poland, for instance, the management developed a clever solution to respect the cultural habit of significant business gifts during Christmas and New Year season whilst remaining compliant with our group's gift policy. The solution is that every top manager of Orange Poland has to give up the external gifts he or she receives in December and January. The resulting "pool of gifts" is then donated to an NGO through the Orange foundation in a widely publicised event. This effective solution is now publicised within the Group as it may also work as efficiently and positively in other operations.

Finally, controls are essential to measure the effectiveness of compliance programmes and should be deployed adequately throughout the organisation. The only thing that may vary geographically is the level of resources needed to enforce them!

In conclusion, I would like to share two strong convictions: the first one is that compliance, more than any other business issue, is a domain where we should think globally and act locally. The second one is that being an ethical and compliant company is not only a winning formula in managing risks but is also becoming an increasingly important competitive advantage.

III. Key Recommendations of B20 Cross-Thematic Group Responsible Business Conduct & Anti-Corruption

Dr. Klaus Moosmayer

1. Introduction

Responsible Business Conduct and Anti-Corruption was a major pillar in the B20 framework under the German G20 Presidency 2017. As a consequence a Cross-Thematic Group was established in order to come up with strategic but also pragmatic recommendations and best practice examples in order to give the view of the business community to the G20 leaders.¹

To raise standards of living, economic growth is indispensable. Job creation, training, and education, innovation and technology development – business plays an integral part in improving living conditions around the globe. Foreign direct investment can positively contribute to local economic development.

Around the world, countless companies are committed to Responsible Business Conduct (RBC), improving health and safety at work, living conditions, society, environment, and consumer welfare. More and more companies are integrating this concept in their value chains.

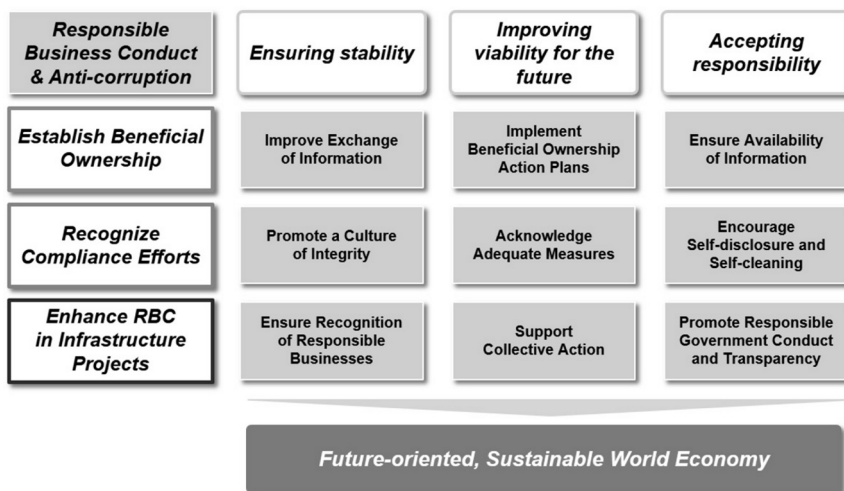
An important aspect of Responsible Business Conduct is fighting corruption. Corruption reduces efficiency and increases inequality. It distorts the efficient allocation of resources. It raises the costs of doing business. It undermines the trust in governments and erodes the rules of law.

According to the World Economic Forum the cost of corruption equals more than five percent of global GDP (US\$ 2.6 trillion). Much has already been done to fight corruption. But we can do better. B20 Germany thus decided to establish a Cross-thematic Group on Responsible Business Conduct and Anti-Corruption.

Relevance of Cross-Thematic Group Recommendations for the G20 focusses “Ensuring stability”, “Improving viability for the future”, and “Accepting responsibility”

¹ All documents regarding the B20 Taskforces and Cross Thematic groups can be found here: <https://www.b20germany.org/>. The comprehensive booklet on Responsible Business Conduct and Anti-Corruption and all related information can be found here: <https://www.b20germany.org/priorities/responsible-business-conduct-anti-corruption/>.

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2. Key Recommendations

2.1 Establish Beneficial Ownership Transparency

Recommendation 1: G20 members should increase their efforts to implement beneficial ownership transparency so that risks related to the ultimate owner(s) can be identified.

Policy Action 1.1: Implement Beneficial Ownership Action Plans – G20 members should continue to lead the world in realizing beneficial ownership transparency by progressively implementing their action plans, raising global standards of data quality, exploring possibilities of connecting ownership information, and monitoring implementation progress.

- G20 members should align Beneficial Ownership Action Plans with Financial Action Task Force (FATF) recommendations and the proposals that were made to G20 Finance Ministers in October 2016.
- G20 members should improve the quality of their company registers so that they provide high-quality data. Members should also explore possibilities of linking and centralizing ownership information.
- G20 should ask a relevant third party (such as the World Bank) for a review of implementation progress before the 2018 G20 Summit.

Policy Action 1.2: Ensure Availability of Information – G20 members should ensure easy access to, and efficient use of, beneficial ownership information by

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laying down clear rules governing access to information, and facilitating access for users through adequate measures and guidance.

- G20 members should specify user access rights to beneficial ownership information.
- Users should have adequate tools and guidance to access and analyze this data quickly.
- G20 members should define technical and organizational measures to ensure easy access for authorized users, both nationally and internationally.

Policy Action 1.3: Improve Exchange of Information – G20 members should facilitate the timely and effective exchange of beneficial ownership information at the national and international levels by defining or adopting data standards, providing guidance on legal set-ups in their country, and assisting developing countries in improving company registers.

- G20 members should agree on international standards relating to data privacy and data handling with regard to the exchange and processing of basic and beneficial ownership information.
- G20 members should publish information on legal set-ups in their country, including risk profiles, reporting requirements, sources of basic and beneficial ownership information, and access rights.
- G20 members should support developing countries with the creation and maintenance of reliable company registers by promoting beneficial ownership transparency with technical and financial assistance.

2.2 Recognize Compliance Efforts

Recommendation 2: G20 members should be supportive of company' proactive engagement by providing positive recognition of effective anti-corruption and compliance systems.

Policy Action 2.1: Acknowledge Adequate Measures – G20 members should recognize corporate compliance efforts when awarding public contracts and when imposing sanctions for breaches, and they should explore additional ways to acknowledge compliance efforts.

- The existence of an adequate and robust compliance program should be a requirement for being eligible to receive public subsidies or other public funds, licenses, public contracts, export credits and trade insurances.
- G20 members should have the ability to reduce sanctions and penalties based on the fact that companies have implemented adequate compliance programs.

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- G20 should commission the OECD to conduct a fact-finding study on countries' approaches to compliance incentives and identify good practices.

Policy Action 2.2: Encourage Self-Disclosure and Self-Cleaning – G20 members should be encouraged to harmonize their administrative and legal approaches to self-disclosure of compliance breaches, recognize effective and safe internal reporting, and support adequate self-cleaning.

- G20 members should align laws and regulatory requirements that strengthen voluntary self-disclosure mechanisms through reduced penalties and institutionalized leniency programs.
- G20 members should offer discounts that specifically relate to the existence of internal reporting systems and adequate protection to whistleblowers who report misconduct within the company.
- G20 members should recognize self-cleaning efforts after misconduct has been detected and remediated, for example, by allowing them to be reconsidered for inclusion in public tenders.

Policy Action 2.3: Promote a Culture of Integrity – G20 should continue its commitment to building a global culture of intolerance towards corruption by reinforcing international cooperation, including the promotion of key international instruments, supporting the provision of capacity building and training for SMEs and in non-G20 countries, as well as improving education on anti-corruption and integrity in schools and universities.

- G20 members should effectively implement and promote key international instruments to help create a level playing field for businesses.
- G20 members should promote capacity building among SMEs by offering training and guidance on RBC and anti-corruption and by recognizing companies that build such capacities in their supply chains.
- G20 members should support capacity building and the provision of effective and efficient technical assistance to assist non-G20 countries in tackling corruption.
- G20 should work together with businesses and society to explore possibilities of integrating integrity, anti-corruption and RBC in the curricula of schools and universities.

2.3 Enhance Responsible Business Conduct in Infrastructure Projects

Recommendation 3: G20 members should increase transparency and accountability at all stages of the project cycle in order to mitigate the risk of corruption and increase efficiency.

Policy Action 3.1: Promote Responsible Government Conduct and Transparency – G20 members should address the demand side of corruption and

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should ensure that public infrastructure projects are selected, planned, awarded and managed openly and accountably by promoting integrity in their own organizational structures and processes and by enhancing reporting about project risks, impacts, progress and costs.

- G20 members need to mitigate corruption risks and improve transparency and accountability at all stages in the project cycle, from the selection phase, through the procurement and the contract, all the way to ribbon cutting.
- To encourage fair competition, G20 members should ensure the publication of relevant tender documentation in line with international standards and improve information sharing and efficiency through the use of digital technologies.
- G20 members should improve adequate reporting to relevant stakeholders throughout the entire cycle of an infrastructure project and balance the protection of sensitive data with the public's legitimate interest to know how public money is being spent.

Policy Action 3.2: Ensure Recognition of Responsible Businesses – G20 members should promote integrity among participating businesses by specifying requirements related to RBC, by encouraging coherent sustainability reporting, and by providing awareness training on anti-corruption and integrity.

- G20 members should require bidders to disclose their beneficial owners and to have adequate controls, measures and programs in place to manage corruption risks. They should exclude tenderers that have been convicted of illicit practices or proven unreliable and recognize self-cleaning by allowing bidders to reapply if they have implemented effective measures to manage the risk.
- G20 members should consider environmental, social and governance (ESG) performance as a bidding criteria and strengthen reporting requirements that improve the comparability of ESG information.
- G20 members should provide integrity training for contracting authorities and bidders to raise awareness of the various risks involved and the potential consequences for themselves, as well as for society.

Policy Action 3.3: Support Collective Action – G20 members should promote Collective Action, that is initiatives between different businesses, and between businesses and the public sector, which foster integrity (such as Integrity Pacts and High Level Reporting Mechanisms). G20 should initiate a study that explores joint ways of fighting corruption and misconduct in infrastructure projects.

- G20 members should encourage coordinated efforts by companies, governments and civil society to step up against corruption and strengthen good business practice.

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- G20 should set up a review of specific infrastructure projects by an expert group to develop appropriate mitigating strategies and identify ways to further support Collective Action.

3. About “Business 20”

The Business 20 (B20) is the official G20 dialogue with the global business community. On September 4 2016, the leading German business associations BDI, BDA, and DIHK, mandated by the German Chancellery, assumed the B20 presidency. Chair of B20 Germany is Dr. Jürgen Heraeus.

Since September 2016, more than 800 representatives from companies and business association developed recommendations for the G20 on a consensual basis. B20 Germany is organized in seven working groups: Trade and Investment, Energy, Climate & Resource Efficiency, Financing Growth & Infrastructure, Digitalization and Employment & Education, Responsible Business Conduct & Anti-Corruption and SMEs. In February, the B20 Health Initiative was launched. Each group is headed by a chair and several co-chairs. The approximately 100 members of each group represent all G20 countries and sectors of the economy.

B20 Cross-thematic Group Responsible Business Conduct & Anti-Corruption

Chair Dr. Klaus Moosmayer, Chief Compliance Officer, Siemens		
Co-Chairs Dr. Andrey Bugrov, Senior Vice-President, MMC Norilsk Nickel Andre Oliveira, Member of South America Executive Team, BASF Corinne Lagache, Senior Vice President, Group Compliance Officer, Safran Jorge Mandelbaum, President, CIPPEC Anny Tubbs, Chief Business Integrity Officer, Unilever		
Knowledge Partner KPMG	Network Partners Business and Industry Advisory Committee to the OECD (BIAC)	International Chamber of Commerce (ICC) Concept Partner Alliance for Integrity

The group consists of 112 members from 26 countries (including the category “international”).

C. Cross Border Ethics, Compliance and Integrity

I. Compliance, Culture and Integrity in Global Perspective

Anatoly Yakorev

1. Integrity is the New Compliance

“Integrity” seems to have become the word of the year as many conferences around the world proudly feature it in their names, including the OECD Global Anti-corruption and Integrity Forum.¹ As some industries (like the venerable anti-corruption industry) quietly become moribund and fade away, the compliance and ethics industry is also losing steam. The term “integrity” is presumably meant to breathe some life into these industries and maintain the interest in global efforts to combat corruption and praise responsible corporate behaviour (dubbed “responsible business conduct”²), to try and spruce up the less popular CSR, charitability and sustainability. However, can integrity really save everyone and eradicate the scourge of corruption? Are we talking about another magic wand – both a carrot and stick – which will make companies rein in poor ethics behaviour and improve reputational capital? One might say that it smacks of being a massive PR stunt to both address the ethical fading of the ‘tone at the top’ and give some credit to senior management efforts. On the other hand (because the word itself means so much), the real motive is to shift positive light away from a bland ‘compliance & ethics’ brand. Integrity and accountability still remain novel and very much relevant to the recurring string of corporate scandals caused by so called ‘ethical fading’ but, in reality, the same greed and fraud is being committed at CEO and board levels.

Integrity is a much sought after a fundamental value in a person who, by applying it, demonstrates how moral and ethical principles work (i.e. accountability, trust, honesty, honor, trustworthiness and dependability). In a business sense, integrity has so much more to offer than just honesty because it is all about the application of these fine qualities (i.e. “living the values”) in all relationships and dealings. It brings along so many benefits such as improved brand equity, reputation, shareholder confidence, improved revenue growth and reduced risks.

¹ <https://www.oecd.org/cleangovbiz/integrity-forum-2017.htm>.

² <http://mneguidelines.oecd.org/responsible-business-conduct-matters.htm>.

Yet integrity is in crisis in the corporate world. If you google “integrity crisis”, you will come across various hits taking you to political and religious discourse. There would be few leads mentioning “integrity” in a corporate sense. Even though we have witnessed so many corporate scandals caused by ethical lapses on the part of their senior management, we still fail to grasp the fact that such behaviour comes from within corporate cultures that have never been grounded on ethics and values. “In order to avoid further, self-inflicted crises – and the human damage they cause – we will have to pay more attention to both institutional norms and ethical leadership.”³ The question that remains nowadays is how to help top management incorporate responsible behaviour into their daily operations. Some appoint Chief Integrity Officers, Chief Harmony Officers and some introduce the role of ombudsman. In my experience, appointing someone to the position of Chief Integrity Officer only highlighted the fact that the individual in question was not fit to perform that role. Yet the tendency seems to reflect a drive to adopt rather fancy titles to stay focused on the broader issues and inspire employees. One of the key factors is ethics training, to be carried out at every level of the management structure. “CEOs have always been expected by shareholders and investors to maintain high ethical standards. Although it doesn’t always happen, today’s regulatory environment makes it easier to identify transgressions and bring violators to justice.”⁴ Hoping to settle at the pre-trial stage is costlier than any ethics training. At the first glance, ROI for ethics appears very convincing: certainly enough to tick some boxes.⁵ One study has shown how unethical behavior tends to snowball and cause major problems, beginning with small things: “People often start their misconduct with small transgressions and then slide down a slippery slope.”⁶ At the same time, the unethical behavior of senior executives can cost the company money, reputation and loss of trust. “It turns out that when an incident of CEO personal indiscretion comes to light, shareholder value declines \$266 million (4.1 percent).”⁷ This means that there is clearly a solid business case for establishing a culture of integrity to help protect an organization and help it prosper. However, some companies adopt a rather worrying trend by involving their CCOs in business decision-making, thereby inadvertently undermining his authority and shielding senior management from potential prosecution. The change in decision-making by se-

3 <https://hbr.org/2016/12/why-were-seeing-so-many-corporate-scandals>.

4 <https://www.forbes.com/sites/investopedia/2013/02/05/5-most-publicized-ethics-violations-by-ceos/>.

5 <https://www.linkedin.com/pulse/whats-roi-ethics-training-answer-all-questions-yes-bucaro-csp-cpae>.

6 <https://hbr.org/2014/09/how-unethical-behavior-becomes-habit>.

7 <http://complianceandethics.org/ceos-personal-integrity-better-business-ethical-leadership-series-pt-ii/>.

nior executives should occur with them adopting core values and not putting their compliance officer in the line of fire when he cannot be fully immersed in all business aspects. Accordingly, many challenges still remain and a lot of work lies ahead to correct corporate behavior at multiple levels.

2. Integrity in a Global Cultural Context

People's reaction to types of interaction at the workplace may vary greatly from culture to culture: in Asia, for instance, confrontation is regarded as unnecessary and immature. In Russia, on the other hand, it is pretty much the old style of doing business: using fear and aggression as an approach to "motivate" people is quite common. Being afraid of "losing face" is not something Russian managers fret about and they deploy a full range of intimidating techniques to ensure results. A feedback system does not work. Perception of time also varies. In international operations, corruption infiltrates even strong organizational cultures such as one often finds in Germany. "Dissatisfaction with managers results in costs and loss of productivity. According to a 2013 survey of employees and managers in Germany, conducted by the consulting firm Information Factory, 50 percent of the respondents had left a job because of a supervisor, while another 20 percent had considered doing so."⁸

The Russian system of management does not run on values: disregard for professional qualities and a skilled work force is common, which greatly reduces performance and increases staff turnover rates. Russian management is a classic command-and-control model: it moves from one crisis to another without having the time to implement any business continuity. Two human factors are consistently used in the Russian business environment: fear and unpredictability. In a workplace environment, people who experience stress operate on signals from their brain's primitive impulses, thus sustaining their own state of being distrustful, uncooperative and unpredictable. Not having standards, boundaries or values greatly diminishes performance in the short and long term. Keeping people overstressed leads to anxiety and burnout and definitely does not inspire loyalty to the company. Micromanagement and failing to appreciate the full picture causes disarray among senior executives. Having an informal communication channel is another problem when the organization is broken into silos and decision-making is flawed. Does integrity have a place in such an environment? Some experts still believe integrity could be incorporated in Russian companies if this is secured by senior management. However, it remains a big 'if' as to whether isolated cases are capable of achieving fundamental change.

8 <https://global.handelsblatt.com/opinion/the-price-of-poor-ethics-810232>.

3. Issues with a Culture of Integrity

While organizational culture can certainly benefit from incorporating diversity, a culture of integrity may still need to be the one for all. It should rest on the core values of the company that are professed, shared, upheld and acted upon by all in the organization. There can be no integrity without the core values. “While the globalization of businesses may carry us closer to universal standards for work, in comparing these distinctive management styles, there is a clear and present need for organizations to acclimatize to diversity. By incorporating cultural aspects into everyday business, utilizing performance review software and by developing strong and effective international management teams, companies will have the competitive advantage to become successful global players.”⁹ When it comes to values that are universal in nature, having one culture based on universal values that make up core values of a company delivers another very important aspect: accountability. Accountability which is not split between the head office and local offices around the world. For decades companies attributed many failures to a rift between the main office and regional branches. Communication on many things is broken between the head office and different jurisdictions, especially when it comes to soft skills and values. In my experience, local offices often are defiant when the head office tries to regulate their anti-corruption policies, compliance training etc. However, they recognize the mandate of the head office to cascade their policies. Most branches bring up the issue of local established practices, different value systems, thus retaining their own ‘special’ way of doing business which quite often reflects pressures from corrupt local business environment. This situation makes the case for having one culture of integrity across jurisdictions very clearly. In over 25 years of working with large international companies in Russia, I never dealt with organizations that were free of corrupt practices. When found out, the head office would rotate corrupt expats and fire locals while failing to address the issue of culture. The issue of sending expats to low integrity regions is also quite acute: companies send their second or third-rate managers who are likely to slip up. Top performers prefer to stay in the head office to advance their careers. When a company’s second-rate manager fails in his capacity of country manager, he and his colleagues are most likely to be written off as ‘damaged goods’ by the company anyway. This also demotivates expats from behaving ethically and responsibly. Most companies are reconciled with the idea of never having full control and prefer to pursue damage limitation, losing money, reputation and sustaining a toxic culture. Given a large number of companies penalized for corruption and fraud, one wonders why companies remain defiant and prefer to pay

9 <http://www.halogensoftware.com/blog/the-business-of-culture-how-culture-affects-management-around-the-world>.

a fine from a rainy day fund than work in earnest to develop that culture of integrity. Human nature suggests that as soon as companies realize that paying steep penalties may bankrupt them, they will be much less reluctant to foster integrity. As soon as boards and shareholders begin to stop this practice and pressure senior executives to adopt responsible behaviour, we will see a dramatic upturn in adopting this soft skill. However, it is most likely to occur because of generational change management in companies, where older executives rotate out and younger managers, who are sensitive to their reputational risks, take control of the ship. In the meantime, some CEOs have decided to become visionaries and benefit from the trend of ethical leadership by setting up their visionary hubs. One example is the Leadership Vanguard,¹⁰ where senior leaders across industries collaborate to find new solutions to humanity's biggest problems. Unilever's CEO Paul Polman is a member of this Vanguard: "Under Chief Executive Officer Paul Polman, Unilever is seeking to espouse a trendy sentiment – that it's possible to make more money by acting virtuously – on a global stage."¹¹ Whether there is such a thing as a virtuous capitalism still remains to be seen, but the effort is aimed to ethically discerning shoppers in the developed world. So what exactly are the benefits or 'ROI' (Return on Investment) for having a culture of integrity in place?

Vision, mission statement and values support business leaders as they offer clarity and encourage commitment. They help empower employees by creating a level playing field, establish organizational justice, bolster credibility, accountability and spur motivation. It allows companies to get the maximum business potential from its people without incurring major costs. Of course, there are always companies (like Ikea) that pay very little but boast of having a great corporate culture by offering perks of working abroad. It is true that pay rises and bonuses have a certain motivational value and, in the case of senior management, "regardless of the size of a top manager's pay package, it should be a fixed salary, rather than a variable amount of money dependent on performance criteria."¹² Another key component is a culture of accountability: senior executives need to act as a role model when acting on their promises so they can expect a similar response from their subordinates.

Setting the tone for the work environment helps improve influence, clarity and accountability to avoid burnout, exhaustion and disengagement. Leaders who trust their employees cannot simply reap rewards from seeing better performance, ownership, accountability and commitment because the team fabric is

10 <http://xysandbox.com/vanguard-i/>.

11 <https://www.bloomberg.com/news/features/2017-08-31/if-unilever-can-t-make-feel-good-capitalism-work-who-can>.

12 <https://hbr.org/2016/02/stop-paying-executives-for-performance>.

equally important. Helping peers and relying on them elevates performance to a higher level. A culture of integrity helps sustain trust in employees and improve decision-making by senior management.

Technology disruption has impacted communication, reducing the role of a human factor while offering some advantages. However, we are far from harnessing full potential of automation, AI and Big Data. Increasing competition adds a lot to a workload of an employee and often comes without additional reward, thereby making people feel underappreciated and leading to potential disengagement. The culture component is key to offer a buffer and better motivation in a competitive environment.

Only speaking about a need of a culture of integrity does not bring results. People in charge should also be held accountable to the very standards they profess. “With the rise of the profession, and the expectations placed on the shoulders of compliance officers, the compliance profession has to develop and promote its own set of ethical standards.”¹³

4. Challenges for Establishing a Culture of Integrity

The tone at the top is key. Indeed, despite this phrase being overused, many studies point to the importance of setting the tone by senior management. “Another study also found that an organization’s proclaimed values were irrelevant; it was the employee’s perceptions of the CEO and senior leaders as trustworthy and ethical that mattered more.”¹⁴ Any CEO and C-Suite with the Board could move mountains having established a culture of trust and openness. Having an open culture, where questions are heard and answered, bolsters trust, respect, inclusion and empowerment which are spread among all stakeholders. Therefore, if a CEO were to take that step in the right direction and embed that culture, he would only need to communicate it on a regular basis to his teams in order to maintain it. Regrettably, this too often becomes a PR stunt and so the role of CCO is also vital to support senior management. The existing disconnect between C-Suite, Board and CCO (for many reasons) makes it very difficult: the lack of mandate, authority, resources and trust from other executives puts CCOs in a difficult spot. Mistrust from middle management just makes it worse. Any wise CCO would do well to learn from the sizeable ethics and integrity industry. However, another challenge is that this industry, in its pursuit of making money, has evolved into more of a ‘feel good’ industry with too much focus on

13 <https://blog.volkovlaw.com/2017/05/compliance-profession-needs-adopt-professional-standards/>.

14 <http://www.kenan-flagler.unc.edu/~media/Files/documents/executive-development/unc-white-paper-return-on-integrity.pdf>.

the positive and less on the reality. Needless to say, that if a head office cannot sort this out, its regional and international offices will remain at peril. As my good friend Richard Bistrong puts it: “When frontline personnel are telling senior management about corruption issues they face in the field, it’s an encouraging sign when those conversations are upsetting.”¹⁵ Openness does not have to be only positive: honest communication between the head office and other locations helps set the tone for one culture of integrity. Despite regional and geographical differences, core values are pretty much universal around the world. Therefore, putting these core values at the center of one culture of integrity could help solve two major problems: corruption risks in regional offices and the pressure needed on head offices to sustain that culture of integrity (which could be ignored by a new CEO). Yet one culture of integrity is even more important for company operations in low integrity regions: too often large multinational companies “go native” when they operate in high risks areas: the Siemens scandal in Russia¹⁶ demonstrates how much a company stands to lose when its management joins the game of local politicians. It clearly shows a disconnect with the head office priorities at a time when the company suffered greatly from its corruption scandal in 2008.¹⁷ Any company would do well to tap into the resources that the compliance and ethics industry has to offer. However, in recent years its optimism has been on the wane because the compliance function has not been getting the resources and authority needed to secure its rightful place within the management structure. Hence, any talk of a culture of integrity runs into various challenges. In this respect, the personal liability of the CEO and CCO is also an issue.

Firms usually anticipate fallout from ethical misconduct or lapses by setting aside funds to reach a settlement with regulators. Another common tactic is to stonewall. Although these actions are predictable, corporations’ behaviour does not change. At the same time, regulators have increased their interactions with colleagues in other countries. The FCPA pilot case may change the overall complacent behaviour by taking the game to a new level.

Leaders have become dependent on the outcome of so many decisions, that it is logical to try and change the culture in other ways than simply waiting for the authorities to knock. The VW and Deutsche Bank cases about prosecution from the US also show that mistakes are becoming more expensive for non-US companies.

15 <https://www.forbes.com/sites/riskmap/2014/11/04/interview-a-frontline-view-of-anti-corruption/#a0b447016651>.

16 <https://www.reuters.com/article/us-ukraine-crisis-crimea-siemens/crimean-scandal-prompts-siemens-to-retreat-from-russian-energy-idUSKBN1A60I4>.

17 <https://www.theguardian.com/business/2008/dec/16/regulation-siemens-scandal-bribery>.

C. Cross Border Ethics, Compliance and Integrity

The question is: why do companies and public sector remain silent about ethics training and show reluctance in embracing soft law initiatives like Collective Action?

As someone who has worked with CEOs and C-Suite, I stress the importance of winning their trust and respect as someone who understands their business and genuinely seeks to improve and protect it. Compliance alone cannot support the culture of ethics and corporate values. Only mature and wise professionals, who have a track record and command respect, can build and develop this culture. Young compliance specialists lack both. On the other hand, many international organizations, compliance associations, professional media run by compliance related people miss the big picture and the ground work is done by someone else who have no time for PR. Their work is rarely covered and referred to and so the industry runs in circles, regurgitating the same topics and rediscovering the same solutions. Few see how they can break this vicious circle. However, it is obvious that developing and sustaining a culture of integrity requires a broad and diverse experience. This applies even more to companies having global branches and offices, including the ones in low integrity regions. Quite often communication between the head office and local offices is broken, which exposes companies to major risks of non-compliance. In addition, companies are rarely able to extend their culture of integrity to far away locations. To do so would require a lot of coordination and effective communication with the front-line employees, so they feel included in the culture.

Even though compliance training has become a part of companies' development (Navex) and a Code of Conduct adopted, there is still a need to promote ethics training and adopt a Code of Ethics. Some roles as Chief Integrity Officer or Ombudsman have been adopted, yet they do not support the culture of integrity that mostly stops at the door of the compliance function. Even though the function should cover ethics, we rarely see any efforts to tackle this issue. Without ethics it is impossible to support core values and achieve integrity. Adopting a Code of Ethics is key as it sets the guidelines of an organization to its stakeholders to help them act in line with the company's core values and ethical standards. From that point on, communication and actions will further uphold the Code. ROI of ethics training is part of a long-term strategy and helps mitigate and prevent ethical lapses and inappropriate behaviour. This is especially the case when compliance fatigue has become commonplace. "Strong ethical leadership, values-based compliance, organizational culture of integrity and well-resourced, able compliance program are parts of the answer and solution so companies do not find themselves in such difficulties."¹⁸ Even though CSR and

¹⁸ <https://www.linkedin.com/pulse/business-ethics-compliance-counterweight-corruption-marilena-fatsea>.

charity seem to be firmly embedded in budgets of large multinationals, they cannot demonstrate the level of integrity that a company has or claims to have. Although awards and certifications of ethical behaviour could be easily procured, the final test of integrity is the company's record and reputation.

“Companies with mature or advanced ethics and compliance training programmes achieve greater return on investment (ROI) as well as significant risk mitigation and culture change”, according to a new survey by NAVEX Global.¹⁹

5. Resume

There has been a lot of work and research done on the merits of integrity for the business world. The prosecution and punishment of global companies has become a trademark of ongoing enforcement trend. Before it becomes the only trend, companies need to do more to embrace the culture of integrity and spread it across jurisdictions in the countries where they operate. Only this approach can lead to responsible business conduct at a time when doing business the old way is becoming too costly and threatens companies' own survival. Whether corporates heed that call and take the necessary steps will serve as a new benchmark of running business in an age of global enforcement.

¹⁹ <https://www.financierworldwide.com/fw-news/2017/8/8/roi-boosted-by-mature-ethics-compliance-programmes-new-survey-finds>.

II. Compliance Culture & Governance

Philip Brennan

1. Culture of Compliance

Let me start by sharing some introductory views on creating an appropriate compliance culture. These are personal views, based on my experience.

When I refer to compliance, I mean not just regulatory compliance, but also business ethics.

1.1 Tone from the top

Let me start with ‘tone from the top’. There is no question in my mind that the predominant recipe for successfully implementing a strong compliance culture is having clear, frequently expressed and unequivocal support for compliance from the board and senior management team of the parent organisation. This must permeate to boards and senior management of subsidiaries, particularly in countries and cultures different to the parent. If employees do not detect this endorsement (and employees do detect these things) no Compliance function, no matter how good it is, will successfully inculcate a strong compliance culture.

Words, however, are not enough. Directors and senior management must not alone speak positively about the importance of a strong regulatory compliance culture, they must also act, and be seen to act, as they speak (e.g. by refusing to sell products unsuitable to a customers’ needs). They must ‘walk the talk’, so to speak.

During the discussion after my presentation, a conference attendee made the point that middle as well as top management must also set the right tone. I could not agree more. To junior staff, their line of sign often does not go beyond middle management.

1.2 Recruitment

Personal values must be a key attribute of staff recruited at all levels in the organisation, from board members, to management, to front line staff. Behaving appropriately and doing the right thing must run in the genes of everyone in the organisation.

1.3 Spirit vs. letter of the law

The Corporate Code of Ethics, the Code of Behaviour and all the Policies should focus not just on the letter of the law or regulation, but also on the spirit. Culturally, some countries struggle with this. Regulation cannot cover every-

thing. If a product or practice does not ‘feel’ right, the corporate ethos should discourage employees from engaging in it. More and more stakeholders expect organisations to act responsibly as well as legally.

1.4 It doesn’t matter what competitors are doing

Boards and senior management should adopt a maxim that, once the actions of the competition offend their own compliance culture, they should not be replicated. There is often a strong temptation to set corporate standards by reference to what the competition is doing. This strategy is short-term and can result in a race to the bottom. Explaining that you were following the norm or the competition is not a defence when things go wrong.

1.5 Systems and processes

Regulation in financial services and indeed in many other industries is complex, extensive and ever-increasing. It is no longer possible to rely on human nature or human intervention to ensure that the organisation acts compliantly. A culture of compliance must be underpinned by systems and processes which automate, to the maximum possible extent, legal and regulatory responsibilities. So many of the compliance failures that arise are due not to deliberate action or inaction by people but to inadequate systems or, where human intervention is required, to human error.

1.6 Training and competency development

To embed a culture of compliance, organisations must strongly invest in training and competency development. This ranges from training on conduct and behaviour to technical training where employees need to know why and how to follow regulation.

1.7 The Chief Compliance Officer

I will speak more about this under the heading of governance. Suffice to say at this stage that the technical competence, ability to influence and independence of mind of the Chief Compliance Officer (“CCO”) are critical factors in developing and maintaining a strong compliance culture. The CCO should be interviewed by a board member and the board, not management, should ratify the appointment. He or she should be the ‘minder’ of the board and senior management on regulatory compliance matters.

2. Governance

Let me turn now to the second subject matter we are considering – that of an appropriate governance structure to ensure that an organisation maintains a strong compliance culture. Again, based on experience, I am going to identify what I regard as the key elements of such a structure:

2.1 Ownership of the responsibility to comply

Establishing ownership and the role, scope and accountability of all parties relating to regulatory compliance is really important. It should be clear to everyone across the organisation that the ownership of compliance rests, not with the CCO or the Compliance function, but with the board which bears ultimate responsibility and which, in turn, delegates this to senior management.

So the board must hold management accountable for acting compliantly and the governance structure should position the Compliance function to act 'schizophrenically', as it were by, on the one hand, advising and assisting management on how to act compliantly and, on the other, independently monitoring the standards of compliance being operated by management and reporting to the board/audit committee on this.

2.2 COSO framework

My preferred governance structure for oversight of compliance, for those of you familiar with it, is the COSO framework, or at least an adaptation of it. This involves three lines of defence – management in the first line (being primarily responsible for compliance), the Compliance function in the second line (advising on and independently monitoring and reporting to the board on standards of compliance) and Internal Audit in the third line (overseeing and reporting independently to the board on the effectiveness of operation of the first and second lines).

2.3 Positioning, composition and independence of the Compliance function

The positioning, composition and independence of the Compliance function are, in my view, a really important part of the governance structure of any organisation. Let me share a few thoughts on this:

- The CCO should be a member of the executive management team. He/she needs to be in a position of influence among senior management and should have unfettered rights to monitor and review what he/she considers necessary. The CCO should have a power of veto on certain regulatory matters.

- The CCO should report functionally to the Chief Executive Officer and independently and directly to the chairperson of the board audit committee. The board is ultimately responsible for compliance. Given that they have no role in the operation of the company, they must rely on management to assure them that the organisation and its employees are acting compliantly. However, they also need someone who understands the subject matter to validate management's assurance. This should be evidence based and independent. This is the role of the CCO and the Compliance function.
- Staff of the Compliance function should have a firm knowledge, not just of regulation but also of the operation of the business – one is just as important as the other.
- The Compliance function should be proactive and solution-minded rather than police men/women.
- The CCO should be accountable for the Compliance function in all jurisdictions. Local compliance officers should not report to local management but to the enterprise CCO.
- The CCO should manage the relationship with all regulators.

2.4 Monitoring

Compliance should be regularly and independently monitored. Monitoring should be based on a risk assessment compiled independently by the Compliance function with input from management. Compliance officers should maximise the use of technology to identify areas of high risk.

2.5 Reward

A long time ago, I remember reading an article by Steven Kerr entitled “*On the folly of rewarding A while hoping for B*”. It sums up for me the importance of building compliance into the reward structure. Reward should be based, not just on financial performance, but on a balanced scorecard involving numerous measures, an important one of which should be adherence to compliance standards. Compliance should be a qualifier: in other words, if a manager or employee fails to meet the appropriate standard, or worse still, is found to have breached regulatory compliance or ethical standards they should, in my view, be disqualified from receiving any discretionary remuneration that year.

2.6 Employee Disclosure

The final key tool in the compliance governance toolkit that I want to cover is the whole area of employee disclosure.

C. Cross Border Ethics, Compliance and Integrity

Ensuring an organisation remains compliant is not an easy job for anyone, at board, management, Compliance, Internal Audit or regulatory level. Monitoring compliance is labour-intensive. No matter how good risk assessments are, tail-risks can pop up from nowhere. Problems can be latent in systems. Wrongdoing deliberately perpetrated by individuals can be difficult to predict and detect.

Employees are the ones who are most likely to know where “the skeletons are buried” so to speak – where the latent problems reside, where things are likely to “blow up”. Organisations, through their boards and senior management, should actively encourage employees to disclose concerns about wrongdoing and ensure that staff are regarded in a positive rather than a negative light for doing so. If a culture of employee disclosure is fostered, it can bring about a situation where every employee becomes a compliance officer, every employee engages in the monitoring of regulatory compliance and business ethics.

Creating the right culture here is of paramount importance. The identity of employees who make disclosures should, as far as possible, be kept confidential. Ensuring they are not penalised, even if their reasonable suspicion proves to be wrong, is equally as important (save of course where the disclosure is known to be false and is made for malicious or malevolent intent). Following up/addressing the issues raised and giving feedback to the disclosers are all part of the recipe for success.

Employees should be facilitated to disclose their concerns both inside and outside the organisation to a trusted recipient. The employer should focus on the concern disclosed, not on the discloser.

Ideally, employers will want employees to raise their concerns with local business management. However, this is not always practical or possible. For this reason, there should be a trusted internal confidential recipient for employee disclosures. This should, in my view, be the CCO in the home country.

Equally, there should be a trusted external confidential recipient employed by the firm to receive employee disclosures, to independently advise employees and to protect their identity.

If an organisation’s culture encourages and looks positively on employee disclosure and if its governance structure facilitates it, it is an all embracing, focused and cost-effective manner of monitoring standards of regulatory compliance – a key part of the governance toolkit in protecting the reputation of the firm, irrespective of the business involved.

III. Compliance Across Cultures: Towards an Increased Awareness of the Self and the Other

Christin Grothaus

An expatriate arriving in a bustling city in Asia, such as Bangkok or Shanghai, might experience modernity and fast-paced lifestyles similar to the West. Despite global cities looking more and more alike, national values often remain durable over time. China has been influenced by the Confucian value for relationship building from one dynasty to the next over a course of more than 2500 years. Thailand has never been colonized and is strongly influenced by the interplay of the monarchy, Buddhism and nationalism.

Although the attempt to cross physical and temporal borders can be overcome rather easily, social and cultural borders can, and often do, remain an invisible and underestimated challenge.

With the process of globalisation, more and more companies operate in countries with less familiar legal and cultural environments.

As one's national values work well in one's own society they are often not questioned much throughout life. A German expatriate might easily agree that some stereotypical "German" characteristics, such as being straight forward, organized, reliable, efficient and self-responsible, are of value. However, he might appear to a Thai – who shows stronger values for relationships, harmony and respect – as someone rather serious, slightly aggressive, not empathetic, inflexible, stubborn, complicated and maybe selfish or even antisocial. Neither one depiction has to be true but what becomes the reality to the other is based on the way behavior is perceived (Grothaus, 2015).

According to Geert Hofstede's value dimensions (2001), Germans and Thais show significant differences in major cultural dimensions, such as in levels of power distance, individualism and masculinity.

Working with people across borders thus asks for a profound self-reflection of one's values and behaviour. Self- and social-awareness as well as the management of one's emotions and those of others, also known as "Emotional Intelligence" (Goleman, 1998), needs to be assessed and encouraged when preparing compliance officers to work abroad.

Communication can go profoundly wrong with one presuming to know where the problem lies. A group of Japanese exchanging with Americans in an experiment (Shigemitsu, 2005) concluded that the Americans did not give them enough time to breath and no indication when to start speaking, whereas the Americans concluded that the Japanese had nothing to say and that they would not become friends.

C. Cross Border Ethics, Compliance and Integrity

An empathetic leader with a high level of emotional intelligence could be able to encourage a conversation that neither exerts pressure nor comes from a perspective of cultural or personal dominance.

Most Asian countries have been found to be high context cultures (Hall, 1989), which strongly consider the context of a situation, which are less verbally explicit, show a more internalized understanding of what is communicated and strong boundaries for who is accepted as a member of the group and who is considered an “outsider”. Countries like Germany that show lower levels of context orientation have been found to value rule orientation. People often play here by external rules and more knowledge is codified, public, external, and accessible.

To introduce approaches such as a grievance system that aims to alert foreign management to allegations of misconduct without fear of retribution might conflict with values such as conflict avoidance, indirect communication, loss of face as well as different concepts of relationship building shared among members of different cultures.

A long-term collaborative approach can counter poor communication. Furthermore, training for host country nationals can enable them to convey key issues to the management. This approach can increase capacity-building resources and help build a company culture that engenders trust and transparency by aligning company values with employee’s values and by sharing learned lessons systematically throughout the organisation.

Consequently, companies and compliance officers are no longer active as police officers but as partners and facilitators (Jamison & Murdoch 2004).

Studies that discuss compliance management with a focus on cross cultural comparisons are scarce. Nations that do not fall into the category of being western, educated, industrialized, rich, and democratic (abbreviated as ‘WEIRD’ nations by Henrich, Heine & Norenzayan (2010)), make up about 88 percent of the world’s population but are still understudied.

Furthermore, research on employees’ perceptions of justice across cultures and organizational outcomes of those perceptions, such as the motivation to voice injustice in organisations, need further attention (Greenberg, 2001).

Different perceptions of justice, such as interactional justice (the degree of respect and sympathy shown), informational justice (honesty and timing of information given), procedural justice (fairness of the process, process control and voice) as well as distributive justice (outcome fairness) should be considered when assessing outcomes of justice perceptions across cultures (Colquitt et al., 2001).

A collaboration between researchers and businesses can help to better predict possible challenges and ways for improvement when working across cultures in the fields of compliance.

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IV. How Ethics Can Support Effective Compliance and Anti-Corruption Programmes

Ousmane Diagana

1. Introduction

It is a real pleasure to be here in Hamburg to give the keynote speech of the Viadrina Compliance Congress. This is the fifth edition of this conference which is becoming a regular and important meeting for academics and professionals specialising in compliance, and more specifically, in its international aspects. I am delighted to take part in this event and I would like to congratulate the organisers for the very interesting programme that they have put together.

I am the Vice-President in charge of ethics in the World Bank Group. The anti-corruption activities, which are also essential, are the responsibility of another Vice-President. Due to the nature of our activities, which include lending, support to development operations, financial resources (including trust fund management) and advisory services, we also have several other units addressing compliance issues. Collaboration and cross-fertilisation exist between these separate functions. Clearly, ethics, compliance and anti-corruption do not exist in isolation. They complement each other.

Today, after reviewing some historical milestones where ethics influenced compliance, I will consider compliance with ethics rules by means of a code of conduct. We often consider that codes of conduct are now well-established instruments but I will point out that there is still scope for evolution (and progress) in the way organisations develop and use them.

2. The Origin of the Link between Ethics and Compliance in the United States

Compliance is not a new topic. The US Food and Drug Administration was created more than 110 years ago in 1906. I am not going to launch into a complete history of compliance but would like to select a few events or dates when compliance and ethics were brought closer together.

The modern era of compliance started about forty years ago, when an investigation by the US Securities and Exchange Commission revealed that many US companies were bribing foreign public officials to obtain government contracts. At the time, bribes to foreign officials were tax-deductible in some European countries. In the US, the SEC inquiry led to the Foreign Corrupt Practices Act of 1977. Then, in the 1980s, scandals relating to procurement of equipment for the US military were uncovered and the public discovered that hammers, for in-

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stance, had been purchased with taxpayers' money for \$400 each. This led, in 1986, to the anti-corruption Defence Industry Initiative regrouping 32 defence contractors.

The next important step was the recognition of the importance of the ethical principle that sanctions needed to be consistent, which led the US Sentencing Commission to issue Federal Sentencing Guidelines for Organisations (FGSO) in 1991. This was a turning point: companies would not only be expected to implement controls to identify fraud and corruption but also to develop an internal culture of ethics and integrity. In many US-based companies, this was the origin of the creation of an ethics office or of a joint ethics and compliance function. It was during this period that the World Bank Group created its ethics function.

In 1996, the World Bank President, Jim Wolfensohn made his famous speech on the need to "deal with the cancer of corruption". He envisioned a three-pronged approach namely to ensure that 1) the World Bank Group would be irreproachable internally; 2) the projects of the World Bank Group would be free of corruption; and 3) the issue of corruption would receive more attention from policy-makers globally. Today, this policy and this legacy are still alive and the World Bank Group continues to be a leader in the fight against corruption at all levels and in all contexts. Let me point out that at the origin of it all is a very ethical stance and a deep sense of duty. Ethical principles, in this case, were at the origin of the anti-corruption policy.

The 21st century started with spectacular corporate scandals such as Enron. The first decade of the 21st century saw also a gradual increase in public disclosure obligations and in controlling conflicts of interest. At the World Bank Group, for instance, the President and the top 50 staff members are required to publish annually on the internet a declaration of interest that reviews their financial holdings, their outside interests and their outside positions. I, myself, am subject to this requirement. In addition, all Executive Directors and their staff are required to make a financial disclosure and all the managers and direct reports of senior management are required to file an annual declaration of interest. In total, more than 10 percent of the staff members of the World Bank Group complete an annual declaration of interest.

To some extent, the first decade of the century was the decade of compliance and the second decade is that of ethics. Let me take two examples at the mid-point of the decade, 2015. One is the "Yates Memo" issued in 2015 by US Deputy Attorney General Sally Yates. The official title of this memo was "Individual Accountability for Corporate Wrongdoing" and was the product of a collective review by an *ad hoc* working group. It represents a significant policy change, by considering that "One of the most effective ways to combat corpo-

rate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.” The memo takes a number of ethical stances:

- First, in order to benefit from a more lenient sentence through what the US system calls “cooperation credit”, companies must disclose all relevant facts about individuals involved in corporate misconduct. The memo makes it clear that this is an all or nothing approach, stating: “companies cannot pick and choose what facts to disclose”.
- Second, the resolution of corporate cases cannot be concluded without a clear plan to resolve related individual cases and cannot include protection from criminal or civil liability for any individuals. In other words, those who control the governance of a company cannot hide behind the corporate veil to exonerate themselves or another from civil or criminal responsibility.
- Finally, cases against individuals should be brought on the basis of the nature and consequences of their acts and not their ability to pay. In other words, the decision to prosecute should be based on ethical and not economic considerations.

In the same year, the Basel Committee on Banking Supervision issued a revised version of the “Corporate Governance Principles for Banks”, originally published in 2010, where ethical issues are clearly more prominent. In particular, the report includes the requirement for management to develop a written code of ethics or code of conduct. Given Basel’s stance that management should focus on what is important, this new responsibility given to management to develop a code of ethics is very significant. At the World Bank Group, we are in a process of revising the corporate values. On this basis, we will also revisit the existing Code of Conduct, moving towards a code of ethics that will not focus solely on what staff should not do but also lay out the ethical ambition that defines us.

3. The Highs and Lows of Managing Ethics through a Code of Conduct

Research and practice confirm that adopting a Code of Conduct reduces the number of ethical violations. However, it is not enough to have a code: It should be a good one. There is perhaps not enough discussion about the quality of codes of conduct. Consideration should also be given to developing international standards. Some codes are far too inward-looking and, as a result, they are not particularly effective against wrongdoing or unethical behaviors. Others focus on compliance with the letter of the law rather than with ethical principles and so it is not surprising that they have not prevented corporate scandals.

Additionally, the implementation of codes of conduct is imperfectly monitored, with some provisions being strictly adhered to and others less so. In some orga-

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nisations, the code of conduct can be seen in the office of every top executive while, in others, it is difficult to even find a copy of the code.

One should also not underestimate the obsolescence of codes of conduct. They need to be periodically revised as part of governance cycles.

Another important aspect is the order of priorities of the various ethical principles that define the ethical compact of an organisation. For instance, a company that has an overriding principle to put the client first and places abiding by the laws and acting with integrity second will develop a very different compliance culture than a company that puts integrity first, and client service second. It is easy to predict which culture will be more compliant.

It is also important to remember that codes of conduct cannot foresee every possibility and the real test of a compliance culture comes when a situation arises that is not foreseen by the rules: will employees apply ethical principles or will they regard the lack of rules as a loophole? This is one of the reasons why it is so important to have a strong connection between corporate values and the rules of a code of conduct. From a compliance point of view, the values represent the safety net of the rules.

4. Lessons from corporate scandals

It is useful at this point to consider corporate scandals, which always, in some ways, involve ethical breakdowns. I am not going to delve into the gory details of the corporate scandals of the last twenty years. We know that the financial industry has had its fair share but that other sectors (the automobile industry, for example) are not exempt either. You all know the stories.

My point is that they exemplify two forms of compliance complacency. In some cases, the fraudulent company ticked all the compliance boxes but had none of the ethical culture to go with the mechanical aspects of compliance. In other cases, everyone assumed that someone else was responsible for due diligence: compliance was always someone else's problem.

An important lesson from past scandals is the need to develop a culture of respect. An important statistic to consider is that about 20 percent of data losses are due to ethical issues. People who voluntarily exfiltrate confidential data do so for one of two reasons: either for revenge, because they feel unappreciated, or by conviction, because they feel that they were not heard inside the organisation. This means that 20% of data losses would be avoided if employees were given more respect. The cost-benefit analysis seems, in my view, clearly in favor of developing a culture of respect. At the World Bank Group, I have initiated a training programme developing a culture of respect.

Another lesson is that individual or collective over-confidence is a compliance risk. The rogue traders that either brought their banks down, or at least created significant losses, were all guilty. They were guilty in two respects: first, in taking financial positions that went well beyond what prudential rules would allow and, secondly, in thinking that they could successfully hide this fact.

At this point, I would like to insist on an important point: ethics complements compliance and is therefore necessary. Rules can only do so much. Employees need to understand not only the consequences of bending the rules but also the consequences of blindly following them. More fundamentally, behaviors cannot simply rely on rules: they also need to be guided by values and by principles. This is why it is important for codes of conduct to provide a connection between values, principles and detailed rules.

Codes of conduct also allow organisations to supplement national laws in order to create a more specific corporate culture. In this way, they can have an impact on development, which is the point I would like to address in conclusion.

5. Ethics and Compliance in Developing Countries

First of all, let me underline that compliance exists in every organised social group. Where there is governance, there is compliance. Where a rule exists and is sufficiently important to be associated with enforcement mechanisms and sanctions, you will find systems of monitoring of compliance and corrective actions destined to ensure compliance without resorting to enforcement. All villages of the world have compliance mechanisms associated with some rules. All religions in the world have compliance mechanisms. You take your hat off in a cathedral, cover your head in a synagogue and take your shoes off in a mosque. These are simple examples of compliance but I am mentioning them in support of an anthropology of compliance: even if you pursue a global compliance objective, the way you promote rules should be differentiated across territories and cultures. As a global institution, the World Bank Group recognises this and I hope that global institutions in the private-sector will also acknowledge this fact. Compliance will be much more effective if it is rooted in local cultures than if it is a visible graft that does not refer to local cultures.

Codes of conduct of cross-border organisations (public or private) can significantly benefit development in three separate ways:

- First, codes of conduct support development by addressing the “dark triad”: corruption, nepotism and leniency on poor performance. Corruption and nepotism are linked: someone who has no qualms about recruiting friends or family will be much more likely to ensure that friends and family also win procurement contracts and are much less likely to refuse a favor to friends

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and family. Nepotism and poor performance are also linked: there would be no point in manipulating recruitment to let in weak performers who are family or friends, if they were immediately captured by the performance management system and expelled from the organisation. So, the more nepotistic an organisation, the weaker its control over performance. This means that nepotism not only affects development by introducing workers who have less embedded knowledge than others who were available and willing to work in that organisation but also affects the productivity of other workers by purposefully inefficient performance management. It is therefore essential for the codes of conduct of cross-border organisations to provide rules against nepotism and its two ugly sisters that are corruption and leniency on poor performers.

- Second, codes of conduct reduce the risk of “ethical dumping”, whereby activities that would not be allowed in rich countries are simply exported to poorer countries that have not developed the relevant regulations. In some developing areas, codes of conduct show real deficits. However, when organisations apply their Codes of Conduct globally and comply with them, this contributes to the private creation of international norms that are conveyed through codes of conduct. Organisations with global codes of conduct are less likely to engage in ethical dumping.
- Third, codes of conduct support development by establishing behavioral standards and spreading them internationally. This is an area where more could be done. Codes of conduct are insufficiently considered in terms of productivity. Yet some behaviors are more conducive to creative team work or error-free team processes and it is in everyone’s interest to incorporate such productivity-enhancing behaviors in codes of conduct. Bullying, for instance, not only has a psychological impact on the victims but also an organisational cost on the company and represents an operational risk. The communication breakdown between the bully and the victim and the overload of alternative communication channels, constitute operational risks.

Codes of conduct can also negatively affect development. To contain such effects, it should form part of the ethics mandate of cross-border corporations and of an enlarged corporate responsibility. I would like to mention three possible adverse effects:

- One is to impose exacting standards that have a cost beyond the means of local populations. For instance (since we are in Europe), applying European water quality standards could, in some countries, price a significant portion of the population out of access to clean water (and thus push that population back to inadequate water sources). A code of conduct that insisted engineers apply the best possible technical standards could also have undesirable side effects.
- Another is to assume that the cost of compliance is the same in all countries. I think that you will all agree that the “Know-your-Customer” (KYC) rules

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are more difficult to implement in some countries. To take a basic example, it is significantly more difficult to check the identity of someone in countries where no complete population register exists.

- A third is to underestimate the need for compensation mechanisms when expected behaviors are at odds with the organisation of society. For instance, the salaries of some categories of personnel may be low in geographical areas and sectors where high levels of corruption exist because the gains from corruption are factored in the salary level (rather how the tips received by waiters are factored in the salaries of restaurant waiters in the United States). When ethics and compliance regulations remove (and rightly so) the possibility of receiving side payments, it also becomes necessary to re-assess salary levels. In the same way, an organisation that has strict anti-nepotism rules will put the children of employees at a disadvantage in societies where nepotism is rife. Therefore, it is necessary to consider compensation mechanisms such as financially supporting school or university fees to help the children of employees get better educations and less relationship support in finding employment. At present, ethics and compliance professionals tend to cut off income or favor sources without considering how this will affect the standard of living of employees in the organisation.

This raises the fundamentally ethical purpose of compliance: is it to protect an organisation against the risk of violating enforceable rules, or is it to develop an organisation that behaves as a good corporate and global citizen, contributing to society and to the economy? I said earlier, that one key role of ethics raises new and difficult questions, which I have presented to you.

6. Summary

I have illustrated the fact that a code of conduct can have a direct impact on the economic performance of an organisation. When compliance is combined with ethics, it is no longer simply an internal “line of defence” as it has sometimes been described. It is an element of the profitability of the firm and thus a parameter in the strategy of the organisation. There are two types of compliance: blind compliance and ethical compliance. If ethics reminds us that compliance is not just following rules irrespective of the consequences, it will have achieved its purpose. It is essential that compliance professionals ally themselves with ethics professionals to argue and defend ethical compliance and avoid blind compliance. I hope that this conference will contribute to this essential task.

V. How to Implement a Culture of Integrity in International Groups

Dr. Tobias Teicke

1. Introduction

Implementing common values in international groups is a tremendous challenge. The reason for this lies in the different upbringing, education and cultural background of employees from different countries. Most importantly: corporate life and business practices vary from country to country. If one compares French and German corporate culture, one can already make out a few differences. There are even more cultural differences between German companies and e.g. Iranian or Indian companies. Unfortunately, a lot of multinational groups simply lack the effort to transfer their corporate culture to their subsidiaries abroad in an efficient and sustainable way. It is difficult to convince employees in subsidiaries abroad to adhere to the corporate culture if the company's philosophy and culture are described in few words in a ten-page document. Simply handing out a code of conduct to employees is not enough. Besides the common compliance tools, two elements of a compliance program can be very useful in implementing a culture of compliance throughout the group.

