



# UNODC

United Nations Office on Drugs and Crime



The United Nations Convention against Corruption

## A Resource Guide on State Measures for Strengthening Corporate Integrity

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## **The United Nations Convention against Corruption**

# A Resource Guide on State Measures for Strengthening Corporate Integrity



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# Introduction

The private sector is central to State efforts to combat corruption under the United Nations Convention against Corruption (UNCAC). While some businesses may engage in corruption, either voluntarily to gain an advantage or because they feel they have no choice, the private sector has also been a driver for change, advancing corporate integrity reforms that are reshaping the global anti-corruption landscape.

## Purpose of the *Guide*

This *Guide* explores measures that States can take to encourage corporate integrity.<sup>1</sup> The *Guide* is divided into three parts. An initial section describes the Convention articles that frame State interaction with the private sector. These include provisions mandating criminalization of bribery and other corruption offences, as well as specific measures for engaging the private sector. The second section takes a closer look at the private sector, with particular attention to governance reforms and other factors that can drive corporate integrity. This section also outlines the “business case” for combating corruption and core elements of an effective anti-corruption programme.<sup>2</sup> The final section of the *Guide* describes the range of sanctions and incentives that have been developed to advance UNCAC objectives for preventing and addressing corruption within the private sector.

## Private sector context

While there are a number of different corrupt acts set out in the Convention, corruption is often seen to involve “the abuse of entrusted power for private gain.”<sup>3</sup> In a business context, this can include false or misleading financial reporting, procurement fraud, embezzlement and especially bribery. Bribery in business is a universal problem, affecting companies of all sizes in all countries, where companies are victims as well as perpetrators.

Corruption is a complex and multifaceted problem that cannot be solved by either governments or companies acting alone. Companies are a common source of corrupt funds, but they are also victims of extortion with a shared stake in reform. Small local businesses are especially vulnerable to extortionate demands by corrupt public officials, while larger domestic and global corporations that manage to control bribery in their own ranks must still worry about unfair competition from less ethical peers. Moreover, States can benefit from the expertise and resources that ethical businesses are able to bring to the fight against corruption.

## Focus on prevention

It is often said that an ounce of prevention is worth a pound of cure and for business organizations, this is achieved through an effective internal programme for preventing and detecting violations of law or for ethical standards. These programmes—referred to as “compliance” or “prevention” programmes—are the subject of prior UNODC guidance.<sup>4</sup> Generally, they involve a leadership

<sup>1</sup> This Guide uses the terms “corporation,” “company” and “private enterprise” interchangeably. The “private sector” for purposes of UNCAC implementation encompasses diverse entities, ranging from small local family businesses and partnerships to national companies and multinational corporations.

<sup>2</sup> United Nations Office on Drugs and Crime, “*An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide*” (2013), (hereafter, “UNCAC Compliance Guide for Business”).

<sup>3</sup> See, for example, “*Clean Business is Good Business: The Business Case against Corruption*”, a joint publication by the International Chamber of Commerce, Transparency International, the United Nations Global Compact and the World Economic Forum. UNCAC does not contain a specific definition, but instead defines corruption by reference to specific offences listed in Chapter III of the Convention. For further discussion of definitional considerations, see United Nations Office for Drug Control and Crime Prevention, “*Global Dynamics of Corruption, The Role of the United Nations Helping Member States Build Integrity to Curb Corruption*,” at pages 2-4 (2002).

<sup>4</sup> See the UNCAC Compliance Guide for Business, *supra* note 2.

commitment to ethical business practices, awareness training, anti-corruption policies and procedures, channels for seeking guidance and reporting concerns, and internal systems and controls to ensure that policies are being followed.

The implementation of a meaningful and effective anti-corruption programme for business is primarily a private sector function and responsibility. Anti-corruption measures are an investment, and like other business investments, they must compete with other demands for scarce resources based on perceived risks and benefits. States can help to shape these corporate investment decisions through a combination of enforcement sanctions and good practice incentives.<sup>5</sup>

## General principles

This *Guide* is designed to provide States parties with a framework for identifying and implementing an appropriate mix of sanctions and incentives for encouraging private sector integrity. It reflects the latest developments in the global fight against corruption, including significant recent advances in benchmarking corporate prevention practices.

States parties are expected to meet certain minimum standards when implementing their UNCAC commitments in relation to private sector corruption, including sanctions for violations by “legal persons” that are “effective, proportionate and dissuasive.” Within these parameters, States have wide discretion to determine the proper balance of sanctions and incentives, as well as ancillary measures for enhancing corporate integrity.

Recommendations in this *Guide* reflect five core implementation principles:

1. Strengthening corporate integrity is an important key to UNCAC success.
2. Corporate anti-corruption programmes are a primary tool for strengthening integrity and should be encouraged.
3. States can encourage better private sector practices through a combination of sanctions and incentives.
4. Business sanctions are a baseline requirement that should address both monetary and criminal sanctions, as noted in the Convention.
5. However, sanctions are most effective when combined with incentives that reward good practice.

The *Guide* recognizes that no one size fits all and that the proper balance of enforcement sanctions and good practice incentives will vary, based on a State’s established legal structure, institutional and resource capabilities, and limitations. Flexibility will also be necessary in adapting to the particular needs and circumstances of business by size and experience. Other measures such as integrity pacts and business code initiatives that seek to strengthen integrity on a project or sectoral basis can be a valuable complement to traditional enforcement practice, especially where risks of discovery and prosecution are low.

<sup>5</sup> “Good practice incentives” refer to the credit or reward an organization may receive for investing in an effective anti-corruption programme or for other forms of cooperation with States in combating corruption. Incentives may be in the form of a credit against sanctions when violations occur, commonly referred to as “penalty mitigation,” or a reward that is independent of a violation or enforcement action such as a procurement preference for having invested in an effective anti-corruption programme. Both are incentives designed to encourage voluntary good practice, as are enforcement sanctions in a negative sense.

## Common practices

Sanctions that are “effective, proportionate and dissuasive” are a baseline UNCAC requirement, for both individuals and enterprises that commit a corruption offence.<sup>6</sup> In a business context, sanctions are effective and dissuasive if they punish misconduct, eliminate illegal gains from corruption, and encourage measures to strengthen prevention practices within a company. Proportionality is related to enterprise size, as well as the gravity of an offence and the harm caused.

States parties have at their disposal a wide range of measures for sanctioning private sector corruption, which fall into one of eight broad categories. For UNCAC purposes, a “sanction” may include restitution, asset forfeiture and other criminal sanctions. Certain of these sanctions are mandatory under the Convention, while others are only recommended.

- *Monetary fines.* Monetary fines are the most common sanction for private sector anti-corruption offences, applicable to both individuals and organizations. They are penal in nature, designed to punish misconduct and deter future offences by a defendant and others.
- *Incarceration.* A prison sentence is a further sanction for individuals convicted of a corruption offence, considered an especially effective deterrent.
- *Confiscation of illegal assets.* The confiscation of ill-gotten gains from corruption is intended to prevent unjust enrichment. Depriving wrongdoers of the economic benefit from corruption serves both the State interest in eliminating the business incentives for bribery and the interest competitors have in a more level economic playing field.
- *Contract remedies.* Contract rescission and restitution can be used to enforce a company’s integrity commitments. A company that engages in corruption in connection with a public contract, whether to obtain or retain business or in its execution, cannot be trusted to perform within the public interest.
- *Debarment.* Suspension and debarment are more drastic forms of contract sanctions, used to prevent an individual or company from bidding on or participating in government contracting activities for a specified period. The threat of debarment can be instrumental in securing an advantageous plea or settlement terms.
- *Denial of benefits.* A corrupt individual or company may also be denied access to government benefits or services, such as a licence to do business or export credit support. The link between benefit restrictions and corruption is especially strong for international business supported by national export credit agencies.
- *Liability for damages.* Civil liability for damages is a further Convention requirement, made available through a State’s general contract or tort law or a corruption-specific private right of action. This sanction is remedial in nature, designed to compensate victims of corruption—including competitors and States themselves—for harm caused by an offence.
- *Reputational harm.* For many companies large and small, the single greatest threat from a corruption scandal may often be reputational. Although not technically a “sanction,” States can encourage corporate integrity through measures that foster public transparency when offences occur.

Experience has shown that a mix of sanctions will often be most effective and many States make all eight types of sanctions available to law enforcement agencies on a discretionary basis. The choice among sanctions options should reflect a State’s legal principles and established regulatory practices and standards, as well as practical considerations that may limit the utility of certain measures.

<sup>6</sup> Article 30 requires that each State party “make the commission of an offence established in accordance with [the] Convention liable to sanctions that take into account the gravity of that offence.” This is a general requirement for individuals who engage in corrupt acts, extended to “legal persons” by article 26.

Incentives that reward a company for good practice are an important complement to enforcement sanctions.<sup>7</sup> They recognize that meaningful commitment to and investment in anti-corruption programmes and other measures that strengthen corporate integrity are largely voluntary, beyond certain minimum legal requirements. State practices in this area have developed more slowly than for enforcement sanctions, but have produced four categories of incentives that may be considered:

- *Penalty mitigation.* Penalty mitigation is the most common form of incentive, used primarily to encourage self-reporting of offences and to reward corporate prevention efforts. This mitigation may be applied through a reduced penalty or charge, or, in some States, through a defence against liability to the company for offences that were committed by an employee or agent.<sup>8</sup>
- *Procurement preference.* A second type of incentive offers companies that demonstrate a commitment to good practice a preference in government procurement, in the form of either a bidder eligibility condition (most common) or an affirmative competitive preference. Procurement preferences based on integrity and trustworthiness have a long history in the private sector, and are increasingly being adopted by States.
- *Access to benefits.* Access to government support or services can also be made conditional on minimum integrity practices, or provided on a preferential basis to companies that invest in an effective anti-corruption programme. This is the counterpart to the sanction of denial of government benefits to companies that commit infractions and is used to encourage and reward proactive efforts to combat corruption.
- *Reputational incentives.* Reputational benefits have been another tool for encouraging corporate integrity, through public acknowledgement of a company's commitment to good practice and combating corruption. Like reputational sanctions, this good practice incentive is largely non-governmental, but can be encouraged by States.<sup>9</sup>

Incentives that reward good practice are not a substitute for sanctions when offences occur, but can be an effective tool for encouraging self-reporting and proactive investments by companies in prevention programmes. This complementary role can be especially valuable for State efforts to raise corporate integrity in circumstances where the risk of detection and punishment is too small to make penalty mitigation incentives very meaningful. At the same time, it is important that incentives be conditioned on robust prevention efforts and not awarded too freely. Incentives that are overgenerous risk undermining UNCAC integrity objectives, as well as public confidence in the administration of justice.

<sup>7</sup> These are in addition to whistle-blower and witness protections that encourage individuals to report UNCAC offences to responsible authorities, that are set out in articles 32 and 33 of the Convention.

<sup>8</sup> A formal statutory defence based on corporate prevention efforts must be narrowly drawn to avoid undermining other important UNCAC objectives. Good faith efforts by a company to prevent and detect corruption offences by its employees, agents or business partners may warrant protection from punitive sanctions, but should not preclude the confiscation of gains to the business from the offence or action by victims to recover compensatory damages.

<sup>9</sup> Financial awards that encourage reporting of corporate offences by employees and other individuals are another form of incentive that may be considered, addressed in Part III(B) of this *Guide*.

# CHAPTER I.

UNCAC and the private sector



This first part of the *Guide* contains an overview of the *United Nations Convention against Corruption* and its private sector provisions relating to criminalization, sanctions and measures to encourage cooperation and reporting by the private sector. It also briefly discusses the roles and responsibilities of stakeholders.

## A. Overview of UNCAC

Corruption is one of the most complex, difficult and corrosive problems facing the world today. Bribery of public officials and other forms of corruption in business undermine fair competition, distort economic investments and deprive governments of the resources needed to promote growth and development. These effects are felt in all regions and countries, but have caused disproportionate harm in poor communities in the developing world.<sup>10</sup>

Designed to provide a legislative framework for addressing corruption, the United Nations Convention against Corruption is the first global legally-binding instrument in the fight against corruption. The Convention's far-reaching approach and the mandatory character of many of its provisions have made it a unique tool for developing a comprehensive response to the problem of corruption. Over 165 States parties have committed to wide-ranging measures that seek to prevent corruption, criminalize bribery and other forms of corruption, strengthen law enforcement and international cooperation, establish legal mechanisms for asset recovery, and provide for technical assistance and information exchange.

## B. UNCAC provisions relating to the private sector

The responsibility of meeting the obligations of UNCAC ultimately lies with States parties; however, there are several provisions relating to private sector corruption which are also of particular relevance to the business community. UNCAC requires States that are party to the Convention to criminalize various forms of corruption, including bribery and embezzlement in the private sector. It also contains a detailed article specifically addressing corruption prevention in the private sector. Several other articles address the concepts of reporting (whistle-blower protection), sanctions and remedies, and cooperation between authorities and the private sector.

Criminalization provisions in chapter III of UNCAC provide a baseline for corporate integrity, detailing corruption offences that States are called upon to proscribe by legislation.

