Appendix: International anti-corruption standards and a selection of national laws

A.1 Overview of international standards on anti-corruption

Many countries have implemented anti-corruption laws because of commitments they have made under international conventions dealing with bribery and corruption. The main international instruments are treaties, recommendations, resolutions and guidance. Some of the guidance is narrowly focused, while some is more widely applicable to both the public and private sectors.

The exact text of these standards may not top the reading list of a busy entrepreneur. It is important to understand the gist of them, though, because they provide the context for the changing legal and social expectations on companies in their efforts to tackle corruption risks in their business operations. If the following brief overviews and examples of anti-corruption laws from around the world pique your interest and you want to know more, there is plenty of information to be found on the internet.

A.1.1 UN Convention Against Corruption

The UN Convention Against Corruption (UNCAC) is the only legally binding global anti-corruption initiative open to all states.[1] It came into force in December 2005 and has 190 signatories. Its scope covers both public- and private-sector corruption, which it defines broadly as including bribery; embezzlement; active and passive domestic bribery; active and passive foreign bribery (whether the acts are committed directly or through the use of intermediaries); and money laundering.

1 Details and text available on the United Nations Office of Drugs and Crime website <www.unodc.org/unodc/en/corruption/uncac.html> accessed 24 November 2019.

The UNCAC specifically aims to prevent and combat corruption and to promote international cooperation and asset recovery. It therefore provides the background context when it comes to looking at the laws introduced by countries around the world. It is the legal basis and reference point for many states that use it as the basis upon which to develop their own national anti-corruption strategies and laws.

A.1.2 OECD Anti-Bribery Convention

The OECD Convention Against Bribery in International Business Transactions, usually known by its shorter form, the OECD Anti-Bribery Convention or even just OECD Convention, came into force in February 1999.[2] It is much narrower in focus than the UNCAC, as it addresses only the supply side of bribery involving foreign public officials (i.e. companies paying bribes to government officials to win business in foreign markets). The OECD Convention, together with its 2009 Recommendation,[3] covers not only the criminalization of active bribery but also non-criminal issues such as the tax treatment of bribes; accounting and auditing standards; exclusion from public procurement; export credits and internal controls; ethics; and compliance.

These topics have all been part of a rigorous peer monitoring mechanism that was implemented shortly after the Convention came into force. Now in its fourth phase, the review mechanism continues to hold the 36 OECD countries and eight non-member countries that have adopted the Convention[4] to account with respect to their efforts to investigate and prosecute cases and to drive improvements.

The OECD country peer monitoring procedure is unique among the international instruments in terms of its effectiveness to pressure the members of the OECD Convention to implement laws and to step up their enforcement and preventive measures for the private sector in particular. The monitoring procedure includes an on-site visit to the country under review. This is an opportunity for SMEs to make

2 Details and text available on the OECD website at <www.oecd.org/corruption/oecdantibriberyconvention.htm> accessed 24 November 2019.

3 'OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions' (OECD 2009) <www.oecd.org/daf/anti-bribery/oecdantibriberyrecommendation2009.htm> accessed 24 November 2019.

4 As at November 2019. The non-members of the OECD that have adopted the Convention are: Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Peru, Russia and South Africa. See <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>.

their views known on their country's implementation of the laws that enforce the OECD Convention. Companies that have contributed in this way report a high degree of satisfaction in being able to express their opinions to the reviewers and for the inclusion of their views in the country reports.

These country reports, which are issued for each review phase as well as for ad-hoc interim check-ups on progress, are all publicly available on the OECD website.[5] They give detailed information on anti-corruption laws and their implementation and enforcement in each of the countries party to the OECD Convention. The timetable for the upcoming reviews is also on the website, so if your country is coming up and you are a representative of the private sector, you could offer to be interviewed by the monitoring team when they arrive for their on-site visit.

As it was modelled on the US Foreign Corrupt Practices Act (FCPA) (see below), the OECD Convention focuses on the bribery of foreign public officials. Its implementation in national laws has prompted growth in corporate criminal liability for corruption and almost all parties to the Convention have implemented this in their domestic laws. The OECD definition of a foreign public official (see also Chapter 5) is also reflected in many of the domestic laws that have implemented the Convention.

A.1.3 Regional anti-corruption conventions

Regional conventions addressing the civil and criminal legal aspects of corruption have been issued by the EU and the Council of Europe, as well as Africa, the Middle East and the Americas.[6] Some of these legal

5 'Country reports on the implementation of the OECD Anti-Bribery Convention' <www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm> accessed 24 November 2019.

6 EU Convention against Corruption Involving Public Officials <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33027>; Council of Europe Criminal Law Convention (ETS No. 173) <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173>; Council of Europe Civil Law Convention (ETS No. 174) <www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174>; African Union Convention on Preventing and Combating Corruption <au.int/en/treaties/african-union-convention-preventing-and-combating-corruption>; the Arabic Convention Against Corruption <www.almeezan.qa/AgreementsPage.aspx?id=1719&language=en>; the Inter-America Convention Against Corruption <http://www.oas.org/juridico/english/corr_bg.htm> all accessed 24 November 2019.

instruments overlap with or reflect the scope and aspirations of the UNCAC and OECD Convention. Nevertheless, they also provide an important impetus for legal and regulatory improvements to address corruption by their respective member countries. For example, implementation of the Council of Europe's legal instruments is reviewed by the Group of States against Corruption (known by its French acronym GRECO) on an ongoing basis.[7] Their reports help to maintain pressure on member states that might be backsliding on their anti-corruption commitments and ensure that countries address gaps in their legislative and preventive programmes.

A.1.4 Multilateral development banks

Multilateral development banks (MDBs) are a frequently overlooked group of institutions that also impact international standards in anti-corruption compliance through their sanctioning powers. These powers enable them to require companies to implement an anti-corruption compliance programme, as well as enact sanctions such as fines and debarment of companies and individuals for corrupt practices in connection with MDB-funded projects. In this way, they exercise a subtle but perceptible influence over the development of anti-corruption compliance standards.

