

Anti-Bribery Policy and Compliance Guidance for African Companies



AFRICAN DEVELOPMENT BANK GROUP



“Companies can prevent bribery, a corrosive crime that erodes the strength of our economies and the trust of citizens in our private and public institutions. By working together to foster transparency, compliance and accountability, we can fight bribery and promote stronger, cleaner and fairer economies throughout the African continent.”

*Angel Gurría, Secretary-General,
Organisation for Economic Co-operation
and Development*



“Transparency and accountability provide the pillars for good economic governance which itself forms the foundation for real economic transformation. It is the duty of all actors on the continent, both public and private to break the chain of corruption.”

*Akinwumi Adesina, President,
African Development Bank*

A powerful tool for fighting bribery in Africa

Corruption is detrimental to economic, political and social development. It distorts market competition, undermines productivity and ultimately impedes sustainable economic growth. This can be measured in Africa. Indeed, while sub-Saharan Africa has become a commercially significant market, bribery and corruption risks are deterring higher rates of investment and the ability of companies to conduct business fairly on a level playing field. The African Development Bank estimates that USD 148 billion is lost to corruption in Africa every year. The bribery risks confronting both African and foreign companies in Africa, including small and medium-sized enterprises, can be attributed to multiple factors. These include:

- the prevalence of business sectors prone to corruption;
- predominantly cash-based economies;
- the requirement to use local agents to carry out projects;
- systemic public sector corruption; and
- weak law enforcement capacity often topped with lack of political will.

Business has a key role to play in improving corporate integrity and accountability, while promoting growth through an environment conducive to attracting foreign investment.

While the legal framework is changing in many African countries with the enactment of anti-corruption laws, the setting up of dedicated anti-corruption authorities, and greater scrutiny from civil society and the media, the business sector must also fight actively against bribery. Indeed, businesses paying bribes to obtain business contracts contribute to undermining the integrity of the public sector in the country in which they are operating, compounding the poverty and governance challenges. In turn, business has a key role to play in improving corporate integrity and accountability, while promoting growth through an environment conducive to attracting foreign investment. This is why the OECD-AfDB Joint Initiative to Support Business Integrity and Anti-Bribery Efforts in Africa (Joint Initiative) supports efforts by Africa's private sector to improve corporate integrity and accountability and ultimately prevent bribery from occurring.

An essential first step is for individuals and companies to educate themselves about the risks and to ensure adequate controls are in place to prevent bribery.

Taking a proactive approach to compliance and making it integral to your company's corporate ethos and culture is the best way to protect your company from bribery risks. An essential first step is for individuals and companies to educate themselves about the risks and to ensure adequate controls are in place to prevent bribery. The *Anti-Bribery Policy and Compliance Guidance for African Companies* (Guidance) is a powerful tool to help African companies of all sizes set up measures to prevent bribery and improve the quality of corporate compliance and bribery prevention measures. Most importantly, an anti-bribery policy is not just about "ticking the boxes". Developing preventive measures and implementing them in a meaningful way are two very different things. This Guidance not only assists companies to get started with drawing up a corporate anti-bribery policy and related compliance measures, it also provides some insights on how to put them into practice. Strong anti-corruption corporate compliance frameworks ultimately benefit all firms – foreign and domestic, large and small.

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The fight against bribery in Africa

Navigating bribery risks

The African Development Bank estimates that USD 148 billion are lost to corruption in Africa every year.

Over the past two decades, sub-Saharan Africa has become a commercially significant market (Ernst & Young, 2013). According to the United Nations Conference on Trade and Development (UNCTAD), FDI levels have increased five-fold over the past few decades, reaching USD 54 billion in 2014. This illustrates growing investment confidence from the private sector. However, bribery and corruption risks are deterring higher rates of investment. In this respect, the African Development Bank estimates that USD 148 billion are lost to corruption in Africa every year (African Development Bank, 2015).

An essential first step in preventing bribery in business is for individuals and companies to educate themselves about such risks and to ensure adequate controls are in place to prevent bribery.

Paying bribes is still perceived as the “only way to survive” in some African countries, whether as a company or individual.

Bribery is the act of offering, promising or giving of an undue advantage (see Box 2 for a fuller description). It is by no means unique to African countries; corruption exists in every country, albeit in varying degrees. However, certain conditions make the

region more prone to bribery risks for both African and foreign companies. In response to a questionnaire conducted in the development of this Guidance, a number of countries refer to systemic public sector corruption as a direct cause of bribery in business. Low government wages often result in public officials seeking to supplement their income by soliciting bribes. Recent studies also indicate that bribery continues to be an accepted practice in many countries (Ernst & Young, 2013). As such, businesses that require interaction with public officials are those most likely to generate high risks of corruption, in particular in the issuing of public contracts, public land allocations, licenses and concessions and in customs clearance. While this is changing with the enactment of anti-corruption laws and greater scrutiny from civil society and the media demanding that governments take action, bribes still remain a common practice in daily life across Africa. According to Transparency International’s Bribe Payers Index, sub-Saharan Africa continues to have the highest reported bribery rate (Transparency International, 2011). The ranking of most sub-Saharan African countries in Transparency International’s 2015 Corruption Perception Index suggests that corruption is still endemic in the region (Transparency International, 2015). While risks differ between countries and markets, to many, paying bribes is still perceived as the “only way to survive” in some African countries, whether as a company or individual (Convention on Business Integrity, 1997). Companies operating in such environments may still be operating under the outdated belief that bribery is a normal – and even expected – part of business conduct.

The wealth of natural resources in the region also creates bribery risks for both African and foreign companies. Corruption is endemic in many of Africa’s resource-rich countries where the demand and supply of bribes in return for lucrative licenses and concessions has contributed, in part, to what is termed the continent’s “natural resources curse”. In questionnaire responses, a number of countries highlight the extractive sectors as those most prone to bribery and corruption. The bribery risks confronting companies, including small and medium-sized enterprises (SMEs), lie in the fact that licenses and concessions to extract resources are often issued by public officials with decision-making powers that are unchecked or with poor oversight. Many national petroleum companies are also state-owned or controlled, making business partners also public officials.

Most countries in Africa also remain predominantly cash-based economies, making it easier to conceal bribe payments and more difficult for companies to prevent and detect such payments through the maintenance of accurate books and records. Local laws in a number of countries also require that companies use a domestic partner in carrying out a project (Control Risks Group, 2011). Poor access to information and public records poses specific bribery risks by making it difficult for companies to conduct appropriate due diligence on third party business partners to ensure they are not acting as bribery intermediaries to public officials. As mentioned above, business partners may also be state-owned enterprises (SOEs). In addition to being prominent in Africa, SOEs confront heightened bribery risks due to the sectors in which they operate and their proximity to government.

Many African companies have yet to establish effective internal control mechanisms to ensure compliance with the law and prevent bribery in their business transactions.

Law enforcement capabilities in a number of countries remain a challenge, especially in investigating and prosecuting economic and financial crime. While this is gradually improving, there remains a risk that weak enforcement and lack of political will undermine deterrence for both the demand and supply of bribes. Furthermore, while most countries across the continent have enacted anti-corruption laws, their effective implementation along with compliance and regulatory systems are still needed. As a result, many African companies – both large and small and medium-sized enterprises (SMEs) – have yet to establish effective internal control mechanisms to ensure compliance with the law and prevent bribery in their business transactions.

In this context, SMEs face additional difficulties and challenges in navigating bribery risks in Africa, particularly given the fewer resources at their disposal to address these risks. Section 6 of this Guidance provides some targeted insights to help SMEs overcome these challenges.

This overview is not intended to paint a dark picture of the region’s business environment, but rather to address openly the bribery risks – and the origins of such risks – companies of all sizes may confront in their business dealings in the region.

The business case against bribery

Corruption is detrimental to economic, political and social development. As the Preamble to the African Union Convention states, Member States are concerned “about the negative effects of corruption and impunity on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples.” Without sustained economic growth, African companies will not be able to compete in a global economy.

Bribery in business transactions can have devastating social effects.

More specifically, the human cost of bribery is something that companies often underestimate. It is not a victimless crime. Bribery in business transactions can have devastating social effects. Companies must somehow recoup the cost of paying bribes, and this can only be done through the delivery of sub-standard products or through charging higher prices. African citizens and consumers thus lose out; essential infrastructure projects are badly executed, hospitals collapse due to the use of poor materials, schools are under-supplied and essential goods must be bought at higher expense. It is not surprising that 83% of all deaths from building collapses in earthquakes over the past 30 years occurred in countries that are particularly corrupt (Transparency International UK, 2013). Companies that pay bribes to public officials to obtain business contracts also undermine the integrity of the public sector in the countries in which they operate, compounding the poverty and governance challenges confronting the region.

Bribery increases the cost of doing business. This is unsustainable for companies operating in Africa’s increasingly competitive and globalised markets.

