Mitigating the Risks of Corruption Through Collective Action

Gemma Aiolfi

Abstract Corporate anti-corruption compliance programs are usually modified in response to internal and external developments to meet regulatory requirements and to be seen as being 'dynamic', but despite this they have yet to solve some of the more difficult corruption issues that still persist, even after decades of law enforcement. Collective Action provides a means to address the wider context of corruption risks by bringing together competitors as well as other market participants and stakeholders to seek common ground to reduce corruption. Companies should use their anti-corruption risk assessments systematically to identify where multi-stakeholder approaches could be used to tackle corruption risks more comprehensively, because risk assessments involve the business as well as compliance. The outcome would be a shift towards business driven integrity, and away from reactive and imposed anti-corruption compliance programs. Establishing a successful Collective Action takes time, trust and a skilled facilitator to ensure the goals are reached and all stakeholders commit to the agreement and take a long-term view.

1 Introduction

In 2011 and 2012, the US Department of Justice and Securities & Exchange Commission netted over US$780 million in settlements under the FCPA with some 27 different companies. In October 2012, the Director of the UK's Serious Fraud Office (SFO) reiterated that agency's role in prosecuting violations of the Bribery Act and withdrew its previous offer to seek only civil penalties against companies that reported themselves for corruption. Shortly thereafter, in late 2012,

G. Aiolfi (✉)
International Centre for Collective Action, Basel Institute on Governance, Basel, Switzerland
e-mail: gemma.aiolfi@baselgovernance.org

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China's new government announced that it would not tolerate corruption, and followed up with investigations into international pharmaceutical companies' marketing practices and alleged widespread bribery of hospital doctors. Less than six months later, Canada responded to international criticism by announcing amendments to its Corruption of Foreign Public Officials Act. The changes of February 2013 increased the maximum prison sentence from 5 years to 14 years; allowed the prosecution of Canadians and Canadian businesses on the basis of their nationality, added a books and records provision, and removed an exception for facilitation payments, amongst other things.

These few examples indicate the importance accorded to foreign bribery laws by national legislators, regulators, and international companies. Even if a company is not prosecuted, the financial consequences of an enforcement action can be considerable. Responding to allegations is time-consuming, and negative publicity may persist whatever the outcome of an investigation or attempt at reform may be. Thus, transnational bribery laws pose a considerable legal and reputational risk for companies. To address these risks, regulators, business leaders and commentators generally agree that companies must actively channel their efforts to combat bribery and corruption effectively. The reality however, is that most international companies have not yet gone beyond a reactive strategy: they limit themselves to responding to allegations of past wrongdoing and overseeing adjustments to internal compliance systems. They do not generally seek to ameliorate the wider context in which they operate which would involve addressing local or sector-specific corruption risks together with other market participants and stakeholders.

In this chapter, the typical components of an anti-corruption program in an international company are outlined and it is argued they are largely a reactive response to external developments or involve developing measures to address an internal incident. There then follows an analysis of Collective Action together with how these initiatives could be integrated into anti-corruption programs to reinvigorate them, and shift anti-corruption compliance into business driven integrity. Nevertheless, Collective Action is not an easy option and the last section of this chapter sets out an example of a type of Integrity Pact from Argentina, which illustrates some of the issues that need to be taken into account by companies when considering joining or initiating Collective Action.

2 Elements of an Anti-Corruption Compliance Program

For international companies, various sets of guidance documents prescribe the essential components of an anti-corruption compliance program. These include the US Federal Sentencing Guidelines and the Resource Guide on the Foreign Corrupt Practices Act,[1] the OECD Good Practice Guidance[2] and the UK Bribery

[1] United States Sentencing Commission (2012), Chap. 8, Sentencing of Organizations and United States Department of Justice and United States Securities Exchange Commission (2012).

[2] OECD (2010).

Act guidance on adequate procedures.[3] These guidance documents all recommend starting with a risk assessment[4] that is proportionate to the size, structure, and geographic diversity of a company, as well as its business sector. They then set out, in varying degrees of detail, what companies must do to prevent an occurrence of bribery either involving their employees or third parties. Last but not least, they indicate that companies that can demonstrate robust anti-corruption programs to law enforcement authorities will have an improved chance of benefitting from reduced penalties, if the wrongdoing can be attributed to (a) "rogue employee(s)".