2. Compliance Dialogue

The first element is to start an open dialogue between the stakeholders involved. The global management should accept that cultural differences exist and listen to the concerns of local management. This requires an honest dialogue and consideration of cultural specifics.

The corporate values described in the compliance guidelines may be interpreted differently in other countries or individual staff members may simply fail to understand what certain guidelines mean. Thus, there is a risk that compliance statements in corporate documentation are merely a set of well-formed phrases that are not actually practiced either locally or within the company. Image brochures which do not reflect the company's day-to-day business are not much help.

The implementation of the company's values in the entire multi-national group requires considerable efforts if taken seriously. Workshops, seminars and town-hall meetings in which the values are stressed and explained are valuable tools in this respect. However, the board must be aware that such activities have to be increased in countries where the cultural setting differs from the corporate culture in the country where the headquarters are located. Adopting a risk-based approach, management can focus on subsidiaries with important business and

extremely high risks. As a rule, compliance efforts must be increased in such countries.

If a company intends to establish new business in a country where there is a high risk of non-compliance (e.g., according to the Transparency International Index), the management has two options. One is that the management just goes ahead and focuses on quick growth. In this case, compliance measures are usually limited to issuing a code of conduct and requiring employees to confirm its receipt or, at most, providing an introductory e-learning session. From a compliance perspective, this first option cannot be recommended because it is not enough to establish an effective compliance culture.

The preferable option would be to try to understand what the real risks are in practice. For example, instead of simply stating in a compliance guideline that facilitation payments are not permitted, the management should really understand what the particular local risks are in this regard. This can be ascertained by establishing a dialogue on-site. At some management meetings and workshops with clients, after two hours of open discussions employees ask very honestly how to deal with critical situations where corrupt behaviour is clearly involved. However, very often such questions are not raised at regular meetings and training courses but only later, in a follow-up call or meeting.

This is the reason why the compliance team should reserve sufficient time to carry out compliance audits and compliance training sessions abroad. Such advice may appear trivial but is in fact vital for communicating compliance efficiently. For example, a two-day trip of compliance experts (e.g. flying in one day, meeting with management, having a seminar the next day and flying back afterwards) will usually not allow enough time to convey the message.

Often, the real “insider information” is only communicated after three or four days, once the compliance experts have had the chance to catch up with individual key employees regarding the topics dealt with in the workshop. This is when the real dialogue starts and the risk analysis gains substance. Once the company has obtained a better understanding of the problems in the local market, it can adjust its risk assessment and may even consider modifying certain general rules of the guidelines to cover certain individual business practices in a specific country (in accordance with the applicable law, of course).

3. Local Management as a Role Model for Compliance

In addition to open dialogue, the second pre-condition for establishing a culture of integrity throughout the group is to have the right persons on the ground. It is essential to have locally experienced compliance role models in management positions in foreign subsidiaries. These are the people who are willing to

stand up against corrupt public servants or bribery attempts in a difficult environment. They will also understand the importance of compliance and, at the same time, know the local market.

The importance of this can best be described by way of an example. A few months ago, in the subsidiary of an international group in Algeria, a public official from the customs agency contacted the local managing director of the Algerian subsidiary and claimed that customs fees had not been paid correctly. The managing director, who was not new in the country, was fortunate enough to know that what the company had done was correct. He was not intimidated by this blatant attempt at bribery, even though the public official had threatened to report the manager's alleged wrong-doing (which was of course unfounded). The manager called security and had the public official removed from the building. An inexperienced managing director would most likely have acted differently under such pressure, especially in view of personal consequences such as jail-time. Compliance experts who conduct a workshop can consider themselves lucky if they have this kind of local director at their side in an internal compliance training. The participants of the workshop become aware that they can rely on their local management in case they refuse a shady deal, even though it is very lucrative. No company guideline is as reassuring for employees as a locally experienced manager.

4. The Bottom Line

Defining corporate culture in colourful and well-phrased company brochures is not enough. An open dialogue between the compliance functions and the local staff is key. The group compliance department should listen to questions and local concerns. On the basis of this exchange, risks can be assessed more accurately and, if need be, local compliance measures can be modified to the extent permissible. In addition, it is important to have the right local management in place to bring the company's culture to life. This should be achieved not only by referring to guidelines but with the support of real people dealing with real problems, who know the local market and are also aware of the importance of compliance.

VI. Culture and Value, Easily-forgotten Paths to Deep Compliance

Prof. Dr. Han-Kyun Rho

1. Introduction

In Panel 2 of the 5th Viadrina Compliance Congress, we have talked about “doing, acting and improving instead of talking, discussing and waiting.” During the discussion, I mentioned that although the talking part is integral to compliance, it is neither sufficiently effective nor lasting.

2. The Costs of “Superficial” Compliance

The term “compliance” has often been used to denote a “superficial change” (e.g., Kelman, 1958¹). However, what we need is not superficial change but change together with internalisation. I would like to call the latter “deep compliance” in order to distinguish this notion from a conventional understanding of “(superficial) compliance.”

Without internalisation, implementation is likely to be discarded when control is loosened. If superficial change is to be lasting, a regulator should develop and maintain a fully functional control system (being composed of norms, monitoring, and corrective actions). However, in an ever-changing globalised world, this is not easy to achieve due to both longitudinal and cross-sectional diversities.

Compliance (or non-compliance) is a result of decision-making by an actor as to whether he or she should comply with a certain norm or not under a given circumstance. Here we can consider Gary Becker’s early model of rational choice. In this sense, compliance (or non-compliance) can be understood as a combination of actor, norm and circumstances.

Longitudinal diversities mean that, in a society, the three elements of compliance (or non-compliance) – i. e. actor, norm and circumstances – change as time goes by. Thus, the nature of compliance (or non-compliance) will subsequently change which, in turn, requires an adaptation of the existing control system.

Cross-sectional diversities result from globalisation. Three elements of compliance (or non-compliance) of a society expand to include those in another society. This also requires an adaptation of the society’s control system.

1 Kelman, H.C., 1958. Compliance, identification, and internalization: Three processes of attitude change, *Journal of Conflict Resolution*, 2 (1), pp. 51–60.

A swift adaptation of the control system to respond to the contemporary world's longitudinal and cross-sectional diversities is too costly to realize. Since adaptation needs to be examined, it will most likely lag behind the diversities. This will produce a regulatory loophole, with the result that superficial compliance starts turning into non-compliance. This is a result of rational choice.

Besides the failure to adapt to external circumstances, the situation will worsen if the control system shows an internal inconsistency in the system of norms, monitoring, and corrective actions. A norm in a control system may not be clear enough to enable compliance. Although the system has a well-developed norm, monitoring may not fully cover the norm. Even after close monitoring, corrective actions may not be adequate. In any of these situations, superficial compliance can easily turn into non-compliance, as a result of rational choice.

To sum up, there is always a danger of superficial compliance's transformation into non-compliance unless we maintain a fully functional control system equipped with both external and internal coherence. However, as discussed above, the pre-requisite is hard to achieve, so the danger is omnipresent.

3. A Third Meaning of Compliance: Multiplication of a Control System

A third meaning of compliance is the admonition by the ultimate controller (usually the state) to one of its controlled entities (mostly a non-state actor such as a company) to establish and maintain an in-house control system (similarly composed of norms, monitoring and corrective actions).

The requested actor thereby acquires the role of partial controller as well as that of the controlled. This third meaning of compliance is different from its other two meanings discussed above because the former take place on the controller's side (i. e. establishment of a control system), while the third meaning focuses on a change of the controlled entity (superficial vs. deep compliance).

As far as the state is concerned, the company and its members are all regarded as the controlled entities. Under this system of compliance, the company is obliged not only to establish an in-house control system but also to make its members comply with the norms set by the state through its in-house control system (which reflects the norms of the state).

If the company is required to build another compliance system pursuant to the third meaning within its value chain (which is common nowadays), there will be multiple layers of control systems along with the value chain. The companies involved in this complex system of compliance aim to establish an in-house control system. Accordingly, the companies focus on complying (from the perspective of the controlled) with the compliance system (from the perspective of

a partial controller). According to this approach, a company tries to maintain a fully functional control system equipped with both external and internal coherence (see the previous section).

However, under this new, complex system of compliance, the ultimate controlled entities are still individuals. In this sense, a company in the complex system of compliance should also pay attention to the compliance of individuals. If the compliance of individuals is superficial, the whole system of compliance will not only be costly but also ineffective (as discussed in the previous section).

4. Enhancing the Social Learning Aspect of Compliance through Culture and Value

There have been two major explanations for the question of why a social actor (state, organisation and individual) complies.

The first answer is rational choice. The actor compares the costs and benefits of compliance and non-compliance and then decides whether to comply or not. From this perspective, if a controller can influence the costs and benefits of compliance then it can make the controlled entity comply. This approach and its inherent limitation are discussed in the first section.

The second answer is social learning and identity. Through social interaction, internalisation and an identification process, the actor reinterprets the meaning of the norms and decides whether to comply or not. From this perspective, the controller can make the controlled entity comply through social interaction, culture and the internalisation of norms.

It is important to note that these two explanations are not mutually exclusive. For example, the costs and benefits under the rational choice approach can also be affected by social interaction and learning. This suggests that we may start with the establishment of a control system equipped with both external and internal coherence and also that we have to consider including the aspect of social learning into the system. Thereby, we can reduce (if not eliminate) the high costs of 'superficial' compliance.

There is an empirical study showing that 'superficial' compliance is contagious across the whole system of compliance. If a controller emphasises only a stricter control system based on a narrower view of rational choice, the controlled entity tends to respond to this approach with superficial compliance. In addition to the inherent limitations of the control system (as shown previously), any incongruence between the formal control system and informal system (such as organisational culture and ethical climate) may harm the effectiveness of the control system. Incongruence between organisational value and individual value also hampers the proper working of the system.

However, we can turn the same cycle backwards to achieve a positive impact. Congruence between formal and informal systems and between organisational and individual value can promote deep compliance. Deep compliance can complement the inherent limitations of the conventional control system. Individuals may be more engaged in the whole system of compliance, which will create a higher level of adaptiveness and resilience of the system.

In this sense, it is time to look at the social learning aspect of compliance along with the current focus on the conventional control system of norms, monitoring and corrective actions. It is time to look for deep rather than superficial compliance both by organisations and individuals.

You may think that the social learning aspect will not produce an immediate effect and so cannot attract the sufficient attention of management. However, consider the fact that its negative impact is immediate whereas its positive impact needs a long time. Without the social learning aspect, the compliance programme based on the narrower rational choice aspect would not be sustainable.

VII. Compliance, Culture and Morality

Shahzad Khan

In the following article, Shahzad Khan, Head of Ethics & Compliance for Mubadala, the Investment Company for the Government of Abu Dhabi, suggests that a focus on morality, together with the key concepts of culture, accountability and responsibility can help take ethics and compliance one step further.

We read or hear reports of acts of corruption occurring almost on a daily basis. However, we only read about the ones that are made public and we only hear about the ones that have been reported. There are countless other situations and incidents that are not reported and which we do not learn about – either publicly or by way of reporting to those people in multinational companies who are tasked with the investigation and resolution of such matters.

On the face of it, corruption is a fairly simple concept. It has existed for thousands of years and is likely to continue to do so. Those in power will always seek ways to exploit or enforce that power for personal gain.

Society is now moving towards the ways and means of rooting out, prosecuting and reducing corruption. There is a universal acceptance that corruption is wrong and can no longer be tolerated. Nearly every country in the world will have some form of laws which forbid it and/or punish those who involved in the supply-side or demand-side of the corruption equation.

Multinational companies have taken the view that whilst they cannot control the demand-side they can seek control the supply-side by putting in place effective anti-corruptions measures and programmes. We have seen a huge upturn in these programmes over the last two decades, in particular.

The foundation of most ethics and compliance programmes is normally setting out what the company stands for and believes in as well as educating those who work for or with the company in what types of behaviour are not considered acceptable.

Reputable multinational companies have spent an inordinate amount of time, money and effort in developing, defining, educating and enforcing acceptable and prohibited behaviors. They do this through codes of conduct, ethical statements, posters, videos, multi-format trainings and the other assorted compliance channels and paraphernalia.

These companies seek to protect themselves from any potential legal liability by requiring all manner of compliance from employees and third parties by means of codes of conduct and other policies. They have ensured that they have the best-in-class, “all-singing, all-dancing” anti-bribery and anti-corruption

compliance clauses in all of their contracts, purchase orders and other sales media.

Despite this, we still hear and read about corruption and even encounter it ourselves. Sometimes, it involves our own employees and sometimes those of other companies. Very often, it involves foreign government officials. Corruption nearly always involves more than one jurisdiction, which poses all manner of cross-border questions and issues for lawyers, experts and academics to analyse and decipher.

One only has to examine the top twenty FCPA fines and penalties to conclude that there have been too many instances of otherwise ethical “western” companies misplacing their moral briefcases at the airport upon arrival in developing countries where they may not have previously done business.

This contrasts with the cultural imperialism of the 1980s and 1990s, where western companies were often perceived as imposing their laws, rules and ways of doing business in various developing countries – often encountering resistance based on established culture and traditions.

So how have we allowed ourselves to get to this point? What can multinational companies do to introduce the requisite change needed to reduce and eradicate the situations that they encounter and which we read and hear about?

There is, sadly, no one simple answer or solution.

We all want to ensure that our employees are “doing the right thing”.

We all want to work for a company that wins contracts because it is able to deliver the best people, products, services in the most cost-effective manner; that wins contracts above the table and not because of what has taken place underneath.

We need to stop talking or writing about ethics and compliance and take it to a different level. Not a new level only known to some deep-thinkers or anti-corruption experts but one that digs deeper into issues of morality: which concerns knowing right from wrong and which is geared towards educating and ensuring that employees know and feel that what they are doing is the right thing. Not because they have been told what they must do or threatened and scared into compliance but because they know and feel that what they are doing (or in some cases what they are not doing) is truly the right way to behave and the right thing to do – for them and, by extension, for the organisation they work for and/or represent.

Basing an anti-corruption programme around morality could require a shift away from the more traditionally used verbiage of a compliance practitioner – that of ethics and integrity.

C. Cross Border Ethics, Compliance and Integrity

Both ethics and morals relate to “right” and “wrong” conduct. While they are sometimes used interchangeably, they are different: ethics refer to rules provided by an external source, such as Codes of Conduct in workplaces or principles set out in many religions. Morals refer to an individual’s own principles regarding right and wrong. These principles are often developed and nurtured from a young age or early on in one’s business career. They often influence what types of business or areas of work people feel drawn towards or set their career paths towards.

We often read about a company or an individual having a “moral compass”. The image of a compass lends itself well to a situation where someone is seeking to navigate stormy and, often, uncharted waters.

A compass is a relatively simple instrument based on a simple concept. With its northward-facing needle, it is a consistent and true indicator of physical direction. By placing *moral* in front of *compass*, we can generate a picture of the mental processes that may point a person in a particular direction in life. These processes are consistent and true indicators upon which personal belief and action can be based.

The concept of morality denotes conduct or duties based on what is right and wrong. Morality is considered to be the basis of one’s character and is, essentially, orientated towards ethics.

Morality can give a common purpose in making decisions and provide direction as to how large companies may conduct themselves as an organisation, whether in their home country or abroad.

But while both the concept of a moral compass and the definition of morality may be simple and clear, the concept of what constitutes morality is not. One person’s moral compass may become temporarily misaligned or may not point in the same direction as another’s, as far as right and wrong conduct and beliefs are concerned.

So how should multinational companies operating in a number of jurisdictions and industries (some of which are perceived to be at a higher risk of corruption than others) deliver and demonstrate the requisite morality and keep their moral compass pointing true north?

The answer, it is submitted, lies within the employees and representatives that make up the body of the company or organisation. We need to spend less time and effort talking, discussing and waiting and get with the doing. A company needs to create the right culture where employees are giving the responsibility to do the right thing but held accountable when they do not. And this starts with leadership.

Such commitments, however, only have meaning, effect and value if parties act consistently in relation to them, reiterate them frequently, facilitate an open dialogue about them, and enforce accountability for them. This may often involve a change in behaviour or making some teetering baby steps into the relative unknown for those anti-corruption programmes that have been based around the relative absolutes of what one can and cannot do.

Put another way, the behaviours we allow are those we encourage and the practices we reward are those which will be repeated. The sum total of our values, behaviors and practices becomes our culture. Basing a culture around morals may enable us to better face the day-to-day issues of corruption faced by most compliance practitioners and businesses.

Ultimately, companies and employees need to realise that they will be held to account for everything they do and everything that they say – whether good, bad or indifferent.

As Marcus Aurelius (Roman Emperor AD161-180) wrote in his sole text, “Meditations”: “If it is not right do not do it; if it is not true do not say it.”

Despite being written nearly two millennia ago, these words are as valid now as they were then.

VIII. Contributing to Sustainable Development Goal 16.5 and Strengthening Compliance with the Alliance for Integrity

Noor Naqschbandi

1. Introduction

Anti-corruption laws and regulatory standards have proliferated in recent years. Nowadays, consumers and non-governmental organisations are paying ever more attention to transparent supply chains. As a result, strengthening compliance and business integrity has moved up the corporate agenda. The private sector is increasingly aware of the fact that compliance is not only a necessity but also brings a competitive advantage.

2. Sustainable Development Goals (SDGs)

Policymakers too are increasingly aware of the negative impact of corruption. This topic is being discussed at international level: e.g, within the Group of Twenty (G20). Reducing corruption is an effective way of increasing foreign direct investment and decreasing the costs and risks of doing business. Furthermore, reducing corruption strengthens good governance and the rule of law. This is why the United Nations has identified corruption as a crucial, cross-cutting issue of the Sustainable Development Goals (SDGs). This global agenda for sustainable development outlines the major challenges for humanity and provides a comprehensive set of goals and concrete targets aimed at solving these challenges. Goal 16 (“Promote Peaceful and Inclusive Societies for Sustainable Development, Provide Access to Justice for All and Build Effective, Accountable and Inclusive Institutions at all Levels”) and target 16.5 in particular (to “substantially reduce corruption and bribery in all their forms”), indicate the importance of strengthening good governance and integrity at all levels. Increasing integrity in the private sector promises not only a more secure business environment and fairer competition for companies but also benefits for the public sector. For example, fighting corruption improves public procurement processes and reduces inefficiencies in public spending. The general public also benefits from more inclusive and sustainable economic growth and reduced inequality.

Ever more countries are stepping up their law enforcement. However, punishment alone is not enough. Prevention is key to ensuring business integrity. This is precisely where the Alliance for Integrity steps in: it contributes to the attainment of SDG target 16.5 by strengthening corruption prevention and business integrity globally.

3. Compliance and Culture

Within this context, the concept of “compliance culture” has assumed major importance. Experience shows that compliance goes far beyond adherence to the letter of the law. Rather, it should be integrated into the overall company culture and manifest itself in day-to-day business-processes. Compliance programmes should exist not only on paper but also in practice. Therefore, an effective compliance management system should focus on the members of the respective organisation and function as a moral compass for the employees. Raising awareness of ethical behaviour should aim at internalising compliance as a value so that employees implement company regulations in their day-to-day practice. In order to build up a strong and resilient compliance culture, it is essential that management set the right tone. Accordingly, management should demonstrate its support and commitment to compliance by communicating its importance to staff continuously and adequately as well as by carrying out compliance training and activities on a regular basis to facilitate an understanding of this issue. Only once a compliance culture is in place and actively practiced at all levels of a company will it begin to gain traction and credibility.

Furthermore, compliance has also assumed greater significance in business operations at global level. A compliance management system for international companies will only be effective if it takes local peculiarities into account. Codes of conduct and other relevant guidelines and regulations should be translated into the local language. Moreover, they should be promoted by practical examples and continuous training, especially in areas where corruption is perceived as endemic. That said, any assumption of a widespread “culture of corruption” cannot go unchallenged. This excuse is often used by management and employees alike when operating in business environments where corruption is perceived to be deeply embedded. Employees will argue that the “rules of the game” are different and companies have no choice but to accept them. The label “culture of corruption” conveys the message that, in certain sectors or jurisdictions, it is impossible to operate in any other way. For example, employees working abroad may feel that moral values and codes of conduct in “far-off” corporate headquarters appear unrealistic or otherwise do not apply to them. To counter this, management and employees should consider the fight against corruption as universal and demonstrate the importance of a sustainable global compliance culture. All companies have a responsibility to shape the business environment by nurturing a compliance culture.

4. Collective Actions

However, even larger companies are uneasy about changing corporate practices on their own. Companies typically fear losing business, being side-lined be-

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cause of their ‘bureaucratic’ approach or simply being overtaken by less diligent competitors. Therefore, the Alliance for Integrity believes that collective action by all relevant stakeholders is the best way to curb corruption and foster a compliance culture.

The World Bank Institute (WBI) defines collective action in its “Fighting Corruption Through Collective Action, A Guide for Business” as:

“[A] .. collaborative and sustained process of cooperation amongst stakeholders. It increases the impact and credibility of individual action, brings vulnerable individual players into an alliance of like-minded organisations and levels the playing field between competitors. Collective Action can complement or temporarily substitute for and strengthen weak local laws and anti-corruption practices” (WBI, 2008).

The Alliance for Integrity (“the Alliance”) is a business-driven, multi-stakeholder initiative between multinational companies, civil society, political organisations, and international institutions. The aim of the global initiative is to promote integrity through collective action among companies, their business partners and other relevant actors in the economic system. Commissioned by the German Federal Ministry for Economic Cooperation and Development (BMZ) and implemented by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, the Alliance is currently active in Brazil, Ghana, India, Indonesia and the respective regions.

5. Global Initiative

The Alliance for Integrity seeks to make a lasting contribution to the longer-term vision of achieving a corruption-free business world. Within this broader remit, the global initiative implements four proven approaches to prevent and combat corruption.

5.1 Peer-to-peer learning and international dialogue

The best way to learn is from others who encounter similar problems. The Alliance encourages its members to share their knowledge of challenges in different sectors and regions. Best practice examples provide suggestions and innovative ideas on how to effectively foster business integrity within a company and the economic system as a whole.

5.2 Public-private dialogue

The Alliance aims to tackle the taboo on discussing corruption that is still prevalent in many societies. In order to enhance business integrity within compa-

nies and the economic system as a whole it is necessary to raise awareness among all relevant stakeholders. The Alliance offers the opportunity to engage in the mutual exchange between businesses, political administrations and civil society representatives. The regular exchange between all relevant stakeholders from the public and private sectors helps to build confidence and trust among participants, encouraging them to pursue collective action.

5.3 Awareness raising and information-sharing across a wider professional audience

An important step in promoting integrity is the increased understanding and awareness of the negative effects of corruption among all of society's stakeholders. The Alliance gathers knowledge and shares experience at conferences, workshops and other fora dealing with corruption prevention and compliance. Furthermore, the initiative distributes and discusses research results and promotes practical solutions for the implementation of compliance within organisations.

5.4 Compliance training and train-the-trainer

The Alliance for Integrity's workshops and training courses (such as the *De Empresas Para Empresas* (DEPE) or "From Companies To Companies" programme), allow participants and their business partners to learn, train, and implement practical measures for increasing integrity in their organisation. For this purpose, the Alliance has developed specific workshops and training courses.

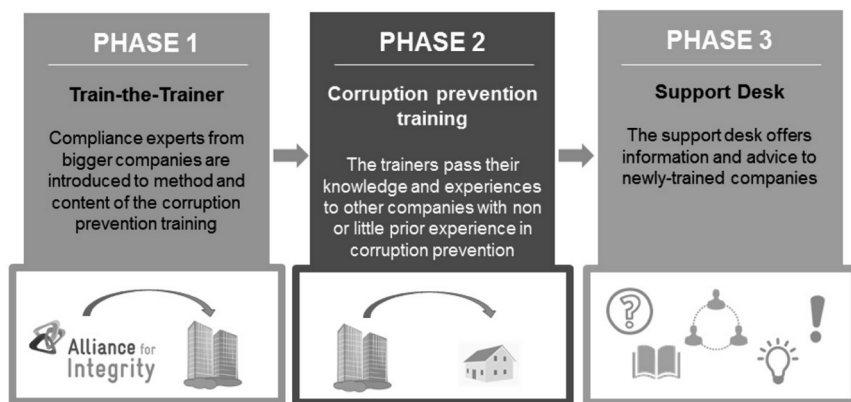
6. The Alliance for Integrity approach

The Alliance offers a practical, three-phase corruption prevention training programme that operates at global level.

In the first phase, representatives of large companies with considerable experience in the field of compliance receive instruction on the content and methods of the Alliance's corruption prevention training. Employees of large companies specialised in compliance are usually familiar with both the theory and practice of implementing a compliance management system. By contrast, representatives of SMEs often have little or no prior knowledge of corruption prevention.

Therefore, in the second phase, the representatives of large companies deliver compliance training on behalf of the Alliance to representatives of SMEs. This approach (developed by the Alliance) benefits both parties. Most SMEs do not have staff with expertise in the field of compliance. Very often, compliance tasks are handled by employees with a number of different responsibilities. This

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is why many SMEs suffer from an information deficit in relation to compliance. The Alliance tackles this problem by encouraging peer-to-peer exchange and sharing of good practices between companies. As a result, SMEs that undergo training acquire practical instruments to combat the risk of corruption and thereby improve their competitiveness on the global market. Larger companies also benefit: on the one hand, it shows clients and business partners that they are committed to business integrity and, on the other, conveys a credible and trustworthy compliance culture to their employees. Last but not least, larger companies can offer training to their business partners and suppliers who lack the necessary financial and human resources in this regard. This is not merely virtuous: some companies may be under a legal obligation to ensure their suppliers adhere to the minimum requirements of a compliance management system.

One reason for this training programme's success is the 'train-the-trainer' approach: representatives of major companies enjoy more credibility as trainers than international experts because they have practical experience of compliance in companies. Unlike the usual 'top-down' approach, therefore, the Alliance's training features an active exchange of experience and good practice.

Finally, in the third phase, participants of compliance training can access the 'Online Support Desk', where they receive operational support and background information on the topic. Many practical questions on how to implement a functioning compliance management system only arise after the training when the participants have settled back into their daily routine at the company. Therefore, the Alliance's 'Online Support Desk' also includes a network of experts that answers specific questions within 72 hours. In this respect, it is important not only to give practical advice on how to implement compliance measures but also to

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ensure that training participants know they are not alone in the fight against corruption and that there is a network supporting this endeavour.

To date, the Alliance has successfully trained over 500 representatives of companies and other organisations. The training programme has been implemented in ten countries all over the world (i. e. Argentina, Brazil, Chile, Colombia, Ghana, India, Indonesia, Mexico, Paraguay and Uruguay).

The Alliance for Integrity encourages companies to become part of the network and to engage in collective action to increase integrity in companies and the economic system as a whole. Together, we can make a significant contribution to SDG 16.5 and foster a global culture of integrity and compliance.

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IX. Penalties or Rewards – How Should Legislators and Justice Support a Sustainable Compliance Culture? Insights from a German Perspective

Dr. Sophie Luise Bings¹

1. Introduction

The topic discussed by Panel 4 raises the crucial question of how legislators and justice should support a prosperous and sustainable compliance culture. At the same time, the topic already points out two possible approaches in supporting a sustainable compliance culture by (a) providing penalties or (b) rewarding the efforts companies make to ensure compliance within their sphere of responsibility. To facilitate a productive discussion in the future, I will approach the topic in two stages:

1. providing an overview of the legal situation regarding penalties, rewards and other supporting tendencies in Germany
2. sharing with you some ideas on how legislators and justice could further support sustainable compliance culture. Ideally, this should take place at both national and international level.

2. Overview of the Legal Situation in Germany

2.1 Penalties or Rewards? The Status Quo under German Law

German law imposes fines and/or imprisonment for economic crimes. These include not only the bribery of public officials but also bribery in commercial practice, price fixing, market sharing, tax fraud, terrorist financing, money laundering etc.

Unlike other countries, German *statutory* law does not expressly provide for rewarding companies for compliance measures taken. By contrast, in the USA, the United States Sentencing Guidelines provide *expressis verbis* for a reduction of fines in the event that a company has implemented an effective Compliance Management System (“CMS”).

Nevertheless, the legal impact of an effective CMS is enormously important in Germany as well because this is the most effective, if not the only way that corporate executives can demonstrate to have fulfilled their supervisory obligations and, therefore, avoid liability in case of unlawful acts committed from within the company. This shows that, although statutory law does not expressly

¹ This contribution reflects the author’s personal legal opinion.

provide for rewarding companies, an effective CMS still has massive impact by protecting corporate executives and corporations from liability.

In order to understand this impact, one must take a closer look at the legal requirements preventing corporate executives and companies from liability. This, in turn, requires an understanding of the German rules on liability.

2.1 Overview of Liability Provisions under the German Act of Regulatory Offences

2.2.1 Supervisory Obligation of Corporate Executives

The general rule is that corporate executives (particularly CEOs and Managing Directors) are obliged to take supervisory measures to prevent criminal or regulatory wrong-doing by employees in the course of their employment. This ‘supervisory obligation’ is found in § 130 of the German Act on Regulatory Offences (“OWiG”) and some other statutes, especially corporate law, as well. The failure of company executives to comply with this supervisory obligation will constitute a regulatory offence subject to two major conditions:²

- There has been a criminal or regulatory offence committed by an employee or a person acting on behalf of the company (i. e. bribing a public official)
- and the supervisory obligation would have at least made the commission of the offence more difficult if it had been performed as required.

Under this rule, company executives can commit an offence if they fail to fulfil the supervisory obligation even owing to negligence. As a consequence, a fine can be imposed on executives *personally*.

2.2.2 Regulatory Fines Imposed on Companies

If a company executive is fined for the (negligent) breach of a supervisory obligation, a parallel fine can also be imposed on the company itself. The company’s fine can exceed any financial benefit that it obtains from the commission of the offence. Needless to say, such fines may amount to several hundred million euros.

2.2.3 Exemption from Liability Owing to the Implementation of a CMS

On the other hand, a duly performed supervisory obligation can exempt corporate executives and corporations from liability. The prevailing legal opinion is that the supervisory obligation can be fulfilled by implementing a CMS. In this respect, it is important that the CMS is designed to prevent employees from

² There are other conditions of lesser importance.

committing legal (especially criminal) offences in the course of their employment.

It must be examined in each individual case whether the requirement to comply with the supervisory obligation in § 130 OWiG has been satisfied, taking the circumstances of each company into account. Each company needs a different, individually designed CMS. Accordingly, each company requires an individual legal definition of the measures to be taken in order to avoid breaching the supervisory obligation. In my opinion, this is the only way of avoiding a negligent breach of the supervisory obligation. For this reason, in my opinion auditors/advisors and legal experts need to work together in order to implement an effective CMS successfully.

2.2.4 Summary of the Legal Situation in Germany

Failing to implement an effective CMS including respective controls and tests can lead to massive fines for both the company and its executives. On the other hand, an effective CMS can prevent such liability arising. German statutory law may not expressly provide for mitigating circumstances but there is still the possibility to avoid liability if an effective CMS is in place, which is of great significance.

2.3 Recent Legal Developments and Rewarding Tendencies in Germany

Recently, two important developments in German law have emerged: a court ruling by the German Federal Court which has highlighted that a CMS can reduce fines and the adoption of a law implementing a competition register.

2.3.1 Recent Court Ruling: Efforts to Implement CMS can Reduce Fines

In May 2017, the German Federal Court stated that when calculating a regulatory fine on companies, the efforts of a company to implement their own CMS must be taken into account in mitigation. With this ruling, the Federal Court has, for the first time, recognised that a CMS has the potential to reduce the fine amount. According to the Federal Court, this will apply even if the company implements or improves an existing CMS during ongoing proceedings in order to prevent similar legal infringements occurring in the future (Federal Court Judgement 1 StR 265/16 of 9 May 2017, marginal note 118).

This is good news, as it shows that it is worth implementing or working on a CMS at any time (even during ongoing criminal or regulatory proceedings!) and that it is never too late for improvements.

2.3.2 Statutory Competition Register

In July 2017, German legislators decided to introduce a new competition register. In general, the aim of the register is to make it easier for public authorities to ban any company convicted of economic offences from taking part in public tenders. Companies, which have been convicted of certain economic offences (especially relating to corruption fraud and anti-competitive practices and other related offences, or pursuant to §§ 130, 30 OWiG) shall be entered into the public register and thereby ‘blacklisted’.

Regarding the question of rewarding tendencies by the German legislator, I wish to mention two important aspects of the new competition register:

CMS Could Prevent Entry in the Register

It seems that an effective CMS can prevent companies from being entered into the competition register. This is because on the one hand, it helps prevent economic crime and, on the other, can exempt companies from liability under §§ 130, 30 OWiG. An infringement of which would lead to companies being entered in the register.

CMS Can Justify Deletion from the Register

Companies will remain registered for a period of 3 or 5 years depending on the economic offence. However, through a process of “self-correction” the company can be deleted from the register and take part in public tenders again. As far as “self-correction” is concerned, German law requires the company to take “definite technical, organisational and personnel measures that are appropriate to prevent further criminal offences or further misconduct”. In principle, the implementation or improvement of a CMS satisfies this requirement.

3. Some Ideas on How Legislators and Courts Could Potentially Promote a Sustainable Compliance Culture

The following provides some ideas as to how legislators could further support a sustainable compliance culture (from a personal view of the author):

3.1 Support by Authorities for SMEs when Implementing a CMS

Small and medium-sized enterprises do not often have the money, manpower and/or knowledge to implement a CMS. In view of this, authorities could provide at least initial help/guidance in implementing a CMS.

3.2 Rewarding the Work of Compliance Personnel in the Form of Legal Protection

The work of compliance personnel could be further rewarded in the form of protection. Compliance work is based largely on trust. This means that sheltering compliance personnel in a way that practically isolates them would not serve to promote a sustainable compliance culture. However, e.g. protection for compliance officers under labour law could strengthen their position within the company and make compliance work independent and thereby more effective. It should also be made absolutely clear that a person responsible for compliance tasks does not, by virtue of this position, have a ‘guarantor status’ which makes him automatically liable when other employees are guilty of criminal misconduct.

3.3 Self-Disclosure

Some countries reward the ‘self-disclosure’ of legal infringements by e.g. not imposing fines or at least taking mitigating circumstances into account when sentencing. This is not the case in other countries. This makes it difficult for companies to decide whether they should self-disclose or not: should they e.g. self-disclose in the US and thereby risk high fines in one or several other jurisdictions? If countries were to align their laws regulating the conditions and consequences of self-disclosure they would be even more effective in detecting and fighting misconduct.

3.4 Action required at EU-Level

Several jurisdictions do provide for rewarding, for instance:

US: Having/not having an effective CMS might lead to mitigated/aggravated sentencing (USSG).

UK: An effective CMS is considered a full defence in case of bribery-related offences (UK-Anti-Bribery Act and Six Principles).

France: Loi Sapin II provides penalties on certain companies for not implementing a CMS (and thereby supports compliance personnel in their struggle for budget, personnel and support).

Germany: According to new ruling by the Federal Court, efforts to implement a CMS (even when made during an ongoing judicial proceeding), must be taken into account for mitigated sentencing, which means a CMS can have fine-reducing effect. Furthermore, in my opinion, implementing an effective CMS as preventive measure might even lead to exemption from liability.

Although such rewarding tendencies for implementing a CMS can be observed at national level, action is definitely required at EU-Level: The European Commission imposes massive penalties on corporations particularly for price-fixing and market-sharing. On the other hand, it does not expressly recognise the efforts for implementing a CMS.

3.5 Action Required at International Level: Mutual Recognition of Fines (ne bis in idem)

When reflecting on what legislators could do at national and EU-level to support sustainable companies in their efforts to implement sustainable compliance culture, we should also question what could be done at an international level. In Germany (and presumably in many other countries), there is the fundamental right of *ne bis in idem*. This means that a person or company can only be sued once for the same offence. This principle should, in my opinion, also work at international level: on the one hand, there are laws with wide extraterritorial effect (i.e. US FCPA, UK Anti-Bribery Act) and, on the other, companies can be sued in several countries for the same offence (e.g. in the US, Germany, the UK and potentially other jurisdictions). This shows that the *ne bis in idem* principle does not work at international level. If there is mutual recognition of taxation by double-taxation treaties, why aren't there any treaties on the mutual recognition of fines? This would correspond the *ne bis in idem* principle as laid down in e.g. Art. 50 of the European Union's Charter of Fundamental Rights, Art. 4 of the 7th Additional Protocol of the European Convention on Human Rights and Art. 14 (7) of the International Covenant on Civil and Political Rights (which, unfortunately, applies only within and not between states).

X. The Nordic Model of Governance

Helena Sjöholm

1. Introduction

The article highlights how the Nordic model of corporate governance reinforces ethics and compliance and the role and responsibility of the Nordic boards in these issues. It ends with a personal reflection on how the boards can reinforce good governance by their working procedures.

The article is written for a panel debate on cross border compliance culture and governance, with the aim of reflecting on socio cultural differences in the implementation of compliance and governance structures. The author has been asked to focus on the role of the boards for compliance and ethics from a Swedish perspective.

2. Good governance creates values

According to an analysis published by Boston Consulting Group at the beginning of June 2016, Nordic governance creates values. The analysis concludes that the success of Nordic companies is attributable to a unique governance structure.¹

This raises two questions:

- What characterises the Nordic model of corporate governance?
- What role and responsibilities does it give to the Nordic board for securing good governance and compliance?

3. The role of the boards for compliance and ethics

The Nordic model of corporate governance gives the board a far-reaching responsibility to ensure that the organisation's working procedures are compliant and ethical. According to the Swedish Code on Corporate Governance (provision 3.1), the boards shall:

- define appropriate guidelines to govern the company's conduct in society, with the aim of ensuring its long-term value creation capability
- ensure that there is a satisfactory process for monitoring the company's compliance with laws and other regulations relevant to the company's operations, as well as the application of internal guidelines

¹ "How Nordic Boards Create Exceptional Value" published 8 June 2016 at <https://www.bcgperspectives.com/content/articles/corporate-development-transformation-nordic-boards-create-exceptional-value/>.

The responsibility has also been stressed in the latest revision of the *Guidelines on Good Governance* by The Swedish Academy of Board Directors (2014).

Many boards fulfil their responsibility by means of written guidelines, internal control reports and whistleblower systems. Many boards within the private and public sectors as well as Parliament have codes of conduct and there is an understanding that dealing with these questions properly will benefit the organisation and avoid costs in the form of trust, trademark or trial costs. Since 2010, all state-owned companies are to submit a GRI-report at the annual general meeting.

Many companies have implemented procedures and allocated functions for monitoring compliance. Most board evaluations also ensure that the board members are satisfied with the internal control and ethical regulation and the extent to which processes are considered optimal.

However, responsibility for compliance and ethics is not just limited to the board. The Nordic corporate governance model also gives the auditors, CEO and the shareholders a role to play in ensuring good governance, ethics and compliance. Therefore, it is worth taking a closer look at the Nordic model of corporate governance and how it supports compliance and ethics.

4. Roles and responsibilities in the Nordic governance model

Like other jurisdictions, the Nordic Companies Act stipulates that companies must have three decision-making bodies (the shareholder meeting, board of directors and CEO), and one controlling body (an auditor). However, their role and function differ in comparison with other international models of corporate governance².

4.1 The shareholders' meeting

The *shareholders' meeting* is the highest decision-making body. Theoretically, it can make all decisions in the company that are not, by law, a matter for another corporate body. Active and responsible ownership is fundamental to the Nordic model of governance. Although the law does not contain a legal obligation for shareholders to attend the shareholders' meeting and express their opinions, society takes the view that the owners should be involved by following the development of the organisation, expressing their opinion and expectations on the future development of the organisation and imposing ethical restrictions

2 For more information on the Nordic model (2014) see Per Lekvall "The Nordic Corporate Governance Model" at http://www.sns.se/sites/default/files/the_nordic_corporate_governance_model_0.pdf 31 July 2016.

by decision at the shareholders' meeting. To further reinforce the owner's ability to ensure that the organisation is well-governed, the Nordic model stipulates that the board members are to be elected at the shareholders' meeting. A shareholders' meeting can also dismiss the board members without explanation at any time. In other words, if the shareholders consider that the board is not governing the organisation effectively and ethically, they can simply elect a new one. Since the shareholders' meeting is the highest decision-making body, they can also issue regulations on governance, ethics and compliance, which the board is obliged to follow (provided the obligations are legal).

4.2 The statutory auditor: controls and reviews the boards and CEO administration of the company

It is also the shareholders' meeting that elects the statutory auditor. The purpose of the *statutory auditor* is to control the organisation from an owner's perspective. In Sweden, the role of the statutory auditor is not just limited to examining the company's annual accounts and accounting practices. He/she is also to review the administration of the company by the board and the executive management. In state-owned companies, a special auditor is also elected with the task of informing the owners of whether business processes are optimal and internal control is effective. The statutory auditor reports to the shareholders' meeting.

The direct link/interaction between the shareholders' meeting and the auditor allows shareholders to have an insight into the administration of the company and to act in situations where they consider the business is not being managed ethically, compliantly or optimally.

4.3 The board of directors: determines and ensures strategic focus and internal control

The board of directors is legally responsible for the management and organisation of the company and must therefore ensure that the company is run ethically and compliantly. The responsibilities of the board of directors are to:

- establish the overall aims and strategy of the company
- ensure there is a system for following-up and controlling the company's operations and risks as well as for monitoring the company's compliance with laws and other regulations
- appoint and, if necessary, dismiss the Chief Executive Officer
- ensure that the company's external communications are transparent, accurate, reliable and relevant.

According to the Nordic model of corporate governance, the board consists of non-executive members. It determines the organisation's decisions, policies, internal control by delegating powers to the Chief Executive Officer.

4.4 The Chief Executive Officer executes

The Chief Executive Officer is responsible for the day-to-day management of the company and answers to the Board of Directors. He/she conducts ongoing management in accordance with the latter's guidelines and instructions.

5. Nordic governance focuses on ethics and compliance through the division of power

The Nordic model relies on several principles that reinforce the governing systems focusing on ethic and compliance:

- *The division of duties and responsibilities.* The laws and codes separate the role and responsibilities of the corporate bodies. They give boards great power to control the company and direct ethical discourse by stating that they should ensure internal control and make strategic decisions. In contrast, the CEO has a purely executive managerial function. The division of roles also serves to strengthen the integrity of the board vis-à-vis the executive.
- *Independent boards.* The board is non-executive (i.e. consists of members that are separate from executive management). The CEO's subordination to the board also reinforces the latter's independence. It gives the board room to maneuver if it believes the CEO is not running the business ethically and compliantly.
- *Hierarchical chain of command.* The corporate bodies are subordinate to each other. The general meeting elects members of the board and can make decisions about the organisation, which the board is obliged to follow. The board elects the CEO, makes decisions and give instructions to the CEO, which he/she is obliged to follow. The CEO, in turn, can make decisions and issue internal rules which the organisation has to follow. This hierarchical chain of command gives each body a role in ensuring a compliant organisation.
- *The board members have individual responsibility for the organisation.* The board is a collective decision-making body but its members bear individual fiduciary liability which is decided at the shareholders' meeting. This means that the board members must act in the best interest of the company because their appointment imposes a duty of care and a duty of loyalty.

Another characteristic of the Nordic model is that it is *owner-oriented*. The corporate governance model gives great power to the general meeting and empha-

sises the importance of active ownership. It provides great protection for minority shareholders: for example, each shareholder has the right to participate and vote in the shareholders' meeting, and the shareholders' meeting may not make any decision that gives undue advantage to one shareholder or individual to the disadvantage of the company or any other shareholder. In companies with several owners, these provisions prevent a dominant owner from making unethical decisions at the expense of a minority owner.

The model is based on *self-regulation*. The Companies Act is pragmatic and facilitates self-regulation and the Nordic corporate governance codes are regarded as a means of continuously improving governance.

6. A third corporate governance model

The Nordic corporate governance model can be seen as a third alternative to the unitary-board system (one-tier) and the dual-board system (two-tier).

The unitary-board system (one-tier) consists of a general meeting and a board of executive directors. It is characterised by an integration of the governance and executive power. The executive directors appoint and elect statutory auditors and new board members. The dual-board system (two-tier) consists of a general meeting and two boards: the supervisory and management boards. In this model, the power of the company is, in practice, delegated to the management board since the decision-making power of the supervisory board is *limited to appointing and dismissing executive directors for material reasons*.³

At this point, the Nordic model differs from other governing models in three ways:

- The shareholders have the ultimate power
- The board has wide-ranging powers to run the company
- It makes a clear distinction between the non-executive board and the executive management function: the board of directors represents the will of the owners instead of corporate management.

7. Applying good governance

Every company has governance but not all have *good* governance. Good governance is ensured by working with the *right focus*: i.e. addressing the issues relevant to the organisations' compliance today and tomorrow. It does this by ensuring the business model benefits the shareholders and society, establishing *optimal working procedures* as well as *good relations and interaction* within the

3 See Per Lekvall p.60 in *The Nordic Corporate Governance Model* (2014) at http://www.sns.se/sites/default/files/the_nordic_corporate_governance_model_0.pdf.

board, between the CEO, owners and society. These three issues are also the most challenging when it comes to implementing or changing the structure of corporate governance.

Good governance depends on each corporate body having the integrity to focus on their role and raise difficult questions. However, relations in governance structure are sometimes resemble “*follow the leader*” or “*the Emperor’s new clothes*”: in other words, no one questions or introduces new ways of looking at decisions, performance or behavior. In this situation, the corporate governance models with provisions for good governance just fade away and vanish.

8. How can boards further reinforce compliance and good governance?

Working with small, medium-sized organisations within the private sector and the public sector, I see that boards can reinforce ethics and compliance in the following ways:

- *Integrating dialog on ethics into the board and their own policy documents.* Boards are very good at adopting ethical rules for the employees but sometimes fail to discuss the ethical standards they should meet and how to implement them in practice. I also see that the *Rules of Procedure*, *Instructions to the Chief Executive Officer* and above all the *Reporting Instructions* can develop with an ethical perspective. For example, the aim of the Reporting Instructions are to focus on when and how the CEO should give financial information to the board. However, Reporting Instructions can be developed and provide more information or key-indicators on what, in the future, can affect financial results.
- *Integrating the stakeholder perspective into the board rooms.* Globalisation and digitisation bring new opportunities and risk. Today, it is not enough that just the CEO and organisation has a stakeholder perspective. In order to evaluate risk analysis and formulate future strategy, boards need an understanding of how the business model affects different stakeholders and how stakeholders can affect the business model. The stakeholder perspective is essential to formulating good strategy and a basis for good innovation.
- *Integrated reporting.* Many companies write sustainable reports, which is very positive, but it is often separate from the financial report. The reports could be more integrated with the aim of having a holistic view of the organisation’s strategy, performance and governance. From this perspective, the framework for integrating reporting is very promising.
- *Margin for maneuver and optimal governance.* The basis for good governance is that each corporate body has an arena to act in. However, the roles are sometimes mixed up. The shareholders, desiring control, make detailed deci-

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sions. The CEO, desiring development, makes strategic decisions without the involvement of the board. The room for maneuver should be balanced by optimal working procedures and policies.

- *The engagement of the owners and statutory auditor:* The owners could be more involved in the controlling process and issue instructions on what to audit to a greater extent.

The aforementioned perspectives arise from the corporate culture and mindset of the owners, the board and the CEO, rather than the business mission.

9. Conclusion

I would like to conclude with four statements:

- Statement 1: Good governance is an interaction between the corporate bodies. All bodies have a role to play in achieving good governance and compliance.
- Statement 2: The model of corporate governance determines the rules and structure for the interactions. Therefore, the corporate governance model is central to the analysis of governance.
- Statement 3: Its separation of power and hierarchical chain of command makes the Nordic model a good basis for governance and accountability.
- Statement 4: Integrity operates as a shield for good governance.

XI. A Culture of Integrity as a Chance for Sustainable and Stable African Entrepreneurship

Tom Brown CAMS

1. Introduction

The African Continent is often forgotten and far too overlooked when it comes to international influence within a socio-political and economic setting. Yet this is a continent that consists of 54 countries (just under a quarter of the worlds recognised countries by the UN), contributes 3% of the world's GDP, holds 72% of the world's core natural mineral resources (bauxite, cobalt, gold, diamonds, uranium, copper, platinum etc.), an estimated 1.2 billion in terms of population. Ironically, its foreign direct investment (FDI) rating is disappointing: estimated at less than 1%. This is an unimpressive statistic by any standard, especially so considering its size of some 11.7m square miles and all its natural resources, human resources and talent as well as its huge potential for growth and investment. At the same time, Africa is home to some of the most impoverished citizens on earth by Western standards ,who get through life on less than a dollar a day. It doesn't take a rocket scientist to tell you that something is very wrong here.

Just imagine this for a moment: the combined annual revenue of Africa's five poorest countries does not come close to the wealth of today's world's richest man, Bill Gates.¹ Yet, seven centuries ago, the richest person in history (even by today's index-linked standards) with an estimated wealth of \$400 billion was an African named King Mansa Musa of Mali.² Irony isn't it (or is it just me)? So, what is the cause of this: how did the African continent get itself into this predicament?

The information above does give you an idea of the problem and the imbalance. However, to appreciate the context and deduce where the fault line occurs, we must separate "perception from reality". Take a look at any satellite photos of the world from Space and see the countries and continents lit up at night. Without a doubt, the African Continent is the darkest. From a "save the planet" perspective, Africa is certainly greener, with good ecological credentials. However,

1 OECD – Organisation of Economic Co-Operation & Development, Revenue Statistics of African Countries 2016 found at this link: https://stats.oecd.org/Index.aspx?DataSetCode=RS_AFR.

2 See Daily Star UK Article entitled "Richest Man in History was a King Worth £317 Billion in Gold", written by Andrew MacDonald, published 17th April, 2017 and found at this link: <https://www.dailystar.co.uk/news/latest-news/606334/billionaire-richest-man-earth-video-money-millionaire-cash-Mansa-Musa-gold-Mali-footage>.

if we view this in terms of economic reality, growth and development, it shows just how development in infrastructure, energy and resource is weak, slow and lacking in most countries within the African Continent. Several factors account for this but the common denominators that stand out are: corruption, lack of good governance, poor leadership and planning. The rest of the world sees this as a problem that hinders businesses. I, on the other hand, see Africa from a different perspective: one of vast untapped resources, opportunity and a people that want change and are slowly getting there. Like a skilled impressionist painter with a blank canvas, it takes several strokes of the brush, layers of paint as well as time and patience to produce a masterpiece.

This article will address this subject on the following five core questions based on some of my submissions made at the G20-inspired Viadrina Compliance Conference in Hamburg on July, 2017.³ The subjects of my contribution are based on questions discussed on Day 2 and are as follows:

- (i) How has corruption affected growth in Africa?
- (ii) What is needed to change the dynamics and encourage growth and development?
- (iii) How do you evaluate the current state of compliance in Africa?
- (iv) What countries do you see as champions that have already made significant progress in the area of integrity?
- (v) What advice would you give foreign companies seeking to invest in Africa?

The great German Philosopher, Friedrich Nietzsche once said "[...] *from chaos, comes order* [...]." This quote exemplifies the perception of the "African factor" in today's world. An often criticised world, thought to be behind the times, corrupt, difficult to do business with. In order to fit in, you will have to give into corruption – summed up by the phrase "This Is Africa" ("TIA"). For those who remember the Hollywood blockbuster "Blood Diamonds" with Leonardo DiCaprio, you will know where I am coming from.⁴ However, is it always this gloomy (as the world will have us believe)? Or should we as investors be braver, more supportive and envisage a long-term plan in our business strategy?

3 See link to the Viadrina Compliance Congress in Hamburg, dated 11th July, 2017 found at this link: <http://compliance-academia.de/en/vcc/>.

4 See summarised insight into movie from the Guardian News Article found at this link: <https://www.theguardian.com/film/2007/jan/28/leonardodicaprio.thriller>.

2. Fundamental questions

This contribution shows how business opportunities exist in a world which most of us perceive as chaotic and too difficult to do business with. By way of introduction, it will first examine the extent to which corruption has affected Africa.

2.1 Question 1: "How has corruption affected growth in Africa?"

To do justice to my submission, I must emphasise a hidden notion that is very often overlooked and far too judgemental: namely, bribery and corruption exists worldwide in all shapes, sizes and forms and within different societal structures. It is far too often stigmatised and blamed as the cause of Africa's problems. Whilst I do acknowledge some of this blame is true (having lived in Nigeria for over 29 years of my life), it is not the only problem and Africans are not the only problem. The embodiment of corruption is a notion that is relative from society to society. In some regions of the world (as in Africa), it is an "in your face" experience whereas in other parts of the world it is below the radar, hidden and packaged in a sophisticated format. Much the same can be said of case studies in the West and developed worlds.

Corruption in Africa, is endemic and in some countries has become the very fabric and foundation of society – not as a matter of choice but as a consequence of survival. That very survival instinct gives to two options: either accept the trend and live according to the adage that says, *"If you can't beat them, join them"* or, alternatively, do the honourable thing, refuse to be corrupted and move elsewhere. The latter is easier said than done.

If a society has the means of production, human resources, infrastructure, energy, market demand, a stable economy with the very basic of social amenities in good working condition, good governance and leadership, why do we see the levels of corruption that exist today? Why does the average migrant risk his life to cross the Mediterranean into Europe? He does so because he chooses to live. Growth, development, good governance, creation of jobs, reduced unemployment and a strong and positive socio-political and economic setting, in my opinion, reduces the need to rely on charity, vices such as bribery and corruption or the need to flee for greener pastures, which is what we see in today's European migration pandemic.

Let's pause and look at the actual causes of corruption with two simple real-life case studies. Consider this for a moment: Nigeria, Africa's wealthiest country and largest oil producing nation, is estimated to have had over \$400 billion embezzled through corruption since its independence in 1960, much of which has been siphoned out of the country and invested overseas or in financial institutions. This is an appalling figure and an abuse of trust and office by those who

have perpetrated this act over decades. However, it takes two to tango (as the saying goes) and this is where I beg to differ when the Continent is stigmatised with the notion of corruption. Take a look at the following case studies in response to my notion.

Case Study 1:

The infamous case of Halliburton and KBR was an eye-opener and the first case to really test the resolve of the United States of America's Foreign Corrupt Practices Act (FCPA). In brief, this case involved the bribing of Nigerian government officials to the sum of \$188 million. In return, KBR⁵ and several consortiums were granted the contract to build the lucrative liquefied natural gas ("LNG") plant on Bonny Island in the Niger-Delta region of Nigeria, valued back then at \$4 billion.⁶

The amounts involved were enormous by any standards. To put it into perspective, the former Head of EFCC,⁷ Nuhu Ribadu, stated that the bribes given in the Halliburton case and the penalty imposed against KBR & Halliburton (approximately \$500 million) could have built hundreds of kilometres of roads in Nigeria, over 120 schools and 15 hospitals to international standards.⁸ Who is to blame here? The greedy Nigerian officials, who put personal greed over public duty, or the foreign corporate executives who couldn't say "no" and put personal, corporate and shareholder interests over common decency and the rule of law? You must be the judge of that.

In my view, it's a chicken and egg situation. The problem and the blame doesn't stop with Africa's corrupt leaders: it goes much further with the same levels of culpability being borne by the gatekeepers, foreign countries and banks who ac-

5 The then subsidiary of Halliburton, whose Chairman at the time was Dick Cheney the former Vice-President of the USA).

6 See article by the ICIJ – International Consortium of Investigative Journalism – "Swiss Leaks: Files Open New Window On \$182 Million Halliburton Bribery Scandal in Nigeria" written by Will Fitzgibbon and Musikilu Mojeed, dated February 10th 2015 and can be viewed via this online link of: <https://www.icij.org/investigations/swiss-leaks/files-open-new-window-182-million-halliburton-bribery-scandal-nigeria/>.