Bribery is also strategically a bad decision for companies. Any short-term gains obtained through bribery will have longer-term consequences for companies. Bribery increases the cost of doing business; as mentioned above, the costs of bribery can often only be recouped through higher prices. This is unsustainable for companies operating in Africa’s increasingly competitive and globalised markets. Engaging in bribery also creates business uncertainty, as it does not necessarily guarantee business to a company; there can always be another competing company willing to offer a higher bribe to tilt the business in its favour. As a result, bribery may swiftly lead to, in economic terms, a “race to the bottom”, where the least desirable and inefficient company may obtain business, not on the basis of merit but on the basis of having deep pockets – a situation that cannot be sustained over the medium and long term. Furthermore, bribery hinders innovation – money spent on a bribe is not spent on innovation, resulting in a company sacrificing its own success and position in constantly evolving marketplaces, particularly in sectors such as information technology and communications.

Companies that engage in bribery also face serious reputational consequences among the public, peers, employees and business partners. Consumers are increasingly becoming alert to a company's corporate social responsibility and ethics. Talented job-seekers may also be reluctant to work for a company whose reputation is tainted by corruption, resulting in a loss of qualified personnel. The reputational consequences of bribery can also lead to additional repercussions such as losses in investment, financing and a decrease in share value; financial institutions and business partners do not want their reputations tainted by engaging with corrupt companies.

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The extra-territorial reach of foreign anti-bribery laws, such as those in the United States and the United Kingdom, can also impact African companies, particularly if it is chosen as a foreign business partner. Companies from these jurisdictions, as well as others with strong enforcement of anti-bribery laws, must

conduct due diligence on their business partners to ensure there are no bribery risks, as they can be held liable for their corrupt practices. The 41 States Parties to the OECD Anti-Bribery Convention also criminally prohibit the offering, promising or giving of a bribe to a foreign public official, and in some cases, may have jurisdiction over partnering companies, intermediaries and individual agents. Foreign bribery enforcement is on the rise in such countries. Since 1999, there have been enforcement actions against 263 individuals and 164 entities for foreign bribery. In 41% of cases, intermediaries were involved such as local agents, sales and marketing agents, distributors and brokers. Another 35% of intermediaries were corporate vehicles, such as subsidiary companies and local consulting firms (OECD, 2014). Accordingly, companies from such jurisdictions will demand strict integrity on the part of their African business partners and would be wary of partnering with local companies that have engaged in bribery or do not have anti-bribery compliance measures in place. Furthermore, African companies listed on US stock exchanges or carrying on business in the United Kingdom would be subject to the jurisdiction of the Foreign Corrupt Practices Act (FCPA) or UK Bribery Act.

Finally, while anti-corruption law enforcement remains a challenge in a number of African countries, the situation is gradually changing. Most Joint Initiative countries now have anti-corruption laws in place that prohibit the offering, promising or giving of bribes as well as legal frameworks for corporate criminal liability (OECD, 2012). Most Joint Initiative countries have also established dedicated anti-corruption authorities, such as Kenya's Ethics and Anti-Corruption Commission (EACC), Economic and Financial Crimes Commission (EFCC), Uganda's Inspectorate of Government (IGG), Zambia's Anti-Corruption Commission (ZACC) or the National Anti-Corruption Commission of Cameroon (CONAC), to name a few. Specialised training of law enforcement officials in the investigation and prosecution of economic crimes is also on the rise. A number of countries, including Kenya, Mauritius, Malawi, Nigeria, Rwanda, South Africa, Tanzania and Zambia, can also hold legal persons liable for corruption offences (OECD, 2012). Companies can therefore face serious legal risks by engaging in bribery, including criminal fines, imprisonment of their CEOs and employees, and damages. Such companies can also be debarred from bidding in domestic public tenders, as well as from contracts from the AfDB, World Bank and other international financial institutions. For example, as of December 2014, there were 61 firms and individuals from the sub-Saharan African region on the World Bank's debarment list. As of March 2016, there were 49 firms and individuals from the sub-Saharan African region on the AfDB's debarment list.



Raising awareness of the law among employees

An essential first step in preventing bribery in your company's business transactions is to ensure that employees are made aware of anti-bribery laws in the country where your company is headquartered, countries where your company operates and where your company may be subject to the jurisdiction of foreign anti-bribery laws. This is particularly important for those employees whose positions place them at a higher risk of committing bribery. One of the most prominent risk areas lies in sales and marketing personnel who may engage in bribery under pressure to meet sales targets. Those working on public procurement bids may also face higher bribery risks because of their close interaction with public officials (Transparency International, 2010).

Knowledge of the law is not just useful to ensure compliance but can also serve as a tool for employees when confronted with bribe demands. A corrupt official may be deterred from seeking bribe payments when an employee cites the law prohibiting the payment of bribes.

Training employees on the different sets of rules and regulations governing anti-bribery is a prerequisite for minimising your company's risk. This section highlights several important areas.

Domestic anti-bribery laws

Relevant employees should be made generally aware of the anti-bribery laws in the country in which your company is headquartered. Individual employees as well as your company as a legal person can be held criminally liable for engaging in bribery. Your country's anti-bribery laws may also criminalise the bribery of foreign public officials; it would therefore also be a criminal offence if your company bribed a foreign public official in a business transaction. To date, South Africa is the only African country party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. However, as the offence of foreign bribery is also required under the UNCAC, a number of African countries also criminalise such acts.

If your company is operating in foreign countries, it is essential that employees are familiar with the bribery laws in those countries, as your company and its employees can also be subject to their criminal jurisdiction. In addition, what may be considered as bribery in your country may be different from that in the foreign country. Some anti-bribery laws allow for an affirmative defence if the bribe payment was permitted under the laws and regulations of the foreign country. However, it would be very rare for a government to explicitly allow for such payments.

Domestic anti-bribery laws may be found in stand-alone legislation, such as specific laws dedicated to the prevention and combating of corruption. Countries such as Kenya, Malawi, Nigeria, Rwanda, Sierra Leone, South Africa, Tanzania and Uganda have enacted stand-alone anti-corruption laws. Anti-bribery laws may also be found in a country's penal code. This is the case in countries such as Benin, Cameroon, Ethiopia, Mauritius and Senegal (OECD, 2012).

Foreign anti-bribery laws

Your company and its employees should be alert to laws in countries with strong enforcement of foreign bribery offences. There are two main reasons for this: first, companies from an increasing number of foreign jurisdictions are obliged to carry out due diligence when engaging with foreign partners and other third parties to ensure they are not a conduit for bribery. As such, if your company seeks to benefit from a partnership with companies from such countries, your company should have sound anti-bribery policy and compliance measures in place. Secondly, as a number of African companies are becoming more globalised, they may be subject to the jurisdiction of foreign anti-bribery laws with extra-territorial reach. The US FCPA applies to United States issuers (publicly-traded companies required to file reports with the Securities and Exchange Commission).

This generally covers any company listed on a US stock exchange. The jurisdiction of the FCPA would also be triggered if a foreign national or entity violates its provisions while in the territory of the United States. The UK Bribery Act also applies extra-territorially to foreign companies that carry on business or part of a business in the United Kingdom. The Act does not define “or part of a business”, which would be subject to interpretation by the courts. African companies should therefore exercise caution; having a United Kingdom representative office or agent may be sufficient to trigger jurisdiction.

Relevant international and regional anti-corruption conventions

It can be useful for employees to know the international standards that form the basis of a number of domestic anti-bribery laws. This adds background and context to compliance beyond the domestic sphere, as it is important to be aware that there are international bodies monitoring countries to ensure they are enforcing their anti-bribery laws, and that their companies are subject to these laws. The Annex provides a list of relevant international agreements and their respective anti-bribery provisions.



Developing your company's anti-bribery policy

A corporate anti-bribery policy sends an essential signal to employees, clients, vendors, suppliers, agents, and other business partners that your company has zero-tolerance towards bribery. The policy should be easily accessible on your company's website and intranet or other means used to communicate to employees and external parties. To help guide your company, this section sets out the key components of a corporate anti-bribery policy and suggests practical implementation steps.

Leadership and commitment

Before addressing the key elements of a corporate anti-bribery policy, it is crucial to emphasise from the outset the importance of senior management's active commitment to ethical conduct and, in turn, your company's anti-bribery policy. Without clear and visible commitment from company leadership, your anti-bribery policy risks being relegated to words on paper, rather than meaningful practice. In short, actions speak louder than words.

The Board of Directors should set the tone, and senior management should regularly communicate the policy and reiterate the principles in internal meetings with staff as well as in external meetings, such as those with clients and business partners. Your company's leadership should make it clear that policy breaches can result in the termination of employment or withdrawal of business from business partners. In its communications, it is also essential that management reaffirm its support for employees who have confronted bribe solicitation, refused to engage in business on such grounds, and reported the incident to management. Above all, senior management, including the CEO and Board of Directors (or equivalent body) should demonstrate ownership of the anti-bribery policy and regard the company's compliance with its principles as its responsibility (UNODC, 2013: 19).

The term “tone from the top” has been widely used when referring to the importance of the Board of Directors and senior management's endorsement of a company's anti-bribery policy. However, the “tone from the middle” is of equal importance – especially in larger companies – as middle management can also play an important role in promoting business integrity (Corporate Executive Board, 2013). Research indicates that middle managers are more likely to receive reports of misconduct. Middle managers also have significant influence over teams, and their ethical behaviour can help reduce the likelihood of bribery and other forms of misconduct. Finally, the “tone from the top” may not always reach all employees in a meaningful way. Most employees – especially those in larger companies – interact with their immediate line managers more regularly than senior management, and as such they may represent a more realistic and accessible portrayal of the company's values.