### Criminalization provisions

- Bribery of national public officials (article 15), bribery of foreign public officials and officials of public international organizations (article 16), and bribery in the private sector (article 21)
- Trading in influence (article 18)
- Embezzlement of property in the private sector (article 22)
- Laundering of proceeds of crime (article 23)
- Concealment (article 24)
- Obstruction of justice (article 25)

<sup>10</sup> Studies confirm the negative correlation between corruption and the quality of government investments, services and regulations. For example, child mortality rates in States with high levels of corruption are a third higher than in States with low corruption, infant mortality rates are almost twice as high and student dropout rates five times higher. Gupta et al, "Corruption and the Provision of Health Care and Education Services," in *Governance, Corruption and Economic Performance*, International Monetary Fund (2002). The World Bank (Baker 2005) has estimated that each year US \$20 to US \$40 billion, corresponding to 20 to 40 per cent of official development assistance, is lost through high-level public corruption involving public budgets in developing States.

UNCAC contains a further set of provisions that call on States parties to enact or consider measures that promote corporate integrity and the reporting of corruption.

#### Private sector provisions

- Private sector (article 12)
- Liability of legal persons (article 26)
- Protection of reporting persons (article 33)
- Consequences of acts of corruption (article 34)
- Compensation for damage (article 35)
- Cooperation with law enforcement authorities (article 37)
- Cooperation between national authorities and the private sector (article 39)

A detailed overview of these provisions and how they are relevant to private sector integrity is contained in annex 2.

## C. UNCAC implementation roles and responsibilities

Corruption involving the private sector is a complex and multifaceted problem that neither governments nor companies can solve alone. Both public and private sectors, together with civil society, have an important role to play in strengthening corporate integrity.

### 1. States parties

UNCAC implementation is primarily a governmental responsibility for States parties. In relation to private sector integrity, primary State functions are to establish the legal framework for combating corruption and enforce the law. A further responsibility is to ensure that State agencies have policies and procedures in place for preventing private sector corruption and that agency personnel receive the necessary training on them.

#### *Establishing a legal framework*

States parties are responsible for establishing a national legal framework for preventing corruption, consistent with UNCAC. Although not mandated by the Convention, a comprehensive approach that illustrates the relationship between prohibited conduct, consequences and protections is most helpful to the private sector. It is also important that legal measures contain sufficient detail to inform the private sector of the law's applicability and requirements.

**Example:** Comprehensive anti-corruption legislation enacted by the United Kingdom in 2010 (the United Kingdom Bribery Act) contains detailed provisions on specific offences, defences and key terms applicable to the private sector.

Governments should also consider providing the private sector with guidance on its compliance responsibilities under the law. While many aspects of a State's anti-corruption framework may be apparent based upon the plain language of a statute, others will be less easily discernible or difficult to apply in practice. For example, a company may understand that bribery to obtain new business is prohibited, but not necessarily recognize that payments to secure a licence or other regulatory advantage are as well. Similarly, it may not always be clear that a company will be held accountable for violations by an affiliate or business partner.

Guidance on these types of common compliance issues helps to raise private sector awareness and thereby strengthen integrity in the conduct of business. This is also important for effective

enforcement when offences occur. Guidance can also be used to alert companies of a State's minimum expectations for the design and implementation of an effective anti-corruption programme, or of recommended practices.

**Example:** A "Resource Guide" published by United States authorities provides companies with detailed guidance on the Foreign Corrupt Practices Act, including common interpretative issues, enforcement policies and elements of an effective anti-corruption programme. The government also has a formal procedure for seeking "advisory opinions" on uncertain applications of the law, which are then made available to the general public. Similar guidance has been issued in the United Kingdom describing "adequate procedures" for an effective anti-corruption programme.

United States Department of Justice, "A Resource Guide to the US Foreign Corrupt Practices Act" (2012) available at <http://www.justice.gov/criminal/fraud/fcpa/guidance/>; UK Ministry of Justice, bribery Act 2010 Guidance (2012), available at <https://www.justice.gov.uk/legislation/bribery>

### ***Enforcing the law***

States have a further responsibility under the Convention to enforce these laws, in a manner that is "effective, proportionate and dissuasive." Enforcement should also be fair, reasonable, predictable, and applied consistently. As in other areas of law, anti-corruption laws and regulatory measures are most effective when supported by meaningful enforcement. Conversely, the absence of meaningful enforcement can undermine public confidence in the law and also make it harder for ethical companies to act with integrity due to the economic threats from less ethical competitors.

Encouraging ethical business conduct through an appropriate mix of enforcement sanctions and good practice incentives is integral to law enforcement, as addressed in part III of this *Guide*.

### ***Strengthening agency anti-corruption practices***

States parties also have a responsibility under UNCAC to take measures to strengthen the anti-corruption commitment and practices of their own agencies. Chapter II of the Convention contains detailed recommendations on improving transparency and accountability in the civil service, public procurement and the management of public finances and ensuring judicial and prosecutorial integrity. Additional measures should also be considered to raise awareness within State agencies about the importance of combating corruption involving the private sector.

**Example:** The OECD Anti-bribery Convention contains detailed recommendations for preventing and detecting corruption in connection with State-supported exports. In response, export credit agencies have established formal anti-bribery policies and procedures. Good practices identified in a recent survey may be applied to governmental interactions with the private sector on a broader basis. These include a formalization of regulatory efforts, enhanced employee training, and targeted risk reviews.

Transparency International, "Export Credit Agency Anti-Bribery Practices, 2010" (2010).

## **2. Private sector**

The primary responsibility companies have under UNCAC, as implemented through national legislation, is to ensure that their employees, agents and business partners understand and comply with applicable anti-corruption laws. This is accomplished through an effective anti-corruption programme, including ways to encourage reporting through such means as an anonymous hotline, prompt disclosure and cooperation with law enforcement agencies when offences occur.

The business community, especially larger domestic and global companies, can also play an important role by helping to raise public awareness about the harm of corruption, by supporting governmental and other anti-corruption initiatives, and by advancing good practice standards for industry and in the supply chain. These activities typically occur in coalition or other associational contexts, but can also be advanced by individual companies.

**Example:** Business associations in Lebanon, Thailand and many other countries have launched code-based initiatives to strengthen integrity practices for local enterprises. In 2004, a task force of leading multinational companies from Europe, North America and Asia, supported by Transparency International, produced a comprehensive guide for developing global anti-corruption programmes.

World Economic Forum, "Partnering against Corruption Initiative (PACI) Principles" (2004). The initiatives in Thailand and Lebanon were developed respectively by the Thai Institute of Directors Association and the Lebanon Transparency Association.

Multinational companies can make an especially valuable contribution to UNCAC objectives by working to strengthen business integrity in their supply chains. Through supply chain training, technical assistance and preferential selection processes, large national and multinational companies have an opportunity to "push down" integrity standards in ways that can surpass State action in impact. Preferences that reward supplier integrity give a practical market value to these good practices.

**Example:** The United Nations Global Compact has made supply chain integrity a priority objective in its "10th Principle" on combating corruption. Guidelines for multinational companies were published in 2010, in "Fighting Corruption in the Supply Chain: A Guide for Customers and Suppliers."

United Nations Global Compact, "Fighting Corruption in the Supply Chain: A Guide for Customers and Suppliers" (2010), available at [http://www.unglobalcompact.org/docs/issues\\_doc/Anti-Corruption/Fighting\\_Corruption\\_Supply\\_Chain.pdf](http://www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/Fighting_Corruption_Supply_Chain.pdf).

### 3. Civil society

Civil society also has an important role in advancing UNCAC objectives, outlined in article 13 of the Convention. States parties are required, within their means and in accordance with their domestic law, "to promote the active participation of individuals and groups outside the public sector" in the fight against corruption through enhanced transparency, outreach, opportunities to participate in decision-making processes, and to report acts of corruption. For UNCAC purposes, civil society ordinarily will include, in addition to individual citizens, non-governmental and community-based organizations, business associations, labour unions, religious institutions, academia and the media.

In relation to the private sector, civil society engagement occurs primarily through public education, advocacy and compliance monitoring. These roles vary in application with the many different interests that constitute civil society. Individual citizens, for example, have a responsibility to become informed about the issues and to hold leaders in government and business accountable. Advocacy organizations, including from the business sector, can support and help to shape anti-corruption initiatives. Both media and advocacy organizations also perform an important watchdog function by disseminating information about policy advances and continuing challenges.

**Example:** Civil society organizations have developed a number of practical tools for citizen monitoring in support of public procurement integrity. Transparencia Mexicana recently published a detailed guide on citizen engagement that catalogues relevant rules and lessons from past monitoring experience. Another tool, developed by Transparency International/USA with World Bank support, provides web-based resources for procurement monitoring, including a monitoring guide, citizen training module, and interactive checklist of common red flags for public procurement corruption.

Transparencia Mexicana, "A New Role for Citizens in Public Procurement" (2011) available at <http://corruptionresearch-network.org/marketplace/resources/C-M%20SERIES%20-%20A%20new%20Role%20for%20Citizens%20in%20Public%20Procurement.pdf/>

Transparency International/USA, "Civil Society Procurement Monitoring Tool," available at <http://monitoring.transparency-usa.org/>.



# CHAPTER II.

Engaging the private sector

Before examining the role of sanctions and incentives in strengthening corporate integrity, it is important to consider the factors that shape normative business practice.

## A. Focus on leadership responsibility

Corporate compliance is largely voluntary, even in robust enforcement environments. No State has the resources or ability to police all corporate activity for potential violations, nor would this be prudent or effective. Rather, the goal of regulation will ordinarily be to encourage responsible conduct on a voluntary basis, through incentives and sanctions designed to drive good practice. “Signalling” on corruption—that is, sending the private sector a clear message that a State is serious about enforcing its anti-corruption laws—is central to strengthening corporate integrity.

The primary audience for anti-corruption signalling is a company’s leadership—in particular, its directors or executive committee. These leaders have a fiduciary responsibility to oversee management of the enterprise, including its efforts to prevent and detect corruption.<sup>11</sup> They are also in a position, with senior management, to ensure that necessary resources are made available to support an effective anti-corruption programme. States help to shape these corporate investment decisions through their enforcement policies, particularly through sentence mitigation or defences based on adequate corruption prevention programmes.

## B. Corporate integrity: the business case

Corporate integrity, in the broadest sense, encompasses the full range of good business practices commonly associated with corporate social responsibility. More narrowly, it reflects a commitment to abide by minimum legal requirements and norms of ethical business conduct. Organizations that act with integrity follow the law and ethical norms, they treat their employees, customers and business partners fairly and respectfully, they abide by their commitments, and they generally conduct their affairs in a socially responsible manner.

In an anti-corruption context, corporate integrity means conducting business in a manner that avoids bribery and other corrupt acts that undermine the operation of and public confidence in the marketplace. First and foremost, businesses have a legal responsibility to follow the law in the countries in which they operate, which under the UNCAC framework extends to all forms of bribery—active and passive, public and private, domestic and international. Companies that engage in bribery risk public exposure, prosecution and sanctions that can significantly damage their interests, as well as have severe consequences for the personnel involved. Businesses also have a responsibility to act as good corporate citizens, which includes following the laws that apply to their operations.

There is increasing awareness among companies that fighting corruption makes good business sense. At the most basic level, corrupt payments are a tax on business, cutting into profits and return on investment. While difficult to calculate because of the hidden nature of corruption, estimates put this additional tax on doing business as high as 10 per cent in some markets.<sup>12</sup> Companies that refuse to bribe also must worry about losing business to less ethical competitors. Many now recognize the broader harm of corruption on business interests. Corruption makes it more difficult for governments to implement laws and policies and undermines trust in public

<sup>11</sup> Corporate governance standards are established by national law. For a useful compilation of good practices, see “OECD Principles of Good Governance,” available at <http://www.oecd.org/corporate/oecdprinciplesofcorporategovernance.htm>. The OECD has also published guidelines for assessing implementation of these practices. Organisation for Economic Co-operation and Development, “*Methodology for Assessing Implementation of the OECD Principles on Corporate Governance*” (2006).

<sup>12</sup> Organisation for Economic Co-operation and Development, “*CleanGovBiz: Integrity in Practice*” (2013). These costs are in addition to potential legal and reputational costs from an enforcement action.

institutions. Most importantly for multinational companies, corruption undercuts the rule of law on which their ability to do business and secure investments ultimately depends.<sup>13</sup>

Embedding corporate integrity in business operations can also have more immediate and practical benefits. Better systems and controls to prevent corruption provide for more certainty and control over operations. They also help to protect an enterprise's reputation—often its most valuable asset—with employees, customers, business partners and the public at large. Companies that have made a demonstrable commitment to corporate integrity find it easier to attract and retain good employees and to maintain high morale, and they also benefit in dealings with like-minded investors, customers and business partners. The comparative advantage from a good reputation for smaller businesses that work with global corporations can be especially valuable, as global corporations work to strengthen practices within their supply chains. Ethical suppliers are more reliable and also less likely to create legal or supply chain problems for a multinational customer.

### C. Institutionalizing integrity through anti-corruption programmes

Corporate compliance programmes are a primary tool used by companies to advance ethical business practices and are thus a focal point for incentives and sanctions analysis. They provide a framework for articulating the values, policies and procedures used by an enterprise to educate its employees, and to prevent and detect corruption within its business operations.

The essential elements for an effective anti-corruption programme are well-established, and have been detailed in the UNCAC Compliance Guide for Business. The guide outlines good practices that have become a global standard. In 2002, the non-governmental organization Transparency International published the first detailed guidance for global anti-bribery programmes and this was followed two years later by companion guidelines at the World Economic Forum.<sup>14</sup> Similar initiatives have been advanced elsewhere, and in 2010 the OECD Working Group on Bribery published advisory “Good Practices Guidance” for companies.<sup>15</sup>

The core elements of an effective anti-corruption programme, which have been described in various sources, include:<sup>16</sup>

- *Executive leadership.* Meaningful compliance starts with a company's leaders, who are responsible for establishing a zero tolerance policy on corruption, overseeing implementation of an effective compliance programme, and generally setting the proper tone for the rest of the organization.
- *Anti-corruption policies and procedures.* An anti-corruption programme should articulate the values, policies and procedures used to prevent and detect corruption, with particular attention to high-risk activities. There should be an appropriate structure for compliance activities, and one or more managers assigned to oversee their implementation.
- *Training and education.* For anti-corruption policies and procedures to be effective, they must be communicated to employees and others acting on a company's behalf, through appropriate training, guidance materials and other programme communications.