7 EFCC – Economic and Financial Crime Commission is Nigeria's Law Enforcement Agency that investigates Financial Crime – An equivalent to UK's NCA, Germany's BKA or the USA's FinCEN. For further reading, look at this link: <https://efccnigeria.org/efcc/>.

8 See Nuhu Ribadu's interview on the Halliburton case – u-tube clip entitled "The Halliburton Case and Corruption in Nigeria", available online via this link: <https://www.youtube.com/watch?v=IhcmwCPf4PY> See also an intriguing insight into corruption in Africa and the gatekeepers crisis in this u-tube real life case study entitled "Looting Nigeria" or "The Nigerian Missing oil Millions – The London Connection", available online via this link: <https://www.youtube.com/watch?v=C-XwzgcmlUs&t=25s>.

cept these funds whilst hundreds of millions of Africa's citizens live in poverty and earn less than a dollar a day. The blame cycle goes on and on.

"But that was a case way back in the 1990's!" I hear you say. Therefore, let us consider Case Study 2 which is even more topical and typifies the problem Africa has when it comes to large scale corruption, abuse of office and plundering of natural resources for selfish gains.

Case Study 2:

We are all now familiar with the term "*blood diamonds*", thanks to Hollywood and the Kimberley process. However, very few have heard of "*blood timber*". In regions such as Brazil (the Amazons) and especially in Africa with the likes of the Congo, Democratic Republic of Congo ("DRC") and Central African Republic ("CAR") the mismanagement and exploitation of uncontrolled and unregulated logging activities has seen foreign investors directly or indirectly fund civil wars in the CAR region.

In 2013, CAR was plunged into a conflict that cost 5,000 lives and displaced millions. Hundreds of millions of Euros were paid into the hands of rebel leaders who committed numerous atrocities (including murder, kidnapping, rape and training child soldiers). This sounds all too familiar considering the similar crisis in Sierra Leone. However, the sad thing is that European, Middle Eastern and Asian logging multinationals unwittingly support this through bribery. This is fuelled by their desire to cash in and gain access to cheap logging activities in the region. The only way they can achieve this is to bribe the power brokers.

Global Witness⁹ made a brief documentary (which is currently being investigated) involving the French logging company IFB, the Lebanese firm SEFCA and the Chinese firm Vicwood. These two cases represent the tip of the iceberg when it comes to large scale inter-continental corruption. Small scale corruption is an inevitability fuelled by the state of affairs and desire to survive. The notion is "...if the big boss is doing it, why can't I? After all, the economy is down and I have five kids to feed..."

This is the vicious cycle and who can blame those involved when the core infrastructure to fuel growth and development needs the very "dollar investment" that is being siphoned out of the Continent through corruption? This is one huge task that Africa is moving away from ever so slightly but it needs international commitment and co-operation to maintain this positive drive and ensure success.

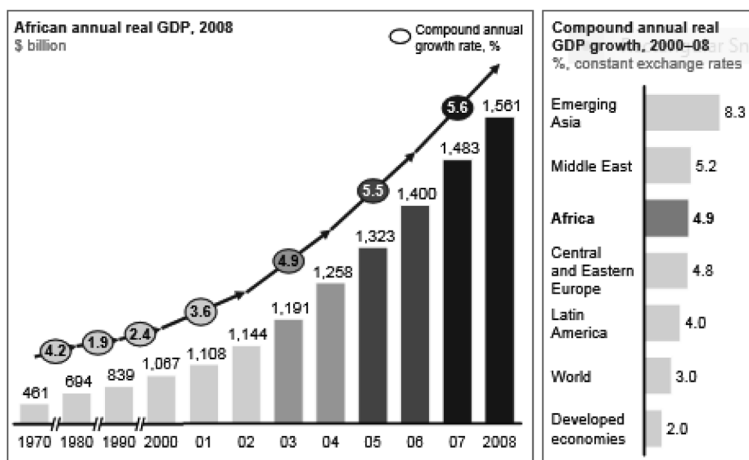
⁹ See Global Witness report of 15th July 2015 found at this online link: <https://www.globalwitness.org/en-gb/campaigns/forests/bloodtimber/>.

2.2 Question 2: "What is needed to change the dynamics and encourage growth and development?"

The United Nations has estimated that by 2050, more than half of the world's population will come from Africa.¹⁰ Today, Africa has by far the world's youngest population whose average age is 25. This is a promising feature when it comes to market economy, consumer growth, manpower, urbanisation and opportunities for investors. With Africa's economic growth accelerating in the early part of the 21st century, it is the world's third fastest economic region (as noted in the diagramme below).¹¹ Accordingly, the world is starting to think twice about the opportunities in this forgotten region.

Exhibit 1:

Africa's economic growth accelerated after 2000, making it the world's third-fastest growing region



SOURCE: International Monetary Fund; World Bank World Development Indicators; McKinsey Global Institute

What Africa needs today is not aid, charity or pity but good old investment and strong partnership with foreign investors. Africa also has a part to play by looking within itself and collectively building the desire and will to change. It must

10 See UN – United Nations article on World Population Prospects dated June, 2017 and available online at this link: <http://www.un.org/sustainabledevelopment/blog/2017/06/world-population-projected-to-reach-9-8-billion-in-2050-and-11-2-billion-in-2100-says-un/>.

11 International Monetary Fund, World Bank Development Projections found within McKinsey Global Institute Article entitled: MGI – Lions On The Move II – Realizing The Potential of Africa's Economies, dated September, 2016.

also realise that in order to progress and catch up with the rest of the world it needs to tackle corruption head on, rebuild its dilapidated infrastructure, improve security and foster good governance through exemplary leadership. Investors need confidence and trust and Africa needs partnership in exploiting its vast opportunities: this means a genuine partnership, not selfish greed and exploitation.

To achieve this, Africa must learn to guarantee security in investment and dispel the insecurity for which it is unfortunately notorious. Looking back at dictatorial regimes such as that of the late Idi Amin Dada of Uganda, Mobutu Sese Seko of former Zaire, General Sani Abacha of Nigeria, Omar Bongo of Gabon and, more recently, President Robert Mugabe of Zimbabwe, a trend and mentality starts to emerge. However, that era is slowly but surely changing owing to the fact that Africa has the youngest population boom in our generation.

Foreign investors also have a role to play by collectively learning to say “no” when it comes to lucrative contracts and opportunities. What breeds corruption on a massive scale is the willingness of some foreign companies and governments to secure deals by any means necessary. Zero tolerance should mean just that and be seen as a means to do the right thing and “collectively agree to stick to ethical principles”. The only way of breaking the vicious circle of corruption and laying to rest the (false) notion that “this is how business is done in Africa” is if change comes from both sides.

Consider this scenario: an African high-tech sector in e.g. “renewable energy” secures bids from five top foreign companies. All five have the same common goal of competing in order to win the bid. Ironically, all parties respect the ethical codes of conduct in doing business: no-one passes a “brown envelope” to leadership or interested parties within the African caucus who are in a position to influence the winning bid. The question here is: will there be an incentive to bribe if none of the companies had agree to do so in the first place? I think not.

Africa has huge untapped potential and its consumer market opportunities are projected to be in the region of \$1.4 trillion by 2020. The McKinsey Global Institute has done an analytical survey of several sectors in Africa and has confidently submitted that four groups of industries in Africa could generate some \$2.6 trillion in annual revenue by 2020. These four groups are mentioned below and are key to what I feel may be part of the trigger and catalyst to winning investment in the region. The industries/sectors are:

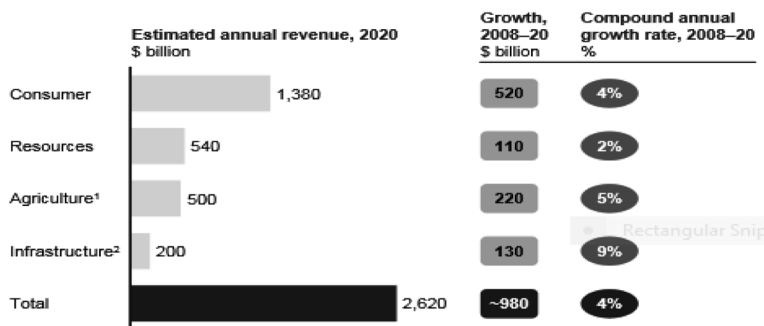
- Consumer
- Resources
- Agriculture
- Infrastructure

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The diagram below¹² shows McKinsey's analysis of how four industry sectors in Africa could have a combined revenue stream of over \$2.6 billion by 2020. This is a positive drive for investors who can see the potential for return on investment.

Exhibit 2:

Four groups of industries could have combined revenue of \$2.6 trillion by 2020



¹ We took the 2020 value of \$500 billion and calculated straight-line equivalent for 2020.

² Represents investment. Assumes need remains as same share of GDP through 2020.

SOURCE: McKinsey Global Institute

In the following, I will focus on two of the four sectors.

Agriculture

Africa has some of the most fertile soils in the planet and yet accounts for 60% of the world's arable land mass that has remained uncultivated.¹³ This is an astonishingly surprising and disappointing statistic coming from a region that has suffered some horrendous famines over the past three decades. Yet if we think positively, it is a massive opportunity that is untapped, under-developed and an avenue for massive foreign investment. The potential from the sale of cash crops and increase in demand for upstream products such as fertilisers, seeds, pesticides and machinery would make the region and sector highly sought after, thereby positively changing the dynamics towards growth and development.

The current downsides as to why this hasn't yet materialised could be the red tape bureaucracy and unfavourable policies. On the other hand, countries in

¹² McKinsey Global Institute Article entitled: MGI – Lions On The Move II – Realizing The Potential of Africa's Economies, dated September, 2016.

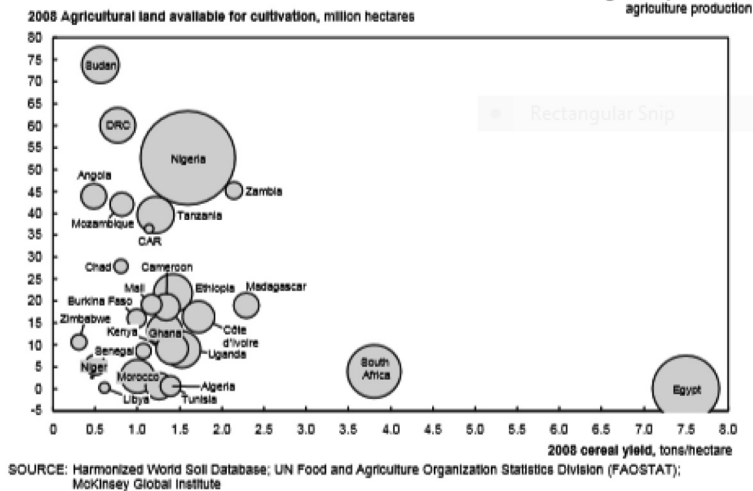
¹³ McKinsey Global Institute Article entitled: MGI – Lions On The Move I – The Progress and Potential of African Economies, dated June, 2010 at pg., 42 of 70.

Africa are slowly but surely opening up as they learn to take advantage of the Brazilian model. Back in the 1980s, Brazil re-cultivated millions of hectares of land and, with government support and FDI, Brazil became one of the largest producers of beef.¹⁴

The diagram below¹⁵ gives us an idea of the amount of available farmland within Africa that is currently untapped and open for business opportunities.

Exhibit 3

Potential for agriculture growth differs by country, based on the amount of available cropland and potential to improve yields



Infrastructure

Ask any African in the streets of his or her country and one key area they will whole-heartedly tell you is lagging behind the times is “investment in infrastructure”. Unfortunately, Africa does have a problem of “maintenance culture” (I know this first hand, as I was born in Africa and have lived there for 29 years of my life). This is especially true within public sector utilities such as electri-

14 See Article entitled: “World Beef Production – Ranking of Countries” dated November, 2017 and found online at this link: <http://beef2live.com/story-world-beef-production-ranking-countries-0-106885>.

15 McKinsey Global Institute Article entitled: MGI – Lions On The Move I – The Progress and Potential of African Economies, dated June, 2010 at pg., 42 of 70.

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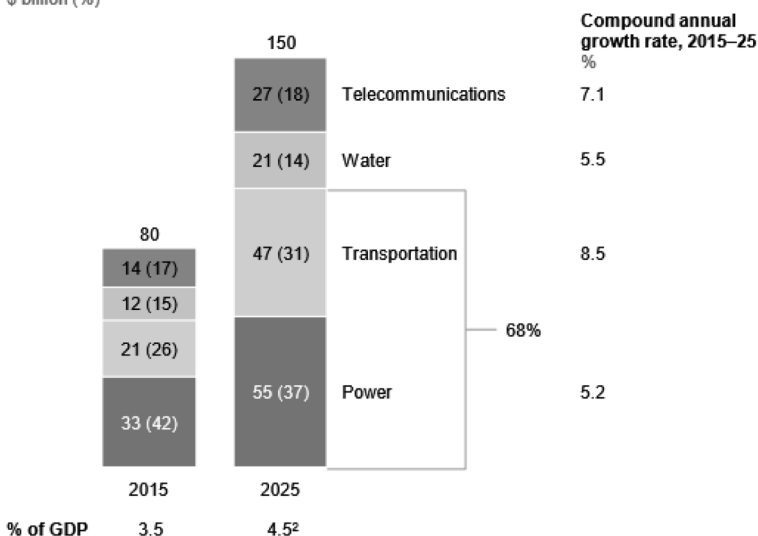
city, water, telecommunications, postal services, transportation (road, rail, airlines services) etc.

The nationalisation of these services, increase in “ghost workers” (illegally employed workers), poor management, inadequate maintenance, poor invoice collection practices etc. have destroyed the very existence of this once lucrative industry and therefore discouraged much-needed investment and interest from the private sector. This submission justifies the sentiments shared by experts who argue that, in order for Africa to compete, it needs to at least double its current investment expenditure on improvements to infrastructure. The diagramme below¹⁶ justifies this argument.

Exhibit 4:

Africa's spending on infrastructure needs to double from \$80 billion in 2015 to ~\$150 billion in 2025, with two-thirds spent on power and transportation

African annual infrastructure investment needed by sector¹
\$ billion (%)



1 Forecast spending need based on international benchmarks of infrastructure stocks and depreciation as a percentage of GDP; does not take into account potential optimization levers.

2 Spending 4.5% of GDP every year will allow Africa to build up its infrastructure stock levels to approximately 70% of GDP within a decade, a level that MGI has identified as typical for economies with good infrastructure levels.

16 McKinsey Global Institute Article entitled: MGI – Lions On The Move II – Realizing The Potential of Africa's Economies, dated September, 2016 at pg., 118 of 148.

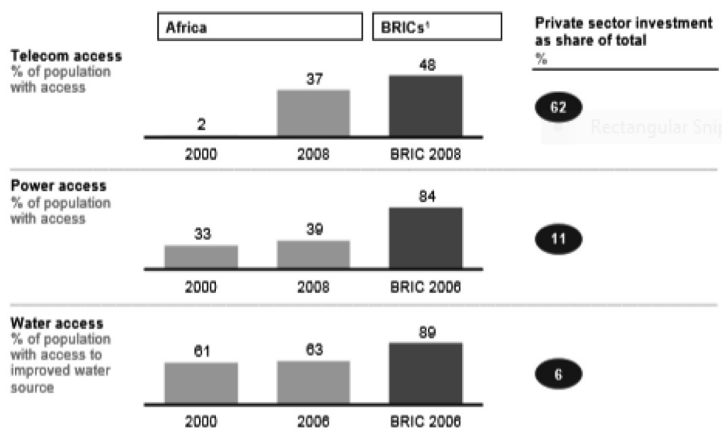
The revolution of the telecommunications industry has been massively successful. Today, there over one billion active subscribers to mobile phone services.¹⁷ This has also revitalised the banking industry where mobile banking and the telecommunication industries have become a phenomenal success. Africa today boasts some of the most secure online banking technology platforms. This is a significant factor: friends of mine who come to the UK shun the archaic technology we currently have in our banking system.

This sector has attracted foreign and private investment for building the much-needed infrastructure that has sparked this African success story. Take a look at the diagramme below which shows how far Africa has come within the period 2000 – 2008 when the boom in mobile telecommunications started.¹⁸

A comparison of the rise in telecommunications in Africa in comparison with other utilities and BRIC nations shows the importance of huge infrastructural investment. It also gives empirical evidence of what could very well happen if FDI, government and private investors turn their gaze to infrastructural investments in other utility sectors.

Exhibit 5:

Africa's telecom sector has grown rapidly, partly due to its large share of private investment



1 Brazil, Russia, India, China.

SOURCE: World Development Indicators; McKinsey Global Institute

17 The Economist – Article entitled: Mobile Phones Are Transforming Africa, found at this online link: <https://www.economist.com/news/middle-east-and-africa/21711511-mobile-phones-are-transforming-africa-where-they-can-get-signal-mobile-phones>.

18 McKinsey Global Institute Article entitled: MGI – Lions On The Move I – The Progress and Potential of African Economies, dated June, 2010 at pg., 49 of 70.

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China has realised that it too can benefit from both importing raw materials from Africa and investing towards the improvement of the dilapidated infrastructure in some African countries. The latter is the lifeline to getting the economy moving, creating jobs and triggering growth and development. China has also realised that if you build a strong long-term strategic plan and support the growth plans of infrastructural regeneration, the leadership and governments in the regions will back contracts that use Chinese products, technological know-how and long-term maintenance contracts: overall, a very lucrative deal.

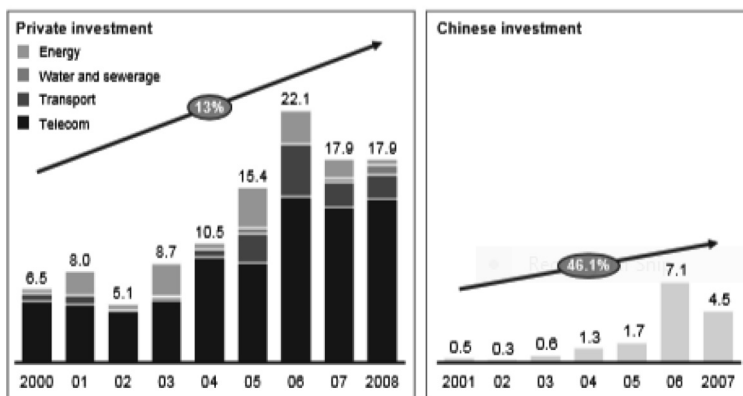
The downside and reality, however, is that China tends to use its own labour force which stifles the amount of foreign currency and earning capacity that an average African would or should have. The Western economies need to learn from this and devise a “win-win” formula to gain the trust and shift in dynamics if they are to succeed in the battle for African investment and opportunities. The graph below shows just how China is winning the game in Africa, with evidence of “double digit growth”, as their role and influence grows as Africa’s single largest infrastructure financier.¹⁹

Exhibit 6:

Private and Chinese investment in infrastructure are both growing at double-digit rates

Infrastructure investment in Africa
\$ billion

○ Compound annual growth rate



SOURCE: World Bank PPI database; PPIAF: “Building Bridges: China’s Growing Role as Infrastructure Financier for Africa”; ICA (2007); McKinsey Global Institute

19 McKinsey Global Institute Article entitled: MGI – Lions On The Move I – The Progress and Potential of African Economies, dated June, 2010 at pg., 48 of 70.

2.3 Question 3: "How do you evaluate the current state of compliance in Africa?"

People often ask me this and I often answer with a question. My response is: would you like a truthful or political answer? In the following, I provide both.

The political answer

Africa is going through a change at the moment and, with that change, comes the realisation that in order to attract foreign investment it needs to meet the standards of Western civilisation, particularly regarding its legal and regulatory framework. In this respect, anti-money laundering (AML), anti-bribery and corruption (ABC) regulations, respect for human rights, economic versatility, freedom, ease of doing business and respect for copyright and good corporate governance practices are some of the core foundations. Africa must ensure compliance with these fundamental standards if it is to achieve the recognition and respect it deserves from the rest of the world in terms of market opportunities and the potential for growth and development.

Now the truth

The truth and reality on the ground is somewhat similar but with a slight twist. This slight variance in opinion comes from African countries which believe that socio-political and economic change is one of the core pillars to a sustained plan of growth and development. There are other nations who cling onto a stagnant policy of control by a few. This leads to economic depression, naivety and failed policies which prevent the provision of several public services which many in the West far too often take for granted (i. e. healthcare, education, security, economic prosperity and the rule of law).

Transparency International's Corruption Perception Index ("TI-CPI") is a good starting point for understanding the state of progression or regression in compliance (particularly corruption). It can be safely said that progression in compliance equates to progression in economic growth, if we factor in the level of growth and development fuelled through foreign trade. Foreign investors gauge confidence and trust as the pinnacle to a sustained partnership of success. The litmus test to this is a country's governmental fiscal policy and regulatory framework. To put it simply: how easy and safe an environment is it to do business in and how secure is the investment and return? Stability in compliance and regulation is one pillar to this theory and Africa is definitely getting there, in my view.

If we look at the progression of a few countries in Africa from 2000 to date, we can see how progress in compliance has in fact shifted from "non-existent" to

“work in progress”. Compliance has indeed taken centre stage but in today’s Africa this is more of an evolution rather than a revolution. It is going to take some time before Africa gets to the levels of the so-called first world countries and, in my view, part of the main catalyst and driver for this change is through compliance and the growth of private sector investment.

The realisation of investment opportunities, revitalisation of what was once state-owned projects and development programmes has, in some sectors, fuelled consumer growth and improved the creation of jobs and opportunities in the private sector. Corporate existence and the need for good governance and proactive regulations that favour business is seeing a gradual shift in the way business is done in Africa. Admittedly, it is slow but it is there and happening: after all, Rome wasn’t built in a day. So how does the private sector change the spectrum of compliance?

Take the Dangote Group of Companies in Nigeria, for example: this is a local private structure investment vehicle owned predominantly by Africa’s richest man, Alhaji Aliko Dangote. Already well-known for his “consumer goods” and cement factory (one of the largest in the world), his company’s current petrochemical infrastructural investment on the outskirts of Lagos Nigeria within the Lekki Free Trade Zone region is a \$12 billion investment, with the potential to create over 60,000 jobs in the region and diversify Nigeria’s economy. The refinery, once finished, would be one of the world’s largest single pipeline refineries capable of producing 650,000 bpd.²⁰

This sector has been run by the Nigerian government for over four decades. It is tarnished by the decadence of corruption and the reputation of having none of its four oil refineries ever working at full capacity. The combined output of all 4 refineries when they do work is estimated at just 400,000 bpd – well below the single refinery currently being built through private investment.

The oil industry is the source of black market inflation, scarcity of fuel and importation of crude oil derivatives. For a country known as the world’s thirteenth largest producer of crude oil,²¹ this is a sector that surely discourages foreign investment because the outcomes mentioned above epitomise the lack of trust and confidence needed by investors to build, grow and improve on sustainability, efficiency and productivity. Then again, it is a sector filled with opportu-

20 See CNN News Publication – Inside Africa – Entitled “Africa’s Richest Man is Building an Oil Refinery” – Aired in 2016 and video found at this online link: <http://edition.cnn.com/videos/cnnmoney/2016/06/06/nigeria-dangote-oil-refinery.cnn>.

21 See List of Countries by Oil Producers via this link: https://en.wikipedia.org/wiki/List_of_countries_by_oil_production.

nities, consumer demand and little per capita investment from the private sector. It is mainly public and state funded.

The Dangote refinery, once built, is destined (or rather “targeted and driven”) to solving a problem that has existed since the early 70’s, when I was born. This is the power and potential of “private sector investment” fuelled by both local investment and FDI. The success of this programme will, in my view, put pressure on the public sector and government, which will have no choice but to embrace change and improve their act over time. The demand and need for consumer change is there and this shift in strategy and concentration of investment opportunity is where Africa is seeing the greatest change. Governments will have to swallow the bitter pill and realise that, in order to attract FDI, it will have to address several vices of which corruption and improved enforcement of regulatory reform and the rule of law top the agenda.

“Too far-fetched and wishful thinking” I hear you say? The following statistics clearly support my view that change is imminent on this Continent. By 2020, the McKinsey Global Institute estimates that Africa’s collective GDP will hit \$2.6 trillion and its consumer spending \$1.4 trillion. By 2040, the number of Africans of working age will amount to 1.1 billion. Considering population growth and age demographics, the Africans able to work will be between 18-35 years of age. It is obvious that this will lead to a growth in urbanisation, with an estimated 50 % living in cities by 2030 or mobile telecommunications (which in 2000 boasted 316 million subscribers) and is estimated to reach 700 million by 2020. There are opportunities in the African Continent compared to the rest of the world (even Asia), as shown by the graph below (showing urbanisation shift)²² and other evidence in this article.

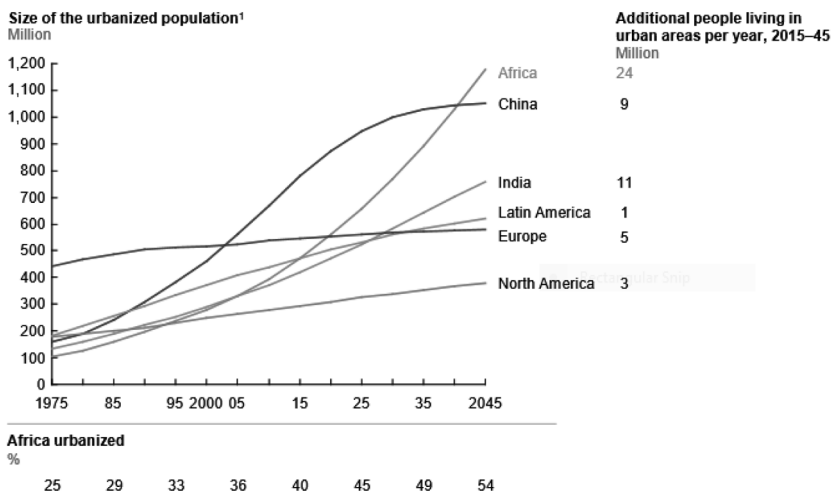
Still not convinced? Well, I can understand why. Although African countries have seen record promulgation of laws, rules and regulations in the field of compliance over the last decade, the problem lies not just in recognising these compliance issues but actually implementing the much-needed regulatory reforms. Some African countries are simply not there yet when it comes to comparing the state of development to that of the West / developed countries. However, my view is that we shouldn’t be comparing Africa’s level of change to that of Western civilised regions: rather, we should be encouraging change in a continent that is embracing change, however slowly.

So, which countries have undertaken these reforms and are now candidates for investment? The following examines this question in detail.

22 McKinsey Global Institute Article entitled: MGI – Lions On The Move II – Realizing The Potential of Africa’s Economies, dated September, 2016 at pg., 16 of 148.

Exhibit 7:

Africa is urbanizing faster than any other region; its cities are expected to gain 24 million people each year until 2045



¹ Population living in urban areas. UN forecasts last adjusted in 2014.

SOURCE: World urbanization prospects, June 2014 revision, United Nations population division; McKinsey Global Institute analysis

2.4 Question 4: "What countries do you see as champions that have already made significant progress in the area of integrity?"

This is a difficult one. Africa consists of 54 countries each with its cultural, economic, legal and societal differences. The issue at hand concerns a selection of African countries who fit the bill when it comes to "integrity" within compliance. This can be achieved by assessing six reasonably reliable governance indices from a report published by the African Corporate Governance Network (ACGN) in an article entitled "State of Corporate Governance in Africa – An overview of 13 Countries".²³ The countries are:

- Ghana
- Nigeria
- Egypt
- Kenya
- South Africa
- Mauritius

²³ African Corporate Governance Network (ACGN) in an article entitled "State of Corporate Governance in Africa – An overview of 13 Countries", dated February 2016.

- Malawi
- Mozambique
- Tanzania
- Tunisia
- Uganda
- Zambia
- Zimbabwe

The surveys used to assess overall integrity in compliance are as follows:

(a) **The Ibrahim Index of African Governance**

This is an index set up by Mo Ibrahim, one of Africa's billionaires, through the Mo Ibrahim Foundation which calibrates and measures the quality of governance in 54 African countries across four categories of governance performance indicators. These include safety and the rule of law, participation and human rights, sustainable economic opportunity and human development

(b) **The Index of Economic Freedom**

This is an index created and managed by the Heritage Foundation and it ranks 186 countries worldwide to determine the level of economic freedom in society through its tracker of 10 factors of economic freedom grouped into the following four broad categories: the rule of law, limited government, regulatory efficiency and open markets.

(c) **The Corruption Perception Index:**

This is an index by Transparency International, which measures and scores the level of corruption perceived in 168 countries around the world. The CPI index indicates the perceived level for public sector corruption on a scale of 0 (highly corrupt) to 100 (least corrupt). In the diagramme below, the index looks at a ranking based on 168 countries and the position of countries determines how corrupt they are. For example, in 2015-16 Tanzania was ranked 117th/168 and Mauritius was ranked 47th/168, making Mauritius a far less corrupt country.

(d) **Global Competitiveness Index**

This is an index created and managed by the World Economic Forum and it contains an annual assessment of the factors that drive productivity and prosperity in over 140 countries worldwide.

(e) **Ease of Doing Business Index**

This is an index created and managed by the World Bank which provides an objective avenue aimed at measuring business regulations and its enforcement across 189 countries / economies.

C. Cross Border Ethics, Compliance and Integrity

(f) Economist Intelligence Unit, Business Environment Rankings

This is an index that assesses the attractiveness of the investment climate across 82 countries. The full analysis of results from the 13 top-ranked African countries is as follows:²⁴

Exhibit 8:

Country	2015 The Ibrahim Index of African Governance ¹	2016 Index of Economic Freedom ²		2015 Corruption Perceptions Index ³	2015-2016 Global Competitiveness Index ⁴		2016 Ease of Doing Business Survey ⁵
	Overall Rank	Overall Rank	Level of economic freedom	Overall Rank	Overall Rank	Stage of development	Overall Rank
Egypt	24	125	Mostly unfree	88	116	Efficiency driven	131
Ghana	7	72	Moderately free	56	119	Factor driven	114
Kenya	14	115	Mostly unfree	139	99	Factor driven	106
Malawi	17	146	Mostly unfree	112	135	Factor driven	141
Mauritius	1	15	Mostly free	45	46	Transition economy (efficiency to innovation)	32
Mozambique	21	139	Mostly unfree	112	133	Factor driven	133
Nigeria	39	116	Mostly unfree	136	124	Transition economy (factor to efficiency)	169
South Africa	4	80	Moderately free	61	49	Efficiency driven	73
Tanzania	18	110	Mostly unfree	117	120	Factor driven	139
Tunisia	8	114	Mostly unfree	76	92	Efficiency driven	74
Uganda	19	102	Mostly unfree	139	115	Factor driven	122
Zambia	12	106	Mostly unfree	76	96	Factor driven	97
Zimbabwe	44	175	Repressed economy	150	125	Factor driven	155

What conclusions can we draw from this chart?

I will discuss the outcome and summarise my views on two of these indexes: the “CPI Index” by Transparency International measuring the level of corruption in the public sector and the “Ease of Doing Business Index” by the World Bank, which looks at the objective measures of business regulation and freedom.

²⁴ African Corporate Governance Network (ACGN) in an article entitled “State of Corporate Governance in Africa – An overview of 13 Countries”, dated February 2016 at pg. 118 of 158.

From the survey, it is quite clear that Mauritius is the least corrupt country among the top thirteen for governance and investment. With a score of 47th from the TPI index (now 50th from the 2016 index), this is pretty decent in a continent where 90% (50 out of 54) countries are considered “very high risk” in the world of compliance. Based on the recent 2016 CPI index survey, the five least corrupt African countries today are Botswana (35th), Cape Verde (38th), Mauritius (50th), Rwanda (51st) and Namibia (53rd). The following focusses on providing the reader with context and perspective.

In Europe and the rest of the world, the CPI rankings puts Denmark, New Zealand and Finland as the three least corrupt countries in the world. In fact,

most Scandinavian countries are among the least corrupt countries in the world and have maintained that position historically. Do they know something we don’t, and can we learn from them?

Surprisingly, the United Kingdom is ranked 10th; Germany and the United States of America are tied at 18th place, Spain is 41st, Italy 60th, China and India tied at 79th, Argentina 85th, Russia 131st and Nigeria 136th.²⁵ You be the judge of the outcome. Corruption exists everywhere in the world, in different forms and doses. How we determine which country is more corrupt is (in my view) a sensitive, surreal and subjective ideology.

If we consider the fact and supposition that, for corruption (especially in the form of bribery) to thrive, it must have either the “active and passive” forms of giving and receiving or the commission of an act for the improper and illegal benefit of another. If we look down on African countries, then we in the West need to take some responsibility for receiving the hundreds of billions of dollars embezzled over decades in private banks and tax havens. Should that not then be reflected in the rankings of some supposedly clean countries? I think it should. The likes of Switzerland, the United Kingdom, France and the USA need to do more to partner with these African countries rather than point the finger of blame.

In the next index (the “Ease of Doing Business”) Mauritius again tops the list. This index gives a sense of comfort, security and reassurance most investors need when it comes to investing. Most other African nations in our list of 13 haven’t done as well: I suppose this means there is room for improvement and that the problems must be tackled through regulatory reform and flexibility in economic and fiscal policies.

25 See Transparency International – CPI Index for 2016 found online at this link: https://www.transparency.org/news/feature/corruption_perceptions_index_2016.

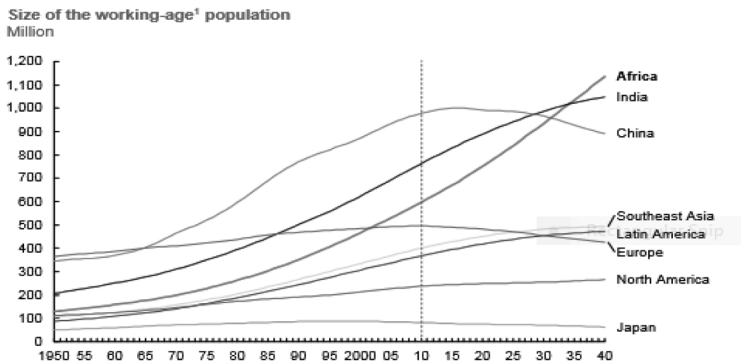
C. Cross Border Ethics, Compliance and Integrity

So, if asked again, what countries in Africa I see as making progress or as champions that have made progress in the field of integrity and compliance, I would say (with a degree of caution) Botswana, Namibia, Rwanda, Ghana, South Africa, Mauritius, Kenya and (unsurprisingly, Nigeria). True, the statistics suggest that, on average, the top five problematic factors for doing business in these countries in Africa are access to finance, corruption, inadequate supply of infrastructure, tax rates and inefficient government bureaucracy/political instability. However, I submit that the size of some of these nations together with the mindset and leadership mentality in government are also factors hindering immediate change. That said, positive change driven by the outlook of a younger, more educated and aware generation will spark a huge drive in economic growth.

Just take a look at the graphs below, which forecast that Africa will have the world's largest workforce and working age population by 2040, surpassing both India and China.²⁶

Exhibit 9:

Africa's workforce will become the world's largest by 2040



1 Population aged 15-64.

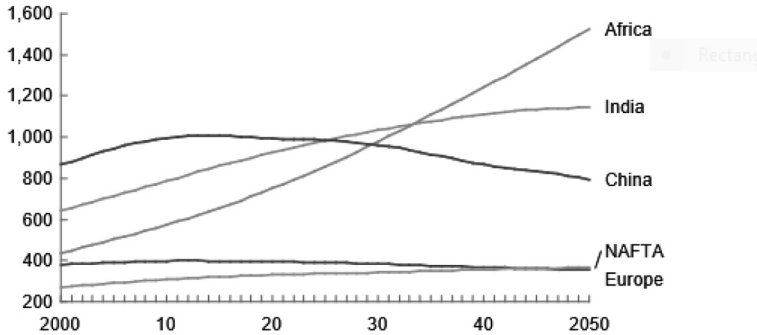
SOURCE: United Nations World Population Prospect; McKinsey Global Institute

26 McKinsey Global Institute Article entitled: MGI – Lions On The Move II – Realizing The Potential of Africa's Economies, dated September, 2016 at pg., 48 of 148.

Africa is set to have a larger working-age population than either China or India by 2034; employment is also picking up

Working-age population in largest countries and regions¹

Million people aged 15–64



Now is the time for the rest of the world to heed change and opportunity in a continent that is opening its doors to economic, regulatory reform and diversification – slowly but surely.

2.5 Question 5: "What advice would you give foreign companies seeking to invest in Africa?"

Africa's economy is growing rapidly as governments realise that lowering inflation, trimming foreign debt and reducing their budget deficits help pave the way to a brighter future – if managed properly and consistently by their governments.

Countries such as Ethiopia, Nigeria, Botswana and Namibia are realising that energising their markets by adopting creative and favourable policies, reducing trade barriers, cutting corporate taxes and strengthening regulatory and legal systems paves the way for foreign investment, particularly in the field of private equity investment. There is no disputing that the return on investment ("ROI") in Africa is huge. However, it is the confidence and security issue that worries investors and what ironically worries Africans is the realisation that some investors are only interested in the "bottom line" and what they can get out of Africa. Yes, the region has problems of corruption and yes, it is difficult to do business in most of its countries. However, it all starts with business, governments and investors taking chances, building a strong and positive strategic partnership with the right people, the right country and for the right reasons – not just selfish gain.

China succeeds today in Africa because it realises that to gain the trust in the region it needs to invest in the community. Certainly, there are problems and case studies of connivance in corruption and sub-standard practices. However, the general notion is that China today has done more for Africa than most other investor nations (at least that's what we are made to believe).

Success in Africa does not mean giving into corruption. It means being a partner towards embracing meaningful change. Investors can only succeed in Africa if they do the following:

- **Be prepared and be patient**

Doing business in Africa is not like any other region. Most foreign businesses either fail or become frustrated due to a lack of patience, understanding and appreciation of the fact that business in Africa does have a “Wild West” mentality. Let me explain with an example. If you are considering investing in energy (renewable energy or fixing the electricity problem in West Africa for example), it accepted that there is a need, a consumer market, a problem that needs solving and support from helpful governments. However, something else is there as well, what I call “negative market forces” and this is where foreign investors get it wrong. Fixing the energy crisis means stepping on a few toes of local (sometimes foreign) investors who make a living from the failed and dilapidated state of the infrastructure because they provide an alternative in the form of generators together with the petrol or diesel needed to run them. This is now threatened by doing the right thing in fixing Africa's energy crisis. What one needs is a strategy to plug that gap between fixing an age-old problem and potentially running people out of business. Providing an alternate source of income to plug the gap is a separate project which an investor needs to think about in order to reduce the likelihood of sabotage, red tape, resistance and corruption. Think smart, work with the people and understand the dynamics of the situation rather than bulldozing your way through. This requires building good relationships with the right people, which is the next point.

- **Build relationships with the right locals on the ground**

Whether through foreign governmental or private equity investment, the key to success in Africa is securing advice from the real McCoy. These are the local, trustworthy consultants, advisors and business partners who know the region well, who have lived and worked in the society and understand its ins and outs. The opposite to these people are what I would call “the usual suspects”, who don't have a clue about African culture, history or way of life.

- **Secure a local mentor or partner who commands respect in the region**

The typical African mentality of respect for one's elders is a principle engained and enshrined in the DNA of every true African and in every society.

A business alliance with a trustworthy power broker that commands respect and obeys the rule of law is often seen as a positive strategic plan for success in medium to large scale investment ventures. It is often seen as a seal of approval and much-needed protection in an environment that is going through rapid change but still clings on to old customs and practices. Selecting the right mentor is an insurance policy for success and security.

– **Be true to your intentions**

Contrary to popular belief that Africa is synonymous with corruption, those who truly know Africa will testify that the opposite is true. The Continent values honesty, integrity and the truth. The very suppression of the truth and corruption in the public sector does diminish the common good of the community who want to prosper. The EU water projects in Sub-Saharan Africa is a key example of this where society distrusts the state and public officials but are willing to work with private investors if they keep their promise of development and job creation.

– **Dream big and act big**

This isn't an arrogant attitude but a simple recognition of the many untapped opportunities that exist in Africa today. Take the energy sector, for example: Africa is a region that needs massive investment in improving channels for growth and development in every known sector (i.e. manufacturing, consumer, resources, agricultural and infrastructure sectors and industries). All these areas require energy (raw energy, in particular). Opportunities in renewables, electricity and gas are huge and untapped.

– **Give back to the communities**

The Niger Delta crisis in Nigeria is a constant reminder of how not to milk a nation of its resources and let the communities from which the wealth in oil is extracted suffer in abject poverty. The ensuing mess has resulted in a never-ending blame culture. The reality is that investing in your host community will not only improve their standard of living, growth and development; it will also secure your company's investment, security and future through the trust, respect and admiration of the community. By practicing good corporate governance and maintaining constructive corporate social responsibility, you will indirectly ensure public security for life!

3. Summary

Africa is here to stay and the future looks bright. Investors should tread with caution but open their minds to what is currently is a blank canvas with the potential for change, reinvention and continuity. In my opinion, equity investment

C. Cross Border Ethics, Compliance and Integrity

and an infusion of investment through the private sector is key to success in Africa. The public sector will realise its mistakes and eventually open up. Investors need to do their homework and align their thoughts and business acumen with the right consultants. They need to understand their market, respect the host nation's cultural and religious setting and partner with people who know the country first hand. By the same token, they should avoid partnering with business partners, consultants or advisors who claim to know the environment from their office desk thousands of miles away but really have no knowledge of the dynamics of African society, which is different and ever-changing.

Corruption is a hindrance, but businesses still thrive in the region and there are legitimate ways of making money in Africa without being the pawn of corruption. Africa has a bright future of innovation, prosperity and global relevance. Let us invest in her to ensure that she achieves this goal.

D. Cross Border Anti-Corruption Aspects

I. Towards a holistic approach of business integrity and the fight against corruption

*Nicola Bonucci*¹

1. Introduction

Cultivating a culture of compliance and business integrity has been a long-term investment. It began at the OECD over 20 years ago, with the signing of the OECD Anti-Bribery Convention. The Convention imposed that parties set criminal penalties on those who bribe foreign public officials in order to obtain business deals, introduced the concept of liability of legal persons in the context of corruption, and included the bribery of public officials of any state (i.e. not just of the states that are parties to the Convention). The Convention represented a big shift not only within the international legal landscape but also within the OECD. Concerning the latter, the Working Group on Bribery in International Business Transactions (“WGB”) took on the role as de facto “international regulator”, via a strong monitoring mechanism, to ensure countries adopted and implemented the standards they committed themselves to.

2. From control and command to a better understanding of corporate compliance

When we started out in 1997, the focus was on ensuring governments had the right frameworks in place. During this **initial period**, the WGB focused on ascertaining “whether the legal texts through which participants implement the OECD Anti-Bribery Convention meet the standard set by the Convention” (phase 1) and ensuring that countries had “the structures to enforce the laws and rules implementing the OECD Anti-Bribery Convention and to assess their application in practice” (phase 2). This was very much an intergovernmental process, with very little focus on corporate behavior or corporate responses to risk. This was in no small part due to the fact that “compliance” does not appear in the text of the Convention nor in the text of the Commentaries.

As the instrument and its implementation matured, there was a growing recognition on the part of the WGB and Members that combating corruption requires an all-hands-on-deck approach. We need to have governments, the private sector, and civil society all working together.

¹ With the assistance of Kristina Miggiani, OECD anti corruption consultant.

D. Cross Border Anti-Corruption Aspects

The **second period** of monitoring therefore fostered a far more holistic and inclusive dialogue. It saw the WGB engaging the private sector and working with partner organizations in the fight against bribery.

- This turning point came as a result of the 2009 OECD Recommendation for Further Combating Foreign Bribery of Foreign Public Officials in International Business Transactions & its Annex II, entitled “Good practice guidance on internal controls, ethics and compliance”. It was formally adopted on 18 February 2010 and is distinguished by the following characteristics:
 - It is the first and, to date, sole intergovernmental guidance on internal control and compliance for foreign bribery. The 12 principles have become widely adopted in today’s business environment.
 - Private sector engagement: the WGB shared the draft recommendation with the private sector before it was adopted. There was also a call for action by Business Organisations and Professional Associations.
- In 2010, the Working Group began the third phase of peer review, acting on the basis of a renewed mandate by the 2009 Anti-Bribery Recommendation to engage more closely with the private sector in the fight against foreign bribery. To this end, the private sector and civil society have continued to play an integral role as the area of compliance has become more systematically reviewed during WGB monitoring and as the WGB enters phase four of its review.

Outside the context of the WGB, there has been top-level political commitment to engaging the private sector through the G20’s promulgation of its first Anti-Corruption Action Plan in 2010. This recognized the integral role that the private sector plays in the fight against corruption.

3. Going beyond implementation

Commitment needs direction. The first ten years of monitoring implementation of the OECD Anti-Bribery Convention rightly focused on ensuring the world’s largest economies adopted robust frameworks to criminalise foreign bribery. There are now 41 parties to the Convention, representing nearly 2/3 of world trade.

The focus must now be on taking a multi-stakeholder, holistic approach to fighting foreign bribery. Given the complexity and scope of this crime, an informed and targeted approach is necessary. This is why the OECD’s experience and data in this regard is so important. The data helps government enforcers and compliance experts to better understand not only the anatomy of this crime but also what actually works in terms of preventing bribery in business. In this respect, the following findings are significant:

I. Towards a holistic approach of business integrity and the fight against corruption

- Quantitative and qualitative data reinforces the importance of company involvement. The OECD's Foreign Bribery Report measured, for the first time, the crime of transnational corruption. It was based on an analysis of data emerging from foreign bribery enforcement actions from the entry into force of the Anti-Bribery Convention in 1999 until 2014. In particular, it showed that:
 - 53 % of cases involved corporate management (41 %) or CEOs (12 %)
 - 1 in 3 cases instigated by self-reporting
 - 2 % of cases instigated by whistleblowers
 - 69 % of foreign bribery cases sanctions were imposed by settlement intermediaries involved in 3 out of 4 foreign bribery cases
- The fact that 1 in 3 cases were instigated by self-reporting reaffirms the importance of rigorous internal and compliance controls for both prevention and detection. The lessons learned from recent corporate scandals and record-breaking settlements also highlight the fact that, without effective compliance and ethics programmes, corporations will be at risk from corruption.
- More importantly, it shows that the solution will have to come from within companies themselves. Indeed, this is the value of self-regulation and initiatives led by companies for companies. This is also why, in 2013, the OECD, World Bank and UNODC took the initiative that led to the Anti-Corruption, Ethics and Compliance Handbook for Business. This contains a set of real-life case studies provided by companies and a comparative table of business guidance instruments on anti-bribery. This suggests that companies can learn from each other's experience of other.

4. Conclusion

This marks a new phase of public private partnerships, in which an organisation like the OECD and its members in government and the private sector must continue to further engage with the private sector and develop appropriate partnerships and common platforms. Tackling corruption is no longer the sole responsibility of governments and hard legislation. All players – including companies – must challenge themselves to look beyond simply operating within the law as a sufficient commitment to addressing corruption. The fight against all forms of corruption must go beyond minimal compliance with anti-bribery laws and must also include other “softer” forms. New initiatives and an overarching commitment to good governance and transparency can drive companies to redefine the fight against corruption as an opportunity to become actors of change, rather than merely viewing it as a risk to avoid.

II. Self-Regulation and Compliance: A Perfect Marriage

José Zamarriego

1. Introduction

The European Federation of Pharmaceutical Industries and Associations (EFPIA) represents the pharmaceutical industry operating in Europe. Through its direct membership of 33 national associations and 42 leading pharmaceutical companies, EFPIA is the voice on the EU scene of 1,900 companies committed to researching, developing and bringing to patients new medicines which will improve health and the quality of life around the world.

EFPIA principles applicable to member companies and associations establish the following requirements (amongst others): (i) subscribe to the aim of EFPIA; (ii) support EFPIA in attaining its objectives; (iii) defend the views expressed by EFPIA on core topics; (iv) implement high and transparent standards of conduct in dealings with external stakeholders and (v) abide by the EFPIA Statutes and Internal Rules (including EFPIA Codes).

2. Legal & self-regulatory background

The pharmaceutical industry is one of the most regulated sectors. There are international and national legislative frameworks that regulate a variety of major activities and practices pharmaceutical companies pursue. For example, specific rules cover good manufacturing practices, research & development initiatives, clinical trials, the promotion of medicines, the interaction of pharmaceutical companies with its main stakeholders (highlighting: healthcare authorities, healthcare professionals, healthcare organisations, and patient organisations), etc. Moreover, as with other industrial and business sectors, general legislation also applies: e.g. regarding intellectual and industrial property rights, personal data protection, fair competition, etc.

Notwithstanding previous legislation, we would like to draw attention to DIRECTIVE 2001/83/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 6 November 2001 (amending and superseding Directive 92/28) on the Community code relating to medicinal products for human use.

As we all know, a Directive is a legislative act of the European Union (EU), which requires Member States (“MS”) to achieve a particular result without dictating the means of achieving that result. For that reason, laws in the MS may differ since Directives normally leave them with a certain amount of leeway as to the exact rules to be adopted.

The scope of the aforementioned Directive (Art. 2) covers, “medicinal products for human use intended to be placed on the market in Member States and either prepared industrially or manufactured by a method involving an industrial process”.

Title VIII regulates Advertising and Information and Advertising (including Art. 86 to 100). In particular, two articles establish the following:

Article 97:

1. *Member States shall ensure that there are adequate and effective methods to monitor the advertising of medicinal products. Such methods, which may be based on a system of prior vetting, shall in any event include legal provisions under which persons or organizations regarded under national law as having a legitimate interest in prohibiting any advertisement inconsistent with this Title, may take legal action against such advertisement, or bring such advertisement before an administrative authority competent either to decide on complaints or to initiate appropriate legal proceedings.*
2. *Under the legal provisions referred to in paragraph 1, Member States shall confer upon the courts or administrative authorities powers enabling them, in cases where they deem such measures to be necessary, taking into account all the interests involved, and in particular the public interest:*
 - *to order the cessation of, or to institute appropriate legal proceedings for an order for the cessation of, misleading advertising, or*
 - *if misleading advertising has not yet been published but publication is imminent, to order the prohibition of, or to institute appropriate legal proceedings for an order for the prohibition of, such publication, even without proof of actual loss or damage or of intention or negligence on the part of the advertiser.*
3. *Member States shall make provision for the measures referred to in the second subparagraph to be taken under an accelerated procedure, either with interim effect or with definitive effect. It shall be for each Member State to decide which of the two options set out in the first subparagraph to select.*
4. *Member States may confer upon the courts or administrative authorities powers enabling them, with a view to eliminating the continuing effects of misleading advertising the cessation of which has been ordered by a final decision:*
 - *to require publication of that decision in full or in part and in such form as they deem adequate,*
 - *to require in addition the publication of a corrective statement.*

D. Cross Border Anti-Corruption Aspects

5. *Paragraphs 1 to 4 shall not exclude the voluntary control of advertising of medicinal products by self-regulatory bodies and recourse to such bodies, if proceedings before such bodies are possible in addition to the judicial or administrative proceedings referred to in paragraph 1.*

Article 99:

Member States shall take the appropriate measures to ensure that the provisions of this Title are applied and shall determine in particular what penalties shall be imposed should the provisions adopted in the execution of Title be infringed.

The pharmaceutical industry's primary obligation is to ensure that the medicines it produces benefit society. Medicines can have a critical impact on individual well-being and, for this reason, relationships with those who prescribe, dispense and use medicines must comply with the highest and most ethical, professional and responsible standards.

To this end, many years ago and according to the aforementioned EU Directive, EFPIA approved a self-regulation initiative consisting of several codes of practice that establish the minimum standards that pharmaceutical companies, national associations and members of EFPIA should follow. Nowadays, three EFPIA codes of practice exist:

- EFPIA CODE ON THE PROMOTION OF PRESCRIPTION-ONLY MEDICINES TO, AND INTERACTIONS WITH, HEALTHCARE PROFESSIONALS (*last version dated 2013*).
- EFPIA CODE OF PRACTICE ON RELATIONSHIPS BETWEEN THE PHARMACEUTICAL INDUSTRY AND PATIENT ORGANIZATIONS (*last version dated 2011*).
- EFPIA CODE ON DISCLOSURE OF TRANSFERS OF VALUE FROM PHARMACEUTICAL COMPANIES TO HEALTHCARE PROFESSIONALS AND HEALTHCARE ORGANISATIONS (*last version dated 2014*).

“The subsidiary principle applied to self-regulation”



3. Building trust & confidence

The pharmaceutical industry displays a high level of commitment to welfare and patient care as well as society as a whole and makes great efforts at all levels to develop new medicines and improve those currently available. It is aware that it cannot permit itself to have a low level of credibility and confidence among the general population.

Recent studies and a comparison of eight different industry sectors reveal the pharmaceutical industry to be in seventh position in terms of trust. Other industry sectors achieve higher rankings in the following order: technology, food and beverages, consumer packaged goods, telecommunications, automotive, energy. Only the financial services sector is ranked below the pharmaceutical industry.

Leaving aside the peculiarities of this sector which could influence levels of trust (for example, having to deal and fight against population diseases, characteristics of existing national healthcare services across European countries, restrictions and limitations regarding the provision of information and the promotion related with medicines), pharmaceutical companies have recognised, since the approval of the first self-regulation initiatives, that they have to increase their efforts and commitment in an ongoing process of improvement with the aim of enhancing their levels of credibility and confidence among the general population (Society).

D. Cross Border Anti-Corruption Aspects

One way of achieving this goal could be to demonstrate the implementation of effective and serious self-regulation systems which guarantee that pharmaceutical companies pursue their activities in compliance with the most stringent ethical criteria of professionalism and responsibility.

In this sense (and taking into consideration the relevance and pioneer character of the initiative adopted by the pharmaceutical industry that has no precedent among other industry sectors), the next section will briefly outline the transparency initiative approved on 2013 and materialised in the “EFPIA Code on Disclosure of Transfers of Value from Pharmaceutical Companies to Healthcare Professionals and Healthcare Organizations” (hereinafter “EfpiA Disclosure Code”).

4. Transparency initiative

In order to improve the understanding of the relationships between pharmaceutical companies and healthcare professionals and organisations, companies assumed the obligation to publicly disclose transfers of value to healthcare professionals and organisations. The first disclosures were made in June 2016 relating to transfers of value made during 2015 (subject to contrary provisions of national laws & regulations).



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National stakeholder platforms for education & enforcement



33 countries

SHU SciencesPo - Paris, 6 June 2016

II. Self-Regulation and Compliance: A Perfect Marriage

Each Member Association transposed the provisions of this Code into its national code by 31 December 2013. The Code sets out the minimum standards applicable to Member Associations, except where it is in conflict with applicable national law or regulation, in which cases deviations are allowed but only to the extent necessary to comply with such national law or regulation. Compliance with the Disclosure Code is an obligation of all EFPIA members.

The following table shows the information that will be disclosed and how:

Article 3 – Disclosure Categories

Level of Disclosure	Disclosure Categories
<u>Aggregate</u>	Research & Development ToV to HCPs/HCOs related to the planning and conduct of: a. Non-clinical studies (as defined in the OECD Principles of GLP) b. Clinical trials (as defined in Directive 2001/20/EC) c. Non-interventional studies that are prospective in nature and that involve the collection of patient data from or on behalf of individual, or groups of, HCPs specifically for the study (cfr Section 15.02 of the EFPIA HCP Code)
<u>Individual HCO Recipient</u>	Donations & Grants to HCOs Contribution to costs of events ➤ Sponsorship agreements with HCOs/third parties appointed by HCOs to manage an event ➤ Registration fees ➤ Travel & accommodation Fee-for-service & consultancy ➤ Fees ➤ Related expenses agreed in the fees for service or consultancy contract
<u>Individual HCP Recipient</u>	Contribution to costs of events ➤ Registration fees ➤ Travel & accommodation Fees for service & consultancy ➤ Fees ➤ Related expenses agreed in the fees for service or consultancy contract
Each company shall publish a note summarising the methodologies used in preparing their disclosures and identifying transfers of value for each category described above (Methodological Note).	