CHECKLIST 1. How management can demonstrate leadership and commitment to the company's anti-bribery policy

- ✓ Clear statement by the Board of Directors, including approval of a code of conduct.
- ✓ Regular e-mails and internal office memos from the company CEO reminding staff of the company's anti-bribery policy.
- ✓ Articles from the CEO related to the company's anti-bribery policy in company newsletters and industry magazines.
- ✓ Management support for regular staff training on the anti-bribery policy.
- ✓ Ensure that the behaviour and actions of both senior and middle management match the anti-bribery message being communicated.
- ✓ Incentivise compliance by recognising and commending employees who have reported instances of bribe solicitation and followed the anti-bribery policy's protocol for such situations. Conversely, management should take disciplinary measures against those who do not comply with the policy; these can range from oral or written warnings to outright employee separation.
- ✓ Inclusion of an "integrity metric" in the performance appraisals of employees.

Devising a clear headline message

Your company's corporate anti-bribery policy should contain a clear headline message that bribery is prohibited under all circumstances. There should be no room for confusion or misinterpretation on the part of your company's directors, management, employees or third parties. Any room for misinterpretation could also be used by the courts to your company's detriment in cases where employees have paid bribes. In this regard, a zero tolerance policy is the best policy.

The message should be conveyed to employees working in marketing and sales in particular, as they may feel pressure to meet company sales targets and be more often confronted with bribery solicitation dilemmas. In this regard, your company should make it clear that resorting to bribery to meet targets is not acceptable and that all business should

BOX 1. Examples of company anti-bribery policy statements

- **Netcare South Africa:** "Netcare prohibits corruption, bribery, economic crime in any form. The company adopted a zero-tolerance stance towards unlawful and unethical behaviour and actions, irrespective whether the influence is internal or external to the organisation".
- **MTN South Africa:** "Fraudulent and corrupt activities are a threat to the sustainability and reputation of any business. MTN has a zero tolerance approach to fraud, bribery and corruption, and we are constantly striving to improve our fight against it. It is our policy to conduct all our business activities with honesty, integrity and to the highest ethical standards".
- **MTN Nigeria (MTNN):** "As a responsible corporate citizen and to mitigate the effects of corruption within its business operations, MTNN's take on the "zero-tolerance" policy against corruption is one of utmost compliance, having in place firm guidelines meant to tackle corrupt or fraudulent practices..."
- **St. Nicholas Private Hospital Group Nigeria:** "A zero tolerance policy on corruption is firmly entrenched in the system and there is an effective disciplinary for erring staff".

Note: These examples, using language drawn from Nigerian and South African companies, may help inspire your company develop its anti-bribery policy statement (Tagbo & Vlok, 2014). Reference to these examples should in no way be interpreted as an endorsement of these companies' anti-corruption compliance programmes by the OECD or AfDB.

be conducted in compliance with the policy, even if it results in a loss of business. Conducting business through bribery will ultimately prove to be more costly for your company – with the inefficiency, business uncertainty, reputational and enforcement risks – than its denunciation.

A number of excuses are often advanced in attempts to justify bribery. These include arguments surrounding local customs (“this is the way things are done in this country/region”); mentality (“we wouldn’t be able to compete unless we paid a bribe”); pretending it is not a bribe (“it was just box seats to the Wimbledon finals and a suite at a luxury hotel”); acts of intermediaries (“our agent was paying the bribes – not us”) (Transparency International UK, 2013); or, blaming competitors (“everyone else is doing it”). Your company should make clear to employees that such excuses deviate from good business practice and would not provide a legal defence. Such clarifications would also go hand-in-hand with a zero tolerance policy.

Understanding the act of bribery

The act of bribery should be clearly set out in your company’s anti-bribery policy. This is an area prone to confusion, and it is important that employees are aware of the various scenarios in which the offence of bribery has been committed. There are a range of definitions that can apply to bribery; Box 2 sets out the fundamental elements of bribery.

BOX 2. Defining bribery: The fundamental elements

- Bribery is the act of intentionally offering, promising or giving of an undue advantage to induce that person to act or refrain from acting in relation to performance of official duties, in order to obtain or retain business or other forms of improper advantage in the conduct of business.
- Usually, there is a *quid pro quo*, in that both parties will benefit. For example, the public official would benefit from a bribe payment and the company would benefit from being awarded a license or concession. However, it is still bribery even if the company does not get the intended result, and your company, CEO and/or employees may still be held liable for bribery.
- It does not matter if the undue advantage is transmitted indirectly through the use of an intermediary, such as an agent, supplier or other business partner. Again, your company, CEO and/or employees may still be held liable for such bribery.
- It also does not matter to whom the undue advantage is intended, as long as it is provided in exchange for the official to act or refrain from acting in the exercise of his official duties. Therefore, it is still bribery when the undue advantage is paid to a third party on behalf of the intended recipient, such as his/her family member, a political party, a company or a charity.
- Understanding the concept of a public official is also essential in defining the act of bribery to ensure your employees understand the scope of the recipient. International best practices define public officials as persons holding legislative, administrative or judicial office, whether appointed or elected; any person exercising a public function, including for a public agency or public enterprise; and any official or agent of a public international organisation.

Under international standards, employees of SOEs – whether low level or senior management – are considered public officials, unless the enterprise operates on a normal commercial basis in the relevant market (i.e. on a basis which is substantially equivalent to a private enterprise, without preferential subsidies or other privileges). For example, the OECD Anti-Bribery Convention defines a “foreign public official” as covering any person exercising a public function for a foreign country, including for a public enterprise. A number of countries apply broad definitions to public officials under their anti-corruption laws. Rwanda’s anti-bribery laws, for instance, define public officials as including those working in public companies and public enterprises (Article 2 of Law No. 23/2003). Similarly, Nigeria’s Corrupt Practices and Other Related Offences Act (CPROA, Section 2) defines “public officer” as a “person employed or engaged in any capacity in the public services of the Federation, State or Local Government, *public corporations or private company wholly or jointly floated by any government or its agency or its agency including the subsidiary of any such company whether located within or outside Nigeria* [...]”

One group of persons who could potentially be considered as public officials, especially in the sub-Saharan African region, are tribal leaders and village elders. In Nigeria, for example, each of its 36 states is comprised of local tribes, with some chiefs having considerable power and influence. An important dimension of the influence of traditional leaders is the community control they may have over land and natural resources. In some cases, traditional leaders may serve as unofficial advisors to elected and appointed public officials. Others may be appointed themselves by elected or appointed government officials (Brown, 2009). Checklist 2 proposes questions that may help your company to determine whether such traditional leaders may be deemed public officials.

CHECKLIST 2. Determining the status of a traditional leader/village elder

- ✓ **Government membership?** Does the traditional leader/village elder hold him/herself out as a member of, or agent for, the government, whether at the national, regional, provincial or municipal level?
- ✓ **Privileges or obligations from government?** What are the traditional leader's/village elder's privileges and obligations under applicable local law?
- ✓ **Employment relationship?** Can the traditional leader/village elder be said to be an employee of a state-owned enterprise or otherwise connected to a public official?
- ✓ **Performance of public functions?** Does the traditional leader/village elder perform purely ceremonial functions, or is he or she empowered to perform traditional governmental functions, such as adjudicating land or other disputes, or officiating marriages?
- ✓ **What is the discretionary authority granted to the traditional leader/village elder?** Is his or her permission or approval required by law or in practice to obtain permits, concessions or rights from the government?
- ✓ **Is compensation provided?** How does the traditional leader/village elder earn an income? Is it received from the government?
- ✓ **Is the traditional leader's/village elder's tribe subsidised or administered by the government?** Does the government subsidise or administer the tribal leader's tribe or village elder's traditional community?

Note: See Funk & Cohen, 2014.

Clarifying bribes, facilitation payments and duress payments

What constitutes a bribe can be an opaque area for employees. They are often confused with small payments made to public officials to perform a routine government action (facilitation payments) or payments made when an employee's health, security or safety are put at risk (duress payments). It is essential that your company clearly set out its policy and approach to these payments to ensure there is no room for confusion.

International legal standards define bribe payments as both pecuniary and non-pecuniary undue advantages. It is not just cash in a briefcase exchanging hands, but can be anything of value. They can thus include intangible items such as positions on boards, admission to universities or the sharing of confidential information. Other examples of bribe payments advanced by member countries based on experience include clothes or jewellery for the recipient's spouse; paid holidays; gifts of the briber's inventory or services, such as the construction of a home or home improvements by a contractor; sexual favours, or hidden interests in companies.

Facilitation payments – often referred to informally as “grease payments” – are unofficial payments made with the purpose of expediting or facilitating the performance by a public official of a routine government action to which the payer is legally entitled. In short, they are used to persuade public officials to carry out a task they are already obligated to do. The demand for such payments – typically done by low level and low-income officials – remains common in Africa. For example, companies often confront situations where public officials solicit such payments for expediting the issuing of licenses or permits, or clearing customs at ports (Business Anti-Corruption Portal).