Transposing the elements set out in the guidance documents into an anti-corruption compliance program involves procedures, tools and personnel (usually Compliance but also other functions such as Human Resources, Communications, and Corporate Social Responsibility). In practice, where Compliance is the "owner" of anti-corruption this function will develop measures and the overarching strategy to prevent, deter, detect and remediate non-compliance with anti-corruption laws and regulations.

The preventive components of an anti-corruption program embrace policies, procedures, training and raising awareness. The family of anti-corruption policies is often predicated on a Code of Conduct that iterates the ethical standards to which the company subscribes. This may include a "zero tolerance" policy when it comes to bribing; the behaviors and actions expected of the workforce are circumscribed accordingly to ensure that this standard is met globally. The basic range of such policies typically includes: anti-corruption standards, gifts and hospitality, sponsorships and donations, record keeping, financial controls, and whistleblowing. Some of these topics will be combined into a single policy others will be addressed alone. Anti-corruption risks may also be addressed within policies owned by other business functions such as Human Resources or Supply Chain Management. They may check, for example whether a job applicant has been involved in bribery allegations when conducting due diligence during the hiring or re-hiring of an employee, or the Supply Chain Management function when addressing procurement risks. For employees, more detailed procedures and standards will address the specific steps for selecting and appointing third parties, handling petty cash and approval procedures for gifts to government officials.

Monitoring and reviews are used to test the adequacy and effectiveness of an anti-corruption program, and ideally should detect weaknesses before they become problems. Techniques may include internal and or, external audits, compliance reviews, verification and testing of systems and technology, and benchmarking of procedures and policies through external agencies. The results of such tests and audits should feed into reviews of the compliance program so that it can be

[3] United Kingdom Ministry of Justice (2011).

[4] See, for example, Transparency International, UK Chapter with PWC (2013), or A Guide for Anti-Corruption Risk Assessment, UN Global Compact Anti Corruption Working Group, September 2013.

improved appropriately and thus meet the requirements of being a risk oriented and responsive program.

To complete the anti-corruption compliance circle, where procedural weaknesses in the control framework are raised to management's attention, or allegations of improper behavior by employees are made, these need to be assessed and investigated appropriately, and in some instances reported to law enforcement, and or, regulators. Shortcomings in the control framework must be remediated within a reasonable timeframe to prevent further risk exposure.

Anti-corruption programs must take account of relevant developments, such as amendments to bribery laws or new regulations. When the UK Bribery Act came into force many international companies benchmarked their policies and procedures against the new legislation, even when they had already implemented a zero tolerance policy towards bribery. This was a reaction or even an overreaction, to widespread comment that the UK law established a new anti-corruption standard.

Merger and acquisition activity can also affect an anti-corruption program, for example, if the acquired company introduces additional or new risks, or perhaps has a more detailed and well-developed program compared to that of the acquiring company. In such circumstances, the companies involved will have to review and adjust their anti-corruption programs accordingly.

When all these elements (policies, procedures, training etc.) are implemented, a company can claim to have an anti-corruption compliance program. The program is perceived as "dynamic" when it is modified in response to an internal or external imperative. But such changes to anti-corruption programs are essentially inward-looking and reactive. They are inward-looking because they focus on the sphere of control that a company can influence directly, even though this includes their relations to external third parties. This is not an unreasonable stance to take, but it is a limited one. Anti-corruption compliance programs are reactive for various reasons. The US authorities are still the most vigorous prosecutor of all the countries that have adopted laws under the OECD Convention[5] and the vast majority of companies investigated by the US authorities enter into settlement agreements rather than being exposed to the risks and costs of a full trial. Compliance standards or the lack thereof will therefore continue to be addressed in those settlements, giving the authorities the opportunity to raise standards. This creates a fairly steady stream of cases to be studied and interpreted to determine whether or not anti-corruption compliance programs need to adjust, be it ever so slightly. For example, in 2012 when the US authorities declined to prosecute Morgan Stanley for bribery in connection with actions by one of its senior managers in China, it emerged that the employee had been reminded to comply with the US Foreign Corrupt Practices Act some 35 times,[6] but despite this, still made improper payments. It was further revealed that between 2002 and 2008, Asia-based personnel at Morgan Stanley had been trained 54 times on the anti-corruption policy. This was

[5] See Transparency International (2012).

