MINISTRY OF EDUCATION AND SCIENCE OF UKRAINE
NATIONAL UNIVERSITY OF “KYIV-MOHYLA ACADEMY”
Faculty of Social Sciences and Social Technologies
Master Degree Program “Anti-Corruption Studies”

MASTER THESIS

on the topic: “**COMPLIANCE PROGRAMS - A NECESSARY INSTRUMENT TO FIGHT CORRUPTION**”

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Kyiv – 2021

МІНІСТЕРСТВО ОСВІТИ І НАУКИ УКРАЇНИ
НАЦІОНАЛЬНИЙ УНІВЕРСИТЕТ «КИЄВО-МОГИЛЯНСЬКА АКАДЕМІЯ»
Факультет соціальних наук та соціальних технологій
Магістерська програма «Антикорупційні студії»

КОМПЛАЄНС-ПРОГРАМИ, ЯК НЕОБХІДНИЙ ІНСТРУМЕНТ У БОРОТЬБІ З КОРУПЦІЄЮ

дипломна робота
на здобуття академічного звання магістра політології
студентки Васильченко Євгенії Олександрівни

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Робота допущена до захисту в ДЕК рішенням кафедри політології
Протокол № ____ від ______________201_р.

Завідувач кафедри ______________________

Київ - 2021

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LIST OF ABBREVIATIONS

ACFE	Association of Certified Fraud Examiners
APEC	Asia-Pacific Economic Cooperation
ARMA	Asset Recovery and Management Agency
CAN	Anti-Corruption Network
CEO	Chief Executive Officer
CIPE	Center for International Private Enterprise
CIS	Commonwealth of Independent States
DANIDA	Danish International Development Agency
DOJ	U.S. Department of Justice
DPA	Deferred Prosecution Agreement
EBA	European Business Association
EBRD	European Bank for Reconstruction and Development
ECI	Ethics & Compliance Initiative
EITI	Extractive Industries Transparency Initiative
EU	European Union
EUACI	European Union Anti-Corruption Initiative
FCPA	Foreign Corrupt Practices Act
GRECO	Group of States against Corruption
HACC	High Anti-Corruption Court of Ukraine
HR	Human resources
ICC	International Chamber of Commerce
IMF	International Monetary Fund
ISO	International Organization for Standardization
MOJ	Ministry of Justice of the U.K.
NABU	National Anti-Corruption Bureau
NAPC	National Agency for Prevention of Corruption

NGO	Non-governmental organization
OAS	Organization of American States
OECD	Organization for Economic Co-operation and Development
OSCE	Organization for Security and Co-operation in Europe
SACCI	Support to Anti-Corruption Champion Institutions
SAPO	Specialized Anti-Corruption Prosecutor's Office
SEC	U.S. Securities and Exchange Commission
SFO	Serious Fraud Office (UK)
TAPAS	Transparency and Accountability in Public Administration and Services
TI	Transparency International
UNCAC	United Nations Convention Against Corruption
UNDP	United Nations Development Programme
UNIC	Ukrainian Network for Integrity and Compliance

DEFINITIONS

This part of the thesis contains definitions of the key terms and abbreviations used in the thesis. Considering that some of the common terms (e.g., corruption) have various definitions depending on the research field, areas of use, and depth of study, it is crucial to use the one applicable for the specific research area of this thesis.

Anti-bribery program - "the enterprise's anti-bribery efforts including values, code of conduct, detailed policies and procedures, risk management, internal and external communication, training and guidance, internal controls, oversight, monitoring and assurance."[1]

Bribery - "the offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal, unethical or a breach of trust. Inducements can take the form of gifts, loans, fees, rewards or other advantages."[2] For this thesis also the broader definition of bribery can be used: "bribery is the corrupt payment, receipt, or solicitation of a private favor for actions or decisions from influential or powerful agents or authorities which could be public officials, corporations or people inside corporations to generate private benefits for the briber."[3]

Code of conduct - "a statement of principles and values that establishes a set of expectations and standards as to how an organization, government body, company, affiliated group or individual will behave, including minimum levels of compliance and disciplinary actions for the organization, its staff and its volunteers."[4]

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[1] Wilkinson P. Managing Third Party Risk: Only as strong as your weakest link / ed. by P. van Veen. Transparency International UK, 2016. P. 57 URL: https://www.transparency.org.uk/sites/default/files/pdf/publications/TI-UK-Managing-Third-Party-Risk_0.pdf (date of access: 17.05.2021).

[2] Transparency International UK. Open Business. Principles and guidance for anti-corruption corporate transparency. Transparency International UK, 2020. P.3. URL: https://www.transparency.org.uk/sites/default/files/pdf/publications/TIUK_OpenBusiness_WEB4.pdf (date of access: 17.05.2021).

[3] Ramdani D., Van Witteloostuijn A. Bribery. *The Encyclopedia of Criminology and Criminal Justice* / ed. by J. S. Albanese. 2014. P. 1. URL: https://doi.org/10.1002/9781118517383.wbeccj066 (date of access: 24.05.2021).

[4] Transparency International UK. Open Business. Principles and guidance for anti-corruption corporate transparency, supra note 2, at p. 3.

Corporate governance - "procedures, practices and processes for how organizations are directed, managed and controlled, including the relationship between, responsibilities of, and legitimate expectations among different stakeholders."[5]

Corruption - "the abuse of entrusted power for private gain. Corruption can be classified as grand, petty or political, depending on the amounts of money lost and the sector where it occurs."[6] Private-to-private corruption - "the type of corruption that occurs when a manager or employee exercise a certain power or influence over the performance of a function, task or responsibility within a private organization or corporation." [7]

Corrupt organizations - "organizations that systematically receive illegitimate or illicit benefits such as advantages in competitions relaxation of political regulations. Often such organizations are able to secure themselves these advantages in both their own country and abroad, because their employees act corruptly on a regular collective basis."[8]

Facilitation payment - "small payments or gifts made to a person – generally a public official or an employee of a private company – to obtain a favor, such as expediting an administrative process; obtaining a permit, license or service; or avoiding an abuse of power."[9]

Integrity - "behaviors and actions consistent with a set of moral or ethical principles and standards, embraced by individuals as well as institutions, that create a barrier to corruption."[10] "Applied to an organization, this means setting up an organizational code of conduct and ensuring that standards are consistently applied and upheld. Business integrity

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[5] Transparency International UK. Open Business. Principles and guidance for anti-corruption corporate transparency, supra note 2, at p.3.
[6] Ibid.
[7] Argandona A. Private-to-private Corruption / Antonio Argandona: Chair of Economics and Ethics, IESE Business School, University of Navarra, 2003. P.4. URL: https://doi.org/10.2139/ssrn.685864 (date of access: 20.05.2021).
[8] Campbell J.-L., Göritz A. S. Culture Corrupts! A Qualitative Study of Organizational Culture in Corrupt Organizations. *Journal of Business Ethics*. 2014. 120 (3). P. 292. URL: https://doi.org/10.1007/s10551-013-1665-7 (date of access: 07.06.2021). /the definition of 'corrupt organization' was cited according to Pinto/
[9] Argandona A. Corruption and Companies: The Use of Facilitating Payments. *Journal of Business Ethics*. 2005. No. 60. P. 251. URL: https://doi.org/10.1007/s10551-005-0133-4 (date of access: 07.06.2021).
[10] Transparency International UK. Open Business. Principles and guidance for anti-corruption corporate transparency, supra note 2 at p. 4.

means implementing rules and processes that make it harder for bad actors to get away with harmful and dishonest behavior, resulting in strengthened operations and reduced costs."[11]

Organizational culture (or corporate culture) - "a set of shared meanings, assumptions, values, and norms that guide employees' behavior within an organization via explicit structures and implicit conventions."[12]

Stakeholders - "those groups who affect and/or could be affected by an organization's activities, products or services and associated performance. This does not include all those who may have knowledge of or views about an organization. Organizations will have many stakeholders, each with distinct types and levels of involvement, and often with diverse and sometimes conflicting interests and concerns."[13]

Third parties - "any associate with which a company carries out its activities. Third parties that companies are commonly involved with include vendors/suppliers; distributors/resellers; joint venture partners/consortium partners; advisors and consultants (tax, legal, financial, business); service providers (logistics, supply chain management, storage, maintenance, processing); contractors/subcontractors; lobbyists; marketing and sales agents; customs or visa agents; and other intermediaries."[14]

Whistleblowing - "the making of a disclosure in the public interest by an employee, director or external person, in an attempt to reveal neglect or abuses within the activities of an organisation, government body or company (or one of its business partners) that threaten the public interest and its integrity and reputation."[15]

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[11] Lysova E., Kimel S. A Guide for Companies in Emerging Markets: Strengthening Ethical Conduct & Business Integrity. Center for International Private Enterprise, 2020. P. 2. URL: https://www.cipe.org/wp-content/uploads/2020/11/CIPE_BusinessIntegrityReport_1025.pdf (date of access: 26.05.2021).
[12] Campbell and Göritz, supra note 8, at p. 293. /the definition of 'organizational culture' was cited according to Schein/
[13] Transparency International UK. Open Business. Principles and guidance for anti-corruption corporate transparency, supra note 2, at p. 6.
[14] Ibid.
[15] Ibid.

INTRODUCTION

The recent international compliance regulations have undergone a true revolution during the last sixty years. What started in the United States in response to the Foreign Corrupt Practice Act's (FCPA) books and records provisions as a desperate measure in the form of the internal processes, aimed to deter violations of law, has grown into a structure of complex internal corporate procedures and controls that help companies to deal with shifting and complicated business environments. [16] It can be assumed that this long way resulted in the shaping of what we know today as a compliance program. Generally, a **compliance program can be described as a system of interrelated principles, standards, monitoring, and controlling tools that must comply with the company's internal rules and national (if applicable, also international) laws.** Compliance program in business organizations and corporations covers various areas depending on a company's goals, values, business profile, industry, size, applicable processes, and geography. According to the survey "Compliance in the CIS and Post-Soviet Countries: Current Issues and Trends" conducted by KPMG in 2020, areas for business' compliance priorities for CIS countries include anti-corruption, personal data protection, data privacy, antitrust, and sanctions. While anti-corruption compliance reinforced its leading position among other compliance priorities - its significance was confirmed by 93% of respondents who mentioned that anti-corruption compliance is the main priority for their companies.[17]

Do compliance programs have a relevant influence on the corporate culture to refrain employees from corruption offenses? This thesis argues that compliance programs have such an impact, thus compliance programs should be used as one of the effective corporate anti-corruption measures. Even though the thesis also accepts the reality that there is no possibility to wipe out corruption in a country or organization solely by developing proper law or procedure. Nevertheless, it is possible to make national legislation or corporate "laws" robust enough to bring a notable impact on the business environment in general.

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[16] Hechler Baer M. Governing Corporate Compliance. *Boston College Law Review*. 2009. Vol. 50, 4 (4). P. 962–963. URL: https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2423&context=bclr (date of access: 15.05.2021).

[17] Compliance in the CIS and Post-Soviet Countries: Current Issues and Trends. KPMG, 2020. P. 5. URL: https://assets.kpmg/content/dam/kpmg/ru/pdf/2020/05/ru-en-compliance-survey.pdf (date of access: 14.05.2021).

Studying the consequences and the impact of corruption is undoubtedly essential, at least to evaluate the actual cost of the low-performing governance system. However, if one wants to prevent corruption, it is critical to study the system's failures that are allowing corruption to flourish. Therefore, to understand how and why to use a compliance program as a corporate advantage, one needs to understand the possible weaknesses of the compliance programs and how they can undermine the existing anti-corruption measures.

Prior to examining the key elements of a compliance program and identifying potential gaps, it is vital to set a context for this research. This thesis first presents the overview of corruption occurring within the business organizations and corporations (in this thesis may be referred to also as "company"/ "companies", "firm"/ "firms" or "organization"/ "organizations"), and its' influence on the business environment in the developing countries in general, with a brief extent on organizations' justification of corruption. Business organizations can be engaged in both public ("private-to-public"[18]) and private ("private-to-private"[19]) corruption. This thesis will cover corruption within the business organizations and corporations in the main, but will also focus on bribery. It is known that different forms of corruption affect organizations. However, bribery is the most common type among them.[20] An example of "private-to-public bribery" is when a public official who has the power of decision to choose an agent in some state-funded project, picks an unqualified participant for this project in return for a specified gift or advantage received from this agent. "Private-to-private bribery" may occur when, for instance, a pharmaceutical company provides gifts, travel, hospitality, or illegal payments to physicians in return for them writing patients prescriptions for that company's drug products.[21]

Secondly, the thesis considers what type of anti-corruption measures exist to fight corruption, including the private sector corruption, at the international and country levels. The thesis continues with a review of recommendations regarding developing the

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[18] Saglibene D. The U.K. Bribery Act: A Benchmark for Anticorruption Reform in the U.S. *Transnational Law & Contemporary Problems*. 2014. 23:119. P. 124. URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2266175 (date of access: 15.05.2021).

[19] Ibid.

[20] Forgues-Puccio G. F. Corruption and the Private Sector:A review of issues. *EPS Peaks. Economic and Private Sector Professional Evidence and Applied Knowledge Service*. 2013. P. 5. URL: http://www.businessenvironment.org/dyn/be/docs/262/Corruption_and_the_Private_Sector_EPS_PEAKS_2013.pdf (date of access: 26.05.2021).

[21] Argandona, 2005, supra note 9, at p. 1.

compliance program shared by particular international organizations or regulators. This part also points out situations where companies conducted a corrupt offense, despite the existing compliance program, to identify what kind of gaps enabled that. Finally, the thesis outlines all reviewed recommendations and results of analysis of the FCPA violations to suggest critical elements of the robust compliance program. This part is supplemented with several points related to the benefits a compliance program can bring to the business firms in a long-term perspective. The conclusion of this thesis presents some thoughts on the necessity to reevaluate the role of private firms in combating corruption and the added value that their anti-corruption measures can bring.

The **main purpose** of this thesis is **to identify the effectiveness of the anti-corruption compliance programs in preventing corruption in the private sector and beyond - its influence on the shaping of the anti-corruption framework generally.** The research within this goal aimed to fulfill the following **tasks**:

1. To study the existing anti-corruption initiatives enforced at the international level;
2. To provide insight into the anti-corruption legal framework (as part of the existing anti-corruption measures) in the United States of America, the United Kingdom, and Ukraine to evaluate its influence on combating corruption within the private sector;
3. To conduct a case study – based on actual cases reported by the DOJ to (i) determine if any deficiencies and gaps discovered in corporate compliance programs of the particular company had a material influence on the corrupt conduct made by its' employees; (ii) to define in which way business organizations and corporations evaluated the corrupt conduct;
4. To study international guidelines and handbooks on the development of compliance program (including anti-corruption compliance program) to identify common key elements of various typical compliance programs;
5. To determine the critical elements of the robust compliance program;
6. To identify the role of the compliance program in fighting private sector corruption.

Hence, the **object** of this thesis is an anti-corruption compliance program as an instrument to fight corruption, and the **subject matter** of this thesis is particular conditions and elements that make the anti-corruption compliance program an effective tool to fight corruption in the private sector.

To complete the primary goal of this thesis, the following **research methods** were favoured: (1) **exploratory research method** to clarify the nature of the private sector corruption and its forms, and to evaluate private sector corruption's influence. Within this research method, *secondary and qualitative researches techniques* will be applied - to review the available articles on the compliance and private sector corruption topics; to perform a case law study on issues of the FCPA and the Bribery Act violations; and to study the data obtained from recent surveys, interviews, and reports conducted within business organizations and corporations; (2) **method of scientific analysis and generalization**; (3) **the comparative method** that will cover comparison of the selected corruption offenses committed by business organizations as well as comparison of the provisions of anti-bribery (anti-corruption) legislation in several countries; and (4) **the legal research method** to study the existing anti-corruption legislation in the selected countries. The case study covers the overview of cases of large multinational corporations with representative or sales offices in different countries, cases of court-ordered fines, and settlement agreements. The study also includes an analysis of the existing recommendations (from international agencies and regulators) regarding anti-corruption programs and recent studies on the influence of the compliance program on business development. Based on the data regarding deficiencies that are causing the major corporate disruptions, how they affect business processes, and the consequences, *it would be possible to provide specific recommendations on the essential elements of an effective compliance program*, what tools or controls it should include. This study shall contribute to the development of a network of responsible businesses and will provide ideas on how to improve the existing compliance programs, as long as corporate corruption is, at last, crushing for businesses of any range. *That indicates the relevancy and novelty of this thesis.* Furthermore, this thesis has particular relevance for Ukraine as long as business organizations operating in Ukraine can be engaged in international transactions, search for investments, or new foreign partners; thus, it is critical to cover possible

corruption risks within various business processes. However, business ethics and compliance are relatively new topics for the business community in Ukraine. According to the recent expert study "International Compliance Index"[22] organized by the EBA, the experts rated the general level of commitment to compliance at 3.15 points out of 5. This survey involved 157 CEOs, lawyers, HRs, and compliance officers of the EBA member companies. This Index demonstrates the neutral values. The adherence to compliance still needs some improvements; therefore, introducing the international best practices in compliance (incl. the development of compliance programs) may bring essential value to the business community in Ukraine.

The resource base of the thesis includes regulatory documents (laws, industry standards, recommendations, et al.); latest studies, surveys, reports on the compliance and corruption in the private sector; reports of the US Department of Justice that includes the overview of cases in relation to the FCPA violation; judicial proceedings of the US courts; handbooks on the development of compliance programs; scientific researches conducted by the recognized experts in the studying of corruption.

The **structure** of the thesis is the following:

- Chapter 1 is dedicated to an overview of the phenomenon of corruption in the private sector, its consequences, and causes;
- Chapter 2 reflects information regarding the efforts implemented on the international level to address corruption in the private sector, along with a summary in relation to the ongoing Anti-Corruption reform in Ukraine to demonstrate current developments and their influence on the business community;
- Chapter 3 gives a comprehensive review of compliance programs starting from analyzing their effectiveness, vulnerability, and role and ending with recommendations for developing a robust compliance program that will be an effective tool in fighting corruption.

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[22] International Compliance Index 2021. European Business Association (EBA), 2021. P.4-7. URL: https://eba.com.ua/wp-content/uploads/2021/06/compliance-index__eng.pdf (date of access: 14.05.2021).

Generally, this thesis includes the introduction paragraph, three chapters supplemented by conclusions, the overall conclusion, the list of definitions, abbreviations, and references, with the total number of pages: 111.

CHAPTER 1. UNDERSTANDING CORRUPTION IN BUSINESS ORGANIZATIONS AND CORPORATIONS

1.1. Consequences of the private sector corruption

The destructive extent of corruption in the public sector is widely examined and discussed, while over a long period, the corruption that occurred in the private sector was depreciated. Corruption in the private sector was considered an "integral part" of business, and bribery - as a worldwide practice. Overseas bribery was treated as a matter of tradition, and some countries used to subtract it as a tax write-off; thus, the negative outcome of bribes was not immediately evident. **Meanwhile, private bribery occurs as frequently as public bribery in international transactions; it brings the same consequences, creates inappropriate grounds for decision-making, and an environment conducive to public bribery.** Its destructive essence shows itself over time. It brings disrupting economies, inhibits free trades, wasting resources, and causing political uncertainty.[23] The private sector corruption generally lacks perspective for the economic investments and discredits the business conduct ethics.