In some cases, US authorities responsible for investigating and prosecuting bribery share evidence and refer cases to MDBs. The importance of MDBs is underlined by an agreement that these institutions entered into between themselves, such that entities debarred[8] by one MDB for more than 12 months will be sanctioned for the same misconduct by other signatory MDBs.[9] Cross-debarment can mean further exclusions under the rules of regional groupings (such as the EU) and national governments too. If your company is reliant on projects that are tendered by a government where your company is headquartered, or by the EU or other international organizations, then due diligence on the project that is being financed by the MDB as well as on your partners will be very important to reduce potential risks.

7 See <www.coe.int/en/web/greco>.

8 Debarment in World Bank terms means the 'exclusion of corrupt actors from access to Bank financing', see: <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WorldBankSanctioningGuidelines.pdf>.

9 See Agreement on Mutual Enforcement of Debarment Decisions, 2010 at: <http://lnadbg4.adb.org/oai001p.nsf/0/F77A326B818A19C548257853000C2B10/$FILE/cross-debarment-agreement.pdf>.

Companies that get caught up in corruption investigations by an MDB often do not realize the consequences of misconduct until they are under the spotlight. Is your business involved in projects anywhere in the world that are funded by any of the MDBs?[10] This could be through a contract your company holds directly with a government to deliver a project that is being funded wholly or partially by an MDB. Alternatively, it could be indirectly through a joint venture partner.

In either case, you should be aware of the potential bribery and fraud risks in the project and take appropriate actions to protect your company's involvement. This could help you avoid being subject to investigations and sanctions in the event that an MDB looks into possible misuse of its funding. MDBs do not shy away from investigating the activities of SMEs, such as where they were acting as suppliers to a large company. In some cases, SMEs are more at risk of being investigated by MDBs than by national authorities.

A.1.5 ISO 37001: Anti-bribery management systems

Standard 37001 was issued by the International Organization for Standardization (ISO) in 2016. Its requirements are generic and are intended to apply to all organizations regardless of the type, size and nature of activity, and whether in the public, private or not-for-profit sector. It addresses bribery according to the traditional three elements used to summarize the aims of compliance management systems to prevent, detect and respond.

It is possible to obtain ISO 37001 certification of a corporate anti-corruption compliance programme (for part or all of an organization), through accredited certifying agents in many countries. Opinions vary on the value of such certification. Always remember that it is a snapshot in time and things may have changed since it was carried out. Some advocate it as a means to ensure a comprehensive anti-corruption programme is in place that can be used to encourage suppliers and other third parties to do the same. Others note that even in the jurisdictions that are most vigorously enforcing anti-corruption laws, certification has not served as a defence or protected a company from prosecution.

10 MDBs include the European Bank for Reconstruction and Development, World Bank Group, African Development Bank, Asia Development Bank and Inter-American Development Bank.

That said, in 2018 the governments of Malaysia, Indonesia, Singapore and Peru recognized the standard and are encouraging companies to implement it. In Brazil, Denmark and Singapore, prosecutors have apparently referenced ISO 37001 certification as a requirement to settle a bribery allegation.[11]

The ISO anti-corruption standard provides useful guidance and can be helpful to benchmark some compliance procedures and activities, but not surprisingly it has its limitations because it has been designed to cover all forms of entities throughout the world, including the public sector. You should therefore read the ISO standard with a critical eye, keeping in mind not just what is included but also what is missing or weak. The ISO standard is, for example, superficial on financial controls, which are a key safeguard for SMEs in particular to prevent corrupt payments being made or received.

Many SMEs find other guidance, such as that issued by the International Chamber of Commerce[12] or the French AFA,[13] more detailed and helpful when it comes to standards for due diligence on third parties.

Remember that certification in itself is not a guarantee that law enforcement will refrain from an investigation, or that financial institutions will be more likely to extend credit, or that governments will consider bids more favourably when assessing bids for tenders. Also, since by this time you know that developing an anti-corruption compliance programme is an ongoing process, certification is not a one-off effort that is valid for ever more. It will need to be renewed and this involves some resource commitments too.

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11 Worth Macmurray (*FCPA Blog*, 13 February 2019) <fcpablog.com/2019/02/13/three-predictions-for-the-future-of-iso-37001/> accessed 24 November 2019.

12 'ICC Anti-corruption Third Party Due Diligence: A Guide for Small- and Medium-sized Enterprises' (International Chamber of Commerce 2015) <iccwbo.org/publication/icc-anti-corruption-third-party-due-diligence> accessed 24 November 2019.

13 'Guidelines to help private and public sector entities prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism' (Agence Française Anticorruption 2017) <www.agence-francaise-anti-corruption.gouv.fr/files/2018-10/French_Anticorruption_Agency_Guidelines.pdf> accessed 24 November 2019. See also Chapter 4.

Should my organization seek ISO 37001 certification?

This is very much dependent on your organization's structure and where you operate, but it is worth asking the following questions:

1. Is ISO 37001 certification recommended by the government or law enforcement authorities where my organization is based?
2. What are the costs, taking into account not just the basic costs of certification but of the resources and any major changes to the organization required to obtain it?
3. Is there an alternative industry-specific guidance framework or scheme that is more relevant and either does not require certification or is part of another certification programme?[14]
4. What effect will certification have on how customers, business partners, investors and employees view my organization? Do they ask for a certification or recommend it?

A.1.6 COSO 2013 Framework

The Committee of the Sponsoring Organizations of the Treadway Commission (COSO) is a private-sector initiative that develops frameworks and guidance on enterprise risk management, internal control and fraud deterrence.[15] The 2013 COSO Internal Control – Integrated Framework is a useful tool to evaluate internal controls over financial reporting, which are a key element in anti-corruption defences for SMEs in particular.