[6] See US Department of Justice (2013).

the first time that the US authorities declined to prosecute a company because it had a robust compliance program, prompting many international companies to review the frequency of their training to personnel in Asia and consider whether they were doing enough to prevent bribery in that region. The investigations by the Chinese authorities into the marketing practices of international pharmaceutical companies is also likely to have a similar influence on companies operating in that country who would be well advised to review their marketing practices and use of local travel agents.[7]

Adhering to the requirements set out in guidance issued by domestic law enforcement agencies and international organizations, and reacting to legal settlements may result in anti-corruption compliance programs being tweaked and even enhanced, but it is an unambitious and passive approach because such changes are orchestrated and driven by compliance. An alternative would be for the business to drive integrity and take the initiative to leverage anti-corruption compliance into a competitive advantage.

3 Business-Driven Integrity Through Collective Action

Collective Action might provide an alternative approach. It has been defined variously as a "catch all term for industry standards, multi-stakeholder initiatives, and public–private partnerships",[8] or it may be a distinct form of interaction: "a collaborative and sustained process of cooperation amongst stakeholders [that] increases the impact and credibility of individual action, brings vulnerable individual players into an alliance of like-minded organizations and levels the playing field between competitors".[9] For the World Bank Institute, Collective Action against corruption can take the form of anti-corruption declarations, principle-based initiatives, business coalitions subject to certification, and integrity pacts.[10] The forms of Collective Action are distinguished from each other by the degree of enforceability of the participants' joint commitments[11] and, perhaps, by the goals of the initiatives.

On any definition, Collective Action is neither a panacea for all corruption problems, nor is it easy to achieve, not least because it demands an active and participatory approach by companies. It could however, help corporate compliance programs pre-empt risk and also help to counter the common lament by employees

[7] See Fox (2013).

[8] Pieth (2007), pp. 81ff.

[9] World Bank Institute (2008).

[10] World Bank Institute (2008).

[11] Design and Enforcement of Voluntary Anti Corruption Agreements in the Private Sector, a study commissioned by the G20 Anti Corruption Working Group and prepared on behalf of the B20 Task Force, Draft 30 May 2013, p. 5 (on file with the author).

in the business; that the competition does not enforce such a rigorous approach to bribery prevention, and that they are operating at a disadvantage in the business environment.

Collective Action is not a new response to transnational regulation,[12] but it is gaining increasing support from a range of international and non-governmental actors as a means to prevent corruption. During the 1990s, Transparency International (TI) developed the integrity pacts to help prevent corruption in public contracting. In July 2009, Siemens AG committed to pay US$100 million over 15 years to the World Bank Group to fight corruption and to promote and engage in collective action as part of the settlement in which the company acknowledged past misconduct and bribe paying in its global business.

The OECD has taken the concept of Collective Action in a slightly different direction. At the October 2012 annual consultation of its Working Group on Bribery, the OECD focused attention on using collective action to combat corruption including through so-called High Level Reporting Mechanisms ("HLRM"). Developed under the auspices of the OECD by the Director of Legal Affairs, the Chairman of the OECD Working Group on Bribery and a member of TI, the HLRM enables companies to report bribery to high government officials. Companies can report extortion by government officials knowing that the complaints will be addressed whilst shielding the company from retribution, and still retaining the possibility for a procurement process to continue. The first such HLRM has been piloted by Colombia in connection with a public procurement for an infrastructure project. Once the results are known, it may serve as an example to other countries interested in such a mechanism. Meanwhile, the OECD may identify further countries that could adopt an HLRM suitable for their political structures and legal systems.