The definition of corruption used by Transparency International, describes corruption as "the abuse of entrusted power for private gain"[24] Another common definition is that "(…) corruption is a transaction between private and public actors through which collective goods are illegitimately converted into private-regarding payoffs."[25] In terms of sectors, public sector corruption defined as "(…) illegal, or unauthorized, acts on the part of public officials who abuse their positions of authority to make personal gains."[26] Private sector corruption is "the type of corruption that occurs when a manager or employee exercises a certain power or influence over the performance of a function, task or responsibility within a private organization or corporation."[27] "Corruption takes many different forms, from the routine

[23] Saglibene, supra note 18, at p. 124-125.
[24] See Transparency International UK. Open Business. Principles and guidance for anti-corruption corporate transparency, supra note 2 at p.3.
25 Corruption. A review of Contemporary Research / J. C. Andvig et al. Bergen: Chr. Michelsen Institute, 2001. P. 123. URL: https://open.cmi.no/cmi-xmlui/handle/11250/2435853 (date of access: 24.05.2021).
[26] Forgues-Puccio, supra note 20, at p. 1.
[27] Argandona, 2005, supra note 9, at p. 4.

cases of bribery or petty abuse of power that are said to ‘grease the wheels’ to the amassing of spectacular personal wealth through embezzlement or other dishonest means.”[28] Authors of the report “Corruption A Review of Contemporary Research” suggests, among other things, to consider corruption as a particular state-society relationship. The origins of corruption can be found in two areas of relationship between the state and society beyond it - at the national and international arenas.[29] On the international arena, due to the globalization of markets, finances, and a variety of other transactions, there is a greater chance for covert transactions between non-state actors and “host” governments and their representatives.[30] The researchers provide examples of multinational companies paying for preferences and monopolies, giving kickbacks for tenders, loans, and contracts, getting new high-cost projects in response to gifts and other benefits offered to the officials. On the national arena, corruption occurs at the intersection of the state and numerous non-state actors - “on one side, there is the corrupt state official, and on the other, there is the corrupter, the bribe supplier.”[31] Researchers also recognize the corruption existing between private business and within non-governmental organizations, without any state agency or official being involved.[32] Generally, private corruption (or “private-to-private corruption”)[33] includes, among others: “bribery (when it is the person who pays who takes the initiative); extortion or solicitation (when it is a person who receives the payment who takes the initiative, whether explicitly or otherwise); dubious commission; gifts and favors; facilitation payments (to speed up completion of an order, delivery of goods or payment of invoice (…)); nepotism or favoritism (in the hiring and promotion of personnel (…)); illegitimate use or trading of information (trade or industrial secrets (…)); use of undue influence to change a valuation or recommendation (…).”[34]

Corruption remains the gage of the highest relevance for the world community. And it is undoubtedly becoming more intense. In accordance to the PwC Global’s data:

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[28] Exporting Corruption. Privatisation, Multinationals & Bribery. The Corner House. 2000. Briefing 19: Corruption, Privatisation and Multinationals. P. 2. URL: http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/19bribe_0.pdf (date of access: 17.05.2021).
[29] Andvig, supra note 25, at p.6.
[30] Ibid at p.7.
[31] Ibid.
[32] Ibid.
[33] Argandona, supra note 9, at p.4-5.
[34] Ibid.

"US$1 trillion is paid each year in bribes globally, and that US$2.6 trillion is lost to corruption."[35] The detrimental effect and the coverage of corrupt offenses (both private-to-private and private-to-public) occurring in the private sector are recognized, reported and reflected in different international agreements. A study on "Business approach to combating corruption" conducted by the OECD among top 100 non-financial multinational enterprises shows that 33 out of 100 enterprises address private-to-private bribery against 26 enterprises that pointed bribery of public officials only.[36] A World Bank's Enterprise Survey, which provides an overview of the prevalence of corruption in private enterprises, shows that in some countries, around 51 percent of enterprises experience at least one bribe payment request per year.[37] Following to the "Global Economic Crime and Fraud Survey"[38] conducted in 2020 by PricewaterhouseCoopers, 30 percent of the respondents reports internal corruption.[39] In the end, the "…permissiveness toward private sector bribery could result in a business climate conducive to foreign bribery, particularly given that the private sector in many countries is larger than the public sector, thus providing more opportunities for corrupt dealings."[40]

Current state of the business climate in Ukraine could become a good representation of the destructive corruption influence. The significance of this topic for Ukraine is also intensified by the deeply corrupted environment, absence of effective anti-corruption measures, and undervalued role of compliance in organizations. The influence of corruption on the economic health of Ukraine confirmed in surveys performed among foreign investors by the European Business association on a regular basis. During the latest survey held in

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[35] Five forces that will reshape the global landscape of anti-bribery and anti-corruption. PwC, 2017. P.2. URL: https://www.pwc.com/gx/en/forensics/five-forces-that-will-reshape-the-landscape-of-anti-bribery-and-anti-corruption-final.pdf (date of access: 17.05.2021).

[36] Business Approach to Combatting Corruption Practices. Organisation for Economic Co-operation and Development, 2003. P. 2. URL: https://www.oecd-ilibrary.org/docserver/870734534651.pdf?expires=1623465334&id=id&accname=guest&checksum=DD038F4C7A4429CF84BB7E8A384C4EF3 (date of access: 17.05.2021).

[37] Explore Topics. *World Bank*. URL: https://www.enterprisesurveys.org/en/data/exploretopics/corruption (date of access: 04.06.2021).

[38] Fighting fraud: A never-ending battle. PwC, 2020. 14 p. URL: https://www.pwc.com/gx/en/forensics/gecs-2020/pdf/global-economic-crime-and-fraud-survey-2020.pdf (date of access: 17.05.2021).

[39] Ibid at p.2.

[40] Consultation Paper. Review of the OECD Instruments on Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption. OECD, 2008. P. 12. URL: https://www.oecd.org/daf/anti-bribery/39882963.pdf (date of access: 15.05.2021).

2020[41], strategical and current investors identified corruption among the two most significant barriers for doing business in Ukraine; the second one is the credibility gap towards the judicial system. However, even this second issue may be a consequence of corruption. General evaluation of the investment environment is not high so far: only 9% of surveyed foreign investors informed about some improvements there, 42% did not report any changes in comparison to previous periods, and the entire 48% esteem that investment attractiveness of Ukraine wanes. Also, the investors in the scope of this survey were asked to name the key factors which significantly influence the investment attractiveness of Ukraine; among other factors, they designated that "combating corruption will have the most substantial favorable impact on the investment environment of Ukraine."[42]

1.2. Causes of the private sector corruption and its justification by the key actors

Despite the available research data and findings saying about the corrosive consequence of corruption, private business continues making the same offenses, paying bribes and sorting out all negative consequences. However, still, there is a tendency that some private firms believe that corruption is a tool that can maximize their business value. This is "a tool" for many companies to **get access to the new market or to expand their presence on the existing one** (e.g., Mobile TeleSystems P.J.S.C. - the company charged by the DOJ and the SEC for corrupt payments to the benefit of the foreign official to facilitate access to the Uzbek telecommunication market)[43], to **get governmental contracts or to get some favorable conditions on the contracts** (e.g., Alstom S.A. admitted offense, where among other misconducts, a U.S. subsidiary of Alstom paid bribes to government officials to win a project, sometimes referred to as "Tarahan", at around $118 million)[44], **get licenses or permits omitting standard procedures and requirements** (e.g., Teva Pharmaceutical

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[41] Foreign Investor Survey 2020. EBA, 2020. P.3-8. URL: https://eba.com.ua/wp-content/uploads/2020/11/2020_ForeignInvestorSurvey_Presentation_en.pdf (date of access: 15.05.2021)
[42] Ibid.
[43] General Allegations of United States District Court Southern District of New York in United States of America v Mobile Telesystems PJSC. URL: https://www.justice.gov/opa/press-release/file/1141636/download (date of access: 15.05.2021).
[44] Information of United States District Court District of Connecticut of 22.12.2014 in no. 3:14-cr-00246-JBA. URL: https://www.justice.gov/file/189326/download (date of access: 14.05.2021).

Industries Ltd. (Teva) and its subsidiaries in Western Europe were charged for bribing government officials in various countries.[45] In Ukraine, Teva bribed a senior government official from the Ukrainian Ministry of Health to urge the Teva drug registration in Ukraine)[46], **get information to win biddings, influence healthcare professionals and institutions through bribes and payoffs - to promote particular drugs** (e.g., Novartis Hellas S.A.C.I. that was charged for, among other things, bribing employees of publicly owned hospitals in Greece to increase prescription of Novartis branded drugs)[47], **to fudge clinical trials data** at al.

Furthermore, of the around 3500 respondents (board members, higher and mid-level managers, and other employees of selected largest organizations and public bodies) interviewed for EY's "Global Integrity Report 2020"[48], 46% confirmed that a short-term financial gain could justify unethical behavior in their organization. As highlighted by Rose-Ackerman, "firms, both domestic and foreign, justify their behavior as a means to their greater goal of the creation of economic value and as a necessary, if unpleasant, response to the weakness and venality of governments", moreover companies recognize themselves "as mere cogs in political\economic systems that transcend their individual deals."[49] It appears that in that way, companies are trying to take away any responsibility for the misconduct, defining it more like a forced response to the external circumstances rather than a conscious choice in favor of the misconduct.

It is noticeable that many companies can quickly go for the corrupt practice in doing business in some developing country that has a stable corrupt environment (where corruption became a norm), but at the same time, they will consider such practice as

[45] Information of United States District Court for the Southern District of Florida of 22.12.2016 in no. 1:16-cr-20967-KMW. URL: https://www.justice.gov/opa/press-release/file/920236/download (date of access: 14.05.2021).
[46] Teva Pharmaceutical Industries Ltd. Agrees to Pay More Than $283 Million to Resolve Foreign Corrupt Practices Act Charges. U.S. Department of Justice. URL: https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt (date of access: 15.05.2021).
[47] Information of United States District Court District of New Jersey of 22.06.2020 in no. Case number: 20-cr-538. URL: https://www.justice.gov/usao-nj/press-release/file/1289826/download (date of access: 15.05.2021).
[48] Global Integrity Report 2020. EY, 2020. P. 9. URL: https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/assurance/assurance-pdfs/ey-is-this-the-moment-of-truth-for-corporate-integrity.pdf (date of access: 24.05.2021).
[49] Rose-Ackerman S. ''Grand'' corruption and the ethics of global business. *Journal of Banking & Finance*. 2002. No. 26. P. 1891. URL: https://doi.org/10.1016/s0378-4266(02)00197-8 (date of access: 15.05.2021).

unacceptable in their home country. Even the risk of sanctions or possible loss of reputation is considered by private firms like some side issue, not a critical problem, in their endeavor to maximize the business benefits.[50] The companies' misconduct is considerably reinforced by their assurance - if they do not pay payoffs, they will not expand their business in the particular country, and then fewer professional competitors will capture the market. Indeed, to some extent, that can be true. If public officials in the country created a well-organized corrupted environment and payoffs are considered a usual way of doing business in such a country; or if the entire system in the country is so unstructured that corruption is the only solution to conduct business there - companies fall into the trap of rough conditions caused by corruption. Naturally, it can be challenging for companies to conduct business transparently, especially in emerging markets. Playing fairly may lead a company to a disadvantage compared to its competitors that continue unethical business practices. Thus, when it comes to corruption, some companies evaluate the dilemma - to steer or not the corrupt practices, from the perspective of their obligations towards stakeholders and employees only. Such companies do not recognize their responsibility to conduct business transparently as they hardly see their responsibility within the corrupt environment of the country where they do business.

Corrupt offense rates remain at record highs, impacting more countries, more communities, more companies in more disparate ways than ever before. From this perspective, instead of making the most of this doubtful business "opportunity", the private firms should be asking: Are the anti-corruption measures we've deployed providing the value we expected? When an issue occurs, are we ready to take the right action? Are we evaluating threats fairly well, or are there some gaps so far leaving us severely exposed?

Now is the right time for the international community to strengthen the focus on causes of corruption (including the private sector's "contribution" as well) rather than on its symptoms, to start speaking more about bribe-givers on all levels, instead of fully concentrating on briber-takers, to expand its attention more to the grand corruption, not to stick on the petty one. Practical actions against corruption should involve effective sanctions

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[50] Rose-Ackerman, 2002, supra note 49, at p. 1891.

by developing countries against private firms engaged in corruption.[51] Besides, there can be sufficient efforts from the private firms' side to respond to the harmful corruption influence. One possible solution is implementing corporate compliance programs, which are considered a common, especially in the US, business firm's response to risks and threats associated with corruption,[52] to establish a framework for the future implementation of the integrity principle into the business practice.

Conclusions to CHAPTER 1

Corruption remains the world's most significant defiance. Traditionally, corruption can be viewed as the issue arising on the public sector's side only (named as a "demand-side" of bribery) "due to the transfer of responsibility and improper monitoring".[53] In contrast, less attention is focused on the "supply-side" of bribery (private sector actors), considered often as a victim. However, bribery requires two parties - the party that gives bribery and receives it. The supply side can also bring severe damages and losses. Indeed, a typical affair presumes that a business organization employee offers a bribe to the public official, even though "some payoffs do not involve any public officials" completely.[54]

The excessive development of the private sector within the developing countries increase risks of involvement of business organizations in corrupt offences (owing to profit maximization goals, business expansion, getting state contracts, et al.). At times business organizations have to conduct business under the commonly accepted rules of the game, which are not necessarily lawful, in the state of governance far from ethical universalism, where corruption is not a deviation but rather a norm. It once again emphasizes the importance of recalibration, fundamental changes in the approach to the private sector bribery and its actors.

[51] Exporting Corruption. Privatisation, Multinationals & Bribery, supra note 28, at p.1-2.
[52] Rose-Ackerman, 2002, supra note 48, at p.1891.
[53] Forgues-Puccio, supra note 20, at p. 8.
[54] Rose-Ackerman S. Measuring Private Sector Corruption. *U4 Brief.* 2007. No. 5. P. 1. URL: https://www.u4.no/publications/measuring-private-sector-corruption.pdf (date of access: 16.05.2021).

There are several reasons why the elimination of corruption should become a top priority for the business community: liability towards investors and employees, reputation on the market, trust in business from customers' side, possibility to be chargeable for employees' misconduct, and agents. Moreover, there is high anticipation of business involvement in the anti-corruption initiatives highlighted by the international organizations - business was recognized as a stakeholder in anti-corruption efforts, a key participant in the fight against corruption.[55] Thus, its involvement should be more notable than ever before.

The private sector will continue its growth, and, accordingly, the level of either private-to-private or private-to-public corruption will increase. **Thus, it is reasonable to say that without strengthening the local response to the corrosive impact of corruption in the private sector, the entire fight against corruption would not be successful.**

[55] Business against Corruption a framework for action. UN Global Compact, 2011. P.3. URL: https://d306pr3pise04h.cloudfront.net/docs/news_events/8.1/bac_fin.pdf (date of access: 07.06.2021).

CHAPTER 2. RESPONSE TO THE PRIVATE SECTOR CORRUPTION

2.1. Efforts of the international community to combat corruption

2.1.1. Overview of the existing anti-corruption initiatives

Before the 1990s, many researchers considered corruption in developing countries as an unavoidable and even desirable condition of doing business.[56] The World Bank considered payments to local officials as a "necessary (…) way to cut through bureaucratic red tape and implement development projects."[57] Payments to local officials were rated as a way to integrate into the local culture and traditions. Kenneth W. Abbott described the dominant view on corruption that implied that some forms of corruption could be considered like necessary and beneficial aspects of the development. Corruption was understood as an integral piece of modernization - corruption occurs when traditional norms are not working anymore, while renewed norms are not developed yet. Changing such attitude towards corruption, changing the existing concepts, and understanding that consequences of corruption are overarching was critical for the development of the anti-corruption movement on the international level. As mentioned by Abbott, at the beginning of the 1980s, some officials and NGOs in developed countries went through a particular transformation in regard to the evaluation of corruption. By the end of the 1990s, the fight against corruption became a noteworthy issue on the international agenda,[58] and "the global anti-corruption norm arose." [59] While corruption as a topic was not new, the judgment against corruption changed fundamentally. From the categories of "tradition" and a "part of the local culture", corruption evolved into a significant global issue worth external monitoring of states.[60]

These changes resulted in developing of a good governance regime and evolvement of the new actors that enforced the anti-corruption initiatives. Among the most influential

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[56] Abbott K. W., Snidal D. Values and Interests: International Legalization in the Fight against Corruption. *The Journal of Legal Studies*. 2002. Vol. 31, s1. P. S158. URL: https://doi.org/10.1086/342006 (date of access: 23.05.2021).
[57] Ibid.
[58] Ibid at p.S158-S160.
[59] Cooley A., Sharman J. C. Blurring the line between licit and illicit: transnational corruption networks in Central Asia and beyond, Central Asian Survey. 2015. P. 13. URL: https://doi.org/10.1080/02634937.2015.1010799 (date of access: 23.05.2021).
[60] Ibid.

Alexander Cooley and J.C. Sharman[61] named: (1) Transparency International (TI), recognized as "the world's most visible and influential watchdog", TI published "an evaluation and ranking of states according to their perceived levels of corruption and bribe-taking" (the Corruption Perception Index, CPI); and (2) The World Bank, and later the International Monetary Fund (IMF). These financial actors spotted corruption as a barrier to economic development. Abbott defines the own list of "central organization": The United Nations, the development banks, the International Monetary Fund, the Organization of American States (OAS), the Council of Europe, the European Union, the Organization for Economic Co-operation and Development (OECD).

Moreover, a range of multilateral agreements to address corruption was introduced during the last twenty years. These agreements engaged states, international organizations, multinational companies, civil society organizations, all united behind one goal - to fight corruption. Alina Mungiu-Pippidi, in the research of the impact of international agencies at anti-corruption regulations framework through several agreements,[62] defines three main ways in which corruption can be addressed: "first, by overcoming collective action problems that might limit cooperation in efforts to increase international constraints to corruption; second, by developing and codifying anti-corruption legal norms internationally; and third by promoting and establishing legal constraints and good governance norms at the national level."[63] Mungiu-Pippidi also defines the following international agreements as key agreements with regard to anti-corruption: "the Financial Action Task Force, established in 1989 to combat money laundering; the 1997 OECD Anti-Bribery Convention (…); the 2002 Extractive Industries Transparency Initiative (EITI), launched to improve transparency and reduce corruption in resource-reach countries; the 2003 United Nations Convention Against Corruption (UNCAC) (…); the 2017 Stolen Asset Recovery Initiative of the World Bank and the United Nations Office on Drugs and Crime."[64]

To support mentioned efforts, some governments and international organizations issued guidelines to assist companies in preventing Corruption and developing robust

[61] Cooley, Sharman, supra note 59, at p.13.
[62]Mungiu-Pippidi A. The Quest for Good Governance. Cambridge University Press, 2015. P. 187. URL: https://doi.org/10.1017/CBO9781316286937 (date of access: 17.05.2021).
[63] Ibid at p.187.
[64] Ibid at p.188.

compliance programs to strengthen their anti-corruption efforts. There is a number of guidelines considered as a best practice[65] already: "Good practice guidance on internal control, ethics, and compliance"[66] issued by Organization for Economic Co-operation and Development (OECD); "Anti-Corruption Code of Conduct for Business"[67] prepared by Asia-Pacific Economic Cooperation (APEC); "ICC Rules on Combating Corruption"[68] issued by International Chamber of Commerce (ICC); "Business Principles for countering bribery"[69] published by Transparency International; "The ten principles"[70] of the United Nations Global Compact; "Principles of countering corruption"[71] by the World Economic Forum; et al. To help companies to set an effective management system model aimed to prevent, detect and address Corruption, the International Organization for Standardization (ISO) developed the ISO 37001, a standardized anti-bribery management process. In addition to the guidelines mentioned above, the US Department of Justice (DOJ) issued the guidelines for evaluating the corporate compliance program, highlighting the main hallmarks of the effective and robust program. The Ministry of Justice of the UK (MOJ) issued a guide regarding procedures that commercial organizations can establish to prevent bribery. This part of the thesis includes a brief review of several selected guidance (standards) to provide an example of the issues typically covered:

1. **ISO 37001:2016 Anti-bribery management systems**[72] produced by ISO (the International Organization for Standardization). **Scope:** describes the anti-bribery

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[65] A Resource Guide to the U.S. Foreign Corrupt Practices Act. The Criminal Division of the U.S. Department of Justice, The Enforcement Division of the U.S. Securities and Exchange Commission, 2020. P. 67. URL: https://www.justice.gov/criminal-fraud/file/1292051/download (date of access: 26.05.2021).

[66] Good Practice Guidance on Internal Controls, Ethics, and Compliance. Official edition. OECD, 2010. 4 p. URL: https://www.oecd.org/daf/anti-bribery/44884389.pdf (date of access: 26.05.2021).

[67] APEC#207-SO-05.1. Anti-corruption Code of Conduct for Business, September 2007. Official edition. APEC, 2007. 6 p. URL: https://www.apec.org/Publications/2007/09/APEC-Anticorruption-Code-of-Conduct-for-Business-September-2007 (date of access: 26.05.2021).

[68] ICC Rules on Combating Corruption. Official edition. Paris: ICC, 2011. 18 p. URL: https://iccwbo.org/content/uploads/sites/3/2011/10/ICC-Rules-on-Combating-Corruption-2011.pdf (date of access: 26.05.2021).

[69] Business principles for countering bribery. Official edition. Berlin, 2013. 16 p. URL: https://images.transparencycdn.org/images/2013_Business-Principles_EN.pdf (date of access: 26.05.2021).

[70] The Ten Principles | UN Global Compact. *Homepage* | *UN Global Compact*. URL: https://www.unglobalcompact.org/what-is-gc/mission/principles (date of access: 26.05.2021).

[71] Global Principles for Countering Corruption. World Economic Forum, 2016. 12 p. URL: http://www3.weforum.org/docs/WEF_PACI_Global_Principles_for_Countering_Corruption.pdf (date of access: 26.05.2021).