<sup>13</sup> This also has important consequences for States, as global companies seek to reduce their legal and reputational risks in countries which are perceived to be facing increased corruption challenges. An International Monetary Fund report in 2000 found that investment in these countries was almost 5 per cent lower than in countries considered relatively corruption-free, and this gap is thought to have increased over the past decade with the rise in global anti-corruption enforcement.

<sup>14</sup> Transparency International, “Business Principles for Countering Bribery” (2002) and World Economic Forum, “PACI Principles for Countering Bribery” (2004).

<sup>15</sup> The Working Group monitors implementation of the OECD Anti-Bribery Convention by signatory countries. Its 2010 Annual Report contains an appendix entitled “Good Practice Guidance on Internal Controls, Ethics and Compliance.”

<sup>16</sup> This summary listing is illustrative only. For more detailed guidance on programme practices, see the UNCAC Compliance Guide for Business, *supra* note 2. See also US Justice Department, “A Resource Guide to the US Foreign Corrupt Practices Act” at pages 56-63 (2012); UK Ministry of Justice, “Bribery Act 2010 – Guidance” (2011).

- *Advice and reporting channels.* Companies also need to provide a way for employees and business partners to raise questions, seek advice or suggest improvements to the anti-corruption programme. This should include a confidential channel for sensitive inquiries or reports, as well as protection from retaliation.
- *Responding to problems.* Suspicious circumstances should be promptly investigated and when violations are found, appropriate disciplinary and remedial measures undertaken.
- *Business relationships.* Guidelines also should be provided for managing relationships with agents and business partners. While these relationships are often essential for doing business, they can present heightened corruption risks that need to be addressed.
- *A risk-based approach.* An anti-corruption programme should be risk-based, taking into account a company's distinctive characteristics and circumstances, such as size, industry, geographical operations and business model.
- *Continuous improvement: periodic testing and review.* Finally, a company should have a process for testing and refining its anti-corruption programme. A good compliance programme will continue to evolve, with changes to a company's business and risk profile and lessons learned from experience under the existing programme.

## D. Transparency and public participation

Public reporting has become a central tool for communicating corporate engagement on a range of sustainability issues, including efforts to combat corruption. The leading framework for sustainability reporting—the Global Reporting Initiative (GRI)—has for many years included certain basic requirements for reporting on anti-corruption programmes. Other newer initiatives for anti-corruption reporting have expanded upon the GRI requirements. Among these is a comprehensive reporting guide developed by the United Nations Global Compact (UNGC) that focuses on the core elements of an effective anti-corruption programme.<sup>17</sup>

Public reporting on anti-corruption programmes is grounded on several normative assumptions, in particular, that transparency can improve internal practices, strengthen public credibility, and provide necessary information to investors and other stakeholders. Reporting additionally provides an opportunity for awareness raising within an organization and an increased focus on leadership and resources.

<sup>17</sup> United Nations Global Compact, “Reporting Guidance on the 10th Principle Against Corruption” (2009), available at [http://www.unglobalcompact.org/docs/issues\\_doc/Anti-Corruption/UNGC\\_AntiCorruptionReporting.pdf](http://www.unglobalcompact.org/docs/issues_doc/Anti-Corruption/UNGC_AntiCorruptionReporting.pdf).



# CHAPTER III.

Using sanctions and incentives



While effective sanctions for corruption offences are required under the Convention, UNCAC also recognizes the essential role of incentives that encourage and reward corporate self-reporting and prevention efforts. Both types of measures signal to the private sector a State's serious commitment to the enforcement of existing anti-corruption laws. In sending a clear message that criminal laws will be backed with enforcement action, and that corrupt practices will be investigated and punished, governments can ensure that those in the private sector continue to prioritize the strengthening of corporate integrity policies. Over time, this is likely to have the effect of reducing the incidence of corruption involving the private sector.

Both types of measures signal to the private sector a State's commitment to strengthening corporate integrity and reducing the incidence of corruption involving the private sector.

## A. Sanctions

States parties have at their disposal a wide range of measures for sanctioning private sector corruption, which fall into one of eight broad categories. For UNCAC purposes, a sanction may serve remedial, compensatory, or punitive purposes.

The UNCAC requirement that sanctions be “effective, proportionate and dissuasive” will usually be satisfied through a mix of sanctions, including monetary fines, confiscation of ill-gotten gains, and remedial measures that compensate victims of corruption. Taken together, these should be of sufficient magnitude to deter future misconduct. In this regard, organizational size will often be a critical factor. Measures adequate to deter future violations by a small local business generally would be inadequate for a larger company. Conversely, the substantial penalties appropriate to a large national or multinational company would be disproportionate for a smaller enterprise.

### *Resource considerations*

Investigating and prosecuting corruption can present special challenges due to the complexity and concealed nature of violations. Measures mandated or recommended by the Convention to encourage private sector cooperation and reporting are essential, but these must also be supported by adequate investigative resources. Cases involving large or systemic bribery can require substantial resources to investigate, and have generated a number of strategies for stretching limited resources. One strategy has been to focus enforcement resources on a specific sector or type of corruption, so that information and experience developed in an initial investigation can be utilized in similar actions involving other companies in the same sector. This type of targeted initiative—sometimes referred to as an industry “sweep”—will be most appropriate for States that have well developed investigative and prosecutorial services.

Another approach for stretching scarce enforcement resources has been to encourage the settlement of corporate actions, thereby avoiding the time and resources needed to prosecute an action to completion. The objective of most corporate enforcement actions is to penalize responsible individuals, eliminate any resulting business benefit, and prevent a future recurrence. When this can be achieved through a settlement, it may be advantageous to both parties in avoiding costly litigation. Settlements should be by formal agreement, subject to judicial oversight, and sufficiently transparent to ensure public confidence in the process. While a settlement can be an effective tool for resolving corporate corruption actions, appropriate judicial review and public transparency is required to prevent abuse.

A third strategy for stretching scarce investigative resources has been for law enforcement agencies to build on the enforcement efforts of counterpart agencies in other States. Sometimes referred to as “copycat” enforcement actions, these actions take advantage of Convention articles requiring mutual legal assistance, the exchange of information pertaining to corruption offences and other forms of international cooperation, and can greatly ease a State's own information-gathering burden.

## 1. Monetary fines

Monetary fines are the most common sanction for private sector violations of anti-corruption laws. They are applicable to both individuals and organizations in most States. Fines are penal in nature and designed to punish misconduct and deter future violations.

### *Nature and scope*

Monetary sanctions for a corruption offence may be criminal, civil or administrative in nature. Criminal fines send the strongest deterrent message, because of the stigma attached to a criminal conviction, but they also require law enforcement agencies to meet a higher burden of proof and thus may be more difficult and time-consuming to achieve. Civil fines can be an effective alternative to criminal enforcement and may avoid the complexities of a corruption prosecution. In some States, these kinds of fines are linked to financial reporting or similar more technical offences. For example, a public company may be fined civilly for failing properly to disclose bribery payments in its published financial reports or for improperly deducting a misreported bribe as a business expense. Administrative fines are a further civil option, administered through an agency rather than judicial proceedings.

**Example:** Under the United States Foreign Corrupt Practices Act, a natural or legal person who bribes a foreign public official may be prosecuted criminally for the bribery itself or civilly under the law's accounting provisions. Civil accounting violations are much easier to prove and almost always accompany a criminal bribery charge. Tax avoidance based on a failure to properly account for bribery offers a similar civil basis for enforcement action.

A monetary fine may be imposed for any violation of a State's anti-corruption laws, including—where appropriate—the failure by a company to prevent misconduct by its employees or agents. Some States make a company responsible for employee violations under common law principles, while others do so by statute. One benefit of the legislative approach is that it provides advance notice to companies of their responsibility to prevent bribery or other corrupt acts by employees, which in turn causes companies to address this pre-emptively by strengthening their anti-corruption programmes: this also strengthens the legal basis for enforcement action when violations occur.

**Example:** The United Kingdom's Bribery Act (article 7) established an express offence for the corporation for failing to prevent bribery by an employee or affiliated person, as well as a defence to this provision if adequate anti-corruption programmes are in place. A primary objective of this offence was to encourage more companies to establish prevention programmes. Much of the desired effect of this provision was achieved even before the first formal action had been brought, with the rapid adoption across industries with operations in the United Kingdom of the minimum compliance practices outlined in an informational guidance document.

United Kingdom Ministry of Justice, Bribery Act 2010 Guidance (2012), available at <https://www.justice.gov.uk/legislation/bribery>.

### *Calculation*

Fines should reflect the gravity of an offence, taking into account an enterprise's size, culpability and other factors such as the harm caused by an offence. In general, legislation will set out either a maximum fine or base penalty level and the actual fine will be determined upon consideration of aggravating or mitigating factors. For example, in the sentencing model used in the United States, enforcement authorities establish a "base fine" (which will either be a specified statutory amount or the pecuniary gain to an organization or harm to a victim, whichever is greater)

and then apply a culpability “multiplier” to determine a range for fines.<sup>18</sup> Culpability factors that can affect a criminal fine include: whether high-level personnel were involved in or condoned the conduct; prior criminal history; whether a company had a pre-existing compliance and ethics programme; voluntary disclosure; cooperation; and acceptance of responsibility.

**Example:** Monetary fines are a standard sanction for corruption, with many examples to draw upon from around the world. For example, the United States medical device manufacturer Biomet Inc. was fined US \$17 million as part of a US \$23 million settlement of bribery allegations involving payments to publicly-employed health-care providers in Argentina, Brazil and China. In 2011, the German engineering firm Ferrostaal AG was fined €140 million by a Munich court in a bribery case involving illicit payments in Greece and Portugal. Also in 2011, the pharmaceutical company Missionpharma agreed to a fine of DKK 1.5 million (US \$250,000) and confiscation of a further DKK 20 million (US \$3.5 million) to settle an investigation by Danish authorities of a suspicious payment made in connection with a United Nations contract to deliver medicine to the Democratic Republic of Congo.

Criminal fines imposed under the FCPA are listed in press releases published by the United States Justice Department, available at <http://www.justice.gov/criminal/fraud/fcpa/cases/a.html>. Additional enforcement examples from other States may be found in country monitoring reports for the OECD Anti-Bribery Convention, available at <http://www.oecd.org/daf/antibribery/countryreports/implementationoftheoecdanti-briberyconvention.htm>. See also Transparency International, “Country Enforcement of the OECD Anti-Bribery Convention 2012,” at [http://www.transparency.org/whatwedo/pub/exporting\\_corruption\\_country\\_enforcement\\_of\\_the\\_oecd\\_anti\\_bribery\\_convention](http://www.transparency.org/whatwedo/pub/exporting_corruption_country_enforcement_of_the_oecd_anti_bribery_convention).

**Example:** Most corporate corruption cases in the United States are settled. Settlements are pursuant to a formal “Deferred Prosecution Agreement” (or DPA) that suspends enforcement action conditionally in exchange for a commitment to strengthen prevention efforts and pay a negotiated penalty. The alleged corporate misconduct and settlement conditions are publicly disclosed in formal documents filed for court review. Mandatory third-party monitoring of a company’s anti-corruption programme is common.

“Non-prosecution agreements” are another form of settlement that is used when the evidence of misconduct or grounds for holding a company directly responsible for employee misconduct is less conclusive.

## 2. Incarceration

The prosecution of individuals can be a powerful tool for strengthening corporate integrity, especially when such action may result in imprisonment. Incarceration is a common sanction for violations of anti-corruption laws, and an express enforcement priority in many States. Business surveys regularly identify this form of sanction as among the most effective deterrents to corruption involving business, particularly when liability extends to supervisory and management functions.<sup>19</sup>

Incarceration is a drastic sanction reserved for the most serious crimes. As in other criminal contexts, the prosecution of individuals for corrupt acts is contingent on clear legal standards of conduct, a fair and impartial judicial system, and due process protections to prevent abuse. Prosecutors generally must meet a heavy burden of proof, and be prepared to take a case to trial. Although negotiated settlements may occur in legal systems that permit plea bargaining, individuals are much less likely than companies to “settle” an enforcement action, particularly if it results in incarceration.

<sup>18</sup> United States Sentencing Commission, Guidelines Manual, available at <http://www.ussc.gov/index.cfm>.

<sup>19</sup> See, e.g., Humboldt-Viadrina School of Governance, “*Motivating Business to Counter Corruption - A Global Survey on Anti-corruption Incentives and Sanctions*” (2012), available at [www.humboldt-viadrina.org/anti-corruption](http://www.humboldt-viadrina.org/anti-corruption).

**Example:** United States enforcement officials regularly emphasize in their public statements the priority given to prosecuting individuals as well as companies for violations of the Foreign Corrupt Practices Act. Since 2006, nearly 100 people have been charged with criminal violations and several dozen have gone to jail for up to two years or longer. In one recent case, the former president of Terra Telecommunications received a 15-year sentence for bribing public officials in Haiti. In another high-profile case, the former chairman and chief executive of the global contracting firm KBR was sentenced to 30 months in prison for a scheme to bribe Nigerian authorities in return for contracts to build liquefied natural gas facilities.