! Definition

Internal control

The 2013 COSO Framework defines an internal control as 'a process, effected by an entity's board of directors, management, and other personnel, designed to provide reasonable assurance regarding the achievement of objectives relating to operations, reporting, and compliance'.

14 For example, joining an existing anti-corruption Collective Action involving certification.

15 See <www.coso.org/Pages/default.aspx>.

The COSO framework sets out five components of internal control, which are summarized as follows:[16]

1. Control environment – the standards, processes and structures that provide the framework for internal control across the organization, including values and top-level oversight.

2. Risk assessment – structured assessment of internal/external risks and mitigation measures.

3. Control activities – preventive or detective activities such as authorizations and approvals, verifications, reconciliations and business performance reviews.

4. Information and communication – internal and external sharing and generation of information to support internal control.

5. Monitoring – structured evaluations, both ongoing and periodic, against criteria established by regulators, standard-setting bodies or top-level management with the aim of identifying deficiencies.

You can use the COSO framework to design an effective anti-corruption compliance programme that provides 'reasonable assurance' of compliance with applicable laws and standards. The COSO approach recognizes that human judgement plays a role and therefore no assurance can be absolute, as well as that resource constraints can affect the control programme.

A.2 Examples of the international standards in domestic laws

The following examples from North and South America, Europe and Asia illustrate the implementation of international standards in domestic laws. You will notice the broad convergence of approaches when it comes to anti-corruption compliance for organizations, although the scope of these laws, penalties and other aspects does vary from country to country.

16 For more details see <www.coso.org/Documents/990025P-Executive-Summary-final-may20.pdf> accessed 24 November 2019.

A.2.1 United States of America[17]

The principal US law prohibiting bribery of foreign public officials is the Foreign Corrupt Practices Act (FCPA). The FCPA has two main sets of provisions: anti-bribery provisions and accounting provisions.

The FCPA's anti-bribery provisions apply to a wide range of entities, including US persons and companies, issuers – companies whose securities are publicly traded in the USA – and anyone acting in violation of these provisions within US territory. Broadly speaking, the FCPA anti-bribery provisions prohibit corrupt payments to foreign officials to obtain or retain business or secure any improper advantage. More specifically, the anti-bribery provisions prohibit the offer of 'anything of value' to a 'foreign official' or 'any person' while 'knowing' that all or a portion of such money or thing of value will be passed on to a 'foreign official' to 'obtain or retain business'.[18] The US enforcement agencies have construed these terms broadly.

The accounting provisions require issuers to maintain accurate books and records and effective internal controls. Specifically, issuers are required to '[m]ake and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer'. They are also required to:

> Devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that – (1) transactions are executed in accordance with management's general or specific authorization; (2) transactions are recorded as necessary; (3) access to assets is permitted only in accordance with management's general or specific authorization; and (4) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.[19]

There are no implementing guidelines for the FCPA, other than the regulations governing the US Department of Justice's (DOJ's) FCPA opinion procedure, under which the DOJ issues non-precedential opinions regarding its intent to take enforcement action in response to specific enquiries. In November 2012, however, the DOJ and the US

17 Many thanks to Matteson Ellis, Member, Miller & Chevalier Chartered, Washington, DC for providing this section on the USA as well as the section on Peru.

18 15 U.S.C. § 78dd-2(a).

19 15 U.S.C. § 78m.

Securities and Exchange Commission (SEC) jointly issued 'A Resource Guide to the U.S. Foreign Corrupt Practices Act' (FCPA Guidance).[20] The FCPA Guidance serves to clarify the FCPA and how it is applied by the enforcement agencies, expressly confirming pre-existing enforcement practices and policies, and consolidating agency thinking in a single, comprehensive reference source.

What does an effective compliance programme look like under the FCPA?

The FCPA Guidance describes the following 'Hallmarks of Effective Compliance Programs':

- a strong commitment to compliance by senior management and boards of directors creating a corporate 'culture of compliance';
- a clear, explicit, and visible policy prohibiting foreign bribery;
- Code of Conduct and compliance policies and procedure, to include guidelines and procedures on gifts, travel, and entertainment, charitable and political contributions, the use of agents and other third parties;
- oversight by senior executives and direct access to boards of directors and board committees;
- a risk-based programme, tailored to the company's business and FCPA risk profile;
- training for employees at all levels of company, and continued advice;
- incentives that drive compliant behaviour and disciplinary measures for violations;
- due diligence on the business need to retain third parties, their qualifications, and their integrity, and controls related to third parties;
- availability of internal advice and channels for confidential reporting of violations, and prompt responses to issues, including, as needed, independent investigations;
- continuous improvement through testing, review, and updates;
- M&A due diligence, including immediate compliance integration post-acquisition.

In the DOJ's Evaluation of Corporate Compliance Programs guidance published in April 2019, it added more detail about compliance

20 'A Resource Guide to the U.S. Foreign Corrupt Practices Act' (U.S. Department of Justice and Securities and Exchange Commission 2012) 59 <www.justice.gov/criminal-fraud/fcpa-guidance> accessed 24 November 2019.

expectations.[21] In general, it provides that prosecutors will consider:

1. Is the corporation's compliance programme well-designed?

2. Is the programme being applied earnestly and in good faith? In other words, is the programme being implemented effectively?

3. Does the corporation's compliance programme work in practice?

The FCPA Guidance provides that '[i]ndividual companies may have different compliance needs depending on their size and the particular risks associated with their businesses, among other factors. When it comes to compliance, there is no one-size-fits-all program'. It states that '[c]ompliance programs that employ a "check-the-box" approach may be inefficient and, more importantly, ineffective'. Specifically, it says, 'each compliance program should be tailored to an organization's specific needs, risks, and challenges'.