[72] ISO 37001:2016(en) Anti-bribery management systems – Requirements with guidance for use // ISO - International Organization for Standardization. URL: https://www.iso.org/obp/ui/#iso:std:iso:37001:ed-1:v1:en (date of access: 26.05.2021).

management system; reflects international best practice and covers rules related to, among other things, risk assessment, due diligence, trainings, internal control, role and responsibility of compliance function; gifts, hospitality and donations, et al.; applicable for organizations of all sizes and from all sectors (public, private, non-profit); covers only bribery-related risks and helps to set up a process aimed help the organization to comply with anti-bribery laws; provides guidelines on implementing policies, procedures and controls in the organization based on the level of the bribery risks this organization faces; provides guidelines on implementing of adequate measures aimed to prevent, detect and respond to bribery.

2. **A guide for companies in emerging markets "Strengthening ethical conduct & business integrity"[73]** published in 2020 by Center for International Private Enterprise. **Scope:** This guide describes the best practice received by CIPE within their projects on ethical business practices in emerging markets; provide guidelines on the implementation of the business integrity program; this guide describes the essential steps in establishing a business integrity program; moreover, it not only points the correct elements (e.g., one should ensure management's oversight over compliance) but provides solid recommendations on how to implement this element, e.g., how to gain management commitment? How should companies approach the risk assessment process? How to develop a code of conduct? CIPE's guide provides strong reasoning for the leadership team regarding the benefits of ethical business practice.[74]
3. **"Good Practice Guidance on Internal Controls, Ethics, and Compliance"** issued in 2010 by Organization for Economic Co-operation and Development (OECD). **Scope:** designed to support companies with establishing effective and relevant internal monitoring, ethics and compliance programs aimed to avert and detect corruption, deter corrupt practices (including bribing foreign officials). OECD guidance provides an overview of good business practices, such as senior

[73] A Guide for Companies in Emerging Markets: Strengthening Ethical Conduct & Business Integrity, supra note 11.
[74] Ibid.

management commitment, robust and visible corporate policy, reviews of the compliance program and internal policies, the establishment of the confidential reporting line, et al. Also, this guidance underlines critical areas (e.g., gifts, hospitality, entertainment, travel expenses, political and charitable donations, sponsorship) which organizations should precisely cover.[75]

2.1.2. Nature and content of the United Kingdom Bribery Act 2010 and its role in combatting private sector corruption

"The United Kingdom has long been a party in international treaties that combat corruption, (…) such as the United Nations Convention Against Corruption, the Organization of Economic Cooperation and Development (the OECD), Anti-Bribery Convention, and the Council of Europe Criminal Law Convention on Corruption."[76]

However, the previous statutory criminal law of the United Kingdom, despite its functional ability, was quite obsolete with some "inconsistencies of language and concepts between the various provisions and a small number of potentially significant gaps in the law"[77] and with unclear "exact scope of the common law offence."[78] Eventually, this criminal law led to the creation of the equally questionable bribery law, which set "an imperfect distinction between public and private bribery"[79], was "difficult to understand for the public and difficult to apply for prosecutors and the courts"[80] and which was heavily criticized by the OECD for its desuetude, as well as the UK was criticized for "its failure to bring its anti-bribery laws into line with its international obligations."[81]

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[75] Good Practice Guidance on Internal Controls, Ethics, and Compliance. OECD, 2010. P. 2-4. URL: https://www.oecd.org/daf/anti-bribery/44884389.pdf (date of access: 03.06.2021).

[76] Rosalez R. C., Loegering W. C., Territt H. The UK's Bribery Act and the FCPA Compared. *In-House Litigator. The Journal of the Committee of Corporate Counsel*. 2020. Vol. 25, no. 1. P. 12. URL: https://www.jonesday.com/files/Publication/8b440742-9854-4137-94f2-314eaeafdd6c/Presentation/PublicationAttachment/041391ca-dab4-4d44-ab57-0965ea90383a/Binder1.pdf (date of access: 18.05.2021).

[77] Bribery Draft Legislation: Draft Legislation (2009). P. 3. URL: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/238651/7570.pdf (date of access: 18.05.2021).

[78] Ibid.

[79] Saglibene, supra note 18, at p. 122.

[80] Bribery Draft Legislation, 2009, supra note 77, at p. 3.

[81] Rosalez, Loegering, Territt, supra note 75, at p. 13.

At that time, the United Kingdom government had an excellent example of the US authorities who applied their extraterritorial law against corporations and their executives worldwide. Corporations that had their business in the UK also fallen under the FCPA penalties and hefty fines. The UK could simply confine itself to supporting all anti-corruption efforts of the US authorities. Instead, the UK decided to become a valuable actor fully engaged in the process, promoting the anti-corruption agenda and strengthening responsibility against those who guilty of bribery, seeing that "bribery undermines democracy and the rule of law and poses very serious threats to sustained economic progress in developing and emerging economies and to the proper operation of free markets more generally."[82] The Bribery Act intends to stand against all mentioned threats caused by bribery and against the variety of its forms. This Act was called to reform a criminal law "to provide a new, modern, and comprehensive scheme of bribery offenses to equip prosecutors and courts to deal effectively with bribery at home and abroad."[83] Moreover, what is specifically essential, the Bribery Act, proclaimed bribery in respect to any person, not only bribing the public official. One can say that The Bribery Act establishes additional offenses that go far beyond the scope of the FCPA in the United States. With the implementation of the Bribery Act, "recognized by the OECD as being a higher standard," the UK parliament set a "benchmark for anti-corruption law around the world". [84]

After entering into effect, The Bribery Act was recognized as a noteworthy and, in some way, groundbreaking anti-bribery statute. It is considered among the strictest legislation internationally on bribery so far.[85] The Bribery Act has a distinctive feature: it makes a private bribe a criminal offense and extends responsibility for those accepting the bribe, while the common approach makes provision for offenses of bribing only. On the model of the FCPA, it prohibits bribing, along with any attempt to influence, foreign officials. Thus, any advantages, gifts, payments may be considered as a bribe. As opposed to the FCPA, the Bribery Act does not include any provisions related to accounting.

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[82] The Bribery Act 2010. Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010). Ministry of Justice, 2011. P. 8. URL: https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (date of access: 14.05.2021).
[83] Rosalez, Loegering, Territt, supra note 75, at p. 13.
[84] Saglibene, supra note 18, at p. 132.
[85] The Bribery Act and Adequate Procedures Guidance. Transparency International UK. URL: https://www.transparency.org.uk/bribery-act-and-adequate-procedures-guidance (date of access: 17.05.2021).

The Bribery Act covers the following key provisions:

1. **Substantive offences** under the Bribery Act include:

- two general offenses: "offering, promising, or giving a bribe **(active bribery)**"[86] covered by Section 1, "requesting, agreeing to receive or accepting a bribe (**passive bribery**)"[87] covered by Section 2;
- two additional offenses related specifically to commercial bribery: "offense relating to **bribery of a foreign public official** in order to obtain or retain business or an advantage in the conduct of business (covered by Section 6); a new form of **corporate liability for failing to prevent bribery** on behalf of a commercial organization"[88] (covered by Section 7).

According to the Bribery Act, for ***offences of bribing another p****erson*, the knowledge requirement is crucial: in case of an offering, promising, or giving a bribe, a person should know or believe that this bribe will influence the exactor "to perform a relevant function or activity improperly."[89] The following *functions and activities* are in scope for offences under Section 1 and Section 2: "(…) any function of a public nature, any activity connected with a business, performed in the course of a person's employment or performed on behalf of a company or another body of persons. Therefore, bribery of both the public and the private sectors is covered".[90] Also, it is assumed that bribery can be given either directly or indirectly (through a third party), and it is not necessary that a person who takes a bribe is a foreign official. As for ***offenses related to being bribed,*** the knowledge requirement is not applicable for all cases under Section 2, while it is similarly (as for bribing another person) have no matter whether a bribe is given directly or indirectly. Moreover, it is not vital if the bribe (advantage) is given to benefit the extractor or another person.

[86] Bribery Act 2010 - Serious Fraud Office. Serious Fraud Office. P. 8. URL: https://www.sfo.gov.uk/foi-request/2020-040-bribery-act-2010/ (date of access: 02.06.2021).
[87] Ibid at p.8.
[88] Ibid at p.11.
[89] Bribery Act 2010. Chapter 23. 08.04.2010. P.2. URL: https://www.legislation.gov.uk/ukpga/2010/23/data.pdf (date of access: 17.05.2021).
[90] The Bribery Act 2010. Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing, supra note 82, at P.10.

Bribing a Foreign Public Official creates a standalone offense: "the offense is committed where a person offers, promises or gives a financial or other advantage to a foreign public official to influence the official in the performance of his or her official functions." [91] There should be an intention of a person offering, promising or giving a bribe to "obtain or retain business, or an advantage in the conduct of business."[92] Significantly, there is no requirement that the described offense should contain an intention for improper, illegal or corrupt influence. Nevertheless, "the offense is not committed where the official is permitted or required by the applicable written law to be influenced by the advantage." [93]

Following the Bribery Act, a *foreign public official* means "(…) an individual who: (1) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such country or territory), (2) exercise a public function - for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such country or territory), or for any public agency or public enterprise of that country or territory (or subdivision), or (3) is an official or agent of a public or international organization."[94]

Section 7 of the Bribery Act sets conditions when a relevant commercial organization will be liable for prosecution, namely for a ***failure of commercial organizations to prevent bribery*****:** if a person "associated with the commercial organization bribes another person intending to obtain or retain business, or to obtain or retain an advantage in the conduct of business."[95] However, if the commercial organization will demonstrate that, in a particular instance of bribery, appropriate measures were in place to prevent persons affiliated with it from bribing, it would have a complete defense. Furthermore, the Bribery Act covers the *liability of corporate officers* (Section 14 of the Bribery Act): "a senior officer"[96] or "a person purporting to act in such a capacity"[97] with "a close connection to the UK can be

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[91] The Bribery Act 2010. Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing, supra note 82, at P.11.
[92] Ibid.
[93] Ibid.
[94] Bribery Act 2010, supra note 89, at p.4.
[95] Ibid at p.5.
[96] Ibid at p.11.
[97] Bribery Act 2010, supra note 89, at p.11.

liable for any violation (…) by a corporation (bribing, accepting a bribe, or bribing a foreign official) committed with their 'consent of connivance'."[98]

2. Based on the key provisions of the Bribery Act, **bribing** can be defined as giving or receiving a financial or another advantage to encourage an individual to inappropriately perform a relevant duty or function, rewarding a person for such improper action, or "(...) knows or believes that the acceptance of the advantage would itself be an improper performance of a relevant function or activity."[99]
3. Following the Bribery Act **facilitation payments**, defined as "small bribes paid to facilitate routine Government action"[100], are not accepted.
4. **Territorial application (jurisdiction).** The Bribery Act defines that a foreign firm that conducts any "part of a business" in the UK may be charged under the Bribery Act for failure to prevent bribery conducted by any of its employees, agents, or other representatives, even if the bribery occurs outside the UK and involves non-UK individuals.[101] When the Bribery Act was introduced, it was considered a universal extra-territorial act that didn't anticipate jurisdiction limitation for the corporate offense.[102] Over time, courts' clarifications (however, there is still a lack of case law as the majority of significant cases were settled under the DPA)[103] and guidance of state authorities "set" conventional limits, which didn't give a complete solution, but provided a common-sense approach to determining whether an organization has a proven business presence in the UK. Accordingly, the UK listing of itself is unlikely to be enough to demonstrate that a company has business presence in the UK. The same is with the presence of a UK subsidiary. It does not necessarily imply that a

[98] Rosalez, Loegering, Territt, supra note 75, at p. 14.
[99] Bribery Act 2010, supra note 89, at p.1.
[100] The Bribery Act 2010. Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing, supra note 82, at P.18.
[101] UK Bribery Act - extra-territorial reach and guidance on corporate anti-bribery procedures. *Travers Smith*. URL: https://www.traverssmith.com/knowledge/knowledge-container/uk-bribery-act-extra-territorial-reach-and-guidance-on-corporate-anti-bribery-procedures/ (date of access: 02.06.2021).
[102] Lordi J. A. The U.K. Bribery Act: Endless Jurisdictional Liability on Corporate Violaters. *Case Western Reserve Journal of International Law*. 2012. Vol. 44, no. 3. P. 957. URL: https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1139&context=jil (date of access: 02.06.2021).
[103] Summary of the UK Bribery Act 2010. *Norton Rose Fulbright. Global law firm*. URL: https://www.nortonrosefulbright.com/en/knowledge/publications/b0080606/summary-of-the-uk-bribery-act-2010-may-2020 (date of access: 02.06.2021).

foreign parent is conducting business in the UK, as the subsidiary may operate autonomously of its parent.[104]

5. **Penalties.** Section 11 of the Bribery Act describes penalties that can be imposed against an individual: "imprisonment for a term not exceeding ten years, or to a fine, or both."[105] Corporations guilty of an offense of the Bribery Act can expect unlimited fines as well as civil confiscation actions arising under the Proceeds of Crime Act of 2002 to recover profits or gains recognized from the bribe.[106] Individuals who violate the Bribery Act's provisions may expect only criminal liability, but an individual that occupies a director position in a company while potential disqualification may be applicable.

There are several **regulatory and enforcement authorities** in the UK in relation to bribery offences. However, a leading one is the Serious Fraud Office (SFO) - the agent responsible for investigating and prosecuting serious fraud, bribery, and corruption (commonly investigates alleged crimes concerning values of £1 million or more).[107] The SFO also supports overseas jurisdictions in their investigations. It brings together multi-disciplinary case teams of lawyers, investigators, forensic accountants, external counsel, and other experts, led by a case controller. [108]

Effectiveness and Current status of the Bribery Act: The Bribery Act was a comprehensive reaction to concerns of the UK's relatively ineffective anti-corruption legislation. However, being the most rigid anti-corruption legislation, the Bribery Act still raises some concerns about the effectiveness of its enforcement actions. According to the UK Bribery Digest published by EY, there was only eight deferred prosecution agreements

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[104] Smith, UK Bribery Act, supra note 101.

[105] Ibid.

[106] Hunter S. G. A comparative analysis of the Foreign Corrupt Practices Act and The UK Bribery Act, and The Practical Implications of Both on International Business. *ILSA Journal of International & Comparative Law*. 2011. 18:1. P. 104. URL: https://core.ac.uk/download/pdf/80037897.pdf (date of access: 17.05.2021).

[107] Q&A in Relation to Bribery Offences in the UK. *Anti-Bribery Guidance | Transparency International*. URL: https://www.antibriberyguidance.org/qa-relation-bribery-offences-uk/guidance#7 (date of access: 12.06.2021).

[108] Annual report, 2019-2020 - Serious Fraud Office. *Serious Fraud Office*. URL: https://www.sfo.gov.uk/download/annual-report-2019-2020/ (date of access: 02.06.2021).

(DPA), involving bribery related conduct, issued since the introduction of the Bribery Act in 2010 and to June 2020.[109]

Only five cases have been taken to courts during the same period.[110] Formation of the Bribery Act was quite complicated, and 2020 brings more challenges for the UK Regulator. It is anticipated that with the exit of the UK from the European Union at the end of 2020, there will be substantial changes in how cooperative enforcement actions are carried out across Europe caused by the fact that EU law will no longer be applicable there. Another significant concern was revealed as a result of the SFO's loss of a case against KBR Inc. (engineering company with a headquarter in the US, involved in a long-running UK bribery investigation).[111]

The UK Supreme Court adjudged that the SFO exceeded its authority when it tried to access corporate documents from the United States, confirming as such that SFO's anticorruption enforcement is not unlimited.[112] Even though the court's decision refers to section 2 of the Criminal Justice Act 1987, it will still directly impact the SFO's extra-territorial investigations and their ability to investigate violations of the Bribery Act. Following the mentioned decision, the SFO will be forced to rely on international cooperation agreements only during extra-territorial investigations.[113]

Even so, 2020 was marked with the first use of the extraterritorial reach of the Bribery Act in DPA with a non-UK-based corporation. This case referred to corrupt conduct of Airbus SE (Airbus), a France based global manufacturer of commercial aircraft, helicopters, military transports, satellites, et. al.[114] Airbus agreed to pay a total penalty of more than €3.6 billion to settle foreign bribery charges with regulators in the US, France, and the UK. The

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[109] Ernst & Young. UK Bribery Digest. EYGM Limited, 2020. P. 4. URL: https://briberydigest.ey.com/edition14/ (date of access: 02.06.2021).

[110] 2020-040 - Bribery Act 2010 - Serious Fraud Office. *Serious Fraud Office*. URL: https://www.sfo.gov.uk/foi-request/2020-040-bribery-act-2010/ (date of access: 02.06.2021).

[111] Investigation opened into KBR, Inc. *Serious Fraud Office*. URL: https://www.sfo.gov.uk/2017/04/28/kbr/ (date of access: 02.06.2021).

[112] Judgement of The Supreme Court of 05.02.2021 in R (on the application of KBR, Inc) (Appellant) v Director of the Serious Fraud Office (Respondent). URL: https://www.supremecourt.uk/cases/docs/uksc-2018-0215-judgment.pdf (date of access: 03.06.2021).

[113] Flying Too Close To The Sun: The U.K. Supreme Court Places New Limits On The SFO's Overseas Investigative Power | JD Supra. *JD Supra*. URL: https://www.jdsupra.com/legalnews/flying-too-close-to-the-sun-the-u-k-3629409/ (date of access: 02.06.2021).

[114] Airbus Home. *Airbus*. URL: https://www.airbus.com/ (date of access: 02.06.2021).

fine of €984 million (from the total amount) was paid to the UK authorities.[115] It was the highest UK enforcement action against a company for criminal conduct. In 2014, the SFO announced the launch of a criminal investigation into alleged money laundering originating from suspicion of corruption in Ukraine. In this instance, the SFO secured a restraint order freezing about $23 million in assets in the United Kingdom. For reasons of confidentiality, no additional information was granted together with this publication or afterward in confirmation of enforcement actions somehow related to the corrupt practices in Ukraine.[116]

2.1.3. Nature and content of the Foreign Corrupt Practice Act and its impact in combating corruption

Generally, there are several federal criminal statutes covering the foreign bribery: **Money Laundering Statute** (criminalizes the financial transaction that was done with a knowledge that funds are transferred for certain illicit activity); **Mail and Wire Fraud Statute** (under certain conditions this statue is used by the DOJ to prosecute foreign bribery if certain act cannot reached by the FCPA); **The Travel Act** that "(…) prohibits the use of foreign travel or the instruments of interstate commerce to further 'unlawful activity' (…), often covers foreign commercial bribery"[117] and **the Foreign Corrupt Practice Act** (prohibits bribery of foreign officials and inappropriate financial practices that may hide such activity). This part of the thesis will focus on the FCPA as one of the essential anti-corruption statutes in the world.[118]

The FCPA was created in response to an investigation by the Securities and Exchange Commission (SEC) into illegal contributions made to President Nixon's re-election campaign. The investigation above revealed hundreds of millions of dollars in corrupt overseas transfers made by over 400 US firms. The FCPA was created in an attempt to terminate such bribery practice and "restore public confidence in the integrity of the

[115] Airbus Group. *Serious Fraud Office*. URL: https://www.sfo.gov.uk/cases/airbus-group/ (date of access: 02.06.2021).
[116] Money laundering investigation opened. *Serious Fraud Office*. URL: https://www.sfo.gov.uk/2014/04/28/money-laundering-investigation-opened/ (date of access: 02.06.2021).
[117] Anti-Corruption Enforcement 2019-2020. A Guide to FCPA, UK Bribery Act and International Anti-Corruption Laws. Chicago: Jenner & Block LLP, 2020. P. 30. URL: https://jenner.com/system/assets/publications/19709/original/Anti-Corruption%20Enforcement%202019-2020%20WEB.pdf?1585151710 (date of access: 17.05.2021).
[118] Ibid at p.3.

American business system by making it unlawful for U.S. citizens and companies to make a corrupt payment to a foreign official to obtain or retain business for or with, or directing business to, any person."[119] The 1977 enactment of the FCPA was the first of its kind in forbidding bribery of foreign officials. While other countries technically banned bribery within their borders, these laws were hardly enforced and the FCPA was effectively the "only game in town". "The United States was successful in pushing its agenda against public bribery on the international stage". [120]

Overview of the FCPA: the FCPA includes (1) accounting provisions, which determine accurate accounting and record-keeping requirements upon publicly held United States companies, and (2) anti-bribery provisions prohibit bribing of foreign government officials to obtain and retain business. In the overview of the FCPA, only anti-corruption provisions will be considered more relevant to the main course of this thesis. The FCPA forbids corrupt payments to foreign officials, staff, or individuals working on their behalf, foreign political parties, or candidates for foreign public office. However, the FCPA doesn't set any responsibility/doesn't restrict bribing officers or employees of the private entities.

The FCPA anti-bribery provisions impose criminal and civil penalties. Each regulation falls within the exclusive jurisdiction of corresponding authority: criminal regulation in the United States Department of Justice (DOJ) scope and civil law - the Security Exchange Commission's (SEC).