While the threat of incarceration is limited to individuals, suspension and debarment can be a comparable deterrent for companies that rely on government contracts. Companies may also be required to terminate culpable employees as a condition of settlement. Although technically not a State sanction, this can be a very effective deterrent for individuals, particularly managers or other senior personnel who may have difficulty finding comparable alternative employment. An organization's managers and employees should understand, as part of their anti-corruption training, that bribery is an offence that would lead to the termination of employment and that termination on this basis would be a corruption "red flag" for other potential employers.

The prosecution of culpable individuals is essential to an effective enforcement policy, but should not displace actions taken against an employer organization that engages in or benefits from a corrupt offence. As noted earlier, article 26 of the Convention, addressing liability of legal persons, requires States to establish corporate liability for corruption offences, as they often have a business purpose and may even be encouraged or facilitated by the organization. Corporate legal exposure is also important as a catalyst for employer investment in its anti-corruption programme.

**Example:** There are many examples of multinational companies that have strengthened their anti-corruption programmes in response to a formal legal enforcement action, and this is a standard requirement for settlement in some States. For example, Siemens AG invested heavily in new training and other prevention measures as part of its settlement of bribery charges in 2008 with enforcement authorities in Germany and the United States. Corporate settlements routinely require an express commitment to strengthen prevention efforts, in many cases with an independent monitor paid for by the company who reports on progress to the government.

Elements of the resulting Siemens anti-corruption programme are summarized in "Siemens Anti-Corruption Compliance Guide," available at [http://w3.siemens.no/home/no/no/omsiemens/Documents/sc\\_upload\\_file\\_ant Corruption\\_handbook.pdf](http://w3.siemens.no/home/no/no/omsiemens/Documents/sc_upload_file_ant Corruption_handbook.pdf).

Independent monitoring is most common in the US, where independent corporate monitors are appointed pursuant to prosecutorial guidelines first issued in 2009, available at <http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf>.

### 3. Confiscation of proceeds

Confiscating the proceeds of corruption is another key private sector sanction and can dwarf legal fines in a major corporate corruption case.

Confiscation or asset forfeiture is used to deprive wrong-doers of their ill-gotten gains and deter violations of anti-corruption laws. The practice is common, particularly for violations in antitrust and competition laws and in combating organized crime. Confiscation serves a number of purposes such as deterring potential offenders, remedying enrichment that has occurred due to the corrupt act, or repairing damage that has been done to victims as a result of the corruption.

Awards typically are limited to recovery of the estimated amount earned from illicit conduct. This may be the profit from a particular contract award secured through bribery, the savings from “expediting” regulatory requirements, or a competitive advantage gained through strategic bribery. For example, a multinational enterprise that secured a dominant position in a new market through systemic bribery might have that market benefit confiscated through an appropriate penalty.

Depriving wrongdoers of the economic benefit from corruption serves both the State interest in eliminating the business incentives for bribery and the interest of competitors in creating a more level economic playing field. Sanctions that merely fine an enterprise for improper conduct, while leaving economic benefits in place, are less likely to deter future violations, particularly in environments where the risk of discovery and prosecution is already low.

Although technically not a “sanction,” confiscation awards can have a substantial deterrent effect on a company. In a number of recent corporate foreign bribery actions, they have contributed to settlement amounts in excess of US \$100 million.<sup>20</sup> Methods for calculating ill-gotten gain are addressed in a recent OECD-Stolen Asset Recovery Initiative (StAR) analysis.<sup>21</sup>

**Example:** A company that sold communications networks and control systems to state-owned enterprises over a four-year period paid US \$5 million in bribes that resulted in project revenues totaling US \$100 million. Project costs were US \$25 million, and after deducting the US \$5 million in bribe payments, the confiscation was set at US \$80 million.

Confiscated economic benefits may be returned to their legitimate owners, used to compensate injured parties pursuant to article 57(3)(c) of the Convention, or allocated to other State purposes. Such other purposes may include grant activities that help to reduce the corrosive impacts from corruption. A 2009 World Bank settlement that helped to fund the Siemens Integrity initiative is illustrative, resulting in the allocation of substantial funds to anti-corruption initiatives over a ten-year period.<sup>22</sup>

**Example:** In its 2008 settlement of bribery charges with the United States government, Siemens AG agreed to pay US \$350 million in disgorgement of profits (a form of confiscation) in addition to US \$100 million in fines plus additional penalties to German authorities. In a subsequent settlement with the World Bank Group, Siemens committed to invest a further US \$100 million in a global initiative to support anti-corruption organizations and projects to improve the business environment. To date, 31 projects in more than 20 countries have received support.

In another example of this type of social investment, the British aerospace company BAE Systems agreed in 2010 to provide £29.5 million (US \$47 million) for textbooks and teacher guides in Tanzanian primary schools as part of a settlement for a pending investigation in the United Kingdom. The commitment was memorialized in a Memorandum of Understanding signed by the Tanzanian government, BAE Systems and the UK Serious Fraud Office.

The initiative and funded projects are described in “Siemens Integrity Initiative Annual Report 2012,” available at [http://www.siemens.com/sustainability/pool/en/core\\_topics/collective-action/siemens\\_annual\\_report\\_world\\_bank\\_2012\\_en.pdf](http://www.siemens.com/sustainability/pool/en/core_topics/collective-action/siemens_annual_report_world_bank_2012_en.pdf).

United Kingdom Serious Fraud Office Press Release, “BAE Systems will pay towards educating children in Tanzania after signing an agreement brokered by the Serious Fraud Office” (March 15, 2012).

<sup>20</sup> See, for example, this component in recent corporate settlements involving Siemens (US \$350 million), KBR (US \$177 million), Snamprogetti (US \$125 million), and Technip (US \$98 million).

<sup>21</sup> OECD-StAR, “*Identification and Quantification of the Proceeds of Bribery*” (2012). In addition to describing calculation methods, the analysis provides a number of case examples. Available at: <http://star.worldbank.org/star/publication/identification-and-quantification-proceeds-bribery>.

<sup>22</sup> World Bank Press Release No. 2009/001, describing US \$100 million fund established pursuant to Siemens settlement agreement.



#### 4. Contract remedies

Contract remedies offer another channel for combating private sector corruption. Breach of legal standards can be grounds for terminating a contract or provide a basis for contractual restitution. These are common remedies available in most States for general failures of contract and may be explicitly extended to corruption offences.

States may themselves be victims of corruption, and are encouraged by article 34 of the Convention to consider the annulment or rescission of corruption-tainted contracts or concessions. In circumstances that may not warrant termination of a contract or concession, other remedial action may include imposing a fine as a lesser penalty. This form of a sanction is remedial in nature, designed to preserve public resources and the integrity of the procurement process. A company that engages in corruption in connection with a public contract, whether to obtain or retain business or in its execution, cannot be trusted to perform its responsibilities in the public interest. Contracts obtained through corruption also undermine procurement integrity, which could impact on the efforts that States parties have made pursuant to article 9 of the Convention.<sup>23</sup>

Contract remedies are ordinarily established by regulation and may be reinforced through explicit contract conditions and requirements. A common practice for States has been to mandate the routine inclusion of anti-corruption provisions in their procurement contracts and concession agreements. Whether in regulatory or contract form, anti-corruption provisions can be used to address: (a) general integrity expectations, (b) mandatory reporting of potential violations, (c) access to records and other cooperation in the event of an investigation, and (d) remedies for confirmed violations.

**Example:** Government procurement in the United States is governed by a complex set of rules known as the Federal Acquisition Regulation, or “FAR.” In 2008, the US added a specific requirement to the FAR that all government contractors have a business ethics and compliance programme. Minimum programme standards have been detailed by regulation and are incorporated in mandatory contract provisions applicable to all contracts above a specified threshold, currently set at US \$5 million. These include (a) assignment of responsibility for the programme and controls within the contractor organization, (b) making efforts to prevent persons who have violated ethics rules from serving in management, (c) periodic review of company policies, practices, procedures and controls, (d) a hotline or similar reporting mechanism, (e) disciplinary action for improper conduct or failing to prevent or detect improper conduct, (f) timely written disclosure to appropriate government authorities where there is credible evidence of a violation of a listed federal law, and (g) full cooperation with the government in the event of an investigation.

This regulatory requirement is detailed in FAR Part 3.10, including links to mandatory contract clauses. FAR Rule 52-203.13 contains a mandatory contract clause listing minimum standards for a contractor ethics and compliance programme.

Companies that do business with the government, or receive concessions or other benefits, should understand their responsibilities under the law and receive clear notice of the potential consequences for violations. This will help to ensure that contractors and grantees take their responsibilities seriously and can also strengthen the legal basis for remedial action.

**Example:** Anti-corruption expectations and remedies established by regulation and confirmed by contract help to ensure that a State will not have to continue working with a corrupt contractor. As procurement officials in one State recently learned, the absence of express remedial authority may preclude termination of a contract despite clear evidence of corruption. The case involved a corruption-tainted contract that the court was not authorized to annul.

<sup>23</sup> States parties are directed in article 9 to take necessary steps to “establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption.” These systems will generally include measures that discourage inconsistent private sector conduct, including through rescission of bribe-tainted contracts or other appropriate remediation.

## 5. Suspension and debarment

Suspension and debarment restrictions are a more drastic sanction for private sector corruption, which when applied at the company level, can be comparable in effect to incarceration for individuals.

This form of sanction prevents an individual or company from participating in government contracts, subcontracts, loans, grants and other assistance programmes. Suspension and debarment restrictions are ordinarily imposed on a government-wide basis, and may lead to cross-debarment by other States. Suspension refers to temporary measures, typically a year or less, whereas debarment refers to restrictions of up to three years or longer. Debarment has serious consequences, potentially taking a company out of the marketplace long enough to lose competitive standing in a field.

In most States, the authority to impose suspension and debarment sanctions is established by law and is limited to actions by a contractor that violate a set list of laws or regulations. Grounds for debarment vary, but will generally include contract fraud, false statements, poor performance or non-performance of a contract obligation, as well as failures to comply with specific integrity, environmental or other legal requirements. Sanctions may be applied on a comprehensive basis or be limited to certain categories of activity or affiliates of an enterprise. For example, debarment involving a large multinational corporation will often focus on a particular offending affiliate rather than the entire global enterprise.

There are two distinct conceptual bases for debarment, one punitive and the other remedial. In the punitive model, debarment is a punishment for bribery or misconduct that is often imposed automatically once a finding of misconduct has been made. An alternative model focuses on procurement integrity and the principle that governments should only do business with “responsible” contractors. In this approach, bribery is an important factor, but is also considered along with other factors, such as a company’s remediation and prevention efforts and the availability of alternative providers would also be considered.

Large national and multinational companies have rarely been debarred under either approach, due to the potential collateral consequences from an exclusion. Procurement agencies may resist using debarment as a tool due to the disruption it can cause to operations or the practical difficulty in finding substitute sources for goods and services. Sanctions that threaten the viability of a large enterprise can also displace tens of thousands of jobs across the organization and its supply chain. Although examples can be found where debarment has been imposed, the more common practice has been for law enforcement authorities to raise the threat of debarment with large national and multinational companies to secure rigorous settlement conditions.

In the discretionary model, cautionary letters requiring an enterprise to provide reasons why debarment should not be imposed have contributed to significant settlement concessions, including commitments to strengthen internal prevention practices. In some cases, warning letters have been succeeded by settlement conditions that mandate independent compliance monitoring for a specified period, typically of three to five years. This negotiating tactic may not always be available for debarment in the punitive model, to the extent debarment is non-discretionary once evidence of a violation has been found.<sup>24</sup>

**Example:** In 2010, the British aerospace company BAE agreed to a US \$400 million criminal fine in settlement of a United States enforcement action. Prior to settlement, suspension and debarment sanctions had been contemplated. These were not imposed, but an independent monitor was appointed to oversee changes to the company’s compliance programme for a three-year period.

<sup>24</sup> A mandatory approach to debarment may present risks to other important UNCAC objectives, in particular encouraging self-reporting and cooperation by individuals or organizations who will have little incentive to raise violations that may cut them off from essential future business. In practice, this harsh consequence and disincentive to private sector cooperation has been mitigated by avoiding threshold determinations of the violation. However, avoidance can have other unintended consequences, such as making it more difficult to administer confiscation or other remedial measures or to secure compensatory relief for victims.

Debarment has been a more common sanction for individuals and smaller firms, because of the lesser collateral impact and the practical difficulties associated with implementing more robust prevention measures. Smaller businesses are less likely to have the same interest or resources as a larger counterpart to invest in an expensive anti-corruption programme, and the governmental oversight required to ensure a programme is working will rarely be cost-effective. In debarments that involve a loss or suspension of a licence to provide professional or other services, there is also often a presumption that individuals who engage in corrupt conduct will not change (in the remedial model) or warrant punishment (in the punitive model).

Because of the severity of this sanction, especially for individuals and smaller businesses, clear standards of conduct and procedural protections to prevent abuse are essential.

**Example:** The World Bank Group has detailed procedures for investigating and sanctioning fraud or corruption involving the Bank and Bank-supported projects. In more than ten years of operation, debarment has been applied to hundreds of individuals and organizations. Allegations of corruption or fraud are referred to the Department of Institutional Integrity, which conducts a preliminary investigation and may recommend to a high-level Sanctions Committee that a “notice of debarment” be issued. If a notice is issued, the individual or company in question will then have the opportunity to respond in writing and to participate in a formal hearing to determine whether debarment or other sanction is warranted. Debarment is discretionary, taking into account exculpatory or mitigating factors such as the quality of a company’s prevention efforts. The Committee will then issue a sanctions recommendation for final decision by the President of the Bank, which may include lesser sanctions, such as a reprimand. Any sanctions imposed are made public, and the Bank may also share information about possible violations of law with interested national law enforcement authorities.