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Through this initiative, society will better understand how the relationship and collaboration between healthcare professionals and organisations benefits patients. It is a relationship that has delivered numerous innovative medicines and treatments and changed the way many diseases impact our lives. It will show that industry and professionals collaborate in a range of activities from clinical research to sharing best clinical practice and exchanging information on how new medicines fit into the patient pathway.

Transparency will also serve to demonstrate that such collaboration and relationship is conducted under strict rules, and even more importantly, respecting one basic principle, namely: “healthcare professional freedom and independence to decide which medicines should be prescribed”.

As mentioned before, this initiative has been adopted by 33 European countries each of which has their particularities and singularities. For example, Denmark,

D. Cross Border Anti-Corruption Aspects

France, the Netherlands, Portugal, Romania and Slovakia have specific transparency legislation in force, so deviations have been granted. When transposing this initiative at national level, most of the countries have to consider the applicable national legislation regarding competition and personal data protection and privacy.

III. Promoting a Fair Business Environment in ASEAN: UNDP's Approach

Elodie Beth, Liviana Zorzi and Alex Conesa-Pietscheck

The ASEAN Economic Community is currently the 7th largest economy in the world and its combined GDP is projected to grow 3–8% over the next four years. Despite rapid economic growth in countries in South East Asia, inequalities remain high and there are a number of obstacles to inclusive growth in the region. Inequalities, as measured by the population-weighted Gini coefficient, rose from 32.6 to 39.1 in South East Asia in the last 5 years.

In addition, poor governance and corruption are cited as major challenges to inclusive growth, as these discourage investment, increases the cost of doing business and fuels inequalities. In fact corruption is cited by investors as the number 1 obstacle to doing business in ASEAN (ASEAN Business Outlook). It is estimated that in Asia, 40% of companies have to pay bribes,¹ which creates uncertainty and undermines the level-playing field. This also represents an obstacle to trade among countries in Asia-Pacific and their international partners and is an impediment to achieving sustainable development.

Public procurement, which is a major interface between governments and private sector, is an area that can be leveraged to increase integrity in government contracts. Public procurement represents, on average, about 20% of the Gross Domestic Product (GDP) in countries in South-East Asia, and up to 30% or more of the national budget.² Given that public procurement particularly vulnerable to corruption mainly due to the extensive volume of business transactions that take place. It is estimated that the cost of corruption is countries that suffer from corruption in public procurement ranges from 1–3% of GDP.

1. Importance of the private sector engagement to achieve the Global Goals

The private sector is essential in development for a number of reasons. First, it is the main driver of economic growth, it represents the main source of employment creation in most countries, and it invests in human capital and workforce development. Furthermore, it creates and delivers goods and services that can benefit society at all levels, develops and deploys new technologies and innovations, and has the capacity to levy scalable solutions through market-based approaches. It also represents the primary source of tax and other public revenues

¹ ACFE Occupational Survey.

² OECD (2013) 'Government at a Glance'.

D. Cross Border Anti-Corruption Aspects

and directs social investment and philanthropic resources toward development. The private sector also has the ability to apply norms and standards in its operations that have an impact on important UN areas such as labour rights, environment, human rights and corruption.

At the same time, the private sector can also negatively impact development, including on the environment, social conditions, labour rights, corruption and conflict, to name a few. UNDP should work with and influence private actors to improve their performance and reverse such negative impacts.³

In addition to ensuring compliance with international standards, businesses need encouragement to embrace the Sustainable Development Goals as part of their overall business strategies, for instance via SDG indicators and reporting frameworks reflecting the private sector's positive contributions. Companies are increasingly taking steps to mainstream governance within their overall business strategies and become responsible partners in achieving the SDGs. Investors can reward meaningful SDG engagement through Responsible Business standards such as the such as the Principles of Responsible Investment. By joining efforts to pursue the SDGs, the private sector will be better positioned to unlock opportunities for growth in new markets.

2. UNDP's programme on Promoting a Fair Business Environment in ASEAN

Recognizing this challenge UNDP is delivering a new regional project (2018-21) in cooperation with the UK government to promote fair, transparent and predictable business environments in dynamic ASEAN countries by working with both governments and the private sector. This is part of UNDP's wider support to governments, private sector and civil society in building transparent and accountable institutions for sustainable development in Asia and the Pacific.

The UNDP strategy of engagement with the private sector of the Programme "Promoting a Fair Business Environment in ASEAN" is structured around five intertwined components:

1. Encourage governments to provide a level playing field for the private sector, in particular through transparent government processes for companies to access government contracts.
2. Partner with civil society and private sector to ensure high integrity standards in procurement and infrastructure projects, in cooperation with Transparency International and the Construction Sector Transparency Initiative.

³ UNDP (2012) 'Strategy for Working with the Private Sector'.

III. Promoting Transparent Government Contracts in ASEAN: UNDP's Approach

3. Encourage business and private sector entities to adopt robust anti-corruption standards, particularly those based on Article 12 of the United Nations Convention Against Corruption (UNCAC).
4. Galvanise private sector support for the Sustainable Development Goals (SDGs) (e.g. private sector construction companies for clean construction, procurement reform, infrastructure building, etc.), given that the UN Global Compact and Business for Social Responsibility (BSR)⁴ have also prioritised the SDGs agenda.
6. Joint advocacy on fighting corruption.

3. What are the UNCAC provisions to prevent corruption in the private sector?

The UN supports State Parties in the implementation of UNCAC⁵ provisions with technical assistance and capacity-building. Article 12 of the UNCAC includes provisions for State Parties to prevent corruption in the private sector. These respond to three main objectives:

1. To address private sector corruption
2. To improve preventing and monitoring functions in the private sector (through accounting and auditing standards)
3. To introduce sanctions in case of non-compliance when appropriate

Article 12 emphasises that each State Party must take measures (in accordance with its domestic law) to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative, or criminal penalties for failure to comply with such measures.

To prevent corruption in the private sector, institutions can:

- Cooperate with law enforcement, government agencies, and other private entities, which would encourage the reporting of corruption. For example, an effective way is to encourage not only individuals but also legal persons to report corruption-related crimes to law enforcement authorities without fears of reprisals in the company.
- Develop standards and procedures, codes of conduct, guidelines on corruption prevention, and corporate governance codes.
- Increase transparency amongst private entities, placing emphasis on the management of corporate entities.
- Prevent conflicts of interests by imposing restrictions, as appropriate, and for a reasonable period of time, on the professional activities of former pub-

⁴ <https://www.bsr.org/en/about>.

⁵ https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

D. Cross Border Anti-Corruption Aspects

lic officials or on the employment of public officials by the private sector after their resignation or retirement.

- Ensure that private enterprises have appropriate internal auditing mechanisms.

States Parties to the UN Convention Against Corruption should ensure that auditing standards and private sector frameworks for the establishment of parameters of internal controls provide a clear guidance and procedures on the core functions of internal audit in the private sector. States Parties are likely to have appropriate criminal sanctions against individuals involved in corruption in the private sector. Courts and other regulators should have the authority to impose a range of other sanctions, which may include financial penalties, compensation and confiscation penalties, debarment, supervision or closure of companies, disqualification of directors and suspension of professional accreditation of, for example, company accountant and lawyers.

It is the responsibility of the private sector to ensure integrity through robust contractor integrity and compliance programmes. These programmes include codes of conduct, integrity training programmes for employees, corporate procedures to report fraud and corruption, internal controls, certification and audits by a third independent party. They should apply equally to contractors and sub-contractors. Voluntary self-regulation can be undertaken by individual suppliers or members of any industry or sector, which pro-actively engage in the adoption of integrity measures, in particular by committing to anti-corruption agreements. It is essential that the information is accurate and maintained up-to-date to ensure the effectiveness of voluntary self-regulation by the private sector.

4. How can multi-stakeholder platforms be used to reform procurement?

UNDP recommends adopting a multi-stakeholder cooperation in tackling corruption. UNDP believes that governments should develop strong national legal frameworks in line with relevant international principles and frameworks. Businesses also have a vital role to play in utilising prevention mechanisms based on harmonised standards and good practices. Lastly, CSO, local community, and the media can act as watchdogs and strategic partners, by using, for example, integrity pacts to monitor major infrastructure projects.

For example, in Thailand, UNDP worked alongside the Office of Public Sector Development Commission, the Office of Public Procurement Management Department of the Comptroller General's Department Ministry of Finance, the Anti-Corruption Organisation of Thailand, the State Enterprise Policy Office and other key stakeholder to undertake an integrity risk assessment in public procurement and identify entry points for capacity development on procurement.

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As a result, UNDP supported the government of Thailand in carrying out an integrity-risk assessment of public procurement (based on internationally recognised methodologies from UNDP⁶ and OECD DAC/WB), and developed a *procurement capacity development roadmap*. Since its inception, the project has yielded several tangible results, which include the development of a procurement law, the introduction of integrity pacts, and the training of public officials on an Integrity Checklist in Public Procurement.

This exercise fostered a multi-stakeholder platform for change by:

- Engaging private sector in the risk-assessment surveys that identified gaps in the system;
- Consulting the private sector in the development of the procurement law
- Introducing integrity pacts
- Using independent monitors/witnesses for big contracts

As a result of this integrity risk-assessment, the Thai government has developed a new Public Procurement Act based on international models to improve value for money and integrity in the public procurement system and is currently working on a procurement curriculum.

To support countries in developing multi-stakeholder strategies to mitigate corruption risks in procurement, UNDP developed the Guidebook on In Tackling Integrity Risks in Government Contracts. The guidebook is designed to help countries diagnose integrity risks in public procurement at various levels of the system, as well as to indicate proper actions to mitigate integrity risks in the public procurement system and processes. In addition, the Guidebook will help governments in the region to upgrade their procurement systems prior to the second UNCAC Review Cycle.⁷ Accordingly, this Guidebook provides a user-friendly point of reference for governments in the region to navigate through existing international standards, good practices and tools from UNCITRAL, WTO, UNDP, UNODC, WB, OECD and Transparency International.

The UNDP Integrity Risk-Management Methodology follows a five-step structure:

1. Baseline data is collected which helps assess the risks and vulnerability, and also helps obtain a high-level commitment to embark on a public procurement integrity risk-assessment

6 <http://www.undp.org/content/dam/aplaws/publication/en/publications/capacity-development/undp-procurement-capacity-assessment-users-guide/Procurement%20Capacity%20Assessment%20Guide.pdf>.

7 State Parties to the UNCAC will be reviewed with the purpose of determining compliance of their public procurement systems with the UNCAC requirements under Article 9.

D. Cross Border Anti-Corruption Aspects

2. Training on risk assessment is done to both anti-corruption practitioners and staff in charge of procurement
3. Piloting the methodology (which involves multi-stakeholder engagement), identifying integrity risks as well as developing a reduction plan
4. Implementing a risk-reduction plan and up-scaling and replicating
5. Evaluating the impact, compiling and disseminating lessons learned to feed into knowledge for more interventions

5. Recommendations for stronger partnerships between governments and private sector in the context of ASEAN

Recommendations for stronger partnerships between governments and private sector are multifaceted and can take a variety of forms in the context of the newly created ASEAN Economic Community. The ASEAN Political Security Community Blueprint 2025 calls on countries to “instil a culture of integrity and anti-corruption and mainstream the principles thereof into the policies and practices of the ASEAN Community”. Therefore, cooperation between governments and private sector against corruption could be encouraged by:

- The development of strong governmental national legal frameworks that are in line with relevant international principles and frameworks
- Involving the private sector in engagement platforms with governments on how to promote the Sustainable Development Goals, emphasising the importance of addressing corruption to achieve this agenda. In this respect, private enterprises would be sensitised to the importance of imperatives, such as clean construction, procurement reforms, infrastructure building, etc. This could be done by building on ongoing advocacy efforts in ASEAN such as the ASEAN Corporate Social Responsibility Network.
- Encouraging private entities to put their own prevention mechanisms in place and adopt internationally recognised and harmonised standards such as ISO37001 (Anti-Bribery Management System Standard), which can accelerate the process to establish a culture of integrity, ethics and transparency in doing business, in line with UNCAC provisions. The current ASEAN-UN plan of action highlights the need to support all ASEAN Member States in the implementation of the UNCAC.
- Promoting high integrity standards for government and private sector in public procurement, through multi-stakeholder initiatives against corruption at country level and tools such as Integrity Pacts and the use of independent monitors. For example, governments could partner with a wide variety of actors, such as the private sector, civil society, NGOs and media, to closely monitor the delivery of big infrastructure projects and report inefficiencies, corruption, bribery, as well as perceived waste of public finances in government projects.

IV. Preventing Cross-Border Bribery through Effective Compliance Measures

*Christine Uriarte*¹

1. Introduction

Most multinational enterprises that are incorporated or listed in countries that are parties to the OECD Anti-Bribery Convention² have made significant progress establishing and implementing measures for preventing the offering, promising and giving of bribes to foreign public officials in order to obtain advantages in international business (foreign bribery). Nevertheless, bribery scandals continue to plague many international business deals, including major government procurements for infrastructure development. This article summarises the most important areas of progress in this field, as well as the remaining challenges, and offers suggestions on what can be done to overcome them. It also discusses business incentives for adopting effective compliance measures for preventing and detecting foreign bribery. It concludes with some ideas about what the future has in store for foreign bribery compliance.

2. Main areas of progress

The OECD Working Group on Bribery, which is composed of the 41 parties to the OECD Anti-Bribery Convention, conducts a systematic peer-review process to monitor implementation of the Convention. The parties, which account for more than 65 % of world trade, share a common interest in ensuring a level playing field for international business. It is therefore not surprising that the review process generates reports with hard-hitting recommendations to improve the

1 The following article summarises the presentation given by Christine Uriarte on 6 July 2016 at the 4th Viadrina Compliance Congress. The opinions expressed and arguments employed herein do not necessarily reflect the official views of the OECD, the governments of its member countries, the European Union or those of parties to the Convention on Combating Bribery of Foreign Public Officials in international Business Transactions. This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.).

2 The full name of the OECD Anti-Bribery Convention is the Convention on Combating the Bribery of Foreign Public Officials in International Business Transactions. Its 41 Parties are obligated to make it an offence to offer, promise and give bribes to foreign public officials to obtain advantages in international business. They are also required to make enterprises (“legal persons”) responsible for such bribery. The Parties are the 35 OECD countries plus Argentina, Brazil, Bulgaria, Colombia, Russia and South Africa: http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

parties' legislative and institutional frameworks for combating the bribery of foreign public officials.³

So far, the review process involves four separate phases. Phase 1, which constitutes a desk review of parties' legislative provisions, commenced in 1999, when the Convention came into force. Phase 2, which assesses parties' institutional frameworks for implementing the Convention, commenced shortly thereafter. Phase 3, which began in 2010, is largely completed. A major component of Phase 3 is an assessment of parties' implementation of the 2009 OECD Council Recommendation on Further Combating Foreign Bribery. The Recommendation states that parties should encourage companies to adopt adequate internal controls, ethics and compliance programmes or measures for preventing and detecting foreign bribery.⁴ An annex to the Recommendation provides guidance to companies on the adoption of such measures.⁵ Phase 4 began in 2016, and focusses on horizontal trends among the parties, as well as specific continuing challenges faced by the individual parties.

The Phase 3 reviews show that companies, particularly multinationals, are making important progress adopting anti-bribery management systems for preventing and detecting the bribery of foreign public officials. A 2015 study of foreign investors conducting business in Vietnam supports this observation. It shows that companies from parties that had undergone Phase 3 monitoring by the time of the survey period were less likely to have bribed Vietnamese officials than companies from parties that had not yet undergone such monitoring.⁶

Progressive trends in corporate compliance that have been observed in companies from parties to the Convention that have undergone Phase 3 monitoring, include increased attention to the following:

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- 3 The monitoring reports of implementation by the parties of the OECD Anti-Bribery Convention are automatically published here: <http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm>.
 - 4 The full name of the 2009 OECD Council recommendation is the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions: <http://www.oecd.org/daf/anti-bribery/44176910.pdf>.
 - 5 Good Practice Guidance on Internal Controls, Ethics and Compliance: <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/44884389.pdf>.
 - 6 Does the OECD Anti-Bribery Convention Affect Bribery? An Empirical Analysis Using the Unmatched Count Technique (N.M. Jensen, George Washington Schools of Business; E.J. Malesky Due University, 2015, Working Paper): http://www.natemjensen.com/wp-content/uploads/2014/09/20141205_OECD_Working-Paper_ejm.pdf. The study also shows that companies from Parties to the Convention with the strongest levels of enforcement bribed the least, and companies from non-parties bribed the most.

IV. Preventing Cross-Border Bribery through Effective Compliance Measures

- Managing the risks of foreign bribery specifically in companies' anti-corruption policies, codes of ethics and training, in addition to bribery more generally.
- Risks of bribing officials of state-owned and controlled enterprises.⁷
- Availability of whistleblower channels and protections.
- Risks of bribing through third-party business partners, including local agents, consultants, foreign subsidiaries, suppliers, distributors and contractors.
- Independence of board members, directors and the audit function, in particular from dominant shareholders.⁸

3. Continuing compliance challenges

Despite these significant advances during the OECD Working Group on Bribery's Phase 3 monitoring, further substantial progress is still needed. Recent surveys support this proposition, and one shows that compliance may have stood still over the last five years.⁹ Small and medium-sized enterprises that are not listed on any party's stock exchange generally have low awareness of the risks of foreign bribery and are in the early stages of adopting compliance programmes. Substantial improvements are also needed in other areas, including coordination with compliance functions for related business misconduct, the use of incentives to drive sales, and internal audits. Although whistleblower channels and protections have seen major improvements, they are still under-

7 The increasing trend to focus on the risks of bribing employees of SOEs is a significant milestone, particularly in light of OECD analysis, which shows that between 1999 and mid-2014, SOE officials received 80.11 % of total bribes in concluded cases of foreign bribery (See: OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials (2014): http://www.keepeek.com/Digital-Asset-Management/oecd/governance/oecd-foreign-bribery-report_9789264226616-en#.WAEZpvl9670#page4).

8 The G20/OECD Principles of Corporate Governance (2015), provide international benchmarks on ensuring the independence of the Board, etc., and other corporate governance issues: <http://www.oecd-ilibrary.org/docserver/download/2615021e.pdf?expires=1476625553&id=id&accname=guest&checksum=8EB566AF165E8398EC9FB450534AAE19>.

9 Corporate misconduct – individual consequences (Ernst & Young, 14th Global Fraud Survey, 2016): [http://www.ey.com/Publication/vwLUAssets/EY-corporate-misconduct-individual-consequences/\\$FILE/EY-corporate-misconduct-individual-consequences.pdf](http://www.ey.com/Publication/vwLUAssets/EY-corporate-misconduct-individual-consequences/$FILE/EY-corporate-misconduct-individual-consequences.pdf); Steering the Course: Navigating bribery and corruption risk – A global study by Hogan Lovells (2016): http://www.hoganlovellsabc.com/_uploads/downloads/Steering-the-course-report.PDF; Beneath the surface: The business response to bribery and corruption 2016 (Eversheds): <http://www.eversheds.com/global/en/what/services/fraud-and-financial-crime/bribery-corruption-report-zmag.page>. The Eversheds report provides evidence of a lack of progress over the last five years.

used. Also, there remains much more to be done by companies to manage their third-party risks.

3.1 Small and Medium-Sized Enterprises lagging behind

Small and medium-sized enterprises (SMEs) may be disadvantaged vis-a-vis large MNEs when it comes to compliance, mainly due to resources. It is difficult for SMEs to attend compliance events, where a significant amount of expertise on new trends in compliance is shared. Moreover, there is a plethora of guidance on compliance in the public arena, which is a very good thing, but it also makes it challenging for SMEs to distil and translate the information into implementable and cost effective compliance measures. This is the main reason why the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance encourages business organisations and professional associations to play an essential role in helping SMEs in this regard, including by disseminating information, and providing training and advice.¹⁰

3.2 Coordination with related compliance functions

In order to bribe foreign public officials, companies frequently engage in related illegal conduct. For instance, fraudulent accounting might be used to conceal the bribe payment as a legitimate expense in a company's books and records. The company might also launder the bribe payment, or request a tax deduction for the bribe by disguising it as an allowable expense such as a consultant's fee, or social and entertainment expense. If bribery is used to obtain a government procurement contract, it might also be part of a bid rigging scheme, or other unfair competitive behaviour. Ensuring closer coordination and information sharing between all the relevant compliance functions is therefore essential.

It is also important to integrate the anti-foreign bribery compliance function more broadly in major corporate decision-making right from the start. If, for example, a company's Chief Compliance Officer (CCO) does not have the authority to comment on the potential risks of entering a new market, or a merger and acquisition, until all the preparatory work has been done by the relevant business units, the CCO's advice may be seen as uninformed at best, and costly and obstructionist at worst. A recent survey showed that 53 % of CCOs feel that their compliance work is perceived as an obstacle to smooth-running operations.¹¹

¹⁰ OECD, *op. cit.*

¹¹ Steering the Course: Navigating bribery and corruption risk? A global study by Hogan Lovells (2016): http://www.hoganlovellsabc.com/_uploads/downloads/Steering-the-course-report.PDF

3.3 Use of incentives

There continues to be overwhelming evidence that many companies' incentive structures run contrary to effective compliance. Put simply, if on the one hand people on the ground in sales are told not to bribe, and on the other hand they must meet projected sales goals to get their bonuses, they are going to have to weigh these competing messages. This puts them at risk of succumbing to bribe solicitations, especially in environments where corruption is pervasive. They may even try to self-justify their conduct, by convincing themselves that they are helping underpaid government officials achieve a more comfortable standard of living. One recent study shows that 57% of CCOs feel that sales pressure is a significant challenge to reducing bribery, and 59% of sales staff worries about being fired if unable to meet sales targets.¹² Companies must therefore place a strong focus on ensuring that their compensation packages do not tip the balance in favour of corruption. One way might be by incorporating compliance into their incentive systems, such as by only rewarding sales contracts that have been obtained through clean business practices.

3.4 Use of whistleblower channels

A 2016 OECD study indicates that only 61% of surveyed companies had established whistleblower procedures.¹³ OECD analysis further shows that only 2% of concluded cases of foreign bribery between 1999 and mid-2014 were disclosed to law enforcement by whistleblowers.¹⁴ And among the 31% of concluded cases that were disclosed through self-reporting by companies to law enforcement, only 17% were detected internally through whistleblower reports.¹⁵

The low level of whistleblowing is often attributed to misplaced company loyalty and continuing fear of retaliation—not just fear of obvious overt forms of retaliation, such as loss of employment. Potential whistleblowers might worry that reporting bribery could damage relations with bosses, lead to less interesting work assignments, relocation, or reduced opportunities for promotion. They might also fear that their employers could discredit them by, for instance, trying to show that they suffer from mental illness, engaged in whistleblowing on previous occasions, or by revealing embarrassing conduct in their personal

¹² Hogan Lovells (2016), *op. cit.*

¹³ Committing to Effective Whistleblower Protection (OECD, 2016): http://www.keepeek.com/Digital-Asset-Management/oecd/governance/committing-to-effective-whistleblower-protection_9789264252639-en#.WAZMNP197IU. The survey was conducted in 2015 by the OECD Trust and Business Project.

¹⁴ OECD Foreign Bribery Report, *op. cit.*, Figure 3, page 15

¹⁵ *Ibid.*, Figure 4 on page 17.

lives. It might not be clear whether whistleblowing policies and laws provide protections from these kinds of actions.

3.5 Managing third-party risks

Effectively managing third-party risks is perhaps the most significant foreign bribery compliance issue. Companies seeking foreign business opportunities invariably need local business partners, including agents, consultants, suppliers, contractors, and for entering joint ventures. OECD analysis shows that 75% of concluded foreign bribery cases between 1999 and mid-2014 involved bribery through intermediaries, including sales and marketing agents, distributors, brokers, and members of the legal profession.¹⁶ The risk of foreign bribery involving local partners increases in sectors and activities that require frequent contact with public officials, such as for the purpose of obtaining licenses and permissions. The risk is very high where local business partners have contact with government procurement authorities. OECD analysis also shows that 57% of concluded cases of foreign bribery between 1999 and mid-2014 involved bribes to obtain public procurement contracts.¹⁷

Although there has been real progress by companies on the need to conduct third party risk assessments and due diligence since the beginning of the OECD Working Group on Bribery's Phase 3 monitoring, a recent study shows that 20% of companies still do not pay adequate attention to this issue.¹⁸ Formidable monetary penalties have been imposed on several companies in recent years for bribery through intermediaries; some of the biggest penalties have been imposed in the United States for bribing foreign public officials through intermediaries, contrary to the Foreign Corrupt Practices Act (FCPA). Some of these cases involve bribing through foreign subsidiaries.¹⁹

The risk of bribing through intermediaries exists for controlled as well as non-controlled business partners. However, companies should at least have more tools at their disposal for managing the risks of bribing through business partners over which they have control. In particular, they should be able to ensure that such business partners implement adequate compliance measures.

16 *Ibid.*, Figure 16 on page 29.

17 *Ibid.*, Figure 20 on page 32.

18 Corporate misconduct – individual consequences (Ernst & Young, 14th Global Fraud Survey, 2016): [http://www.ey.com/Publication/vwLUAssets/EY-corporate-misconduct-individual-consequences/\\$FILE/EY-corporate-misconduct-individual-consequences.pdf](http://www.ey.com/Publication/vwLUAssets/EY-corporate-misconduct-individual-consequences/$FILE/EY-corporate-misconduct-individual-consequences.pdf).

19 Information about United States settlements under the FCPA for bribing through foreign subsidiaries, including in cases against Avon, Bi-Rad Laboratories, and Hewlett Packard, can be found on the US Department of Justice website: <https://www.justice.gov/justice-news>.

Companies should also make sure that business partners over which they do not have control implement compliance measures that are adequate for addressing the bribery risks raised by the transaction in question, such as bidding on a government procurement project. Assessing the risk should involve all the pertinent factors, including the level of corruption in the foreign country and business sector involved, as well as the nature and size of the transaction. Where it is not possible to ensure that a potential business partner has in place adequate compliance measures to address the bribery risk, it is necessary to take appropriate steps, such as delaying the transaction until the issue can be rectified, or terminating the transaction when rectification is not possible.

In order to effectively manage third party risks, it is necessary to know the identity of the beneficial owners of potential business partners. Although the recent Panama Paper leaks succeeded in raising public awareness of this issue, policy-makers had been struggling with it for some time.²⁰ Impetus for change has been driven by Recommendations 24 and 25 of the FATF Recommendations, which specifically address transparency and beneficial ownership of legal persons and legal arrangements.²¹ The Global Forum on Transparency and Exchange of Information for Tax Purposes is also a force for reform.²² The G20 High Level Principles on Beneficial Ownership Transparency address the need to prevent the misuse of legal entities for illicit purposes, such as tax evasion and money laundering, as well as corruption. Although these standards are driving change at the national level, many jurisdictions still have a long way to go. In the meantime, it will be difficult for companies seeking business opportunities in such jurisdictions to be able to obtain and verify information about the beneficial ownership of their potential business partners. This will be a factor to take into account when conducting third party risk assessments in relevant jurisdictions.

3.6 Independence of the audit and compliance functions

An independent audit function is essential for detecting and preventing corruption. In addition, CCOs will be much more effective if the corporate governance

20 G20 High Level Principles on Beneficial Ownership Transparency (2014): http://www.g20australia.org/official_resources/g20_high_level_principles_beneficial_ownership_transparency.html; and Recommendations 24 and 25 of the FATF Recommendations (2012): http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf.

21 FATF Recommendations (2012): http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf.

22 See the 2016 Terms of Reference to Monitor and Review Progress towards Transparency and the Exchange of Information on Request for Tax Purposes: <https://www.oecd.org/tax/transparency/about-the-global-forum/publications/terms-of-reference.pdf>.

structure ensures their independence and direct access to key decision-makers. Recent analysis and surveys indicate that, generally speaking, foreign bribery prevention and detection could be improved through more attention to the independence of the internal audit and compliance functions.

OECD analysis shows that of the 31 % of concluded foreign bribery cases between 1999 to mid-2014 that were brought to the attention of law enforcement authorities through self-reporting, only 31 % were detected by the internal audit function.²³ Further study is needed to understand the reasons why the internal audit function is not detecting a higher percentage of concluded cases. But anecdotal evidence suggests that at least in some companies, the internal audit function could much more rigorously scrutinise payments entered in the books and records that might represent bribes, especially where the books and records contain expense categories that could easily be used to disguise such payments. Such evidence also indicates that in some companies, reports of suspicions of bribery by the audit function are frowned upon by senior management.

The independence of the CCO is another major area requiring further attention by many companies. One recent study shows that only 39 % of CCOs report directly to the CEO.²⁴ If the CCO must go through layers of management, such as the CFO or General Counsel, there is an increased likelihood that suspicions of company wrongdoing would be filtered, or not make it to the CEO or board level at all. Providing the CCO with sufficient independence sends a strong message that senior management is invested in the compliance function, and makes “tone at the top” a fact and not simply rhetoric.

Convincing the private sector that compliance is necessary.

3.7 Risk of enforcement

Enforcement of foreign bribery offences is on the rise. Between 1999 and 2014, 361 individuals and 126 companies were sanctioned in criminal proceedings in 17 Parties to the OECD Anti-Bribery Convention. More than one-quarter of the individuals were sentenced to prison. A number of fines set records, particularly those imposed pursuant to the United States Foreign Corrupt Practices Act (FCPA) (See table).

²³ OECD Foreign Bribery Report, *op. cit.*, Figure 4, page 17.

²⁴ Hogan Lovells (2016), *op. cit.*

FCPA Top Ten Enforcement Actions

Company	Sanction amount (USD)	Year
Siemens AG (Germany)	USD 800 million	2008
Alstom (France)	USD 700 million	2014
KBR/Halliburton (United States)	USD 579 million	2009
BAE (United Kingdom)	USD 400 million	2010
Total SA (France)	USD 398 million	2013
VimpelCom (Netherlands)	USD 397.6 million	2016
Alcoa (United States)	USD 384 million	2014
Snamprogetti Netherlands B.V. / ENI S.p.A (Netherlands/Italy)	USD 365 million	2010
Technip SA (France)	USD 338 million	2010
JGC Corporation (Japan)	USD 218.8 million	2011

Source: FCPA Blog, <http://www.fcpablog.com/blog/2016/2/19/heres-our-new-top-ten-list-with-vimpelcom-landing-sixth.html> (accessed 12 August 2016)

Although to date, companies mainly fear enforcement under the U.S. FCPA, and the United Kingdom Bribery Act, 12 other Parties to the OECD Anti-Bribery Convention have also imposed sanctions for foreign bribery.²⁵ Since many of these sanctions have been imposed for bribing through intermediaries,²⁶ companies, particularly MNEs, are increasingly paying much more attention to the risk of bribing through local business partners (see discussion under “Managing third party risks”). The flip-side to increased due diligence on potential business parties, is that companies wishing to enter joint ventures, supply and distribution chains, or act as agents and consultants for MNEs, need to establish and maintain effective compliance measures to make themselves attractive business partners.

25 These countries are: Belgium, Canada, France, Germany, Hungary, Italy, Japan, Korea, Luxembourg, Netherlands, Norway, Sweden and Switzerland.

26 OECD Foreign Bribery Report, *op. cit.*, Figure 16, page 29.

3.8 Smart business decision

Fear of foreign bribery enforcement actions is not the only reason for companies to implement effective compliance measures. Indeed, companies would be making a huge mistake if they focused on the risk of enforcement when conducting foreign bribery risk assessments. This is because of the myriad business incentives for making compliance a priority. Multilateral financial institutions, such as the World Bank, debar and cross-debar companies and individuals that violate the institutions' anti-corruption policies and procedures. Countries that belong to the OECD Export Credit Group have endorsed an OECD Council recommendation that obligates them to take measures for preventing and detecting bribery in relation to transactions benefitting from their support.²⁷ Pursuant to another OECD Council recommendation, adherents should require that firms bidding for government procurement contracts adopt anti-corruption compliance measures.²⁸

There is also evidence that it is much harder for firms that engage in corruption to attract and keep talented employees. According to a recent study, 80% of employees would not work in a company with a history of corruption.²⁹ Moreover, institutional investors, including mutual, pension, and sovereign-wealth funds, are becoming increasingly reluctant to invest in companies that have not demonstrated a commitment to principles of Corporate Social Responsibility. For instance, the Norwegian Wealth Fund – the largest sovereign wealth fund in the world – excludes companies that are suspected to have engaged in corruption.

4. Conclusion

Before the OECD Anti-Bribery Convention came into force in 1999, other than the United States,³⁰ most countries had not made it an offence to bribe foreign public officials in international business, and bribes were pretty much tax deductible around the globe.³¹ Enterprises have come a long way since then. Ac-

27 Recommendation of the Council on Bribery and Officially Supported Export Credits (OECD, 2006): [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=td/ecg\(2006\)24](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=td/ecg(2006)24).

28 Recommendation on Public Procurement (OECD, 2015): <http://www.oecd.org/gov/ethics/OECD-Recommendation-on-Public-Procurement.pdf>.

29 Asia-Pacific Fraud Survey 2015: A live sciences perspective (Ernst & Young): <http://www.ey.com/Publication/vwLUAssets/EY-asia-pacific-fraud-survey-2015-a-life-sciences-perspective/%24FILE/EY-asia-pacific-fraud-survey-2015-a-life-sciences-perspective.pdf>.

30 The U.S. FCPA came into force in 1977.

31 Pursuant to the Recommendation of the OECD Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials (2009), Parties to the OECD Anti-Bribery Convention are required to make bribes to foreign public officials explicitly non-tax deductible: <https://www.oecd.org/tax/crime/2009-recommendation.pdf>.

IV. Preventing Cross-Border Bribery through Effective Compliance Measures

According to a recent study, 95% of respondent senior executives recognised the critical importance of bribery and corruption issues.³² However, this study and others show that there is still room for improvement.

The next wave in compliance will likely be driven by increasing awareness that it is smart business to implement effective compliance measures for preventing and detecting foreign bribery. A 2016 study conducted by researchers from Harvard Business School shows that even though bribery might increase sales in certain business environments, the overall impact of bribery on a company's finances is almost zero.³³ This is likely due to the costs and uncertainty of dealing with dishonest customers, and the exposure to continuing risks of bribe solicitation. On top of being no further ahead in overall profits, firms that engage in the bribery of foreign public officials must live with the risk of enforcement and penalties, bad publicity, potential debarment from public procurement, and reduced availability of financing. They will also lose talented employees to competitors with cleaner reputations. It is beyond debate that establishing and implementing an effective compliance programme for preventing and detecting foreign bribery is one of the smartest decisions a company can make.

³² Eversheds, *op. cit.*

³³ An Analysis of Firms' Self-Reported Anticorruption Efforts (Paul Healy, George Serafeim, *The Accounting Review*, March 2016, Vol. 91, No. 2, 489–511).

V. The National Crime Agency: Advice for SMEs on How to Protect Your Business from Bribery and Corruption*

Ingrid Leonard

1. Introduction

The National Crime Agency's International Corruption Unit was set up in May 2015 and has given the UK an enhanced capability to combat international bribery and corruption.

Supported by the Department for International Development, the International Corruption Unit (ICU) is made up of a team of more than 50 investigators with extensive experience in international corruption and financial investigation.

The ICU's main functions are to:

- investigate money laundering in the UK resulting from grand corruption overseas
- investigate international bribery offences involving UK-based companies or nationals or where there is a UK nexus
- trace and recover the proceeds of international corruption.

The unit also supports HM Treasury with the enforcement of financial sanctions, supports foreign law enforcement agencies with international anti-corruption investigations, engages with government and business to reduce the UK's exposure to the proceeds of corruption and works with business to support increased compliance with the UK Bribery Act 2010.

2. Outreach

The ICU has an Anti-Bribery Outreach Programme which aims to promote anti-bribery compliance to the private sector, encourage reporting of bribery allegations to the ICU and develop initiatives in support of the above.

The ICU works with industry experts in anti-bribery compliance to promote the six principles of the Bribery Act and to deliver related capacity-building, particularly to Small and Medium Enterprise (SMEs). It does this by developing relationships with business networks and professional associations within a variety of sectors to reach its target audience, presenting at members' events around the UK and abroad to encourage companies to implement policies and mechanisms which safeguard their business against committing offences under the Bribery Act.

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3. IGBT

The International Foreign Bribery Taskforce (IGBT) is a trans-border agreement set up to combat international bribery. Made up of specialised investigators from across the globe, the taskforce enhances the law enforcement response to bribery on an international scale by providing a platform for police experts from Australia, the United States, Canada and the United Kingdom to work collaboratively to strengthen investigations into international bribery offences and to support the aims of the Organisation for Economic Cooperation and Development (OECD) and United Nations (UN) anti-bribery conventions.

The IGBT holds an annual conference which allows law enforcement officers to share knowledge, skills and methodologies as well as to discuss case studies and coordinate international investigations, share up-to-date trends and typologies and discuss best practice in relation to existing bribery investigations. A collective law enforcement approach from a number of countries with robust anti-bribery legislation already in place will lead to an increase in the perpetrators and facilitators of bribery being brought to justice and reduce the number of individuals who believe that they can commit bribery with impunity.

The IGBT also meets regularly to discuss initiatives to encourage compliance with bribery legislation and to develop strategies to aid companies safeguard their business against bribery. It also contributes to awareness-raising, through the provision of multi-agency investigator panels at conferences and law enforcement stalls with officers on hand to give advice and guidance on compliance with bribery legislation.

4. Corporate Liability

Under section 7 of the Bribery Act, commercial organisations can be criminally liable for failure to prevent bribery if a person associated with their organisation bribes another person intending to obtain or retain business or a business advantage for that organisation.

If a person associated with a company engages in conduct which amounts to an offence under section 1 (active bribery) or section 6 (bribery of a foreign public official) of the Bribery Act, intending to obtain or retain business or an advantage in the conduct of business, that company could be liable to prosecution for failing to prevent bribery.

A commercial organisation will have a full defence to the section 7 offence if it can demonstrate that it had adequate procedures in place to prevent persons associated with it from bribing.

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D. Cross Border Anti-Corruption Aspects

Whether or not a commercial organisation has adequate procedures in place will ultimately be a question for the courts to decide. However, a vast amount of information, guidance and training materials on adequate procedures and preventing bribery is available for companies to consult. An excellent starting point is the Ministry of Justice Bribery Act 2010 Guidance¹ and their six principles, which form the basis for most commercially available anti-bribery solutions. The six principles are:

- Proportionate Procedures
- Top-level Commitment
- Risk Assessment
- Due Diligence
- Communication (including training)
- Monitoring and Review

While equal weight is placed upon each principle, Proportionate Procedures will be of particular significance to SMEs. This is because the guidance recognises that a commercial organisation's adequate procedures should be commensurate with the bribery risks it faces and the key characteristics of the business, such as its size and the scale and nature of its activities.

This means that adequate procedures need not necessarily be sophisticated, expensive or onerous to implement.

5. Facilitation payments, hospitality and promotional expenditure

Illicit small-scale payments paid to secure routine government action, sometimes referred to as facilitation or facilitating payments are bribes for the purposes of the Bribery Act. Hospitality and promotional expenditure is not prohibited by the Act, unless of course it is employed as a bribe. Further information on what prosecutors would take into account when considering whether to prosecute in this area is available in internet.²

British multinationals have reportedly been quick to respond to the introduction of the Bribery Act. Many SMEs who face bribery risks have been slower to respond, either because they are unaware that the Act applies to their operations or because they are unsure what an appropriate and proportionate response

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1 <https://www.gov.uk/government/publications/bribery-act-2010-guidance>.

2 https://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf.

should be. A 2015 government report³ revealed that a third of UK SMEs surveyed were not aware of the Bribery Act and its corporate liability provisions.

Ultimately, the Bribery Act applies to all UK-based businesses both domestically and internationally and to foreign companies who carry on a business or part of a business in the UK. All companies who fall within these categories therefore need to take steps to consider what their exposure is and what measures are necessary to prevent wrongdoing.

The starting point is to understand the risk profile of the organisation. A company which exports goods or services with a point of sale into markets where corruption is prevalent and which uses third parties to sell on its behalf will have a very different risk profile to a company that only sells within the UK. It may be proportionate for the latter to implement a low key prevention regime based on a written policy committing to do business without bribery and communicate that to employees. An exporting company would, on the other hand, need to implement a more sophisticated prevention regime if it is to combat the risk of bribery.

6. What are the key features that an SME should consider in framing adequate procedures?

6.1 Ownership

Responsibility for the policy could be assigned to a single individual within a company's leadership team to ensure accountability, as part of a top-down strategy. Resources should be dedicated to implementing the policy and associated programme, with a clear reporting line to the policy owner. In SMEs, this might be part of a person's duties rather than their full-time job, depending on what resource is available and what is proportionate for that company considering its risk profile.

6.2 Employee Awareness

Bribery prevention procedures are redundant unless they are applied. Any policy should be communicated to employees so that they are aware of it and understand how to comply with it. Statements from senior management ('top-level commitment' – see Ministry of Justice guidance) can drive recognition and publicise the importance of the policy across the organisation. Dedicated training for employees covering the nature of bribery risks faced, the nature of the proce-

* © Crown copyright 2016.

3 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/in-sight-into-awareness-and-impact-of-the-bribery-act-2010.pdf.

D. Cross Border Anti-Corruption Aspects

dures to be employed to mitigate those risks and how employees should respond in a manner consistent with the policy, is essential. This is particularly important for employees in high risk roles, such as sales, those liaising with foreign governments or those operating in areas where there is a high risk of corruption.

Mechanisms should also exist for employees to report any concerns, such as suspected breaches of the policy. This might be a point of contact within Human Resources or via an externally-managed reporting line.

6.3 Managing third party risk

Third parties, such as suppliers, distributors, agents, business partners, which a company relies on to perform services on its behalf, can present particular risks for that company, owing to the section 7 provision under the Bribery Act for liability for acts of bribery committed by ‘associated persons’. The starting point in managing third party risk is to know who a third party is, what they will be doing on the company’s behalf and whether that exposes the company to liability under the Bribery Act.

An effective strategy for an SME could include clear communication to third parties of a company’s bribery policy and procedures and contractual provisions committing third parties to comply with applicable bribery laws, with a provision for termination of a contract in the event that these terms are breached.

6.4 Continuous Improvement

Regular review of procedures is important to enable understanding of how effectively those procedures are functioning with respect to the risk they are designed to mitigate and whether any improvements are needed. Risks change over time and new risks might emerge, warranting adaptation of the procedures in place.

7. Contacting the ICU

The ICU would be particularly interested to hear from companies who have come across corrupt practices in their industry. For advice on reporting possible bribery and corruption offences, or queries on the law enforcement approach to international corruption issues, please contact the ICU at: ContactICU@nca.x.gsi.gov.uk

The National Crime Agency is a prescribed body for the purposes of bribery and corruption on the UK Department of Business, Innovation & Skills

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V. The National Crime Agency: Advice for SMEs on How to Protect Your Business

‘Blowing the Whistle to a Prescribed Person: List of Prescribed Persons & Bodies’.⁴ Individuals can therefore blow the whistle on bribery and corruption to the NCA rather than to their employer.

Further information and useful links can be found at the ICU pages on the NCA website.⁵

* © Crown copyright 2016.

4 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/431221/bis-15-289-blowing-the-whistle-to-a-prescribed-person-list-of-prescribed-persons-and-bodies-2.pdf.

5 <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/economic-crime/international-corruption-unit-icu>.

VI. China's New Definition of Bribery Is Anti-Competitive

Henry Chen

1. Introduction

There are two primary laws in relation to bribery in China: one is criminal law the other is the Anti-Unfair Competition Act ("AUCL"). Criminal law makes bribery an offence and the AUCL makes commercial bribery (and some other anti-competitive practices) administrative offences. However, sanctions for the offences are anti-competitive in nature and not severe enough to be punished under criminal law.

The AUCL was promulgated and took effect in 1993 ("1993 AUCL"). It seeks to regulate an array of practices that impede the competitive nature of the market. The 1993 AUCL governs the passing-off and misappropriation of trade secrets, predatory pricing and tie-ins, abuse of administrative powers, misleading advertising and the organisation of lotteries as well as commercial bribery.

In order to tackle the complaints and confusion that the 1993 AUCL caused to the business community and to revise the law after 14 years of legal evolution, China amended the AUCL and this amended version became effective from January 1, 2018 ("2018 AUCL").

2. Revise the definition and scope of commercial bribery

Article 8 of the 1993 AUCL provides a blanket prohibition on a business from giving a bribe in the form of property or other means for the purpose of selling or buying goods. To implement the 1993 AUCL, the enforcement agency of the AUCL – the State Administration for Industry and Commerce ("SAIC") – enacted the Interim Rules of the State Administration for Industry and Commerce on Prohibition of Commercial Bribery (the "Commercial Bribery Rules"). The Commercial Bribery Rules define commercial bribery as businesses giving a bribe in the form of property or other means for the purpose of selling or purchasing goods. "Property and other means" includes promotion costs, publicity expenses, sponsorship, research costs, remuneration, consultation fees, commissions and advantages other than property.

As a result of this blanket prohibition, the recipient of a commercial bribe might be a business (vis-à-vis its individual employees). There is a risk that legitimate payments commonly made in everyday commerce between businesses (such as payment of consultation fees and commissions), risk being caught as acts of bribery. For convenience, the following refers to bribery between businesses as "B2B bribery".

VI. China's New Definition of Bribery Is Anti-Competitive

Case 1: *In June 2006, and February and September of 2007, a general contractor of Tsingtao beer in Wenling signed several agreements with other five companies, paying them monetary incentives for exclusive distributions. The payments were described as a “buyout fee” and an “exclusive fee”, amounting to RMB 1.205 million for the purpose of obtaining trade opportunities. Together, the parties together were fined a total of RMB 1.727 million by Wenling Administrations for Industry and Commerce (AIC).*

Case 2: *In July of 2006, AIC Luoyang found that Tsingtao paid RMB 2,000 – 70,000 to 30 hotels and restaurants respectively in return for them only selling Tsingtao beer and determined that such conduct constituted commercial bribery.*

Case 3: *The Foshan AIC determined that Pepsi Guangzhou had committed commercial bribery by paying “entrance fees” and “display fees” amounting to RMB 247,900 to some stores, in order to promote the selling of its products by means of better shelf displays. As a result, Pepsi Guangzhou was fined RMB 50,000, and its profits were confiscated.*

The above cases (and other similar ones) were criticised for wrongful law enforcement and causing legislative chaos.

AUCL 2018 redefines bribery to the effect that B2B bribery may not be viewed as bribery. Article 7 of AUCL 2018 provides that a business shall not resort to bribery, by offering properties or by any other means, to any of the following entities or individuals, in order to seek a transaction opportunity or competitive advantage: (1) any employee of the counterparty in a transaction; (2) any entity or individual entrusted by the counterparty in a transaction to handle relevant affairs; or (3) any other entity or individual that is to take advantage of powers or influence to influence a transaction. This definition makes significant changes.

First of all, AUCL 2018 requires the element of purpose of “seeking transaction opportunities or competitive advantage”, as opposed to the broadly-drawn purpose element under AUCL 1993 (i.e. “for the purpose of selling or buying goods”).

Secondly, the other party to a transaction is no longer expressly listed as a potential bribe recipient as in AUCL 1993. As such, the B2B bribery illustrated by the three case studies above may no longer be investigated and punished under AUCL 2018.

Thirdly, a party to a business transaction may still be a bribe recipient but, apparently, only if he is a third party engaged by a party to the transaction. For example, if a school purchases uniforms from a supplier, the students are the *de facto* purchasers and users. The school is deemed to be entrusted by the students

to make the purchase and so it is a potential bribe recipient (2). Another example would be where two parties employ an appraisal agency to appraise the quality of the goods and one party bribes the agency to make the appraisal result beneficial to the bribing party. The appraisal agency may be a bribe recipient (3) since it has the power and influence to influence a transaction. Although both bribery recipients are still businesses (*vis-à-vis* individuals), the bribery seemingly takes place with the agent or fiduciary acting to the detriment of its principal or beneficiary. In both scenarios, the duty of loyalty is breached.

3. Clarify Corporate Liability for Commercial Bribery and Distinguish It from Individual Responsibility

The Commercial Bribery Rules provide for vicarious liability so that if an employee engages in commercial bribery his activity will be viewed as the conduct of his employer. AUCL 2018 reiterates vicarious liability: the act of an employee bribing any others shall be deemed an act of the employer itself, unless it proves otherwise by adducing evidence that such an act is not related to its efforts in seeking a transaction opportunity or competitive advantage.

The above provision under AUCL 2018 provides businesses with an affirmative defense or safe harbor. Provided it can prove that the employee's activity does not relate to its objective of obtaining specific business transaction opportunities or other competitive advantages, then the business may be avoid sanctions under AUCL.

The leader of the Anti-Monopoly and Anti-Unfair Competition Bureau of the SAIC commented in a recent interview conducted by the PRC Industry and Commerce News, that business operators may have a valid defense against vicarious liability if they can demonstrate that they: (1) have adopted proper compliance policies and measures; (2) have implemented effective measures to supervise and control its employees' activities and (3) do not indulge either openly or in a disguised form, its employees' bribery activities.

4. Strengthen the Enforcement Agency's Investigative Power

AUCL 1993 did not provide SAIC and its subsidiaries (collectively as "AIC") with investigative powers to seize or detain cash and property in relation to breaches of AUCL.

AUCL 2018 grants the AIC the necessary powers to seal or detain cash and property. The AIC has also been granted additional powers to inquire into bank accounts of businesses which have allegedly committed unfair competition activities.

Specifically, AUCL 2018 both provides and refines existing investigation procedures available to the AIC during investigations of potential commercial bribery violations, including:

- Entering business premises to conduct inspections;
- Questioning businesses and other related entities and individuals, and requiring them to explain relevant situations and to provide evidentiary materials or related information;
- Accessing or copying related evidentiary materials;
- Sealing and/or detaining property related to suspected unfair competition and
- Inquiring about bank accounts of businesses suspected of unfair competition.

5. Increase Administrative Penalties

AUCL 1993 provides for fines ranging from RMB 10,000 to 200,000 for commercial bribery as well as the confiscation of illegal gains. By comparison, Article 19 of AUCL 2018 sets forth that, in cases of commercial bribery violations, administrative authorities can “confiscate illegal gains resulting from illegal conduct and impose a fine of between RMB 100,000 and 3 million.” More seriously, the AICs may revoke a company's business license in cases of severe misconduct.

In addition, Article 26 of AUCL 2017 provides that if a business receives an administrative penalty for engaging in commercial bribery, enforcement agencies will record the penalty in its public credit record. Such credit record documentation could not only harm the business's credibility rating but also cause reputational damage.

6. Conclusions

For companies doing business in China, compliance risks in relation to commercial bribery are more severe than before AUCL 2018 took effect. With the increased power of investigation, AICs tend to launch dawn raids more often than before to investigate bribery (as well as other anti-competitive activities). Companies may face more severe punishments ranging from monetary fines, confiscation of illegal gains to revoke of business licenses.

However, the new AUCL provides a safe harbor to companies. Those who have established and operated a robust compliance management (i.e. not just window-dressing) will be entitled to meaningful benefits. As such, companies should re-examine the operational risk and compliance controls of their busi-

D. Cross Border Anti-Corruption Aspects

ness to ensure that they catch up with the new AUCL, not only in terms of knowledge but also risk management. For example, companies may consider reviewing their existing business arrangements, including contractual parties and sub-contractors such as agents, distributors or other intermediaries. The companies may also conduct compliance and due diligence investigation before hiring third-party vendors to facilitate transactions. In order to establish an effective and robust company management system, they must train their employees in the applicable law and corporate policy.

VII. Grand Corruption in Malaysia: How Money Is Laundered and Who Is Facilitating It?

Cynthia Gabriel

1. Introduction

It's a tale of brazen outright theft and corruption in the tens of billions of ringgit: perhaps the largest case of its kind in the world. It involves international transfers through different financial centres, including Singapore, using secretive shell companies in the British Virgin Islands, Cayman Islands, Seychelles and elsewhere, and large international banks such as RBS, Deutsche Bank, Citibank, JP Morgan Chase, Standard Chartered and UBS amongst others. Underlining (in bright red) the continued complicity of the global financial system in transferring ill-gotten gains by corrupt regimes from the developing world.

It reflects the blatant cover-up of criminality with investigating authorities compromised by intimidation, transfers, new appointments, and an inexplicable lack of investigation despite (literally) tonnes of missing money.

That (and more) is the story of "1Malaysia Development Bhd" ("1MDB"), Malaysia's self-styled strategic development company that eventually became mired in RM42 billion of debt. At least as much as RM40 billion has been put at risk or lost through dubious means, including theft, bond mispricing and overpayment for assets.

The US Department of Justice, in a civil filing, states that over US\$3.5 billion has been misappropriated, out of which US\$730 million found its way into Prime Minister Najib Abdul Razak's accounts. Most of the misappropriated funds (almost three-quarters of those embezzled) went into the accounts of Low Taek Jho or Jho Low.

2. How It All Started

It all started seven years ago, in 2009. As soon as the first RM5 billion was raised via the federally guaranteed bond issues the melee started. By July 2009, the federal government took over 1MDB from Terengganu and put it under the Ministry of Finance Incorporated (MoF Inc). Thus, 1MDB came under the direct control of the Finance Minister, Najib, who was also Prime Minister. While Najib was not on the main board he chaired the advisory board.

What followed was a series of other inexplicable mistakes and surprising lapses of governance, which could only have come about by complicity. It resulted in the corporation losing billions of ringgit through mismanagement and criminal activities.

D. Cross Border Anti-Corruption Aspects

The leak of e-mails to both the financial newspaper “The Edge” and the website “Sarawak Report” opened up a Pandora’s box of trails linking Jho Low to 1MDB and highlighting a host of questionable practices. The Edge was suspended for some two months in 2015 under Malaysia’s tough media licensing laws. The “Wall Street Journal” (“WSJ”) reported on money passing from 1MDB to the accounts of Prime Minister Najib Abdul Razak, involving RM2.6 billion.

The Public Accounts Committee’s report on 1MDB provided a watered down version and more evidence of mismanagement. However, it was the Malaysian Auditor-General’s Report that was one of the most important documents to unveil wrongdoing at 1MDB. This was classified an official secret under Malaysia’s oppressive Official Secrets Act, which made it illegal for anyone in Malaysia to divulge its contents.

This tale of massive corruption has shaken the nation to its very core, forced awkward political alliances among those seeking change, brought about a change in the political landscape owing to the rise in brinkmanship through racial and religious extremism and considerable uncertainty in every sphere. It also raises fresh questions of international complicity among banks and financial institutions who helped launder all the loot and asked few questions (if any).

3. On the Trail of the Missing Billions

The DOJ civil filings in July seized over US\$1 billion worth of assets (the largest such seizure ever) obtained using money that came from over **US\$3.5 billion (RM14 billion)** in funds misappropriated or stolen from 1MDB. It has provided what is to date the most comprehensive publicly available account of money flows from 1MDB. This implicates no less than Malaysian Prime Minister Najib Abdul Razak, his stepson, Riza Aziz, Jho Low, and two former high ranking IPIC and Aabar officials. The following goes into some detail in order to trace the movement of the funds.

Reports put the payment of fees to Goldman Sachs at nearly US\$600 million or about RM2.4 billion. A Bloomberg report in May stated that in 2012 and 2013, Goldman Sachs handled three 1MDB bond sales totaling \$6.5 billion that yielded fees, commissions and expenses of US\$593 million, or about 9 percent of the money raised, well above the industry norm. Typically, Goldman charges 1–2% for such deals, which means overpayment could exceed US\$500 million or about **RM2 billion**.