The following elements must be reached to constitute a violation of the FCPA: "(1) the briber must be any US citizen, business entity, or employee of a US business entity or any company listed on a US stock exchange; (2) the bribe must be made with corrupt intent; (3) payment or offer of payment must be anything of value; (4) the recipient must be a foreign government official; (5) the bribe must have been offered or paid to obtain or retain business."[121]

Key provisions of the FCPA can be defined as below:

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[119] Hunter, supra note 104, at p. 90.
[120] Saglibene, supra note 18, at p. 124.
[121] Hunter, supra note 104, at p. 93.

1. **Bribing a Foreign Public Official.** In accordance to the paragraph 78dd-1, the FCPA prohibits "an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any foreign official" [122] for purpose of influencing any act or decision of that foreign official.[123]
2. **The FCPA anti-bribery provisions apply to three categories of individuals and entities:** "(1) 'issuers' and their officers, directors, employees, agents, and shareholders; (2) 'domestic concerns' and their officers, directors, employees, agents, and shareholders; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States." [124] According to the FCPA guidelines, an organization may be classified as an **"issuer"** if one of the following requirements applies: (i) in the United States, it is traded on a public securities exchange (either stock or American Depository Recipients); (ii) the stock of the firm is traded on the securities market in the US, and the firm is expected to file SEC reports.[125] The term **"domestic concerns"**[126] is broadly defined by the FCPA as: "any individual who is a citizen, national, or resident of the United States, and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole partnership which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States."[127] As a result, the FCPA applies to the overseas operations of private US corporations as well.
3. The FCPA prohibits payments that indirectly benefit persons committing bribery to obtain or retain foreign business. Accordingly, any act that directly or indirectly aids in obtaining or maintaining a foreign business will fall within the FCPA's

[122] Anti-Bribery and Books & Records Provisions of The Foreign Corrupt Practices Act. United States Code: as of 22 July 2004. P. 2-3. URL: https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/fcpa-english.pdf (date of access: 18.05.2021).
[123] Ibid.
[124] A Resource Guide to the U.S. Foreign Corrupt Practices Act Second Edition, supra note 65, at p. 9.
[125] Ibid at p.10.
[126] Ibid.
[127] Anti-Bribery and Books & Records Provisions of The Foreign Corrupt Practices Act, supra note 122, at p.10.

scope. The FCPA **prohibits corrupt payments made to foreign officials**, employees, or persons acting on behalf of such officials, foreign political parties, or candidates for foreign political office. However, the FCPA does not prohibit bribes paid to officers or employees of private, nongovernmental entities.[128]

4. **"Facilitating"**[129], **"expediting"**[130] or **"Grease payments**."[131] The FCPA creates an exception to its anti-bribery provisions that allow for any facilitating or expediting payments to be made to a foreign governmental official "to expedite or to secure the performance of a routine governmental action"[132] (e.g., getting licenses, permits, or handling visa request, et al.).
5. **Jurisdiction.** The FCPA's anti-bribery provisions will extend to actions both within and outside the United States. Issuers and domestic businesses, as well as their officials, directors, staff, associates, and owners, can be charged for using the US mails or other means or instrumentality of interstate trade to facilitate an illicit payment to a foreign official.[133] Mentioned **means or instrumentality** includes: "wire transfers, facsimile transmissions, telephone calls, and interstate or international travel."[134]
6. **Definition of a foreign official.** The term public official used in the Bribery Act replaced in the FCPA with the term "foreign official" that has equal meaning and seen as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."[135]
7. **Penalties.** Corporations and individuals face potential civil and criminal penalties if they violate the anti-bribery provisions of the FCPA. The DOJ prosecutes

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[128] Hunter, supra note 104, at p. 97.
[129] A Resource Guide to the U.S. Foreign Corrupt Practices Act Second Edition, supra note 65, at p. 25.
[130] Ibid.
[131] Hunter, supra note 104, at p. 93.
[132] Anti-Bribery and Books & Records Provisions of The Foreign Corrupt Practices Act, supra note 122, at p. 7.
[133] A Resource Guide to the U.S. Foreign Corrupt Practices Act Second Edition, supra note 64, at p. 13.
[134] Hunter, supra note 104, at p. 94.
[135] Anti-Bribery and Books & Records Provisions of The Foreign Corrupt Practices Act, supra note 122, at p. 11.

criminal matters arising under the FCPA while the SEC prosecutes civil matters arising under the same. Individuals prosecuted under the FCPA's anti-bribery provisions face a maximum of five years imprisonment, criminal fines of up to US$100,000, and civil penalties of up to US$10,000 per violation, as well as restitution and forfeiture. The individual's employer or principal is prohibited from paying these fines. FCPA violators also face suspension or revocation of the benefits of conducting business in the United States. 08 In criminal prosecutions, corporations and other business entities face hefty fines of up to two million dollars per violation. Under the Alternative Fines Act, these fines may be much higher. “Where the offense resulted in pecuniary gain or loss, the actual fine may be up to twice the amount of the benefit the defendant sought to obtain by making the corrupt payment.”[136]

Effectiveness and Current status of the FCPA: one can see the effectiveness of the FCPA based on the enforcement activity of the US regulators, and, in the context of this thesis, mainly the US Department of Justice and its Fraud Section. The Fraud Section plays a crucial role in the Department of Justice’s fight against sophisticated white-collar crime cases. The Department of Justice investigating crimes throughout the country and its Fraud Section is uniquely qualified to stand against “geographically shifting crime problems”[137], thus, this Section, among other things, coordinates multi-district investigations and international enforcement efforts. The Fraud Section includes three litigation units: Foreign Corrupt Practices Act Unit; Market Integrity and Major Frauds Unit, Health Care Fraud Unit. According to the DOJ’s yearly review, “the Foreign Corrupt Practices Act (FCPA) Unit has primary jurisdiction to investigate and prosecute violations of the FCPA, and works in parallel with the Securities and Exchange Commission (SEC), which has civil enforcement authority for violations of the FCPA by publicly traded companies.”[138] The 39 prosecutors of the FCPA Unit investigate and prosecute offenses under the FCPA and

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[136] Hunter, supra note 104, at p. 104.
[137] Fraud Section Year in Review 2020. US Department of Justice, 2020. P. 3. URL: https://www.justice.gov/criminal-fraud/file/1370171/download (date of access: 02.05.2021).
[138] Ibid at p.3-4.

related legislation. Transnational corruption is a specific global phenomenon that disrupts foreign governments and threatens America's national security. Thus, a strong focus is given to cooperation between FCPA's Unit and international law enforcement partners to ensure appropriate investigation and prosecution of foreign bribery offenses by American and foreign individuals and companies.[139]

Based on the Stanford Law School research, from 1977 to the present $US 13,146,439,983 of monetary sanctions were paid to Foreign Governments in FCPA-related Enforcement Actions.[140] The below table (table 1) reflects the largest U.S. monetary sanctions by entity group (excluding sanctions paid to foreign governments):

Table 1.

The U.S. largest monetary sanctions (source: Stanford Law School[141])

Company name	The amount of sanctions
Odebrecht S.A.	$US 3,557,626,137
The Goldman Sachs Group, Inc.	$US 2,617,088,000
Airbus SE	$US 2,091,978,881
Petroleo Brasileiro S.A. Petrobras	$US 1,786,673,797
Telefonaktiebolaget LM Ericsson	$ 1,060,570,832
Telia Company AB	$US 965,604,372
Mobile Telesystems Public Joint Stock Company	$US 850,000,400
Siemens Aktiengesellschaft	$US 800,002,000
VimpelCom Ltd	$US 795,326,798
Alstom S.A.	$US 772,291,200

[139] Fraud Section Year in Review 2020. US Department of Justice, 2020, supra note 137, at p.10.
[140] Foreign Corrupt Practices Act: Statistics & Analytics. *Foreign Corrupt Practices Act: Home*. URL: https://fcpa.stanford.edu/statistics-top-ten.html (date of access: 01.06.2021).
[141] Ibid.

As for 2020 results, the FCPA Unit of the Fraud Section reported the following numbers ("including charges brought and pleas entered under seal in 2019 that were unsealed in 2020”[142]):

(1) Summary of individual prosecutions[143]:

- 28 individuals charged;
- 15 individuals convicted by Guilty Plea and at Trial;
- 1trial conviction in regard to individual.

(2) Summary of corporate resolutions[144]:

- $US 7.84 billion of Total Global Monetary Amounts;
- $US 3.33 billion of Total U.S. Monetary Amounts;
- $US 2.33 billion of Total U.S. Criminal Monetary Amounts.

Although there is data that the enforcement status of the FCPA demonstrates sure steadiness without any slowdown, even despite the current global challenges (e.g., COVID-19 pandemic), the actual enforcement numbers fell dawn in 2020: the DOJ and the SEC enforcement actions stand to lose 40% against 2019, resolutions went down by 50%, and the number of defendants accused - by 51%.[145] However, if to measure 2020 in terms of the settlement amount, this year was the most successful in FCPA history in frames of corporate enforcement actions.

The year 2020 was marked with a noticeable trait - no corporate monitor was imposed in any of the 2020 FCPA resolutions, which is for the first time since 2015. Another trend of DOJ in 2020 - heightened focus on the importance of effective corporate compliance programs. This focus was reflected in the revised joint guidance DOJ and the SEC (first published in 2012) and also in the DOJ’s updated version of the Criminal Division’s formal guidance - “Evaluation of Corporate Compliance Programs.”[146]

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[142] Foreign Corrupt Practices Act: Statistics & Analytics, supra note 140.
[143] Fraud Section Year in Review 2020. US Department of Justice, supra note 137, at p.5.
[144] Fraud Section Year in Review 2020. US Department of Justice, supra note 137, at p.6.
[145] Anti-Corruption Enforcement 2020 Year in Review. A Guide to FCPA, UK Bribery Act and International Anti-Corruption Laws/ ed. by K. N. Stanford, K. B. Johnson. Chicago: Jenner & Block LLP, 2021. P. 5. URL: https://jenner.com/system/assets/assets/11377/original/Jenner_and_Block-Anti_Corruption_Enforcement-2020_Year_in_Review.pdf (date of access: 17.05.2021).
[146] Ibid.

Since FCPA has extraterritorial jurisdiction, DOJ also had some enforcement actions and investigations related to FCPA violations in Ukraine. There were some enforcement actions from DOJ and the SEC against Alfred C. Toepfer International (Ukraine) Ltd. and Archer Daniels Midland Company; Teva Pharmaceutical Industries Ltd.; Analogic Corporation and Lars Frost, and BK Medical ApS; International Business Machines Corp; Dmitry Firtash et. al.[147]

2.2. Anti-Corruption reform in Ukraine and its impact on the private sector.

The assumption that Corruption is a topical and critical issue for Ukraine is absolutely fair. It was also argued by the "Corruption Perceptions Index 2020"[148] introduced by Transparency International, where Ukraine is ranked 117 out of 180 countries (with some improvements comparing to previous years - since 2012, Ukraine moved up the list by 7 points).

A new round of the anti-corruption efforts followed by more precise and complete measures started in Ukraine after the Revolution of Dignity in 2014 when Ukraine's society shifted from the suboptimal equilibrium to the developing anti-corruption critical mass, which was supported by the efforts of international donors aimed to develop good institutions and strengthen the anti-corruption policy in Ukraine.[149] All that prompted the reinforcement of the anti-corruption reform in Ukraine - probably, one of the most complicated reforms. It is generally accepted that there were two outbreaks of reforms. The first one started in 2011 after ratifying the United Nations Convention Against Corruption and included some minor anti-corruption efforts. However, the "second wave" which continues to date, went out with significant and systematic transformations.[150]

2.2.1. Anti-corruption strategy of Ukraine.

[147] Foreign Corrupt Practices Act: Statistics & Analytics, supra note 140.
[148] Corruption Perceptions Index 2020 for Ukraine. *Transparency.org*. URL: https://www.transparency.org/en/cpi/2020/index/ukr (date of access: 07.06.2021).
[149] Mungui-Pippidi, supra note 62, at p. 210.
[150] Yakovleva D. How Ukraine Fights Corruption. Lawyer & Law. 2019. No. 44. URL: https://uz.ligazakon.ua/ua/magazine_article/EA013286 (date of access: 07.06.2021).

Anti-corruption strategy (covered by the Law of Ukraine “On the Principles of Anti-Corruption Policy in Ukraine”) is the first step of Ukraine in fulfillment of its obligations according to the United Nations Convention Against Corruption.[151] This strategy determines the main principles for cooperation between all public authorities as this is critical for assuring that implemented anti-corruption measures are exercised effectively. Moreover, coordinated actions determined in the United Nations Convention Against Corruption among critical condition of the effective anti-corruption measures. The anti-corruption strategy covers general aspects of the performance of the anti-corruption system, set priorities in particular sectors of state administration, and measures related to the adequate responsibility for venality.[152] Noticeably, Ukraine did not generate most of the first Anti-corruption strategy (2014-2017). Even though it was a sophisticated document, many resources were invested in developing and establishing anti-corruption institutions. Moreover, critical provisions of the first strategy were not reviewed and updated regularly, so over time; they become obsolete. The new Anti-corruption Strategy (2020-2024) aimed to reach considerable progress in preventing corruption and establishing the fully coordinated actions of public authorities.[153]

2.2.2. Institutional reform.

Following 2014, Ukraine executed a broad institutional reform and established four new anti-corruption bodies: “the National Anti-Corruption Bureau (NABU), which investigates high-level corruption cases; the Specialized Anti-Corruption Prosecutor’s Office (SAPO), an independent unit within the Prosecutor General’s Office that oversees NABU’s investigations and prosecutes its cases; the National Agency for Prevention of

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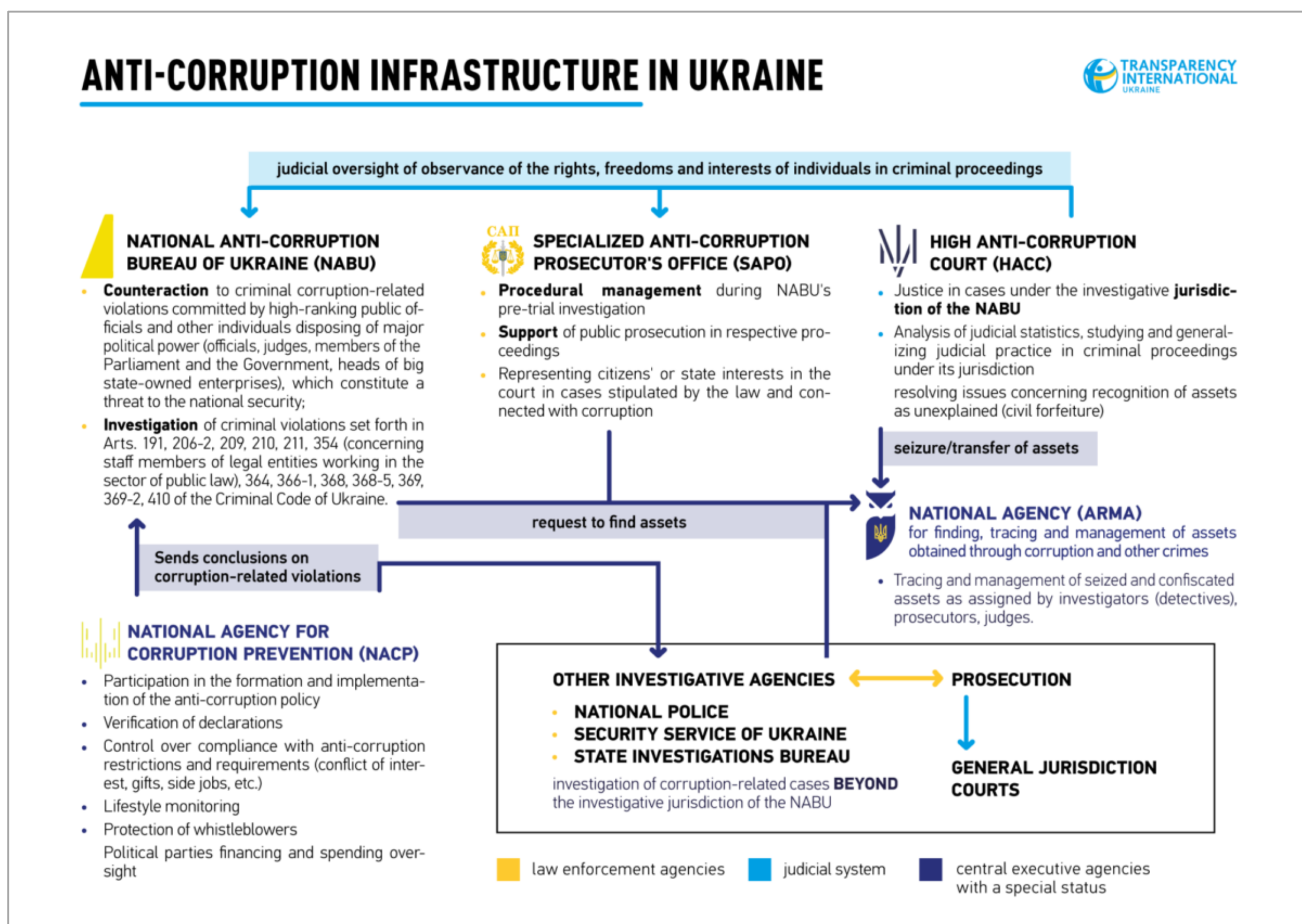
[151] International Anti-Corruption legislation and UN Convention Against Corruption: what is that to Ukraine? | National Agency on Corruption Prevention. *National Agency on Corruption Prevention.* URL: https://nazk.gov.ua/uk/novyny/mizhnarodne-antykoruptsijne-zakonodavstvo-ta-konventsiya-oon-proty-koruptsiyi-do-chogo-tut-ukrayina/ (date of access: 07.06.2021).
[152] Anti-corruption Strategy | National Agency on Corruption Prevention. *National Agency on Corruption Prevention*. URL: https://nazk.gov.ua/en/anti-corruption-strategy/ (date of access: 07.06.2021).
[153] Anti-Corruption Strategy for 2020-2024. Kyiv: National Agency on Corruption Prevention, 2020. 37 p. URL: https://nazk.gov.ua/wp-content/uploads/2020/09/Antykoruptsijna-strategiya-na-2020-2024-roky-za-rezultatamy-publichnyh-obgovoren-16.09.2020.pdf (date of access: 07.06.2021).

Corruption (NAPC), which administers the asset declaration system and participates in anti-corruption policymaking; the Asset Recovery and Management Agency (ARMA), which focuses on the recovery of stolen assets."[154] However, on the score of the weak and corrupt judicial system, all mentioned institutions could not operate effectively. To address this severe obstacle in the successful implementation of anti-corruption measures, Ukrainian activists advocated creating a specialized anti-corruption court - the High Anti-Corruption Court of Ukraine (HACC). The whole way from this initiative to the final establishment of the court was challenging. Predictably, the idea to create such a specialized court did not gain needed support locally; thus, the court's establishment was pushed with **international support**. Following the U4 Brief on Ukraine's High Anti-Corruption Court prepared by Kuz and Stephenson, among international actors who driven the appearance of HACC were International Monetary Fund (IMF) that made the establishment of HACC an indispensable requirement for Ukraine to receive $1.9 billion in funding and the European Union (EU) in the same way set the requirement to create HACC as mandatory condition of their financial assistance.[155] Current anti-corruption infrastructure in Ukraine displayed below (pic.1).

[154] Kuz I. Y., Stephenson M. C., Series editor: Sofie Arjon Schütte. Ukraine's High Anti- Corruption Court Innovation for impartial justice. *U4 Brief 2020:3*. 2020. P. 1. URL: https://www.u4.no/publications/ukraines-high-anti-corruption-court.pdf (date of access: 07.06.2021).
[155] Kuz, Stephenson, Ukraine's High Anti-Corruption Court Innovation for impartial justice, supra note 154, at p.2.