World Bank Sanctions Procedures, adopted 1 January 2011.

Coordination with procurement agencies is important to ensure that debarment determinations are made and implemented on a consistent basis. While law enforcement agencies are ordinarily responsible for investigating allegations and determining guilt, debarment determinations will often be made independently by other agencies of the government. These agencies may not always appreciate a broader law enforcement perspective, or may be guided by countervailing concerns about the possible disruption of operations resulting from debarment determinations. Such differences are best resolved through an appropriate mechanism for inter-agency coordination.

Inter-agency coordination can also help to identify potential corruption violations. Procurement agencies are a common channel for detecting potential violations and they should understand that this as a part of their mandate. UNCAC guidelines for ensuring procurement systems that prevent corruption are detailed in article 9 of the Convention. At an operational level, personnel engaged in procurement for the government should receive training on anti-corruption requirements and procedures and their responsibility to report concerns or suspicious circumstances for further inquiry. Government contractors and grantees can also be required, as a condition of contract, to report material corruption incidents.<sup>25</sup>

## 6. Denial of government benefits

Limiting access to benefits or services is another potential sanction for corruption, analogous to the suspension and debarment for government procurement.

Governments provide a range of benefits and support to their citizens and companies, from licences for doing business and exporting to tax incentives and job-creation for export operations. These are privileges granted by the government that may be restricted or withdrawn as a sanction

<sup>25</sup> Anti-corruption training for agency personnel is part of a State’s UNCAC implementation responsibility, described earlier. Mandatory reporting of legal violations by government contractors is among the common regulatory and contract measures outlined in the preceding section on contract remedies.

for violations of law, including corruption offences. The link between benefit restrictions and corruption is especially strong for international business activities supported by a national export credit agency. The OECD Anti-Bribery Convention contains a general commitment to detect and deter bribery in State-supported international business, which is elaborated in a 2006 addendum on export credit agency practices.<sup>26</sup>

**Example:** Access to export credit loans, guarantees and other support is expressly conditioned by Export Development Canada (EDC) on compliance with anti-corruption laws. EDC has a formal anti-corruption programme, overseen by a senior agency official, that includes policy guidelines and a code of conduct for exporters, training and operational support for agency personnel, and an internal database and screening tools for identifying corruption risks. EDC also maintains a dedicated anti-corruption page on its website, and sends all new applicants a letter advising of anti-corruption requirements. Programme activities are monitored and periodically reviewed for effectiveness by an internal agency working group.

Export Development Canada, Business Ethics, available at <http://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Pages/business-ethics.aspx>.

## 7. Liability for damages

Liability for damages from a corrupt offence can be another significant private sector sanction. Article 35 requires that a State take measures, in accordance with its domestic law, to ensure that victims, including a competitor and the State itself, have a right to initiate legal proceedings against those responsible for compensation for the consequences of corruption.

The domestic laws in most States authorize legal proceedings for compensation by individuals and organizations as a matter of course. States may also consider establishing an express private action procedure for compensatory damages resulting from a corruption offence. As in other civil actions, the victim will ordinarily have to prove the breach of duty, the occurrence of damage, and a causal link between the corruption offence and damage. In a business setting, compensation may include lost profits and other indirect or non-financial damages.

Other general business laws can also provide a basis for civil action against companies that engage in corruption. For example, competitors in some States have relied upon “unfair competition” laws to seek damages for lost business. In others, criminal laws relating to conspiracy or participation in criminal groups have been used by customers harmed by a corrupted procurement process.

**Example:** In 2012, the aluminum manufacturer Alcoa Inc. agreed to pay US \$85 million in the settlement of a civil action for damages brought by one of its customers, Aluminium Bahrain B.S.C. (Alba). The civil action was based on allegations that Alcoa had bribed Alba officials and overcharged for raw materials. The civil action followed a State enforcement action against Alcoa.

Shareholder “derivative” actions are lawsuits initiated by shareholders on behalf of a company against the company’s senior leadership. They have been used to bring legal proceedings against public companies for bribery offences, alleging that the leaders of the company committed securities fraud or a failure of oversight. Although damages are rarely awarded, such actions serve as a warning to leadership and can catalyse investments in a company’s anti-corruption efforts.

<sup>26</sup> OECD Anti-Bribery Convention, “*Recommendation on Bribery and Officially Supported Export Credits*” (2006).

**Example:** In response to published reports that one of Wal-Mart's affiliates had engaged in systemic bribery in Mexico to obtain permits for new stores, a shareholder group filed a "derivative action" alleging that the officers and directors identified had breached their fiduciary duties and caused harm to the company. The action was brought on behalf of Wal-Mart, and any damages awarded would be paid to the company rather than shareholders who brought the case. The matter is still ongoing. As a consequence of this case, an alert was issued for members of the New York Stock Exchange, "that boards of global companies must remain vigilant in exercising their oversight responsibilities or face the possibility of personal liability."

Corporate Board Member/NYSE Governance Services, "Derivative Actions Based on FCPA Violations: The Case of Wal-Mart de Mexico."

## 8. Reputational damage

For many companies, large and small, the single greatest threat from a corruption scandal may often be reputational. As with individuals, a company's reputation for integrity and trustworthiness is hard-won and easily lost. Protecting this asset is a primary leadership responsibility and an important motivation for corporate investments in anti-corruption programmes and other integrity measures.

Although not technically a sanction, the effects of reputational harm from a corruption scandal can easily outweigh the immediate effects of a monetary fine or even disgorgement penalty. Large national and multinational enterprises make an enormous investment in their "brand" and they depend on a good reputation to attract and retain employees, investors, business partners and customers. A company's reputation for integrity can take years to build, and even longer to repair following a high-profile corruption scandal. While legal sanctions generally require the State to bring evidence to prove its case, reputations are judged by public opinion and can be won or lost in the span of a news cycle.

Reputational risk is primarily associated with larger companies that have a national or international profile, but can also be a significant factor for small businesses. Small and medium-sized enterprises (SMEs) are also judged on integrity by their employees, customers and business partners and can suffer economic harm from a poor reputation. As large national and multinational companies work to strengthen integrity practices in their supply chains, local partners with a poor reputation or inadequate anti-corruption practices will increasingly be passed over.<sup>27</sup>

Information on a business' reputation is conveyed through a variety of channels, mainly non-governmental. These include media reporting, investor and commercial due diligence services, and reporting by civil society organizations. Media reporting and due diligence services rely in part on information provided by law enforcement agencies, although many States limit official disclosures by law enforcement during a pending investigation.

**Example:** Many governments publish information about corruption cases on their websites, including press releases that describe the resolution of enforcement actions and court filings that summarize alleged offences. This practice adds a reputational aspect to the imposed legal sanctions, by making a wide range of information, including the reasons for imposing a sanction.

Company financial reports that are filed with securities regulators are a common source of information about pending investigations, as are formal court filings that initiate or settle an enforcement action. Civil society reporting also relies on information that companies make available about

<sup>27</sup> The growing attention to supply chain integrity in connection with the discussion of private sector roles and responsibilities under the Convention is addressed in Part II(C) of this Guide. Recommendations for reducing supply chain corruption risks are detailed in a 2010 United Nations Global Compact Guide, *"Fighting Corruption in the Supply Chain: A Guide for Customers and Suppliers"*.

their prevention programmes through corporate social responsibility disclosure and other means. A number of the reports released by civil society organizations rank corporate compliance efforts in relation to their peer organizations.

**Example:** Several surveys have been issued by civil society organizations that rate companies on their anti-corruption practices. In 2011, the Revenue Watch Institute and Transparency International published the report “Promoting Revenue Transparency”, evaluating global oil and gas companies on their organizational transparency and public reporting on anti-corruption programmes. The report included a list of companies categorized as the “worst-performing” companies. A subsequent Transparency International initiative, Transparency in Corporate Reporting, extended this methodology to the 100 largest publicly listed multinational companies.

Revenue Watch and Transparency International, “Promoting Revenue Transparency: 2011 Report on Oil and Gas Companies,” available at [http://www.transparency.org/whatwedo/pub/promoting\\_revenue\\_transparency\\_2011\\_report\\_on\\_oil\\_and\\_gas\\_companies](http://www.transparency.org/whatwedo/pub/promoting_revenue_transparency_2011_report_on_oil_and_gas_companies).

Transparency International, “Transparency in Corporate Reporting: Assessing the World’s Largest Companies,” available at [http://www.transparency.org/whatwedo/pub/transparency\\_in\\_corporate\\_reporting\\_assessing\\_the\\_worlds\\_largest\\_companies](http://www.transparency.org/whatwedo/pub/transparency_in_corporate_reporting_assessing_the_worlds_largest_companies).

## B. Incentives

Incentives that reward a company for good practice are an important complement to enforcement sanctions. They recognize that meaningful commitment to and investment in anti-corruption programmes and other measures that strengthen corporate integrity are largely voluntary and can be encouraged through inducements that signal their priority to company leadership.

### 1. Penalty mitigation

Penalty mitigation is the most common form of a good practice incentive. Companies that have made a substantial effort to detect and deter corruption may be rewarded with a reduction in fines, reduced charges or even a defence against liability for the misconduct of an employee or agent. In a settlement context, the perception that a company is serious about combating corruption can substantially ease the conditions for resolving an investigation.

#### *Policy considerations*

Penalty mitigation and other incentives that encourage participants in an offence to report violations and to cooperate in the investigation are addressed in article 37 of UNCAC. As has been noted, corruption may go undetected without the cooperation of a participant in or witness to the offence. The Convention recognizes the need for practical means to encourage participants to come forward, and this may come at a price, such as mitigation of punishment or granting immunity from prosecution. These incentives also serve to advance the broader Convention goal of depriving offenders of the proceeds of crime and recovering such proceeds.

Although most commonly associated with reporting by individuals, penalty mitigation incentives are also an important tool for encouraging the cooperation of companies. A well-designed incentives mechanism can encourage investment in anti-corruption measures, such as employee training and auditing controls, and the prompt reporting of potential violations coming to a company’s attention. Corporate self-reporting has been a primary source of information for investigations by law enforcement authorities in several States, particularly in cases involving the bribery of foreign public officials by multinational enterprises. Penalty mitigation and leniency programmes have been an important motivation for this self-reporting.



Incentives should strike an appropriate balance between the potential investigative benefits that result from the cooperation of offenders and the administration of justice, particularly in view of the public perception of the benefits for this cooperation. On one hand, penalty mitigation or immunity, if granted too freely to a private enterprise, can be counter-productive. This could arise if full immunity is granted for an anti-corruption programme that appears sound on paper, but may not be effective in practice. On the other hand, the benefits from cooperation must be seen by the offenders to outweigh the potential risks associated with reporting. Where there is a perception that the costs of self-disclosure are too great, companies may be less cooperative and calculate that they are better off remaining silent and risking discovery.

Penalty mitigation is only one factor that companies consider when deciding whether to self-report a violation. Judgements are also made about the risk of discovery or prosecution and the consequences of a disclosure. When there is a perception that self-reporting will lead to lengthy investigative or judicial proceedings, the calculation may be made that it is less risky to remain silent—especially where the risk of discovery and prosecution is thought to be low. States that ensure that there are reasonable and efficient investigative and judicial processes in place will encourage more cooperation by reporting companies. This said, a single reported incident may signal systemic problems across an enterprise that would warrant more extensive and therefore lengthy investigation and adjustments to a company's prevention programme.

### Applications

Good practice incentives are an established method for encouraging corporate integrity. A number of States have adopted a system that rewards good practice by allowing it to be used as a defence for corporate liability offences. In this way, a company that is charged with a criminal offence because it failed to prevent an employee or person associated from bribing another person will have a full defence to the prosecution if it can demonstrate that it had an adequate programme to prevent corruption. Companies that do not have such systems in place could be convicted of an offence.

The government of the United Kingdom has released a guidance on the elements of an anti-corruption programme that would satisfy this defence under the *Bribery Act 2010* which are: proportionate procedures, top-level commitment, risk assessment, due diligence, communication (including training), and monitoring and review.<sup>28</sup>

A different model exists in some countries in which proof that there is an adequate anti-corruption programme in place to prevent corruption is used to reduce the penalty for the offence and does not provide a full defence. In the United States, prosecutors and judges look to specific criteria enumerated in published "Organizational Sentencing Guidelines" when deciding whether to charge a company for employee misconduct and when determining sanctions.<sup>29</sup> The Guidelines list both aggravating and mitigating factors, that is, factors that can raise or reduce the charges and penalties for an organization. Mitigating factors relate to the quality of a company's internal programme for preventing and detecting criminal conduct, self-policing, reporting of potential violations, cooperation with law enforcement, and remedial action in response to a violation.

The basic minimum criteria for an effective anti-corruption programme are visible and active leadership, risk-based operational guidelines and training, channels for seeking advice and reporting concerns, and systems and controls for oversight and periodic refinement of the programme.<sup>30</sup> Companies are also expected to manage risks relating to their third-party relationships and to establish an organizational culture that encourages ethical conduct and a commitment to compliance.

<sup>28</sup> United Kingdom Ministry of Justice, *The Bribery Act 2010 - Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing* (section 9 of the Bribery Act 2010) pages 20-31.