According to the DOJ filings, between 2009 and at least 2013, multiple individuals, including public officials and their associates, conspired to fraudulently

VII. Grand Corruption in Malaysia: How Money Is Laundered

divert billions of dollars from 1MDB through various means, including by defrauding foreign banks and by sending foreign wire communications in furtherance of the scheme, and thereafter, to launder the proceeds of that criminal conduct, including in and through U.S. financial institutions.

“The funds diverted from 1MDB were used for the personal benefit of the co-conspirators and their relatives and associates, including to purchase luxury real estate in the United States, pay gambling expenses at Las Vegas casinos, acquire more than \$200 million in artwork, invest in a major New York real estate development project and fund the production of major Hollywood films. 1MDB maintained no interest in these assets and saw no returns on these investments.”

The DOJ outlined three main phases of “criminal” conduct. Under “**The Good Star Phase**”, fraudulent diversion of funds from 1MDB began around September 2009. “Between 2009 and 2011, under the pretense of investing in a joint venture between 1MDB and PetroSaudi International (“PetroSaudi” or “PSI”), a private Saudi oil extraction company, officials of 1MDB and others arranged for the fraudulent transfer of **US\$1.03 billion** in two tranches from 1MDB to a Swiss bank account held in the name of Good Star Limited.

1MDB officials, including **former CEO Shahrol Azral Ibrahim Helmi, executive director Casey Tang and general counsel Jasmine Loo** (referred to respectively as 1MDB officer 2, and 3 in the DOJ filings) caused this diversion of funds by, among other things, providing false information to banks about the ownership of the Good Star account. Contrary to representations made by 1MDB officials, the Good Star account was beneficially owned not by PetroSaudi or the joint venture, but by Jho Low. “Low laundered more than **US\$400 million** of the funds misappropriated from 1MDB through the Good Star Account into the United States, after which these funds were used for the personal gratification of Low and his associates,” the DOJ said.

Under the “**Aabar-BVI Phase**” in 2012, 1MDB officials and others misappropriated and fraudulently diverted a substantial portion of the proceeds that 1MDB raised through two separate bond offerings arranged and underwritten by Goldman Sachs International of US\$1.75 billion each for a total of US\$3.5 billion. The bonds were guaranteed by both 1MDB and IPIC.

1MDB officials caused a substantial portion of the proceeds (**approximately US\$1.367 billion** – more than forty percent of the total net proceeds raised) to be wire transferred to a Swiss bank account belonging to a British Virgin Islands entity called Aabar Investments PJS Limited (“Aabar-BVI”)

“Aabar-BVI was created and named to give the impression that it was associated with Aabar Investments PJS (Aabar), a subsidiary of IPIC. In reality, Aabar-BVI has no genuine affiliation with Aabar or IPIC, and the Swiss bank account be-

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longing to Aabar-BVI was used to siphon off proceeds of the 2012 bond sales for the personal benefit of officials at IPIC, Aabar, and 1MDB and their associates,” the DOJ said.

It added that the funds diverted through the Aabar-BVI Swiss Account were transferred to, among other places, **a Singapore bank account controlled by Tan Kim Loong, also known as Eric Tan, who is in fact Low himself.** “Those funds were thereafter distributed for the personal benefit of various individuals, including officials at 1MDB, IPIC, or Aabar, rather than for the benefit of 1MDB, IPIC, or Aabar.

During the “**Tanore Phase**” in 2013, several individuals (including 1MDB officials), diverted more than **US\$1.26 billion** out of a total of \$3 billion in principal that 1MDB raised through a third bond offering arranged by Goldman in March 2013. The proceeds of this bond offering were to be used by 1MDB to fund a joint venture with Aabar known as the Abu Dhabi Malaysia Investment Company (ADMIC). However, beginning days after the bond sale, a significant portion of the proceeds was instead diverted to **a bank account in Singapore held by Tanore Finance Corporation for which Tan was the recorded beneficial owner.**

Although the Tanore Account had no legitimate connection to 1MDB, the then executive director of 1MDB (although not named, indications are that it was **Casey Tang**) was an authorised signatory. 1MDB funds transferred into the Tanore Account were used for the personal benefit of Low and his associates, including officials at 1MDB, rather than for the benefit of 1MDB or ADMIC.

The filings state that the proceeds of each of these three phases of criminal conduct were “laundered through a complex series of transactions, including through bank accounts in Singapore, Switzerland, Luxembourg, and the United States.

“Numerous assets, including the defendant asset (those the DOJ is claiming for forfeiture under its actions), were acquired with funds unlawfully diverted from 1MDB, or funds traceable thereto. As a result, the defendant asset is subject to forfeiture to the United States pursuant to [...]” It goes on to cite the relevant legislation.

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The Misappropriation Phases

	Relevant Bond (US\$bil)	Phase	Amount Stolen (US\$ bil)	Bank Account	Beneficiary	When
	1.25 (RM5 bil)	Good Star	1.03	Good Star	Jho Low	2009-11
	3.5 (2 issues)	Aabar-BVI	1.367	Aabar BVI	Aabar BVI	2012
	3.0	Tanore	1.26	Tanore Finance Corp	Eric Tan for Jho Low	2013
Total	7.75		3.657			

Note: Table compiled from US Department of Justice Civil Filings

In total, the three phases amount to US\$3.657 billion (or a massive RM14.6 billion at current exchange rates) which was stolen and transferred from 1MDB. What this means is that if 1MDB is unable to recover any of the misappropriated money, the government will bear the costs because 1MDB is wholly owned by the government, and the government has issued guarantees for a substantial portion or even all of the borrowings.

Of the US\$6.5 billion in bonds arranged by Goldman Sachs, US\$3 billion carries a letter of support from the Malaysian government (effectively a guarantee). The remaining US\$3.5 billion (in two equal bond issues of US\$1.75 billion), is guaranteed by IPIC which seems to have some sort of back-to-back arrangement with the Malaysian government. It is interesting to note that IPIC is claiming, not just US\$3.5 billion in disputed payments, but US\$6.5 billion under arbitration proceedings. The DOJ filings then go on to detail the money transfers.

4. Where 1MDB's US\$3.657 Billion Went

The eight persons listed in the table below were the eventual beneficiaries of the US\$3.657 billion heist from 1MDB. Incorporating the three phases of theft and going by the beneficial ownership as stated by the DoJ in its filings, we were able to establish that US\$3.657 billion was stolen. Of this, US\$3 billion went into the accounts of entities controlled by Jho Low, US\$238 million to Najib's stepson Riza Aziz and US\$119 million as residual amount in the Aabar-BVI account.

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Name	Amount (US\$)
1. Jho Low	2640
2. Qubaisi	473
3. Riza Aziz	238
4. Najib Raak	111
5. Husseiny	67
6. Jasmine Loo	5
7. Prince Turki	4.5
8. Others	119
Total	3657

From the chart in Appendix 4, the main person who moved the funds was Jho Low. On the Aabar side (whose cooperation was required for the Aabar-BVI phase of the theft) were Qubaisi and Husseiny, the chairman and managing director of Aabar respectively. Qubaisi received US\$473 million while Husseiny got US\$67 million.

Also, the flow of money establishes a close relationship between Jho Low and Najib Razak, with a total of US\$731 million flowing into Najib's accounts from Jho Low and US\$620 million flowing back. Also Najib's stepson Riza Aziz received US\$268 million directly from Aabar-BVI.

5. How Money Laundering Was Facilitated

The DOJ filings detail how money laundering was facilitated by a number of things such as banks (including large ones), not being vigilant enough; jurisdictions allowing companies to operate without transparency; and shell companies set up in areas with lax regulation.

5.1 Many Banks Involved, Some Large

In the **“Good Star Phase” of misappropriation** (see previous section), Good Star, which was incorporated in the Seychelles and owned ultimately by Jho Low, opened an account in **RBS Coutts' Singapore branch**. Not only that, the bank's address was used for all correspondence to Good Star, according to the DOJ filings. The filings indicate that eventually over US\$1 billion was trans-

ferred into the Good Star account at RBS Coutts. This included US\$700 million from **Deutsche Bank in Malaysia** in Sept/October 2009 despite considerable suspicion by officials involved. Subsequently, between May and October 2011, a further US\$330 million went to Good Star from accounts at **AmBank** and **Deutsche Bank**. The correspondent bank for all the transactions was **JP Morgan Chase** of the US.

Between February and June 2011, two transfers were made from the Good Star account (via **JP Morgan Chase** as correspondent bank) to an account of Petro-Saudi co-founder (Prince Turki of Saudi Arabia) at **Riyad Bank** for US\$24.5 billion. Within days of the transfers via correspondent bank **JP Morgan Chase and Wells Fargo**, US\$20 million from Prince Turki's accounts were transferred to Najib's account at **AmBank**.

According to DOJ filings, Low laundered hundreds of millions from the illegal proceeds into the US. Between October 2009 and Oct 13, 2010, US\$368 million from the Good Star account was sent to law firm **Shearman and Sterling LLP**. These funds were used to buy assets. Between June 2011 and Sept 2013, US\$389 million was transferred from the Good Star account to the account of Abu Dhabi Kuwait Malaysia Investment Corp at **BSI Bank in Singapore**. The Monetary Authority of Singapore (MAS) in May this year shut down **BSI Bank Limited** for "serious breaches of anti-money laundering requirements, poor management oversight of the bank's operations, and gross misconduct by some of the bank's staff".

Similarly, during the "**Aabar-BVI phase**" (see previous section for details), **US\$1.367 billion** were stolen and diverted to bank accounts in **Switzerland and Singapore**, according to the DOJ filings. From IMDB, the US\$1.367 billion was transferred to the **Swiss bank account of BSI Bank**. A circuitous route was used involving **Bank of New York in London and New York and Falcon Bank** (owned by Abu Dhabi's IPIC, which also owns Aabar).

Of the US\$1.367 billion, US\$1.101 billion was transferred into the Blackstone account (see previous section) at **Standard Chartered Bank** in Singapore. A further US\$238 million went into Riza Aziz's account at **BSI Bank Singapore**. The wire transfers were processed through correspondent banks **Standard Chartered Bank and Citibank in the US**.

In the "**Tanore Phase**" of misappropriation (see previous section), more than \$1.26 billion in proceeds were diverted to a bank account held in the name of Tanore Finance Corporation at **Falcon Bank (US\$835 million)** in Singapore and an account opened under the name of Granton Property Holdings Limited at **Falcon Bank (US\$430 million)** in 2013. Sending parties into the Tanore account included **BSI Bank Singapore (US\$210 million)** and **ING Bank Neth-**

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erlands (US\$625 million). Funds set up in **Curacao** received the money from 1MDB, which were then sent on to the Tanore account.

In March 2013, **US\$681 million** from the Tanore account was transferred into Najib's account at **AmBank**. Of this, **US\$620 million were returned** to the Tanore account in August 2013.

Further, Reuters reported that besides the banks named here, MAS is scrutinising several other banks, including **UBS and DBS Group Holdings** to see if they broke anti-money laundering rules in handling transactions linked to 1MDB.

5.2 Shell companies

International financial centres such as those in **Singapore, British Virgin Islands (BVI), Seychelles, Cayman Islands and Curacao** facilitated the setting up of anonymous shell companies into which billions in funds in total could be transferred with very few, if any, questions being asked. In some cases, companies were set up in different locations with identical names to companies in other places, as with Aabar PJS Investments in Abu Dhabi and in BVI.

Large sums of money were also transferred into various companies' accounts in Singapore, including Seychelles-incorporated Good Star, whose ownership was ultimately through a bearer share. Good Star received more than US\$1 billion in funds through its Singapore account to which it was not entitled.

In fact, the entire amount of US\$3.657 billion stolen from 1MDB was laundered through accounts in Singapore with various banks. This should raise serious concerns about the level of vigilance of these banks in stopping the laundering of stolen money and Singapore's supervision levels.

5.3 Money Laundering and International Neglect

It is a great surprise that big international banks continue to play a huge supporting role in laundering stolen money and money obtained through illegal operations despite the heavy fines previously imposed by regulatory authorities. If this laundering of money by international banks and global financial institutions were stopped, then it would be impossible to launder large sums of money stolen by politicians and their proxies in the Third World into the developed world.

That this is not being done is an indication that, for various reasons, there is insufficient will on the part of the developed world to properly legislate and control money laundering. Despite the massive fines paid by some of the largest financial institutions for money laundering, hardly anyone has been charged with money laundering and jailed. As long as this does not happen, global fi-

nancial institutions will continue to help launder money because they get lots of money for very little effort – basically for looking in the other direction.

The series of money laundering actions involving money stolen from IMDB include big-name banks such as **Citibank, JP Morgan Chase, Standard Chartered, UBS, DBS Group, Deutsche Bank, RBS Coutts and Wells Fargo besides smaller banks** mentioned earlier and involve some big-name international financial centres such as the **United States, Switzerland and Singapore**.

These reflect an abject failure of controls on international money laundering, despite the fact that the **Financial Action Task Force (FATF)** has been in existence since 1989. This is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction.

The FATF says its recommendations are recognised as the global anti-money laundering and counter-terrorist financing standard. Malaysia is an observer member country of the FATF and a member of the Asia-Pacific Group (APG), a regional grouping of FATF overseeing countries' compliance with FATF Recommendations

Some of the requirements in the FATF Recommendations include the following:

- Countries should ensure that financial institution secrecy laws do not inhibit implementation of the FATF Recommendations.
- Financial institutions should be prohibited from keeping anonymous accounts or accounts in obviously fictitious names.
- Financial institutions should be required to undertake customer due diligence (CDD) measures when establishing business relations, carrying out transactions of over 15,000 Euros, wire transfers, and where there is suspicion of money laundering and the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.
- The CDD measures to be taken include: (a) identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information; (b) identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is; (c) understanding and, as appropriate, obtaining information on the purpose and intended nature of the business relationship; (d) conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer.

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The FATF recommends further measures in addition to CDD for correspondent banking which includes being satisfied that the respondent bank has done CDD on the customers concerned. Other measures include additional checking for “politically exposed persons”, for wire transfers, provisions for compulsorily reporting suspicious transactions, immunity from lawsuits for disclosing financial informations etc.

That 1MDB money was so blatantly laundered through the global financial system via the participation of many big name banks and international business centres reflects a continuing neglect of money laundering on a global scale. If the measures recommended by FATF had been followed, 1MDB money could not have been laundered.

6. Some of the Assets Purchased

The filings go into detail of how stolen money was used to purchase US assets which include:

- a. **The L’Ermitage Property:** Low purchased this luxury hotel in Beverly Hills, California in 2010 for **US\$44.8 million**, obtained from the US\$700 million wire transfer from 1MDB.
- b. **Hillcrest Property 1:** Low bought this property located in Beverly Hills, California first with funds from GoodStar. Later, funds from the BVI-Aaabar phase were used to transfer the property to Aziz. It is valued at **US\$17.5 million**.
- c. **Park Laurel Condominium:** Low bought this property located in New York for **US\$24 million**. Subsequently, an entity controlled by Aziz bought it for **US\$35.5 million**.
- d. **Bombardier Jet:** Low bought the Bombardier Global 5000 aircraft for **US\$35.3 million** using funds traceable to the US\$700 million transferred to the Good Star Account.
- e. **Time Warner Penthouse:** This property in Columbus Circle New York was bought from money traceable to the US\$1.03 billion, which was transferred into Low’s Good Star account from 1MDB. The purchase price was **US\$30 million**.
- f. **Oriole Mansion:** Low bought the property located in Beverly Hills for **US\$39 million** with funds traceable to the Good Star account.
- g. **Greene Condominium:** Low bought this New York condominium for **US\$13.8 million**.

- h. EMI Assets:** Low used **US\$106.7 million** from the Good Star account to buy a substantial stake in EMI Publishing Group North America Holdings, the world's third largest music publishing company by revenue.
- i. Tens of millions of dollars to Red Granite Pictures:** Low distributed this money to Red Granite, owned by Aziz, to fund the production of the movie "The Wolf of Wall Street."
- j. Nearly US\$100 million for paintings by Van Gogh and Monet.**
- k. Some US\$85 million in gambling debts in Las Vegas.**

7. Malaysia's Legal System

It also outlined the relevant Malaysian and UAE laws as foreign laws, which are bases for forfeiture. "Misappropriating public funds by a public official is a criminal offense under Malaysian law, as enumerated by the Penal Code of Malaysia, including but not limited to sections 403 (dishonest misappropriation of property), 405 (criminal breach of trust), 409 (criminal breach of trust by public servant or agent), 166 (Public servant disobeying a direction of the law, with intent to cause injury to any person (including a company)), 415 (cheating), 418 (cheating with knowledge that wrongful loss may be thereby caused to a person whose interest the offender is bound to protect), and 420 (cheating and dishonestly inducing delivery of property); and the Malaysian Anti-Corruption Act 2009, including sections 16, 17, and 23.

"Bank fraud is a criminal offense under Malaysian law, as enumerated by the Penal Code of Malaysia, including but not limited to section 415 (cheating), 418 (cheating with knowledge that wrongful loss may be thereby caused to a person whose interest the offender is bound to protect), and 420 (cheating and dishonestly inducing delivery of property).

"Misappropriating public funds by a public official is a criminal offense under U.A.E. law, as enumerated in Federal Law No. (3) of 1987 on Issuance of the Penal Code, including but not limited to Articles 224, 225, 227, 228, 229, and 399."

8. Conclusions

8.1 1MDB would not have happened if basic principles of corporate and public governance had been adhered to and a system of checks and balances had been in place. In the event, 1MDB was blatantly exempted from all the control procedures introduced for government-linked companies (GLCs), especially those introduced by the Putrajaya Committee on GLC high performance, spear-headed by Khazanah Nasional. Not only was it completely exempted but noth-

ing was done to take corrective measures despite repeated signs of abuse. Even today, billions are being put at risk by the refusal to launch investigations. Although some board members tried to instruct management not to conclude some deals, these orders were ignored and not all directors performed their duties in trying to stop the misdeeds at 1MDB

8.2 1MDB was a deliberate scheme to steal billions from Malaysia. At the end of the day, all evidence points to 1MDB having been deliberately set up and manipulated to make tens of billions of ringgit (money lost one way or another can amount to as much as RM40 billion or more) with complicity from the very top. If there was no such complicity, 1MDB's losses would not have happened. It is the largest such theft in the world and is a shameless and audacious transfer of bond proceeds out of 1MDB and into the hands of criminal conspirators on top of earlier misdeeds such as bond mispricing and overpayment for assets.

8.3 The global financial system allowed the crime to take place. The crime could not have taken place without the global financial system through international banks allowing the movement of stolen funds, hence facilitating money laundering exercises. It is no secret that big banks have engaged in such activities for a long time. While no individuals are generally charged for offences, big banks routinely pay billions of US dollars in settlement for money laundering offences.

8.4 Big bank names in five countries at least involved. Money was moved through big names which included amongst others Citibank, JP Morgan Chase, Standard Chartered and UBS. Others mentioned include BSI Bank and some smaller private banks in Europe. Countries into which funds moved in and out include Singapore, the US, Switzerland, Luxembourg and Malaysia.

8.5 Shell companies in tax havens, multiple accounts and lawyers used. Shell companies in multiple tax havens such as Cayman Islands, British Virgin Islands and Seychelles – used by those who want to hide their identities – were conduits for the movement of funds in some cases. Multiple accounts were used and lawyers colluded in the transfer of monies into their accounts for purchases of assets.

It was nothing less than organised crime perpetrated by a conspiracy. It also represented a classic cover-up and suppression of information by direct interference in the operations of enforcement and policing agencies stopping them from acting against crimes by changing those in charge and intimidating others into submission.

Malaysia has adequate laws to charge those involved for these crimes. However, complicity between those entrusted to enforce the laws and pressures from po-

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lice and political leadership reinforced each other to prevent the rule of law from taking its course

At international level, if money laundering (especially of ill-gotten gains from developing countries such as Malaysia), is to be stopped in its tracks, banks and other parties who accept funds from overseas must be required to do much better due diligence.

A cross border mechanism to stamp out global kleptocracy and grand corruption is needed now more than ever.

VIII. Cross-border Compliance, Corporate Governance and Culture in Russia

Anatoly Yakorev

1. Introduction

The Russian economy is deeply integrated with the EU. In 2014, the EU ranked as Russia's number one trading partner, accounting for almost 41 % of its trade. In 2016, Russia is the third largest trading partner of the EU and latter is still its number one trading partner. However, a lot has changed since the Russia's annexation of the Crimea, which heralded a new political and economic reality – with legal issues brushed aside.

After two years of sanctions and import substitution and economic sovereignty¹ announced by Russia not much has been achieved, except in the agriculture and a few other areas at the expense of a weakened Rouble and much lower quality of domestic produce. Russia's most pressing problems relating to sanctions concern access to capital markets and technology. A retaliatory food ban imposed by Russia in August 2014 failed to boost local production and gave rise to a shadow economy in which goods are smuggled in from neighboring countries disguised as their own produce.

The Russian government decided on Wednesday (29 June, 2016) to prolong a ban on EU food imports from August until the end of 2017 in retaliation for EU sanctions over the Ukraine.² On 1 July 2016, the EU Council prolonged the economic sanctions targeting specific sectors of the Russian economy until 31 January 2017.³

2. Sanctions compliance

Despite the added workload of complying with constantly updated databases, creates a tangible need to have a robust compliance programme in place.⁴ However, some companies prefer to end their dealings with Russia rather than spending money on improving their sanctions compliance for fear of potential penalties.

1 <https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2016-06-09-import-substitution-russia-connolly-hanson.pdf>.

2 <http://www.euractiv.com/topics/russian-food-ban/>.

3 http://www.consilium.europa.eu/en/press/press-releases/2016/07/01-russia-sanctions/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Russia%3A%20EU%20prolongs%20economic%20sanctions%20by%20six%20months.

4 <http://www.tradesanctions.com/ofac-actions-against-russia-increase-certainty-for-compliance-programs/>.

Apart from ongoing and extended sanctions, Russia has been hit with a recession whose nature is both cyclical and structural and which is exacerbated by low oil prices. Moreover, poor public governance combined with weak institutions makes it very hard for Russia to break this vicious circle. Having been cut off from any meaningful exchange with their peers within the EU and worldwide, public entities are beginning to lose efficiency and focus.

As economic challenges spread globally and the threat of transnational corruption is recognised, regulators and prosecutors worldwide are improving their communication channels, making it very costly for global companies to make mistakes. For example, Apple was recently ordered to pay \$14,5 billion by the European Commission.⁵ Russia is not immune to this and multinationals operating in Russia are being punished.⁶

Another challenge is the increasing complexity of global regulation which increases the compliance costs of running businesses and provides little relief to companies which could still face stiff penalties. That is even more prevalent in high risk regions. It seems the only strategy is to seriously re-engineer companies' business strategy and ethical conduct in low integrity and high risk markets.

3. Compliance standards in banking

The Russian banking sector is being ravaged by the Central bank of Russia which is trying to flush out incumbent banks and preserve the stability of the financial system. Surprisingly, Russian banks were among the first to implement Basel III⁷ requirements mainly because access to the outside financial resources is vital for Russia. The Central Bank is now talking about implementing its own compliance standards.⁸

4. Compliance in state owned companies

Unlike banking, most large Russian state-owned companies have been reluctant to develop their compliance function. However, certain state owned companies (e.g. Bashneft) have eagerly allocated resources to ensure their compliance departments operate as effectively as possible (Picture 2). Bashneft's young and professional team recognise the need to have a robust anti-corruption compliance team in place and stand out with their commitment to making this function one of the best in the industry. Private companies usually throw resources at this

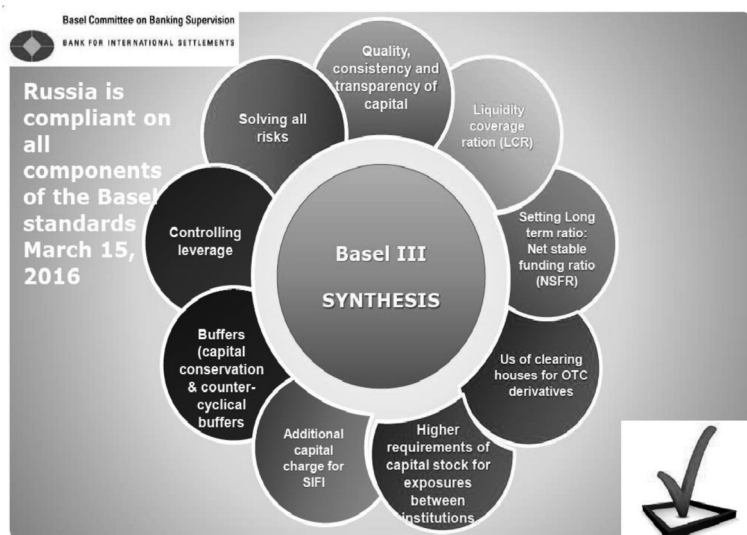
5 <http://www.reuters.com/article/us-eu-apple-taxavoidance-idUSKCN114211>.

6 <https://www.statnews.com/pharmalot/2016/08/31/astrazeneca-bribes-china-russia/>.

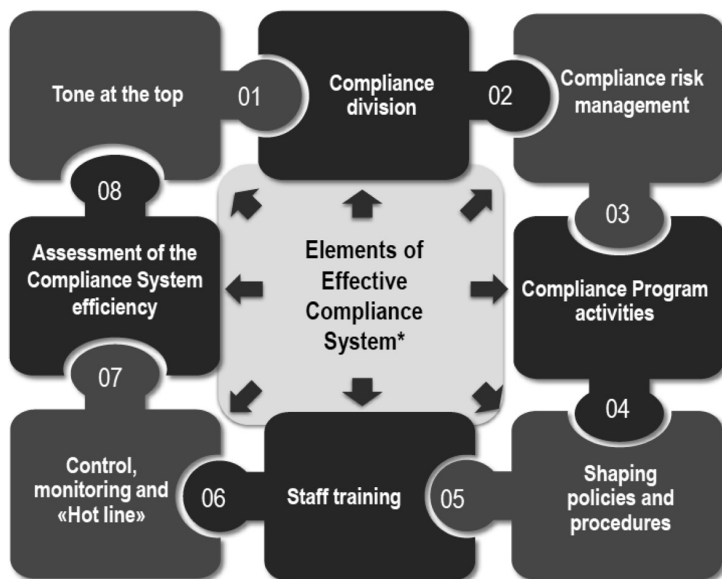
7 <http://www.bis.org/bcbs/publ/d357.pdf>.

8 <http://ibcongress.com/en/news/detail/bank-rossii-razrabotaet-standarty-komplaens>.

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Pic 1 Russia complies with Use of clearing houses



Pic 2 "Hot line"

function such as BP's joint venture "TNK-BP" which has developed its compliance function to be better than BP.⁹ It is a good sign if any state owned companies manage to perfect their compliance department because their success story will invariably cascade down to other companies and partners in Russia.

Russia in 2016 is very different from what it was in 2014: There are many reasons for this: the slump in oil prices, loss of some external oil markets (that are among the major sources of revenue for Russia) as well as aggressive politics and propaganda have had a dramatic effect. China has not become Russia's big trading partner as expected because China takes sanctions seriously and does not wish to invest in the current political and economic period Russia is in. Politics has also had a profound effect on the economy in Russia because of belligerent policies and disregard for international law.

Violation of international law regulating the use of force and compliance may not go hand in hand in a country where institutions are weak and the law is selectively applied in accordance with a political agenda. Yet, as banking compliance shows, Russia is making impressive strides in anti-corruption laws having exemplary anti-corruption legislation that also includes provisions for establishing compliance in companies and organisations.

That said, ongoing anti-corruption efforts can roughly be split into three groups: the first led by the federal authorities, determined to weed out bad apples who have become a liability, demonstrated exceptional inefficiency or have been singled out due to the political agenda. The second group is represented by officially-assigned institutions such as the Ministry of Labor which was charged with the development of anti-corruption policies but lacks the teeth and authority to introduce any meaningful changes. It promotes documents that prescribe anti-corruption activities to underpin National Anti-corruption Plan. The third group is more into ousting political corruption through orchestrated leaks about corruption among senior public officials, fueled largely by the desire to remove them from positions of power. That's how people from Mr. Putin's inner circle were forced to bow out.

So the first group has been very successful by flagging some regional leaders and putting them behind bars and resolving in-house conflicts among competing law enforcement agencies. However, such actions are aimed at optimising bloated networks which also represent reputational risks since they have been in power for a long time. The third group is led by Alexey Navalny and his Anti-corruption Foundation's revelations.

Anti-corruption legislation: Russia is a signatory to many conventions, including the Council of Europe Criminal Law Convention on Corruption, the

9 <http://www.techknowledge.me/files/theme/KC/Baltzer/BUCOA4Leaflet2015.pdf>.

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UN Convention against Corruption, the UN Convention against Transnational Organized Crime, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The key piece of legislation is the Federal Law on countering corruption 273-FZ. It contains almost all key international anti-corruption features: e.g. an intermediary or a third party, if they acted intentionally to elicit a bribe, shall be criminally liable under article 291.1 of the Criminal Code. Companies are not subject to criminal liability according to Russian criminal legislation (article 19 of the Criminal Code). The same applies to foreign companies that can only be punished under the Russian Administrative Offences Code. Since corporate bribery became an administrative offence under Art. 19.28 of the Code of Administrative Offences (akin to FCPA or UKBA), however, it has lacked a crucial component, namely the “adequate procedures” defense which a company may use to avoid liability. Even the minimum compliance measures that companies need to take (i.e. training, internal policies and procedures) pursuant to Art. 13.3 of the Federal Anti-corruption Law 273-FZ do not yet provide for the “adequate procedures” defense in courts. Nevertheless, lawyers have referred to it in certain cases.

5. “Soft law”

Any initiative launched by the business community in the form of the Collective Action and Integrity Pact could become a best practice, bringing more transparency into areas notoriously stricken by corrupt practices (e.g. bidding and tenders), or improving supply chain and interaction with third party agents. I led my first Collective Action in the energy sector called “Russian Energy Compliance Alliance” (“RECA”) in 2010. I brought together the 15 foreign and Russian companies that existed at the time; the latter were reluctant to join but, following the support of the Federal Anti-monopoly Service, they realised that the federal agencies could also be interested in setting a level playing field for the market players. Later, as a member of the Coordination Council on implementing the Anti-corruption Charter of Russian Businesses at the Russian Chamber of Commerce,¹⁰ I tried to introduce best international practice to the SMEs and their networks along with methodological recommendations from the Ministry of Labour as well as criteria for anti-corruption programmes to meet existing requirements of the Russian anti-corruption legislation. Of all civil society organisations that help businesses in this area, the Chamber of Commerce is the best suited and most competent to introduce compliance mechanisms to SME which normally lack the resources to implement this function.

¹⁰ <http://against-corruption.ru/en/>.

The Business Ombudsman's office was established in Russia in May 2013 to address the imperfections of the Russian court system and unfair treatment by prosecutors. I participated as the Council of Europe's independent expert in the project together with regional Business Ombudsmen called "Protection of the Rights of Entrepreneurs in the Russian Federation from Corrupt Practices – PRECOP RF."¹¹ Such initiatives help identify good business models that ensure protection from corrupt law enforcement agencies and biased court rulings.

6. Compliance industry

On the back of changes in anti-corruption legislation, the domestic anti-corruption compliance market sprang up to establish a local compliance industry, which is normally frowned upon by prosecutors. Yet any attempt to modify and localise the anti-corruption industry falls short of international expectations. As a result, internationally-accredited organisations like ICA find a lot of clientele because companies are ready to invest in compliance which is on a par with international standards rather than taking their chances with local providers. This is good news for cross-border compliance-related issues, especially if proper education is provided to compliance officers whose certification is recognised beyond the Russian borders. That would greatly simplify cross-border issues.

7. Anti-trust compliance

The Federal Anti-monopoly Service is very active in Russia. Its main financial sanction is an administrative fine which ranges from 1%–15% of the company's annual turnover. These fines are issued pursuant to the Code of Administrative Offences, which provides that administrative liability is fault-based. Accordingly, taking appropriate compliance measures could be perceived as substantive defense which would relieve a company from any administrative liability.

8. Cross-border governance

This is also gaining traction in places such as the Kaliningrad region, where small and medium enterprises strive to emulate the best corporate governance practice they have learned from their foreign partners. This region's Business Ombudsman – Georgy Dykhanov – kindly provided me with a few examples of successful cross-border governance lessons which, in turn, were taken further into mainland Russia to be shared with other Russian companies and suppliers.

¹¹ https://www.coe.int/t/dghl/cooperation/economiccrime/corruption/projects/precop/precop_default_en.asp?toPrint=yes&.

9. Corporate governance

Corporate governance may be stagnant in Russia at the moment (at least based on Deloitte's findings) but a new Corporate Governance Code (adopted by the Central Bank of Russia's Board of Directors 21 March, 2014) provides clear guidance for companies to implement the Code's principles and monitor its compliance. Public companies are required to comply with the Code or explain why they fail to do so. Companies must integrate these changes into their internal documents, organisational structure and corporate procedures.

Based on the findings of Deloitte CIS Centre for Corporate Governance in 2015,¹² there are still relatively few independent directors: they are found in only 41 % of companies. Most directors (61 %) have connections to the state authorities. Only 22 % of companies perform the Board's self-assessment compared with 78 % in the EU.

10. Cross-border culture

Following the exodus of large sections of the workforce many Russians have returned from abroad and taken up senior positions in Russian companies. However, this is not sufficient to offset the steady brain-drain as many mid-level managers continue to leave Russia. Russian capital has failed to repatriate from

2. Corporate culture

VESTER Group Company "Vester" mission:
Best serving the customer through professional staff, using best technology, price and product portfolio policies

СЕМЬЯ Trading House «Family» mission:
Our objective is to be that comfortable shop within reach. Our advantage is in serving our customer by being quick, having best selection of products available and demonstrating accountability.

ВИКТОРИЯ Group Company «Victoria» mission:
Provide the best product and level of service to our customers and offer fresh produce at a very fair price.

LAZURIT «Lazurit» mission statement:
As a furniture manufacturer we strive to make our furniture lasting, stylish and comfortable, while offering the best price for our work and keeping our customers' interests in our hearts.

Management of all of these Russian companies underwent training in Sweden and other countries. The owners developed their own distinctive corporate culture which contributed to their fast growth and brand recognition and helped them reach the mainland Russian market, which is remarkable for regional companies.

¹² <http://www2.deloitte.com/ru/en/pages/risk/articles/2016/corporate-governance-structures-of-public-russian-companies.html>.

the West: only around 2,500 mid-sized companies were accounted for in the government's de-offshorisation programme. Falling education levels due to Russia adopting a liberal education model is also contributing to a poorly-equipped workforce. At the same time, there are examples of cross-border cultural successes in the Kaliningrad region bordering Poland and Lithuania that can be shared and replicated in mainland Russia.

11. Conclusion: Main compliance challenges

After two years of sanctions, the number of consultancies that deal with fostering compliance and compliance services (including the Big Four, think tanks, NGOs and other organisations) has markedly declined. Many professionals and experts have left this field because there is little demand for their services and lots of foreign companies have also left. A potential solution is offered by automated and IT compliance solutions that help aggregate data once they localise their product and could fill this gap.

For companies which still deal with Russia, the following sanctions and corruption issues remain top priority:

- Identifying gaps and overlap between sanctions and compliance due diligence
- Knowing Your Customer and Know Your Counterparty
- Getting owners' identities, PEPs, SDNs, conflicts of interest
- Awareness of ethnic criminal networks and transnational crime which operates with impunity because they are intertwined with federal enforcement agencies. However, Russia has finally recognised this as a threat and set up special police units to fight ethnic crime.

Corruption continues to be a huge and tangible risk especially regarding sanctions. As the "pie shrinks" it increasingly becomes a matter of the survival of the fittest. In addition, the global recession and other looming crises present global challenges along with the prosecution of non-compliant companies by the SEC and DOJ. Although foreign companies have stopped monitoring what is going on in Russia and are re-allocating their resources elsewhere, it would be prudent to continue watching this space because few do. Russia will emerge after sanctions with many problems and challenges (e.g. severe technological gaps, lack of investment and innovations, lower levels of professional workforce, degraded institutions and infrastructure), but will still have a lot of natural resources, a potentially large consumer market and an appetite for huge infrastructure projects. It all starts with cross-border compliance, governance and culture to maintain good levels of professional interaction and could later be replicated elsewhere in Russia because best practice must be emulated in order to save money and resources in our challenging times.

E. Compliance Standardization – Global and National Perspectives

I. ISO 19600 – An Open and Flexible Standard in a Regulated Context that also Offers Benefits at International Level

Prof. Dr. Peter Fissenewert

ISO 19600 can be used to internationalise standards of compliance management for use by countries throughout the world. As a cross-border code applicable to all branches, the norm can be used to achieve internationally uniform framework conditions for establishing and implementing compliance management systems in the most diverse types of organisation.

The norm considers not only a company's international activities and organisation but also its size (i. e. medium-sized companies), insofar as many clauses include the express reference that the norm's scope of application depends on the organisation's structure and complexity. Compliance is like a suit, tailored to a company's size and individual characteristics.¹

In addition, the norm provides recommendations on how to observe principles of good governance (i.e. proportionality, transparency and sustainability). In this respect, ISO 19600 also takes account of value systems in that it consists not only of obligations which organisations are compelled to fulfil but also those they wish to fulfil and which comprise of society's social and ethical values.

Today, it is generally recognised that compliance solutions must be determined by the needs of the organisations in question. This often has the consequence that compliance management systems differ markedly from country to country. The variety of solutions increases when other countries are considered.

At this point, the first crucial question arises: how can standards, which are characterised as fixed, ensure flexibility? ISO stands for "International Standard Organization". It is an international association of organisations responsible for norms and develops international norms in all areas with the exception of electricity and electrical appliances (for which the International Electrotechnical Commission (IEC) is responsible) and telecommunications (for which the

¹ See also Makowicz, Grundsätze der Compliance, 1–10, p. 4 in Makowicz/Wolffgang, Rechtsmanagement im Unternehmen.

International Telecommunications Union (ITU) is responsible). Standards or norms are rules that are recognised by society as a whole or in certain areas.

At international level, compliance is found in different national settings. The consideration of cultural peculiarities differs not only from case to case but also state to state. There are even regional cultural peculiarities within a country. Against this background, the question arises as to what extent an internationally active company is prepared to subject itself to a minimum cultural standard which is to be applied independently of any less strict cultural requirements that may exist. In law, something similar already exists. Such “supra-legal standards” can be found in the fields of environmental protection, product liability and labour conditions. A corresponding minimum standard is required by rating agencies for ethical investment. Accordingly, lists of criteria ask what percentage of the workforce are affected by a certain rule.² These criteria have to be established centrally and be observed by all companies regardless of national legislation.

However, it must also be observed in this respect that a central compliance department might be overstretched if it had to deal with each and every cultural peculiarity in every country. This would be impossible due to linguistic and cultural barriers. For this reason, the central criterion of the great cultural guideline should be expanded with decentralised cultural components. The minimum standard should be set centrally but the consideration of national peculiarities must take place locally. Thereby, it is particularly important to consider national cultures. Accordingly, other cultures may make it necessary to pursue e.g. anti-corruption strategies in South European countries more intensively than in Scandinavia.

The example of anti-corruption strategies (i. e. following the law and prosecuting infringements) is closely connected to respecting different cultures. Accordingly, respecting foreign culture can lead to liability since German management can also be personally liable under German law for infringing compliance requirements abroad.

This is not only seen in criminal liability (under German law) for bribes made to public officials and private persons from a foreign country, which has existed for a long time. Moreover, there is a significant risk of the company (from a foreign perspective, this is the parent company in Germany) making compensation claims against its management board in Germany owing to compliance infringements abroad.

2 See Behringer in Compliance kompakt, p. 398; cf. e. g. the FTSE4Gob Inclusion Criteria, available under: http://www.ftse.com/products/downloads/FTSE4Good_Index_Series.pdf? 32.

This was made clear by the seminal “Neubürger Judgement” issued by the *Landgericht München I* (hereinafter “Munich I District Court”). Siemens AG sued their former financial chairman for compensation of 15 million euros because he had infringed his compliance duties. The Munich I District Court allowed the action.³

The charge against Neubürger, the former financial chairman, alleged that he had breached his compliance duties as member of the board in relation to cases of corruption abroad. The Munich I District Court justified its judgement as follows: “The accused failed to take any or at least adequate measures to clarify and investigate the breaches, to prevent their occurrence and to punish the workers responsible, despite having them repeatedly brought to his attention.” The District Court continued: “Above all the repeated occurrence of breaches or at least serious suspicions in connection with cases of corruption abroad show that the current system is not adequate. However, in this case, it is the responsibility of each member of the board and thereby the accused, as part of his supervisory duty, to ensure that within the board a functioning compliance system is agreed.” Consequently, the District Court stated: “Accordingly, international bribes represent a statutory breach that cannot be justified by claiming that, without them, it would not have been possible to succeed economically on corrupt foreign markets.” Concerning the applicable standard of care and compliance duties of a member of the board, the Court stated: “Considering the dangers involved, the board would only satisfy such a duty if it established a compliance organisation that was designed to prevent loss and control risks.”

Regarding the management’s compliance duties in Germany, it is insignificant in which country bribes are paid. In this case, even minor negligence can lead to liability. This is clearly stated in the District Court’s decision. Moreover, high compensation amounts may threaten the very existence of the board member concerned.⁴

The judgement of the Munich I District Court is not only forward-thinking regarding the standard of the board’s liability in German stock corporation law; it also affects the management of a GmbH.

Observing the flexible standards of ISO 19600 is of crucial importance for the success of compliance management at international level. Ideally, compliance will then be regarded as the standard for all employees at all corporate levels and internationally.

³ Landgericht München I of 10.12.13, 5 HK O 1387/10.

⁴ Stucken/Senff, Compliance-Management in China: Praxishandbuch für Manager, p. 164.

II. Introducing Compliance to the Shop Floor – ISO 19600 and Germany

Michael Kayser

1. Introduction

When the International Organisation for Standards published the ISO 19600 Compliance Management Standard in late 2015, the reaction throughout Germany was scepticism to harsh critique in some compliance quarters. Critics questioned how the organisation responsible for technical standards could concern itself with a largely legal topic.

“Amateurs vs. professionals” was the tag line on the one hand, “Nothing new here and therefore not required” on the other. Initially, the compliance profession’s scepticism outweighed the curiosity that should have been warranted.

This reaction may not be as surprising as it seems, given the development of compliance in Germany in the past. Understanding the history of compliance, and how Germany got to where it is today, may explain some of the controversy surrounding the reaction towards the standard.

2. Compliance in Germany

Germany has had its fair share of high-profile compliance cases, with a prominent case 2006 when Siemens got into trouble, closely followed by major breaches within Daimler, Deutsche Telekom, and Deutsche Bahn among others. These compliance cases were rigorously prosecuted with hefty fines being imposed. Consequently, calls for protective measures were made – particularly from and in relation to the supervisory boards and their potential liabilities. The call for compliance management systems grew stronger and (at least within large, publicly listed organisations), significant investment went into establishing related structures. Against this background, it is no surprise that the people charged with establishing and maintaining those structures came from a predominantly legal background, having previously been lawyers and solicitors or involved in internal audit or finance.

In the years that followed, compliance established itself as a predominantly legal concept affecting organisations, starting with the large, publicly listed companies. During this period, the focus started shifting from purely defensive characteristics to the implementation of preventative measures. At the same time, compliance requirements found their way into supply chain relationships, increasingly affecting the “*Mittelstand*” (i.e. organisations still considerable in size, but neither listed nor publicly owned). Over time, these developments con-

tributed to a considerable level of compliance awareness and maturity in Germany.

3. Operational and Legal Aspects

Interestingly enough, it could be argued that promotion through supply chain relationships and the increasing focus on preventative measures saw organisational and operational aspects starting to move into the foreground, adding to the originally legal risk. Therefore, it seemed natural for standards organisations to step up to the challenge and get involved, particularly in relation to management system standardisation. Approaching compliance from an organisational and operational perspective can even be characterised as the point when it arrived in the day-to-day business world, offering the chance to make it mainstream – somewhat like to the concept of quality in the mid-80s.

4. The Approach

In developing ISO 19600 (and as with earlier management system standards), the aim was to provide guidelines and guidance for organisations that wished to firmly implement compliance in their respective organisations.

In developing this concept, nothing radically new was invented. Rather, the work involved taking various concepts, guidelines and principles that existed locally to a certain level of detail, such as the national standards of Austria and Australia, general worldwide principles (as formulated by the UN Global Compact) and various other initiatives (e.g. the ones published by the OECD). In its development, it incorporated experience already gained over the past few years, including that of compliance-mature environments.

Consequently, the result reflects rather than contradicts existing practices, adding an operational dimension and (most importantly) a universal international understanding of the concept of a compliance management system. From a German perspective, it translated a legal view into an operational, management system-based approach.

5. Adoption, Use and Benefits

As is generally the case with every standard, the benefits of ISO 19600 will vary across sectors, types of organisation and regions. Heavily regulated sectors such as the financial industry that have had experience with compliance measures, processes and procedures for many years (sometimes without the desired effects) will probably not be the first to use ISO 19600. Equally, large and publicly-listed corporations that are already operating compliance management systems and have been doing so for years (as is the case in Germany), will not

be the first to implement the standard in their respective organisations. Those organisations starting to establish such management systems will be interested in using ISO 19600 as the guiding basis for their efforts (particularly in Germany). For those companies, ISO 19600 is an obvious choice to demonstrate their compliance management arrangements to clients and customers in an increasingly global economy with international business relationships.

For organisations that consider themselves “compliance mature”, using the standard as a benchmark and requirement in relation to their business partners provides an opportunity for improving compliance management across the supply chain and increasing efficiencies in managing compliance across these relationships. In this context, for those requiring evidence of a certain quality of compliance management, ISO 19600 provides an international, universal point of reference for the compliance management system an existing or future business partner has in place. It can be a powerful tool for compliance officers in mature organisations in Germany and elsewhere. It has the potential to assist in the adoption and implementation of compliance in one’s own organisation and provides an objective requirement for business partners and suppliers in support of one’s compliance efforts.

This aspect, in particular, has led to a more measured view and evaluation of ISO 19600 in Germany. In addition, the argument that compliance is essentially a legal matter is beginning to be put in perspective. With ISO 19600, translating a concept or principle (here, compliance) into operational measures and processes, implementing it across an organisation “on the ground”, supports a preventative approach. It translates the (usually) abstract concept of compliance into tangible, concrete operational processes, procedures and measures. Using a shared terminology and approach with other management system standards, it facilitates understanding and implementation within the organisation. In the process, it recognises existing structures and processes, utilising and expanding them where necessary.

6. Where Are We Now?

After the controversy that ensued with the publication of the standard, media coverage was considerable and debate and discussion within the profession was lively and passionate. As the debate continued, two aspects became increasingly evident: the standard would come and, more importantly, it could be considered as actually complementing existing compliance efforts.

As for the standard itself, adoption across Germany has begun with a number of organisations aligning their compliance management systems with ISO 19600. Even the first certifications have been completed and the providers of such cer-

tifications are growing in number. Adoption in neighbouring regions is also picking up, as is international adoption – particularly in Asia. It is therefore to be expected that adoption will also grow via international supply chain relationships.

7. Outlook

The compliance community and beyond is increasingly considering the approach that the compliance standard offers, similar to the developments we have seen with ISO 9001. In that sense, ISO 19600 can bridge the abstract threats and operational risks that an organisation can evaluate and mitigate using appropriate operational measures. It provides compliance managers with a tool – and often language – that the operating business can understand, is often already familiar with and can relate to.

It is, however, increasingly recognised that it can contribute positively when implementing cross-border, cross-organisational compliance programmes. In addition, the association of accounts with their proprietary audit standard means that ISO 19600 is increasingly viewed as a precursor and route to a successful audit certificate.

What happened in Germany is introducing the topic into the wider business community and bringing compliance out of its ivory tower. Considering history, ISO 19600 may not have the game changing impact in Germany that it had in other regions (incidentally, ISO 9001 did not have that effect either), but it is on its way to becoming a formidable tool in the compliance manager's toolkit.

III. Cross Border Compliance – Standardisation Experience from Austria

Dr. Barbara Neiger

Nowadays, it appears that *Compliance* has become a kind of buzz word in the contemporary business world. However, it only means: “to act in conformity with applicable regulations” and no one can say that there have been no regulations and that organisations did not act accordingly. However, in a business environment where regulations are increasing in number and complexity, it can be a real challenge for organisations to follow them. A new approach is required which goes beyond individual measures to ensure compliant behaviour in the conduct of business activities.

The theme of this congress is: “Compliance across Europe”. In my contribution, I will present the approach of the Austrian business community in developing compliance standards as represented by a committee established at the Austrian member of the International Organisation for Standardisation.

The Austrian Committee ASI/PC 265 has been founded in June 2012. One reason for establishing the Committee at this time was the amendment of anti-corruption regulations in the Austrian Criminal Code at the beginning of 2012. Among the changes introduced, the concept of a public official was greatly expanded to include employees of companies in which the public sector has a greater holding than 50%. There are about 50 members of the Committee from all three sectors, with majority coming from various industries of the private sector. A small task force group was formed for the development of the first draft of the new standard. Its members met during the summer months and presented the first draft of the new standard to the plenum by the middle of September. Intensive discussions followed in several meetings. Finally, the text was approved by a majority at the end of 2012. The ONR 192050 Compliance Management System (CMS) was published on February 2013.

The ONR 192050 applies to all types of organisations in the private, public and civil sectors. It can be applied to the whole organisation or only part of it and be used for third party due diligence. The norm establishes requirements for an effective compliance management system in seven elements: top management, compliance officer, compliance risk management, instructions, training, effectiveness and communication.

All elements of the norm have to be developed and implemented in order that the compliance management system satisfies ONR 192050. This means that there can be no cherry picking of elements. However, the norm expressively states that the Compliance Management System (“CMS”) has to be proportion-

ate and adequate to the individual needs of the organisation. The extent of each element within an organisation depends on its individual situation (e.g. size, structure or type and location of business activity).

The main trigger for adequacy and proportionality is a compliance risk assessment. So the argument that a CMS is only applicable to large and complex organisations and is an administrative burden for small and medium-sized companies does not really apply. In particular, this group of organisations are far more vulnerable to compliance failures than large organisations. Fines could easily endanger their existence. Furthermore, when small and medium-sized companies are suppliers to large corporates they are often confronted with numerous requests to demonstrate their approach to compliance. Being able to present a structured and systematic approach according to a best practice benchmark may facilitate their response to such requests.

Shortly after the publication of the ONR 192050, an international project committee for the development of the ISO 19600 started work in April 2013. The project for the development of a new ISO-Standard had already started in 2012 when Standards Australia (the Australian member of the International Organisation for Standardization), proposed the establishment of such a committee based on their standard for compliance management system AS 3806:2006. So, at the time the development of ISO 19600 started, Austrian and Australia (like pioneers) were the only two countries which had voluntary standards for CMS. They are voluntary in as much as these two standards were developed by users for users, unlike guidelines to the laws published by state authorities.

Three delegates were nominated from the local Austrian Committee, of whom I was one. Intensive discussions at several international meetings followed for which the Austrian delegates were well equipped due to the intense and somewhat controversial discussions during the development of the Austrian norm ONR 192050. Talking to representatives of other countries revealed that they were having the same discussions on ISO 19600 in their own committees that we had when developing the ONR. The document “ISO 19600:2014 Compliance management systems – Guidelines” was published in December 2014.

The ISO 19600 is currently being incorporated into the Austrian system of norms. The main obstacle is that no German version is available yet. It is currently “work in progress” and should be published before the end of 2016. However, in principle, incorporation into the local system of norms is not mandatory; organisations can always access and implement the official English version of an ISO standard. Besides these two voluntary norms, the German-based standard IDW 980 is used in Austria, mainly by listed companies.

The ONR 192050 establishes the requirements for an effective CMS. By satisfying the requirements, a CMS can be certified according to ONR 192050. The

ISO 19600 is a “Guideline Norm”, which means that it consists of recommendations and not requirements. Based on ISO understanding, guideline norms cannot be used for certification. Requirement norms use the words “shall or must” whereas guideline norms are characterised by “should and can”. Furthermore, guideline norms are – by their very nature – usually quite lengthy while the wording of requirements norms is short and precise. In order to audit and certify management systems according to a guideline norm, the wording has to be changed from “should” to “shall” and reduced in length. Moreover, any examples provided must be excluded.

As the ONR 192050 is a requirement norm, the certification scheme results directly from the text of the norm. Regarding ISO 19600, the aforementioned approach to the guideline standards was applied by Austrian Standards to establish the certification scheme for ISO 19600. Currently, there are two valid certificates issued by Austrian Standards on conformity assessment of CMS: one for ONR 192050 alone and one for both ONR & ISO 19600. I served as lead auditor in both certification audits and the surveillance audits one year after the certificate was issued. One holder of a certificate is a regional energy provider with a majority of public shareholders. The second holder of the certificate is a section of the administration of the City of Vienna. Both organisations have published their certificates on their web-pages and the certificates are registered in the official certification register of Austrian Standards.

In conclusion, I would like to share with you some experiences of these certification audits and the principal benefits of a certification. The main effects observed from the audit process is increasing awareness of the importance of compliant behaviour for the organisation and effective communication from the top. Due the considerable numbers of people involved in the audit through interviews or observations of their day-to-day tasks, the audit is well-known throughout the organisation. The certificate is used for external stakeholders to demonstrate commitment to business activities in compliance with applicable regulations. Referring to the example given at the beginning of my contribution: a small and medium-sized company is faced with numerous requests from its suppliers to demonstrate the approach to compliance. A certificate may not replace or substitute due diligence by the business partner but it may positively influence the extent of such investigation.

The external audit process provides a summary of information to management about the status quo of the organisation’s CMS in comparison to an international best practice benchmark. Last but not least, the three-year certification cycle under the ISO scheme ensures a structured approach to continual improvement of the CMS.

IV. Cross-Border Compliance Standardisation – A Swiss NGO Perspective

Dr. Daniel Lucien Bühler

1. Introduction

Switzerland has always been an active member country in international standardisation bodies. This is because Switzerland, with its small domestic market, has a vital interest in accessing foreign markets and ensuring low technical barriers to do so. With the increasing importance of cross-border services, the interest in international standardisation has also expanded beyond technical product standards and, today, includes management system standards. Switzerland, through the Swiss Association for Standardisation SNV, has actively contributed to the establishment of “ISO 19600 – Compliance Management Systems” and is also actively involved in e.g. “ISO Technical Committee 262 – Risk Management”.

Today’s globalised economy would not have developed without international standards. Many aspects of our life are based on international standards, from the DIN A-4 format to “ISO 9001 – Quality Management” and the international financial reporting standards (IFRS). It is evident that standards are necessary to reduce complexity and cost for companies and individuals and to abolish barriers that would otherwise restrict trade, development and prosperity. The same goes for management system standards for risk management and compliance management. “ISO 31000 – Risk Management” and ISO 19600 are two key standards for best practice risk and compliance management. They are the only international standards in their field (if one defines a standard as a generally accepted description of the state of the art which has been developed by an independent standardisation body in an open, transparent process and by consensus). Of course, there are many guidelines and frameworks available for risk and compliance management. However, none of the organisations issuing such guidelines are independent nor are their standards generally accepted by all members of society, nor are their processes entirely open to all interested persons. Therefore, the availability of international standards for risk and compliance management is an important step towards better management of compliance risks and a chance for global uniform best practices resulting in a significant reduction of complexity and cost.