Pic.1. **Anti-Corruption Infrastructure in Ukraine** (source: Transparency International Ukraine)[156]

2.2.3. International support of anti-corruption reform.

The international support of Ukrainian anti-corruption reforms and initiatives is an extensional topic worth a separate overview, while this thesis will cover a brief outline of few collaborations - the most essential in the context of the current research. So, in addition to the support from IMF's and EU's side mentioned above, the following actors set forth conditions related to the implementation of particular anti-corruption actions for Ukraine or financed projects focused on the development of anti-corruption institutions:

1. The *United States* provided unstinting support to the establishment of anti-corruption institutions in Ukraine. In 2016-2017 the US disbursed US$1,1 million within its

[156] Anti-Corruption Infrastructure | Transparency International Ukraine. *Transparency International Ukraine*. URL: https://ti-ukraine.org/en/project/anti-corruption-infrastructure/ (date of access: 07.06.2021

project to support the newly created anti-corruption institutions fighting "high-profile"[157] corruption in Ukraine. This funding helped to bring a vast improvement to the technical infrastructure of NABU and SAPO. In 2017-2018 the US initiated a similar project giving an additional US$1,1 million of financial support. This help continued through additional projects: (a) *Transparency and Accountability in Public Administration and Services* (TAPAS). The amount invested into TAPAS is around US$18,5 million during 2018-2019, but the project continues until August 2022. TAPAS is a "joined USAID/UKaid activity aimed to develop and provide e-governance tools to reduce opportunities for corruption within the Government of Ukraine and to engage the public in anti-corruption efforts";[158] (b) *Support to Anti-Corruption Champion Institutions (SACCI)*. Project duration: 2017-2022. Until 2020 SACCI already provided support that amounts to US$ 18,5 million. SACCI project was designed to eliminate corruption and to strengthen the accountability of the government in Ukraine. This project has three main objectives: "empower key government institutions to fight corruption, increase public support for, and engagement in, anti-corruption efforts, and reduce the public's tolerance of corrupt practices;"[159] (c) *Program USAID#Взаємодія* the ongoing five-years program (2017-2022) provided, among others, financing of anti-corruption projects for around US$20 million; et al. Technical support of the above activities was fulfilled through projects financed by the *United Nations Development Program* (UNDP) and *Organization for Security and Co-operation in Europe* (OSCE);

2. *European Union* (the EU): (a) Ukraine signed the European Union–Ukraine Association Agreement[160] with European Union and its Member States. This Agreement defines an obligation for parties to cooperate in the fight against crime

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[157] Marusov A. Anti-Corruption Policy of Ukraine: First Success and Growing Resistance. Kyiv: International Renaissance Foundation (IRF), the Open Society Foundation, 2016. P. 6. URL: https://www.irf.ua/content/files/renaissance_a4_4(anti-corruption_policy).pdf (date of access: 07.06.2021).

[158] Democracy, Human Rights and Governance | Ukraine | U.S. Agency for International Development. *U.S. Agency for International Development*. URL: https://www.usaid.gov/ukraine/democracy-human-rights-and-governance (date of access: 07.06.2021).

[159] Democracy, Human Rights and Governance, *U.S. Agency for International Development*, supra note 158.

[160] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part. *Official Journal of the European Union*. 2014. URL: https://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf (date of access: 07.06.2021).

and corruption, "combating and preventing criminal and illegal activities, organized or otherwise". This cooperation should address, among other things, corruption in the private and public sector (article 22, point 2(d)).[161] Following this agreement, Ukraine adopted the Strategy of sustainable development "Ukraine-2020"[162] that included a separate provision regarding the administrative authority renewal and implementation of anti-corruption reforms as one of the highest priorities; (b) one more agreement was signed between Ukraine and the EU within the technical assistance program in fighting corruption "*European Union Anti-Corruption Initiative*" (EUACI). Ukraine received funding amounting to €22,9 million to implement anti-corruption reforms and strengthen anti-corruption institutions. This project is funded by the EU and co-funded by Danish International Development Agency (DANIDA) for the amount of €7,9 million);[163]

3. *European Bank for Reconstruction and Development* (EBRD): EBRD is one of the main international actors supporting reforms in Ukraine. Its support for state-owned firms is conditional on changes in corporate governance. The Bank worked already with such state-run enterprises like Naftogaz, Ukrenergo, UkrPoshta, EnergoAtom, Ukrzaliznytsia. Until 2020 EBRD invested €14.4 billion in 479 projects in Ukraine, the bank is considered a leading institutional investor;[164]
4. A separate role is assigned for the international *anti-corruption agreements ratified in Ukraine* such as:
    - "the UN Convention against corruption"[165] (ratified in Ukraine in 2006; came into effect in 2010);

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[161] Association Agreement, supra note 160, at p.11.
[162] The Strategy for Sustainable Development of Ukraine until 2020: Presidential Decree of 12.01.2015 no. 5/2015. URL: https://zakon.rada.gov.ua/laws/show/5/2015#Text (date of access: 07.06.2021).
[163] Yakovleva, supra note 148.
[164] Rosca O. EBRD and Ukraine in breakthrough agreement to strengthen corporate governance. 2020. Online article. URL: https://www.ebrd.com/news/2020/ebrd-and-ukraine-in-breakthrough-agreement-to-strengthen-corporate-governance.html (date of access: 07.06.2021).
[165] United Nations Convention Against Corruption: Convention of 09.12.2003. URL: https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (date of access: 07.06.2021).

- "Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism"[166] (ratified in 2010; came into effect in 2011);
- "the Council of Europe Criminal Law Convention on Corruption" (ETS No.173)[167] and its additional protocol (ratified in Ukraine in 2006; came into effect in 2010);
- "the Council of Europe Civil Law Convention on Corruption" (ETS No.174)[168] (ratified in 2005; came into effect in 2006). Any state party to the "Criminal or Civil Law Convention on Corruption" automatically enlisted to *Group of States against Corruption* (GRECO) [169] and its evaluation procedures. Established in 1999 by the Council of Europe, GRECO currently unites 50 member States.[170] In accordance with its statute, GRECO's goal is to increase its member states' proficiency "to fight corruption by monitoring their compliance with the Council of Europe's anti-corruption standards through a dynamic process of mutual review and peer pressure;"[171]
- United Nations Convention against Transnational Organized Crime[172] (ratified in 2004);
- Additionally, Ukraine participates in *Anti-Corruption Network* (ACN) for Eastern Europe and Central Asia (the program of OECD Working Group on Bribery) established in 1998. Following the ACN's web-page, it works in partnership with several international agencies: "United Nations Office on

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[166] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism: Convention of 16.05.2005. URL: https://rm.coe.int/168008371f (date of access: 07.06.2021).
[167] Criminal Law Convention on Corruption: Convention of 27.01.1999 no.173. URL: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007f3f5 (date of access: 07.06.2021).
[168] Civil Law Convention on Corruption: Convention of 04.09.1999 no. 174. URL: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007f3f6 (date of access: 07.06.2021).
[169] Agreement Establishing the Group of States Against Corruption - GRECO: Agreement of 12.05.1999. URL: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806cd24f (date of access: 07.06.2021).
[170] Council of Europe. What is GRECO? *Group of States against Corruption*. URL: https://www.coe.int/en/web/greco/about-greco/what-is-greco (date of access: 07.06.2021).
[171] Council of Europe. What is GRECO? *Group of States against Corruption*, supra note 170.
[172] United Nations Convention against Transnational Organized Crime and Protocols Thereto : Convention of 15.11.2000. URL: https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf (date of access: 07.06.2021).

Drugs and Crime (UNODC), United Nations Development Programme (UNDP), Council of Europe Group of States Against Corruption (GRECO), the Organisation for Security and Cooperation in Europe (OSCE), the World Bank, the European Bank for Reconstruction and Development (EBRD), Transparency International and others."[173] Its principal goal is to assist its member countries in their attempts to prevent and combat corruption. It provides a regional platform for promoting anti-corruption efforts, exchanging information, developing best practices, and coordinating donors. The ACN conducts general meetings, conferences and executed various sub-regional initiatives.[174] One of such sub-regional programs, where Ukraine also participates, is *The Istanbul Anti-corruption Action Plan*. This Plan was launched in 2003 within the framework of ACN to support the anti-corruption reforms. It promotes the best international anti-corruption standards and practices by conducting country evaluations and continuous monitoring of the implementation of recommendations based on UNCAC and other standards.[175]

2.2.4. Changes to legislation

The establishment of the revised anti-corruption legal framework in Ukraine was founded on the relevant international anti-corruption legal proceedings and standards. Based on the anti-corruption standards mentioned in the ratified declarations and other agreements, a package of laws that proposed the originating of several new anti-corruption bodies, revised responsibility, et al., was introduced. In the report on economic evaluation of the anti-corruption measures in 2014-2018[176] introduced by the Institute for Economic Research and Policy Consulting the following groups were highlighted:

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[173] About the Network - OECD. *Home page - OECD*. URL: https://www.oecd.org/corruption/acn/aboutthenetwork/ (date of access: 07.06.2021).
[174] Ibid.
[175] Istanbul Action Plan - OECD. *Home page - OECD*. URL: https://www.oecd.org/corruption/acn/istanbulactionplan/ (date of access: 07.06.2021).
[176] Ukraine against corruption: the economic front. Economic evaluation of anti-corruption measures in 2014-2018 / I. Burakovskyi et al.; arr. by Institute for Economic Research and Policy Consulting. Dnipro: Srednyak T.K., 2018. 88 p. URL: http://www.ier.com.ua/files/publications/Policy_papers/IER/2018/Anticorruption_%20Report_Ukr_.pdf (date of access: 07.06.2021).

1. laws covering *overall anti-corruption regulations* and the matter of responsibility for corruption-related offenses and crimes: the Law of Ukraine “On the Principles of Anti-Corruption Policy in Ukraine (Anti-Corruption Strategy) for 2014-2017”[177]; renewed anti-corruption law aimed to prevent one of the most significant problems for Ukraine the Law of Ukraine “On Preventing Corruption”[178] (Anti-Corruption Law); The Law of Ukraine “On Government Cleansing (Lustration Law) of Ukraine”[179]; Additionally, specific provisions are regulating corruption-related administrative offenses and crimes that were included in the Criminal Code of Ukraine[180] and Code of Ukraine on Administrative Offences.[181] On top of that, there are regulations on creating and implementing the Anti-Corruption program and establishing a code of conduct for public officials.
2. laws *regulating the activity of specialized anti-corruption institutions* of Ukraine: The Law of Ukraine “On the National Anti-corruption Bureau of Ukraine";[182] The Law of Ukraine “On the National Police”;[183] The Law “On the Public Prosecutor’s Office of Ukraine”;[184] The Law of Ukraine “On the State Bureau of Investigations”;[185] et.al
3. laws *covering ethical principles, anti-corruption restrictions, and limitations for selected officials*, measures on the prevention of political corruption, among others:

[177] The Law of Ukraine “On the Principles of Anti-Corruption Policy in Ukraine (Anti-Corruption Strategy) for 2014-2017”: Law of 14.10.2014 no. № 1699-VII. URL: https://zakon.rada.gov.ua/laws/show/1699-18#Text (date of access: 07.06.2021).
[178] The Law of Ukraine “On Preventing Corruption”: Law of 14.10.2014 no. 1700-VII: as of 2 June 2021. URL: https://zakon.rada.gov.ua/laws/show/1700-18#Text (date of access: 07.06.2021).
[179] The Law of Ukraine "On Government Cleansing (Lustration Law) of Ukraine": Law of 16.09.2014 no. 1682-VII: as of 20 May 2020. URL: https://zakon.rada.gov.ua/laws/show/1682-18#Text (date of access: 07.06.2021).
[180] Criminal Code of Ukraine: Code of 05.04.2001 no. 2341-III: as of 23 April 2021. URL: https://zakon.rada.gov.ua/laws/show/2341-14#Text (date of access: 07.06.2021).
[181] Code of Ukraine on Administrative Offences: Code of 07.12.1984 no. 8073-X: as of 27 May 2021. URL: https://zakon.rada.gov.ua/laws/show/80731-10#Text (date of access: 07.06.2021).
[182] The Law of Ukraine “On the National Anti-corruption Bureau of Ukraine": Law of 14.10.2014 no. 1698-VII: as of 16 September 2020. URL: https://zakon.rada.gov.ua/laws/show/1698-18#Text (date of access: 07.06.2021).
[183] The Law of Ukraine “On the National Police”: Law of 02.07.2015 no. 580-VIII: as of 23 April 2021. URL: https://zakon.rada.gov.ua/laws/show/580-19#top (date of access: 07.06.2021).
[184] The Law "On the Public Prosecutor’s Office of Ukraine": Law of 14.10.2014 no. 1697-VII: as of 22 May 2021. URL: https://zakon.rada.gov.ua/laws/show/1697-18#Text (date of access: 07.06.2021).
[185] The Law of Ukraine “On the State Bureau of Investigations”: Law of 12.11.2015 no. 794-VIII: as of 1 January 2021. URL: https://zakon.rada.gov.ua/laws/show/794-19#Text (date of access: 07.06.2021).

The Law of Ukraine “On Civil Service”;[186] Changes in the Law of Ukraine “On the Political Parties”;[187]

4. laws on the *corruption prevention in economics and sports*: The Law of Ukraine "On Public Procurement";[188] specific provisions to the Commercial Code of Ukraine[189] and Code of Commercial Procedure of Ukraine;[190]
5. laws *regulating access to the informa*tion: The Law of Ukraine "On the National Agency of Ukraine for Finding, Tracing and Management of Assets Derived from Corruption and Other Crimes"[191] changes in The Law of Ukraine “On Information”;[192] The Law of Ukraine “On Access to Public Information”.[193]

The main legal act in combatting corruption in Ukraine as of 2015 is Law of Ukraine No.1700-VII “On Preventing Corruption”. Anti-Corruption Law of Ukraine defines corruption, a corruption offense, unjustified benefit, and a gift; distinguishes between offense and corruption-related offense; regulates protection of whistleblowers; creates ethical behavior guidelines for certain groups of officials; underlines the importance of the anti-corruption compliance programs; defines rules aimed to prevent corruption in legal entities; et al.[194]

[186] The Law of Ukraine “On Civil Service”: Law of 10.12.2015 no. 889-VIII: as of 23 May 2021. URL: https://zakon.rada.gov.ua/laws/show/889-19#Text (date of access: 07.06.2021).
[187] The Law of Ukraine “On the Political Parties”: Law of 05.04.2001 no. 2365-III: as of 11 April 2021. URL: https://zakon.rada.gov.ua/laws/show/2365-14#Text (date of access: 07.06.2021).
[188] The Law of Ukraine “On Public Procurement”: Law of 23.12.2015 no. 922-VIII: as of 23 January 2021. URL: https://zakon.rada.gov.ua/laws/show/922-19#Text (date of access: 07.06.2021).
[189] Commercial Code of Ukraine: Code of 16.01.2003 no. 436-IV: as of 15 May 2021. URL: https://zakon.rada.gov.ua/laws/show/436-15#Text (date of access: 07.06.2021).
[190] Code of Commercial Procedure of Ukraine: Code of 06.11.1991 no. 1798-XII: as of 26 May 2021. URL: https://zakon.rada.gov.ua/laws/show/1798-12#Text (date of access: 07.06.2021).
[191] The Law of Ukraine "On the National Agency of Ukraine for Finding, Tracing and Management of Assets Derived from Corruption and Other Crimes": Law of 10.11.2015 no. 772-VIII: as of 3 July 2020. URL: https://zakon.rada.gov.ua/laws/show/772-19#Text (date of access: 07.06.2021).
[192] The Law of Ukraine on Information: Law of 02.10.1992 no. 2657-XII: as of 16 July 2020. URL: https://zakon.rada.gov.ua/laws/show/2657-12#Text (date of access: 07.06.2021).
[193] The Law of Ukraine on Access to Public Information: Law of 13.01.2011 no. 2939-VI: as of 24 October 2020. URL: https://zakon.rada.gov.ua/laws/show/2939-17#Text (date of access: 07.06.2021).
[194] Kheda S. Bribery & Corruption 2021 | Ukraine. *Bribery & Corruption Laws and Regulations 2021*. online edition, 2020. URL: https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/ukraine#chaptercontent1 (date of access: 07.06.2021).

2.2.5. Primary offences under current anti-corruption legal framework

The following forms of corrupt offenses related to the illegal advantage are punishable under the Criminal Code: "(1) offering, promising, soliciting or requesting of unlawful benefits in one's own interests or in the interests of a third person; (2) providing, accepting an offer, providing, promising or receiving of unlawful benefits; (3) abuse of powers for obtaining unlawful benefits; (…) and (4) provoking a person to offer, promise or provide an unlawful benefit or accept an offer, promise or benefit itself, aiming to extort this person later." [195] Furthermore, individuals may be held administratively accountable for the following corruption-related offenses: "violation of restrictions on occupying two or more confliction positions; violation of restrictions on obtaining of gifts; (…) violation of the requirements for prevention or settlement of the conflict of interests; illegal use of information that became known in connection with the performance of official powers; and failure to take anti-corruption measures if a corruption offence has been revealed."[196] (Kheda, Bribery & Corruption, 2020)

The Anti-Corruption law provides the explicit list of individuals (covered by the article 3) who could be held prosecuted for corruption and corruption-related offences, divided into the following categories: "(1) persons authorized to perform state functions or local government functions; (2) persons that for the purposes of the Anti-Corruption Law are conferred the same status as persons authorized to perform state functions; (3) persons permanently or temporarily holding positions related to organizational, executive, or administrative and commercial duties, or persons specifically authorized to perform such duties in any private companies under the law etc.; (4) candidates for elective positions; (5) private individuals providing, offering or promising unlawful benefits; and (6) legal entities may be liable for corruption offences under the following conditions: (i) the company's authorized representative commits a corruption offence on behalf and/or in the interests of

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[195] Kheda, supra note 194.
[196] Ibid.

such a company; or (ii) the authorized person failed to take anti-corruption measures that led to the commission of a corruption offence."[197]

Some of the key differences between Ukrainian anti-corruption legislation and FCPA, the Bribery Act: (1) Ukrainian legislation imply the term "unlawful benefit"[198] as a substitute of a bribe. "An unlawful benefit is any money or other property, benefits, privileges, services, intangible assets, any other non-financial advantages that are offered, promised, granted, or received without any legal justification in order to receive improper advantage through abuse of powers given to a person";[199] (2) dislike the Bribery Act and FCPA, Ukrainian legislation does not have extraterritorial reach. At the same time, foreign corporations may be held accountable for corruption offenses committed in Ukraine; (3) Ukrainian legislation does not utilize DPA; however, it provides the equivalent mechanism - plea agreement.

2.2.6. Key elements to ensure compliance

The Anti-Corruption Program must be implemented by fully or partially (50 percent or more) state (or municipal) owned firms, as well as private enterprises who intend to participate in state or municipal tenders. Under Ukrainian legislation, there is a proposed template for an anti-corruption program that the firms can adjust to meet their specific needs. As of January 2020, additional requirements related to whistleblowers were introduced: establishment of the hotline allowing anonymous reporting of corruption-related offenses; ensure the protection of whistleblowers and their family members; ensure payment of the financial incentives to whistleblowers in cases defined by the law.[200] The above requirements make it necessary for multinational companies doing business in Ukraine to

[197] Q&A in Relation to Bribery Offences in Ukraine | Anti-Bribery Guidance | Transparency International. *Home | Anti-Bribery Guidance | Transparency International*. URL: https://www.antibriberyguidance.org/qa-relation-bribery-offences-ukraine/guidance#4 (date of access: 07.06.2021).
[198] Ibid.
[199] Ibid.
[200] Conducting business in Ukraine 2020. Baker McKenzie Ukraine, 2020. P. 44. URL: https://www.bakermckenzie.com/-/media/files/insight/guides/2020/conducting-business-in-ukraine-2020_090420.pdf?la=en%20(page%2047) (date of access: 07.06.2021).

bring their internal policies and procedures up to date - to implement the anti-corruption compliance program or to amend the existing one.

2.2.7. Evaluation of anti-corruption actions implemented by Ukraine

According to the overview conducted in 2019 by Transparency International Ukraine, there were several significant achievements of Ukraine in 5 years after launching the anti-corruption reform. These five years were marked with (1) few anti-corruption innovations: (a) reducing corruption in the public procurement process using electronic public procurement system ProZorro that provides access to information on public procurements available to everyone; (b) development of DOZORRO - the monitoring portal to track violations that occurred during the public tender process; (c) introducing eHealth system that improves transparency in the supply of healthcare services; (2) creation of a full-scale anti-corruption infrastructure; (3) launching of anti-corruption communication campaigns through social advertising projects: Corruption Kills, Corruption Must Be Spotted, I Don't Bribe.[201]

Another review of Ukraine's gain in its anti-corruption efforts was done in 2019 in frames of the Istanbul Anti-Corruption Action Plan's implementation monitoring. In the monitoring report in frames of the assessment of the Business Integrity in Ukraine, the ACN defines the progress with implementation of various measures that simplified business regulations. However, it underlines unchangeable weaknesses with the enforcement of corporate liability for corruption; poor functioning of the procurement debarment system; lack of measures taken to "introduce debarment of companies involved in corruption offenses from the use of public resources such as public procurement, state loans, subsidies, and tax benefits; establishing obligations for external and internal auditors to report corruption offenses; or raising awareness of companies about the law on the liability of legal

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[201] What Changed in Ukraine over Five Years of Anti-Corruption Reforms | Transparency International Ukraine. *Transparency International Ukraine*. URL: https://ti-ukraine.org/en/blogs/what-changed-in-ukraine-over-five-years-of-anti-corruption-reforms/ (date of access: 07.06.2021).

entities for corruption offenses and enforcing this law in practice"[202]; lack of an action aimed to reinforce the role of the Business Ombudsman Council which provide support to private organizations that had to contend with corruption from the side of government authorities. A positive comment was given for the NACP's groundwork, resulting in developing a model compliance program for state-owned enterprises. Additionally, the report noted the Ukrainian Network for Integrity and Compliance (UNIC) achievements; UNIC managed to reach certain improvements without any support from the NACP's side. UNIC brings together private companies that transparently conduct their business and promote business integrity.[203] Their outstanding achievements were recognized further in 2020 by the Collective Action team at the Basel Institute on Governance for UNIC's efforts on engaging the private sector in the collective action initiatives aimed to fight corruption. UNIC uses a positive role model for collaboration with private sector actors; they prefer: "to point to positive examples of companies that make progress. Success stories are more inspiring than criticism."[204]

Summing up the above, one can see in what manner all mentioned achievements and failures affect the development of the compliance culture in Ukraine. Compliance culture and the concept of compliance generally are relatively immature in the Ukrainian business environment. Therefore, strengthening the compliance culture requires constant support; it is needed to raise awareness of risks of non-compliance among the private sector actors. On the part of the Ukrainian legislation, specific requirements urge companies to implement anti-corruption programs. These refer to the stated above condition of participation in government or municipal tenders - a bidder should develop an anti-corruption program and designate an employee responsible for its implementation.