It must be emphasised that facilitation payments are illegal in most jurisdictions; they are considered simply “small bribes” (Transparency International, 2014). The UK Bribery Act, for example, states: “facilitation payments, which are payments to induce officials to perform routine functions they are otherwise obligated to perform, are bribes” (Ministry of Justice of the United Kingdom, 2010). International standards have also recognised the corrosive effect of such payments, particularly on sustainable economic developments and the rule of law.

The OECD Anti-Bribery Convention recommends that countries encourage their companies to prohibit or discourage such payments. The UNCAC does not expressly provide an exception to the bribery offence for small facilitation payments. As Transparency International states, such payments “feed a culture of corruption, which creates an unstable operating environment for companies” (Transparency International, 2014).

The difficulty your company’s employees may face is that there is no clear demarcation of when a facilitation payment can become a bribe. It could be determined by the amount paid, the recipient of the payment and the frequency of the payment. However, rather than face this uncertainty and the need to navigate different countries’ legal regimes on facilitation payments, your company should consider adopting a blanket prohibition on the making of such payments in its anti-bribery policy. This approach is both safer and more efficient, and reflects the current global trend companies are following with respect to facilitation payments.

There may be pressing situations where an employee cannot avoid paying a bribe or facilitation payment. This can include situations where an employee’s health, security or freedom is put at risk. In these situations, your company’s anti-bribery policy should clarify that such payments are not considered bribes and would probably trigger the defence of duress. However, it is critical that such situations be narrowly and clearly defined, to avoid misinterpretation or possible abuse or exploitation. Your company’s anti-bribery policy could also set out what steps employees should take when confronted by such threats. Emphasis should also be placed on *post facto* control measures (Checklist 3).

CHECKLIST 3. Addressing duress payments

- ✓ Clearly define the scope of duress payments. Reference should be made to your local law and jurisprudence on duress.
- ✓ Highlight that the safety of your employees is paramount.
- ✓ Instruct employees not to refuse to make a payment if faced with a threat of, or fear of, violence or loss of liberty.
- ✓ Instruct employees to report incidents immediately to senior management.
- ✓ Senior management, in turn, should consider reporting incidents to relevant law enforcement authorities.
- ✓ Ensure that duress payments are accurately reflected in your company’s books and records.

Rules on gifts and hospitality

The giving of gifts and hospitality can play an important role in building and facilitating business relationships. However, the giving of some gifts and hospitality can create improper influence and in some instances be viewed as bribes. This can damage your company’s reputation and potentially break the law. Because of this, some companies have chosen to adopt a complete ban on the provision of gifts and hospitality.

If your company chooses to give gifts and hospitality, then it is important that the anti-bribery policy sets out clear rules to prevent bribery risks. Distinguishing between a genuine gift and a bribe can be difficult and employees need to exercise care when offering gifts and entertainment. In developing rules, your company may wish to include the points and principles set out in Checklist 4. Once again, it should be made clear that your company’s rules on gifts and hospitality extend to third parties or any persons performing services on behalf of your company.

CHECKLIST 4. Rules on gifts and hospitality

- ✓ Employees should first think about the motivation behind the offering of the gift or hospitality. Is it to help build a business relationship or an expression of business courtesy? Or is it intended to influence the recipient's objectivity in making a decision to favour your company? If it is the latter, the act is inappropriate as it can be construed as a bribe.
- ✓ Be aware of the geographical location in which your company is operating. The practice of giving gifts and hospitality can vary greatly between countries and often depends on local laws and customs.
- ✓ Set a reasonable monetary limit on gifts and hospitality that employees can offer. Values exceeding the limit should be subject to management approval.
- ✓ Be aware that some cultural and religious practices encourage gifts. This differs according to the local context and is a challenge for companies that are operating in multiple jurisdictions. In this regard, gift policies need to be context-specific and it is important to have thresholds for different staff.
- ✓ Do not use cash as a form of gift or hospitality, as it greatly increases the risk of it being viewed as bribery and not a legitimate and fair business practice.
- ✓ For transparency, ensure that all gifts and hospitality expenses are accurately recorded in your company's books and records. In this regard, your company could set up a central gifts and hospitality register.
- ✓ Bear in mind the timing of when gifts or hospitality are offered. This should not be done at the time when business decisions concerning your company are being made, such as during a tendering process, a licensing award or a contract renewal.
- ✓ Be alert to the nature of the recipients, especially if they are public officials. Most countries set strict limits on gifts and hospitality that public officials may receive. As such, your company may choose to prohibit any kind of gift to public officials, as it can lead to improper influence or the appearance of improper influence and can be viewed as bribes. Alternatively, your company could choose to offer gifts of modest value to public officials, where it is legal and considered respectful of local customs. Most importantly, ensure that it is legal in both your country and that of the recipient's country.
- ✓ With regard to hospitality and entertaining public officials, your company's policy should apply a sign-off mechanism, asking employees to seek management approval for such expenses.
- ✓ Legitimate travel and related expenses may be offered to public officials in connection with your company's promotion of products and services. However, your company should not select the public official who will be the recipient of a promotional trip. Furthermore, where a public official wishes to bring a spouse or guest, your company's policy should discourage such practice or request that the public official cover the costs of the spouse or guest. In such cases, the spouse or guest should not participate in any work-related hospitality.
- ✓ More generally, a useful question your company could encourage employees to ask themselves in determining whether the giving of gifts and hospitality is reasonable and legitimate is "how would it look if these details were on the front page of a newspaper?" If you wouldn't want such details publicised, then there is probably something wrong.

Charitable donations

Corporate donations to charities can also give rise to bribery risks. Like bribes, they can take on different forms, including monetary gifts, grants or scholarships, and can be used to facilitate kickbacks to third parties. Charities can also be used as fronts by corrupt public officials. A common bribery scenario is for a public official to agree to give a business advantage in return for a donation to a specific charity.

BOX 3. Examples of high-risk donation scenarios

- A requirement that a company construct an orphanage in a West African country and use a specific contractor chosen by the local official in doing so.
- A request by local tribal officials in a sub-Saharan African country that a company contribute to a community fund managed by those officials.

Note: (Demas, 2014)

There are countless charities operating in Africa. Your company should exercise caution in ensuring that any corporate donation does not have affiliations or connections with public officials, including their family members, advisors or entities in which the public official has a financial interest. Weak regulation of charities, as well as limited access to information can pose heightened bribery risks in the region. Several measures and best practices can assist your company to ensure that bribes to public officials are not disguised in the form of charitable donations and that payments are directed to and used for the intended charitable purpose (Checklist 5).

CHECKLIST 5. Avoiding bribes disguised as charitable donations

- ✓ Donations should never be made if there is a suggestion or perception that a benefit will be given to the company in return for the donation.
- ✓ Verify that the donation is not prohibited under the local law and ensure compliance with any disclosure or threshold requirements.
- ✓ Charities receiving corporate donations should be pre-approved by your company's Board of Directors or equivalent body.
- ✓ Donations should not be made in cash or paid directly to individuals or their bank accounts.
- ✓ Approval of donations should be made in writing and accurately recorded in company accounts.
- ✓ To ensure full transparency, donations should be publicly disclosed, for example, on your company's website or in its annual report.
- ✓ Follow-up measures should be undertaken to ensure the donation is being used for its intended purpose. In this regard, your company's policy could request auditing rights on charitable contributions. Where relevant, on-site checks could be applied in cases where the donation is made to support a physical project.

Political donations

A number of Joint Initiative countries have highlighted how political donations by companies have resulted in corrupt practices. One country stated that, during elections, it is common practice for businesses to pay large sums of money to political candidates in return for favours if the candidate wins. This is a form of bribery.

While political donations are legal in a large number of countries, the public tends to view such donations unfavourably and as a means of swaying political decision-making towards private interests. Such views can result in significant reputational risks for companies. As a result, a number of companies have adopted a policy of prohibiting political donations outright (Méan, 2008). However, should your company choose to make political donations, the best practices outlined in Checklist 6 can help to prevent bribery and promote transparency.

CHECKLIST 6. Avoiding bribes disguised as political donations

- ✓ Ensure that political donations are lawful in both your country and the country in which your company wishes to make the donation. Note that some countries, such as Ghana and Mali, prohibit foreign donations (ISS, 2013). Others, such as Botswana, allow donations by foreign companies (OSI, 2012).
- ✓ Comply with all disclosure requirements under the applicable law(s).
- ✓ Even if the law does not require the disclosure of political donations, it is considered best practice to be fully transparent and publicly disclose political contributions. This can be done, for example, on your company's website or in its annual report.
- ✓ The amount and timing of political donations should be carefully reviewed to ensure it is not used as a means of bribery. Companies should avoid the perception of any connection between their donation and the making of a decision in their favour. Donations should therefore not be made, for example, at the time the government will be awarding a contract or other favourable decision to the company (Méan, 2008).
- ✓ Your company's board or equivalent body should approve the company's policy on political donations and provide oversight of political activity.
- ✓ Companies should be open about employees, including board members, as well as dealing with business partners, who have or had prominent roles in politics. In this regard, your company may wish to consider adopting a specific conflict of interest policy.