2. Standards are, by nature, genuinely cross-border and cross-cultural

The way international standards are developed (for instance by the International Standardization Organization ISO), is genuinely cross-border and cross-cultural.

al. ISO Standard 19600 was developed by experts representing 11 member countries from America, Europe, Asia and Australia. The almost 30 experts were delegated from their national standardisations organisations to participate in the ISO project committee. During a period of 2 § years more than 1,000 comments on the draft standard were discussed and accepted or rejected in the consensus process. Thus, by the very way international standards come to existence, they represent what international experts view as being the state of the art in a particular field. Clearly, international standards are not free from error. However, they are reviewed every couple of years and, during this review process, comments from all interested stakeholders are considered (again by consensus). Looking at the process of international standardisation, it quickly becomes clear that no state, government or company (however big or powerful) can outperform an international standard on its own. A single organisation can never be as independent, international, multicultural and inclusive as the ISO, for instance. Moreover, given the cost associated with the individual exercise of re-inventing the wheel, it becomes evident that organisations should urgently make use of generally-accepted instruments whenever they are available (such as international standards). Failing to do so results in a waste of financial and human resources and sub-optimal management effectiveness.

3. To effectively promote compliance, access to know-how must be low cost and easy

International standards are particularly important – if not vital – for small and medium-sized organisations, including governments with limited resources. They cannot afford to create their own way of doing things and they may lack technical expertise. Imagine a regulator in a poor country who wishes to understand what the current state of the art in compliance management is to use as a benchmark for the supervision of its banks, insurance companies and asset managers. With a few hundred USD, government officials can buy the relevant standards and get access to information that would easily cost a few million USD and a lot of human resources to (sort of) establish on their own. Furthermore, when government officials decide to incorporate international standards into their regulatory framework they use the same terms and speak the same language as their counterparts in other countries. They can even ask them for advice and exchange experience over time.

What applies to small and medium-sized organisations and developing countries also applies to large organisations, rich countries and their agencies. They are not able to create a true standard either and, in terms of resources, it also makes no sense for them to re-invent the wheel. After all, imagine the cost that would be saved if all companies of a regulated sector were required to choose

one single standard (e.g. ISO 31000) for their risk management system. From a domestic and especially global point of view, the reduction of complexity and cost for organisations, for regulators and for external auditors (who are now required to review and certify standardised processes), could easily amount to tens or even hundreds of billions of USD per year. Money that is currently wasted.

4. Public organisations and standardisation

International standards for management systems are addressed to all organisations, private and public. Public organisations should assess and treat their risks and manage compliance with the same diligence as any private sector company or NGO. Since public organisations generally act under parliamentary supervision, they are careful to maintain their independence – particularly from certain industries and foreign governments. Against this background, it is evident that the public sector can only apply independent and generally-accepted standards. A German regulator will most likely not apply or require companies to apply guidelines issued by a US regulator, for instance. A Swiss regulator or agency would not be able to apply guidelines developed by a business association when assessing a compliance defence argument raised by a company under investigation. Under such circumstances, regulators can only apply independent national or international standards.

By way of example, the Swiss Confederation applies ISO 31000 across the board in the Federal Administration for risk management. The Swiss Competition Commission refers to ISO 19600 (among other guidelines) as a benchmark to assess whether it should accept a company's compliance defence and reduce a competition sanction because the company acted diligently in designing, implementing, maintaining and continually improving its compliance management system.

5. Standards strengthen sound principles, good governance and foster accountability

Standards are, by nature, based on principles. ISO Standard 19600 is a 30-page document. This is a very short document for a topic that could easily fill thousands of pages if one goes into details. However, the principles matter more than the 1,000 details and 10,000 rules you can imagine. In practice, it is usually the case that organisations get the principles wrong rather than the details. ISO 19600 is centred on leadership, ethical values and culture. They are the key drivers of effective compliance management. If an organisation decides to allocate resources to compliance but top management does not lead by example and is not seen to comply in the organisation, then every dollar spent on compliance is

a waste of money. It is not a coincidence that almost all material integrity and compliance crises have resulted from a lack of leadership, values and culture. Therefore, one needs to get this right before starting to spend time and money on day-to-day compliance management. This underlying concept is stated clearly throughout the entire ISO Standard. The same goes for the implementation of a good compliance governance framework. Unless the compliance function has direct access to the board, is independent from line management and is given appropriate authority and adequate resources, every single dollar and every hour spent on compliance management will be of little use or even useless, depending on how severe the governance failure is. Standards also foster accountability because they demand clear and documented functional tasks and responsibilities, which must be measured and audited for effectiveness and be subject to regular reporting to top management and the governing body. Any organisation without clear functions and functional accountability is prone to risk and failure.

6. Summary

Many organisations complain about too much regulation and demand less regulation. However, what they should really be demanding is a more global standardisation of regulation which, in itself, would reduce regulatory complexity and cost to the maximum.

Systematic risk and compliance management are topics which, for a few years now, have been outlined in international standards, particularly in ISO Standards 31000 and 19600. Organisations are free to apply international standards or other guidance or no standards or guidance at all. Not following a generally-accepted international standard is an option but clearly a bad, expensive and risky one. Organisations following a multitude of guidelines or following an “invented-here” approach inevitably spend more time and money on developing a framework which, by its very nature, will not be able to match the quality of an international standard. However, it is not only a waste of resources to re-invent the wheel but also a receipt for sub-optimal effectiveness and increased risk, for a lack of transparency and expensive follow-on costs (for instance for educating the auditors and new employees on what exactly one is doing, if it is capable of explanation at all). Imagine the financial savings and improvement in effectiveness that could be gained if all regulated financial institutions in the world were to apply a small number of generally-accepted international standards: all professionals would speak the same technical language, they would respect the same principles and apply the same practices and it would be transparent and easy to understand for employees, auditors, investors and regulators. The gain in effectiveness and the savings achieved by the reduction in complexity and

cost would certainly be massive, to say the least. The positive result would certainly be comparable to the well-known result of applying generally-accepted accounting standards as opposed to the situation that existed up to the 1950s, where every organisation essentially had its own individually-accepted accounting standard. Therefore, it is time to think and act big and move forward to a less complex, less expensive and more effective risk and compliance management based on international standards. All organisations should act *now*: companies, governments and NGOs, for their own and their employees' benefit and also for a better society.

F. Cross Cultural Compliance Communication and Other Methods

I. Cross-Cultural Compliance and Communication – the thyssenkrupp Experience

Will Phua

1. Introduction

Compliance is not a foreign topic in European corporate culture. It is very much part of corporate life and there is familiarity and general acceptance in everyday business. In Asia, the concept and understanding of compliance is not as developed as in the West. This diverse mindset and cultural divide make compliance a particularly challenging topic for a global company seeking to implement a consistent compliance programme across its network of companies.

At thyssenkrupp, we share common values, a common mindset and stand for long-term sustainable value creation. Our interactions are based on transparency and mutual respect. Integrity, credibility, reliability, and consistency define everything we do. Compliance is a must. We seek to be a responsible corporate citizen. But the challenge is to implement these ideals consistently across the cultural divide in a very diverse organisation which operates across the globe.

On a group level, our compliance programme is built on a hierarchy with the company's Mission Statement at its apex, supported by a Code of Conduct governing the behavior of its employees. For specific topics, there are various Compliance Regulations which are supplemented by Guidance Notes and 'Nutshells' of best practices for a diverse range of topics.

'Compliance' is defined differently by different companies. At thyssenkrupp, core compliance topics include anti-corruption, anti-trust, data protection as well as anti-money laundering. The focus of this contribution is on anti-corruption.

2. Asia Pacific

Asia is an extremely diverse region, made up of multiple traditions, cultures, languages, religions and peoples with centuries of proud history. At thyssenkrupp, Asia is divided into three regions – India, Greater China and the Asia-Pacific region which comprises of countries in eastern and southern Asia and Southeast Asia as well as Australasia. The comments given herein relate primarily to thyssenkrupp's Asia-Pacific region.

The Compliance footprint for thyssenkrupp in the Asia-Pacific region – with its regional headquarters situated in Singapore – stretches across a very diverse geographical area comprising operations in seventeen countries from Japan to the North to New Zealand in the South. This geographical spread itself is a challenge as such and even more so in the event of a compliance emergency.

The other challenge is the area's legal diversity. There are at least seventeen sovereign countries for which thyssenkrupp has a business footprint in its Asia-Pacific region, each with its own unique and different legal systems. Unlike Europe, where there is a high degree of harmonisation of laws and business practices, there is no such legal harmony in Asia; not even in ASEAN, the region's biggest bloc. On the other hand, there is a certain degree of legal familiarity and harmonisation between Australia and New Zealand; businesses in these effectively western democracies are relatively familiar with compliance concepts. So, with this legal diversity, articulating and communicating one coherent compliance policy based on European standards can be a cross-cultural challenge in itself as legal definitions, standards and practices are vastly different.

In the context of anti-corruption, the issue of business gifts and invitations is particularly pertinent. In Asia, the use of gifts and invitations/business entertainment are very common and usual ways of building (business) relationships. The challenge is therefore to cross the cultural divide to bring about a consistent yet pragmatic compliance programme. Some of the challenges include:

- **Gifts of money**

While most companies have a zero-tolerance policy and a zero-cash gift policy, the fact remains that money gifts (e.g. red/green packets) are common in many cultures in this part of the world. While most (if not all) employees at thyssenkrupp understand that cash gifts are strictly prohibited, there are those rare occasions when compliance officers have to review a request for making a cash gift in accordance with local culture/customs. Situations where cash gifts are normal in Asian culture include weddings, birthdays, funerals, Lunar New Year and religious donations. The challenge is therefore for compliance officers to review each of these situations carefully, and decide whether such gifts are in conformity with local and cultural norms or whether the giving of such a cash gift is seen as creating undue influence on business decisions or worse as a means of bribing or soliciting special favours from the recipient.

- **Festive gifts (eg. hampers, alcohol, 'moon cakes')**

Apart from cash gifts, it is also very common practice for businesses to exchange gifts during various festive occasions. These gifts can range from calendars, diaries and other promotional items, to gift hampers consisting of numerous items within, wine/whiskey or other forms of local alcohol, cakes,

biscuits and other food stuff (eg. moon cakes). Sometimes these gestures can quickly escalate into a race to see who can give the 'better' gift and therefore lead to undesirable situations from a compliance perspective. This should be carefully managed: while the perception of wrongdoing should be avoided; not participating in such gestures can be seen as arrogant or rude by customers who have been giving many years of loyal custom. This is particularly so in competitive markets where such gestures are a courteous way of sending good wishes to important business partners. A balance needs to be found in accordance with local practices. While respecting local cultures, such gestures must be reasonable in scale. The test should be that no third party looking at such gestures would identify it as an inappropriate behavior.

- **Sporting events**

Businesses do make use of sporting events to entertain business associates or use sports as a way to conduct business interactions. Being spectators at important sporting events can be very expensive, so care must be taken and proper assessments should be done to ensure that there is no undue influence given nor be open to accusations of wrong doing. Participating in sports (e.g. golf) is another common way to conduct business in certain cultures. This also has to be assessed on its merits to ensure that there is no perceived or actual wrongdoing.

- **Speaking engagements**

Occasionally, executives are invited to give presentations at seminars/forums etc. by third parties. As a result, their hosts sometimes provide these speakers with various gifts and incentives (e.g. flight tickets, accommodation, free city tour, golf games etc.). While speaking at relevant seminars/forums may be useful to raise company and industry profiles, these engagements have to be carefully reviewed for a) potential anti-trust violations and b) for anti-corruption issues associated with the gifts and incentives offered and received. Lavish gifts should be avoided and incentives should be declined to avoid the appearance of wrongdoing.

- **Delegation/incentive Trips**

All expenses-paid trips to visit a business partner's facilities/factories/offices is a common practice in this region. Incentive trips are used to incentivize sales staff of business partners to perform for reward. Delegation trips are given to business partners to conduct factory inspections or meetings to discuss a project/product. Annual open days are also held with both official business elements as well as a significant portion of recreational activities organised by the host. Such trips have to be carefully reviewed to ensure that the non-business activities do not form a significantly large part of the trip.

3. Best Practices

The cross-cultural challenge and East-West divide in attitudes towards compliance must be handled sensitively, yet reasonably. On one hand, to maintain a zero tolerance for corruption violations but, at the same time, taking into account regional/local practices in order for business to thrive. It is therefore imperative for companies to introduce some best practices within the organisation in order to raise the standard of compliance within the corporate culture. Some best practices include:

► **Ensure transparency**

As they say, 'transparency is the enemy of corruption'. Employees should be encouraged to show transparency in their activities as a means to create an open culture which would go a long way to fight corruption.

► **A culture of speaking up**

In a region where speaking up, especially against authority, is still relatively taboo, companies would go a long way in combating corruption if they would encourage their employees to speak up against anything untoward around them.

► **Entertainment/gift register**

Maintaining an entertainment and/or gift register where employees record all entertainment given/received and gifts given/received is another best practice which can lead to the consequence of a more transparent and compliant corporate culture.

► **Prior alignment with business partner**

Increasingly, it has been noticed that many companies in the region would send out festive greetings to their business partners with a compliance note encouraging business partners not to send gifts to their employees. In cultures where gifts are routinely exchanged during a meeting as a matter of courtesy, there is also increasing alignment between business partners prior to the meeting agreeing not to exchange gifts at meetings so as not to 'escalate' the gifts (to bigger and more expensive gifts with each subsequent meeting).

These practices are on the increase in the region, which is a positive sign, and go some way in bridging the cross-cultural compliance divide.

4. Conclusion

There should be circumspection within businesses when it comes to gifts and invitations. Business entertainment should not be overly lavish but rather it should stay within the boundaries of reasonable customary scale. Invitations

I. Cross-Cultural Compliance and Communication – the thyssenkrupp Experience

should only be given and/or accepted if reasonable and appropriate. Companies should ensure transparency within the organisation and also with those of their business partners. Business gifts should only be exchanged if the value is insignificant. Lavish gifts should be avoided.

Special care should be taken when dealing with public officials. Companies should have a more stringent compliance policy regarding dealings with public officials. Any behavior should not give rise to perceptions of inappropriateness.

Given the cross-cultural compliance divide, communication and education of expectations and appropriate behavior are important. Frequent articulation of company policies through training, workshops and corporate communication is necessary particularly in countries where wealth generation takes precedence over ethical compliance behaviour. Companies should devise internal checks through audits and risk analyses to plug loopholes or gaps in internal policies. Encouraging and communicating a speak up culture by introducing a compliance whistleblowing hotline can also raise awareness.

While compliance is gaining prominence and acceptance in the region particularly with the introduction of laws with extra-territorial effect by major western economies, the cross-cultural divide in mindset and perception still has room for improvement. The numerous multinational companies operating in the region also have an overall positive effect on compliance in the region. There is a lot of work to be done but the future of compliance in the region is positive; with sustained engagement, compliance in the region should reach a new and higher plane before too long. At thyssenkrupp where there is a strong commitment to compliance we understand that compliance is a question of mindset and should be behind everything we do; we are taking positive and encouraging steps to bring about greater compliance awareness to colleagues within this culturally diverse region.

II. Lessons on Cross-Cultural Compliance Communication

Vincent Pepito F. Yambao, Jr.

1. Introduction

Working in a cross-cultural environment like Asia Pacific (APAC) can be daunting, especially in a company with diverse portfolio and varied business models. Unlike those in Europe or in Latin America, there are less commonalities among the countries in this region except perhaps for the happenstance of geography. There could be no doubt that China is very dissimilar in almost all respects from Australia, India, or Indonesia.

Diversity characterises the social, economic, cultural, religious, legal and political structures of even the sub-region of South East Asia. Becoming another European Union is too far on the horizon despite the efforts of the ten-member Association of South East Asian Nations (ASEAN)¹ to become economically homogenous.

Given these realities, how can multinational companies (MNCs) enforce uniform compliance standards across cultures? How can a compliance officer overcome the barriers of language, religion and politics? What communication strategies work and don't work?

This contribution will attempt to answer these questions against the background of my limited experience in the pharmaceutical and chemicals business as Compliance Officer in South East Asia.

2. Understanding the “Whys” of Compliance

In designing a compliance program, it is imperative to have a clear understanding of the company's motivations to be able to set the proper tone and to develop the right mindset of both the management and the employees.

In its practical signification, compliance is about avoiding or minimising risk. In a purely economic sense, the cost of having a robust compliance program is nothing compared to cost arising from the possible repercussions of non-compliance.

Corollary to the risk-avoidance rationale is the concept of self-regulation. Some MNCs that are members of the UN Global Compact anchor their compliance program on a commitment to promote, protect and fulfil certain normative stan-

¹ Including Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

dards such as the universal principles on human rights, labour, environment and anti-corruption.²

A normative standard is, by definition, prescriptive; it describes the way something ought to be done according to a value position. Normative standards are therefore naturally more restrictive than the prevailing local laws or regulations. Many employees find the proposition rather difficult to appreciate. In the absence of any threat of regulatory or legal sanctions, it appears counter-intuitive for a company to willingly limit what it can do and cannot do.

Fortunately, the normative compliance standards set by the major pharmaceutical organisations have been adopted by local industry associations,³ resulting to the near harmonisation of compliance standards in the pharmaceutical industry. This phenomenon has the effect of levelling the playing field for the members of industry associations, and thus providing incentives for MNCs and their subsidiaries to continuously subscribe to these standards.

3. Policies, Process and Tools

Subscribing to normative standards is just one of the aspect of a robust compliance program. To operationalise these standards, policies and processes must be established. These should be supplemented by empowering tools, appropriate training, and relevant communication plans.

The whole exercise of coming-up with sensible compliance policies could be tricky, involving as it does delineating matters that can be addressed by general guidance from issues that would entail more specific rules. There is a natural tendency towards specificity that may sidestep local realities. Generally-speaking, it makes sense to provide more general guidelines and leave the determination of limits to the local compliance officer on matters such as the fair market value of professional services, venue of events, hospitalities, and the like. On the other hand, it may be wise to provide specific non-exhaustive list of items or gifts that the company may give.

To animate these policies, the necessary processes, approvals, and documentation must be clearly defined, including appropriate complaint management and escalation protocols. In a multi-cultural environment, tools must be able to fulfill the requirements of uniformity and flexibility to adopt to local specificities.

2 As member of the UN Global Compact, these MNCs committed to UN Guiding Principles on Business and Human Rights. For more information, visit the UN Global Compact webpage at <https://www.unglobalcompact.org/>.

3 Local industry association codes of ethics are mostly patterned after the International Federation of Pharmaceuticals Association (IFMA) Code of Practice.

Taking advantage of technology could significantly lessen administrative burden, and could exponentially expand space and stretch time.

4. Compliance Training and Communication

Communication and interpersonal skills are the most important abilities a compliance officer must possess especially for “high context” societies like South East Asia. “High context” societies are known to be collectivist, value interpersonal relationships, and have members that form stable, close relationship.⁴

Below are the ten things I learned from my experiences in conducting training and communication initiatives in SEA:

1. Policies must be explained in context. They should be related to the realities of particular country as far as possible.
2. Personal interaction is important. While online training portals may be the most efficient way to roll out group wide compliance training modules, this should be supplemented by other forms of training and/or communication strategies that allow personal interaction.
3. Group and problem-solving activities and case studies are preferred.
4. Informal meetings and consultations, personally or online, draw the most interesting questions and are invaluable avenue for knowledge exchange.
5. Emotive graphics for poster campaigns can transcend culture and language, and thus could have more impact than merely emailing copies of the policies.
6. Tone from the top is crucial. No matter how flat the organization is, employees take their cue from their leaders. If you want things done, secure the support of management.
7. Tap into the employees’ sense of shared identity. Apart from personal accountability, encourage collective compliance responsibility.
8. Be attentive. Silence is a form of communication, and non-verbal cues may give hints on the employees’ real thoughts. Initiate discussions to illicit information.
9. Constant presence is necessary to build trust. People tend to listen to a person that they trust.
10. Do not be offended easily. Employees use multiple sources of information and synthesize them to arrive at their own conclusion. Encourage them to ask questions.

4 http://www2.pacific.edu/sis/culture/pub/Context_Cultures_High_and_Lo.htm.

III. Compliance communication in crossborder cases

Prof. Dr. Peter Fissenewert

Communication is the most important tool of all for implementing compliance in a company. This is true, in particular, of companies that are active internationally and deal with different cultures.

“Is my conduct appropriate in this situation?” Employees perform this balancing act on a daily basis, especially when they have to navigate international structures involving different cultures. “May I invite my business partner to lunch, or will that embarrass them or even cause them problems?”; “How should I behave if gifts, even for officials, are normal in my culture but my European group management has a completely different view on the matter?”; “Whom do I obey?”; “What is right and what is wrong?”

Nowadays, it is not only professional groups vulnerable to corruption which are being informed about “compliance issues”. Employees at all levels and in all sectors are regularly confronted with new guidelines on different topics that are relevant to compliance. They are frequently uncertain because it is not clear what exactly constitutes legitimate conduct and what legal consequences they may have to fear.

This uncertainty or even minimal acceptance on the part of employees is often rooted in the implementation and formulation of compliance measures, which are all too often undertaken by corporate lawyers or the auditing department. The introduction of a compliance programme, however, always entails a change to the corporate culture as well. This is generally borne by the company management and is a problematic if corporate cultures and social cultures are faced with well-nigh unsolvable compliance challenges. Culture management is the task of corporate communication, which is why these departments need to be involved early on in the implementation of compliance projects. Very often, however, they are not sufficiently involved or are only involved once it is too late, if at all. Consequently, the necessary measures are not supported or realised appropriately and in a targeted manner.

This is quite apparent in international groups that have a main office in Germany and are active in Asia. It must be said that these groups often have excellent compliance practices and equally excellent compliance officers in the countries in question. Problems do exist, however, but they are not insurmountable.

Employees form not only the largest and most important but also the most diverse target group for compliance communication. They are already diverse due to the fact that some departments such as sales or purchasing are, nationally

speaking, more strongly impacted by acts of economic crime than production, for instance. Even if enough is being done in a comparatively corruption-averse country like Germany to effectively communicate compliance regulations, it becomes particularly difficult in “corruption friendly” areas. This is particularly problematic in places where actions are not subject to corruption regulations, even though they have been punishable in Germany for a long time.

This cross-border compliance culture impacts not only the company but also senior executives. They depend on compliance communication in several respects. On the one hand, they must fulfil their personal responsibilities and comply flawlessly with social and cultural rules. On the other, they need to enter into dialogue with their employees, assume their tasks as multipliers and also motivate employees to comply with guidelines. In addition, they must build cross-border cultural bridges.

Monitoring business partners also plays an increasingly important role where transnational activities are concerned. They include partner companies, suppliers, cooperation partners, subcontractors and freelance staff. Third parties are very important for compliance strategy because incorrect behaviour on their part (pursuant to the UK Bribery Act, for instance), entails liability risks and could also cause considerable damage to reputation. This is a particular concern in countries whose “bribery cultures” are different.

In addition, the public also has an interest in the compliance activities of the company. Customers and business partners like compliant companies. For that reason, it is recommended that all companies – no matter their size – be able to prove to their investors and outside creditors that they have introduced compliance measures and also actively pursue them.

Internationally active companies interact with different cultures, legal spheres and social traditions – and not only when they have business contact with third parties. To the extent allowed by legal measures, the parent company bears central responsibility for the organisational compliance structures in its subsidiary companies.

This begs the question: how do international companies manage the balancing act between varying regulations and legal systems?

Here it is important to equally consider the (at times) vastly different jurisdictions of the countries involved. In this context, Chinese courts can impose the death penalty on corrupt managers, which recently happened in the case of the chairman of the board of the chemical giant Sinopec.

Even if the death penalty has concerned “only” managers of companies that are state property of China, foreign managers are threatened with Machiavellian prison terms. The manager of the Chinese branch of the Australian-British

mining company Rio Tinto (himself Australian) was sentenced to 10 years in prison by a court in Shanghai.

As far as data protection is concerned, many German companies still believe they are on the safe side. However, appearances are deceiving – and not only in Germany. According to a study by Privacy International, there are considerably stricter special regulations in several countries in and outside of the EU. By contrast, in most countries in the world the data protection culture is less strongly instituted than it is in Germany.

Additionally, not all countries in the world apply cartel law procedures in the same way. While the Federal Cartel Office and the European Commission only impose fines against the companies concerned, courts in several Western industrialised countries also pass down prison sentences for the managers involved – and sometimes implement them.

For instance, the Russian Civil Code allows gifts of up to about 80 euros to be made to officials as long as no specific quid pro quo is expected. At the same time, that very gift may violate the zero-tolerance policy of group guidelines.

In light of the heterogeneity of the legal systems in which a company is intertwined, it may turn out that having a uniform compliance programme in every country may simply be impossible due to a lack of sufficient points of intersection where country-specific particularities are concerned. Nonetheless, in every case, guaranteeing company-internal uniformity to a great extent is recommendable. A compliance culture across the company can only develop if every country without exception punishes the same violation of regulations as uniformly as possible. If some countries failed to punish or react it would neither be fair nor create transparency for the company as a whole. Consequently, at least the important guidelines must be structured uniformly. The Good Practice Guidance from the OECD can serve as an appropriate guide for creating a basic compliance programme for the whole group. After all, it has been approved by all of the OECD member states.

Uniformity also makes it possible to check the regulations are being complied with across the group. Regardless of whether the existence of a separate national inspection authority is considered necessary in some countries, it is highly recommended that companies set up a central point where the compliance programme can be monitored. An additional national inspection authority appears to be of great value if a subsidiary company is active in the country in question beyond simple business relationships. In that case, the central inspection authority not only monitors observance of compliance regulations but, in addition, issues approvals of the changes to the programmes suggested by the national authorities due to national peculiarities.

One solution could be to position all compliance-related facts internationally on a zero-tolerance basis, to the extent that everything is prohibited across the group that is forbidden in a certain country, however far away it may be.

However, such a solution does not consider other regional peculiarities in which, for instance, giving gifts is not associated with corruption, where expensive invitations are good form or where practices that are ostracised here are (still) normal. This makes it difficult for people active on site to explain the situation. Therefore, national peculiarities should be taken into account even if this would entail greater expenditure in terms of monitoring and documentation. This is certainly not a solution if different cultures clash in a business area, however.

In the end, then, the strict observance of an international compliance programme appears the better option in such cases, accompanied by training that addresses how to deal with cultural differences in individual cases and on site.

The new ISO 19600 standard places considerable value on culture, values and training. However, it is only possible to resolve the culture clash described here using ISO 19600 if people receive uniform.

IV. “Integrity Has No Borders”: Collective Action on Business Integrity in ASEAN

Thomas Thomas

1. Introduction

The Association of South East Asian Nation (ASEAN) was formed in 1967 by Indonesia, Malaysia, Philippines, Singapore and Thailand. Between 1984 and 1999, 5 other countries (Brunei in 1984, Vietnam in 1995, Lao PDR and Myanmar in 1997 and Cambodia in 1999) joined ASEAN making it an association of 10 nations.

In the 1967, ASEAN was established as “an initiative to ensure peace and stability in the region, through a commitment to work together and deal peacefully with mutual differences”. It has achieved this objective and also achieved good economic and social development.



Fig. 1: Countries of the Association of South East Asian Nations (ASEAN)

ASEAN is diverse in terms of political structures, economy, population, land area, culture, biodiversity and along many other measurements. The progress made inspite of differences is commendable.

If ASEAN was a single country, it would have been the 3rd largest in terms of population, 6th largest economy and having the potential as the fastest growing region in the world. (<http://www.aseanstats.org/wp-content/uploads/2016/11/AEC-Chartbook-2016-1.pdf>)

Yet ASEAN has many problems. Growth at all costs mindset have social and environment prices to pay. Human rights especially for migrant workers, corruption, transboundary pollution and environmental problems are among the problems that feature strongly in ASEAN.

Corruption is a serious problem. Seven ASEAN member states were ranked in the bottom half of the Transparency International (TI) Corruption Perception Index (CPI) 2015, with the scores well below the global average of 43. Singapore had the highest score of 85 and ranked 8th out of 176 countries and territories, while Cambodia obtained the lowest score of 21, and ranked 150th.

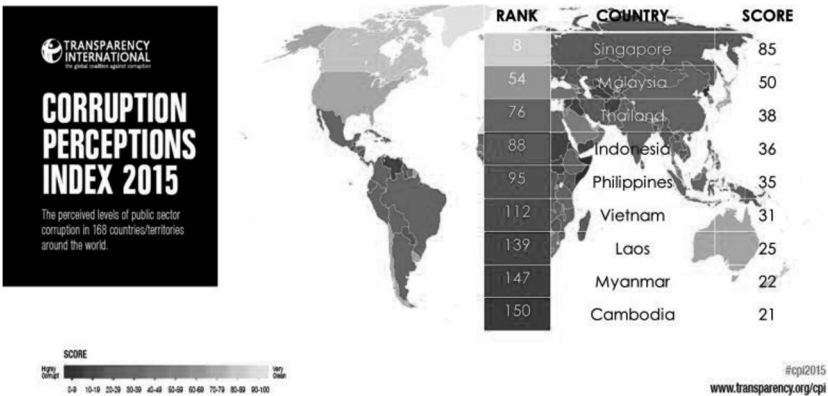


Fig. 2: ASEAN Countries in Transparency International's Corruption Perceptions Index 2016

2. Acknowledging the Problem

In 2015, the ASEAN Community Blueprint 2025 which charts the path of the ASEAN Community in the next 10 years was issued. The document, ASEAN 2015: Forging Ahead Together articulates ASEAN's goals and aspirations as the regional grouping enters the next phase of consolidation, further integration and stronger cohesiveness as a Community. This includes envisioning the ASEAN Economic Community, which was officially launched on 31 December 2015, as a highly integrated, competitive, resilient, inclusive and dynamic community.

IV. “Integrity Has No Borders”: Collective Action on Business Integrity in ASEAN

ASEAN leaders addressed the issue of corruption in this document. They committed “to instil culture of integrity and anti-corruption, and mainstream the principles thereof into policies and practices of ASEAN Community” (A.2.3). The steps proposed include:

- Promote ASEAN cooperation in implementing United Nations Convention against Corruption – UNCAC (A.2.3.iii)
- Strengthen implementation of domestic laws and regulations against corruption and of anti-corruption practices in both public & private sectors within ASEAN, including through capacity building programmes (A.2.3.iv)
- Promote sharing of experiences, best practices and exchange of views on ethics, values & the culture of integrity to strengthen anti-corruption activities, including through ASEAN Integrity Dialogue (A.2.3.vii)

No anti corruption effort can succeed without the co-operation of the private sector. A study conducted by the ASEAN CSR Network and the Centre for Governance, Institutions and Organisations (CGIO) of the National University of Singapore’ Business School, showed that the level of disclosure on business integrity is still low in ASEAN.

Taking 50 companies with the largest market capitalisation in each of the 5 selected ASEAN countries, the study analyses the level of disclosure on 13 items using the framework established by Transparency International. (<http://asean-csr-network.org/c/images/CorporateDisclosureonBusinessIntegrityinASEAN-FINAL.pdf>) It revealed that on average, only 54 per cent of the top listed companies in five ASEAN countries have a publicly disclosed commitment to anti-corruption. Some key findings were:

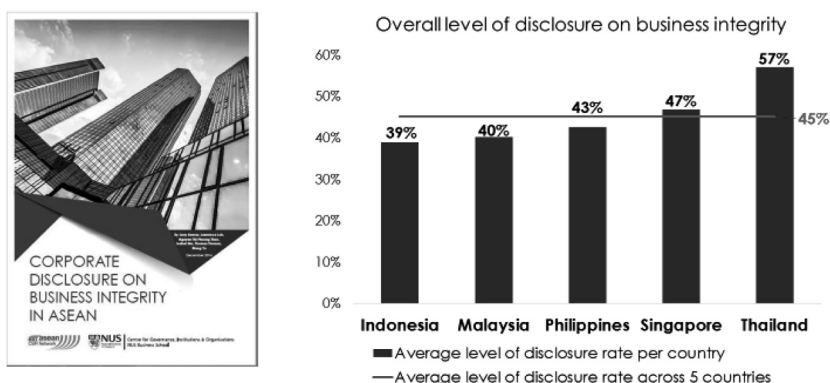


Fig. 3: Overall disclosure on business integrity by top ASEAN companies

Overall level of disclosure across the five ASEAN countries

- 96 per cent of companies expressed a commitment to comply with relevant laws and regulations in their country;
- Only 14 per cent of the companies disclosed that their anti-corruption policy explicitly applies to third parties acting on behalf of the company;
- On average, 59 per cent of the companies had a policy covering gifts, hospitality and expenses
- Only 19 per cent of the companies disclosed that they explicitly prohibit facilitation payments;
- Only 31 per cent of companies disclosed policy covering political contributions.

3. The Challenges

Generally, corruption and bribery are in companies in the region due to various reasons, including:

- Pressure to meet unrealistic objectives and deadlines
- Increase in acute competition
- Economic greed
- Pressure to earn profit
- Poor leadership/lack of management support, etc.

The other problems contributing to corruption include the tone from the top. Many leaders' action give the perception that corruption is alright. The tone from the top is essential for the fight against corruption. This is coupled by the many new opportunities for corruption with the increased trade and investments in the region. The diversity of ASEAN and the divergence in policies and practices across ASEAN at all levels, poses a problem for effective joint action. Inefficient bureaucracies and weak enforcement capabilities in many ASEAN countries makes corruption easy with perpetrators acting with impunity.

Due to the above reasons, companies who want to take leadership in the anti-corruption efforts fear the "first mover disadvantage". Companies that refused to pay bribes will be disadvantaged if they are only ones refusing to pay. It is difficult to remain clean in an unclean surrounding. For this reason, it is important to have collective action to address this matter. This is also compounded by the perception that it is culturally alright for businesses to pay bribes. Giving and receiving of gifts are seen as part of the region's culture. But when does a gift becomes a bribe?

4. The Opportunities

Together with these challenges, new opportunities have arisen to address the challenges.

All the ASEAN governments have ratified the UN Convention Against Corruption, the first multi-national legally-binding anti-corruption instrument. This means that all ASEAN governments recognise that it is illegal to bribe public officials, whether they are national public officials, foreign public officials or officials of public international organizations.

In line with the UNCAC, virtually all ASEAN countries have criminalized bribery and corruption when committed domestically. Anti-corruption authorities have also been established following the legislation of national anti-corruption laws. However, the overall effectiveness of laws and the authorities is hampered by numerous factors.

The UNCAC also lists measures for preventing corruption, not only for the public sector but also for the private sector. This includes promoting cooperation between relevant authorities and private entities, the development of standards and procedures designed to safeguard the integrity of private entities, and ensuring that private entities have sufficient internal auditing controls to assist in preventing and detecting acts of corruption, among others.

Civil society has traditionally played a watchdog role and continues to be a key stakeholder in the battle against corruption. Transparency International (TI) is an example of how a civil society organization can help influence positive action from other stakeholders. Not only is TI serving a watchdog role by publishing critical annual reports and surveys such as the CPI, but it also works constructively with other sectors, including businesses, to develop tools and measures to address the root causes of corruption. TI Chapters in the region have been working hard to tackle corruption at all levels.

The business community has also started to take a more proactive and stronger stand against corruption. Within ASEAN, various private sector bodies have initiated integrity programs designed to help businesses prevent corruption. These actions stem from the increasing legal and reputational risks faced by companies when they engage in corruption, especially when dealing with public officials or entities.

Foreign laws like the UK Bribery Act and the US Foreign Corrupt Practices Act increased awareness of the risks involved with corruption and bribery. This also contributed to companies putting in place systems to tackle corruption. Also the ISO37001, Anti-Bribery Management System gives guidance on implementing systems within the company.

At the global level, the UN Global Compact 10th Principle states that *"businesses should work against corruption in all its forms, including extortion and bribery"*, urging companies to join civil society, the UN and governments to develop and implement policies and concrete programs to address corruption.

5. Business Initiatives Against Corruption

Businesses in ASEAN have taken the lead and have programmes to promote business integrity and address the corruption challenge. These include:

- The Integrity Initiative and SHINE project by the Makati Business Club and the European Chamber of Commerce of the Philippines;
- The Private Sector Collective Action against Corruption by the Thai Institute of Directors Association, Thai Chamber of Commerce and the Joint Foreign Chamber of Commerce;
- The Collective Action for Fighting Corruption and the Business Ethics Programs by the Indonesia Business Links;
- Enhancing Integrity Initiative in Business (Project 12) by the Vietnam Chamber of Commerce and Industry

6. At ASEAN Level: Regional Working Group on Business Integrity

As ASEAN becomes a tighter economic community, the challenge of corruption has also to be addressed at the regional level by businesses. To realise the vision of "a corruption-free ASEAN", the Regional Working Group on Business Integrity in ASEAN (the Working Group) was established in September 2014 in Manila (Philippines) with a mission of promoting and achieving the highest standard of business integrity in ASEAN through collective action on advocacy, capacity-building and stakeholder engagement.

The objectives of the Working group are:

1. To promote and implement anti-corruption and integrity initiatives that enable businesses to operate more responsibly and ethically;
2. To cooperate with one another in the areas of sharing information, best practices, and technical resources;
3. To work together towards developing a common strategy and framework for action against corruption in ASEAN for the private sector.

The Working Group is continuously expanding to include all ASEAN countries. It is currently comprised of 7 private networks from 6 ASEAN countries:

1. ASEAN CSR Network;
2. Integrity Initiative (Philippines);

IV. “Integrity Has No Borders”: Collective Action on Business Integrity in ASEAN

3. Indonesia Business Links;
 4. International Chamber of Commerce – Malaysia;
 5. Global Compact Network Singapore;
 6. Vietnam Chamber of Commerce and Industry;
 7. Private Sector Collective Action Coalition against Corruption (Thailand).
- The Working Group has adopted the Framework on Anti-corruption and Action Plan with 3 priority actions:

1. Advocacy and Awareness Raising

The Working Group collectively developed and implemented the “Integrity Has No Borders” regional advocacy campaign to show that the ASEAN business community is standing up against corruption. The campaign is focused on two core messages – that first, as individuals with integrity, we should practice it both in the confines of our homes and families as well as in our workplace, including in our dealings with both government and private sector officials; and second, as businesses with integrity, it should be practiced across our entire business, across international borders, and spanning our entire value chains, including in our engagements with regulators, investors, suppliers, contractors, retailers, and other business partners.

As a part of the advocacy campaign, in March 2017, the Working Group in partnership with partners launched the Regional Integrity Pledge – Integrity Has No Borders Pledge. The Pledge permits signatories to make a commitment to uphold ethical values at the enterprise/organisational, national and regional level.



Fig. 4: Integrity Has No Borders Campaign

2. Capacity Building

The Working Group members support one another in building skills and capacity to combat corruption by sharing best practices and technical resources, providing opportunities for information sharing and knowledge transfer, and organizing training sessions on relevant skills and strategies.

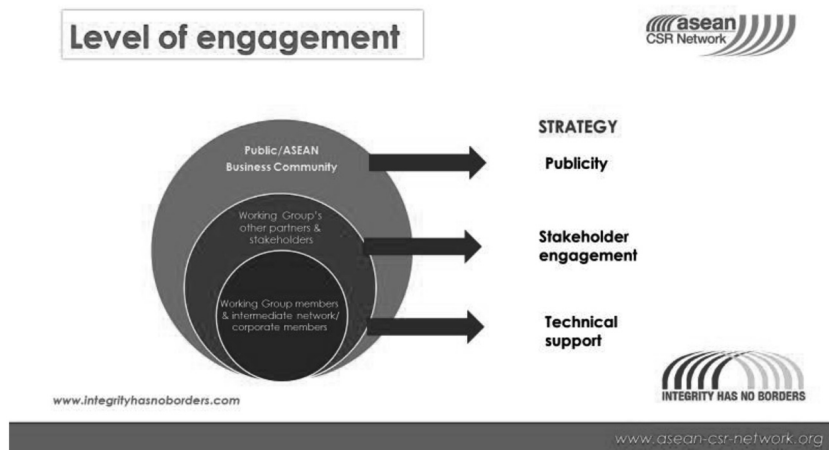
Each Working Group member and external partners are invaluable source of information, skill and resources. The Working Group therefore will continue to operate with no exclusivity on who it chooses to work with, nor on who its members choose to partner with.

3. Collective Action/Harmonising Strategies and Programmes

A mid to long-term goal of the Working Group is to move its members towards harmonized, and eventually standardized, integrity programmes. Harmonized programmes have the added benefit of being comparable, presenting opportunities for benchmarking and best practice adaptation. Also, moving towards more harmonized and standardized programmes can in the long-term open opportunities for mutual recognition of integrity pledges and certifications across ASEAN.

7. Conclusion: Moving Forward

The fight against corruption cannot be won without collaboration between stakeholders. it also requires strong commitment from the leaders – political, business and civil society.



IV. “Integrity Has No Borders”: Collective Action on Business Integrity in ASEAN

The ASEAN CSR network together with our network organisations and partners are promoting responsible business conduct to achieve zero tolerance of corruption in ASEAN. It also a multi prong approach as well as reflected in the figure below.

The culture of integrity in private and public sectors are essential to ensure that the growth and progress ASEAN achieves is enjoyed by the people of ASEAN. This also needs people of high ethical values.

The building of a culture of integrity requires a holistic approach. In that Corporate Social Responsibility (CSR) and Responsible Business (RB) are important sources of working. The growing number of regional stock exchanges requiring companies to report on their non-financial performance will force companies to look at their governance more carefully. These will include measures to prevent corruption and bribery.

Together with partners, the ASEAN CSR Network will work to achieve the vision of a responsible business community working to achieve a sustainable, inclusive and equitable ASEAN for the benefit of all.

V. Compliance & Third Party Due Diligence

Leas Bachatene

Kicking off 2017 which calls for a renewed and intensified focus on compliance, I was privileged to participate in discussions at the Asian Compliance and Anti-Corruption Summit on January 12th 2017. With the summit devoted to the theme of “Compliance Across Asia”, I delivered a presentation focused on **compliance and third party due diligence**.

1. Introduction: Anti-Corruption Compliance Landscape

Recent times have seen a dramatic eruption of corruption scandals, catapulting corruption, and equally anti-corruption efforts to the forefront of the business and social consciousness. Increasingly, corruption issues have become mainstream with coverage across major media outlets and a consistent (and increasingly visible), crackdown by regulators and enforcement agencies on corporates.

As organisations look to grow and seize new business or cost-saving opportunities through an increasingly international web of suppliers, vendors, resellers, agents and intermediaries, their exposure to corruption risk through these third party relationships similarly increases. With the economic, social and (increasingly) personal cost of ‘getting it wrong’ now so high, gone are the days of metaphorically placing third party files in a drawer for later attention, or conducting one time due diligence on just a small percentage of third parties deemed ‘high risk’. If history and recent media coverage has taught us anything it is that risk actively hides. Should an issue ever arise from any third party, authorities will enquire about policies and processes related to third party management and due diligence. Naivety is a luxury that few are able to afford and ignorance, in terms of compliance and third party management, has been outlawed.

Given increasing regulatory and enforcement pressure, as well as heightened global and regional trade activity, it is understandable that many compliance, legal and procurement professionals feel overwhelmed by the prospect of managing each and every third party relationship within their supply chain. Managing **100 %** of third party relationships however, need not be daunting nor expensive.

2. Historic Third Party Due Diligence Challenges

In an ideal world, full due diligence would be conducted on every third party but historically very few organisations, if any, have had the capacity for such an extensive program due to previously high due diligence costs, difficulties in acces-

sing public data, huge numbers of false positives and long turn-around times, let alone the challenges of monitoring all of these third parties on an ongoing basis.

3. Increasing Regulatory Expectations

Regulators around the world may have different priorities and focus areas in terms of anti-corruption compliance but when it comes to third party risk there are a number of commonalities. Regulators want to see compliance frameworks that are carefully considered, based on sound decision making amid documented evidence and rooted in relevant regulation. They also prefer a consistent approach and a process of continual monitoring with structured and regular reviews. A point that is becoming increasingly important is that the risk profile of a third party can change over time, so a process that monitors and re-categorises third parties if necessary is important.

4. Redefining Best Practices: Steps to Achieving 100 % Third Party Due Diligence

The goal of any third party risk management program is to reduce risk by knowing who you are doing business with: i.e. establishing the true identity of the third party, understanding their activities and assessing the risk that they pose depending on the criteria that has been chosen. It is also important to understand, given their circumstances, how likely they are to participate in corrupt activity. This information can then be sorted into different potential risk levels, with defined workflows and clear lines of accountability to escalate third parties that require further review.

The following best practice steps redefine the approach to third party due diligence by leveraging regulatory technology (RegTech) and advanced data to provide previously unparalleled visibility of third party risk across **100 %** of an organisation's third party network.

4.1 Step 1 – Understanding the scope of your third party network

At the beginning of any effective program is a discussion about the scope of the project, its limitations and definitions. Review objectives, define what a third party is to your organisation, how many you have and where information on these third party relationships is currently saved.

4.2 Step 2 – Conduct Baseline Screening for 100 % of Third Parties

100 % of third parties should undergo a consistent baseline screening process which includes, at a minimum, checks against key sanctions and enforcements. Where available ascertaining a third party organisation's registry details is also

important along with obtaining directorship details and the background of associates if possible. Results of this process should be documented and ideally saved in a singular repository for future reference.

4.3 Step 3 – Review Potential Third Party Risk Indicators and Categorise Risk

Following first level screening, third parties should be assessed and categorised into low, moderate and high risk based on the potential corruption risk they may pose to your business using various criteria such as:

Country risk – a third party that is located in a country that is known to have lax financial and risk controls or a higher perception of corrupt activity may require further scrutiny.

Industry/ sector risk – some sectors, especially those that require substantial budgets and some level of state involvement, can be more susceptible to corruption than others.

Public profile – in the internet age, public information on allegations of the third parties' potential involvement in key risk areas such as corruption, human rights issues, financial crimes and other key risk areas should be reviewed as part of the categorisation process.

Level of transparency – the accessibility of the ownership of an organisation will help to determine its risk profile. An organisation where the leadership is easily identifiable, as are their assets and interests, is less risky than one where the owners are difficult to trace.

Significance to supply chain – it goes without saying that the bigger the impact a third party has on your organisation the bigger the risk that third party poses should anything go wrong. Making a judgement call based on the size of the transaction, revenue stream or the integral role a third party plays in your supply chain is important.

Results of baseline screening – should baseline screening in step 2 indicate potential matches against sanctions and enforcements that cannot be immediately ruled out as a false positive then additional due diligence is required in order to adequately assess risk and decide whether to continue the business relationship.

4.4 Step 4 – Escalation & review

Following a review of potential risk indicators and subsequent categorisation, third parties deemed a higher risk are the priority. However, a risk-based ap-

proach is not a licence to ignore third parties categorised as moderate or low risk. Devise a strategy based on regulators' expectations and organisational goals and schedule a regular review of this process – regulatory updates are increasingly frequent and third party information is subject to change.

In 2016, ethiXbase introduced the first free to use third party due diligence platform, providing free to access sanctions and enforcements screening for baseline due diligence along with cost-effective escalation options for moderate and high risk third parties – all in a singular third party repository.

An example of the ethiXbase 2.0 risk-based escalation workflow can be found below:

Low risk – Initial baseline due diligence applied to **100 %** of third parties against sanctions and enforcements along with verification of the legitimacy of the company and directorship details.

Moderate risk – Where third parties are flagged as moderate risk they can be escalated to online due diligence including not only sanctions and enforcements but also politically exposed persons (PEP), checks of associated individuals and a detailed adverse media search of specific risk areas such as corruption, financial crime, criminality, human rights, environmental crimes etc.

High risk – Enhanced due diligence that includes a review of civil litigation, regulatory, criminal and bankruptcy records (in English and the local language) along with verifying financial ownership records and the background of key associates, such as directors and senior management. It is also important to review local language media searches and conduct on-site inspections and interviews if necessary.

4.5 Step 5 – Ongoing monitoring

It is well known that a third party's risk profile can change over time. For this reason, it is increasingly important to monitor third parties on an ongoing basis with alerts to any changes in their risk profile. Should a third party's profile change then they may need to be re-categorised and therefore require escalation to a higher level of due diligence than previously performed.

5. Conclusion

Regulators recognise that today's compliance objectives are not easy to achieve and that the task is increasingly challenging. What they want to see is that there has been an effort made to interpret the regulator's guidelines in an appropriate

F. Cross Cultural Compliance Communication and Other Methods

manner – that the approach is consistent, systematic, carefully considered and supported by documented evidence.

Historically, the cost and complexity of due diligence served to prevent many organisations from adopting **100 %** third party due diligence. Times have changed however and, as outlined in my presentation, a consistent approach does not have to be daunting, or expensive.

As risk actively hides, taking an initial step towards managing due diligence for 100% of third party relationships is a very important step forward for many organisations who previously may have conducted only one-time due diligence on third parties deemed high risk, or, in the case of many, no third party due diligence at all. This is also a strong and visible way that organisations can be seen to be taking a strong stance against corruption to every third party within their supply chain, their regulators and the market, not to mention an important step towards 100 % third party compliance.

Useful links: To learn more about 100% third party compliance, visit ethixbase.com/2-0.

VI. The Role of Middle Management in CMS

Dr. Oskar Filipowski

1. Introduction

During the 4th Viadrina Compliance Congress 2016 held in Frankfurt an der Oder on 6th-7th July 2016,¹ most of the speakers (covering the broad range of topics) stressed the importance of the so-called “tone at the top” in establishing a successful compliance management system (“CMS”). However, the meaning of the term was not elaborated further. In my opinion, this left an interpretative gap that should be addressed. Therefore, the aim of this short article is to share some insights on the issue.

2. What the “tone at the top” actually means

The concept of “tone at the top” originated from audit firms, where it referred to an organisation’s general ethical climate, as established by its board of directors, audit committee, and senior management.² The term is broadly connected to both good governance principles and CMS. However, in my opinion, this approach to the “tone at the top” is only suitable for rather small organisations with a very flat structure. The “tone at the top” should also include middle managers for the reason I give below.

Even though today’s business leans towards an horizontal organisational structure,³ in most cases there is still a “management gap” between top management and regular employees that is filled with one or two layers of middle management (depending on the organisation). The general trend shows that leading global organisations build a complex matrix of responsibilities and reporting duties that allows them to manage the organisation effectively in various locations. However, a side effect of such a set-up is that the employees’ perception of top management is that those people at the very top of the organisation are distant and inaccessible and do not understand employees. Therefore, employees place their trust in the middle management as they are accessible on a day-to-day ba-

1 See the official event webpage at: <http://compliance-academia.de/en/4vcc/> (access: 4th September 2016).

2 See i. e.: David A. Wood, “An Examination of How Entry-Level Staff Auditors Respond to Tone at the Top vis-à-vis Tone at the Bottom”. *Behavioral Research in Accounting*. 27 (1). 2015.

3 As described by Frank Ostroff “The Horizontal Organization. What the Organization of the Future Actually Looks Like and How It Delivers Value to Customers”, Oxford University Press, 1999.

sis. As a result, middle managers will be the natural first point of contact if any compliance doubts are raised or any non-compliance detected.

The other factor that may discourage people from escalating compliance issues to the very top of the organisation is the fear of bypassing the official reporting line.⁴ This may damage the relationship between employees and their direct manager who, after all, is responsible for supervising and evaluating their work. According to the ERC study,⁵ 70% of employees would only talk to their direct manager about serious compliance issues or questions and 85% of respondents identified their direct superior as being the most important person for them in the organisation.⁶ Therefore, the other observation that can be drawn is that employees look up to their managers' behavior in order to determine what is allowed and what is not. As a result, everything that is done (or not done) by the middle management will, in most cases, be mirrored in their employees' behavior. The manager that e.g. forges his/her expenses shows that internal rules can be circumvented without fear of consequences. However, a manager who does not emphasise the role of compliance and does not discuss or inform his team of compliance policies and duties, is also sending a message that compliance is not something that has to be taken seriously.

3. Middle manager – man caught in the middle

As shown in previous section, employees are most likely to look up to their direct management in order to identify behavioral patterns that are expected or not tolerated. However, middle managers – in contrast to their top colleagues that guide the company at strategic level – have a duty to achieve their business goals and therefore will have fewer resources to promote compliance or (in the worst case scenario) those goals will promote unethical behavior. It was also discovered that middle managers often feel lost when challenged by compliance issues⁷ brought by their employees, as they do not have the required expertise to solve them. Another dimension of this problem is that only few legal regulations (at least in Poland and most other European countries) penalise middle man-

4 The approach to this issue may differ in different organisations, but generally larger and complicated organisations would rather have a more complex and formalised reporting structure.

5 Ethics Resource Centre, *National Business Ethics Survey of the US Workforce*, NBES 2013.

6 However no such study was made in Poland, my experience shows that the results of such study, would be comparable.

7 The KPMG Survey of Corporate Responsibility Reporting 2013, available at: <https://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/corporate-responsibility/Documents/corporate-responsibility-reporting-survey-2013-exec-summary.pdf> (access: 10th September 2016).

agers directly since overall responsibility for an organisation's (mis)performance is associated with top management.

Therefore, numerous organisations' compliance programmes look impressive from the outside with a high level of commitment and declarations made at the highest level but, in reality, are not effective because middle management is "disconnected" from the process. Overcoming this problem requires the proper governance of the organisation. ISO 19600 provides effective guidance on how to divide compliance obligations between top management and middle management. The top management is responsible for building the proper framework, leading by example and establishing proper compliance policy.⁸ They also have an overall responsibility to ensure proper resources for compliance are made available.⁹ It must be recognised that "proper resources" is not just about sufficient funds, but also access to knowledge, people (e.g. compliance officers) and the time required to operationalise the compliance system at lower levels. In other words, middle managers must be satisfied that they have a person to consult with if they are not able to tackle a compliance issue themselves, that they will have proper training to be able to recognise and resolve compliance issues and, finally, that they will be assessed (at least in some part) on the basis of their compliance performance.

As the bank crisis in 2008 proved, a lack of good governance within the organisation also leads to non-compliance since employees (especially those at the management level) are tempted not to follow the rules if they believe they can benefit more from misconduct than doing things by the book.¹⁰ It has to be added that some organisations with an appetite for high risk may willingly decide to adopt such a business model (which admittedly makes less sense nowadays considering that there are regulators all over the world hunting such organisations when they reach a certain size), although in most cases the governance model is not affected by CMS implementation as nobody wants to "hurt the business". In my opinion, governance is often a component that determines whether the compliance process works correctly or not. However, this issue is usually addressed at top level and will therefore not be elaborated further in this article.

The last key issue on the list is the clear communication of the organisation's expectations towards middle managers. ISO 19600 (in section 5.3.5) again pro-

⁸ For details see: ISO 19600:2015 point 5.3.3.

⁹ *ibidem*.

¹⁰ The classic example is the situation where bank product managers were given very high bonuses, when they were able to get a certain turnover in a given year without any claw-back clauses or any other key performance indicators that would be connected with the quality and accuracy of the service provided.

vides a very good idea of how to assign compliance responsibilities to middle managers.

The steps briefly described above, give middle managers the resources and motivation to spread the compliance culture across the organisation. As a result, there is a good chance that compliance requirements will be fulfilled in general: middle managers are at the forefront of any successful compliance programme as they translate high level declarations into daily work.

However it must also be remembered that a lack of commitment at middle management level can also be dangerous for any organisation because these are the people who have a proper knowledge of internal verification procedures and processes and therefore know how to cover up any misconduct they (or employees under their supervision) have committed.

4. Closing remarks and summary

As elaborated in this article, the meaning of “tone at the top” covers not only top management but also middle managers that have direct access to employees within the organisation. Even though only few legal regulations impose legal responsibilities on middle managers (at least in Poland), their influence on the success of a compliance programme is enormous.

For this reason, it is key to prepare them for their role of “the man in the middle” and to give them proper incentives that would encourage them to make compliance their priority. The organisation cannot succeed in this endeavour without proper governance. In this regard, ISO 19600 provides valuable guidance for most types of organisations.