Moreover, according to Ukrainian legislation, a company may face criminal liability for corruption offenses committed by its employee (not only by a member of the management team). Ukrainian anti-corruption legislation cannot be a model yet. Still, it

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[202] Istanbul Anti-Corruption Action Plan. Fourth round of monitoring. Ukraine, progress update. OECD/ACN, 2019. P. 110-111. URL: https://www.oecd.org/corruption/acn/OECD-ACN-Ukraine-Progress-Update-2019-EN.pdf (date of access: 07.06.2021).
[203] Ibid at p.112-113.
[204] Ideas, Insights & Inspiration on Collective Action 2020 Integrity Partner workshop series. Switzerland: Basel Institute on Governance, 2020. P. 3. URL: https://baselgovernance.org/sites/default/files/2020-09/200924%20CA%20workshop%20outputs.pdf (date of access: 07.06.2021).

requires certain improvements, even though it already includes some of the essential standards of international conventions against corruption. Global companies, multinational corporations, forced by the possible enforcement actions against their management in home countries, can be another driver for developing compliance culture in Ukraine. Multinational corporations can influence the local environment through their Ukrainian operations, causing their business partners to adopt relevant compliance standards.[205]

The most positive aspect of the described changes is that anti-corruption initiatives place more and more pressure on the private companies in Ukraine to start developing an effective compliance system and integrating high ethical and compliance standards into the business community in Ukraine.

Conclusions to CHAPTER 2

Definitely, strict anti-corruption regulations demand and encourage companies to strengthen compliance with rules by implementing compliance programs. There are still many reasons why organizations implement their compliance programs: to reduce the liability of board members; sometimes to follow the direct requirements of the law (e.g., the requirement of Anti-Corruption Law of Ukraine to companies fully or partially state-owned firms); to fulfill company's obligations determined in a result of regulatory enforcement actions; to mitigate the intensity of the possible enforcement actions (some regulators count efforts of the company to establish an effective compliance program in their decisions regarding the application of further penalties); et al. What is critically important - to shift organizations' focus from the above rationale (resulting in the adoption of a formal compliance program often) to the development of ethical values and culture incompatible with corruption. In the end, no bribery laws can completely prevent corruption, they can act as some additional motivation or pressure for the companies to implement compliance programs, but the fight against corruption cannot rely on the legislation framework only. One can see that the global response against corruption is significant; international

[205] Marchuk M. Regulation of Compliance Matters in Ukraine. *Ukrainian Law Firms. A Handbook for Foreign Clients 2020*. Online article. URL: http://ukrainianlawfirms.com/reviews/compliance/ (date of access: 07.06.2021).

agreements included corruption in corporations' agenda, underlining corporate responsibility for anti-corruption actions. National efforts to increase transparency and to implement anti-corruption initiatives, with high support of international agencies and states, also can influence the overall business environment (a good example is UNIC's case in Ukraine, seeing that UNIC managed to consolidate efforts of the highly responsible business organizations over one common goal - to make transparent and ethical business practice the new trend in Ukraine). *Currently, the ball is on business organizations' court - they can contribute to the strengthening of the anti-corruption measures by incorporating compliance principles into their business processes.*

CHAPTER 3. THE ROLE OF CORPORATE COMPLIANCE PROGRAMS IN PREVENTING AND COMBATING CORRUPTION

3.1. The role and effectiveness of compliance programs in combating corruption

The preceding part of this thesis demonstrated the measures to combat and prevent bribery and corruption introduced by the international community and selected countries. It is challenging to overcount all efforts performed by national regulators and international organizations - starting from raising the first anti-corruption law prohibiting abroad bribery and creating a high benchmark for the anti-corruption legislation worldwide (the FCPA), and criminalizing commercial bribery for the first time (The Bribery Act), to providing guidelines on the universal compliance standards for the wide variety of business organizations regardless their size, industry, jurisdiction. Nevertheless, considering the extent of corruption occurring on the private sector's side, these measures appear to be not sufficient. Furthermore, considering the scale of corruption, the way it is corroding public trust, investment climate, business opportunities, and effective competition, **public and private sectors need to work together to develop, update, and strengthen anti-corruption measures.** The most common step expected from business organizations is creating and implementing a robust anti-corruption **compliance program**. The most prevailing notion of developing such programs is that they "deter wrongdoing and generate ethical norms within the firm."[206]

As defined by the Corporate Compliance Committee, ABA Section of Business Law: *"a corporate compliance and ethics program consists of an organization's code(s) of conduct, policies, and procedures designed to achieve compliance with applicable legal regulations and internal ethical standards."*[207] Although the corporate compliance programs can cover even broader views to manage all risks within the organization and this thesis will provide an overview of opposite views on the effectiveness of the compliance

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[206] Hechler Baer, Governing Corporate Compliance, supra note 16, at p. 959.
[207] Corporate Compliance Survey. Corporate Compliance, Committee ABA Section of Business Law. The Business Lawyer. 2005. Vol. 60, no. 4. P. 1759. URL: http://www.jstor.org/stable/40688333 (date of access: 17.05.2021).

programs (compliance structures) based on the review of the corporate compliance programs, further focus in this thesis will stay on the corruption and bribery risks only.

Again, it is critically important to accept the reality, the fact that neither a "zero tolerance to corruption" statement alone nor laws or regulations by themselves will be capable of preventing corruption and bribery at all times. Thus, focusing on rules and regulations alone may bring a sort of frustration. All mentioned laws, provisions, regulations, and standards introduced by international organizations and local regulators should encourage the private company not merely to put in place an effective compliance program to deter bribery and corruption. A compliance program should be considered and used as a core element of corporate anti-corruption regulations that can support implementing integrity and ethical business conduct principles.

Obviously, there is no one common approach and recognition of the role and effectiveness of the compliance program. Kimberly D. Krawiec, in her research of "cosmetic compliance", challenges the idea of the effectiveness of the compliance structure (joint name of corporate conduct codes and internal compliance programs) as such and brings into question the justifiability of the reduction or elimination of liability "for those organizations that can demonstrate the existence of 'effective' internal compliance structures"[208] prescribed by the United States law. Krawiec assumes that the mentioned legal standard is based on the idea that an internal compliance structure effectively reduces misconduct within organizations. To support the point regarding the overestimated role of the compliance programs in deterring law violation, Krawiec provides an overview of the imperial evidence showing an insignificant connection between compliance programs and decreasing misconduct in an organization. Krawiec insists that internal compliance structures are just "window-dressing mechanisms" implemented by organizations to reduce the liability or provide the appearance of legitimacy to the key stakeholders. Organizations implement compliance programs partially and quite impassively; they are not trying to achieve any goals set by regulators. Therefore, such compliance programs will not achieve

[208] Krawiec K. D. Cosmetic Compliance and the Failure of Negotiated Governance. Washington University Law Review. 2003. Vol. 81, no. 2. P. 487. URL: https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1288&context=law_lawreview (date of access: 17.05.2021).

their true purpose. Moreover, Krawiec argues that the existing legal standards overstate the importance of the compliance structures and thus create two potential problems: "(…) an under-deterrence of corporate misconduct"[209] and "a proliferation of costly - but arguably ineffective - internal compliance structures."[210]

Christine Parker and Sharon Gilad likewise review the issue of the formal compliance programs. They examined the possibility of empirically identifying the effectiveness of the formal compliance programs in preventing the misconduct in corporations in frames of their study of the extent to which corporations implement their compliance systems and the actual reasoning behind this implementation.

In order to address the research question, Parker and Gilad applied the "generic sociological concepts of structure, culture, and agency."[211] They examined "the interaction between the adoption of formal systems for compliance management (one component of structure), the perceptions, motivations, and strategies of individuals within the corporation in relation to compliance (agency), and the local norms and habituated practices (culture or cultures) that mediate between corporate structures and individual agency."[212] Researchers argue that "(…) complex interaction between structure, agency, and culture entails the adoption of formal compliance systems that have limited, variable and unintended impacts on compliance behavior."[213] They call attention to the fact that compliance systems can be designed to take advantage of liability elimination and confirm to regulators that their efforts to implement the compliance system were fulfilled rather than to prevent the misconduct. The truth is that corporate managers can accept relatively high risks of non-compliance and can apply their view of the noncompliant behavior in the decision-making - regulators cannot expect or control that.[214] Parker and Gilad bring to date the long-running dispute regarding the possibility that many organizations would be ever motivated to implement an effective compliance system. They emphasize that external regulation can push

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[209] Krawiec, Cosmetic Compliance and the Failure of Negotiated Governance, supra note 208, at p.491.
[210] Ibid.
[211] Parker C., Gilad S. Internal Corporate Compliance Management Systems: Structure, Culture and Agency. *Explaining Compliance: Business Responses to Regulation*. 2011. P. 3. URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1790283 (date of access: 17.05.2021).
[212] Ibid at p.4.
[213] Ibid.
[214] Ibid at p.3.

organizations to adopt formal and standard compliance systems only. However, they cannot influence how these compliance systems will be communicated within the organizations if they will meet the real needs of the industry where the particular organization operates and how the standard covered by the compliance program will be understood in practice.

The opposite view was presented by Mark S. Schwartz in the study[215] of the relationship between corporate codes of ethics and behavior of employees in the number of Canadian companies. Codes and policies are an essential part of a compliance program, "companies use codes for a number of reasons including the provision of consistent normative standards for employees, avoidance of legal consequences, and promotion of public image." Schwartz admits certain limitations of the selected research method (interview); however, he still argues that evidence confirms the influence of a code of ethics on employee behavior. He lists the main reasons for noncompliance with the code of conduct: self-interest, dissatisfaction, environment, company's interest, ignorance, and the justification behind compliant behavior: personal values, fear of discipline, feeling of loyalty. Moreover, based on the data received from the interview, Schwartz suggests eights "metaphors" aimed to explain how codes can influence behavior: "(1) as *a rule-book*, the code acts to clarify what behavior is expected for employees; (2) as *a sign-post*, the code can lead employees to consult other individuals or corporate policies to determine whether certain behavior is appropriate; (3) as *a mirror*, the code provides employees with an opportunity to confirm whether behavior is acceptable to the corporation; (4) as *a magnifying glass*, the code suggests a note of caution to employees to be more careful or engage in greater reflection before acting; (5) as *a shield*, the code acts in a manner which allows employees to better challenge and resist unethical requests; (6) as *a smoke detector*, the code leads employees to try to convince others and warn them of their inappropriate behavior; (7) as *a fire alarm*, the code leads employees to contact the appropriate authority and report violations; and finally (8) as *a club*, the potential enforcement of the code causes employees to comply with the code's provisions."[216] The outcome confirms that "(…) *codes*

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[215] Schwartz M. S. The Nature of the Relationship between Corporate Codes of Ethics and Behaviour. Journal of Business Ethics. 2001. No. 32. P. 247–262. URL: https://doi.org/10.1023/A:1010787607771 (date of access: 19.05.2021).
[216] Ibid at p.255.

of ethics can be an important first step towards the objective of encouraging legal and ethical behavior. Codes, however, are by no means the only necessary step."[217]

The assumption mentioned above raises flags on the lack of mindfulness and proper motivation for implementing the compliance program. **The formal, "one-size-fits-all" compliance program, or "cosmetic compliance", cannot be effective.** The compliance programs known as "window-dressing" will merely create an impression of the organization's established culture of integrity and compliance. Even a well-designed compliance program developed to meet the particular organization's needs will not be effective if not communicated properly. **What counts is the true motivation of the organization to implement the compliance program.**

Thus, it is essential to encourage organizations to implement compliance programs that will go far beyond sole compliance (corresponding to laws and regulations), programs aimed to cultivate the culture of business integrity and high ethical standards, will reflect the best from all measures, both internal and external.

3.2. Elements of the robust compliance program

Definitely, there are many resources aimed to guide companies in the creation and implementation of global compliance programs. The elements of a robust compliance program were determined by international organizations, government, and even researchers from the academic environment who tried to summarize the essential elements of the compliance program suggested by different statutes and regulations.

Geoffrey P. Miller, in the overview of the compliance function[218], outlined some of such essential elements according to few statements: (1) **Federal Sentencing Guidelines** (1991) defined that the organization must conduct due diligence, "promote an organizational culture that encourages ethical conduct and a commitment with the law."[219] The organization must: develop and implement the adequate standard to deter violations of law

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[217] Schwartz, The Nature of the Relationship between Corporate Codes of Ethics and Behaviour, supra note 215, at p. 260.

[218] Miller G. P. The compliance function: an overview. Law & Economics Research Paper Series. Working Paper No.14-36. New York University School of Law. 2014. P.1-20. URL: https://doi.org/10.2139/ssrn.2527621 (date of access: 25.05.2021).

[219] Ibid at p.12.

and identify criminal conduct, ensure that its management understands the scope of the compliance program and provides a reasonable oversight over its implementation, arrange effective training, implement incentives for the keeping of the compliance approach and disciplinary sanctions for misbehavior, to implement necessary measures to prevent the repeated violations.[220] (2) **The Bank Secrecy Act** declares own elements of a robust compliance program: “high-level commitment to compliance, written policies, peer-based review, oversight and independence of compliance officers; training and guidance for employees; internal reporting; investigation; enforcement and discipline, oversight of agents and business partners, monitoring and testing;”[221] (3) **The Volcker Rule**, a federal regulation proclaimed by banking agencies, requires mid-size banks to include mandatory six elements to their compliance programs: “written policies and procedures; a system of internal controls; a management framework that clearly delineates responsibility and accountability for compliance; independent testing and audit of the effectiveness of the compliance program; training of trade personnel and managers; making and keeping records sufficient to demonstrate compliance.”[222] This part of the thesis will suggest a detailed overview of several recommendations provided by governments and international organizations to summarize some common features of the robust and effective compliance programs.

3.2.1. Hallmarks of the robust compliance program according to DOJ guidelines

The DOJ does not provide a formal list of requirements regarding compliance programs; however, it points out the basic element considered during the evaluation of the compliance programs by prosecutors. All these basic elements, covered by the DOJ guidance on Evaluation of Corporate Compliance Programs, aimed to evaluate the organization on its performance against three “fundamental questions”[223]: “Is the

[220] Miller, The compliance function: an overview, supra note 218, at p.12.
[221] Ibid at p.12.
[222] Ibid at p.13.
[223] Evaluation of Corporate Compliance Programs. Official edition. U.S. Department of Justice Criminal Division, 2020. 20 p. URL: https://www.justice.gov/criminal-fraud/page/file/937501/download (date of access: 20.05.2021).

corporation's compliance program well designed? Is the program being applied earnestly and in good faith? Does the corporation's compliance program work' in practice?"[224]

The corporate compliance program should be adequately designed to prevent and detect misconduct by employees effectively. It should include appropriate policies and procedures (assignment of responsibilities, training, discipline, and incentive systems) and a clear statement regarding zero tolerance to corruption. The program should be: (i) tailored to a specific company, its needs, and business risks; (ii) comprehensive, well-integrated into its processes, and should be recognized among employees. **Hallmarks of the well-designed compliance program include the following:**

1. **Risk assessment.** An effective and robust compliance program should be based on the qualitative risk assessment of the existing processes, which the company shall perform to identify, assess and define its risk profile. These risk assessment results should be fully addressed in the compliance program and should justify particularities of the selected compliance program. Risk assessment helps to build a customized compliance program that will cover specific risks related to the company's country, potential business partners, potential cooperation with government authorities, business size, the industry where this company operates, and the range of regulations there. As a result, the company keeps the proper focus on the high-risk processes that require more resources to ensure proper control and monitoring over such processes. A company should avoid the implementation of the "one-size-fits-all" type of compliance program. [225]

   The risk assessment process should typically cover the following stages:

   - "Risk Management Process." This process contains the methodology for the risk assessment selected by the company; specific metrics used to detect the type of misconduct, and the procedure on the regular review and update of the existing compliance program based on the risk assessment results;
   - "Risk-Tailored Resource Allocation." A company should portion its resources according to the extent of the risk it expects to cover;

[224] Evaluation of Corporate Compliance Programs, U.S. Department of Justice, 2020, supra note 223, at p. 2.
[225] Ibid at p.2-3.

- "Updates and Revision." Risk assessment should be performed regularly; it should cover analysis of the operational data and information received across the functions. Outcomes of the periodic reviews should result in the update of the respective policies, procedures, or controls;
- "Lessons Learned." A company should monitor issues inside the organization and on the market (within the same industry/region); all findings should be incorporated in its systematic risk assessment process.[226]

2. **Policies and procedures.** A company should develop policies and procedures that "incorporate the culture of compliance into its day-to-day operation."[227] A company should implement a code of conduct where the company's commitments to full compliance with relevant laws are declared, among other things. The DOJ typically reviews policies and procedures against the following control points: **design, comprehensiveness, accessibility, responsibility for operational integration,** and **gatekeepers**. Briefly, procedures and policies should be changed and updated routinely to reflect and address the risks that a particular company faces during its activity. Procedures and processes should be accessible to employees - all policies and procedures should be issued in a "searchable format."[228] However, what is more critical - policies and procedures should be clear and understandable; they should be communicated to employees and relevant third parties and translated into a local language (for foreign subsidiaries). Furthermore, the company should evaluate which of the published policies and procedures are in high demand and reinforce applicable procedures and policies through the internal control systems. Gatekeepers involved in the control process should be trained and aware of the essential misconducts they should monitor.[229]
3. **Training and communication.** A company should integrate applicable policies and procedures through regular training for all relevant employees (incl. management of the company) and, where necessary - for the company's third parties. Training

[226] Evaluation of Corporate Compliance Programs, U.S. Department of Justice, 2020, supra note 223, at p. 2-3.
[227] Ibid at p. 4.
[228] Ibid.
[229] Ibid.

should be designed for a specific audience - its size, level of expertise, and awareness. A company should design specific training for the high-risk and control functions, including training on the areas of misconducts, if any (risk-based training). Training should be conducted in the form and language appropriate for the particular audience; it should include the possibility of the final rating of the information learned and the opportunity to follow-up (form/content/effectiveness of training). The effectiveness and relevance of the training program should be regularly assessed. "Compliance program cannot work unless effectively communicated"[230] and understood by employees. In addition, the company should ensure that employees receive "(…) guidance and advice on complying with the company's ethics and compliance program (…)."[231] The company should ensure the communication about occurred misconduct in the appropriate manner. The last point for this hallmark is that the company ensures the availability of all needed resources for employees to get guidance related to compliance policies.[232]

4. **Confidential Reporting Structure and Investigation Process.** A company must implement an efficient and trusted reporting mechanism for employees to report (inclusive with anonymous reporting options) any concerns related to the breach of the company's codes and policies, suspected or actual misconduct. The company has to design the appropriate process to handle received alerts (routing of the alerts, appropriate timelines for the investigation, follow-up, and discipline measures) and to establish a safe workplace atmosphere, whistleblowers protection, at al.). Correspondence of the company to this hallmark would be measured against the following criteria: (a) effectiveness of the reporting mechanism (company has an established anonymous reporting mechanism accessible for employees and third parties; periodical testing of employees' and third parties' awareness regarding the exiting reporting mechanism; accessibility of information related to allegations to compliance function); (b) investigations are properly scoped by qualified personnel (alerts should be evaluated and categorized based on the existing procedure to ensure

[230] A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition, supra note 65, at p. 59.
[231] Ibid at p.59.
[232] Evaluation of Corporate Compliance Programs, U.S. Department of Justice, 2020, supra note 223, at p. 5.