Handling bribery solicitation

The demand for bribes by public officials unfortunately remains prevalent throughout a number of African countries. Bribe solicitation can put your employees in a very difficult position. Your company's anti-bribery policy would therefore benefit from providing guidance on what to do when confronted with bribe demands by public officials. More generally, to get a sense of the level of solicitation risks certain countries, projects and/or sectors pose, it is useful for your company to undertake a bribery risk assessment. This is addressed in further detail in Section 3. Checklist 7 outlines best practices for developing guidance on how to handle bribery solicitation.

CHECKLIST 7. Handling bribery solicitation

- ✓ The employee should refuse the request, stating that it not only violates your company's anti-bribery policy and business principles, but also violates the laws in your country, the country of the public official (if different), and could lead to dismissal and criminal prosecution of both parties.
- ✓ Any instances of solicitation should be reported and recorded internally to management.
- ✓ Return to the soliciting person and reaffirm your company's willingness to do business. It is useful to bring along a colleague as a witness. If the solicitation is repeated, again refuse the request and threaten to refuse to participate in further dealings. In doing so, your company could inform the bribe solicitor that it will publicly disclose the reasons why it has stopped its dealings.
- ✓ Report the solicitation request to more senior management within the bribe solicitor's organisation.
- ✓ Explain to the bribe solicitor that engaging in bribery could expose both your company and the bribe solicitor to criminal prosecution.
- ✓ Your company could report the incident externally, to your anti-corruption commission or law enforcement authority.
- ✓ If the solicitation request was made by a foreign public official, your company could report the incident to your local embassy or high commission in that country. Embassy representatives can provide guidance and, at times, act as a negotiator to stop the solicitation.
- ✓ Your company could report the incident to industry associations and regulators. Industry associations can use their leverage to expose the bribe solicitor and help deter future demands.
- ✓ Your company could participate in – or initiate – collective action measures to address solicitation issues within a certain sector or industry. Collective action is addressed in more detail in Section 4.
- ✓ Your company could provide all staff with a formal letter on company letterhead which they can present to the public official in situations of solicitation. The letter could mention your company's anti-bribery policy and highlight that the giving of any improper payment would result in the criminal prosecution of both your company and the public official. The letter could also mention that repeated bribe solicitation requests would result in the company reporting the instance to the public official's managers and law enforcement authorities. Alternatively, your company could request that a standard letter be supplied from your law enforcement authority and/or anti-corruption commission with similar provisions. The latter may have a greater deterrent effect.

Note: These best practices are drawn from ICC RESIST, 2010.

Communication and training

Regular and systematic communication of your company's anti-bribery policy signals to employees that your company takes its zero tolerance policy towards bribery seriously and this, in turn, helps ensure compliance. At a minimum, each employee should be given a hard copy of the policy and be frequently reminded of its provisions, whether through an internal office circular or on your company's intranet homepage. Communication of the policy should feature during recruitment, and prospective employees should be vetted for integrity, both through background checks and interview questions.

Employees, particularly new employees, should receive regular and specific in-person training on your anti-bribery policy to ensure meaningful implementation. Role-based bribery dilemmas and case studies are particularly useful and can help give employees new tools and more confidence in resisting bribery when solicited. The RESIST (Resisting Extortion and Solicitation in International Transactions) tool provides a number of practical scenarios involving bribery dilemmas and suggests ways to respond to the solicitation (ICC RESIST, 2011).

Oversight, monitoring and review of the policy

Regular monitoring demonstrates your company's commitment to effective implementation of its anti-bribery policy. It can also help evaluate compliance, as well as detect and react to problems effectively.

As mentioned earlier, your company's Board of Directors (or equivalent body) should hold overall responsibility for the anti-bribery policy, with senior and middle management being responsible for its implementation. If your company is large, a special committee may be established to monitor implementation of the policy, including in your subsidiaries and branches.

Your company should ensure that adequate financial and human resources are provided for the implementation of the anti-bribery policy. Regular update reports should be issued, including on any instances of bribery and the remedial steps that were taken in response (UNODC, 2013: 30, 96-97). In this regard, meeting and discussing with employees who are on the "front line" of confronting bribery risks is essential.

Regular reviews of the policy would also help identify whether any policy adjustments may be required. This is particularly important when there are changes to your company's business environment. This may include when your company enters new markets, partnerships, processes or needs to address new legal or regulatory requirements. Your company may also decide to review its policy upon learning of new bribery risks experienced by industry peers (UNODC, 2013: 96-97).

Undertaking bribery risk assessments

Measures to prevent and detect bribery in business transactions should be developed on the basis of a risk assessment addressing the individual circumstances of your company, in particular the bribery risks facing your company. This would allow your company to estimate the likelihood of bribery in certain projects or circumstances. Conducting a risk assessment can also help tailor your company's anti-bribery policy by focusing on issues that may be more relevant, although, at a minimum, the principles mentioned in this Guidance should be covered.

Conducting business in Africa raises a number of red flags in a bribery risk assessment. A number of these risks are highlighted in this Guidance. Conducting a bribery risk assessment for each project will help your company isolate red flags and develop measures to help ensure bribery is prevented. The depth of such assessments will depend on the resources available in your company. Checklist 8 proposes key questions for consideration.

CHECKLIST 8. Getting started with a bribery risk assessment

- ✓ What is the corruption profile and local business climate of the country in which your company plans to operate?
- ✓ In what sector does your company operate? What are the common risks confronting the sector?
- ✓ Is there a public tender? Is it open, fair and competitive, and conducted in compliance with the law?
- ✓ Does the project require the use of agents or other intermediaries or third parties? If so, what is known of their integrity profiles?
- ✓ Do you have a clear indication of the ultimate beneficial owner(s) of your clients or business partners?
- ✓ Is there a presence of politically-exposed persons (PEPs)? If so, why and are there any indications of conflicts of interest or misuse of position? Are you comfortable with their sources of wealth?
- ✓ To what extent are decisions or approvals by public officials necessary to carry out the business? Which public authorities require interaction with your company?
- ✓ Are you partnering or doing business with SOEs?
- ✓ What is the method and volume for any payments?
- ✓ Are gifts or entertainment being provided?
- ✓ Are any political or charitable contributions being requested?

These questions will help your company get started in establishing the context in which it is operating and identify potential bribery risk areas. The next steps would involve: assessing and analysing those risks; evaluating when they may occur and their impact; setting out a control strategy to mitigate the risks; communicating and consulting with relevant employees; developing an action plan; and determining the level of monitoring, review and adjustment that may be necessary.

A useful exercise to undertake in this regard is to develop a risk matrix that rates key questions to be considered. More detailed information on such exercises can be accessed through the publicly-available *Guide for Anti-Corruption Risk Assessment* (UN Global Compact, 2013).

Your company may wish to complement this risk assessment and the principles in the Guidance by referring to ISO standard 37001 developed by the International Organization for Standardization. It has been designed to help organisations and companies prevent and detect bribery by creating a framework of minimum requirements. It also provides guidance for establishing and implementing anti-bribery management systems.

3

Supporting the implementation of your anti-bribery policy

Once an anti-bribery policy has been developed, additional measures should be adopted to ensure its effective implementation and application. This section highlights some of the essential measures that can help the transition of your company's anti-bribery policy to a more comprehensive anti-bribery programme.

Mitigating third party bribery risks

The use of third parties in the conduct of business is not uncommon in Africa. Middlemen are often used to make introductions to public officials to facilitate business, especially given the prevalence of state-owned companies in the region. Third parties can also act as sales agents, distributors, consultants or joint venture partners.

It is important for your company to ensure that bribery is not "outsourced" through the actions of third parties, as they can pose a risk of passing on bribes to public officials (The Ethical Boardroom, 2014). Business relationships with unethical third parties can both undermine your company's anti-bribery policy and cause reputational and financial damage. Your company could also be held liable for the illegal acts of third parties.

To further support the meaningful implementation of your anti-bribery policy, due diligence should be exercised when selecting and working with third party business partners. Checklist 9 proposes key questions and control measures to consider in this regard.

CHECKLIST 9. Mitigating third party bribery risks

- ✓ What is the reputation of the third party, including perceptions of its business conduct?
- ✓ What is the ownership structure of the third party? For example, shell companies and companies registered in jurisdictions with strong secrecy laws may pose additional risks.
- ✓ Has the third party been implicated in any instances of bribery (allegations, arrests, indictments) or been blacklisted by a government agency?
- ✓ Is the third party listed on the debarment lists of international financial institutions?
- ✓ Has the third party been involved in any litigation, whether civil, criminal or regulatory?
- ✓ What is the breakdown of any service charge? Is the compensation or commission paid commensurate with industry standards?
- ✓ What is the nature of any relationships the third party may have with public officials? Is the public official's willingness to conduct business with your company tied to the use of a specific third party?
- ✓ Have other companies suddenly terminated their relationship with the third party? If so, what were the reasons?
- ✓ Does the third party have internal controls in place to prevent bribery in its business dealings?
- ✓ Does the third party fully understand your anti-bribery policy? Was strict adherence to your anti-bribery policy incorporated into the agreement to work with the third party?
- ✓ Has the third party been trained on the provisions of your anti-bribery policy?
- ✓ Have you agreed to audit and termination rights on the third party?