Adopting these compliance best practices is a way to reduce FCPA-related risks. How should SMEs apply these standards, especially smaller companies that still have significant corruption risk profiles? What do smaller companies do when their resources, personnel and capacity are much more limited than those of multinational corporations? Does a privately held oil and gas services company with 100 employees in Texas and 250 in Brazil need a standalone compliance officer? How robust a third-party due diligence and monitoring programme does a small technology company with 200 distributors throughout Latin America need to have in place?

Formal and informal guidance exists to help SMEs establish adequate compliance programmes.

A.2.1.1 Sentencing Guidelines[22]

Section 8B2.1 of the US Sentencing Guidelines provides a description of compliance expectations for smaller companies, explaining that

21 See <www.justice.gov/criminal-fraud/page/file/937501/download> accessed 24 November 2019.

22 'Guidelines Manual' (United States Sentencing Commission 2018) §8B2.1 <guidelines.ussc.gov/gl/%C2%A78B2.1> accessed 24 November 2019.

SMEs 'shall demonstrate the same degree of commitment to ethical conduct and compliance with the law as large organizations'. It states that SMEs can meet these requirements with 'less formality and fewer resources' than larger companies. This can mean reliance on existing resources or systems that are simpler than those of larger companies.

The Sentencing Guidelines provide four examples:

- 'The governing authority's discharge of its responsibility for oversight of the compliance and ethics program by directly managing the organization's compliance and ethics efforts'.
- 'Training employees through informal staff meetings, and monitoring through regular "walk-arounds" or continuous observation while managing the organization'.
- 'Using available personnel, rather than employing separate staff, to carry out the compliance and ethics program'.
- 'Modeling its own compliance and ethics program on existing, well-regarded compliance and ethics programs and best practices of other similar organizations'.

A.2.1.2 FCPA Guidance

The FCPA Guidance provides that 'small- and medium-size enterprises likely will have different compliance programs from large multinational corporations, a fact DOJ and SEC take into account when evaluating companies' compliance programs'.[23]

Chuck Duross, who headed the DOJ's FCPA Unit from 2010 to 2014, once explained that one of the main reasons for producing the FCPA Guidance was to help provide information for smaller companies: 'In October 2010 the OECD proposed that we provide better guidance as to both our enforcement priorities, our interpretations of the statute and the like, particularly aimed towards small and medium enterprises … the guide was the ultimate product of that'.[24] This insight suggests that the FCPA Guidance's description of the Hallmarks of Effective

23 At p. 57.

24 Interview with Chuck Duross in Global Investigations Review, April 2014 <http://documents.jdsupra.com/24480ofb-d8d5-468e-8da2-3a64fe2ffcf2.pdf>.

Compliance Programs should be read, understood and followed not only by multinational corporations, but by SMEs as well.

A.2.1.3 Enforcement officials

The SEC's Chief of the FCPA Unit, Charles Cain, and former Chief of the DOJ's Fraud Section, Jeffrey Knox, have discussed SMEs in the context of FCPA enforcement. Cain has noted that, while the SEC recognizes that companies have different resources, smaller companies still need to find ways to manage risk:

> I can't give specific examples how, but it generally involves the creative use of existing resources. While not the same as big companies, they are addressing the same risks and need to be creative. They need to make it a standard part of business. If compliance is part of the culture, the compliance program overlay doesn't need to be as big.[25]

Knox noted that FCPA authorities would still ask, 'Were the [compliance] actions taken reasonable? Was there management involvement? Was the misconduct pervasive? What is the culture of the company?'

In 2014, the SEC's then-Chief of the FCPA Unit, Kara Brockmeyer, noted that smaller companies need compliance mechanisms in place, but that they do not necessarily need 'Rolls-Royce' programmes. She advised that SMEs should still try to leverage the controls they have in place to address FCPA risks. For example, SMEs should use their internal audit functions to ensure that books and records are complete, supporting documentation is maintained for expenditures, employees know what they can spend money on, and segregation of duties and authorization levels are in place. She said that the types of controls that help prevent misconduct like embezzlement are the same controls that can prevent bribery.[26]

In 2014, Patrick Stokes, former chief of the DOJ's FCPA unit, explained that the DOJ realizes that SMEs cannot conduct the same type of due diligence during mergers and acquisitions as larger companies. But he said, 'We expect them to identify the highest risk areas and take a look at the books and some contracts to the extent possible and follow it up

25 Personal views expressed made at Momentum Global Anti-Corruption Conference, 2014, Washington, DC.

26 Personal views expressed at a conference in 2014.

and conduct more thorough review of various subsidiaries and units around the world where it is operating'.[27]

These authorities make clear that a robust anti-corruption compliance programme is an essential step to managing FCPA risk, not only for large companies but for SMEs as well.

A.2.2 UK

The main UK legislation dealing with bribery is the Bribery Act 2010. This contains four main offences.

A.2.2.1 Offering, promising or giving a bribe (active bribery)

This offence is divided into two types of cases:

1. The advantage is offered to induce or reward a person for improper performance. The offence would still be committed if the advantage were given to a person other than the one performing improperly.

2. The advantage is offered, and the person offering knows or believes that the acceptance of the advantage would itself constitute improper performance.

If the bribe is made indirectly through a third-party intermediary, the person using the intermediary would still be liable.

A.2.2.2 Requesting or agreeing to receive a bribe (passive bribery)

Liability for receiving a bribe is set out in terms of requesting, accepting or agreeing to receive a financial or other advantage in exchange for improper performance. If a third-party intermediary is used, the offence is still committed by the recipient of the bribe, and the advantage does not have to benefit the recipient. The recipient does not have to know or believe that the performance of the activity is improper. This also applies to any third party that performs the activity.

27 See < https://www.corporatecomplianceinsights.com/fcpa-enforcement-thinking-2014/>.

A.2.2.3 Bribery of a foreign public official

This is a separate standalone offence whereby a person offers, promises or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official function. The person offering, promising or giving the advantage must also intend to obtain or retain business or an advantage in the conduct of business by doing so.