proper investigation, if applicable; company secure by specific measures that investigations are independent, objective, adequately documented and conducted in the appropriate way; (c) investigation response (company determined exact timelines for handling of incoming alerts; set the process to monitor the outcome of the investigation and follow-up on all findings or recommendations; (d) resources and tracking of results (reporting and investigating mechanisms are sufficiently funded; company use information from its reporting mechanism to update its internal controls, compliance program and training curriculum).[233]

5. **Third-Party Management.** The FCPA enforcement actions of the DOJ and the SEC reveal that companies commonly paid bribes to foreign officials through their third parties (agents, consultants, distributors). Therefore, risk-based due diligence is essential. Indeed, the appropriate due diligence level may be changed to correspond to the specific transactions conducted by the company; however, the company must have an understanding of the proper qualifications and associations of its third parties with any foreign officials.[234] The following criteria considered within the "third party management" hallmark: (a) risk-based and integrated process (the company's third-party management process must be integrated into the relevant procurement and vendor management processes and should comply with the organization's type and level of the risks identified for this organization); (b) appropriate controls (company should have a strong business rationale for the transaction with a particular third party; company established adequate "(…) mechanisms to ensure that the contract terms specifically describe the services to be performed, that the payment terms are appropriate, that the described contractual work is performed, and that compensation is commensurate with the services rendered"[235]; (c) management of relationships (the company should review a compensation structure for its third parties against the identified risks; the company has to ensure that third parties are monitored; company should have an audit rights to perform the analysis the books and accounts of third parties; third party

[233] Evaluation of Corporate Compliance Programs, U.S. Department of Justice, 2020, supra note 223, at p. 6-7.
[234] A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition, supra note 65, at p. 60.
[235] Evaluation of Corporate Compliance Programs, U.S. Department of Justice, 2020, supra note 223, at p.8.

relationship managers are trained about compliance risk management; at al.); (d) real actions and consequences (company ensured that third party-related red flags are identified and addressed; company keep tracking of third parties that did not pass the company's due diligence or that were terminated).[236]

6. **Mergers and Acquisitions (M&A).** If the company disregards the proper due diligence procedure before to merger or acquisition, it may result in significant business and compliance risks. Compliance program "(…) should include a comprehensive due diligence of any acquisition targets, as well as a process for timely and orderly integration of the acquired entity into existing compliance program structures and internal controls."[237] To evaluate the effectiveness of the existing measures the company should review the proper implementation of its due diligence process (including pre-acquisition due diligence), the integration of due diligence in the M&A process, and the process connecting due diligence to implementation (inclusive of the process for "(…) tracking and remediating misconduct or misconduct risks identified during the due diligence process; (…) the company's process for implementing compliance policies and procedures, and conducting post-acquisition audits, at newly acquired entity."[238]

   In order to be effective, a well-designed compliance program should be implemented properly, "(…) if the implementation is lax, under-resourced, or otherwise ineffective,"[239] the compliance program will remain just a "paper program" without any real impact on the organization culture and processes.[240]

7. **Commitment by Senior and Middle Management.** Corporate leaders (board of directors and senior management) are, in fact, those who sound the keynote of the corporate culture within the organization.[241] They are setting "(…) the tone for the rest of the company."[242] Their commitment is crucial for a company "to create and

[236] Evaluation of Corporate Compliance Programs, U.S. Department of Justice, 2020, supra note 223, at p.7-8.
[237] Ibid at p.9
[238] Ibid.
[239] A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition, supra note 65, at p. 57.
[240] Evaluation of Corporate Compliance Programs, U.S. Department of Justice, 2020, supra note 223, at p.9.
[241] A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition, supra note 65, at p. 57.
[242] Evaluation of Corporate Compliance Programs, U.S. Department of Justice, 2020, supra note 223, at p.10.

foster a culture of ethics and compliance with the law at all company levels"[243], "(…) from the middle and the top."[244] Key points related to this hallmark include: (a) **conduct at the top** (senior leadership team should intensify the importance of compliance within the organization, build a proper behavior model to subordinates, demonstrate committal to the compliance principals and ethics standards even in case of certain disadvantages for business, at al.); (b) **shared commitment** (senior leaders and middle-management stakeholders should demonstrate their commitment to compliance); (c) **oversight** (board of directors should have a reasonable level of compliance expertise to perform their oversight responsibilities). A strong compliance program is impossible without a strong compliance culture. By demonstrating a commitment to compliance principles and standards, middle and senior managers will inspire other employees to reinforce those standards.[245]

8. **Autonomy and Resources.** The company should devote a sufficient number of personnel and resources within the compliance function and to ensure that dedicated personnel have: (a) "sufficient seniority within the organization"[246]; (b) "sufficient resources, namely, staff to effectively undertake the requisite auditing, documentation, and analysis;"[247] and (b) "sufficient autonomy from management, such as direct access to the board of directors or the board's audit committee."[248] The company should: arrange the proper **structure of the compliance function** (to secure that structure has needed independent reporting line to the CEO/or board; headed by a designated chief compliance officer; compliance personnel is not burdened with other, non-compliance tasks within the organization); support **its seniority and stature level** comparing to other strategic functions in the organization, provide the appropriate authority for compliance function within the organization; assure that compliance personnel have needed level of **experience and qualification** and provide the possibility for further training and

[243] Evaluation of Corporate Compliance Programs, U.S. Department of Justice, 2020, supra note 223, at p.10.
[244] Ibid.
[245] A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition, supra note 65, at p.57.
[246] Evaluation of Corporate Compliance Programs, U.S. Department of Justice, 2020, supra note 223, at p. 11.
[247] Ibid.
[248] Ibid.

development; **provide funding and resources** to guaranty that existing team will be able to perform the audit effectively and needed follow-up actions; **provide data resources and access** needed for timely and effective monitoring or testing of policies, controls, and transactions is available; ensure its **autonomy.**[249]

9. **Incentives and Disciplinary Measure.** The Company should imply a straightforward disciplinary procedure in place. The possible disciplinary measures should be proportional to the level of violation. The Company should communicate that violation of Company's ethical standards and principles will not be tolerated and will result in a corresponding consequence to any wrongdoer despite the organization's job title and seniority level. The Company can promote its compliance program through the appropriate incentives in case of performing under the compliance and ethics program (personnel evaluations, promotions, rewards, bonuses for ethics and compliance leadership, at al.); and through the "appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct."[250] Companies can select which internal actions would be sufficient for the particular organization at this stage - disciplinary actions or the positive incentives approach. There are examples when companies have made "(…) compliance a significant metric for management bonuses and have made working on compliance a means of career advancement."[251] The Company should define responsible employees/functions who should participate in making disciplinary decisions. All disciplinary actions and incentives have been fairly applied across the organization.[252]

The company's effective compliance program should be updated to address existing and changing compliance risks. Based on the DOJ's guidelines, the company's compliance program is checked against effectiveness in frames of investigation of the misconduct - to evaluate whether the company has conducted

[249] Evaluation of Corporate Compliance Programs, U.S. Department of Justice, 2020, supra note 223, at p.1.
[250] Ibid at p.13.
[251] Ibid.
[252] Ibid at p.13-14.

the root cause analysis to clarify the issue that caused the misconduct and its consequences to prevent similar misconduct misbehavior in the future. [253]

10. **Continuous Improvement, Periodic Testing, and Review.** A robust and effective compliance program should be constantly improved and updated. Due to specific changes in the market, changes in the business activity, laws, standards and regulations, specific conditions of the industry and country where the company operates, and even in the scope of customers, the company needs to review and update its compliance program accordingly. The company should regularly arrange review and testing (internal audit and control testing) of its controls and the compliance program to identify issues and weaknesses that result in misconduct and evaluate the culture of compliance. It is critical to review and update compliance policies, procedures, and practices to cover the identified risk areas if was not covered yet (evolving updates). [254]

3.2.2. Overview of The Ministry of Justice (UK) recommendations on the developing of compliance programs

Ministry of Justice of the United Kingdom published The Bribery Act 2010 Guidance covering the procedures that commercial organizations can establish to keep individuals associated with them from bribing. This guidance proposes a commercial organization with six principles. These principles can be flexible, outcome-driven. Based on a distinction between the commercial organizations, there may be differences in how those principles would be applied; however, implementation of principles should always result in practical and robust anti-bribery procedures. [255] The following principles can be found in the above-mentioned guidance:

Principle 1 - Proportional procedures

A commercial organization's procedures aimed to prevent bribery by its associated person should be proportional to the risks this organization faces and the nature and scope

[253] Evaluation of Corporate Compliance Programs, U.S. Department of Justice, 2020, supra note 223, at p.14.
[254] Ibid at p.15.
[255] The Bribery Act 2010 Guidance, supra note 82 at p.20.

of the activities conducted by the organization. Procedures should be "clear, practical, accessible, effectively implemented and enforced."[256] The procedure here means both bribery prevention policies and the procedures that ensure their implementation. The organization should conduct a risk assessment. Procedures need to be proportionate to the bribery risks the organization faces. Such procedures should be appropriately implemented and communicated.

It is recommended to include specific elements to the antibribery policies of the commercial organization: (1) a commitment of the organization to bribery prevention; (2) scope of standard mitigation actions of the commercial organization to manage specific bribery risks (associated with intermediaries, agents, or with hospitality, promotional expenditure, facilitation payments, donations, and contributions); (3) overview of the strategy of the antibribery policies implementation. The procedure should also prevent the possible unethical behavior on the part of associated persons; thus, it might be appropriate to cover the following topics (not an exhaustive list): top-management involvement; risk assessment procedure; due diligence of existing and prospective third parties; the provisions related to gifts and hospitalities, donation activities; governance of business relationship with associated persons; financial and commercial controls; the reporting mechanism ("speak up" or "whistleblowing procedure"); communication of policies and procedures; et al. [257]

Principle 2 - Top-level commitment

The top-level management (board of directors, owners, et al.) of the commercial organization should be dedicated to promoting the culture of integrity within the organization where bribery should not be tolerated or accepted. There should be unconditional involvement of the top-level management in the development and enforcement of anti-bribery procedures.

Management should communicate a clear statement regarding zero tolerance to bribery internally and externally. This statement should be translated or published periodically on the company's corporate social media. The guidance provides the core

[256] The Bribery Act 2010 Guidance, supra note 82 at p.21.
[257] Ibid at p.22.

elements of the effective formal statement: "(a) a commitment to carry out business fairly, honestly and openly; (b) a commitment to zero tolerance towards bribery; (c) the consequence of breaching the policy for employees and managers; (d) articulation of the business benefits of rejecting bribery"[258] (includes public image of the company); et al. Also, the guidance provides, among others, following several elements of the "top-level involvement in bribery prevention"[259]: training for the selected senior managers on anti-bribery measures; leadership in encouraging transparency throughout the organization; oversight on the misconduct. [260]

Principle 3 - Risk assessment

The commercial organization should conduct a periodic risk assessment for the subject of potential internal and external risks of bribery on its behalf. Risk assessment procedure helps the commercial organization identify and prioritize risks it faces. It typically includes a few essential elements that implicate oversight of the risk assessment by senior management, proper resourcing, appropriate records management related to the risk assessment, and the risk assessment findings. [261] According to guidelines suggests the most common external risk categories: "country risk"[262], "sectoral risk"[263], "transaction risk"[264], "business opportunity risk"[265], "business partnership risk."[266] Even though the external risk assessment helps the commercial organization design an adequate mitigation plan, a bribery risk assessment helps identify additional risk factors inside the corporate structure. Common internal risk factors include, among others: "lack of clear financial controls"[267]; "lack of clear anti-bribery message from the top-level management"[268], "lack of clarity in the organization's policies on, and procedures for, hospitality and promotional expenditure, and political and charitable contributions." [269]

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[258] The Bribery Act 2010 Guidance, supra note 82 at p.23.
[259] Ibid at p. 24.
[260] Ibid.
[261] Ibid.
[262] Ibid at p. 26.
[263] Ibid.
[264] Ibid.
[265] Ibid.
[266] Ibid.
[267] Ibid.
[268] Ibid.
[269] Ibid.

Principle 4 - Due diligence

The commercial organization conducts the due diligence procedure grounded in the risk-based approach regarding its existing or future third parties. Due diligence procedure is "(…) both a form of bribery risk assessment and a means of mitigating a risk."[270] The primary purpose of this principle to prompt commercial organizations to the implementation of due diligence procedures. The procedure can be conducted internally or externally; the procedure itself should be proportionate to risk arising from particular cooperation.[271]

Principle 5 - Communication and training

The commercial organization should ensure that its anti-bribery procedure and policies are appropriately communicated, accessible, and well-understood by employees. The organization should provide needed training to raise awareness of employees regarding the organization's anti-bribery measures. It can implement general training mandatory to all employees and relevant third parties and tailored training for the "high risk" functions. Moreover, the organization has to develop and implement a secure, accessible, and confidential reporting line for those who wish to raise a concern. External communication on bribery prevention can be fulfilled through statements or provisions in the code of conduct, "such communications can include information on bribery prevention procedures and controls, sanctions, results of surveys, rules governing recruitment, procurement and tendering."[272] Internal communication should include "the tone from the top."[273]

Principle 6 - Monitoring and review

The commercial organization must review and update its anti-bribery procedures. Before the update organization regularly performs monitoring and evaluation of the effectiveness of the existing procedures. Commercial organizations are encouraged to use the most applicable internal and external mechanism to deter, detect and investigate bribery (internal control; staff surveys, questionnaires, and training feedback, et al.).[274]

[270] The Bribery Act 2010 Guidance, supra note 82 at p. 26.
[271] Ibid at p. 27.
[272] Ibid at p. 29.
[273] Ibid.
[274] Ibid at p.31.

3.2.3. Principles and guidance for the development of anti-corruption corporate transparency introduced by Transparency International UK

In 2020 the Transparency International UK (TI UK) provided "Principles and guidance for anti-corruption corporate transparency. Open Business." Authors specify that their guidance provides practical tips for organizations regarding disclosure across high-risk areas and focuses on the anti-corruption program transparency. The report evaluates the most critical anti-corruption areas that require a particular focus in case of the disclosure. The TI UK provided its view of the essential elements of the anti-corruption compliance program from the perspective of transparency. Based on the TI UK assumption, transparency around the specific area and understanding that certain information needs to be disclosed will encourage companies to improve their policies and procedures.[275]

"Anti-corruption program transparency refers to the reporting and public disclosure around a company's governance, top-level commitment, anti-bribery and corruption policies and procedures, risk assessment, human resources, conflict of interest, charitable donations and sponsorships, facilitation payments, gifts and hospitality, training, anti-bribery and corruption program, monitoring and review, whistleblowing, incident management, third party management, and private procurement."[276]

Based on the disclosure requirements of the TI UK to the core principles of anti-corruption transparency, it follows that the anti-corruption program should include or cover the following areas:

1. "*Top-level commitment to anti-bribery and corruption*. This commitment should be expressed in a zero-tolerance statement authorized by leadership; evidence that the board or a board committee sets the anti-corruption tone; evidence that a senior executive has responsibility for the anti-bribery and corruption program; and a

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[275] Transparency International UK. Open Business. Principles and guidance for anti-corruption corporate transparency, supra note 2, at p. 10.
[276] Ibid at p. 21.

public commitment to supporting and protecting employees who refuse to act unethically, even when it might result in the loss of business."[277]

2. *Anti-bribery and corruption policies*. The company should have an extensive and well-implemented anti-bribery and corruption policy, supporting policies and procedures to strengthen its anti-corruption program.[278]
3. *Risk assessment*. The company should set its "anti-bribery and corruption Key Performance Indicators (KPIs)" [279] and update its anti-bribery and corruption program to cover the risk-assessment findings.
4. *Human resources.* The company should ensure workplace safety; employees should feel comfortable refusing to act unethically. The company's incentive program for employees should encourage ethical behavior.[280]
5. *Conflict of interest.* The company should design and implement a worthwhile conflict of interests management policy.[281]
6. *Charitable donations and sponsorships.* The company should design and implement an effective policy on charitable donations and sponsorships.[282]
7. *Prohibition of facilitation payments.* The company has to prohibit any facilitation payments and ensure adequate resources and measures to manage any related risks in its business activity.[283]
8. *Gifts and hospitality.* The company should design and implement the Gifts and Hospitality policy that will cover, among other things, the consequences of misconduct.[284]
9. *Training.* The company should put the anti-bribery and corruption program in place to keep it up to date and measure its effectiveness.[285]

[277] Transparency International UK. Open Business. Principles and guidance for anti-corruption corporate transparency, supra note 2, at p. 9.
[278] Ibid at p. 23-24.
[279] Ibid at p. 24.
[280] Ibid.
[281] Ibid.
[282] Ibid.
[283] Ibid.
[284] Ibid at p.25.
[285] Ibid.

10. *Monitoring and review.* The company should regularly review its anti-corruption and bribery program, evaluate this program during internal or external audits, and update corporate policies and procedures in case of any findings.[286]
11. *Whistleblowing.* The company should design and implement the policy on whistleblowing, provide a confidential and anonymous channel where employees and whistleblowers can report any concern related to bribery or corruption, collect and review the whistleblowing statistics, and ensure that company has assumed all measure to ensure non-retaliation against whistleblowers and employees who reported their corruption or bribery concerns.[287]
12. *Dealing with incidents.* The company should have the operative process for address any findings related to bribery and corruption; this process should also cover remediation activities and exact disciplinary measures against employees who made corrupt conduct.[288]
13. *Managing third parties.* The company needs to: conduct a risk-based anti-bribery and corruption due diligence before signing a contract with a new third party; include anti-bribery and corruption clauses and rights to conduct an audit in all contracts with third parties; "include its audit rights in its contracts with third parties."[289]
14. *Private procurement transparency.* The company should, among other things, implement efficient measures to addresses bribery and corruption risks in its procurement process; and to declare its zero-tolerance on bribery and corruption inside the organization.[290]

[286] Transparency International UK. Open Business. Principles and guidance for anti-corruption corporate transparency, supra note 2, at p. 25.
[287] Ibid.
[288] Ibid.
[289] Ibid at p. 26.
[290] Ibid.

3.3. Vulnerability of compliance programs

The majority of the resources and publications that were reviewed indicated the same elements of the robust and effective compliance program, the same or somewhat similar tools that should support the establishment of such compliance program in the organization, and still, we can see that it may not work.

The US Department of Justice investigated many cases where accused companies had compliance programs with implemented policies and regular training in place; however, *all measures maintained by these companies did not deter their employees from the misconduct.* One of the best-known examples refers to the case "United States of America against Garth Peterson":

Garth Peterson, a former managing director of the real estate business of Morgan Stanley in China, was convicted to five years imprisoning and a highest fine of $US 250,000 or twice his gross gain from the misconduct for evading internal controls required by FCPA. Morgan Stanley was not subjected to any enforcement procedures by the Department of Justice due to Garth Peterson's actions. The corporation willingly revealed this case and has cooperated with the department in the investigation.[291] Peterson, having collusion with other employees, evaded Morgan Stanley's internal controls in order "to transfer multi-million dollars ownership interest in a Shanghai building to himself and a Chinese public official with whom he had a personal friendship."[292] In return for Peterson's offerings and rewards, the Chinese official assisted Peterson and Morgan Stanley in obtaining business while directly profiting from some of the same investments.[293]

According to the DOJ's press release Nr 12-534[294]:

"According to court documents, Peterson conspired with others to circumvent Morgan Stanley's internal controls in order to transfer a multi-million dollar ownership interest in

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[291] Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA. *U.S. Department of Justice*. URL: https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required (date of access: 25.04.2021).

[292] Ibid.

[293] Complaint of United States District Court Eastern District of New York of 25.04.2012 in Securities and Exchange Commission vs Garth Ronald Peterson. URL: https://www.sec.gov/litigation/complaints/2012/comp-pr2012-78.pdf (date of access: 25.04.2021).

[294] DOJ Press release, supra note 291.

a Shanghai building to himself and a Chinese public official with whom he had a personal friendship. The corruption scheme began when Peterson encouraged Morgan Stanley to sell an interest in a Shanghai real-estate deal to Shanghai Yongye Enterprise (Group) Co. Ltd., a state-owned and state-controlled entity through which Shanghai's Luwan District managed its own property and facilitated outside investment in the district. Peterson falsely represented to others within Morgan Stanley that Yongye was purchasing the real-estate interest, when in fact Peterson knew the interest would be conveyed to a shell company controlled by him, a Chinese public official associated with Yongye and a Canadian attorney. After Peterson and his co-conspirators falsely represented to Morgan Stanley that Yongye owned the shell company, Morgan Stanley sold the real-estate interest in 2006 to the shell company at a discount to the interest's actual 2006 market value. As a result, the conspirators realized an immediate paper profit of more than $2.5 million. Even after the sale, Peterson and his co-conspirators continued to claim falsely that Yongye owned the shell company, which in reality they owned. In the years since Peterson and his co-conspirators gained control of the real-estate interest, they have periodically accepted equity distributions and the real-estate interest has appreciated in value."[295]

One of the most remarkable details refers to the government's decisions to decline the prosecution of Morgan Stanley. On the one hand, this event represents the Department of Justice principles. They clearly stated that an effective compliance program (and Morgan Stanley has one) would not release a company from criminal responsibility; however, such a program can be considered an essential element in influencing prosecutorial discretion. "Both the DOJ, in its Press Release, and Securities and Exchange Commission (SEC), in its civil Compliant, went out of their way to praise the Morgan Stanley compliance program."[296] Nevertheless, on the other hand, all efforts of Morgan Stanley in compliance training, monitoring, drafting policies, etc., were ineffective.