One of the difficulties your company may confront in conducting due diligence is the lack of standard registration processes and publicly available information in most African countries. Certain firms, particularly sole-proprietorship or partnership firms, may not be formally registered. Criminal record checks are also difficult to obtain, as is information related to political or charitable contributions. Identification of ultimate beneficial owners may also be difficult. To help overcome some of these challenges, your company should ensure references are fully checked, in-person interviews are conducted and periodic on-site visits are undertaken.

Maintaining accurate books and records

International anti-bribery standards, such as those under the OECD Anti-Bribery Convention (Article 8) and the UNCAC (Article 12.3), require countries to prohibit, and effectively punish, the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existence expenditures, the entry of liabilities with incorrect identification, as well as the use of false documents, for the purpose of bribing public officials or of hiding such bribery.

To comply with the law and to help prevent and detect bribery, it is important that your company establish financial and accounting procedures to maintain fair and accurate books and records. This can help ensure that they are not used for the purpose of engaging in or concealing bribery. Checklist 10 outlines best practices your company can follow to ensure the maintenance of accurate books and records.

A specific risk that your company may confront in the maintenance of fair and accurate books and records stems from the fact that the majority of African countries remain primarily cash-based economies. In sub-Saharan Africa, only 24% of the adult population has an account with a formal financial institution (CGAP 2012; World Bank 2013). It is not uncommon for companies – both large and small – to settle payments in cash. Bribery and corruption can thrive in such environments as cash payments, unlike bank transfers, can be easily concealed and leave no audit trail. As such, payments through financial institutions should be made wherever possible. Any cash payments should be closely

CHECKLIST 10. Maintaining accurate books and records

- ✓ Ensure that all financial transactions are adequately identified and properly and fairly recorded in appropriate books and that accounting records are available for inspection by the body with ultimate responsibility for the company, as well as by auditors. Records should also be kept for a reasonable period (e.g. 5 years after the transaction).
- ✓ Ensure there are no “off the books” or secret accounts and no documents can be issued which do not fairly and accurately record the transactions to which they relate.
- ✓ Ensure there is no recording of non-existent expenditures or of liabilities with incorrect identification of their objects or of unusual transactions which do not have a genuine legitimate purpose.
- ✓ Ensure no bookkeeping or other relevant documents are intentionally destroyed earlier than required by law.
- ✓ Ensure that independent systems of auditing are in place, whether internal or external, designed to uncover any transactions that may violate applicable accounting rules and which provide for appropriate corrective action.
- ✓ Ensure compliance with all provisions of national tax laws and regulations including those prohibiting the deduction of any form of bribe payment from taxable income.

Note: These best practices are drawn from the ICC's Rules on Corruption (ICC, 2011).

monitored to avoid being used as substitutes for bribes. In countries where there are limited, or no, working banking systems, only small payments made from company petty cash should be permitted (ICC, 2011). The responsibility for the disbursement of petty cash should be given to one employee. In all cases, any cash payment should be accurately recorded in company accounts.

Supporting whistleblowing

Encouraging employees to report misconduct is one of the most effective ways to prevent and detect bribery in your company's operations. However, whistleblowers will only come forward in environments where they feel safe to report and where their reports will be treated seriously and acted upon. Some countries, such as Rwanda, South Africa and Uganda, provide legal protection for private sector whistleblowers from retaliatory conduct. However, on the whole, legal provisions on whistleblowing and the protection of whistleblowers tend to be more common for the public sector than the private sector.

Nevertheless, companies are increasingly taking voluntary measures to establish internal and independent, external channels to safely and confidentially report misconduct. There are a number of benefits in doing so. An effective whistleblowing regime demonstrates a company's commitment to its anti-bribery policy; deters wrongdoing; facilitates the reporting of bribery and other forms of misconduct without fear of retaliation; helps companies identify and address problems early on and thereby prevent potentially serious disasters; and reduces the risk of external reports, which could damage a company's reputation (OECD, 2011).

Checklist 11 outlines measures for consideration when developing a corporate whistleblowing mechanism.

CHECKLIST 11. Establishing a corporate whistleblowing mechanism

- ✓ Set up an internal reporting channel. This can be done through oral or written communication, a telephone hotline or intranet system. Your company may also consider outsourcing the reporting channel to an independent, external service provider.
- ✓ Designate a person or body of undisputed reputation to manage and administer the mechanism. In larger companies, this can be done by the audit committee or other internal control committee or department, such as the Compliance Department.
- ✓ Encourage employees, shareholders, suppliers, contractors, the public or any other interested party to report bribery.
- ✓ Promote the whistleblowing hotline via your company's website, intranet, office circulars and other means of communication with employees.
- ✓ Provide regular training on the whistleblowing mechanism.
- ✓ Protect whistleblowers against all forms of retaliation and discrimination, including through the confidential treatment of the information received, and, where appropriate, allow the whistleblower to remain anonymous. A strong company policy stipulating the consequences for retaliation, ranging from disciplinary action to dismissal, is another way to ensure whistleblower protection.
- ✓ Investigate promptly any information received.
- ✓ Communicate regularly with the whistleblower on the follow-up steps being taken.
- ✓ Maintain adequate and auditable documentation of all reports received.

Note: These best practices are drawn from the ICC's Guidelines on Whistleblowing (ICC, 2008).

4

Industry collective action measures

Collective action involves like-minded companies operating in the same sector joining forces with other relevant stakeholders to commit to prohibiting bribery and ensuring transparency in business. The objective of such efforts is to create a level playing field and to eliminate the possibility of engaging in bribery (World Bank, 2010: 2).

Collective action measures can be a complementary tool to help your company prevent bribery and curb the supply side of bribes industry-wide. It can be particularly useful in environments where corruption is entrenched, bribe solicitation is prevalent and law enforcement weak.

Collective action therefore not only contributes to your company's compliance with legal obligations, but can also serve as a tool to address bribery solicitation. It also allows companies to save significant sums of money that would have otherwise been paid in bribes. Moreover, it helps eliminate the business uncertainty that bribery creates and helps foster an efficient and competitive market by ensuring that a business contract is fairly awarded on the basis of merit (UN Global Compact, 2011).

Some examples of well-established industry collective action initiatives include the Extractive Industries Transparency Initiative (EITI), the Construction Sector Transparency Initiative (CoST) and the Maritime Anti-Corruption Network (MACN). While these are international initiatives, it is important to note that collective action can work effectively in a domestic market among local players. To this end, the work of the local chapters of the UN Global Compact is worth noting, as well as that of the Business Action Against Corruption (BAAC), Nigeria's Convention for Business Integrity and The African Lawyers Initiative on Compliance in Business Relations.

Collective action could be a particularly useful tool for the region's large number of SMEs. As SMEs face specific corruption obstacles due to their low profile and size, it is often difficult for such companies to say no to bribe solicitations; they do not have the same leverage or financial capabilities as larger companies to walk away. Collective action thus allows all companies operating in the same sector, to join forces to create a bribery-free market (Basel Institute on Governance).

The following initiatives show what your company can do.

Identify stakeholders

In looking to establish an initiative, your company could seek the assistance of your local chamber of commerce, business and industry associations or anti-corruption civil society organisations to make contact with local companies operating in the same sector. Such bodies can serve as an awareness-raising platform for the initiative. The greater the inclusion of stakeholders in the initiative, the greater level of awareness and monitoring, which can help reduce the likelihood of bribery solicitation.

Issue declarations

Companies involved in a collective action initiative can issue a joint declaration setting out such points as their commitment to not pay bribes; to share experiences and best practices in preventing bribery, and; to reach out to other industry peers and relevant stakeholders to participate in joint activities. Such declarations can be posted on your company website as a way to complement your anti-bribery policy. They can also be distributed to relevant public procurement authorities as means of deterring bribe solicitation in a public tender.

Sign integrity pacts

Integrity pacts are formal agreements where your company commits not to pay bribes or engage in collusion. They are often attached to a specific public tender or bid for a certain project. Integrity pacts are usually introduced in the pre-tender phase and comprise a formal written contract between the contracting public entity and all bidders, committing to refrain from all corrupt practices, including the demand and supply of bribes. Sanctions would normally apply in the case of violation of the contractual terms, which can include exclusion from the collective action initiative or from engaging in future bids. A third party, independent external monitor is appointed to oversee compliance with the integrity pact.

Develop an industry anti-bribery policy/code of conduct

Your company can work with peers to develop an anti-bribery policy/code of conduct tailored to your industry and agree to voluntarily abide by it. Developing an industry-wide policy /code of conduct allows for uniformity in compliance and levels the commercial playing field in your sector or geographical location of operations (Basel Institute on Governance). Adherence to the code of conduct can be a prerequisite for a company to be a member of the collective action initiative and failure to comply with it could result in its expulsion. The principles laid out in this Guidance can serve as a basis for developing an industry wide policy/code of conduct.

Undertake longer term measures

The sharing of best practices and experiences in preventing bribery among industry players is one of the key benefits of collective action initiatives. Your company can work with partners, business and industry associations and civil society to promote the collective action initiative, organise roundtable discussions, develop training programmes and other awareness-raising measures. These should also involve other key stakeholders, such as civil society organisations, business and industry associations and relevant public sector bodies. Such longer-term initiatives help foster an environment to support the effectiveness of project-specific integrity pacts and industry-specific codes of conduct (World Bank, 2010: 3). These activities also serve as an important means of building a community and developing trust among member companies of the initiative (Basel Institute on Governance). Your company may also wish to participate in the increasing number of international fora available to private sector representatives on the issue of tackling bribery in business. This could include meetings of the Joint Initiative, the World Economic Forum's Partnership Against Corruption Initiative (PACI), B20 collective action hub or TRACE international.

