

# SAFEGUARDS

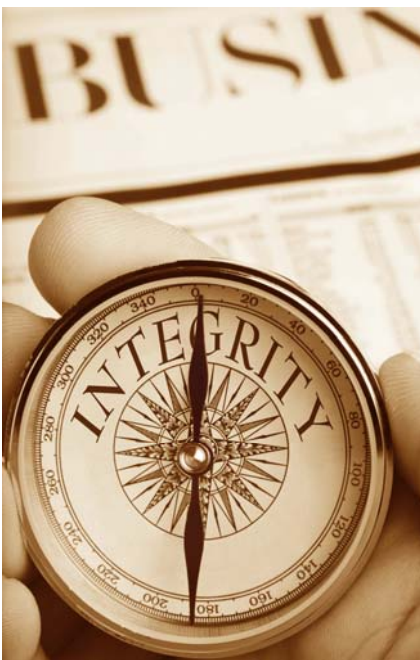
SGS CONSUMER TESTING SERVICES

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## ANALYSIS OF CORRUPTION CASE LAW 2011

What is the impact of the latest regulations, case law and international recommendations for companies' anti-corruption programmes? We would like to highlight some important events that have impacted organisations in 2011: The necessity to adopt an anti-corruption programme; The content that should be covered by an anti-corruption programme; The legal risks of having an insufficient anti-corruption programme in place.



### NECESSITY TO ADOPT A PROGRAMME

#### UK Bribery Act

Whereas previous legislation (such as FCPA) expected organisations to adopt an anti-corruption programme, to respond to the offence of 'failure of a commercial organisation to prevent bribery', the UK Bribery Act has formally created an obligation of implementing such a programme for the first time. "It is full defence for an organisation to prove that despite a particular case of bribery it nevertheless has adequate procedures in place to prevent persons associated with it from bribing." This creates obligations in terms of the means to be developed; it also offers protection to organisations that have now also received guidance on what should be included in such a programme – both through [the Bribery Act 2010 – Guidance](#) and the recent norm [BS 10500:2011](#).

### THE CONTENT OF AN ANTI-CORRUPTION PROGRAMME

Among multiple recommendations on what should be covered by anti-corruption programmes, 2011 has particularly focused on the following aspects:

- Facilitation / routine payments;
- Alert Systems;
- Control of Business Associates;
- Private Corruption; and
- Companies cooperation.

### FACILITATION PAYMENTS

Although facilitation payments are still tolerated under some regulations (FCPA for example), and companies are requested to limit and record them, there is a new trend which considers that facilitation payments should be considered as bribes and are to be forbidden. This not only forms part of the UK Bribery Act requirements but also of the update [ICC Rules on](#)

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[Combating Corruption](#) published in November 2011. "Enterprises should, accordingly, not make such facilitation payments, but it is recognized that they may be confronted with exigent circumstances, in which the making of a facilitation payment can hardly be avoided, such as duress or when the health, security or safety of the Enterprise's employees are at risk." (art 6).

#### ALERT SYSTEMS

If US regulations have always insisted on the necessity of implementing proper whistle blowing systems, the year 2011 has reinforced the importance given to this channel to fight corruption. The most significant development in this regard is the adoption of the Dodd Frank Act in August 2011 which rewards the whistleblowers with 10% to 30% of the fines imposed on Companies - where their information has enabled the SEC to make a case and obtain at least USD1M sanction. "[Assistance and information from a whistleblower who knows of possible securities law violations can be among the most powerful weapons in the law enforcement arsenal of the Securities and Exchange Commission](#)". The whistleblowers in US have been awarded a total of USD553M in 2011 thanks to the Dodd Frank Act. UK has also adopted a similar system to raise cases [SFO Confidential](#) – with no particular reward to whistleblower. This is seen as a tool to dissuade companies from tolerating unfair practices.

At least one of the cases brought in 2011 came about as a result of an employee alert. The EADS/GPT case - allegation of having offered luxury cars, jewellery and cash to the Saudi government - was disclosed by a GPT employee to SFO (UK).

#### BUSINESS PARTNERS

A permanent feature of previous years was a focus on the importance of controlling business partners – and not only the intermediaries but also joint venture partners, sub-contractors or other distributors (see in 2011 Johnson & Johnson or Diageo FCPA cases for example). This is confirmed not only by the latest guidance issued (UK Bribery Act Guidance, ICC Rules against corruption etc.) but also by the latest case law. Most of the cases resulting in penalties in 2011 have involved intermediaries (agents) to channel bribes regardless of the jurisdiction: USA (Tenaris, [Comverse Tech. Inc.](#); [JGC](#); [Maxwell Technologies Inc.](#)); Switzerland (Alstom); Australia (Securency); Poland (Philips Medical); Germany (Siemens).

