Making Anti-Corruption Regulation Effective for the Private Sector

A comprehensive regulatory framework for the private sector is a prerequisite for a transparent, honest and just society: where regulation is weak, corruption risks grow strong. As the primary rule makers and enforcers, governments have a responsibility to ensure the effective regulation of markets, protection of citizens and enforcement of laws. Ultimately, an inadequate or unstable regulatory framework for the private sector — without the will, power or resources to enforce legislation — facilitates the marginalisation of stakeholder rights, distortion of markets and negligent or corrupt practices.

The current financial crisis is a timely example. Some of the responsibility for the crisis lies with the poor regulation of financial markets, including inadequate rules and lax regulators. As the international economic system becomes increasingly complex, it requires regulators to be more vigilant and to tighten their regulatory frameworks to minimise corruption risks and ensure that any breaches are detected and punished. Leaders from the Group of Twenty (G20) countries have recognised these demands and have promised to strengthen regulatory regimes, oversight and risk management in order to respond to the current turmoil and prevent further market upheavals. Yet how and to what extent a comprehensive and well-resourced regulatory framework is put into practice for the private sector will define the future of the global economy.
1. Towards a comprehensive framework

**Legislation: robust and refined.** Even in the most advanced regulatory environments, legal loopholes exist and are exploited by companies, making it essential that systems are kept robust with continuous refinement.

Regulations need to adapt to challenges brought about by the emergence of new markets. For example, the growing trade in carbon emission credits as an integral part of the global response to climate change comes with considerable conflicts of interest and corruption risks that require co-evolving rules and institutions to keep these potential problems in check.

Along with nascent markets in need of regulation, the global economy is also changing rapidly with the rise of emerging economies such as Brazil, Russia, India and China, providing a new focus for the application of international norms and conventions. The varying quality, reach and consistency of legislation internationally provide opportunities for corruption to flourish. For example, a concise legal definition of bribery is difficult to establish and bribe takers often face harsher punishment than bribe payers. In many countries, the use of intermediaries and facilitation payments, two vehicles that may be used by companies to pay bribes, are inadequately covered by anti-corruption laws. While no distinction is made between bribery and facilitation payments in the UK and Japan for instance, facilitation payments tend not to be prosecuted in practice.

Even countries with good rules on the book and those that are party to comprehensive conventions exhibit shortcomings in their anti-corruption legislation. Research done by Transparency International on the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention illustrates that loopholes — such as short statutes of limitation, low penalties or ineffective criminal liability — can undermine this important legal framework, which seeks to address the supply side of bribing foreign public officials.

**Enforcement: resources and political will.** As practice has shown, good laws and regulatory institutions are not enough for effective oversight and enforcement. Effective enforcement depends on a combination of appropriate laws and sound institutions as well as adequate resources and political will.

Different resource levels can translate into diverse levels of enforcement, even where similar laws and regulations exist. Transparency and disclosure are key to ensuring that resources are used effectively. Citizens need to know how many people and what level of financial resources are devoted to enforcement. Linking this information with performance indicators, such as the number of cases investigated and fines issued by the regulating body, makes it possible to assess the efficiency and effectiveness of regulators. In today’s interconnected global economy, the weakest link, such as an under-resourced or poor-performing national regulator, has the potential to destabilise the entire system.

In the US, the case of funding for the Federal Bureau of Investigation (FBI) illustrates how resource constraints linked to the lack of political will can have a considerable impact on enforcement (see side bar). The UK Serious Fraud Office’s decision to halt its investigation into the case of the BAE Systems bribery scandal is also an illustration of political will interfering with enforcement. The decision was a serious setback for the OECD Anti-Bribery Convention. Not only could this decision constitute a green light for UK companies to bribe overseas,
but it also undermines international efforts to encourage states to enact and
enforce laws in compliance with the convention. Despite this shortcoming in the
UK, the US Securities and Exchange Commission is pursuing the case, illustrating how initial cross-border collaboration would have been a more
expedient first step and effective remedy.