A.2.2.4 Corporate offence of failing to prevent bribery

The offence of failing to prevent bribery is applicable to any commercial organization. Failure to prevent bribery can be caused by employees, subsidiaries, third-party agents or anyone who acts on behalf of the business. The company itself, as well as its senior officers, may be found guilty if a senior officer is found to have agreed or connived in the offence. However, if an organization has implemented adequate procedures (an anti-corruption compliance programme) that are designed to prevent bribery in its business operations, then it may have a defence.

The offences can be committed both by individuals and a 'relevant commercial organization'.

! Definition

Relevant commercial organization

This is defined as a body or partnership incorporated or formed in the UK irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of incorporation.

The key concept here is that of an organization which 'carries on a business'. To date, the UK courts have not ruled on how this phrase is to be interpreted. The UK Guidance has stated that it will be determined by 'applying a commonsense approach'. The Guidance further states that 'organizations that do not have a demonstrable business presence in the UK would not be caught … having a subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies'.[28]

28 'The Bribery Act 2010: Guidance' (UK Ministry of Justice 2011) <www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> accessed 24 November 2019.

A.2.2.5 Jurisdiction

Section 12 of the Act provides that the UK courts will have jurisdiction over offences under section 1 (active bribery), section 2 (passive bribery), section 4 (improper performance relating to a bribe) and section 6 (bribery of a foreign public official) when committed in the UK. The courts will also have jurisdiction over offences committed outside the UK where the person committing them has a close connection with the UK by virtue of being a British national, or ordinarily resident in the UK or a body incorporated in any part of the UK.

The close connection rule does not apply to the failure of an organization to prevent bribery, and can be committed irrespective of whether the acts or omissions take place in the UK or elsewhere and can accordingly be applicable in conjunction with the offences in sections 1 and 6.[29]

A.2.2.6 Commercial bribery

To trigger the failure to prevent bribery offence, a commercial organization must have failed to prevent conduct that would amount to the commission of an offence of active or passive bribery. The elements of the commercial active bribery offences require that an 'advantage' is given to bring about or reward the improper performance by another person of a relevant function or activity. The offence applies to bribery relating to any function of a public nature, connected with a business, performed in the course of a person's employment or performed on behalf of a company or another body of persons. Bribery in both the public and private sectors is therefore covered.

! Definition

Improper performance

Performance which amounts to a breach of an expectation that a person will act in good faith, impartially or in accordance with a position of trust.

For the offence of active bribery to be fulfilled it must have been committed with intent. The amount or value of the bribe is therefore generally not significant.

29 Bribery Act 2010, s 7(3)b and 12(5).

A.2.2.7 Bribery of a foreign public official

! Definition

Foreign public official

Any individual who exercises a public function for any public agency or public enterprise of a country or territory that is outside the UK. See also the discussion in Chapter 5.

This offence does not require an intention to induce 'improper performance'. The focus is rather on the person offering, promising or giving the advantage, who must intend to obtain or retain business or an advantage in the conduct of business by doing so. If the prosecution is able to establish that such an advantage has been offered, promised or given, it must then establish the connection between the advantage and the intention to influence and secure business or a business advantage. To establish such a connection will depend on the 'totality of the evidence', which takes into account 'all of the surrounding circumstances'. This includes the type and level of advantage offered, how it was provided and the amount of influence the particular foreign public official has over awarding the business'.[30]

A.2.2.8 Failing to prevent bribery

The corporate offence of failing to prevent bribery allows for unlimited fines and extends to include the activities of third parties acting on behalf of the organization. What this means for companies is that irrespective of the size of the bribe or whether it resulted in a benefit for the company or not, it is the overall corporate environment that is relevant, and whether it facilitated the wrongdoing. This is why the defence of having adequate procedures to prevent bribery has become so important.

In 2011 the UK Ministry of Justice issued principles-based guidance around six key areas for companies to address:

- proportionate procedures;
- top-level commitment;

30 UK Ministry of Justice (n 28) 13 §28.

- risk assessment;
- due diligence;
- communication;
- monitoring and review.

These principles are addressed in the relevant sections of this book.

A.2.3 France[31]

France implemented the 1997 OECD Anti-Bribery Convention early on, but for a long time lagged behind in terms of effective enforcement. In 2013, a first round of reforms led to the creation of a centralized national prosecutor's office for white-collar crime, the Financial Prosecutor of the Republic (*Procureur de la république financier* or PRF).

A second round of reforms in 2016 was carried out by the so-called Sapin II law of 9 December 2016.[32] This act introduced into French law certain key aspects of enforcement systems drawn from the USA and other foreign countries, such as the notion of a corporate compliance programme (*programme de mise en conformité)*, the deferred prosecution agreement or DPA (*Convention judiciaire d'intérêt public* or CJIP) and corporate monitorships.

The Sapin II law also created an independent administrative agency in charge of preventing corruption, the *Agence française anti-corruption* (AFA), which enjoined organizations to set up appropriate whistleblower hotlines and further strengthened the legal protection of *bona fide* whistleblowers.

According to the Sapin II law, an anti-corruption compliance programme must include eight elements that are translated into English as follows:

31 Many thanks to Emmanuel Breen, Associate Professor at Sorbonne University and Counsel at Laurent Cohen-Tanugi Avocats for providing this section on French anti-corruption law.

32 Law No. 2016-1692 of 9 December 2016 on Transparency, Anti-Corruption and Economic Modernization.

1. a code of conduct defining and illustrating the different types of prohibited behaviours, notably bribery and influence peddling;

2. an internal system to enable employees to report any violations of the code of conduct;

3. a regularly updated risk map designed to identify, analyse and categorize the company's exposure to any risks related to bribery;

4. an assessment of clients, suppliers and intermediaries in light of the risk mapping;

5. accounting controls designed to ensure that the company's books and accounts are not used to conceal acts of bribery or influence peddling;

6. training for managers and employees exposed to the risk of bribery and influence peddling;

7. disciplinary sanctions against employees that violate the code of conduct;

8. internal control procedures to assess the efficiency of the compliance programme.