To date, most corporate approaches that utilize Collective Action to prevent corruption usually start by one or more companies identifying issues of common interest and approaching their competitors in a market or country to tackle the issue jointly, with the aim of leveling the competitive playing field. Apart from business competitors, this process may also involve other stakeholders such as civil society or government agencies. To turn this process into a business driven initiative, companies could evaluate the option of Collective Action as a possible means to prevent corruption when appraising the results and findings of their anti-corruption risk assessments, and involve the business in those discussions as they are best placed to understand the mechanisms of how bribes can be paid or how conflicts of interest might arise. This would be the appropriate time to do this, because the process should identify the highest risk areas for the company and involve

[12] The principles set out in the International Federation of Pharmaceutical Manufacturers and Associations (IFPMA) (2012) Code of Practice aims to ensure that the same high standards of ethical behavior apply to the promotion of pharmaceutical products in all countries, regardless of the level of development of their economic and health care systems. The IFPMA Code Practice was first adopted as the foundation of a global approach to self-regulation by the pharmaceutical industry in 1981 and has been updated frequently since then.

consideration as to how those risks could be addressed most effectively. For example, where a country poses an increased corruption risk, and the company operating there is in a business sector prone to bribe solicitation, with a state owned entity as the end customer and where tenders are invited through a public bidding process, then a form of integrity pact for the procurement process might be an appropriate way for the affected sector to address the problem. Ideally, such Collective Actions would be replicated in all high-risk countries making bribery prevention through joint approaches the norm, rather than the exception. Where corruption relating to the import and export of goods exists, it may be appropriate to address the issue on a multi-industry basis and involve other actors such as customs brokers and logistics companies.

Using the risk assessment stage to identify areas for Collective Action would enable companies to take a timely, holistic and sustained approach to specific identified risks. Getting competitors and other stakeholders interested in joining a Collective Action requires a certain degree of assertiveness, which would be a new departure for many companies that have not yet considered Collective Action as an additional weapon in their arsenal to combat corruption.

So far, few companies have integrated consideration of Collective Action into their regular tool-kit to address the findings from a corruption risk assessment. Those Collective Action initiatives that have developed are as a result of the efforts of one or two companies and (typically) an external facilitator. Just such an approach developed as a variation on the concept of an Integrity Pact by companies in the energy transmission sector in Argentina: ABB, Alstom Grid, Arteche, Lago Electromécanica, Tubos Transelectric SA and Siemens. Called a Compliance Pact, the agreement includes an obligation to abide by local laws, as well as the principles of the UN Convention Against Corruption and the Inter-American Convention against Corruption. It requires the parties to refrain from paying or accepting any kind of bribe and to avoid bid tampering and political donations. The principles are to be applied to employees and to business partners, and third parties; business relationships with parties who do not abide by its principles are to be avoided. In terms of enforcement, the Compliance Pact also establishes an "Ethics Committee", which is a forum where signatory companies can exchange their experiences of anti-corruption issues and also raise concerns about each other's business practices. The Ethics Committee may apply sanctions to a signatory company that breaches the Compliance Pact. The Center for Governance and Transparency at the IAE Business School in Buenos Aires acts as a facilitator to the group as well as monitoring adherence to the Compliance Pact; it will also encourage additional industry players to join the initiative.[13]

The Argentine Compliance Pact may also be described (at least by those signatory companies that are multi-national subsidiaries) as a "bottom-up" approach to Collective Action. It was initiated at the country level and in a specific

[13] For more detailed references associated with this initiative see Zindera and Forstnig-Errath (2012), p. 185.

market segment. By way of contrast, a "top-down" initiative emanates from a company's headquarters, and may tend to mirror the "tone from the top" and be a set of high-level declaratory principles rather than the more hands-on approach of a local initiative. Whether all the headquarters of the multi-nationals involved were aware of the Argentina Compliance Pact, or endorsed it from the outset, is not known for all the companies involved.