VII. Compliance in and for Africa: perspective of a SME

Meinhard Remberg

1. Introduction

The African continent is the big hope for a lot of western companies. A huge and young population demands products and services of all kinds. Stable growth, especially in plants, machinery and various forms of equipment, is very important for the African economy. Western medium-sized companies planning to enter the African market face three main challenges. First, they often have to redesign their products to fit the needs of the African market. Second, they have to ensure the proper financing of their goods and projects. Last but not least, they have to take the partly undeveloped legal and cultural environment into account. This leads us to the question of compliance in Africa.

2. Why is Compliance an Important Topic for Companies Willing to Engage in Africa?

Most African countries have a poor ranking in the Transparency International Corruption Perception Index. A lot of western companies have had bad experience with corruption in some African countries. On the other hand, saturated markets in Asia, Europe and America force companies to go to Africa. At the same time, they know that a “compliance-incident” could cost them a lot of money in penalties and – even more importantly – a loss of reputation. Western companies are therefore very interested in meeting African customers and partners who know about compliance topics and, ideally, can help them set up a Compliance Management System (“CMS”). Companies have to learn that compliance is not an aim but a way of doing things. In my experience, a lot of African companies do not approach compliance matters in an organised way.

It is important that western companies enter into a constructive dialogue with their African customers regarding compliance matters. For their African partners, this could be an important step on their way to compliance.

3. How Can Small and Medium-sized Companies Strengthen a Culture of Integrity in Their Business Practice?

As far as compliance and integrity are concerned, small and medium-sized companies (“SMEs”) have a big advantage over larger companies insofar as the owner or director is able to set a good example for his employees. In daily business (and when making difficult decisions), he can act in a way that shows just how highly he and the company value integrity. It is always better to lead by example than by guidelines and policies. Reliable behavior is especially important when decisions need to be taken. Guidelines and policies address employees in

an abstract sense. They deal with a lot of topics which may not be immediately relevant. Therefore, this often leads to a gap between theory and practice. If the owner or the director of the company gives a clear “No” to a potentially illegal project or contract, he can be sure that his employees understand the message. There is a high likelihood that they will adapt their own behavior accordingly.

4. How Important are Public-Private Dialogue and Collective Action?

The fight against corruption cannot be won unilaterally. If a company does its utmost to have a modern and robust CMS this will not ensure its competitiveness in a country where corruption dominates public and private behavior. The company could lose orders if other companies do not act compliantly as well. In this scenario, therefore, it will be extremely helpful if the whole society knows about how corruption works and shows very clearly that it is not acceptable.

Public-private dialogue is important to raise issues and make problems transparent. Often, such a process increases the alternatives open to investors and suppliers. They are no longer caught in a trap where corruption is the only means to win the contract. Public-private dialogue improves the business climate substantially. This is proved by various OECD reports and the work of Transparency International.

Another way of achieving a level playing field for companies is to establish instruments for collective action. One such instrument is the “Compliance Pact”. This is where companies of the same branch (competitors) unite in their fight against corruption by agreeing to install a CMS. Due to anti-trust legislation, such a pact has to be moderated and monitored by a professional supervisor. The advantage of such a pact is obvious: customers and investors will have more trust in companies who join the pact. They offer greater security because they are investing in measures to prevent corruption, therefore demonstrating the high value they attach to compliance.

5. Result

Actually many business studies come to the result that Africa will become very important for Western companies. Therefore it is very much advisable to occupy oneself with African business habits and culture.

Many companies have bad experience with corruption in Africa and think that the risk of doing business there is too high.

Experience shows that a constructive dialogue with a potential customer regarding compliance is possible and could lead to business procedures without any corruption.

Also modern anti-corruption instruments like public-private dialogue or Collective Action could be introduced to minimize potential compliance risks.

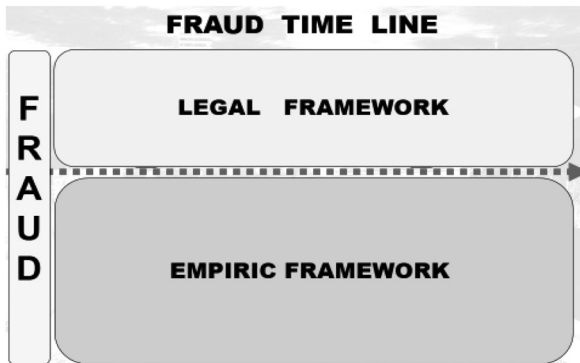
G. Whistleblowing and Internal Investigations

I. How to Act in Cases of Cross Border Fraud

Geert Delrue

1. Introduction

The prevention and detection of corporate fraud might be a major problem in an international context. The investigation of an established fraud in an international environment may even be as problematic. A lot of legal provisions must be observed in every country where the private investigations are being carried out. For this reason, we must consider a lot of legal provisions when preventing and prosecuting crime in national legal systems. Different legal and practical questions and observations arise when investigating cross-border fraud. We can draw a distinction between the legal and empirical framework. In this contribution, we will concentrate on the empirical framework, whilst keeping in mind the legal framework.

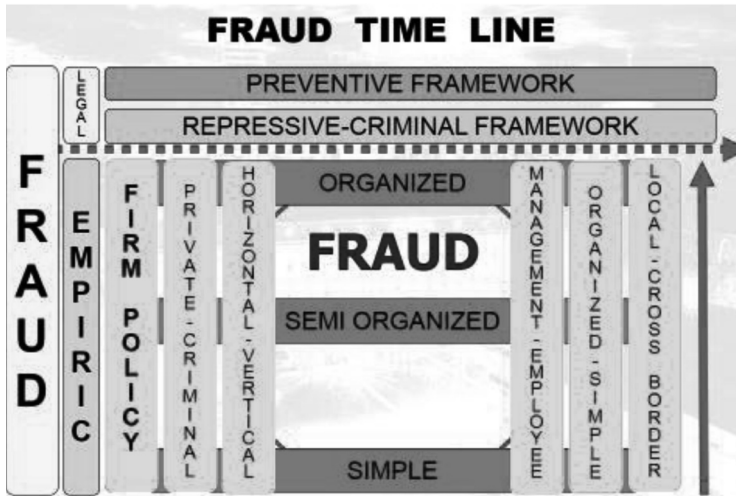


2. Conducting investigations

At the start of a fraud investigation, important questions must be answered. What is the company's policy? Should there be an internal or criminal investigation? Other questions that arise later include: What sort of fraud are we dealing with: vertical or horizontal? Management or employee fraud? Internal versus external fraud? Organised versus simple fraud? Local or cross-border fraud? Moreover, what are the goals of the investigation: to identify the fraudulent procedure or the weak points in the chain of custody? Should we only try to find

G. Whistleblowing and Internal Investigations

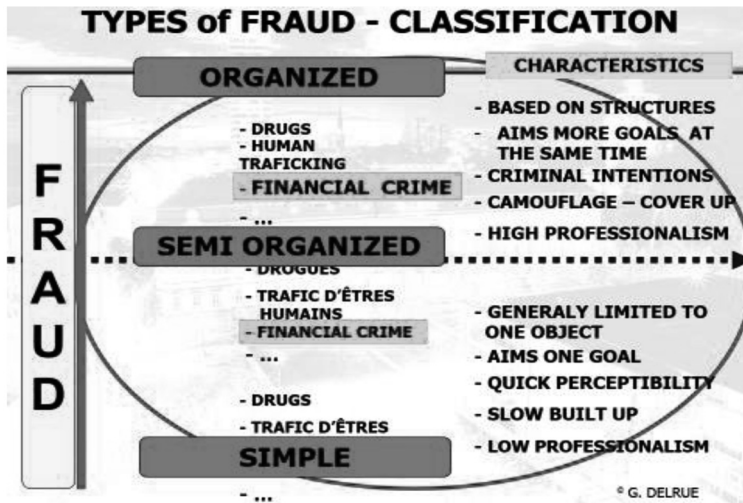
the goods or money that were embezzled or should we also try to trace other proceeds of the fraud?



First, the company's policy must be considered. Does it wish to keep most of the fraud detected internal, to avoid possible reputational damage? Or is a criminal investigation an option with the possible consequence of bad publicity? If an internal private investigation within the firm is chosen, then there will be fewer legal provisions to consider. On the other hand, when a criminal procedure is involved it must be ensured that certain legal provisions comply with the local criminal procedure of the country where the fraud was committed, where the investigation is being carried out or where the fraudster is living. For instance, any evidence collected contrary to the principles of the local criminal procedure cannot be used in a criminal court. However, not only local principles must be kept in mind but also those in the Universal Declaration of Human Rights.

Once it has been decided to pursue the criminal investigation, it is necessary to consider the legal regulations relating to prevention and prosecution. A possible next step is to determine whether it concerns vertical or horizontal fraud. Vertical fraud concerns the relationship between authorities and legal entities/individuals (e.g. corruption, tax fraud, social fraud). Horizontal fraud, on the other hand, concerns the relationship between individuals/legal entities and individuals/legal entities. Horizontal fraud can be divided in management fraud (e.g. cooking the books, insider trading) and employee fraud (theft of social goods or money and professional or commercial secrets).

Once this step has been taken, the next question is to decide whether we are dealing with simple or organised fraud. Simple fraud is generally limited to one object, has only one goal, is quickly perceptible, is slowly built up and has low professionalism. Organised fraud, however, is just the opposite: it is based on structures, targets more goals simultaneously, uses complex camouflage and cover up and is characterised by high professionalism.



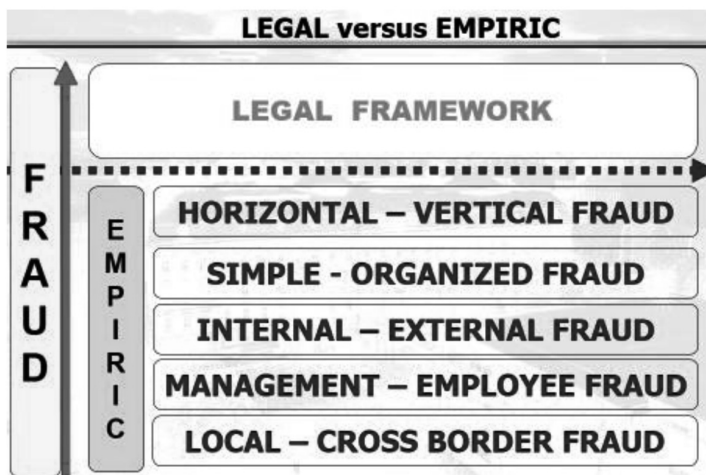
Once the type of fraud has been established, the following step is to determine whether it concerns local (i.e. within the boundaries of a country) or transnational (i.e. cross border) fraud.

In case of a transnational private investigation, one must keep in mind that the fraudsters might be brought before justice in different countries. This implies that, during the transnational private investigation, one must comply with the provisions of criminal law and other legal areas (social law, civil law, tax law etc.) of the country in question. While carrying out a (trans)national fraud investigation we are acting in the empirical track but must consider that a criminal procedure can be introduced at any phase of the private investigation. As a result, the findings of the private investigation can only be used as evidence in criminal proceedings if they are collected in accordance with local legal procedures. This implies that evidence collected contrary to local legal procedures cannot be used as evidence in court. For example, a statement of a fraudster in which he/she confesses to have committed the fraud might not be admissible

before court if no lawyer was present during the interrogation. Or if, during the investigation, you are at the home of the fraudster and you find stolen things that later turn out to be the property of the firm. In this case, it might not be legal to return these things to the firm without the explicit consent of the fraudster. The Belgian civil code provides that “One is the owner of a movable thing while it is in one’s possession”. In Belgium, a thief has to give his explicit consent to return the stolen goods to the owner. If not, only a court decision can decide to return the stolen goods to the real owner.

The order of questions mentioned above is not fixed, i.e. they do not have to be posed in the same order as presented. It is even possible to formulate the first question as follows: “Are we dealing with local or transnational fraud?” and then ask, “Is it organised or not?” or “Is it management or employee fraud?” or “Is it horizontal or vertical fraud?” A completely different order of questioning is also possible depending on the case in question.

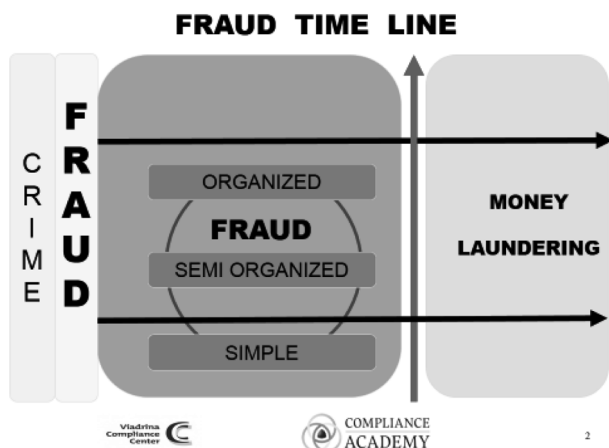
One always has to keep in mind the firm’s policy. Always start a private investigation considering that a criminal procedure might be involved, despite the possible negative consequence of reputational damage. Whenever a (trans)national fraud investigation arises, we must always take into account the applicable local legal provisions. This has the advantage that a criminal investigation can be started at any phase of the private investigation and the results can be used as evidence in the criminal procedure.



When carrying out the (trans)national investigation it is important not only to find out how the fraud was committed but also what the fraudster did with the embezzled goods or money or where the other proceeds of his fraud have ended up.

First of all, it is essential to ascertain the weak points in the chain of custody. How was the fraudster able to avoid the anti-fraud procedures? These findings are of vital importance in addressing the weaknesses particularly susceptible to fraud and thereby prevent future fraud.

Another objective of the investigation, which should not be forgotten, is finding out what happened to the stolen goods or money. Some fraudsters immediately purchase some luxury goods or go on luxury holidays. Concerning the purchase of (luxury) goods, it is possible to seize¹ the goods in question. Money in a bank account can be (temporarily) frozen or seized. Here we come to the final track of the fraud time-line: money laundering.



While investigating we need to understand why people launder money and how they do it. This can help us to carry out our investigation more efficiently.

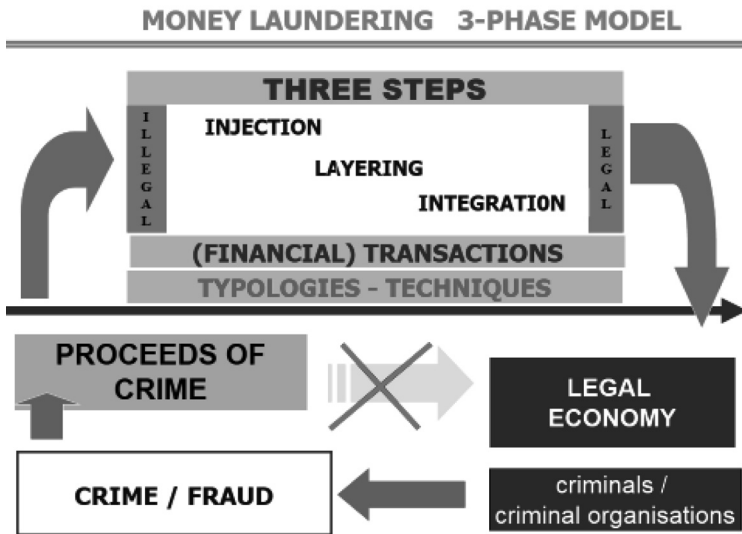
People launder for various reasons:

- they want to accumulate wealth by avoiding seizure and confiscation;
- they want to avoid taxes by maximising their profits;
- they want to maximise and give a legal appearance to their illegal proceeds by reinvesting them in the legal economy, or

¹ In some countries civil seizure is possible, in other countries a court order is necessary.

- they want to avoid a laundering conviction by denying a link with the underlying crime.

”Understanding how money laundering works” is essential for concluding fraud investigations. If you understand the process of money laundering you can also maximise the results of your investigation: discovering the proceeds of fraud and its destination. The three-phase model is still the simplest way of explaining how money laundering works.²



In each of these three phases there are specific typologies to recognise possible money laundering. These typologies are only tools to detect possible money laundering. In most cases, these typologies are normal legal transactions. However, when they are carried out in relation with some other typologies there is often money laundering involved. However, it is very difficult to detect money laundering schemes because they are usually made up of normal transactions.

² In some literature you can find a lot of other ML-models, but they tend to be more complicated.

SPECIFIC INDICATORS		
according to the ML STAGE		
<u>INJECTION</u>	<u>LAYERING</u>	<u>INTEGRATION</u>
<u>METHODS:</u>	<u>METHODS:</u>	<u>METHODS:</u>
- smurfing - refining - money smuggling via couriers - deposits - use passing through accounts - electronical money transfer - investments in insurance products -	- use of "walking accounts" - use of third parties e.g. money-mules - tax paradises and off-shore banks - bank secrecy as a concealing technique - international constructions and shell-banks - use of trusts - ...	- investment in real estate - use of foreign credit cards - management fees - income from gambling activities - purchase and sale of stocks - use of trade activities - international import and export - use of tax paradises - ...

3. Conclusion

To conclude, we can state that (transnational) fraud investigations involve a lot of questions, legal procedures and special knowledge in relation to fraud and money laundering . That is why thorough and specialised training in the conduct of legal and empirical investigations is of the utmost importance. After all, "You cannot detect what you don't know".

II. Dealing with Compliance Cases at Siemens

Marcin Szczepański

1. Introduction

In many of his speeches, our President & CEO – Mr. Joe Kaeser – underlines the importance of Siemens being, or permanently striving to become, a compliant company: “The ownership culture of our company makes the difference. People rightly associate Siemens with reliability, fairness and integrity”. His statement can be supported not only by the trust expressed by Siemens’ stakeholders but also several external awards and recognitions. One we are especially proud of is the Dow Jones Sustainability Index, where Siemens has been recognised for last couple of years as one of the most sustainable & compliant companies in our industry worldwide.

Of course, we cannot deny the fact that Siemens was not always a leader in this area. Moreover, we cannot forget what happened almost 10 years ago, in Autumn 2006, when the corruption affair at Siemens was revealed to the public. Many of us can still recall the shocking newspaper headlines, disclosing details of various malpractices committed in the name of our company by some of its employees and managers. This may seem like a bad dream today but it also serves as a warning of what can happen when the company builds its success on insecure foundations. Our current achievements have only been possible thanks to the measures taken by Siemens’ management and owners immediately after the incidents were revealed. In 2006, Siemens immediately started the clean-up operation, later supported by independent experts from the international law firm Debevoise & Plimpton. During the next few months, a new company structure was implemented resulting in several new appointments to managerial positions across the company. Siemens also established a professional and comprehensive Compliance system based on international standards and equipped with all necessary procedures, tools and staffed with a team of qualified Compliance Officers across the entire company. Since then, Siemens has adopted company-wide “Business Conduct Guidelines”, which consist of a set of universal rules – akin to a constitution – with the Compliance Department acting as their guardian.

2. Compliance Management System

The effectiveness and independence of our Compliance organisation is primarily guaranteed by defined structures and responsibilities. Accordingly, the Chief Compliance Officer (currently Mr. Klaus Moosmayer) reports directly to the Siemens CEO, whereas the independence and effectiveness of Compliance offi-

cers in individual countries is assured by having them report to Compliance Headquarters. A Siemens Compliance Officer combines the roles of an expert, facilitator and guardian, focusing on the areas of anti-corruption, anti-trust as well as data privacy and money laundering.

Siemens' Compliance system assumes that managers are responsible for its implementation and maintenance in accordance with their areas of responsibility. It consists of 3 main pillars:

2.1 Prevent

In terms of time, this is currently the main focus area. It is based on periodical Compliance risk assessment, conducted each year across the company, with the focus on defining and weighting existing Compliance risks and adjusting policies and procedures accordingly (or even creating new ones if necessary), as well as developing supportive IT Tools to make our work more efficient and standardised. Another important part of our preventative activities is focused on communication and training to promote Compliance and ethics in business not only among our employees but also in relation to external parties (e.g. Compliance training, communication measures or collective actions with external partners).

2.2 Detect

This part focuses on discovering potential weaknesses of our system including any wrongdoing or breaches of guidelines by our employees and partners. It is mainly based on the comprehensive "Compliance Control Framework", backed by tailor-made controls, implemented in accordance with the existing risks. Controls are strengthened by Compliance-related audits and reviews both conducted using local, dedicated organisations as well as external supporters. It is also worth mentioning that Siemens allows its employees, partners and all other stakeholders to report any misconduct they observe anonymously using a "Tell-Us" channel and the Ombudsman Office. Last but not least, this pillar also includes the topic of today's discussion, namely investigations of Compliance cases.

2.3 React

The main goal behind this pillar is to continuously improve the existing Compliance system by learning from the cases and adjusting existing processes and procedures as well as by correcting any weaknesses in implementation. Also, Compliance violations established by internal investigations lead to disciplinary measures.

3. Compliance Case Handling Process

The following explains the “Compliance Case Handling Process”.

During the implementation of Siemens’ Compliance system it was decided that Siemens should also establish a special investigative process and provide tools and qualified resources in order to investigate allegations in a fair and objective manner. This resulted in the establishment of a dedicated team at Compliance Headquarters whose main task is to deal with central cases. In addition, it also establishes rules and trains other compliance professionals throughout the company.

Information about potential misconduct is collected from several sources.

The anonymous channel “Tell-us”: operated by an external provider, which is independent of Siemens, to assure confidentiality and prevent leakage of whistleblower data to Siemens. Accordingly, allegations can be reported anonymously and securely.

In addition, Siemens engages an independent external law firm as an “Ombudsman Office”, which allows personal contact to the whistleblower. Each report, from the ombudsman and/or “Tell-Us” is checked by the respective HQ Unit for plausibility and then handed over to the responsible Compliance Officer in a form which does not allow Siemens to trace the information contrary to the whistle-blower’s wishes. All information received by the whistle-blowing system is first recorded and then examined by specialist lawyers to determine whether there are grounds for further action or investigation.

Other ways: Apart from using anonymous channels, Siemens employees and contractors are encouraged to report violations they observe directly to their supervisors or specialised departments including Human Resources, Legal or Compliance. The identity of Siemens employees who report compliance violations in person is protected by a special guideline that prohibits whistleblowers from being sanctioned or disadvantaged in any way if reports are made in good faith.

Each report, regardless of its source (including anonymous letters, text messages etc.), is registered and traced in a dedicated Global Case-Tracking IT tool. This enables cases to be dealt with in a structured way. Registration includes assignment to the relevant case category, providing details of the potential subjects / description of allegations / location / entities and individuals involved etc. Next, compliance cases are evaluated: i. e. it is decided whether they should be treated as “central” and investigated by Compliance HQ or “local” and clarified by the respective Compliance Officers. This distinction depends on the case category, seriousness of the allegation, potential damage as well as the seniority of the accused.

Regardless of whether the case is deemed “central” or “local”, the mandates empower the “case-handler” to clarify the case within the permitted scope and in accordance with the respective procedure as well as with reference to possible violations of the law and/or Siemens’ guidelines. Each mandate must be signed by the respective Compliance Head & General Counsel and then distributed among the respective stakeholders. The mandates inform them about the case handling procedure within their areas of responsibility and obliges them to support and not interfere with the procedure.

Once the mandate has been signed, the investigation presumes the subject’s innocence and that his rights are safeguarded. Typical investigative actions include:

- analysis of documents (e.g.: contracts, invoices, protocols, other internal documentation, accounting entries, payment runs etc.)
- analysis of documents found on the subject’s devices (only if necessary and legally justified),
- interviews with the whistleblowers (if not anonymous), witnesses and subjects.

Once the investigation procedure has been completed, a report is issued that summarises the case facts, findings and recommendations for remedial actions (including disciplinary action against the perpetrators). If the findings are inconclusive or the allegations cannot be proved, the case can be closed as a “non-plausible compliance case” without any specific results.

Case remediation typically includes establishing a Disciplinary Committee at either central or local level, depending on the case category. This usually consists of the representatives of Legal, HR and Compliance as well as supervisors of the persons involved / management of the respective Siemens entity. Its task is to evaluate the recommended disciplinary actions and decide what sanctions to take in accordance with the applicable law and practice and past sanctions to ensure fair and objective treatment.

4. Conclusion: Challenges

One of the most challenging aspects of the case handling process is its internationalisation. In a large multinational company like Siemens, each case investigation requires cooperation with colleagues from many different countries – often located in different parts of Europe. The main challenge from my point of view is to communicate in a way which is understandable for everybody while at the same time addressing local peculiarities and risks. The situation becomes more complicated if the case and subject come from a different country than the investigation team (which is usually the case with most central mandates). Un-

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der these circumstances, the investigation team looks for either supporters in the local Siemens organisation (usually Compliance and/or Legal representatives) or, in exceptional cases (e.g. due to the existing conflict of interest risk or lack of capacities), to engage external support such as specialised legal or consulting firms, which can provide local expertise.

III. Conducting a cross border compliance investigation in a crisis

Nico Zwikker

1. Introduction

Over the past few years, regulatory scrutiny and sanctions have attained dizzying proportions. The recent Telia Company¹ and the Deutsche Bank mortgage² issues are cases in point.

Both in the financial and corporate world, matters are getting worse with significant clamp downs on integrity failings. It wouldn't surprise me if we are entering an age in which fines may force firms to shut down.

The latest development is the Wells Fargo case, which has led to mass dismissals of employees and questions being raised by institutional investors in e.g. the Netherlands.³

Cooperation between regulators on an international level,⁴ together with competition and prosecuting authorities have created new dynamics that CCOs need to specifically address in crisis situations.

This article relates to situations and issues I have dealt with personally. The most important of these was the nationalisation of Fortis/ABN Amro in 2008 and subsequent developments when I was the firm's CCO, as well as later cases I dealt with as a crisis management consultant.

My objective is to share experience and, in particular, situations that later proved to be valuable lessons.

What do you specifically need to investigate and manage as a CCO in a crisis if the crisis results from an unforeseen incident (for instance a whistle-blower going to the press or criminal authorities) raising serious issues of integrity and ethically sound practice?

How do you go about it?

1 Telia Company, press release, 15 September 2016.

2 Deutsche Bank press release, 15 September 2016.

3 Pension fund giants APG and PGGM are reported to have insisted on the clawback of senior management remuneration.

4 See, for instance, the LIBOR benchmark manipulation case.

2. The Facts

It may sound obvious, but any sensible response to a crisis must start with an investigation and a clear understanding of the facts, placed in perspective.

This is easily said but there are many pitfalls. Here are just a few:

- Inadequate record-keeping can leave the CCO in the dark as to the plausibility of allegations or charges. It is imperative to be sure of at least basic facts in order to assess what risks to the firm are involved and to decide next steps.
- Although available, it may not be possible to retrieve data quickly and easily leading to a multitude of operational or IT issues.
- The people involved cannot be found. It strikes me that many incidents relate to past activities and dormant problems that later become active. In such cases, the inability to speak with the people who were involved in gathering not only the facts but also the circumstances can prove to be a significant handicap.
- The lack of time to analyse the available material.

In a crisis, the CCO has to deal with many obstacles standing in the way of assessing the risks involved by an impartial assessment and understanding of the facts.⁵

One should always avoid jumping to conclusions, however strong the pressure may be to either dismiss allegations or to overreact.

One must also bear in mind that events take their own course. Things seldom end the way they started.

3. Dealing with internal and external pressures, leadership

In a crisis, a great deal of operational responsibility falls on the shoulders of a few people (the CCO among them), but there are many stakeholders who wish to have their questions answered.

The managing board, supervisory board, internal risk management, the communication department, internal audit, the relevant external regulators, the press and sometimes even politicians and shareholders will all, at some point, want to know the status and, more importantly, what is being done to prevent damage. Concerns and even fear can run high.

A CCO has a strong interest in taking the reins firmly in hand and organising the process of communication. Providing timely, full and consistent information

⁵ It is important to maintain high standards of fairness when conducting an investigation. I have encountered situations in which employees were interrogated rather than interviewed leading to frightful results.

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to those involved is very important in maintaining internal calm and preventing uncoordinated activity.

Most larger financial institutions will have crisis teams that are well-prepared to deal with a regulatory crisis. This represents an effective means of organising communication and executing further measures.

However, I have generally found that a CCO who takes leadership can prove to be very valuable in keeping matters manageable and providing a level of comfort in a bad situation.

Leadership will also help in providing a realistic view of the seriousness of the risks to the firm and the measures that will be required in the future to remedy failings.

Finally, leadership will also be required in dealing with the authorities.

In a crisis, there are many possible reactions to events ranging from internal denial to complacency. It is my firm belief that the CCO should keep an open mind and assess whether there has indeed been a lapse of standards, applying a broad risk management approach rather than simply following the formal letter of the law.

Although one's lawyers and their expertise are absolutely necessary, one should always avoid letting the legal approach take precedence over and above the recognition that standards may require improvement.⁶ The long-term policy implications of a crisis are far more important than legal battles.

I therefore feel that cooperation with the authorities is more effective in the long run than denial and opposition.

4. Change

One can and should learn from a crisis.

Identifying root causes are part of the total process of successfully managing a crisis. Moreover, there must also be a general recognition if things need to change and one must be prepared to use the momentum to achieve that recognition.

Implementing change (which is not the same as executing a compliance programme) is a big challenge, which again involves leadership and a fair amount of perseverance and courage.

If failings are attributable to culture then this should be recognised and met head-on. If business models are to blame then they should be abandoned. If it is

⁶ As Churchill once said: "Experts on tap, not on top!".

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a question of poor management and inadequate control, that too should be changed.

5. Conclusion

A CCO managing an investigation during a crisis faces many internal and external difficulties. The stakes are high and increasing – as is the level of discomfort at managing board level owing to the risk of personal liability.

Nevertheless, provided that the firm recognises the issues there is also a momentum for change which should be used for maximum benefit. However, this takes time.

IV. “Whistleblower protection” – legal threats and challenges in Poland

Marcin Gomola

Poland is one EU country which does not have a dedicated national regulation covering the issue of whistleblower protection. Until 2014, there was no regulation regarding compliance in the Polish economy – apart from the banking and finance sector, which was regulated by EU rules and local regulations. As of 31 March, 2016 the first national compliance conference took place at the Warsaw Stock Exchange. As a result of this and many conferences afterwards, the Warsaw Stock Exchange and Polish Financial Services Authority adopted the Corporate Governance Code which established a system of compliance in October 2015. The whistleblower protection topic is a continuation of these regulations. The protection of whistleblowers is not regulated in the Polish legal system, except one provision in banking law. The regulation of a whistleblower status (particularly its legal protection) is not easy to achieve in Poland, mainly due to Polish historical experience and the social perception of a “denunciator” (as whistleblowers may appear to be). Polish cultural heritage means that even today it is not easy to say whether a “whistleblower” is regarded as a hero or a traitor.

These doubts are highlighted in a Polish survey organised by Batory’s Foundation in 2013. The results were as follows:

- 77% of respondents believed that an **employer would negatively react** against an employee who reported irregularities,
- 4% of respondents believed that the employer would use the information obtained to prevent similar irregularities,
- 1% of respondents believed the employer should reward the whistleblower,
- 80% of Poles believed that an employee who reported irregularities to the relevant departments in the interests of the employer or the public interest should be entitled to legal protection,
- 63% of respondents believed that a **whistleblower would not obtain effective legal protection.**

Whistleblowers inform their organisations about: conflicts of interest, fraud, acts of corruption, offences and similar irregularities taking place in the organisation where they work. Often, the consequence of such reporting (or denunciation) is ostracism in the form of mobbing, harassment and humiliation by colleagues as well as social problems. Therefore, special treatment and care should be given to the person who, despite these negative consequences, has finally decided to report irregularities. This is especially important considering that, in

many cases, the whistleblower's information is the only evidence of fraud that exists.

Although the information about irregularities provided by whistleblowers may be accepted and highly valued, there are simply no regulations protecting whistleblowers either directly or indirectly in Poland. The pressure on whistleblowers together with an unfavorable legal environment which, in its extreme form, can even take the form of civil and criminal charges or multi-million Euro compensation claims is not helping whistleblowers. Whistleblowers are confronted with legal pitfalls, starting with regulations on protection of privacy, reputation and personal data, to regulations requiring care for the good name of the employer, which may be affected by the whistleblower's reporting on irregularities. Whistleblowers who reveal irregularities must therefore take into account the charges of slander and causing unjustified suspicion. We have found that every single legal Act in Poland, relevant for the protection of whistleblowers (e.g. the Labor Code, Civil Code, Penalty Code, Data Protection Act) includes provisions that can be easily used to the detriment of whistleblowers. At the same time, protective provisions are lacking. The only way of protecting whistleblowers is to regulate this topic within the internal procedures of a company.

For example, the whistleblower's civil legal liability for infringing the personal rights of a person against whom action should be taken may be applied based on Sec. 24 of the Polish Civil Code. This regulation states that those whose personal rights are threatened by actions of others, may request action, unless it is not unlawful. An infringement may also demand that the person responsible takes the action necessary to remove its effects, in particular, making a statement in the appropriate content and form. The conditions laid down in the Code may also demand financial compensation or payment of an appropriate amount of money for a specific publication. Victims may seek compensation on general principles if a breach of a personal right gives rise to material injury.

Whistleblowers are also open to the threat of criminal liability in accordance with Sec. 212 of the Polish Criminal Code. One of the legal grounds is found in Sec. 212 § 1 of the Criminal Code which imputes to another person, group of persons, institution, legal person or entity without legal personality of such behavior or characteristics that could humiliate him in public or expose him to loss of trust necessary for a particular position, profession or activity.

Another criminal regulation, which might be used against whistleblower, is the duty of confidentiality regarding confidential information protected by law according to Sec. 265-266 of the Criminal Code (esp. Sec. 265. § 1). Whoever discloses or, contrary to the provisions of this Act, uses information classified as "secret" or "top secret", is punishable by imprisonment from 3 months to

5 years. Also Sec. 266 of Polish Criminal Code states that, whosoever, in violation of the law or obligation he has undertaken, discloses or uses information with which he is familiar due to his function, work, public activity, social, economic or scientific activity, shall be subject to a fine, restriction or imprisonment of 2 years.

In criminal proceedings, the institution of the “anonymous witness”, applies in exceptional cases (e.g. whenever life, health or property of significant value is threatened, see Sec. 184 et seq. of the Polish Code of Criminal Procedure). This can be seen as a form of “whistleblower protection” but is limited to the number of criminal offences. However, the solution provided by such regulation can be applied to provide general protection to whistleblowers. Moreover, the identity of whistleblowers in criminal proceedings can be withheld on the basis of Sec. 184 Polish Code of Criminal Procedure, which states that, if there is a justified fear of danger to life, health, liberty or property of significant value of the witness or the person closest to him, the court, and in preparatory proceedings the prosecutor may decide to hide the identity of the witness, including personal data. The procedure in this regard proceeds without the parties to proceedings and the subject is kept secret as classified information (i.e. “secret” or “top secret”).

It is worth mentioning that confidentiality regulations adopted in a company’s internal procedures protecting whistleblowers may cause problems under the Act on the Protection of Personal Data. In the light of this regulation, employers interested in such a mechanism may bear the risk of breaching data protection. Based on these rules, it may turn out that the employer will be obliged to disclose the personal data of whistleblowers to the person implicated in the irregularities. This is because Sec. 25 of the Law on the Protection of Personal Data, provides that the employer is obliged **to inform the person to whom the data relates**, *inter alia*, about the source of the data, the purpose and scope of data collection, the recipients or categories. Confidentiality is essential to the effectiveness of internal alert procedures.

Currently, the only “weapon” that whistleblowers still have is anonymity. However, this also significantly weakens the force of his argument in most cases and dissuades those who wish to make use of information by means of the whistleblower process. They cannot rely on the information anonymously but must use legal methods to investigate the whistleblower’s credibility as this may be the only basis on which to formulate charges. If a whistleblower uses a tip-off portal he may stay anonymous but this makes it hard to use such information in formal proceedings (i.e. court hearing of evidence).

Therefore, a procedure that will protect the whistleblower from offences and improper treatment is vital in each and every company. Whistleblower protec-

tion regulations should not be based on simple “black-and-white” solutions but rather constitute guidance, and “navigation rules” instead of simple answers. Such an approach results from the fact that whistleblowing tends to be seen as a corporate “shadow zone”. When preparing such a procedure it must be recognised that whistleblowers are motivated differently namely, to avoid conflicts of interest, unnecessary risks and to protect the company’s interests.

There are also other challenges and “grey areas” that must be addressed in such a regulation. The first “grey area” is that the whistleblower may act in “bad faith” and accuse somebody of wrongdoing for a personal reason. Indeed, the whistleblower in this case may even be part of the fraudulent activity but, for whatever reason, has decided to reveal the irregularities and acquire the status of whistleblower. It must be clearly regulated and communicated, that this status is not available to persons who act in bad faith, is not given in advance and is not permanent. The protections granted by the status of whistleblower must also be clearly regulated and communicated. What whistleblower status means for (i) the whistleblower himself, and (ii) organisation must be clearly defined. Whistleblowers should be given a guarantee that they will be protected from i.e. dismissal and, in some justified cases, a guarantee of legal and personal security as well. For the company it means that such a person is privileged and cannot easily be removed from the company.

The second grey area arises when the whistleblower appears as a part of a fraudulent activity but then finally decides to blow the whistle on it. There is no simple answer to the question “What should we do now?” and, furthermore, there is no simple way of regulating such a situation. The only way is to professionally assess and decide whether the pieces of information provided by the whistleblower are sufficiently valuable to justify whistleblower status for this person regardless of his motivation to be whistleblower. There are plenty of reasons why such a person decides to become a whistleblower and what kind of information she/he brings. Accordingly, regulation must give a significant portion of discretion to the Compliance Officer when “dealing” with such a person. It must be stressed that, from the company’s perspective, it is not really important what motivates the whistleblower. What matters is rather the accuracy of information provided by whistleblower, which may lead to uncovering the fraud.

A separate problem that arises in some jurisdictions (mainly common law countries), is whether to remunerate the whistleblower for information provided or not. The topic needs to be examined in detail as there are different types of whistleblowers. Those who are employees should be treated differently to those who are (i.e. customers or contractors, or third parties). For example, an employee is obliged to be loyal to his employer and is remunerated accordingly but a customer and contractor may not be necessarily loyal beyond the scope of the rele-

vant contract. Therefore, additional incentives for the whistleblowers in the latter category should be considered (including those of a contractual nature).

Internal regulation on whistleblower protection should recognise that the person entitled to confer “whistleblower status” is the Compliance Officer who is also responsible for protecting the whistleblower from dismissal. He must closely cooperate with HR and the board member responsible for compliance. Such regulation should also determine (i) the definition of whistleblower, (ii) the scope of protection (corresponding to the legal environment), (iii) the time-limits for such protection, and (iv) the position and relevant authorisation for the Compliance Officer enabling him to confer such a status on a person and to keep him at the company for as long as he is a whistleblower. This should also be used as a basis for the further nationwide regulation of whistleblower protection.

Post scriptum

Everyone has almost certainly heard of Julian Assange or Edward Snowden or native whistleblowers and the accompanying scandals. Apart from the momentary flash of attention in the press (usually immediately after the scandalous disclosure of information), they are actually seen as lonely people – heroic, and modeled after Roman gladiators blessing Caesar before a fight to delight the audience. Such a picture – and such a fate – is not a good example and certainly does not convince ordinary people to “blow the whistle” in their own backyard. The image of a “Desperado” is not enough motivation to take on the difficult role of the whistleblower – even if the cause is a worthy one. Whether whistleblowers will be deemed heroes or traitors depends on what legal protections they are given internally; this determines their position both culturally and socially. At present, the legal regulation in Poland makes a whistleblower appear like “Don Quixote”, fighting alone in the name of “higher cause”. We can change this, starting from our internal TMPL regulation. What we can easily do is to communicate and create a “whistleblower culture” across the organisation and ensure the anonymity and proper treatment of persons who have made the difficult decision to share information about irregularities with us. We should recognise the protection of a whistleblower as a vital tool to avoid risks in the company and protect its reputation.

V. Romanian Whistleblowing Regulations: From Exemplary to Incomplete

Dr. Raluca-Isabela Oprea

1. Introduction

Compliant conduct is said not to be separated from ethics and morals. In Romanian society (formerly often perceived as immature and corrupt), situations of abuse, waste or fraud used to be the norm. However, ethical rules are changing and compliance has also become highly topical in Romania. Public and private companies are looking for the right way of conducting their activities on the basis of legally and ethically irreproachable principles, often realising that the local customs are not easy to cope with.

Although Romania took the lead in establishing protection for whistleblowers in the public sector in 2004, reporting itself is still traditionally connected with the communist past and the terrorised society in which “everyone informed on everyone else”.¹ The wind has changed slowly and the rules which first looked good only on paper are starting to be effective in practice, too. The following report offers a general overview of the most relevant aspects of whistleblowing in Romania and the relevant case law of the High Court of Cassation and Justice.

2. Compliance and Ethics in the Public Sector

Romanian Law no. 571/2004 (“Law 571”)² was one of the pioneering laws in Eastern Europe to deal with the protection of whistleblowers in the public sector. Public authorities were compelled to harmonise their internal by-laws with legal provisions within 30 days from the entry into force of such law. However, this did not always turn out to be successful. One example is a decision where policemen were found guilty in the first instance of breaching internal rules which prevented them from communicating with the press.³

1 On the historical sensitivity of this topic, see: Radu Ogarca in: “Whistle Blowing in Romania”, 2009, <http://feaa.ucv.ro/RTE/013S-14.pdf>, accessed on 27.8.2016.

2 Law no. 571/2004 regarding the protection of the staff of the public authorities, public institutions and other units that notifies breaches of law, published in the Official Gazette no. 1214/ 17.12.2004.

3 Decision no. 2567/2011 in the file no 9662/1/2010 pronounced on 5.5.2011 by the Administrative and Fiscal Contentious Section of the High Court of Cassation and Justice (<http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=94159>, accessed on 27.8.2016).

In the private sector, no equivalent protection was provided by the generally applicable labour law; this was seen as a gap which has since been filled by labour law courts, using the principles of non-discrimination, proportionality etc.⁴

3. The Whistleblower (Ro. *avertizor de integritate*)

On the basis of art. 3 lit. b of Law 571, only employees of public authorities and civil servants can claim the status of a “*avertizor*” (i.e. “whistleblower”) and thus be able to report a violation of law or other irregularities covered by the legal provisions. Independent contractors are not protected by the above-mentioned regulations.

A special situation exists in respect of so-called “competition whistleblowers (Ro. *avertizori de concurenta*).” Such whistleblowers have been encouraged by the Romanian Competition Council since 3.3.2016 to notify any breaches of competition law on a secure and anonymous platform.⁵ Any whistleblowing in either the private or the public sector is covered by art. 35 of Competition Law no. 21/1996.⁶ The Competition Council may apply certain mitigation procedures in such cases.

4. Protection of Whistleblowers

A whistleblower submitting a report is generally protected against dismissal and any kind of detriment suffered consequently to his disclosure action.⁷ Art. 7 par. 1 lit. b of Law 571 gives this person the right to ask for the presence of a trade union representative or the press if invited to a disciplinary commission after having reported internal wrongdoings.

In most cases, a whistleblower will contest any disciplinary measures and thus have their proportionality confirmed by a Court. The employer bears the burden of proof regarding lack of causality between the disciplinary sanction and the whistleblowing. Concerning proof of the allegations made by the whistleblower, the latter must demonstrate his good faith according to the aforementioned prin-

4 According to Raluca Dimitriu “There is an oasis of detailed regulations in an ocean of uncertainty” – see p. 245 in: “Romania: First Steps to Whistleblowers’ Protection”, published in Whistleblowing – A Comparative Study (Gregor Thüsing, Gerrit Forst, editors), Springer International Publishing 2016.

5 <https://secure.secway.info/ro/start.php>, accessed on 27.8.2016.

6 Competition Law no. 21/1996, republished in the Official Gazette no. 153/ 29.2.2016.

7 See decision no. 5857/2011 in the file 7159/2/2009 pronounced on 6.12.2011 by the Administrative and Fiscal Contentious Section of the High Court of Cassation and Justice (<http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=91626>, accessed on 27.8.2016).

ciples of art. 4 of Law 571. If the Court subsequently discovers that the sanctions were disproportionate, it will annul the internal decision and reinstate the whistleblower if he has been dismissed.

5. The Motivation of a Whistleblower

According to the definition of “whistleblowing” in art. 3 lit. a of Law 571, such reporting must be made in good faith. The principles of responsibility (art. 4 lit. c) and of good faith (art. 4 lit. h), expressly referred to, state that a whistleblower may benefit from legal protection even if the information turns out to be incorrect, provided he was convinced of the truth of the facts described and the reported violation of law. Art. 7 par. 1 of the Law presumes the good faith of a whistleblower.

Unfortunately, there is only limited case law to substantiate such principles. A not entirely comprehensible decision no. 5545/2011 of the High Court of Cassation and Justice⁸ held that a policeman was denied promotion because of a TV appearance in which he described the grading system of his police department and the personal abuse of his senior officers. Given the fact that only two of his three allegations were proved to be correct, both the judge of the first instance and the judges of the High Court decided that the punishment was appropriate.

Moreover, a highly debated decision of the European Court of Human Rights in the case of *Bucur and Toma against Romania*⁹ tackled issues connected to whistleblowing, privacy, freedom of expression and revealing classified information on a government wiretapping intelligence programme of the Secret Intelligence Service (Ro. *SRI*). In this case, the European Court decided that Mr. Bucur had acted in good faith when taking the steps for disclosing illegal SRI conduct and was convinced that this outweighed the interest of maintaining public confidence in the SRI (para. 115).

In connection with the topic of motivation, there was a public discussion in Romania on whether to provide for financial incentives or rewards to whistleblowers using the models in other countries. No decision has yet been taken but this is expected to be introduced for competition issues linked to considerable pecuniary sanctions.

8 Decision no. 5545/2011 in the file no. 9562/57/2010, pronounced on 22.11.2011 by the Administrative and Fiscal Contentious Section of the High Court of Cassation and Justice (<http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=80655>, accessed on 27.8.2016).

9 For a summary of the most important facts and arguments see <http://www.right2info.org/cases/r2i-bucur-and-toma-v.-romania>, accessed on 27.8.2016.

6. Anonymity of Whistleblowers

Anonymous reports are controversial in Romanian law and are closely connected to the concept of good faith.

On the one hand, art. 7 of Governmental Ordinance no. 27/2002¹⁰ provides that anonymous petitions are not to be taken into consideration. Especially in relation to petitions of irregularities involving employment issues, art. 18 lit. c of Law no. 108/1999¹¹ imposes a duty on labour inspectors to protect the identity of the whistleblowing employee by withholding the information that their checks are based on a report received for the authority's attention.

On the other hand, it is exactly this aspect of anonymity which makes whistleblowing systems so attractive in the private sector. Private companies search for the right compliance tool (either web-based or by involving external ombudsmen who encourage employees to notify wrongdoings, etc.). Hence, the right to remain anonymous should be reinforced.

7. The Reported Wrongdoings

Art. 5 of Law 571 protects whistleblowers where they report violations of the law in terms of corruption,¹² conflicts of interest, abuse of authority, public tenders, misuse of public resources as well as mismanagement and other irregularities. A clear example can be found in a textbook case of the High Court of Cassation and Justice regarding the sanction applied to an employee of the Central Military Emergency Clinical Hospital, who had complained about the wrongful managerial activity of his hierarchical superior (among other things).¹³

10 Governmental Ordinance no. 27/2002 regarding the regulations of the activity to solve petitions, published in the Official Gazette no. 84/ 1.2.2002.

11 Law no. 108/1999 for the establishment and the organisation of the Labour Inspection, republished in the Official Gazette no. 290/ 3.5.2012.

12 It was the corruption offences which determined the adaptation of the whistleblowers' protection. Given the success of the Romanian anti-corruption body (DNA – *Directia Nationala de Anticoruptie*) in recent years, the general perception of the population has changed regarding reporting corruption cases. According to the last report, published on 27.1.2016 by the European Commission, around 85-90% of the cases leading to convictions originate from citizens' complaints (p. 10, fn. 40, http://ec.europa.eu/cvm/docs/com_2016_41_en.pdf, accessed on 27.8.2016).

13 Decision no. 4743/2008 (ref. no. 8972/2/2007) pronounced on 16.12.2008 by the Administrative and Fiscal Contentious Section of the High Court of Cassation and Justice (<http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=46479>, accessed on 27.8.2016). The complaining physician brought also consistent proof on the medical career and the unacceptable behavior of his commander.

8. Recipient of the Report

According to art. 6 of Law 571, the report has to be presented to the hierarchical chief but can directly be disclosed to the press or parliamentary commissions, trade unions, NGOs etc. The whistleblower himself can choose to whom to disclose the information taking into account the particularities of each case and his intentions.

One case from 2009 showed that, in practice, some Romanian judges from the first instance were not familiar with such alternatives because they permitted a policeman, who had directly informed the press, to be punished for by-passing the internal reporting system and informing the press directly.¹⁴

9. Summary

Romania introduced legislation providing special protection for whistleblowers in the public sector as early as 2004. Such detailed legislation provides a high level of protection compared to other European countries. However, it has not led to a consistent jurisprudence that encourages a high number of whistleblowers to come forward.

In the private sector, discussions started much later but the topic has attracted great attention. Romanian companies that wish to be taken seriously on the private market by competitors and clients are already taking the first steps in implementing active compliance systems and (in some cases) whistleblowing mechanisms. The Competition Council (the Romanian anti-trust authority), has taken the lead in this respect and established a special platform for competition issues. Such actions, together with a considerable number of arrests of senior officials on bribery charges, have contributed to changing the citizens' attitudes towards ethics, the institutions and their trust in the morals and civic values so deeply affected by history.

¹⁴ See decision no. 2567/2011 quoted above under fn. 3.

H. International Trade Compliance

I. Current Challenges in International Trade Compliance

Gabriel Kurt

1. Introduction

In recent years, the global exchange of goods has increased massively due to globalisation, the growth of multi-national companies and agreement of different free trade agreements (“FTAs”). At the same time, the risk of commercial fraud, counterfeiting, money laundering, electronic crime, smuggling of arms, nuclear materials, toxic waste and weapons of mass destruction, violation of intellectual and cultural property and endangered plants and animal species etc. Has increased enormously.

Taking this into account, national (customs) authorities are trying to protect, on one hand, revenue by collecting customs duties and, on the other, society by controlling the flow of goods. Such protection is commonly achieved by means of customs law and special prohibitions and restriction on imports and exports (e.g. export control laws, arms regulations, security, safety and public health requirements, IPR etc.).

Sometimes, these regulations have the effect of trade barriers due the fact that import/export licences, registration obligations or any other formal requirements make it complicated or impossible to import or export goods (especially for foreigners), either directly or indirectly.

In order to overcome such barriers, WTO members recently concluded negotiations on the Trade Facilitation Agreement (TFA),¹ which entered into force in February 2017. The TFA improves trade facilitation by aligning formal aspects of trade, setting up rules for the collaboration of the authorities involved and ensuring customs compliance elements. One of the benefits is that global trade is estimated to increase up to \$ 1 trillion per year, with the biggest potential in poorest countries.

The following will focus on trade compliance regarding the import and export of goods.

¹ https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm.

2. Covered Areas

Before explaining the necessity of trade compliance, it is first necessary to clarify the scope of “trade” regarding import and export. In this respect, the most important trade related aspects are:

Lodging import and export **declarations** is necessary to import or export goods. If any data is missing or incorrect the goods could be prevented from being imported or exported.

Customs declarations are based on the relevant **customs data**. The **goods description** and **HS code** (“Harmonized System”) / customs tariff code are especially important in identifying the correct customs duty rate, applying anti-dumping measures or any prohibitions and restrictions.

Furthermore, customs **valuation** also forms part of the customs declaration in order to calculate customs duties. In recent years, customs authorities all over the world have focused on the correct determination of customs value, especially where transfer prices between related parties are involved. The most frequent mistakes in this area relate to transfer pricing methods, price adjustments and documentation for customs purposes.

Free Trade Agreements are very popular nowadays and the main focus is on accelerating existing trade flows and reducing the duties to increase trade between contracting parties. The main challenge in this respect is determining the country of origin and proof of origin.

Last but not least, the application of existing **export controls law** is an absolute **imperative** in nearly all companies. After 9/11, rules became stricter and increasingly complicated the deliveries of goods year after year. Export control laws may even apply to domestic supplies depending on the end-user or end-use of the goods. Export control law asks four basic questions:

- What is delivered (dual-use items, listed items)?
- To whom (sanctions party list, embargo list)?
- To which country (embargoes)?
- For what kind of end-use (military, nuclear)?

Export control law does not simply focus on the exchange of goods but also controls the transfer of know-how (e.g. in the form of information or software).

Accordingly, legal provisions have to be applied in all of these areas and the question is how to implement a robust and effective trade compliance in order to ensure that these laws are applied.

3. The Necessity of Trade Compliance

The necessity of trade compliance programmes is explained by the following consequences of non-compliance.

Bearing in mind the risk-based approach that is used in many areas of compliance, the risks or consequences in trade basically take the form of criminal sanctions or fines against the company and/or its employees responsible and, from an administrative law perspective, the withdrawal of authorizations / simplifications and the (temporary) blocking of imports and exports.

The administrative consequences could have a particularly severe effect on a company's business since the supply chain and production processes of most companies are focussed on speed and efficiency. They do not take account of delay or provide for huge storage capacities as a precaution. For example, any delays in importing raw material or exporting finished goods or commercial products may have a significant financial impact as the production sites need raw material to produce the finished product within the agreed time-frame. Delays in production and delivery could expose the company to claims from customers and damage its reputation.

To sum up: stopping or slowing down the import or export of goods could give rise to massive issues for importers and exporters. The authorities are also aware of the severity of consequences.

The risk-based approach encourages every importing or exporting company to estimate the likelihood of damage occurring and the results thereof in detail.

In order to manage risk properly, companies must implement effective compliance management systems ("CMS").

Besides such "internal" measures against exposure to risk, the authorities have launched their own trade-compliance programs or certifications which are being adopted by an increasing number of companies. Membership of such "compliance programmes" (or at least compliance with their requirements) is a precondition for many authorisations or simplifications. From a global perspective, the status as AEO ("Authorized Economic Operator") is wide-spread with more than 60 countries in the world adopting this program. The idea behind the AEO is to secure customs compliance and achieve transparency in trade processes relating to import and exports for both the company and the authority. In some countries, the AEO program also covers security aspects (security of goods, protection of sites, export controls law).

In addition to the AEO program, several countries have developed special programmes in the field of export control law. For example, ICP (BAFA Germany),

ECO (UK) and EMCP (US) are programmes that grant licences to companies which show their liability and existing compliance structure.

4. Challenges

Based on practical experience, there are three main challenges directly linked to a good trade compliance structure: organisation, knowledge and IT.

4.1 Organization

First of all, companies must organise the trade-related areas described above properly. Therefore, they must identify stakeholders and involved parties (internal and external), clearly describe roles and responsibilities as well as implement measures to structure and control the processes (e.g. standard operation procedures, checklists, etc.). We therefore have the same basic elements of any other area of compliance. However, trade compliance presents us with some extra challenges.

Unfortunately, many companies still think that these topics exist purely at operational level and therefore do not view them in legal terms. As long as goods cross the border, everything is fine. As a result, compliance with customs or export control law is the responsibility of staff in logistics, warehouses or others closely linked to the goods, or the supplier or customer. As a matter of fact, companies which have different inbound or outbound locations usually deal with the processes differently, with varying results and consequences.

In many countries outsourcing the customs declaration process to an external provider (e.g. customs broker or freight forwarder) is considered the ideal solution – at least by stakeholders. The idea behind this is that outsourcing the task also serves to outsource responsibility. In fact, however, liability remains with the company (with a few exceptions). This means that the company has the additional burden of supervising and controlling the external provider.