<sup>29</sup> United States Sentencing Commission, *2012 US Sentencing Guidelines Manual* §8B 2.1.

<sup>30</sup> These factors are detailed in Part II(C) of the Guide, and at greater length in the *UNCAC Compliance Guide for Business*, supra note 2.

States parties that establish this form of good practice incentive to strengthen corporate integrity will want to consider specialized training for law enforcement personnel to ensure that the rewards accurately reflect the quality of the anti-corruption programme and its implementation. The publication and periodic updating of guidelines for the private sector on State expectations for an effective anti-corruption programme can be another useful tool for capturing the evolutionary nature of good practice.

**Example:** The first formal guidelines for corporate penalty mitigation were published by the United States Sentencing Commission in 1991, listing minimum requirements for a company to receive credit for an effective compliance programme and other mitigating factors such as self-reporting. The guidelines were substantially revised in 2004, concurrent with legal reforms designed to improve corporate responsibility, disclosures and auditing, and are reviewed and updated annually. Although technically limited to sentencing in criminal cases, the guidelines have much broader practical importance. The American government relies on them when deciding whether to prosecute a company for employee violations and in settlement negotiations. The guidelines also have become a common standard for corporate anti-corruption programmes and for compliance specialists and business groups.

The Organizational Guidelines are in Chapter 8 of the US Federal Sentencing Guidelines Manual, available at [http://www.ussc.gov/Guidelines/Organizational\\_Guidelines/index.cfm](http://www.ussc.gov/Guidelines/Organizational_Guidelines/index.cfm).

## 2. Procurement incentives

Another option for incentives are procurement benefits for companies that demonstrate a meaningful commitment to integrity practices. These may be in the form of an eligibility requirement or affirmative competitive preference, and can be applied in both the public and private sectors.

The simplest form of this incentive is a requirement that companies meet certain minimum good practice standards as a condition for doing business with State agencies. Mandatory programme requirements can be a very effective way to strengthen corporate integrity practices, but can also present special challenges for smaller enterprises that may not have the experience or resources to compete on this basis. Multinational corporations are increasingly making available good practice guidance and training to key partners in their supply chains. Governments have also responded in this way and provide technical assistance to smaller companies, through training seminars, model content and other means. Another response has been to ease programme requirements for smaller companies, recognizing their different circumstances and risk profile and taking into account that changing entrenched attitudes and practices will take time. This is sometimes accomplished through a minimum threshold for certain formal practices, allowing very small enterprises to satisfy integrity requirements in ways more suited to their size and circumstances.<sup>31</sup>

Good practice may also be encouraged through the giving of a preference in public procurement that rewards voluntary measures that an enterprise has taken to strengthen its integrity. This form of incentive—sometimes referred to as a “genuine” incentive—offers a counterpoint to suspension and debarment for corrupt acts. In a responsible contractor procurement model, a company’s poor record or practice on corruption will weigh against its suitability as a business partner for the government. Conversely, companies that have made corporate integrity a priority are more likely to be responsible and trustworthy and may be rewarded for this in the competitive process.

<sup>31</sup> Although not always a practical option, initiatives that retain flexible minimum integrity standards for small enterprises and support efforts to meet them are generally recommended. Whether integrity requirements are eliminated or only eased for small enterprises, eligibility for this special treatment should be clearly delineated by size and in a manner that excludes enterprises that may consider themselves small, but in fact have the required resources and ability to meet reasonable integrity standards. This would include, for example, entities that generate tens of millions of dollars annually in revenue, but for certain regulatory purposes may be classified as small businesses.

This basic principle is central to commercial business dealings, particularly in preferential selection processes that give priority to local business partners with a proven record of reliability and integrity. Similar considerations inform government procurement, and serve both to protect State fiscal and procurement interests and to advance benchmark practices for contractor integrity. As with mandatory programme requirements, potential negative impacts for smaller companies can be addressed through flexible standards, technical assistance and phasing.

Procurement preference can also provide a practical alternative for encouraging private sector integrity in States that face resource constraints or other obstacles to a traditional enforcement approach. Incentives that reduce the impact of sanctions can only have a limited effect in environments where the perceived risk of discovery and prosecution is low or non-existent. By contrast, incentives that reward good practice for its own sake can still be effective in the absence of a meaningful enforcement risk.

**Example:** In 2006, the World Bank Group debarred Lahmeyer International GmbH from Bank-financed contracts for a period of seven years, for corrupt activities in connection with the Lesotho Highlands Water Project. The period of ineligibility was subject to an optional reduction by four years, if the Bank determined that Lahmeyer had met specific compliance conditions and fully cooperated in disclosing past sanctionable misconduct. In August 2011, the Bank released Lahmeyer from debarment following its assessment that the company had satisfactorily adopted and implemented an effective compliance management system. This was accompanied by removal from the debarment list and a press release acknowledging the company's improvements.

World Bank Press Release No. 129/2007/INT and World Bank Press Release [15 August 2012].

### 3. Preferential access to government benefits

Preferential access to government support or services is a another potential good practice incentive.

This form of incentive is the counterpart to the sanction of the denial of benefits. As noted earlier, evidence of bribery or that a company is not conducting business with integrity may be grounds for the denial or withdrawal of export support or other business benefits. In contrast, these benefits may also be made available on a preferential basis to individuals and companies that are able to demonstrate a commitment to good practice. As with a procurement preference, this incentive may take the form of an eligibility requirement, for example, that an applicant for government benefits meets specified minimum programme standards. Preference may also be given for voluntary measures taken by an enterprise to strengthen its integrity.

Preferential access is most commonly associated with government procurement opportunities addressed in the preceding section, but may also be applied to other categories of government benefits or services. For example, a company able to demonstrate a commitment to ethical practice might be given “fast-track” access to customs services or a preference in export credit support. Investments in quality anti-corruption systems and controls can also be rewarded through targeted corporate tax benefits, mirroring the kind of expense deductions and credits widely available for business-generating activities. This can send a message to the private sector that investments in quality prevention programmes are as important as these other business investments.

Whether preferential access to benefits is based on mandatory standards or on voluntary good practice, it will be important to ensure that the specified prevention measures that are identified as good practices have substance and that the measures do not have unintended disparate effects on smaller companies.

**Example:** As part of a broader effort to combat corruption, Paraguay has streamlined its customs office and created a one-stop-shop mechanism for the import and export of goods. Companies with a proven record of integrity have benefited from expedited processing. One method of eligibility has been through a training and certification system developed by Pacto Ético Comercial, a private sector collective action initiative.

For additional information about this certification initiative, see <http://www.pactoetico.com.py/>.

#### 4. Reputational benefits

Reputational benefits can be another tool for encouraging corporate integrity, through public acknowledgement of a company's commitment to good practice and combating corruption.

As with reputational sanctions, positive information about a company's integrity will ordinarily be communicated through non-governmental channels in the private sector, the media and civil society. People in a particular industry are generally aware of which companies operate with integrity and can be trusted and they will take this into consideration in their risk and business planning. Companies that have earned a good reputation make for better business partners, and this will often be reflected in a competitive preference in procurement and other business selection processes. States can reinforce this positive market signal through measures of their own that encourage and reward good practice.

Judgements about corporate integrity are also shaped by a company's own public reporting on its anti-corruption activities, through the Global Reporting Initiative and similar channels, as well as public recognition of its membership in or support for integrity initiatives. Similarly, positive recognition in a comparative survey conducted by civil society can enhance a company's reputation for integrity.

**Example:** While some companies have fared poorly in recent civil society "name-and-shame" comparative surveys, others have benefited. For example, Statoil, the Norwegian oil and gas company, received the highest overall rating in Transparency International's 2011 "Transparency in Corporate Reporting" survey and was credited in media reporting for its strong performance.

Another notable recent development has involved the creation of "white lists" that recognize a company for good practice, as a counterpart to traditional debarment or "blacklisting." This is best illustrated by an innovative initiative in Brazil developed by the non-governmental organization the Ethos Institute. The Ethos Institute, supported by Brazil's Office of the Comptroller General, has created a "pro ethics list" to recognize companies that meet a high standard of anti-corruption practice. Some of the requirements for making this list are a rigorous code of conduct, effective training, a reporting system and complaints procedure, financial disclosure, and participation in collective action. Assessments are conducted by the Ethos Institute, with oversight by an independent group of experts, and there is periodic updating of both benchmark standards and company assessments.

More formal programme "certification" options may also be available in the future. The Brazilian initiative is explicitly not a certification process, but this type of third-party service is emerging. Commercial certification is still at an early stage and there is no consensus yet on benchmark standards for either the qualitative programme assessment or the certification reviews.

## 5. Whistle-blower awards

While preventive incentives are primarily aimed at encouraging corporate investments in good practice in anti-corruption programmes, incentives can also be used to encourage reporting of potential violations by individuals. Such incentives have been used for many years in the United States to encourage and reward reporting on procurement fraud and other violations in government contracting, resulting in reported savings to the government of more than US \$30 billion over a 20-year period.<sup>32</sup>

This form of whistle-blower incentive was recently extended on a broader basis to securities law violations by public companies, including the failure to properly record and report instances of bribery. Under this legislation, a whistle-blower may receive from 10 to 30 per cent of any amount recovered in an enforcement action.<sup>33</sup> Awards are mandatory, subject to a US \$1 million recovery threshold and certain other requirements. A successful applicant for a whistle-blower award must have been the original source for “high-quality” information that was provided voluntarily and led to the successful enforcement action. There is an exclusion for public officials, as well as individuals convicted of a crime relating to the reported information or who gain knowledge through the performance of audit services under the securities law. Provisions have also been made to encourage employees to report offences internally within a company before reporting to securities regulators.

**Example:** A whistle-blower who provided documents and other significant information that facilitated prosecution of a multi-million dollar scheme to defraud investors was awarded 30 per cent of a US \$1 million penalty ordered by a court. The actual award was limited to a percentage of the amount collected by the government and was publicly reported in a press release.

## C. Additional measures

This final section briefly surveys additional measures that States may use to reduce corruption involving the private sector, as an adjunct to enforcement sanctions and good practice incentives. A number of these additional measures respond to resource and other practical challenges that can undermine a more traditional enforcement approach.

### 1. Integrity pacts

Integrity pacts are a multi-stakeholder tool for strengthening integrity in public procurement. As the name suggests, they are a contractual agreement entered into between a government agency procuring goods or services and companies that wish to participate in the procurement in which all parties commit to certain minimum standards of integrity and transparency. Compliance is usually overseen by an independent monitor, often from civil society, with sanctions for non-compliance.

The integrity pact concept originated with the non-governmental organization Transparency International in the 1990s and has since been applied in more than 15 countries and 300 projects. Core elements for an integrity pact include a pledge by the government and bidders not to offer or accept bribes, “revolving door” restrictions on post-government employment, procurement transparency requirements, disclosures regarding agents and intermediaries, and appointment of

<sup>32</sup> US Department of Justice, “Justice Department Celebrates 25th Anniversary of False Claims Act Amendments of 1986: Considered Single Most Important Tool US Taxpayers Have to Recover Funds Lost Due to Fraud Against the Government” (2012), available at <http://www.justice.gov/opa/pr/2012/January/12-ag-142.html>.

<sup>33</sup> Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), Pub. Law No. 111:203 (2011). Criteria for issuance of a whistleblower award are detailed in final rules published by the US Securities and Exchange Commission, “Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934”, Release No. 34-64545 (12 August 2011), available at <http://www.sec.gov/rules/final/2011/34-64545.pdf>.

an independent monitor. Specific details, which can vary significantly, are spelled out in a formal contract document. Non-compliance may require a bidder to withdraw from a project, and other sanctions may also be applied.<sup>34</sup>

Integrity pacts may be project-specific, sectoral or applied on a government-wide basis. One of the earliest applications was for the construction of Berlin's new international airport, a €2.4 billion project that began in the 1990s. Other project-specific pacts have focused on infrastructure development relating to water supply and other public services. Integrity pacts have also been used to strengthen integrity practices on a sectoral basis, committing participating companies to minimum integrity standards in their interactions with government. In addition, a number of States have developed applications of the integrity pact concept for use on a government-wide basis.

**Example:** Integrity pacts have been used in hundreds of projects around the world, including more than 100 in Mexico with an aggregate value exceeding US \$30 billion. India, Malaysia and other States also require integrity pact agreements for most or all major procurements.

One of the earliest and most significant integrity pacts in Mexico involved the bidding phase for a major new hydroelectricity plant called "El Cajón." Mexico's Federal Electricity Commission (CFE) was the procurement agency, and the pact was facilitated by Transparencia Mexicana. Participants were required to submit a "Unilateral Integrity Declaration," signed by the highest-level officials of a bidding consortium. As part of the pact, the independent monitor met with each of the bidders to identify the aspects of the process that were considered most at risk of irregularities. Proposals were submitted by three consortia representing ten companies. The result was a successful bid which was substantially lower than CFE's allocated budget for the project.

Another early integrity pact, in Colombia, has focused on corruption involving piping for municipal aqueducts and sewer systems. Member companies of ACODAL (the Colombian Association of Sanitary and Environmental Engineering) entered into a "Pipe Manufacturing Agreement" that committed signatories to strict ethics requirements and an industry oversight process. The initiative, which is on-going, has been managed by an independent Ethics Committee and is widely credited with having helped to improve integrity and transparency in procurement in the piping sector.

## 2. Code-based initiatives

Code-based initiatives are another emerging tool for raising standards of integrity and compliance within or across business sectors. These are voluntary "collective action" initiatives by business, which are often in coalition with or facilitated by civil society organizations.