The AFA issued detailed guidance in 2017 on each of these eight components, with a particularly strong emphasis on the methodology for risk mapping.[33] All in all, the French approach to the key components of an anti-corruption compliance programme is very much aligned with leading international guidance on the topic, such as the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance of 2010[34] and the US FCPA Guide of 2012[35] with its list of 'hallmarks' of an effective compliance programme.

The novelty of the French approach is the creation of a standalone positive obligation for larger companies to set up an anti-corruption compliance programme. Companies and company executives may thus

33 Agence Française Anticorruption (n 13).

34 'Good Practice Guidance on Internal Controls, Ethics and Compliance' (OECD 2010) <www.oecd.org/daf/anti-bribery/44884389.pdf> accessed 24 November 2019.

35 US Department of Justice and Securities and Exchange Commission (n 20).

be sanctioned under Article 17 of the Sapin II law by an administrative fine issued by the AFA for failure to implement an anti-corruption compliance programme, irrespective of whether an act of bribery actually occurred. This fine may amount to up to EUR 1 million for legal entities and EUR 200 000 for senior executives, who would be personally liable for paying this fine.

However, SMEs are left out of the scope of this potential fine, as Article 17 of the Sapin II law is applicable only to companies that fulfil both of the following conditions:

- employ at least 500 employees or are part of a group with at least 500 employees with a parent company headquartered in France; and

- have an annual revenue or consolidated annual revenue exceeding EUR 100 million.

According to the generally accepted interpretation, French subsidiaries of foreign groups fall within the perimeter only if they themselves exceed both thresholds. Conversely, foreign subsidiaries of French groups are included in the perimeter irrespective of their size.

Strong incentives nonetheless remain under French law for SMEs to implement an anti-corruption compliance programme. In particular, the AFA and PRF, in their joint 2019 guidance on CJIPs (the new form of criminal settlement introduced by the Sapin II law) have made it clear that favourable treatment by French enforcement authorities will depend, among other factors, on the existence and quality of a company's compliance programme. This is true for all companies irrespective of whether they surpass the thresholds set out in Article 17 or not.

The AFA and PRF thus write that, regarding 'legal persons excluded from the scope of Article 17 [of the Sapin II law], voluntary implementation of an effective compliance programme is a favourable indicator for being granted a CJIP'.[36] In this regard, it is interesting to observe that SMEs are among the first companies to have entered CJIPs in 2018

36 'Guidelines on the implementation of the Convention judiciaire d'intérêt public' (Agence Française Anticorruption) 7 <www.agence-francaise-anticorruption.gouv.fr/files/files/EN_Lignes_directrices_CJIP_revAFA%20Final%20(002).pdf> accessed 24 November 2019.

with the PRF, in a case involving the bribery of employees by suppliers of the national electricity company, EDF.[37]

It is also important for SMEs to be aware that Article 8 of the Sapin II law introduces an obligation for companies to set up appropriate procedures for channelling compliance alerts by employees and third parties. This obligation is applicable, in particular, to all companies with 50 or more employees.

Generally speaking, the 2017 AFA recommendations are 'intended for all private and public sector entities, regardless of their size, legal structure, business area, revenue or number of employees'[38] and are meant to serve as a common French anti-corruption reference guide, although of a non-binding nature. Additional guidelines by the AFA on specific topics, such as gifts and invitations or mergers and acquisitions, will also be of interest to all companies, including SMEs.[39]

Finally, it should be noted that SMEs may request advice from the AFA's Division for Support to Economic Players (*Département de l'appui aux acteurs économiques*). This advisory procedure, dubbed 'individual support' (*accompagnement individuel*), is, according to the relevant AFA guidance, 'available to all economic players including those who remain outside of the scope of Article 17 [of the Sapin II law]'.[40] This procedure is confidential and is conducted by AFA agents who are not, and will not, be involved with enforcement procedures.

A.2.4 Malaysia[41]

Offences relating to corruption and bribery in Malaysia are found primarily in the Malaysian Anti-Corruption Commission Act 2009 (MACCA)[42] and the Penal Code (Act 574). Other legislation such as the Companies Act 2016 and the Anti-Money Laundering, Anti-

37 Three mid-sized companies, Kaefer, Set and Poujeaud in February and May 2018.

38 Agence Française Anticorruption (n 13) 3.

39 These additional guidelines are in draft form at the time of writing (November 2019) and subject to public consultation.

40 'Charte de l'appui aux acteurs économiques' (Agence Française Anticorruption 2018) <www.agence-francaise-anticorruption.gouv.fr/files/files/2018-09_-_Charte_dappui_aux_acteurs_eco_o.pdf> accessed 24 November 2019.

41 Many thanks to Caesar Loong LL.M of Raslan Loong, Shen and Eow for providing this section on Malaysian law.

42 As amended by the Malaysian Anti-Corruption Commission (Amendment) Act 2018.

Terrorism Financing and Proceeds of Unlawful Activities Act 2001 also deal with activities that may involve corruption or criminal behaviour. The main offences under the MACCA are prescribed in Sections 16–18 and Sections 20–23. The following are the most relevant to companies.

A.2.4.1 Giving or accepting gratification as inducement

Section 16 deals with the offence of corruptly soliciting, receiving or giving gratification to any person whether for the benefit of that person or of another person. The scope of the offence covers any form of improper inducement 'of any person … in respect of any matter or transaction'.