In view of all the challenges, one of the first things to consider is how processes should be handled, i. e. centrally or decentrally. As always in life, the answer appears to be “it depends”. Relevant considerations could be the size of the company, import / export sales volume, organisational set-up, resources, etc. Ideally, there should be a centralised organisation with additional strategic elements containing decentralised, operational elements. The central unit should guide and control and the decentralised unit should act and check.

4.2 Knowledge

Secondly, there is a severe lack of knowledge relating to legal requirements, internal standard operating procedures and awareness of or sensibility for any non-compliant actions. In many companies, “customs experts” are people who have been trained on the job. If lucky, they have been trained by a former employee. If not, they have had to learn through trial and error. Unfortunately, in most countries of the world (with some exceptions) there is no specialised education or training available in the field of customs for the private sector. Only customs authorities train and educate their officials in a structured way. Therefore, only rarely will you find well-trained and educated customs employees in the private sector.

Considering that trade also covers a lot of different jurisdictions it is even harder to find general practitioners who cover all topics (i.e. from customs to export control).

Due to this, companies with adequate resources will try to split the topics and form specialised teams or train people.

Before doing so, however, it is highly recommendable to train all people involved in the relevant trade areas in the basics. Experience shows that, in most cases, it is not the specialist or trained people who are non-compliant. More often than not, it is the people with no or insufficient knowledge who are guilty of non-compliance.

At the end of the day, it is necessary to create a well-structured training plan based on the trainees’ education level, responsibility and functions (linked to their job descriptions). This plan should also include the how the training is to be delivered (e.g. workshop, presence training, online training).

4.3 Information Technology

Finally, all the main processes are related to IT. In most countries, the customs declaration process takes place by means of an electronic process which uses special customs software. Most of the relevant customs data is already included in the different IT systems (e.g. ERP, warehouse management system, logistics system). The exchange of information with external service providers (e.g. customs broker or freight forwarder) either is or could be managed electronically.

Therefore, aligning the customs data in the relevant systems and ensuring clear and secure interfaces between the different IT systems will boost the level of trade compliance massively. This is shown by the fact that in many countries the customs authorities are increasingly using auditing tools for data analysis (e.g.

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IDEA) to perform electronic customs audits in a more comprehensive and efficient way.

It is easier if the authorities can access all relevant data electronically because they can then check any inconsistency within a few minutes. In a few years, electronic customs audits will be state of the art and any exporting or importing company will have to prepare for such audits by performing pre-audits or audit simulations.

5. Conclusion

In conclusion: the challenges presented by trade cover different topics that involve most departments of a company as different legal provisions, mixed organizational set-ups, the need for knowledge and aligned IT-systems collide with reality.

II. Managing Customs Compliance in International Trade

Prof. Dr. Wiesław Czyżowicz

1. Introduction

For thousands of years, international trade related exclusively to goods. Despite the development of international trade in services, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)¹, the Agreement on Trade-Related Investment Measures (TRIMs)² or others, trade in goods is still the most important for the world market. It is accompanied by diverse barriers: tariffs and non-tariffs measures, language problems, unknown national regulations, etc. Such barriers present many risks in connection with compliance requirements.

During the last two centuries, traders and governments have attempted to make trade barriers clearer and more transparent for the international trading community. Starting with the founding of the International Union for the Publication of Customs Tariffs with its International Customs Tariff Bureau (BITD)³ at the end of the 19th century, the trading community has made great efforts to develop and implement additional trade facilitation measures (e.g. trade nomenclature, agreements on transit, temporary admission and many others). In this respect, international organisations like WTO/GATT,⁴ CCC-WCO,⁵ UN,⁶ OECD⁷ or ICC⁸ have played a very important role. Most of the results achieved were dedicated to the political and trade partners voluntarily.

Towards the end of 2013, for the first time in the modern history of international trade, members of WTO agreed to adopt and implement legally-binding trade facilitation measures. The final Trade Facilitation Agreement (“TFA”),⁹ commonly known as the “Bali Package”, is the result of long trade negotiations. It contains provisions for faster and more efficient customs procedures through

1 https://www.wto.org/english/tratop_e/trips_e/trips_e.htm#WhatAre.

2 https://www.wto.org/english/tratop_e/invest_e/trims_e.htm.

3 <http://www.bitd.org/Homepage.aspx>.

4 WTO-World Trade Organization: <https://www.wto.org/>; GATT – The General Agreement on Tariffs and Trade: https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf.

5 World Customs Organization-Customs Cooperation Council: <http://www.wcoomd.org/>.

6 United Nations: <http://www.un.org/en/index.html>.

7 OECD – Organization for Economic Cooperation and Development: <http://www.oecd.org/about/>.

8 ICC – International Chamber of Commerce : <https://iccwbo.org/about-us/>.

9 TFA -Trade Facilitation Agreement. It was adopted as amendment to the GATT. See: Protocol Amending the Marrakesh Agreement Establishing the World Trade Organization Decision of 27 November 2014, https://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm.

effective cooperation between customs and other appropriate authorities on trade facilitation and customs compliance issues. It also contains provisions for technical assistance and capacity-building in this area.

Despite the immense importance of TFA for the international trade in goods, many compliance risks still exist. As in past centuries, there are barriers, requirements and regulations which business has to comply with. In today's very complicated world, new priorities in customs paradigms can be seen. For centuries, the customs paradigm was "revenue collection". At the end of the twentieth century, this changed into "a facilitating environment for the trade in goods and information and communication technologies (ICT)". After September 11, 2001 (i.e. the attack on the World Trade Centre in New York), a further paradigm in customs policy and law appeared, namely "security". However, later years have shown that focusing customs activities on the fulfilment of this requirement (i.e. instead of securing and facilitating the international trade in goods), effectively created new barriers, new requirements and new risks for business.¹⁰ For both partners (i.e. customs authorities and the international business community), the new challenge is how to reconcile high security requirements with the need for facilitation in the international supply chain. As a result, the new customs paradigm "security and facilitation" was adopted by WTO members.

2. Customs Compliance in Cross-Border Trade in Goods: Its Importance and Relevance for Business

"Security and facilitation" is a very important new customs paradigm for customs compliance concerning companies involved in the trade in goods. For the first time in the history of customs, the Bali Package aims to make customs laws and requirements governing international trade fully understandable for and accessible to business. How important and relevant is it for customs compliance? In practice, documentation requirements are often non-transparent and duplicated, problems which are compounded by a lack of cooperation between traders and official agencies. Despite advances in information technology, automatic data submission is still not common-place. According to the United Nations Conference on Trade and Development, the average Customs transaction involves:

- 20–30 different parties,
- 40 documents,
- 200 data elements (30 of which are repeated at least 30 times) and

¹⁰ Kunyo Mikuriya, WCO Deputy Secretary General: WCO Work for Facilitate Global Trade and Secure Supply Chain, Brussels, January 24, 2005.

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– the keying in of 60–70 percent of all data at least once.¹¹

In the modern ICT business environment of just-in-time production and delivery, traders need a fast and predictable release of goods (“time is money”).

The TFA contains provisions for faster and more efficient customs procedures through effective cooperation between customs and other relevant authorities on trade facilitation and customs compliance issues.

It also contains provisions for technical assistance and capacity building in this area. Diverse, evolving global trade regulations require companies to implement systems and procedures that ensure strict adherence. Trade laws and regulations are complex and constantly changing. Ultimately, each company in international trade in goods is responsible for ensuring full compliance with customs requirements and trade regulations around the world. Whether large or small, companies should ensure they have effective and up-to-date procedures in place and understand the key areas of compliance risk. With stiff penalties at stake (some of which could put companies out of business), small companies must also take customs compliance measures. Companies that do not understand or fail to follow these laws and regulations can face grave consequences. Compliance should be at the top of the list of every business seeking to expand into the international marketplace.¹² The following diagramme shows customs compliance in relation to the international supply chain:



11 Briefing note: Trade facilitation – Cutting “red tape” at the border, https://www.wto.org/english/thewto_e/minist_e/mc9_e/brief_tradfa_e.htm.

12 J. Min: Customs Compliance: Small Mistakes Can Lead to Big Problems, <http://www.inboundlogistics.com/cms/article/customs-compliance-small-mistakes-can-lead-to-big-problems>.

3. Customs Compliance: Challenges and Risks in the International Trade in Goods

Custom compliance begins with identifying and understanding the applicable laws and policies. It therefore presents challenges to customs compliance managers who must keep abreast of developments in this respect. Trading companies must implement appropriate internal procedures and controls. The main challenge facing international trade in goods is to minimize risk and the future potential costs of non-compliance.

Company managers must ensure that their decision-making process takes account of risk and provide timely and transparent reporting. This recognises data integrity and accuracy as key areas of compliance risk and seeks to improve data management. Among other things, the following risks must be taken into account:

- product risk,
- customer risk,
- destination risk,
- delivery chain risk,
- correctness of delivery data and customs declaration risk.

The following analyses these risks in greater detail in order to facilitate a better understanding of the essence of compliance management in an international company.

3.1 Product risk

For security and foreign policy reasons, governments (acting either autonomously or in accordance with international law) closely control the export and import of certain materials and equipment (including software and technology), that may facilitate dual use. International traders must understand how the nature of their product relates to existing regulations (*e.g.: licences to export or import*). Using a product's Control Classification Number on import or export helps to identify these items and the agency which can provide the necessary licence.

These special regulations are used by the EU and other countries. Moreover, the EU customs tariff is available electronically so the business can quickly check any problems.

3.2 Customer risk

Companies must know who is placing orders and receiving goods in international trade. Supplying to and from well-known foreign companies presents a

lower risk, while fulfilling orders through freight forwarders should raise red flags because shippers are liable for the ultimate end recipient of their products. It's necessary to verify the identities of foreign customers. Cooperation with well-known foreign companies reduces the risk.

3.3 Destination risk

EU companies trading with countries embargoed by the United Nations and the European Union understand the specific restrictions. Doing business in regions such as Iran, Syria, Sudan, North Korea, EU companies get to know the types of shipments allowed and prohibited, along with any rules that apply. A similar situation exists in relation to the Russian Federation.

3.4 Delivery risk

Many national and EU customs regulations are strict when it comes to customs violations. Illegal, undervalued or incorrectly identified goods in shipments are treated as a criminal violation and the companies in question may face severe penalties and delays. Companies can save time and money by strictly following the rules for shipments of and disclosures.

4. Main Compliance Risks Affecting the International Trade in Goods

The most important compliance risks facing companies involved in international trade mainly concern filling out customs declaration forms correctly. The accuracy of the data entered in customs declarations is one of the basic conditions for acting consistently with customs law and requirements at national, regional and international level. In any case, the risks are very similar, if not identical. Therefore, it is very important to provide accurate data, regardless of the form of data collection: electronic vs paper. However, there are many traps here and not only relating to documentation. In fiscal terms, the calculation of customs value is of paramount importance in this respect.

4.1 Valuation

The customs value of goods and its documentation is very extensive and not just limited to the invoice. In this respect, Art. VII GATT is not sufficient.¹³ Though helpful, the Agreement on Implementation of Article VII GATT requires addendums and agreements concerning many elements that are included or excluded

¹³ Article VII of The General Agreement on Tariffs and Trade, 1994, Valuation for Customs Purposes, http://dov.gov.in/newsite3/art_vii.asp.

from customs value.¹⁴ For this reason, it is necessary to use additional sources in order to calculate the correct amount of the customs value declared, such as the Customs Valuation Encyclopedia of US CBP¹⁵ or the EU Compendium of Customs Valuation texts of the Customs Code Committee Customs Valuation Section.¹⁶

4.2 Classification

The correct classification of goods is also extremely important. A change of one digit in the goods nomenclature code could lead to the application of a completely different customs tariff. Despite that, the Customs Tariff Nomenclature Classification (i.e. “Harmonized System” or “HS”)¹⁷ is quite commonly used. Although many regional economic integration groups (EU, the Andean Pact etc.) and countries use their own nomenclatures, these are still based on the Harmonized System.

4.3 Origin

Probably the most serious risk relates to the correct determination of origin of goods in customs declarations.¹⁸ Miller Thompson identifies many other elements and problems related to the risks that exist in connection with tariffs and non-tariffs barriers. These are: anti-dumping and countervailing duties, preferential tariff treatment; special levies or taxes (autonomous, seasonal, etc.), certification requirements (sanitary, veterinary, technical, etc.); export and import

14 Agreement on Implementation of Article VII of The General Agreement on Tariffs And Trade 1994, https://www.wto.org/english/docs_e/legal_e/20-val.pdf and Technical Information on Customs Valuation, https://www.wto.org/english/tratop_e/cusval_e/cusval_info_e.htm; the broad packet of the information of similar character can be found also on the website: <http://www.docs-engine.com/pdf/1/customs-valuation.html>.

15 Customs Valuation Encyclopedia 1980–2015, <https://www.cbp.gov/document/publications/customs-valuation-encyclopedia-1980-2015>.

16 Compendium of Customs Valuation texts of the Customs Code Committee, Customs Valuation Section, http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/customs/customs_duties/declared_goods/european/valuation_compendium_en.pdf.

17 Detailed description of the Harmonized Commodity Description and Coding System as well as the Classification Decisions taken by the Harmonized System Committee in the period (2001-2010) can be found on the WCO website: <http://harmonizedsystem.wcoomdpublications.org/>.

18 Agreement on Rules of Origin, https://www.wto.org/english/docs_e/legal_e/22-roo_e.htm; see also: Rules of Origin – Handbook, <http://www.wcoomd.org/en/topics/origin/overview/~media/D6C8E98EE67B472FA02B06BD2209DC99.ashx>; Guidance Rules of origin for imported and exported goods, <https://www.gov.uk/guidance/rules-of-origin>, etc.

controls such as embargos, sanctions, countercharges (retortions), permits (for import or export) and specific requirements depending on the country concerned.¹⁹

It follows from the above that companies and their managers have to consider and solve many customs compliance issues. Compliance planning and programming should be incorporated into existing business processes. Trade security programs must reflect compliance obligations more completely.

5. The Programming and Planning of Customs Compliance in Companies Trading Goods Internationally

To determine compliance with custom laws and regulations, companies trading goods internationally use the risk management processes, which involve the identification and correct assessment of risks in order to minimise and eliminate risks. This helps to achieve different aims such as moving goods across borders without disruption; reducing the risks of penalties or fines; meeting a wide range of safety, security and commercial compliance mandates; ensuring effectiveness, efficiency, confidentiality, integrity, availability, reliability as well as the ability to comply with all regulations.

In order to achieve these objectives it is important to gather data from multiple sources and integrate it in the records and store it in order to facilitate official responses, including complete audit and reporting capabilities (cargo security compliance; declarations for customs procedures and fiscal compliance; customs warehouse management, etc.) as well as AEO, C-TPAT,²⁰ EU Green Lanes,²¹ etc.

Companies are also advised to follow the best customs compliance practices (e.g. those by US CBP).

6. The Best Customs Compliance Practices Adopted by Companies Trading in Goods Internationally

The following describes the main components of internal control processes (i.e. risk assessment, control environment, internal control activities, information and communication) as well as monitoring.²²

19 Miller Thomson LLP: How to plan a customs compliance program, <http://www.lexology.com/library/detail.aspx?g=0d2df4e0-edd5-4c0d-936d-0b5903c5b6d7>.

20 C-TPAT: Customs-Trade Partnership Against Terrorism: <https://www.cbp.gov/border-security/ports-entry/cargo-security/c-tpat-customs-trade-partnership-against-terrorism>.

21 EU green lanes: <http://www.greenlane.eu/>.

22 US. Customs and Border Protection Best Practices of Compliant Companies, <https://www.cbp.gov/document/forms/best-practices-compliant-companies>.

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As far as risk assessment is concerned, it is necessary to take into account state compliance and cost goals. Both the activities and environment are decisive for efficient risk management and control. It is necessary to develop formal policies and compliance requirements for suppliers, ensure management's commitment and to have access to executives for required resources. One of the very important elements of this policy is to establish an effective record – keeping system. In the field of information and communication it is very useful to create a compliance group, establish training programs and develop partnership with the customs and border agency. Monitoring is an integral part of the internal control system and assesses its effectiveness.

All these elements should be based on legal and organisational principles including:

1. Creating a compliance committee involving a compliance manager and representatives for the regions or countries in which the company or group of companies does business.
2. Understanding any country specific laws and policies that affect the goods that will be imported or exported.
3. Conducting regular, periodic self-audits to determine compliance levels. Compliance audits should focus on high-risk priorities.
4. Establishing good lines of communication with the customs officers responsible for the administration and enforcement of programmes that apply to the business. In this respect, caution should be exercised because there is a risk of corruption!²³
5. It is not easy for companies that trade goods internationally to satisfy the principles mentioned above. In particular, SMEs may have problems meeting the requirements for a good customs compliance policy. Other proposals (which theoretically also apply to SMEs), are US CPB C-TPAT²⁴ and the Authorised Economic Operator (AEO) programme.²⁵

23 <http://www.lexology.com/library/detail.aspx?g=0d2df4e0-edd5-4c0d-936d-0b5903c5b6d7>.

24 C-TPAT: Customs-Trade Partnership Against Terrorism, <https://www.cbp.gov/border-security/ports-entry/cargo-security/c-tpat-customs-trade-partnership-against-terrorism> and https://www.cbp.gov/sites/default/files/documents/ctpat_brochure.pdf.

25 The idea of AEO was elaborated in EU and WCO as: Framework of Standards to Secure and Facilitate Global Trade, http://www.wcoomd.org/~media/wco/public/global/pdf/media/newsroom/communiqués/2005/wco_-framework-of-standards-april-05-def.pdf; See also: 3rd Global AEO Conference, <http://www.wcoomd.org/en/events/event-history/2016/global-aeo-conference.aspx> and also Authorised Economic Operator (AEO), https://ec.europa.eu/taxation_customs/general-information-customs/customs-security/authorised-economic-operator-aeo_en.

7. Authorised Economic Operator

7.1 The International Legal Basis for AEO

The following international documents are relevant for the AEO:

- The Revised Kyoto Convention – GA 3.32²⁶
- The fundamentally important WTO Trade Facilitation Agreement – Article 7.7 (*Additional trade facilitation measures to Authorised Economic Operators*)²⁷
- Authorised Economic Operator – AEO (*Framework of Standards to Secure and Facilitate Global Trade – i. e. “The WCO SAFE Framework”*)²⁸
- Union Customs Code – AEO (*Art. 38-41*)²⁹

7.2 Objectives and Benefits of AEO Status

The primary objectives and benefits of the AEO programme relate to trade facilitation and simplification as well as supply chain security. It grants benefits to members of the programme.

The creators of the AEO programme refer to the following objectives and benefits:

- Clearance with reduced information and a low rate of examination
- Deferred payment of duties/taxes
- Reduced and comprehensive guarantees
- Single declaration for a given period
- Clearance at traders’ premises
- Clearance with minimum information (simplified declaration, entry in the records)
- Single declaration for a given period
- Self-assessment of duties and taxes
- Priority and reduced examination
- Green Line on borders (import EU)

Additional benefits for business can be given by national customs authorities in some countries. This mainly relates to the mutual recognition of specific docu-

26 International Convention on The Simplification and Harmonization of Customs Procedures (Renewed Kyoto Convention – RKC) – http://www3.wcoomd.org/Kyoto_New/Content/content.html.

27 Trade Facilitation Measures for Authorised Operators, <http://www.tfafacility.org/article-7>.

28 Framework of Standards to Secure and Facilitate Global Trade, see: footnote 16.

29 Regulation (EU) No 952/2013 of the European Parliament and of The Council of 9 October 2013 laying down the Union Customs Code (recast), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0952&rid=1>.

H. International Trade Compliance

ments, especially AEO Certificate or C-TPAT Certificate. The EU has concluded and implemented AEO Mutual Recognition Agreements with Norway, Switzerland, Japan, Andorra, the USA and China.

AEO regulations include the following basic customs compliance requirements:

- Good compliance record
- Commercial record management
- Secure premises
- Employee screening
- Cargo security, etc.

On the basis of Article 39 of the Union Customs Code (UCC), the AEO status can be granted to any economic operator meeting the common criteria presented in Table 1.

Conditions and criteria	AEOC ³⁰	AEOS ³¹
Compliance with customs legislation and taxation, rules and absence of criminal offences related to the economic activities	X	X
Appropriate record-keeping	X	X
Financial solvency	X	X
Proven practical standards of competence or professional qualifications	X	
Appropriate security and safety measures		X

Table 1: Legal Base and Compliance Requirements in European Union³²

7.3 AEO – Challenges and Hopes

The AEO concept and programme are very important and relevant for companies that trade in goods internationally, despite the fact that real and tangible benefits (not only financial ones) are still forthcoming. Concerning AEO-S, a big issue remains the identifier for AEO traders in order to get full access to AEO benefits in the country of destination. For SMEs, the AEO concept means

³⁰ Economic operators authorised for customs simplification.

³¹ Economic operators authorised for customs security and safety.

³² http://ec.europa.eu/taxation_customs/general-information-customs/customs-security/authorised-economic-operator-aeo/authorised-economic-operator-aeo_en#criteria.

challenges and hopes but they can always outsource to customs brokers with an AEO certificate.

8. Conclusions

- (1) For companies involved in cross-border trade, customs compliance is fundamental for safe and secure risk management.
- (2) Customs compliance risks present challenges to customs compliance managers who must keep abreast of the applicable laws and policies. Trading companies must implement appropriate internal procedures and controls. The main challenge for companies involved in cross border trade is to minimise the risk and future potential costs of non-compliance.
- (3) In light of the current customs laws at global, regional and national levels, the AEO certificate and its mutual recognition by national customs authorities represents the most effective tool for customs compliance in companies involved in the cross-border trade in goods.

III. The Nexus between Export Compliance and Anti-Corruption Controls

Lino Arboleda

1. Introduction

Recent enforcement actions in the US involving prominent oil and gas and aerospace multi-national companies have highlighted the convergence of export compliance and anti-corruption controls. It has been said that if a company does not have strong anti-corruption controls, it probably does not have sufficient systems and processes to address export control compliance either (Wysong, 2010). Braumiller Law Group (2013) suggests that FCPA, sanctions and export control laws have several risk factors in common.

“The two main risk factors are: owning foreign subsidiaries and conducting business in countries with high levels of instability or corruption. Employees at foreign subsidiaries often lack knowledge of U.S. laws concerning FCPA, sanctions and export control laws. And even if they have knowledge, they may not realize the severity of the penalties associated with violations of the laws. In addition, conducting business in countries with high levels of instability or corruption often creates risks in these areas because these countries often tend to be associated with the most stringent export controls. For instance, China has figured prominently in past FCPA cases, and as a result has been of highest concern in regard to enforcement of EAR and ITAR.”

At GE, we acknowledge these risk factors and, in so doing, we have strengthened our Integrity and Compliance programme to a greater degree than ever before. It focuses on prevention [preventing ethics, compliance and regulatory problems] and, when prevention fails, detection (i.e. detecting the problems that do occur at the earliest possible stage) and once detected, response (i.e. responding quickly and thoroughly). A hallmark of GE’s compliance programme is a steadfast commitment to a vibrant, well-publicised and effective “open reporting environment.” This encourages employees to raise integrity concerns and to feel confident that they can do so without fear of retaliation.

2. Export Controls

GE complies with all export control, economic sanctions and customs laws that regulate cross-border transfers of goods and technology. At the heart of our export control compliance programme are the 5Ws – sets of five questions that an employee must ask when faced with an export transaction.

III. The Nexus between Export Compliance and Anti-Corruption Controls

1. What is being exported?
2. Who will be receiving the item?
3. Where is the item being exported to?
4. Why is the customer or end-user seeking the item?
5. Will the export violate the US anti-boycott law?

We have a robust Watchlist Screening programme to ensure we do not do business with individuals or entities identified on government restricted party lists. Screening helps identify parties that are subject to sanctions or suspected of activities of concern including weapons proliferation, terrorism and drug trafficking.

3. Improper Payments

On the other hand, GE's policy against improper payments in business transactions is a key element of our Integrity and Compliance programme and represents a core belief in how we do business. Among its key features are:

- Prohibiting improper payments in every transaction, whether with a government or a private party
- Extensive controls, including thorough due-diligence, careful screening and training on GE policies, over third-party intermediaries such as distributors, services providers, and commercial agents and representatives
- Heightened attention to key risk areas such as gifts and entertainment, travel and living expenses, donations, and facilitating payments

4. Nexus between Export Controls and Anti-Corruption

So, where do export control and anti-corruption intersect in our Integrity and Compliance programme? First, both export control and anti-corruption fall under our compliance and legal structure. The implementation of initiatives in these areas is overseen by the Chief Compliance Officer who takes a holistic view of the effectiveness of the programme. Second, there are due-diligence processes that are common to both export controls and anti-corruption, most notably, the 'Onboarding Due-Diligence' process. We acknowledge the risks that lies in the activities performed by our intermediaries and administrative service providers (ASPs) who act on the Company's behalf in seeking official administrative action, which has a Government touch point. This includes third parties who clear goods through customs; process export licenses; schedule meetings with government officials; perform lobbying or other government relations services; obtain regulatory approvals; and negotiate with government agencies regarding the payment of regulatory fees.

H. International Trade Compliance

Watchlist Screening, which is part of our export control programme, is also part of the Onboarding Due-Diligence process. Screening flags out involvement of terrorists and proliferators or companies which are majority owned or controlled by them. Screening ensures that third parties intended for onboarding are not influenced by restricted parties. On the other hand, screening also provides information on politically-exposed persons. This information is necessary for determining whether government employees or their relatives are involved. Screening also yields results on World Bank debarred entities – a crucial indicator for us not to deal or associate with entities who have been found to have engaged in fraudulent, corrupt, collusive, coercive or obstructive practices.

5. Conclusion

Never have the risks been greater. Aggressive enforcement of the FCPA by the SEC and the U.S. Department of Justice remains the norm. Enforcement is not limited to companies?individuals increasingly face prosecution and lengthy terms of imprisonment for breaking the law. Prosecutors continue to broaden their reach across the commercial sector, focusing on healthcare, energy, oil and gas, software, financial services and telecommunications and across developing and emerging markets such as those in China, India, Russia, Mexico, Brazil, the Middle East and Africa, where GE's presence is rapidly expanding.

These trends are not limited to the United States. Global enforcement of anti-corruption, sanctions and export control laws is increasing, and enforcement actions are increasingly coordinated and interconnected. Sometimes a single transaction can expose a company to prosecution in multiple jurisdictions. GE closely monitors these trends to ensure that its global compliance programme and internal controls address these evolving risks and enforcement trends.

References:

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IV. Customs in the Era of Terrorism

Prof. Dr. Achim Rogmann

1. The Role of Customs in the Era of Terrorism

The traditional function of customs has always been to levy import duties. However, all along, it also served to filter the incoming flow of goods and form a barrier against prohibited or restricted goods (we all are familiar with cases where weapons, narcotics, counterfeit and dangerous goods are confiscated by customs authorities).

Customs authorities receive comprehensive information on all cross-border movements of goods. Hence, customs administrations “own” the procedures for cross-border trade in goods. They are regarded as being the best actor to co-ordinate with other relevant agencies to prevent terrorist attacks by means of international trade. It is recognised that the global trading system is vulnerable to terrorist activities that have the potential to severely damage the entire global economy.

In the aftermath of the terrorist attacks on 9/11, the United States was the first country to recognise the terrorist threat to the security of the international trade supply chain. This motivated the international trade community and customs administrations, under the auspices of the World Customs Organisation (WCO), to develop the SAFE Framework of Standards to Secure and Facilitate Global Trade (“SAFE Framework”), which is a global supply chain security initiative. The SAFE Framework was unanimously adopted in June 2005 by the Directors General of Customs representing the members of the WCO. The Framework is not a legally binding instrument but a strong recommendation to national legislators to implement the agreed standards.

Despite the global threat of terrorism, global trade and the ever-increasing cross-border flow of goods also has to be seen in the context of the need for greater trade facilitation and for customs to support legitimate business activity. This is arguably a consequence of the remarkable success of the world trading system. Since 1947, the GATT has been the engine for an on-going process of reducing tariff levels from more than 40% to less than 5%. The Uruguay Round led to the establishment of the WTO and a further reduction of import duties by developed countries by additional 40% to 3.8% for industrial products. Moreover, one effect of the boom in regional trade agreements is the more-or-less complete elimination of import duties in intra-regional trade. In consequence, this sharp reduction in import duties (as the most prominent type of import barriers) increased awareness of the more opaque burdens to trade.

In particular, bureaucratic burdens and ineffective border procedures have been identified as significant barriers to international trade. During the 2013 Bali Ministerial Conference, WTO Members concluded negotiations on the Trade Facilitation Agreement (“TFA”), which entered into force on 22 February 2017. The core instruments for trade facilitation are the simplification, modernisation and harmonisation of export and import processes. Accordingly, the TFA contains provisions for expediting the movement, release and clearance of goods. As one of the signatories to the TFA, the EU is obliged to implement the TFA in its customs legislation. Accordingly, one core task of customs authorities is to maintain a proper balance between effective customs controls, on the one hand, and the facilitation of legitimate trade on the other. This is particularly challenging in the era of terrorism. Thus, customs is confronted with the “trade security/trade facilitation dilemma”.

This balance was also the basis for the SAFE Framework, which was developed not only to secure but also to *facilitate* the global supply chain (as its name suggests). To date, nearly 170 WCO Members have expressed their intention to implement the Framework of Standards. This includes the European Union, which has exclusive competence in the area of customs law (see Art. 3(1) lit. a of the TFEU). Accordingly, the EU has enacted a body of directly binding customs legislation with the Union Customs Code (UCC) as its most important element. The UCC has been fully applicable since 1 May 2016 and replaces its predecessor, which entered into force more or less in parallel with the establishment of EU’s single market.

One of the objectives of the UCC is the facilitation of legitimate trade and prevention of fraud. This requires simple, rapid and standard customs procedures and processes (Consideration (15) of the UCC). The UCC emphasises that the use of information and communication technologies is a key element in ensuring trade facilitation and, at the same time, the effectiveness of customs controls – thus reducing costs for business and risks to society. The UCC defines the term “risk” as the likelihood and the impact of an event occurring having regard to the cross-border movement of goods (Article 5 (7) of the UCC). This would *inter alia* pose a threat to the security and safety of the Union and its residents. Without explicitly mentioning the threat of terrorism, it is undisputed that customs authorities are also entrusted with combatting terrorism. The European Commission sees the customs authorities of EU’s Member States “in the front line in the fight against fraud, terrorism and organised crime.”

2. The Core Elements of the SAFE Framework

The SAFE Framework is aimed towards a safer world trade regime. It was the start of a new approach towards the end-to-end management of goods moving

across borders whilst recognising the significance of a closer partnership between customs and business. The EU recognised the importance of the objectives and elements of the SAFE Framework by implementing its standards into European customs legislation. The following describes the four core elements of the global security initiative under the SAFE Framework, using the UCC as a starting point.

2.1 Registration of Economic Operators

According to Article 9 of the UCC, any economic operator established in the EU needs to have a unique registration number before starting customs activities in the EU. The reason for introducing this registration requirement is that security measures introduced by the EU will be more effective if the persons concerned can be identified by a common number which is unique to each individual and valid throughout the EU. For this purpose, the EU developed the “EORI” (“Economic Operators’ Registration and Identification”) number, which the economic operator must provide in order to be identified. This is particularly the case when lodging customs declarations and entry and exit summary declarations, which have to be forwarded to customs in the context of cross-border movements of goods.

A central electronic system has been developed for storing and exchanging data on registrations between customs authorities in all EU Member States. This makes security measures more effective as the registration enables customs authorities to track economic operations throughout the EU and gives them easy and reliable access to operators’ registration and identification data. The introduction and application of the registration system demonstrates that the EU follows the “know your customer” approach by identifying economic operators who communicate with customs authorities in order to import or export goods. Moreover, Member States must introduce measures to reduce the burdens placed on economic operators as a result of the introduction of the EORI system. Hence, the registration can also be used as instrument to facilitate trade.

2.2 Advanced Communication

The second element requires traders to provide customs authorities with information on goods before they are imported into or exported from the customs territory of the European Union (Article 127 respective Article 263 of the UCC). For this purpose, the obligation to lodge a pre-arrival declaration or a pre-departure declaration has been created. The declaration must be lodged at the customs office of first entry within the prescribed deadlines, which depend on the transportation mode used. For example, declarations for deep-sea containerised shipments destined for an EU seaport must be lodged “no later than

24 hours before commencement of loading” in a third country port. This means that relevant security data will be sent electronically before the goods arrive in the EU. It is important to know that the pre-arrival or pre-departure declaration is designed to serve security aspects only and does not replace the complete customs declaration which has to be lodged for customs clearance of the consignment. However, the economic operator may lodge also additional data (i.e. not related to security) in order to speed up the customs clearance procedure. Due to this option, the pre-arrival or pre-departure declaration can also serve as means of facilitating customs processes.

As most countries participate in the security initiative under the SAFE Framework, a shipment must undergo two stages of advanced communication: first in the country of export and then in the country of import. The concept of the authorised supply chain provides the possibility to integrate the export and import information flows into one single declaration for export and import purposes, which is shared between the customs administrations concerned. However, this bundling of communication cannot be exploited because the essential exchange of data between customs authorities located inside and outside the EU is not yet possible due to the lack of interoperable IT-systems.

2.3 Risk Analysis

The requirement for advanced communication leads to the third element of EU's security legislation: how can the data collected via pre-arrival declarations be used to improve supply chain security? Article 127 para. 5 of the UCC stipulates that the entry summary declaration is to contain the particulars necessary for risk analysis for security and safety purposes. The same standard applies to pre-departure declarations under Art. 263 para. 4 of the UCC.

This makes it possible for customs to conduct a pre-arrival or pre-departure security risk analysis based on the cargo information submitted electronically under the advanced communication rules. Under Article 128 (import) and Article 264 of the UCC (export), the customs office in charge must ensure, within a specified time-limit, that the risk analysis is carried out, primarily for security and safety purposes, on the basis of the entry summary declaration and must take the necessary measures based on the results of that risk analysis. The most prominent of these measures is carrying out any customs controls that customs authorities deem necessary.

According to Article 46 para. 2 of the UCC, customs controls (other than random checks) must primarily be based on risk analysis using electronic data processing techniques with the purpose of identifying and evaluating the risks and developing the necessary counter-measures on the basis of criteria developed at national, Union and (if possible) international level. Uniform risk-selection cri-

teria must be applied in order to achieve an equivalent level of protection in customs controls for goods brought into or out of the EU.

The main reason for conducting risk analysis is to enable customs authorities to inspect only a small percentage of shipments crossing the borders. To do so they need a sophisticated system to select consignments for inspection. Under the SAFE Framework, non-intrusive inspection equipment (such as large-scale X-ray machines) and radiation detection equipment should be made available and used to conducting inspections in accordance with risk assessment. This equipment is essential for identifying and inspecting high-risk cargo and/or transport conveyances quickly, without disrupting the flow of legitimate trade. The risk-based selection of consignments for inspection demonstrates that risk analysis will be conducted prior to inspection of goods. In reality, far less than 5% of all shipments are inspected physically by customs offices in the EU, although a higher number of inspections would also comply with EU customs law. This means that the density of control measures is left to the discretion of customs authorities. However, creating bottle-necks by a high number of inspections would contradict the trade facilitation goal of customs rules. This situation underlines the importance of sophisticated risk analysis in restricting inspections to those international shipments, which are potential high-risk cargo.

2.4 The AEO Programme as Tool for Securing and Facilitating Trade

The fourth and last element is to provide reliable traders with trade facilitation measures. In this respect, the Authorised Economic Operator (“AEO”) concept has been established as a core element of the SAFE Framework in order to implement the customs-to-business partnership in accordance with the standards stipulated in the Framework. Due to this concept, the SAFE Framework suggests that customs authorities will provide benefits to businesses that meet specified supply chain security standards and best practices.

The SAFE Framework stipulates detailed provisions on the conditions and requirements for AEOs. Traders who voluntarily meet this wide range of criteria work in close cooperation with customs authorities to assure the common objective of supply chain security. On the other hand, AEOs enjoy a number of benefits which can result in savings of time and costs. Once again, we see the interaction between enhancing security and facilitating trade.

In addition to its foundations in the SAFE Framework, the AEO concept forms one of the elements of the Trade Facilitation Agreement (“TFA”). Due to its integration into the multilateral trade rules of WTO law, an operational AEO programme is now mandatory for all WTO Members in recognition of what this programme can contribute to trade facilitation. According to Article 7 para. 7.1 of the TFA, each WTO Member must provide additional trade facilitation mea-

H. International Trade Compliance

asures related to import, export, or transit formalities and procedures to an AEO. The criteria for qualifying as an AEO relate to compliance or the risk of non-compliance, with requirements laid down in domestic laws, regulations or procedures (Article 7 para. 7.2 of the TFA).

The EU has already implemented the AEO as an element of the SAFE Framework and has continued to apply the AEO concept under the new UCC. Thereby, the EU has complied with the now binding requirement to implement a fully-fledged AEO programme under the TFA. Under Article 38 (1) UCC, an economic operator established in the customs territory of the Union who meets the criteria set out in Article 39 of the UCC may apply for AEO status. Holders of the status will be subject to permanent monitoring. Traders who voluntarily meet a wide range of criteria and who work in close cooperation with customs will enjoy benefits throughout the entire EU.

The EU has developed two different types of AEO status (Article 38 (2) UCC): AEO-Customs Simplification (“AEO-C”) and the AEO-Security and Safety (“AEO-S”). Both types of AEO authorisations may be held at the same time and the AEO authorisation will be recognised by customs authorities in all EU Member States.

The status as AEO-C enables the holder to benefit from certain simplifications in accordance with the customs legislation, whereas the holder of an AEO-S authorisation can benefit from particular facilitations related to customs controls addressing security and safety issues when the goods enter or leave the EU. Obviously, the AEO-S status is most relevant for combatting terrorism.

The criteria for granting AEO status are stipulated in Article 39 of the UCC. Among the criteria that an economic operator must fulfil for AEO-S authorisation are:

- Show a record of compliance with customs legislation and taxation rules, including no record of serious criminal offences relating to the economic activity of the applicant (Article 39 (a) of the UCC). According to the implementing rules to the UCC (“UCC-IA”) this criterion will be deemed fulfilled if, over the last three years no serious infringements of customs legislation and taxation rules have been committed or repeated and the applicant has no record of serious criminal offences relating to his or her economic activity. Obviously, assessing compliance with the condition must take into account whether the economic operator is a natural or legal person.
- Demonstrate appropriate security and safety standards: the AEO must demonstrate that he or she maintains appropriate measures to ensure the security and safety of the international supply chain including in the areas of physical integrity and access controls to premises and containers, logistical pro-

cesses, personnel and identification of his or her business partners (Article 39 (e) of the UCC). According to the UCC-IA, customs authorities must always take into account the specific nature/business and size of the operator and also bear in mind a number of common considerations.

- In order to grant an AEO-S authorisation, customs must also physically check whether the applicant's premises fulfil the standard under Art. 39 (e) of the UCC. Examinations of the security and safety criterion will be carried out for all premises relevant to the applicant's customs-related activities. Accordingly, if a warehouse holds goods which are not under customs supervision but nevertheless intended for export (i.e. they will enter the international supply chain), it must be sufficiently secured.

The idea is to achieve a global supply chain secured from end-to-end. This can only be achieved if all partners in a supply chain hold an AEO authorisation from the competent customs authorities and if all authorisations are granted under comparable conditions. This leads to the obligation to identify the business partners because their selection is of vital importance and applicants for AEO status should have a clear and verifiable process for selecting business partners. In order to facilitate security in the whole supply chain, a number of mutual recognition agreements to recognise the AEO authorisations granted in third countries and *vice versa* (to date, with Norway, Switzerland, Japan, Andorra, the USA, China and a basic agreement with Canada, while more agreements with other important trade partners are to be negotiated) have already been signed. This will enable customs administrations to adopt a broader and more comprehensive view of the global supply chain and serve to eliminate duplication and multiple reporting requirements, thereby contributing to trade facilitation and enhanced security and safety standards.

According to Article 39 (6) of the UCC, the holder of an AEO authorisation will enjoy more favourable treatment than other economic operators in respect of customs controls according to the type of authorisation granted. A trader with AEO-S status granted in the EU will enjoy one or more of the following benefits:

- facilitations regarding pre-departure declarations;
- fewer physical and document-based controls in respect of security and safety;
- prior notification in case of selection for customs control;
- priority treatment if selected for control;
- possibility to request a specific place for such control.

The TFA (Article 7 para. 7.3) also refers to the following trade facilitation measures which can be granted to holder of an AEO authorisation. As EU legislation distinguishes between AEO-S and AEO-C authorisations these benefits have been implemented mainly in context of AEO-C authorisations:

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- rapid release time;
- deferred payment of duties, taxes, fees, and charges;
- use of comprehensive guarantees or reduced guarantees;
- a single customs declaration for all imports or exports in a given period.

In addition, every AEO can enjoy indirect benefits such as recognition as a secure and safe business partner, improved relations with customs authorities and other government authorities, reduced theft and losses, fewer delayed shipments, improved planning and management of shipments, improved customer service, improved customer loyalty, lower inspection costs of suppliers and increased co-operation.

These benefits underpin the trade-facilitating aspect of global AEO initiatives by giving AEOs the option to save time and costs and being more competitive in comparison to their non-AEO competitors. Voluntarily entering into a partnership with customs can lead to multiple benefits to economic operators participating in the programme. However, under the former customs legislation, a number of economic operators refrained from lodging applications for the AEO status due to lack of benefits outweighing the bureaucratic burden of applying for and maintain AEO status. The new UCC has implemented a stronger link between trade facilitation and AEO status, making it attractive – if not indispensable – for even more companies to seek AEO authorisation (participation in the AEO programme is still optional).

3. Conclusion

The different elements of EU's security initiative have shown the changing role of customs administrations in the era of terrorism. In the aftermath of the terrorist attacks on 9/11, the global trading system has been identified as vulnerable to terrorist exploitation that can severely damage the entire global economy. As authorities that control and administer the cross-border movement of goods, customs administrations are in a unique position to provide increased security to the global supply chain whilst contributing to trade facilitation at the same time. Measures enshrined in customs legislation have made a considerable contribution to securing the global supply chain in order to prevent terrorist activities by means of the international movement of goods. At the same time, customs has used its changing role to contribute to trade facilitation. This has led to a fundamental change in the role of customs officers: from tax collector to trade facilitator and security manager.

V. China's Current Export Control Scheme and Draft New Law – An Overview

Deming Zhao

1. Introduction

On June 16, 2017, a draft Export Control Act (“Draft Act”) was released for public opinion by the Ministry of Commerce of PRC (“MOFCOM”), with a deadline of July 15, 2017. The Draft Act has attracted much attention from the business sector. The main reason for such attention was that the penalties for violation in the Draft Act are based on the value of illegal business. This can lead to huge penalties similar to those found in monopoly violation cases.

2. The Current Export Control Scheme in China

It should be pointed out that China already has an export control scheme which can impose serious sanctions if the exporting company does not already have an export control compliance system in place.

2.1 A Case Study

A foreign-owned company in China processed certain chemical products and exported them to the United States. Prior to export, the company consulted a customs broker who classified the exported item under an HS code which was not on the export control list prescribed by MOFCOM. Accordingly, the company determined that the exported chemical product did not require a dual-use export licence from the Chinese authorities.

However, following the successful export of one shipment, China Customs seized the second export shipment and requested the company to report to MOFCOM because the exported product potentially required a dual-use item export license. The underlying reason was that there was a chemical embodied in the product which was capable of being used in weapons of mass destruction or “WMDs” (e.g. long range missiles), despite the fact that the export product itself was not listed.

While admitting the prior export was the same product, the company went through the consultancy procedure with MOFCOM by themselves, which resulted in a notice from MOFCOM that the export product in question required an export licence. Given that China Customs also received the same notice from MOFCOM, it transferred this case to its Anti-Smuggling Bureau for further investigation. At the same time, the company could not export any products, which drove it to the verge of collapse.

The key legal issue in this case appeared to be whether the company knew or should have known that the same product could be used in WMDs under Article 16 of Export Control Regulation on Missiles and Relevant Items and Technologies. If the answer were yes, a licence would have been mandatory. The problem, however, was that the company did not present any defence to refute the accusation that it had knowledge or constructive knowledge in the whole process.

As Chinese lawyers, we submitted a vigorous defence to MOFCOM, arguing that the chemical compound was imported into China in order to be processed. Therefore, it was absurd to claim that the processed chemical products, when exported to the United States, would present the risk that a certain chemical could be extracted from them. If such a risk of extraction risk did exist, what was stopping the foreign buyer from simply extracting the same chemical from the compound material in the United States before exporting it to China?

Eventually MOFCOM accepted our defence and agreed that no licence was required for the exported product and the future of the company was thus saved.

The lesson drawn from the case is that (a) Chinese export control law can be very dangerous to business; (b) compliance with export control is not simply a matter of checking control lists and classifying the listed items. Rather, the company must adduce evidence refuting actual or constructive knowledge of the risk that the export item in question could be used for military or massive destructive weapon purposes in order to free itself of liability; (c) the company did not have a sound export control scheme in place and (d) the company did not put up a vigorous legal defence from the beginning of the customs investigation.

2.2 Current Export Control Scheme

(1) Control Lists

Each year, MOFCOM and General Administration of Customs (GAC) jointly release a catalogue of import and export control licenses for dual-use items and technologies including related services. Concerning export, the catalogue lists the following items:

- (a) nuclear items and technologies;
- (b) nuclear dual use items and relevant technologies;
- (c) biological dual use items and technologies;
- (d) those listed in the catalogue attached to the Administrative Regulation on Controlled Chemicals;
- (e) relevant chemicals and relevant equipment and technologies;
- (f) missiles and relevant items and technologies;

- (g) precursor chemicals (I)
- (h) precursor chemicals (II)
- (i) other dual use items and technologies.

For items (a) to (h), each list is based on the separate administrative regulation issued by the State Council for each of these items. Dual-use items under the Chinese export control scheme covers nuclear, biological, controlled and other chemicals, missiles, precursor chemicals and other controlled items as well. 'Dual-use' simply means any items capable of being used for both civil and military or other restricted purposes. Any dual-use item, intended for actual civil use will require a dual-use export licence. If it is intended for actual military use, the item will be classified as a military-use item and subject to the corresponding control scheme.

(2) List of military-use items

If the items in question are to be exported for military use, the exporter must be a company which has a monopoly for the export of military items and hold an export licence.

(3) Registration of exporters

An exporter must register with MOFCOM before it can export dual-use items. MOFCOM has a simple registration process.

(4) End-use and end-users

In deciding whether to grant an export licence, MOFCOM will consider the nature and sensitivity of the export item, end-user and end-use in practice. Sometimes, the shipping route will also be an important factor in determining whether there is a risk of proliferation. Agreements and confirmation from the foreign buyer are also helpful in confirming the end-use and users.

(5) Actual knowledge and constructive knowledge

As shown in the case above, an export licence is not confined to the control list of dual-use items. Normally, the exporter will be guilty of violating the export control rules if the exporter in question knew or should have known that the dual-use item is used for military or other restricted purposes. In practice, the exporter may have two lines of defence as follows:

- (a) The items are not capable of military use;
- (b) The items would not possibly be used for military use;
- (c) The exporter has done everything as may be reasonably necessary beforehand to ascertain its civil use.

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Defence (a) is possible if the authorities have misunderstood the specific properties of export items, particularly in respect of shipments exported in the past. Defence (b) is important in cases where the exports are capable of dual-use but the possibility of military-use would be absurd given the facts of the case. As explained in the case above, the dual-use chemical was indeed contained in the compounds imported from the States and, once mixed with other chemicals, the finished products were re-exported to the United States. In such case, it would be absurd to conclude that any user in the United States would extract the controlled chemical from the re-imported mixture when they could do so from the chemical compound itself without exporting the same to China.

Defence (c) is a general defence to prove that the company is innocent and not guilty of exporting controlled items without a licence or otherwise unlawfully. In this connection, it is of the utmost importance to have an export control compliance scheme in place and document every effort, inquiry and response made regarding the export items, use and end-user. Without such documentation, it may be difficult to provide evidence refuting the allegation that the exporter had actual or constructive knowledge. The ASB of China Customs will also be very likely examine whether the company intended to smuggle goods, which is also a corporate criminal offence.

2.3 Enforcing Authorities

MOFCOM is the authority responsible for examining export licence applications in conjunction with other ministries if necessary. As such, it can either grant or refuse export licences.

China Customs is responsible for supervising the export clearance of dual-use items. Given that often it is easier for customs (rather than MOFCOM) to uncover irregularities in exportation, customs has been the major authority in investigating violations of export control laws.

Under the current scheme, MOFCOM has jurisdiction over the licencing procedure and can impose penalties for irregularities in that process. Customs has jurisdiction over the export clearance process and can impose penalties for the violation of rules governing customs supervision. In the event that one breach leads to violations with two different penalties, the more severe penalty will apply.

2.4 Consulting Procedure

If customs is uncertain whether an exporter licence is necessary, it will first suspend the export and instruct the exporter to contact MOFCOM. If the latter decides that a licence is not necessary, customs will release the goods. Otherwise, the ASB division of customs will continue the investigation (whether administrative or criminal).

2.5 Legal Liabilities

Under the current export scheme, if the exporter knowingly exports dual-use items without an export licence, it may commit offence of smuggling, illegal business and/or disclosing state secrets.

If it is not possible to establish knowledge or intent, the ASB division of customs may impose a fine on the importer up to 30% of the export value. Alternatively, MOFCOM may impose a fine of one to five times of the illegal gains, if any, and suspend or revoke the foreign trade business licence. Given that it is not always easy to ascertain illegal gains in practice, MOFCOM's penalties are usually not severe enough. As a result, the penalties imposed by customs are more significant than those imposed by MOFCOM.

If an export licence has been fraudulently obtained, the exporter's export licence will be revoked, a fine up to 30,000 RMB imposed and the exporter excluded from participating in foreign trade. If missile-related items are involved, fines will be commensurate with the amount of illegal gain.

Assuming that the exporter has both duly checked and complied with the export control lists and has also refuted the allegation of knowledge or constructive knowledge that the goods were dual-use in nature and that they were intended for an illegal end-use, he will normally be deemed innocent of wrongdoing, even though the foreign buyer and end-user have violated Chinese export control law.

3. What Changes does the Draft Act Introduce?

By virtue of the Draft Act, the relevant administrative regulations on export control have been consolidated into a single statute, which helps make the export control scheme easier to understand and follow.

3.1 Scope of Controlled Items

Nuclear-related items are no longer controlled as dual-use items but are separately controlled in the same way as military-use items. Besides goods, the Draft Act controls related technology and services. The law may also apply to other subjects if they relate to national security.

3.2 Exports Subject to Control

Export controls cover both the cross-border transfer of controlled items as well as the provision of controlled items to foreign persons or entities, regardless of where this occurs.

Exports of controlled items or foreign products to third party countries or regions containing controlled items that exceed certain thresholds will also be subject to the Draft Act.

3.3 Meaning of “Controlled Items”

Under the Draft Act (Article 3), dual-use items are those items capable of civil and military-use or enhancing military potentials, particularly items which can be used in designing, developing, producing or using massive destructive weapons.

Military-use items include equipment, dedicated manufacturing equipment and other materials used for military purposes.

“Nuclear” means relevant nuclear material, equipment and non-nuclear material used in reactionary piles and related technologies and services.

3.4 Potential New Risks to Export Transaction Parties

- (a) Retaliation: export transactions can be blocked if China adopts export control measures against the country of import, which discriminates against China in terms of export control measures (Article 9);
- (b) Interim export control measures: these can be taken from time-to-time with a normal term of 2 years (Article 14);
- (c) Embargo: an embargo on the export of certain items, to certain persons or entities can be imposed, if approved by the State Counsel or the Central Military Committee.

3.5 Filing Requirements

It is important to note that, under the Draft Act, the existing special registration requirement for exporting dual-use and military-use items has been transformed into a filing requirement only. A filing process may be simpler than the existing registration procedure. However, we will have to wait until the procedure is finalised to see if the filing process is efficient. It is also possible that the transformation into a filing requirement will avoid administrative liability for the filing process, since filing can be viewed as a pure formality rather than a procedure requiring administrative approval.

The Draft Act retains the monopoly scheme for the export of military items.

3.6 Transparency When Granting Export Licences

Article 22 of the Draft Act prescribes the factors to be considered when examining export licence applications. These include (a) national security and development interests; (b) international commitments and covenants; (c) sensitivity of

the items; (d) market supply conditions; (e) end-users and end-use; (f) exporter's internal compliance scheme; (g) other considerations as may be set out by laws and regulations.

3.7 Obligations of the Overseas Importer and End-User

MOFCOM may request the exporter to provide an end-use and end-user covenant from the overseas importer (Articles 25 & 26). If the importer violates this covenant both the importer and end-user may be blacklisted by MOFCOM. Transactions with such importers and end-users will also be prohibited (Article 29).

3.8 Obligations of the Exporter

Apart from performing the filing requirement and following the control lists, the Draft Act reiterates that the exporter must apply for an export licence when he knows or should have known that the export of any item not covered by the control lists may endanger national safety, run the risk of proliferation or be used for terrorism (Article 23), or if the exporter has been so informed by the government.

In any case, the exporter has the legal obligation to examine and reasonably verify the end-user and end-use before entering into export contracts. The export must report to MOFCOM if the end-user and end-use change (Article 27).

The exporter is also under a positive obligation to comply with export control law (Article 55).

3.9 Governmental Investigation

MOFCOM will maintain a system to assess the end-user and any risks presented by the end-use. If necessary, MOFCOM can dispatch investigators to conduct on site investigations overseas (Article 28).

The Draft Act grants MOFCOM the following powers to perform investigations in China:

- (a) Conduct on site checks;
- (b) Make inquiries and demand explanations;
- (c) Duplicate records and data;
- (d) Inspect and stop conveyances;
- (e) Demand the reshipment of exported items;
- (f) Attach or seize relevant items;
- (g) Audit and freeze bank accounts.

Under the Draft Act, China Customs has the same powers to investigate violations occurring under customs supervision. Under Chinese customs law, cus-

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toms supervision encompasses the designated areas of ports or places where customs supervises the clearance of imports and exports. If China Customs discovers a violation during export clearance or within free trade zones, it will have jurisdiction to investigate and, if necessary, impose penalties.

3.10 Legal Liabilities

The Draft Act imposes severe legal consequences for various violations. The most significant change is that the penalty will now be five to ten times of the value of illegal exports. This could result in huge financial penalties. Examples of violation include exporting without licence, fraudulently obtaining a licence, third-party use of licence or assists, export control evasion, transaction with blacklisted parties and so forth.

If intent is proved, the exporter and other collaborating parties will be subject to criminal prosecution.

3.11 Mitigation

The exporter can be exempt from a penalty or plead mitigation if he voluntarily and immediately stops the violation when the government so requests and actively cooperates with the investigation. He can also report the potential risks after export and actively cooperates with the investigation.

4. Conclusion

China already has a strict export control legal scheme in place, which is largely enforced by China Customs according to Chinese customs law and the consequences may be sufficiently severe to put companies out of business. However, the business community is not sufficiently aware of the risk because such cases are not diligently reported.

The Draft Act vastly increases administrative penalties. It is predicted that once it is enacted, both MOFCOM and Chinese Customs will rigorously enforce export control law. This will place great pressure on exporting companies to ensure trade compliance.

In the export control compliance programme, the exporter must carefully classify and determine the HS codes for listed controlled items. Further, the exporter must have a due diligence programme in place by which he can reasonably examine the nature of exported items, shipping route, import country, end-use and end-user. Such due diligence will help to refute the allegation of criminal intent and therefore avoid corporate or personal criminal liabilities as well as administrative penalties by disproving actual or constructive knowledge of the violation.