#### PRIVATE CORRUPTION

Finally we can see that international recommendations and companies' own programmes are focussing less on public corruption. Of course public officers still represent the biggest risks and need to be particularly controlled but any kind of corruption - including private corruption - has to be forbidden and treated in the same way. This trend is particularly clear in the UNCAC and the UK Bribery Act. US Authorities are also addressing private corruption through regulations that complete FCPA: the Travel Act and/or the False Claim Act.



#### COMPANIES' COOPERATION

The analysis of case law in 2011 shows that companies are demonstrating the effectiveness of their programmes and reduce their potential liabilities by self-declaring situations to relevant authorities. A Siemens spokesman in 2011 stated in relation to the case identified in Kuwait 'We were able to uncover the incident at an early stage, we have promptly brought in the authorities, we have made the case public and we have immediately taken disciplinary measures'. Also several US cases were resolved through plea bargains: Tenaris (Luxembourg); Comverse Tech Inc (USA) or Tyson Foods Inc (USA).

#### THE LEGAL RISK OF HAVING AN INSUFFICIENT PROGRAMME IN PLACE

A growing number of countries is sanctioning the corruption of Foreign Public Officers. The number of countries adopting specific laws on the

corruption of Foreign Public Officers has increased. Since South Africa has joined the group of the member states having signed the OECD Convention in 2009 and Israel in 2010, Russia has signed it in May 2011 and obtained parliamentary agreement in January 2012 to ratify it. To demonstrate its commitment, Russia has adopted a specific law on May 4<sup>th</sup> 2011. Colombia was invited to join in November 2011.

Furthermore among the biggest countries having an influence on international trade, China adopted a regulation in February 2011 and India is currently reviewing its own regulations. Brazil is also working on its own bill to strengthen its foreign bribery law. This is a positive trend that is contributing to the development of a level playing field for all companies whatever their origin.

#### EXEMPLARY SANCTIONS

The analysis of FCPA cases demonstrates that the sanctions are constantly growing. Two cases out of the 10 biggest FCPA fines were imposed in 2011 (and 6 in 2010): JGC Corp with a fine of MUSD 218,8 and Deutsche Telekom with a fine of MUSD 95,2. Furthermore prison sentences have drastically increased with 4 cases out of the top 10 FCPA cases - up to 15 years sentence.

In parallel, in the first case in the UK since implementation of the UK Bribery Act, Munir Patel a court clerk has been particularly strict. The sanction was 9 years prison (3 years for corruption) for having received £500 from individuals wishing to avoid having road traffic offences recorded- even with a plea-bargain. According to a public declaration of the SFO Director Mr Alderman, between July and October 2011 the total number of investigations has increased from 26 to 50. Considering the extra-territoriality of the British law, this increases the pressure on companies and the number of potential jurisdictions to be pursued.

#### WIDE DEFINITION OF FOREIGN PUBLIC OFFICERS BY US AUTHORITIES

In spite of company protests, the US Department Of Justice (DOJ) has clearly confirmed this year that para-governmental organisations are treated as public officers. The number of cases relating to foreign state owned entities has significantly increased in 2011. Historically these represented around 60% of cases in 2009 and 2010 and this has risen to 81% in 2011 (13 cases out of 16). Three companies contested the definition of public officers in 2011 (ABB, Lindsey Manufacturing and Control Component). However the DOJ has confirmed that a foreign public officer is "any officer or employee of a foreign government or any department agency or INSTRUMENTALLY thereof" and instrumentally is considered in a very broad sense.

#### CERTIFY YOUR ANTI-CORRUPTION PROGRAMME

The Swiss Order to dismiss proceedings that closed the Alstom case in Switzerland in November 2011 has highlighted the efforts made by Alstom through its ETHIC Intelligence certification process conducted with SGS: "In view of all these circumstances taken together, the corporate liability of ALSTOM SA for deficiencies in organization must be described as insufficiently serious for a separate prosecution to be brought against ALSTOM SA, in addition to the prosecution of ALSTOM



Network Schweiz AG, as the memorandum by Professors Handschin and Pieth (...) further demonstrates that efforts had already been made for years to improve the organization of the compliance department. The latter fact also becomes manifest in the fact that ETHIC Intelligence agency in 2007 issued a certificate grading ALSTOM's Integrity Programme as good. In 2011, ALSTOM's Integrity Programme" was certified by ETHIC Intelligence Agency as the first of the CAC40 companies in 2011."

Certification against applicable legislation and acknowledged international best practice allows you to maximise your investment in this important area and gives you the opportunity to:

- Communicate your efforts in a positive way
- Offer credible proof of the quality of your programme
- Benchmark your company's integrity programme against international best practice

- Further enforce your policy and reduce the risk of potential lapses that could result in legal challenges
- Be seen as “best in class” within your industry
- Provide verified information to relevant stakeholders

Get more information on ETHIC Intelligence certification and other SGS corruption prevention services on [our website](#).



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