One of the advantages of this "bottom-up" approach is that it also aims to draw in other local companies, either as direct participants to the collective action itself, or as indirectly affected third parties. In both cases, awareness of corruption risks will be raised, and there will be opportunities for the signatories to the Compliance Pact to engage in appropriate anti-bribery training, and to help prevent solicitation of bribes. The Compliance Pact may serve as a model for other collective action initiatives within the country, or wider Latin America region,[14] or, as already mentioned, within the companies themselves. This localized initiative may have, in turn, inspired action at the headquarters of the global players. These companies have separately signed a commitment to engage in collective action (they are also joined in this endeavor by GE), and have expressed an interest in addressing areas of mutual concern in the Energy and Transport sector.[15]

The Argentinean initiative also serves to illustrate some of issues and questions that may arise in connection with Collective Action. As the World Bank rightly notes,[16] and can be attested to by anyone who has ever helped develop an anti-corruption Collective Action, the process of reaching a concrete agreement is often slow and does not always result in the outcome originally foreseen by the founding members.[17] Often it will take time to engender a climate of trust amongst the stakeholders. Creating trust depends on variables such as the nature of the competitive relationships, the relative strength and scope of their respective anti-corruption compliance programs. Where one company has a well-established internal anti-corruption compliance program there may be a perception that it is seeking to impose it on those companies with less developed systems, particularly if there is a marked disparity in the size of the companies participating in the discussions to develop a Collective Action. The personalities of the individuals representing their companies as well as their seniority are factors that can speed up the trust building exercise. In these conditions, the need for attentive facilitators is important so that all stakeholders progress towards the goals in a spirit of consensus and unison. Once an agreement is signed, the trust that has developed needs to be sustained to permit

[14] The Argentina energy transmission sector collective action initiative was presented at the Second Latin American Conference on Ethics, Transparency and Anti-Corruption Compliance held in Buenos Aires on 1–2 August 2013.

[15] See Basel Institute on Governance (2013).

[16] World Bank Institute (2008), slide 58.

[17] See Mark Pieth's remarks on the how the original defense integrity initiative was derailed by the BAE scandal; only to re-emerge as the Defense Industry Initiative on Business Ethics and Conduct: Pieth (2012), p. 11 (with further references).

frank exchanges on compliance issues either bilaterally between the parties or through the forum designated for such exchanges.

The proceedings of such meetings where the parties may raise criticisms of their fellow signatories to an agreement may need a sensitive approach. The challenges should not be underestimated particularly when the participants come from disparate sized companies, are at different stages of implementing their compliance programs, and where conceivably the participants at the meetings may have limited or no previous experience of such types of exchange or interactions. If there is reluctance to use the forum for frank discussions, then the facilitators will need to coax the stakeholders into the process, because to have come so far and then to let the initiative wither for want of a tactful approach, would be a lost opportunity. In such circumstances the facilitators will be required to come up with some imaginative ways to get the parties talking openly and in a constructive manner.

The potential stumbling blocks outlined in the preceding paragraphs do not necessarily apply to the Argentina Compliance Pact; it rather conveniently just provides a springboard for a few thoughts on some of the hurdles that may need to be overcome if stakeholders opt for a similar approach elsewhere.

4 Conclusions

Fighting corruption requires a multiplicity of approaches; Collective Action provides one method that is both economically viable and simple to understand both for sophisticated and complex multinationals and smaller local companies operating within a domestic market. It provides an opportunity for various stakeholders in society to join together to make a tangible difference to prevent bribery within their spheres of influence, it enables the small players to sit down with those that dominate the market and set the conditions for how business is carried out. Collective Action is not an easy option because building the alliances that are required for it to be a success, are not always intuitive or obvious. If however, careful assessments were conducted as part of regular risk reviews by companies in order to ascertain which market players could be interested in creating and contributing to a Collective Action, this process should become easier, and even routine and an integral part of the compliance program.

It is quite feasible that it is only a matter of time before law enforcement goes beyond scrutinizing the due diligence efforts expended on third parties and business partners, and ask what *proactive* efforts did a company undertake to engage with third parties to prevent bribe payments in a particular business, country, market or process. In other words, did the company consider Collective Action, and if not, why not? Creating trust takes time and in the business world time is a scarce commodity. Dealing with competitors and discussing the risks associated with markets or a business sector requires an open mindset and a degree of humility; companies need to move away from propagating the company-centric doctrine about having a ”state of the art compliance program“ and admitting that no

company is completely immune from the risks of corruption anywhere in the world, and looking at other ways of addressing some of the more difficult issues that continue to persist even after decades of anti-corruption law enforcement.

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