Innovation and incentives: leveraging legislation and enforcement. Some
regulators have begun to use innovative techniques to increase the efficiency
and effectiveness of regulations and their enforcement. These tools complement
the remit to sanction wrongdoing with a stronger focus on sustainable prevention
and using available resources more efficiently (see side bar).

In some jurisdictions, the use of deferred and non-prosecution agreements can
spur companies into compliance. They provide an alternative to protracted and
expensive trials by offering delinquent companies the opportunity to enter into an
agreement with regulators. These arrangements typically require companies to
stop any wrongful practices, implement an improved compliance programme and
in some cases hire an independent monitor to oversee and report back on the
process, thereby shifting attention towards the prevention of future wrongdoing.

Other examples of innovative tools include partial blackouts, whereby certain
business lines or units of a company are frozen for a period of time if bad
practice is found and contained. This approach assumes that companies are
capable of solving their own problems and that this measure can motivate them
to do so. Ethical blacklisting is also an option when companies do not ‘play by the
rules’. While blacklisted, companies can be removed from bidding processes or
prevented from accessing export credits from governments and multilateral
development banks. Whitelisting, on the other hand, is used to give companies
preferential treatment, including access to bidding processes and inclusion in
certain company indices (e.g. the Maala Index in Israel).

For their part, companies can assist efficient and innovative regulation by
reporting on their compliance with corporate integrity and anti-corruption
standards. Exemplary reporting and a credible track record of compliance can be
linked to more lenient treatment by regulators if corruption incidences occur.

2. Responses

For regulation of the private sector to be effective, it must rely on successful
enforcement. Punitive action against companies is not enough; regulations need
to provide incentives for private sector players to help detect and disengage from
corrupt practices. Furthermore, regulators themselves need to be independent
and transparent and avoid conflicts of interest to ensure that they have the
freedom and resources to enforce regulations when breaches occur.

Businesses must:

Promote transparency, anti-corruption practices and active compliance with laws.

- Companies should adopt comprehensive anti-corruption policies and systems
  that are implemented, monitored and checked independently.

- Companies should make all anti-corruption commitments binding and verifiable,
  and report on key aspects of compliance and adherence to laws and regulations
  in a transparent and publicly available manner.
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Respond proactively to regulators’ enforcement efforts.

udit companies discover breaches in regulations within their own operations they should take advantage of voluntary disclosure policies and work with the regulators to improve compliance.

Governments and public regulators must:

Refine innovative tools for smart regulation and increase the use of such tools.

Regulators increasingly complement punishment with a focus on sustainable prevention. These tools, such as deferred and non-prosecution agreements, monitors and ethical blacklisting, should be refined and promoted.

Promote transparency and accountability in the management and enforcement activities of regulators.

It is difficult to assess and compare the resources devoted to public regulation, the way these resources are allocated to different activities and the outputs these resources generate. Governments must make enforcement more transparent and accountable by publicly reporting this information.

Close loopholes, address new challenges and promote international coherence.

Governments should work to continuously refine laws so that loopholes cannot be exploited. Particular attention should be given to ensuring that new markets are adequately regulated.

Governments, including those in emerging economies, should strengthen international coordination and consistency of laws, including fully ratifying and implementing international conventions such as the OECD Anti-Bribery Convention and the UN Convention against Corruption.

Addressing corruption in an increasingly global environment requires anti-corruption agencies, tax authorities and financial market regulators to cooperate more closely across borders.

Civil society must:

Promote awareness of the importance of regulation and effective enforcement.

Civil society is well placed to promote effective regulation and support regulators by identifying potential loopholes and providing novel solutions.

Demand transparent and comprehensive reporting by companies and regulators

Civil society can help monitor compliance and regulatory efforts, if related information is publicly available. Civil society should demand transparent and understandable reporting from companies and regulators.

References:

1 See www.londonsummit.gov.uk