A.2.4.2 Giving or accepting gratification by agents

Any agent who corruptly accepts or obtains from any person, for themselves or for any other person, any gratification as an inducement for doing or forbearing to do any act in relation to their principal's affairs or business, commits an offence under Section 17. Likewise, any person who offers or gives gratification to an agent as an inducement for any of the aforesaid acts also commits an offence. The offence does not require proof that the agent had the power, right or opportunity to forbear any of the intended acts or that they did not in fact forbear any act.

A.2.4.3 Offence of deceiving the principal

Under Section 18, an agent is also liable if they intentionally deceive their principal with any account or document in which the principal is interested, and which they have reason to believe contains any statements which are false, erroneous or defective. Any person who gives an agent any such account or document with the intention of misleading the agent's principal is also liable for the same offence. The offence only arises where documents are used but not where a principal is intentionally misled with oral representations. It is unclear whether an audio or visual recording constitutes a document. This means that any agent who submits an erroneous claim for expenses commits an offence. This is a significant deterrent against disguising bribes as expenses or service fees.

! Definition

Agent

Under the MACCA, an agent means 'any person employed by or acting for another, and includes an officer of a public body or an officer serving in or under any public body, a trustee, an administrator or executor of the estate of a deceased person, a subcontractor, and any person employed by or acting for such trustee, administrator or executor, or subcontractor'. This could also encompass directors of companies and partners in a partnership.

A.2.4.4 Corruptly procuring withdrawal of tender

Section 20 makes it an offence for any person to obtain a contract from a public body by offering a gratification to any person who has made a tender for that contract as an inducement for withdrawing their tender. Similarly, it is an offence for any person to solicit or accept a gratification for withdrawing their tender.

A.2.4.5 Bribery of an officer of a public body

The language of Section 16 is wide enough to capture most corrupt acts relating to public officials. In addition, Section 21 expressly makes it an offence to give or receive a gratification as an inducement to an officer of a public body for:

- voting at any meeting of the public body in favour of or against any measure, resolution or question by public body;
- performing or aiding, expediting, delaying, hindering or preventing the performance of, any official act;
- aiding in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or
- showing any favour or disfavour in their capacity as such officer.

A.2.4.6 Bribery of foreign public officials

It is an offence under Section 22 to offer gratification as an inducement of any foreign public official to use their position to influence any act or decision in a foreign state or international organization in which they

exercise their duties. Foreign public officials themselves would also be deemed to have committed an offence if they solicit or accept any similar gratification. Section 66 on extraterritorial application of the legislation states that the Act applies outside of Malaysia only to 'Malaysia citizens or permanent residents'. Nonetheless, foreign public officials will still be caught under Section 22 if the gratification is received or solicited in Malaysia.

A.2.4.7 Using public office for gratification

Offences by public officials are further extended under Section 23 of the MACCA. Where an officer of a public body uses their position for gratification, whether for themselves, their relatives or associates, they commit an offence. The officer of a public body shall be presumed, until the contrary is proved, to use their position for such gratification, when they take any action in relation to any matter in which they, or any relative or associate of theirs, has an interest. Neither the extent of the interest nor the degree of proof is prescribed, so public officials should be careful to avoid or immediately disclose any conflicts of interest.

A.2.4.8 The Penal Code

There is some duplication of offences under the Malaysian Penal Code, which also makes it an offence for a public servant to obtain any gift from any person involved in any proceeding or business transacted by him or her.[43] It is an offence for any person to accept, obtain or attempt to obtain gratification from any other person as a motive or reward for inducing any public servant to do or to forbear to do any official act, or to show favour or disfavour to any person in the exercise of the official functions of such public servant, or to render any service or disservice to any person.[44]

A.2.4.9 Liability of companies and their officers

In a significant extension of directors' duties and liabilities, Section 17A of the MACCA, which will come into effect on 1 June 2020, was modelled on Section 7 of the UK Bribery Act 2010. It renders a commercial organization and its officers liable if a person associated with

43 Penal Code s 165.

44 Ibid s 162.

the commercial organization corruptly gives or offers any gratification to any person with the intent to obtain or retain business for the commercial organization or to obtain or retain an advantage in the conduct of business for the commercial organization.[45]

Similar to the UK law, in Malaysia the commercial organization will also have to prove that it has adequate procedures in place to prevent persons associated with the commercial organization from undertaking corrupt acts.[46] Government guidelines on what constitutes adequate procedures, which will come into force for commercial organizations in June 2020,[47] can be summarized according to the following acronym:

- T – top level commitment;
- R – risk assessment;
- U – undertake control measures;
- S – systematic review, monitoring and enforcement;
- T – training and communication.

The guidelines also recognize the principle of proportionality, so the question as to what would be reasonable for an SME to undertake is as relevant for companies in Malaysia as elsewhere.

If a commercial organization is found guilty of an offence under section 17A(1), a person who is a director, controller, officer or partner of the commercial organization will be deemed guilty of the same offence unless that person proves that the offence was committed without their consent and that they exercised due diligence in preventing the commission of the offence, having regard to the nature of their function and to the circumstances.[48] Therefore, a person who is a director, controller, officer or partner cannot escape criminal liability under the

45 MACCA s 17A(1).

46 Ibid s 17A(4).

47 'Guidelines on adequate procedures pursuant to subsection (5) of section 17a under the Malaysian Anti-Corruption Commission Act 2009' (National Centre For Governance, Integrity and Anti-Corruption): <giacc.jpm.gov.my/wp-content/uploads/2019/01/Eng-Garis-Panduan-Tatacara-Mencukupi.pdf> accessed 24 November 2019.

48 MACCA s 17A(3).

MACCA by merely asserting that they are not the perpetrator of the offence.