5

Specific bribery risks for state-owned enterprises

State-owned enterprises (SOEs) are entities under central government or federal ownership using a distinct legal form, having a commercial activity, and where the state has effective control through full, majority or significant minority ownership (OECD, 2014: 4). SOEs play an important role in African economies. For example, in the Democratic Republic of the Congo, major SOEs employ between 4 000 and 12 000 people each. The current portfolio includes 20 SOEs and 55 government-controlled entities performing commercial activities. In Tanzania, there are 238 SOEs in operation, and over 300 in South Africa (Balbuena, 2014).

Just as private companies, SOEs face bribery risks and should therefore also develop and implement anti-bribery and compliance measures. In a number of African jurisdictions, SOEs are subject to corporate liability and can therefore also be held liable for acts of bribery committed by employees (OECD, 2014). SOEs may also be confronted with specific bribery risks due to their public nature that are important to note, whether your company is an SOE or doing business with an SOE. Recent findings in the OECD's Foreign Bribery Report show that bribes were offered, promised or given most frequently to employees of SOEs (27%) and that 80% of total bribes were paid to SOE officials. Specific bribery risks confronting SOEs are described below.

Operation in high-risk sectors

In many countries, SOEs operate in high-risk sectors, such as the extractive industries, utilities, power generation, infrastructure, defence and telecommunications. These sectors are considered high-risk because they tend to be heavily regulated by the state and require that governments issue licenses, concessions and/or certificates in order for them to operate. The awarding of licenses and concessions in these sectors is particularly vulnerable to bribery in the procurement process. Companies must interact with public officials who have extensive discretionary powers over lucrative contracts, often with little oversight. Bribery risks can therefore occur any time a decision is being made in the procurement cycle, ranging from the decision to contract, the details of the contract and drafting of the bid, the tendering process and the award of the contract (U4, 2014: 4).

SOEs can mitigate these risks by ensuring their employees are made aware of, and trained on, the anti-bribery policy and including the anti-bribery policy as part of the bid presentation. They can also consider joining collective action initiatives and entering into integrity pacts on a public tender.

Status of employees as public officials

As mentioned earlier, under international standards, employees of SOEs – whether low level or senior management – are considered public officials, unless the enterprise operates on a normal commercial basis in the relevant market (i.e. on a basis which is substantially equivalent to a private enterprise, without preferential subsidies or other privileges). SOEs can therefore be on both the receiving (passive) or giving (active) side of bribery; the offering, promising or giving of a bribe to an employee of an SOE, as well as the solicitation or acceptance of a bribe by an SOE employee, can be a criminal offence. Your company should be alert to this status of SOE employees in developing your anti-bribery policy, as well as bribery risks assessments when conducting business with such entities.

Political influence

A related issue to the status of SOE employees as public officials is the risk posed by the composition of SOE boards. In a number of jurisdictions, civil servants (and sometimes Ministers or other persons related to the Executive or the ruling political party) sit on the boards of SOEs. The proximity of such persons to the government creates a heightened bribery risk in that they can be bribed by companies seeking to gain political favours and influence. If your company is an SOE, steps should be taken to help shield yourself from these risks by ensuring sufficient independence in board nomination, appointment and composition processes (Balbuena, 2014: 7).

Weak reporting systems

Inadequate reporting and monitoring systems as well as complexity in the accountability chain are some of the main performance challenges confronting SOEs (Balbuena, 2014: 7). Weak reporting and monitoring mechanisms can shield SOEs from the misuse of public money and corruption. Bribery risks are also heightened in such environments where there is little or no oversight, as payments can be easily made and concealed. In addition to adopting and implementing an anti-bribery policy, SOEs should ensure that their boards of directors are sufficiently independent and assigned ultimate responsibility for the company's acts and overall performance. SOEs should also establish related risk management committees to ensure reporting and compliance with its anti-bribery policy.

Some countries, such as Botswana, Malawi and Mozambique, have identified the heightened bribery and corruption risks confronting SOEs and have taken steps to develop internal codes of ethics (OECD, 2014:23). In addition to the measures set out in this *Guidance*, SOEs would also benefit from the wider governance principles set out in the OECD's *Southern African Guidelines on the Governance of State-owned Enterprises* and the OECD *Guidelines on Corporate Governance of State-owned Enterprises*.

6

Overcoming challenges confronted by SMEs

Small and medium-sized enterprises (SMEs) play a dominant role in sub-Saharan African economies. For example, they account for 70% of Ghana’s gross domestic product (GDP) and 92% of its businesses. In Nigeria, SMEs comprise 70% of the country’s manufacturing sector, and in South Africa, they make up 91% of formalised businesses (Consultancy Africa Intelligence, 2012). Bribery undermines the growth of this important sector, as income or profits are lost through the payment of kickbacks given to obtain contracts. Evidence illustrates that where SMEs pay bribes or other unofficial payments to public officials, they are likely to pay out much higher percentages of their revenues than larger companies (ACCA, 2013: 8).

As major economic drivers in the region, it is therefore essential that SMEs have anti-bribery compliance measures in place to ensure corruption risks are mitigated. Furthermore, as larger companies are increasingly demanding such measures from their suppliers and business partners, SMEs should not lose out on business opportunities due to not having anti-bribery policies and compliance measures in place.

However, in light of their size and availability of resources, SMEs confront a number of difficulties in effectively establishing such measures. Many have a very low level of awareness of the law and means of compliance. Without the leverage and market power of larger companies, it is harder for SMEs to resist bribery, especially when trying to get a foothold in new markets. Incentivising SMEs to adopt anti-corruption measures therefore remains a major challenge.

The international anti-corruption community has become increasingly alert to the position of SMEs in the fight against bribery in business transactions, and a number of initiatives have been developed to help companies with limited financial and human resources combat bribery. Prominent tools providing comprehensive guidance for SMEs include Transparency International’s *Business Principles for Countering Bribery: SME Edition* and the *Business Anti-Corruption Portal*. The latter, in particular, is a useful resource for small companies who do not have the ability to employ designated due diligence personnel. The *Business Anti-Corruption Portal* provides comprehensive information on laws, country and sectoral risk profiles to help increase employee awareness or conduct a corruption risk assessment on a particular project or contract.

Most of the principles set out in this Guidance can be followed by SMEs as they apply to companies of all sizes. However, implementation, oversight and management of an anti-bribery policy can be more of a challenge for SMEs, especially as they often have no dedicated legal or compliance departments. The insights below may be useful to SMEs looking to implement an anti-bribery policy within the confines of available resources.

Prioritisation of risks

As a small business, your company may be confronted with certain bribery risks more than others. For example, gift and hospitality payments may pose a lower risk than facilitation payments or interactions with public officials to obtain licenses or permits. To make efficient use of available resources, your company should identify the main risk areas from the outset and focus on implementing policies and procedures to minimise those risks. This is not to say that other risk areas should be ignored, but that your company should consider designing anti-bribery policies that correspond proportionately to its risk profile.

Employee buy-in

Just as in a large company, it is essential that all employees adhere to your company’s anti-bribery policy. However, in SMEs, each employee may have more responsibility and, in turn, more direct exposure to bribery risks. While the concepts of “tone from the top” and “tone from the middle” apply equally to SMEs, the “tone throughout” may be even more relevant to employees of SMEs in this regard. As such, all employees must be made aware of your company’s anti-bribery policy and provided with related training. When hiring employees, your company should pay particular attention to the level of integrity and the ethical profile of candidates.

Awareness-raising measures

As an SME, your company may not have the same sophisticated technological tools as larger companies, such as a company intranet, on-line training tools or even an e-mail network. It is nevertheless essential that your company's anti-bribery policy be publicised by senior management and this can still be done effectively with limited technological capabilities. For example, hard copies of the policy can be distributed to all employees and newly hired staff. Senior management can ensure the policy is regularly discussed in staff meetings and, in particular, any difficulties employees may be confronting in relation to the policy. The policy can also be publicised in common areas and on company notice boards. Finally, a copy of the policy should also be given to any business partners with whom your company engages or any persons representing your company.

Oversight and management

Oversight and management of your anti-bribery policy should be based on the size of your company. If your company has a Board of Directors, it may designate a person to implement the policy and related compliance measures. Alternatively, the owner or CEO may wish to take on this role. If your company is smaller in size, it can be better for all employees to discuss the management and implementation of the policy. Leadership in preventing bribery in business transactions should always come from the top of your company, but all employees should take responsibility (Transparency International, 2008).

Encouraging whistleblowing

Encouraging the reporting of bribery and corruption can be difficult for companies, regardless of their size. Unless employees feel that they can report confidentially, without fear of retaliation and that their reports will be acted on meaningfully, whistleblowing will be difficult to promote within a company. SMEs can face additional hurdles, whereby it is more likely that employees know one another more closely and thus may be reluctant to report misconduct. Ensuring anonymity and confidentiality can also be difficult in smaller work environments. Your company should be alert to these potential obstacles and address them accordingly. While, as a smaller company, you may not have a compliance officer to receive and address whistleblower reports, a responsible employee should be designated to act in such a capacity and ensure that confidentiality (and/or anonymity, if your company chooses this approach) be maintained.