Code-based initiatives focus on raising overall standards of practice within a business community. They are typically national or regional in scope, but may also have a sectoral focus. Most build on a common set of standards, reflected in a code of conduct or guidelines for anti-corruption programmes. National initiatives tend to focus on smaller businesses with limited past experience or resources, and will often combine a formal public commitment to minimum integrity practices with practical implementation support of various kinds. While sectoral initiatives can also serve smaller businesses, they are more typically aimed at larger enterprises and the different corruption challenges they face.

Whether national or sectoral in scope, code-based initiatives can be a valuable adjunct to more traditional enforcement efforts. They give a focus and shared sense of purpose to participating organizations, facilitate the development and sharing of good practices, and provide a framework

<sup>34</sup> Practical issues in designing an integrity pact relate to the specific standards and procedures used to ensure integrity, the scope and nature of procurement transparency, sanctions for non-compliance, and the selection and authority of an independent monitor. A monitor's independence, experience and resourcing are critical ingredients essential to a pact's operational success as well as its public credibility.



for identifying and addressing common challenges. They also provide ethical companies with some assurance that they will not be undercut by rivals, through informal peer pressure and more formal oversight mechanisms.

**Examples:** There are many good examples of locally-based private sector anti-corruption initiatives. Three are briefly described here, from different regions, but with common objectives and methods.

**Nigeria:** The Convention on Business Integrity (CBI) was formally launched in 1997 as a forum for advancing business integrity objectives in Nigeria. CBI has developed a Code of Business Integrity that leaders in business and government publicly pledge to meet. It also provides member businesses with practical tools for implementing the Code, including a seven-step guide to corporate social responsibility, conducts member assessments and provides a forum for targeted collective action initiatives.

**Lebanon:** The Lebanese Anti-Bribery Network (LABN) was established in 2008 as a multi-stakeholder network of professionals dedicated to researching issues related to bribery in Lebanon, raising public awareness, and encouraging public officials to take measures to curb corruption. The LABN has developed a code of ethics for small and medium-sized enterprises, published a guide to the public audit process, and convened workshops on “collective action.” It has also released research papers on bribery and corruption in specific sectors, including electricity, taxation and construction.

**Thailand:** In response to public pressure to address corruption, leaders in Thailand’s business community joined together in 2010 to establish a “Private Sector Collective Action Coalition Against Corruption.” The Coalition, which was launched by the Thai Institute of Directors (IOD) and the Center for International Private Enterprise (CIPE), is supported by seven of Thailand’s major business organizations. Its ambitious agenda has included a campaign to raise private sector awareness about the harm from corruption, launch of a business code initiative, executive training on integrity practices, tools for designing and evaluating company prevention programmes, and a certification process for signatory companies.

Code-based and similar collective action initiatives are not a substitute for legal enforcement and other mandated Convention measures, but offer an important supplementary channel for advancing corporate integrity practices that may be encouraged through State recognition and other means.

### 3. Public sector reforms

Civil service and regulatory reforms that reduce the opportunities for corruption are another potential area for cooperation between States and the private sector. Like integrity pacts and code-based initiatives, this alternative form of engagement can be especially valuable where there are obstacles to more traditional State enforcement.

Several of the private sector “collective action” initiatives described in the preceding section have gone beyond the development of code-based standards and programme support to address a broader range of common regulatory concerns. Initiatives of this type recognize that the environment in which businesses operate can often be as important as any specific actions undertaken by individual companies.

While measures described in this *Guide* focus primarily on private sector integrity, there is also a “demand” side to corruption that must be addressed under the Convention. Articles 7 and 8 contain detailed recommendations for strengthening public sector integrity, through better systems for recruiting, retaining and compensating civil servants and additional measures that emphasize integrity, honesty and fairness in the performance of official duties. Article 9 details further measures for promoting transparency, competition and accountability in public procurement and the

management of public finances. Article 10 requires States to take measures to enhance transparency in its public administration and to seek to simplify administrative procedures.<sup>35</sup>

Civil service and regulatory reforms serve the broader purpose of making government more transparent, efficient and accountable, but can also significantly advance private sector objectives addressed through sanctions and incentives. Civil servants who understand the importance of integrity, operate in a clear and transparent environment and are properly compensated are less likely to demand or accept bribes from private actors. Companies can conduct their operations with more certainty and confidence that they will be treated reasonably and fairly. Measures that encourage the reporting of illicit conduct, that regulate the “revolving door” between employment in government service and business, and that address potential conflicts of interest from gifts and political contributions can be especially helpful in raising corporate integrity standards.

**Example:** The Malaysian Anti-Corruption Commission has a formal procedure for recognizing and rewarding civil servants who report on public bribery offences. The initiative is designed to raise public sector awareness about corruption, encourage reporting of violations and improve public perceptions about the integrity of civil servants. Reports are made to the Anti-Corruption Commission or law enforcement authorities and, on successful prosecution of an offence, may entitle a reporting official to public recognition and a financial award based on the circumstances of the case. Other provisions under Malaysian law regulate gifts in connection with an official’s public duties and require public officials to report any bribe offered, promised or given to them.

Civil service and procurement reforms are primarily a State responsibility, but local business communities can make a valuable contribution to these efforts. Private enterprises are on the corruption front lines, whether as a source of corrupt funds or as a victim of extortion, and they can often help to identify priority risks and effective response options. Private sector practices for identifying and mitigating corruption risks, training employees and monitoring for compliance can also be a model for parallel initiatives in State agencies to combat corruption.

The Convention recognizes a further private sector role in “preventing the misuse of procedures regulating private entities,” such as the licences and other approvals needed to undertake commercial activities.<sup>36</sup> Laws and regulations that are poorly designed, duplicative or unnecessary make it harder for companies to do business. They also create opportunities for corruption, whether by businesses willing to pay to expedite or circumvent a burdensome regulation or by public officials who condition action on a “facilitating” payments or other improper arrangements.

Government procurement is particularly susceptible to corruption because of the large amounts of funds involved and is singled out for special attention in the Convention, but the problem is much broader. Corruption can be a risk wherever there is required State action, discretionary authority and little opacity or accountability. Examples commonly cited by the private sector include business licencing and construction permits, securing basic public services, customs processing and the administration of environmental, health and safety regulations.

Whether a particular form of regulation is overly burdensome or only unwelcome by regulated parties will not always be clear, but engagement with the private sector to identify consensus areas for reform can be beneficial to both sectors. This form of civic action has a long history in many States, through open and transparent participation by business associations and individual companies in public policy debates over the proper role and content of business regulation. A number of the private sector collective action initiatives described in the preceding section have also focused on this involvement.

<sup>35</sup> For guidance on specific measures under these articles, see *UNCAC Legislative Guide* at pages 25-33; *UNCAC Technical Guide* at pages 13-46.

<sup>36</sup> Article 12(2)(d).

**Example:** In 1999, Colombia's leading business association Confecámaras launched a private sector integrity initiative called "Probidad" to combat corruption in Colombia. The initiative began with a detailed business survey to gauge perceptions of public sector corruption, confirming that bribery and lack of transparency were seen as major problems and that many companies did not participate in public procurements because of corruption concerns. These findings sparked a broader public debate in Colombia on the role of the private sector in corruption and contributed to government anti-corruption reforms, including a new procurement law in 2007 that strengthened and harmonized practices across the country. The survey also supported other Probidad initiatives, including municipal integrity pacts and a code of conduct for local businesses.

For additional background on this initiative, see I. Gómez and J. Arteaga, "The Private Sector's Role in Reforming Public Procurement: The Case of Colombia," available at <http://www.cipe.org/sites/default/files/publication-docs/041509.pdf>.

**Example:** Another model for private sector collective action, developed by Russia's Saratov Chamber of Commerce and Industry, focuses on the "corruption potential" embedded in draft business legislation. The "Saratov methodology", published in Russian and English, has been used by a number of business associations in Russia to identify legislative gaps or differences in the local and regional implementation of national laws that can give rise to corruption because of the discretion local officials have in interpreting the law. The process examines laws regulating procedures that entrepreneurs must complete to engage in business activities, such as obtaining licences, bidding on procurement contracts or buying land. The methodology involves surveying legal and government experts, analysing laws, and generating recommendations to close loopholes that allow for corruption.

The methodology is described in "Improving Regulation to Reduce Corruption: The Role of The Russian Business Community," available at <http://www.cipe.org/sites/default/files/publication-docs/saratovMethodologyEng2.pdf>. The project was developed in coordination with the US Agency for International Development and Center for International Private Enterprise.

#### 4. Public education

Activities that raise public awareness about the harm from corruption can also be a tool for strengthening corporate integrity and reducing corruption involving the private sector.

While there are many root causes of corruption, experience has shown that a lack of awareness of its corrosive impacts is an important contributing factor. Enforcement sanctions and good practice incentives can influence the cost-benefit analysis by an individual or organization considering corruption, but corrupt acts may also reflect a poor understanding of the harm from corruption. Practices that have become entrenched may appear more an inconvenience than a crime, and therefore, not be seen as being blameworthy.

Recent behavioural research suggests that by changing social attitudes about particular illicit conduct, social acceptance and, therefore, the incidence of certain forms of corruption can be reduced.<sup>37</sup> While there are bad actors who may knowingly and intentionally engage in anti-social conduct based on a calculation of risk and benefit, many others believe themselves to be honest and fail to appreciate the significance of their conduct or are otherwise able to rationalize misconduct.<sup>38</sup> Tax reporting and downloading of copyrighted music are illustrative, where communal attitudes often have a greater impact on conduct than laws do.

<sup>37</sup> See, for example, D. Ariely, *"The (Honest) Truth About Dishonesty"* (HarperCollins 2012).

<sup>38</sup> N. Mazur et al, "The Dishonesty of Honest People: A Theory of Self-Concept Maintenance," *Journal of Marketing Research* (2008); J. Dana et al, "Exploiting Moral Wiggle Room: Behavior Inconsistent with a Preference for Fair Outcomes," *Economic Theory* (2007).

**Example:** Public servants in Paraguay's Ministry of Education and Culture and five other government ministries responsible for administering a considerable portion of Paraguay's public budget participated in a comprehensive ethics campaign designed to strengthen integrity practices and reduce corruption. In addition to creating a code of ethics and an ethics office, the programme involved extensive awareness training and leadership engagement. The programme was launched in 2006 with a survey among public employees about perceptions on ethical and unethical behaviour within their ministries. A key finding, in line with recent behavioural research, was that most employees described themselves as ethical individuals and associated problems with others in their agencies.

The initiative was supported by the Millennium Challenge Corporation, described on its website at <http://www.mcc.gov/pages/countries/program/paraguay-threshold-program>.

The operative assumption in much of this research is that certain types of corruption are more a matter of custom than bad intent and that acceptance thresholds for individuals, organizations and the public at large can be changed through more and better information about the harmful impacts of corruption. A range of options for raising awareness is available, from small educational workshops to general public awareness campaigns and reform initiatives that target specific actions such as petty corruption among traffic police or customs inspectors.

**Example:** Transparency International Bosnia Herzegovina runs a programme called "Educating Future Leaders: Good Governance in Schools" that consists of a six-month course on civics, ethics and democracy and is presented in high schools and regional seminars throughout the country. Other national initiatives that focus on anti-corruption awareness-raising and youth education are described in a guide published by Transparency International, entitled "Teaching Integrity to Youth." Practical examples are drawn from 11 countries, including Argentina, Brazil, Cambodia, Colombia, Georgia, Italy, Macau SAR, Moldova, Uganda, the United States and Zambia.

Transparency International, Teaching Integrity to Youth, available at [http://archive.transparency.org/global\\_priorities/other\\_thematic\\_issues/education/anti\\_corruption\\_education/recommended\\_readings](http://archive.transparency.org/global_priorities/other_thematic_issues/education/anti_corruption_education/recommended_readings).

Consistent with article 13 of the Convention, many governments conduct public education campaigns to raise awareness about the harm from corruption, as well as to publicize their efforts to address the problem. Campaigns are also conducted by civil society organizations, often with the support of allied private sector interests.

**Example:** Hong Kong SAR's Independent Commission Against Corruption (ICAC) recently launched a new campaign to raise public awareness about the harm from corruption. The campaign uses the image of an egg yolk, pure and protected inside the egg, to symbolize the core value of integrity. Public service advertisements on television and radio warn that corruption, like any impurity for the egg, are a threat to society. Internet and other channels are also used to communicate a zero tolerance message on corruption. Another IACC programme seeks to engage teenagers through an innovative Facebook initiative (iTeen Xtra) that features daily chats and discussions, and an interactive on-line game (iTeen Detective) that has users help to solve a major corruption case.