! Definition

Commercial organization

A 'commercial organization' under section 17A of the MACCA refers to any company or partnership organized under the laws of Malaysia, or a company or partnership wherever organized that carries on a business in Malaysia.[49] A person associated with a commercial organization refers to any director, partner or an employee or any person acting on behalf of the commercial organization.[50]

A.2.4.10 Companies Act 2016

The Companies Act 2016 (CA 2016) does not deal with corruption directly, but contains some provisions that have the effect of preventing or deterring corruption by imposing criminal liability on the part of a director. For example, it is an offence for a director or an officer of a company to use their position or the company's property to gain a benefit for themselves without the approval of a general meeting.[51] It is also criminal conduct to enter into transactions with a related party unless approved by the shareholders.[52] Section 229 makes it an offence for a director not to disclose any interest in a transaction with the company in which they are directly or indirectly interested.

A.2.5 Peru[53]

Peru recently introduced corporate liability for corruption-related offences with a compliance programme defence. On 1 January 2018, Peruvian Law 30424 went into effect, introducing corporate liability for existing criminal offences related to corruption, money laundering and terrorist financing. The law was originally scheduled to take effect in July 2017, but Legislative Decree 1352, adopted on 6 January 2017,

49 Ibid s 17A(8).

50 Ibid s 17A(6).

51 CA 2016 s 218.

52 Ibid s 228.

53 Many thanks to Matteson Ellis, Member, Miller & Chevalier Chartered, Washington, DC for providing this section on Peru. Many thanks also to Oscar Solórzano, Senior Asset Recovery Specialist, Basel Institute on Governance, for the insightful exchanges on these provisions and the development of corporate liability in Peru.

amended the original version of Law 30424, broadening the range of applicable offences and shifting the effective date of the entire law to 1 January 2018.

Under the new law, legal entities including SMEs may be liable for domestic and international bribery of public servants or officials, as well as for certain offences related to money laundering and terrorist financing defined in other legislation. In addition to direct liability, legal entities may be liable for conduct carried out in the legal entity's name, on its behalf or for its benefit by any of the following:

- (a) partners, directors, de facto or legal administrators, legal representatives, or attorneys-in-fact of the legal entity or any of its branches or subsidiaries;

- (b) any person who was under the authority and control of a person or entity in paragraph (a) and committed the offence by their order or authorization;

- (c) any person within the scope of paragraph (b), where the commission of the offence was possible because the person or entity in paragraph (a) did not fulfil his or her duties of supervision, oversight and control with respect to the conduct at issue.

A legal entity is exempt from corporate liability only if an individual who commits the offence does so exclusively for their own benefit or the benefit of a third party that is distinct from the legal entity.

Violations of Law 30424 can result in two types of penalties. The first is a fine, the amount of which is derived from either the undue benefit or the legal entity's annual income. The second is a corporate 'disqualification', which can take one of several forms, from suspension of an entity's social activities to debarment, nullification of various administrative or municipal licences, or dissolution.

Law 30424 lists several mitigating circumstances that can reduce potential penalties, including cooperation with authorities, impeding the harm caused by the offence, full or partial reparation of the damages, and the adoption and implementation of a 'prevention model' (akin to a compliance programme) after the commission of an offence but before trial. The law grants courts substantial discretion with regard

to penalties, including the ability to suspend a penalty by requiring a legal entity to: (1) provide full compensation for the damage caused by the offence; and (2) adopt and implement a prevention model. If the legal entity does not become subject to another criminal proceeding within the suspension period, the court may nullify the imposed sanction and dismiss the case upon confirming that the legal entity satisfied the compensation and prevention model requirements.

To be considered sufficient under Law 30424, a prevention model must be tailored to a legal entity's nature, risks, needs and characteristics. Thus, the expectation is that SMEs will tailor their compliance programmes to their particular levels of risk and resources. The law also notes that a prevention model must contain adequate monitoring and control measures to prevent the offences covered by the law or significantly reduce the risk of their commission. Given that SMEs generally lack the level of resources that larger companies have, SMEs should take care to ensure that an adequate monitoring regime is designed and implemented even when resources are limited.

Moreover, a prevention model generally must include, at a minimum, the following elements:

- a person (or body) in charge of prevention, appointed by the highest administrative body of the legal entity and able to exercise this function autonomously;
- identification, evaluation, and mitigation of risks related to the offences covered by this law;
- reporting procedures;
- dissemination and periodic training;
- continuous evaluation and monitoring of the prevention model.

The law provides an exception for SMEs to these prevention model requirements. In particular, for these companies, only some of the characteristics of the prevention model will be required based on a consideration of the SME's nature and characteristics. In this way, SMEs are positioned to assert that their compliance programmes are sufficient, even if they do not include all of the five characteristics listed above. The SME would need to show that the compliance controls it

does have in place are otherwise sensible given the size and structure of the organization.

The law states that if an adequate prevention model is in place, corporate liability will not attach if an individual commits a proscribed offence by fraudulently eluding the duly implemented prevention model.

A Supreme Decree published on 9 January 2019 provides greater detail related to requirements and standards of the prevention model.[54] With respect to SMEs, Article 44 explains that prevention models should be implemented based on the principle of adaptability, taking into consideration the SME's conditions and characteristics, with adequate management of risk as the basic component. To do this, SMEs are expected to take steps to understand their own risk profiles, no matter the size of the company. Such risk assessment should take place any time the company changes its structure or organization or experiences a relevant change that would merit another evaluation. The Decree states that the risk assessment should be documented.

In all, Law 30424 reflects standards called for by the OECD Anti-Bribery Convention, which Peru joined in 2018.

As corruption allegations have recently reached the highest levels of Peruvian government, including four Peruvian ex-presidents, one of whom committed suicide shortly before his arrest,[55] companies can effectively manage corruption risk by adopting prevention models that meet the standards set out by Peruvian law.

54 Supreme Decree No. 002-2019-JUS of 10 January 2019.

55 'Ex-Peru president's daughter reads suicide note at funeral' BBC (19 April 2019) <https://www.bbc.com/news/world-latin-america-47993257> accessed 24 November 2019.