Collective action

Bribery can affect SMEs more than larger companies, both in terms of share of revenues lost through bribe payments and loss of business when bribes are not paid. SMEs do not have the same market power as larger firms and may resort to bribery out of desperation to sustain their business (ACCA, 2013: 11). Joining forces with peers operating in the same sector and collectively agreeing to resist bribery can be a useful tool to help SMEs overcome the challenges they confront with regard to bribery solicitation. Section 4 discusses collective action measures in further detail and how your company can become involved in such initiatives.

Resources

While this concise guide can assist in the development of a corporate anti-bribery policy and related compliance measures, a wealth of resources providing more detailed information on this topic is publically available. Some of the more comprehensive tools and documents to which companies can refer when seeking to build on the principles set out in this Guidance are listed below.

An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide, UNODC, <https://www.unodc.org/unodc/en/corruption/publications.html>

Anti-Corruption Ethics and Compliance Handbook for Companies, OECD, UNODC, World Bank www.oecd.org/corruption/anti-corruption-ethics-and-compliance-handbook-for-business.htm

Business Action Against Corruption, www.baacafrika.org/

Business Anti-Corruption Portal, www.business-anti-corruption.com/

Business Ethics Network of Africa, www.benafrika.org/

Business Principles for Countering Bribery: SME Edition, Transparency International www.transparency.org/whatwedo/tools/business_principles_for_countering_bribery_sme_edition/1/

Collective Action in the Fight against Corruption: A Guide for Business, World Bank Institute Working Group, http://info.worldbank.org/etools/docs/antic/Whole_guide_Oct.pdf

Committing to Effective Whistleblower Protection, OECD www.oecd.org/corruption/committing-to-effective-whistleblower-protection-9789264252639-en.htm

Convention on Business Integrity, Nigeria, www.cbinigeria.com/

Countering Small Bribes: Principles and Good Practice Guidance for Dealing with Small Bribes including Small Facilitation Payments, Transparency International, www.transparency.org.uk/publications/15-publications/1096-countering-small-bribes

G20 Study on Whistleblower Protection Frameworks: Compendium of Best Practices and Guiding Principles for Legislation, OECD, www.oecd.org/corruption/48972967.pdf

Guide for Anti-Corruption Risk Assessment, UN Global Compact, <https://www.unglobalcompact.org/library/411>

Guidelines on Whistleblowing, International Chamber of Commerce, www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/corporate-responsibility-and-anti-corruption/whistleblowing/

Influence Africa, www.influence-africa.org/

International Chamber of Commerce Rules on Combating Corruption www.iccwbo.org/advocacy-codes-and-rules/document-centre/2011/icc-rules-on-combating-corruption/

International Organization for Standardization (2016), ISO/DIS 37001 Anti-bribery management systems -- Requirements with guidance for use, www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=65034.

National Business Initiative South Africa, www.nbi.org.za/

OECD Guidelines on Corporate Governance of State-owned Enterprises, www.oecd.org/daf/ca/guidelines-corporate-governance-soes.htm

Resisting Extortion and Solicitation in International Transactions: A Company Tool for Employee Training, International Chamber of Commerce, www.iccwbo.org/products-and-services/fighting-commercial-crime/resist/

Stocktaking of Business Integrity and Anti-Bribery Legislation, Policies and Practices in Twenty African Countries, OECD, www.oecd.org/daf/anti-bribery/stocktakingofbusinessintegrityandanti-briberylegislationpoliciesand-practicesintwentyafricancountries.htm

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ANNEX : International anti-corruption instruments



The African Union Convention on Preventing and Combating Corruption

Article 1(b): The Convention is applicable to the following acts of corruption and related offences [...] the offering or granting, directly or indirectly, to a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage to himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions.



The Southern African Development Community Protocol against Corruption

Article 1(e): The offering, giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage, to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties



The Economic Community of West African States Protocol against Corruption

Article 6(b): offering or giving a public official, either directly or indirectly, any object of pecuniary value such as a gift, a favour or an advantage, whether for himself or another person, in exchange for an act or omission in the discharge of his duties.



The East African Community Protocol on Preventing and Combating Corruption

Article 7(b): the offering or granting, directly or indirectly, to a public official, of any article of monetary value, or other benefit, such as a gift, favor, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions.



The United Nations Convention against Corruption

Article 15(a): Bribery of National Public Officials: Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for that official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

Article 16(1): Bribery of Foreign Public Officials and Officials of International Organisations: Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.



The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Article 1: Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

Annex II of 2009 Recommendation of the Council for Further Combating Bribery in Business Transactions: Good Practice Guidance on Internal Controls, Ethics and Compliance

About the OECD/AfDB Joint Initiative

In 2008, the Organisation for Economic Co-operation and Development (OECD) and the African Development Bank (AfDB) established the Joint Initiative to Support Business Integrity and Anti-Bribery Efforts in Africa (Joint Initiative). Twenty-one African countries are members of the Joint Initiative: Benin, Burkina Faso, Cameroon, Ethiopia, Ghana, Kenya, Madagascar, Malawi, Mali, Mauritania, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Tanzania, Uganda and Zambia.

The Joint Initiative helps African countries in their fight against the bribery of public officials in business transactions and to improve corporate integrity and accountability, while promoting growth through an environment conducive to attracting foreign investment. The overall objectives of the Joint Initiative are to increase the capacity for effective anti-bribery enforcement, support international anti-bribery efforts, enhance public and private sector integrity, and contribute to transparent and accountable business conduct in Africa.

The Joint Initiative builds upon the complementarities between the African Union Convention on Preventing and Combating Corruption (African Union Convention), the United Nations Convention Against Corruption (UNCAC) and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Within a framework of strong African leadership, the OECD and AfDB are working together to design and implement effective measures to combat the bribery of public officials that draws from these international and regional instruments. Through the involvement of African business and industry, as well as policy makers, the Joint Initiative also focuses on providing technical support to Africa's private sector to improve standards of corporate integrity and accountability. Indeed, while African economies are among the fastest-growing in the world, the perceived levels of corruption in the continent are hindering foreign investment and the ability of companies to conduct business fairly, and on a level playing field.

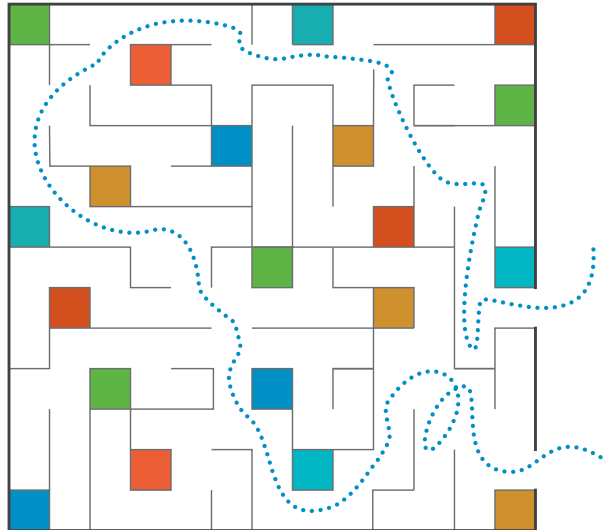
Following the adoption of the Anti-Bribery and Business Integrity Course of Action for Africa at its First Regional Experts' Meeting (Lilongwe, Malawi, January 2011), Joint Initiative member countries requested more tools to assist with implementing the Course of Action through practical guidance on preventive measures tailored to the bribery risks confronting African companies. Member countries also highlighted the continued need for awareness-raising of anti-bribery compliance measures among the private sector, which is largely comprised of SMEs with limited resources and access to information.

About the Guidance

This Guidance has been prepared by Melissa Khemani, working as a consultant for the OECD. It has benefited from input by the OECD and AfDB Secretariats. The Guidance has been developed on the basis of discussions held under the auspices of both the OECD and the AfDB in April 2014 with representatives from the Ministries of Foreign Affairs of Joint Initiative member countries. The content and scope of the Guidance was also informed by responses to a questionnaire submitted by Joint Initiative member countries. The Guidance draws on best practices from the OECD, the AfDB, the African Union, the UN, Joint Initiative member countries, international business associations and civil society. It also complements broader and more comprehensive anti-corruption compliance tools developed by the OECD, UNODC and the World Bank.

The opinions expressed and arguments employed in this Guidance are the sole responsibility of the authors and do not necessarily reflect those of the African Development Bank, its Board of Directors or the countries they represent; the OECD, its member countries, and the States Parties to the OECD Anti-Bribery Convention. The OECD and AfDB accept no responsibility whatsoever for the consequences of the use of the information contained in this document.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.



The Anti-Bribery Policy and Compliance Guidance for African Companies is a

practical, concise guide to help African companies set up measures to stop the supply side of bribes to public officials in business transactions and support both the public and private sectors in their efforts to prevent bribery and improve the quality of corporate compliance and bribery prevention measures. The Guidance will help your company to draw up a corporate anti-bribery policy and related compliance measures. It also provides insights and ideas on how to put them into practice.



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