

Part 2 Trends in compliance and prevention

2.1 The value and importance of Collective Action – Gemma Aiolfi⁷

‘Sticks in a bundle are harder to break.’

‘If you want to go fast, go alone, but if you want to go far, go together.’

These two African proverbs have been used to encourage the private sector to become actively involved in anti-corruption Collective Action. But before joining an initiative with other stakeholders, corporate management usually needs to be convinced that there will be good reasons and value in taking such a step and, not unreasonably, will also want to understand what they are getting into and, if they do decide to proceed, how best to go about it. This section provides an introduction to this topic and examples of anti-corruption Collective Action open to the private sector, as well as other stakeholders. It also considers the role of the legal profession in promoting Collective Action.

Anti-corruption Collective Action

Definitions of anti-corruption Collective Action illustrate how broad the concept has become since the early days of Integrity Pacts. Mark Pieth describes Collective Action as a ‘catch all term for industry standards, multi-stakeholder initiatives, and public-private partnerships’. The World Bank Institute define Collective Action as a ‘collaborative and sustained process of cooperation amongst stakeholders [that] increases the impact and credibility of individual action, brings vulnerable individual players into an alliance of like-minded organizations and levels the playing field between competitors’.¹ Collective Action can take the form of anti-corruption declarations, principle-based initiatives, business coalitions that are subject to certification and integrity pacts. These forms of Collective Action are distinguished from each other by the degree of enforceability of the participants’ joint commitments and the goals of the initiatives. The geographical scope, stakeholder composition and operating mechanism can also be adapted as circumstances require making the potential for Collective Action almost limitless.

As a flexible tool that can help to prevent and combat corruption, the business case for joining a Collective Action initiative can be made irrespective of an organisation’s size, and often focuses on the reduction of legal risk. In the United Kingdom, according to the Ministry of Justice, an organisation’s involvement in a collective action against bribery in the same business sector is an indicator of ‘top level commitment’ under the adequate procedures defence in section 7 of the UK Bribery Act. Business-led Collective Action also enables companies to collaborate with industry peers and other key stakeholders to create markets that are driven by economic considerations and not influenced by corruption. In so doing, they can help to establish a level playing field that can contribute to greater transparency and predictability for business, enhance corporate reputations, and tackle some of the systemic aspects of corruption in markets and sectors in a practical manner.

Companies can join or initiate anti-corruption Collective Action at any point as part of their developing or improvement of their compliance programmes. Collective Action can assist a company

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to start if it does not yet have a compliance programme, or it can assist companies that already have implemented and advanced programmes to encourage their peers to raise their standards, or to improve their supply chains.

Collective action as part of developing compliance programmes

In February 2016, the government of Columbia introduced a new law to address transnational bribery. As part of implementing the law, companies in certain sectors are required to introduce anti-corruption compliance programmes. The purpose of this initiative is to incentivise companies to develop their programmes. As part of a pilot programme completed in mid-2016, the government developed a questionnaire to assess 17 of the largest companies' compliance programmes and an independent body analysed the results. Four companies dropped out citing the procedure as too onerous, and of the remaining 13 only one passed the assessment and was deemed as having an adequate compliance programme. However, of the 13 companies that 'failed' the Secretariat's assessment, all indicated that they are willing to improve their programmes and to learn from an exercise that involved close collaboration between the public and private sectors, and involved an independent group of technical experts.

An assessment tool developed by Inteli in Portugal provides an example of a Collective Action involving some seven companies that contributed to its development. The tool is designed for mid-sized businesses that do not have an anti-corruption compliance programme. With a few clicks the risk parameters help to determine the scope and level of detail that an anti-corruption programme should encompass; it has proved useful for companies that are too small to justify having a dedicated compliance function.

Collective Action for companies with existing programmes

For companies that have already embarked on developing a compliance programme, Collective Action involving discussions between compliance officers (during which benchmarking of specific aspects of their programmes) are practical and efficient ways to improve anti-corruption programmes; and this approach that has been cited by the US Department of Justice's Compliance Expert as one of the most useful ways to share and compare programmes. Many examples of such groups are to be found around the world, such as in Nigeria (Convention on Business Integrity), Thailand (Collective Action Against Corruption) and Russia (Compliance Alliance).

Companies with mature compliance programmes may be well placed to support other companies in their supply chains as they seek to develop their own programmes, such as the Argentine Agreement in the Electrical Power Transmission Industry. Companies can also effect change by wielding their influence to support a Collective Action, as has happened in the Customs Broker initiative in Turkey. Several multinationals have asked their customs brokers to join the initiative and start adopting anti-corruption standards and to refrain from paying facilitation payments. While some of these initiatives are modest in scope and may only have limited effects, they serve as a starting point and provide examples of what can be achieved even in areas where bribery is deep-seated and part of daily life.

The role of lawyers in anti-corruption Collective Action

Lawyers are ideally placed to support their corporate clients in identifying and joining anti-corruption Collective Action. Lawyers should inform themselves about the range of possibilities open to their clients, for example, by consulting the database in the B20 Collective Action Hub. Companies that take an active role in Collective Action will likely be more attuned to the risks that their industry faces and more willing to develop solutions that can change the environment in which they operate. The Maritime Anti-Corruption Network (MACN) provides shipping companies that are part of the initiative the opportunity to benefit from the tools developed by the group as well as the opportunity to contribute to the identification of the specific jurisdictions and markets where ships captains are mostly likely to be solicited for bribes or facilitation payments. Lawyers should be able to cite examples such as the MACN to their clients to help ensure they are fully informed about the opportunities to manage their risks globally.

Legal advisers assisting with their clients' risk assessments can do so by balancing an analysis of the risk profile of each country with the potential for mitigating that risk by identifying existing in-country Collective Action initiatives (which could be led either by the local UN Global Compact, civil authority or government led, or involve company peers).

Apart from recommending existing Collective Action, lawyers can also help to establish a new initiative. If a corporate client is being solicited for bribes such as may occur at customs or the local land registry or indeed at any government department, it is highly likely that they will not be alone in having to contend with such demands. Joining forces with other companies across sectors or in the same sector can help to change an intransigent public authority.

Conclusion

Collective Action is becoming increasingly popular as a tool to help solve some of the more difficult and systemic aspects of bribery. It also plays an important role for peer companies keen to ensure a level playing field when acquiring new business. Lawyers can help their clients to identify, join or initiate new forms of Collective Action because the opportunities and scope are so broad and flexible. There is the potential therefore to find something suitable for all companies wherever they operate in the world.