# ANNEX I.

Common practices



SANCTIONS	PURPOSE
Monetary fines	Punish misconduct and deter future violations
Incarceration	Also punitive and deterrent, focused on individuals
Confiscation	Used to deprive wrong-doers of ill-gotten gains and deter future violations
Contract remedies	A tool for communicating, enforcing anti-corruption contract requirements
Suspension and debarment	Used to bar unreliable contractors from government procurement process
Loss of benefits	Limits wrong-doer access to other government benefits, services
Liability for damages	Compensates victims of corruption
Reputation	Holds wrong-doers publicly accountable

INCENTIVES	PURPOSE
Penalty mitigation	Encourages self-reporting of offences, credits company prevention efforts
Procurement preference	Rewards good practice through procurement preference
Preferential access to benefits	Rewards good practice with preferential access to government benefits, services
Reputation	Encourages good practice through public recognition
Whistle-blower awards	Encourages reporting by individuals of potential violations

ADDITIONAL MEASURES	PURPOSE
Integrity pacts	A tool for raising integrity standards on project or sectoral basis, through contractual commitments and third-party oversight
Code-based initiatives	Voluntary “collective action” initiatives by business used to raise awareness and strengthen integrity practices on a local, regional or sectoral basis
Public sector reform	Cooperative public/private initiatives that target the demand side of corruption, through civil service and regulatory reforms
Public education	Activities that raise public awareness about the harm from corruption



# ANNEX II.

UNCAC provisions  
relating to the private sector

## A. Criminalization provisions

Criminalization provisions in chapter III of UNCAC provide a baseline for corporate integrity, detailing corruption offences that States are called upon to proscribe by legislation. While a detailed examination of these offences is beyond the scope of this *Guide*, familiarity with the basic concepts and interpretative challenges is important to private sector engagement in this area. Companies need to understand, with reasonable precision, the meaning and scope of the legal definitions set out in UNCAC. This also will be important for the design and award of incentives for encouraging good practice.

### 1. Public and commercial bribery

Bribery is a core UNCAC concern, addressed in three separate articles. Articles 15 and 16 target bribery of national and foreign public officials respectively, and article 21 relates to commercial bribery in the private sector. The criminalization provisions of UNCAC address both “active” and “passive” forms of bribery, that is, both the act of offering or paying a bribe and the act of soliciting or accepting one. Taken together, these articles call on States parties to outlaw all forms of bribery in the conduct of business.

Bribery in a business context involves giving something of value to another person in order to gain an undue business advantage. Bribes are often in a cash form, but they can also involve a less direct and tangible benefit, such as an inappropriate gift or travel reimbursement or a steered business opportunity. The concept of undue business advantage is also very broad, including not only new or retained business, but also a regulatory or other competitive advantage.

Companies face two common challenges in implementing training and monitoring programmes to ensure compliance with anti-corruption laws. One is to determine the exact scope of the prohibition in order to communicate it to employees and agents. While some forms of bribery will be obvious, others may be more subtle and require elaboration, for example, defining the line between legitimate promotional expenditures and prohibited bribery. Another common challenge relates to differences in national laws. While most anti-corruption laws are broadly comparable, there can be important differences in coverage terms or statutory exceptions. The exception found in some laws for so-called “facilitation” payments is illustrative.

### 2. Trading in influence

Article 18 requires that a State party consider criminalizing “trading in influence,” which refers to giving a payment or an undue advantage to a public official in return for the influence of the public official in obtaining an undue advantage from the public authority of the State. This offence is similar to bribery and may be seen as such in the business context.

The offence of “trading in influence” is limited to actions “committed intentionally” in order that a public official or other person “abuse his or her real or supposed influence” to obtain an undue advantage in connection with the exercise of governmental authority. Political contributions are a special concern because of the potential for abuse, as a subterfuge for bribery, and require appropriate safeguards to prevent this. Public reporting is a common safeguard, and may be combined with limits on contribution amounts that are general or specific to companies or their “lobbyists.”

### 3. Embezzlement of property in the private sector

Embezzlement is another UNCAC priority for the private sector, addressed in article 22. States parties are required to criminalize the misappropriation of funds, securities or other things of value in violation of a fiduciary responsibility when committed intentionally “in the course of economic, financial or commercial activities.”

Embezzlement is commonly associated with false or misleading bookkeeping by an employee to conceal the theft of corporate assets, but can also involve misappropriation by a lawyer, financial adviser or other service professional of entrusted client accounts or investor funds. The provision

on criminalizing embezzlement reflects a broader State interest in preserving investor confidence in public companies and thereby advancing socio-economic objectives that benefit from a stable and reliable market environment. These same considerations underlie securities market regulation. While not specifically addressed in the Convention, in addition to enforcing the offence of embezzlement, States parties should be encouraged to develop good practice incentives to maintain effective controls for preventing and detecting embezzlement.

#### 4. Laundering of proceeds of crime

Corruption and money-laundering are intimately linked, with money-laundering being a common method of converting illicit funds from corruption into funds for personal use. This close connection is reflected in the article 23 requirement that States parties take appropriate measures to criminalize money-laundering, and a further directive in article 14 to prevent money-laundering through a “comprehensive domestic regulatory and supervisory regime” for financial institutions. Sanctions and incentives can be used to encourage financial institutions and others to adopt robust employee training and AML prevention practices.

#### 5. Concealment

Article 24 addresses the related problem of another person’s use or receipt of the proceeds from corruption, requiring that States parties consider establishing as a separate criminal offence the “concealment” of property known to derive from a violation of the Convention.

Concealment is a statutory crime in many jurisdictions, commonly associated with the intentional and fraudulent hiding of assets from creditors in bankruptcy or other legal proceedings. In a corruption context, the offence would extend to the receipt by a financial institution of customer funds that are known by the institution to derive from corruption. In this example, an institution need not have participated directly in the corrupt act, and under some national laws knowledge may be constructive rather than actual.

#### 6. Obstruction of justice

Obstruction of justice refers generally to the interference, through words or actions, with the proper operation of a court or officers of a court. Article 25 draws particular attention to words or actions that interfere with the giving of testimony or production of evidence in relation to a corruption offence, or the performance of official duties by a justice or law enforcement official.

This article and others relating to the protection of reporting persons and witnesses recognize that the integrity of the judicial system depends on participants acting honestly and without fear of reprisals. Threatening a judge or investigator, trying to bribe or silence a witness, or encouraging the destruction of evidence are examples of prohibited obstruction. For businesses, this can include intimidation or punishment of a whistle-blower.

### B. Private sector provisions

UNCAC contains a further set of provisions that call on States parties to enact or consider measures that promote corporate integrity and the reporting of corruption. The core commitment, outlined in article 12, is to take appropriate measures to prevent corruption involving the private sector. Additional provisions address the liability of legal persons, strengthening of accounting and auditing standards, consequences for violations, encouragement of prevention practices, protection of reporting persons and cooperation with law enforcement authorities.

#### 1. Private sector

Article 12 establishes a basic framework for combating corruption involving the private sector. It requires that States parties take appropriate measures to: (a) prevent corruption; (b) enhance accounting and auditing standards; and (c) provide effective, proportionate and dissuasive penalties for violations.

Enhanced accounting and audit standards and penalties for violations are means to accomplish the overarching goal of reducing corruption in the private sector. Enhanced standards provide for greater transparency, clarify a company's business operations, strengthen public confidence in its financial statements, and generally help to prevent and detect misconduct. Penalties that are "effective, proportionate and dissuasive" help to ensure that companies take standards seriously, as well as to level the economic playing field for ethical competitors. Additional provisions proscribe common practices associated with corruption, such as off-the-books accounts and false documentation, and require that States disallow the tax deductibility of expenses that constitute bribes.

Article 12 contains a further listing of recommended measures. These measures, and their benefits, include:

- *Promoting cooperation between law enforcement agencies and private entities.* Very often, private entities are in the best position to detect corruption and through cooperation and reporting can aid both prevention and deterrence efforts.
- *Promoting the development of standards and procedures to safeguard the integrity of private enterprises.* Organizations of any size and complexity need to have systems and controls for preventing corruption. Good models for this have been developed, and States can encourage their broader adoption through technical assistance, good practice incentives and other means.
- *Promoting private sector transparency.* As in other areas of corporate social responsibility, companies may be encouraged to report publicly on their anti-corruption efforts. Reasonable transparency practices help both to focus organizational attention and resources and to strengthen public confidence in the integrity of a company's business operations.
- *Preventing the misuse of procedures regulating private entities such as subsidies and licences.* This provision recognizes that private entities are at times victims of extortion by corrupt officials, as well as active bribers, and encourages States to take appropriate measures to reduce corruption risks in known vulnerable areas.
- *Preventing conflicts of interest involving former public officials.* Measures in this area target the so-called "revolving door" between government and the private sector by establishing a "cooling off" period before a former public official can engage in certain activities on behalf of a business employer. These restrictions, which in some States also apply to movement from the private sector to government, serve to prevent actual or perceived conflicts of interest.
- *Ensuring that private enterprises have sufficient auditing controls.* Auditing controls are a key feature of any compliance programme, used to prevent, detect and remedy corrupt and other illegal practices. They are a standard requirement for publicly-listed companies. Less formal and extensive auditing practices can also benefit smaller companies, and may be encouraged through standards development, technical assistance and targeted enforcement incentives.

## 2. Liability of legal persons

Article 26 contains an important innovation, requiring States parties to extend liability for Convention violations to "legal persons", that is, corporations and other private enterprises. Such liability may be criminal, civil or administrative, consistent with a State's legal principles, provided that the resulting sanctions are "effective, proportionate and dissuasive." This does not detract from the criminal liability of the natural persons committing the offence.

The rationale for extending liability to corporations and other private enterprises is two-fold. First, in an increasingly complex and global economy, it can often be difficult to identify or prosecute responsible individuals. Decision-making processes can involve multiple layers within an organization, operating through complex business structures. Responsible individuals also may reside in another State, and the benefits from a corrupt act accrue primarily to the enterprise



rather than to any one individual. This is especially common for bribery involving multinational enterprises. Second, extending liability to the legal entity—as well as to culpable individuals—can have an important deterrent effect, motivating an enterprise’s leaders to make compliance a priority and invest in effective prevention programmes.

### 3. Protection of reporting persons

The protection of reporting persons—commonly referred to as “whistle-blower protection”—is especially important to the prevention and detection of bribery and other forms of corruption involving the private sector. Corruption offences typically are covert acts, involving complex actions that can be difficult for non-participants to see and document without help from an insider. Such reporting becomes less likely when the individuals with knowledge of a potential violation fear retaliation for coming forward. This can also be a problem for businesses that become aware of corrupt acts by a competitor or public official.

Article 33 accordingly requires that States parties consider incorporating into their domestic legal system “appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with the Convention.” The critical importance of these protections—and the related mandatory obligation for States to provide protection for witnesses, experts and victims of corruption in article 32—has been elaborated in previous guidance for implementing the Convention.

The protection of reporting persons has two main aspects. Firstly, States parties are encouraged to incorporate appropriate whistle-blower protection into their domestic legal systems. These laws, which are now common, typically focus on the risk of retaliation by an employer or co-workers for reporting potential violations of law. They are most effective when broadly conceived, bearing in mind the critical importance of insider reporting to effective enforcement and the broader societal interests advanced by UNCAC. Secondly, companies should establish confidential communication channels which allow their employees and others to report concerns. As with governments, these are a primary source of information for managers within an organization who are responsible for preventing and detecting bribery or other improper conduct. Confidential channels for reporting have become a core element for corporate anti-corruption programmes, encouraged through various leniency incentives and legal mandates.

### 4. Consequences of acts of corruption

In the private sector, acts of corruption generally are committed in order to create or increase economic gain. They may facilitate business opportunities, allow for more favourable conditions in a contract, secure favourable administrative acts, such as concessions or procurement decisions, or otherwise advance an enterprise’s business interests. Article 34 recognizes that monetary sanctions may not always suffice to eliminate economic benefits from a corrupt act and calls on States to take additional measures to ensure that corruption is not profitable.

Article 34 contains a general obligation to take measures to address the consequences of corruption, leaving the choice of specific consequences to the discretion of States parties. States may themselves be victims of corruption and are encouraged to pursue, in appropriate circumstances, the annulment or rescission of corruption-tainted contracts, the withdrawal of concessions or other similar remedial actions. These other measures that may be considered could include the withdrawal of subsidies, the cessation of financial support, or bans from tender procedures for a specified period of time.

### 5. Compensation for damage

Article 35 establishes the further requirement that States parties take necessary measures to ensure that victims of corruption have the right to initiate legal proceedings for compensation against those responsible. These legal proceedings may be in the form of a private action or lawsuit, allowing victims to make compensation claims as a part of criminal proceedings or on other legal bases provided by a State’s domestic legal system.



Private actions will be familiar to many States from their use in an anti-trust or competition law context, where private actions serve both to compensate victims and to supplement governmental enforcement. Article 35 also may be satisfied through general legal provisions that provide a channel for seeking compensation, for example, “unfair competition” laws that authorize competitors harmed by corrupt acts to seek compensatory damages for lost business. Other provisions of UNCAC also provide for recovery of stolen assets by States.

## **6. Cooperation with law enforcement authorities**

Article 37 addresses incentives such as the mitigation of punishment that can be used to encourage participants in an offence to report violations and otherwise cooperate in their investigation.

As has been noted, corruption often occurs in secrecy and may go undetected without the cooperation of a participant in or witness to the offence. The Convention recognizes the need for practical means to encourage participants to come forward and that this may sometimes come at a price, such as mitigation of punishment or granting immunity from prosecution. Such incentives serve to advance the broader Convention goal of depriving offenders of the proceeds of crime and recovering such proceeds.

## **7. Cooperation between national authorities and the private sector**

The Convention recognizes that individuals and organizations in the private sector have a shared interest in combating corruption, as well as knowledge and expertise that can help law enforcement authorities to identify and prosecute violations. States accordingly are required by article 39 to foster cooperative relationships with the business community, particularly with financial institutions as they are in a position to monitor for financial irregularities that may be indicative of corruption. To do this, States parties should ensure that private sector entities understand their interest and role in supporting the Convention, cooperate with the private sector in the development of regulatory and compliance standards, provide them with reasonable assurance of confidentiality and protection from civil suits and claims for damages, and explore other means to encourage cooperative engagement.

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