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[295] DOJ Press release, supra note 291.

[296] Fox T. Morgan Stanley Goes One for One with a Best Practices Compliance Program. LexisNexis® Legal Newsroom. URL: https://www.lexisnexis.com/legalnewsroom/corporate/b/fcpa-compliance/posts/morgan-stanley-goes-one-for-one-with-a-best-practices-compliance-program (date of access: 25.05.2021).

What measures were implemented by Morgan Stanley to establish a robust compliance program and to deter employees from bribing foreign officials: (1) trainings on transaction process (incl. the topic of granting gifts or something valuable to foreign government officials); anti-corruption trainings (between 2002 and 2008, various groups of Asia-based personnel received their training on anti-corruption policies 54 times); (2) allocation of resources for compliance function (between 2002 and 2008, Morgan Stanley hired over 500 dedicated compliance officers) and dedicated personnel for anti-corruption matters; (3) maintenance of independence of the compliance function (direct lines from compliance department to Morgan Stanley's Board of Directors; regular reporting through to the Chief Executive Officer and senior management committees); (4) regular monitoring of customer and employee transactions; (5) random audit of the selected personnel in a high risk areas; (5) due diligence of business partners; (6) provision of the toll-free compliance hotline for employees 24/7; (7) annual certification of the adherence to the company's code of conduct; and many other mandatory and additional initiatives. In respect to Peterson's training, Morgan Stanley conducted at least seven trainings on FCPA duties between 2000-2008 and sent 35 compliance reminders on FCPA rules. Moreover, Peterson was regularly asked to certify his knowledge of FCPA requirements and restrictions.[297]

As one can see, Morgan Stanley out an effort to implement all FCPA recommendations to the compliance program. Still, something was wrong. Hui Chen and Eugene Soltes, in their research of the compliance programs' failure, provided a brief review of the Morgan Stanley case mentioned that all Morgan Stanley's efforts "(…) had little influence on Peterson because he viewed them like a pro forma."[298] The DOJ decision not to prosecute Morgan Stanley in frames of Peterson's misconduct was perceived as an acknowledgment of Morgan Stanley's measures to promote ethical business conduct. However, Peterson himself considered the program a "check box" activity and claimed that the government cheated the public with recognition of Morgan Stanley's approach. The

[297] Information of United States District Court Eastern District of New York of 25.04.2012 in no. 12-224 (JBW). URL: https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/04/26/petersong-information.pdf (date of access: 26.05.2021).
[298] Chen H., Soltes E. Why Compliance Programs Fail - and How to Fix Them. Harvard Business Review. Online version. March-April, 2018. P. 116–125. URL: https://hbr.org/2018/03/why-compliance-programs-fail (date of access: 26.05.2021).

reality is that, as mentioned by Peterson, the compliance program "(…) wasn't getting into people's heads, which is what really matters."[299]

For many companies and organizations, compliance programs are instrumental in "protection against worst-case scenarios"[300]: they ask employees to sign acknowledgment lists to confirm that they read and understand lengthy codes and policies, conduct inefficient training where employees simply need to be present and sign the attendance list, they roll out compliance communications when needed, and send reminders about compliance-rules when required. *All measures are implemented, like per the list, to check the box*. More and more often, one can see a well-structured program with all needed tools to support it in place; however, seldom do companies ensure that their compliance program comes with an adequate substance.[301]

Chen and Soltes observe good points related to the inefficient programs when companies that invested a lot in building compliance programs produced only "hollow facades."[302] Their review of the DOJ's guidance mentioned the widespread approach when companies believe they need to provide correct answers to each question in the DOJ's guidance to meet the DOJ expectations. Such companies used to select only "favorable" data to provide evidence that their program works, while preferred to look through complete records showing both strong and weak points of the program. Companies decided not to recognize the real issue; moreover, they decided to avoid measuring the compliance program's effectiveness that could help to understand why it sometimes fails. Even if measurement is done, companies tend to measure the fulfillment but not the effectiveness. Based on the figures from Deloitte and Compliance Week, represented by Chen and Soltes, a common way for companies to measure the effectiveness of their training program is to evaluate the completion rates - to check the box, but not to understand the actual quality of the training (relevance and clarity of its content) or its effectiveness (if employees in their business decision applied information received from this training). Such companies strive to demonstrate to the regulator that they are doing the right thing. [303]

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[299] Chen, Soltes, supra note 298.
[300] Ibid.
[301] Ibid.
[302] Ibid.
[303] Ibid.

Chen and Stolen define one of the main reasons for compliance programs' inoperativeness as the lack of proper measures. Thus, companies cannot define what works and what does not. These are the most common weak points of the wrong measurement of compliance program effectiveness: incomplete metrics, invalid metrics, mistaking legal accountability for compliance effectiveness, self-reporting and self-selection bias, linking compliance initiatives to objectives, compliance engineering. In his study of corporate compliance, Todd Haugh also argued that there is an issue of poor measurement. This issue appears to be increased by a relatively common assumption of corporate leaders "that unethical and illegal conduct occurs more or less predictably (…) according to a normal distribution."[304] Thus, they believe that if the company faces any risk, such risk will be predictable and manageable.[305]

3.4. Role of the private organizations and corporations in the development of effective compliance programs

Certainly, there are many representatives of private businesses that declare and follow ethical solid business principles. However, it is hard to imagine that among the number of companies that have favored a corrupt way of profit maximization already, one can find a fair quantity of organizations that will change their approach to doing business to refound corporate ethics. Undoubtedly, profit maximization is a legitimate goal of multinationals, but it can be reached differently. However, what can move such companies to change their corrupt approach completely?

The reviewed above practice of violations demonstrated is a good illustration of a "short-run orientation". [306]On the one part, companies recognize all risks arising from their corrupt behavior (e.g., public officials who have a deal with multinationals can suffer punishment for corruption; state regimes may change; contracts received using payoffs can

[304] Haugh T. The Power Few of Corporate Compliance. Kelley School of Business Research Paper No. 18-91. 53 Georgia Law Review. 2018. 128 (2018). P. 6. URL: https://ssrn.com/abstract=3284157 (date of access: 26.05.2021).
[304] Rose-Ackerman, 2002, supra note 49, at p.1893.
[305] Haugh, supra note 304, at p.6.
[306] Rose-Ackerman, 2002, supra note 49, at p.1893.

be voided for political or other reasons)[307], but on the other part, companies don't evaluate the comprehend impact of their corrupt behavior - they create the terms where a "short-run orientation" became the only possible reality. Corruption involves companies in an endless circle, and once they settled into this bog, they cannot escape it in most cases. Obviously, a company that paid a bribe to a public official to deal with some issue cannot likely expect a transparent negotiation with the same official in the future. More than this, companies that cross the "red lines' accepting and reinforcing the corruption in their business practice create certain traditions for doing business in a country, unwritten codes, and terms that can disable an honest business to stay the course.

As was precisely mentioned by Rose-Ackerman, none expect that private companies or corporations should change the system or implement the anti-corruption reforms all alone.[308] There is no intention to make corporations or private companies the only responsible party for the corruption as far as "corruption is a two-sided deal involving both venal officials and corrupt briber payers (…)"[309] and it "(…) cannot be described as "imported" by multinational firms into innocent developing countries."[310] However, private sector actors, especially multinationals, can rethink their role in the anti-corruption measures, the role of the key actors conditioned by their strong influence in the particular country or on the specific market where they do business. The truth is that private companies can make a difference in this intense fight against corruption. Still, remembering that corruption is "(…) a global phenomenon in need of a global response, the battlefield upon which this war is won or lost remains national."[311] So, companies can impact, push for some change, and their efforts will find a true significance exactly in that particular developing country where they make their investment.

Firstly, companies should understand that transparent business brings more benefits than any corrupt practices in the long run. Undoubtedly it can be challenging to convince the company leadership team to see the benefits of refrain from corruption. But the fact is that corruption increases expenses for doing business. In contrast, the robust compliance

[307] Rose-Ackerman, 2002, supra note 49, at p.1893.
[308] Ibid at p.1892.
[309] Ibid at p.1892.
[310] Ibid at p.1894.
[311] Mungui-Pippidi, supra note 62, at p. 210.

program includes the appropriate risk assessment that can help the company save money and resources. According to the 2020 "Report to the Nations"[312] published by the Association of Certified Fraud Examiners (ACFE), "corruption was the most common scheme in every global region"[313], "organizations lose 5% of revenue to fraud every year."[314] Around 43% of occupational fraud was committed through corrupt conduct (including conflict of interest, extortion, bribery).[315] The report also provides a median loss during 2018-2019 among small businesses that didn't establish the integrity culture - it amounts to around US$150.000. Considering that not all fraud schemes can impact the companies equally, ACFE also studied how rapidly work-related frauds tend to generate harm. For each case submitted to ACFE, they calculated the scheme's velocity by dividing the lost amount by the number of months the scheme operated. The median velocity for all cases in the ACFE research was a monthly loss of US$8,300. "Analyzing the velocity by scheme type revealed that certain types of occupational fraud schemes cause damage much more quickly than others. The financial statement fraud schemes have the greatest velocity of US$39,800 per month, followed by **corruption schemes, with a velocity of US$11,100 per month**."[316] Furthermore, establishing a corporate compliance program is beneficial for organizations looking to expand internationally or find foreign partners. International organizations are increasingly expecting local businesses to have a corporate integrity and compliance program in place.[317] Costly consequences of corruption are also well-known, it is suffice to recall the cases of the FCPA violations where companies were penalized for bribery and corruption, e.g., TEVA Pharmaceuticals (paid US$519 million penalty), VimpelCom and MTS (US$835 million penalty), Walmart (US$138 million penalty).[318] Furthermore, if organization conducts business ethically, has a robust compliance program, it may help to increase business growth and borrowing opportunities - "UniCredit (one of the largest lenders to Eurasian business) ensures its partners comply with local anti-

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[312] Report to the Nations 2020 Global Study on Occupational Fraud and Abuse. Association of Certified Fraud Examiners, Inc., 2020. 88 p. URL: https://acfepublic.s3-us-west-2.amazonaws.com/2020-Report-to-the-Nations.pdf (date of access: 27.05.2021).
[313] Ibid at p.4.
[314] Ibid.
[315] Ibid.
[316] Ibid at p.16.
[317] Lysova, Kimel, supra note 11, at p. 9.
[318] Ibid at p.9-10.

corruption and bribery laws."[319] So the one can see that transparently doing business will not only bring a positive impact on the company's reputation but will be economically advantageous. While misconduct can result in claims that severely harm a company's reputation, this can have a negative impact on the company's share price or revenue. Transparency International UK provides good examples of the correlation between investigation, reputation, and share price in their "Principles and guidance for anti-corruption corporate transparency".[320] One of their case studies refers to Petrofac company, whose reputation tainted due to the ongoing Serious Fraud Office (SFO) investigation. Petrofac's shares fell 19.5% in 2017 when the SFO revealed information of an investigation. Petrofac failed to secure any of the projects it had been competing for in Saudi Arabia and Iraq in June 2019, resulting in a total loss of US$10 billion in contracts. Petrofac has warned that it anticipates its income to fall in 2020 as it struggles to obtain new orders due to the SFO probe. This highlights the link between investigation, reputation, and potential revenue.[321]

Secondly, organizations should accept their liability towards societies where they invest - following that, they should determine and implement the strategy that will become a basis for their future activity. Rose-Ackerman determines two possible strategies: "(…) to assure that individual managers have high standards of personal morality"; however, the author considers this strategy as a kind of limited approach; "(…) to establish clear and well-enforced corporate guidelines and policies against corruption (…)."[322] The second strategy seems to be a more viable option. Organizations need to create a corporate culture where corruption will not be tolerated and will not be accepted despite the level of corruption in the particular country where the company invests. The compliance program should become a core element of such corporate culture.

Thus, the most critical step towards a robust and effective compliance program belongs to the organization's readiness to put out appropriate substance to its compliance program. The last part of the thesis argued that "paper program", "one-size-fits-all

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[319] Lysova, Kimel, supra note 11, at p.10.
[320] Transparency International UK. Open Business. Principles and guidance for anti-corruption corporate transparency, supra note 2, at p.22.
[321] Ibid.
[322] Rose-Ackerman, 2002, supra note 49, at p.1895.

program," et al. cannot be considered an effective tool to fight corruption. As mentioned by Joseph Murphy, "you should only proceed with a compliance program if you are serious about doing the right thing. A sham program is worse than none at all."[323]
Core elements of the effective compliance program

3.5. Developing a robust and effective compliance program

Creating an effective compliance program is arguably a complex process that should be based on the objective risk assessment. It is essential to focus on the processes (actions) that carry the highest risk and identify the key priority areas among them - do not miss the multimillion transactions while tracking applicable but less risky processes, e.g., business gifts and hospitality. The essential elements of the robust compliance program suggested in the guidelines from regulators and international associations have a lot of similar recommendations for organizations: to conduct a risk assessment, develop proportional procedures and policies, ensure effective communication and training, maintain a reporting line for employees, plan how to deal in case of a compliance violation, ensure top-level management commitment, arrange monitoring and review regularly, arrange due diligence of third parties. There can be additional recommendations depending on the specific area the guidelines are covering. All mentioned elements are undeniably important. However, as was already described in this thesis, an organization should bring to the front two main topics: the substance of all elements of a compliance program and also the effective measurement of their effectiveness.

The first point, regarding the substance of the compliance program, can be addressed through the right program orientation. Compliance programs may be established with a wide range of objectives and perspectives. There are two main approaches, "a compliance-based approach" and "an integrity or values-based approach." According to the study of corporate

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[323] Murphy J. E. A Compliance & Ethics Program on a Dollar a Day: How Small Companies Can Have Effective Programs. Minneapolis: Society of Corporate Compliance and Ethics, 2010. P. 6. URL: https://assets.corporatecompliance.org/Portals/1/PDF/Resources/CEProgramDollarADay-Murphy.pdf (date of access: 27.05.2021).

ethics “Managing Ethics and Legal Compliance: What Works and What Hurts”[324], “the compliance-approach focuses primary on preventing, detecting, and punishing violations of the law, while a values-based approach aims to define organizational values and encourage employee commitment to ethical aspirations.”[325] The study covers also research results of Lynn S. Paine who fully disclosed these two types of approach, and who affirmed that “(…) the values-based approach should be more effective than a compliance-based approach.”[326] In a values-based approach, an employee is focused on personal self-governance; this approach encourages an employee to behave "in accordance with shared values." At the same time, the compliance-based approach gives attention to outliving the punishment rather than self-governance.[327] The named study justifies that formal program characteristics are relatively unimportant[328], while the value-based approach to compliance management is seen as the best solution for an organization. Within the performed study, all employees of organizations with value-based compliance demonstrated high commitment to corporate values, awareness of ethics and compliance issues, willingness to report a compliance violation, and readiness to ask for advice in case of any concerns openly. Moreover, such organizations demonstrated fewer cases of unethical/illegal behavior because of the organization’s efforts in establishing a robust compliance program.[329] As opposed to dysfunctional organizational cultures under which employees connive to hide evidences of violations from their management.[330] Thereby, firstly, a company should denote the exact business conduct standards and consequences of the misconduct through the compliance program and its elements. In that way, a company will shape a cornerstone for values-based decision-making.[331]

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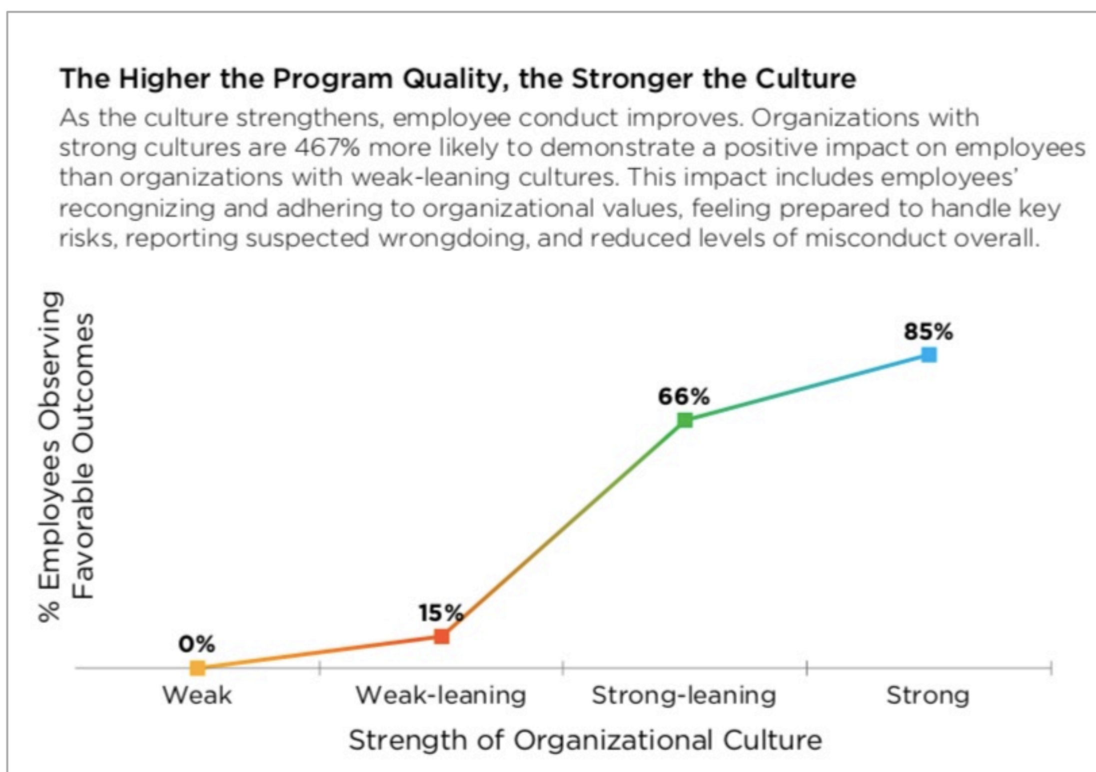
[324] Managing Ethics and Legal Compliance: What Works and What Hurts / L. K. Treviño et al. California Management Review. 1991. Vol. 41, no. 2. P. 131–151. URL: https://doi.org/10.2307/41165990 (date of access: 28.05.2021).
[325] Ibid at p.135.
[326] Ibid at p.135.
[327] Ibid at p.136.
[328] Ibid at p.140.
[329] Ibid at p.149.
[330] Rose-Ackerman, 2002, supra note 49, at p.1902.
[331] Chesnut R. Intentional Integrity. How smart companies can lead an ethical revolution. New York: St. Martin's Press, 2020. - P.215.

According to the "2021 Global Business Ethics Survey Report"[332] issued by the Ethics and Compliance Initiative (ECI) in 2021, there is a close connection between robust compliance programs and ethical corporate culture. The mentioned report summarizes answers from 14,000 employees working in for-profit organizations and corporations in different business industries in countries picked for the research (Mexico, Brazil, France, Germany, Spain, UK, et al.). Survey respondents were asked to share their perceptions regarding the robustness of the ethical culture in their organizations, how it is supported and fostered. **As seen in pictures 2 and 3, there is a significant impact of a strong ethical and compliance culture on employees' conduct: the effective compliance program contributes to the development of the corporate culture (pic.2), employees working in a strong corporate environment most often demonstrate their commitment to company's values (pic.3) - all that leads to the lower level of corporate misconduct.**

Pic.2. **The influence of compliance program's quality on the strength of the corporate culture** (source: "2021 Global Business Ethics Survey Report", ECI)[333]

[332] 2021 Global Business Ethics Survey Report. The Ethics & Compliance Initiative/ Ethics Research Center, 2021. P.5-7. URL: https://www.ethics.org/global-business-ethics-survey/ (date of access: 07.06.2021).
[333] Ibid at p.7.



Pic.3. **The influence of a strong corporate culture on employee's behavior** (source: "2021 Global Business Ethics Survey Report", ECI)[334]

Certainly, commitment to corporate ethical values is not a guarantee that employees will refrain from bribery and corruption. Following data described by Rose-Ackerman, "many individuals express strong norms of moral behavior but do not apply these norms to their behavior as the employees of for-profit firms."[335] **Therefore regular measurement of the effectiveness of the compliance program should be done periodically.**

Measuring effectiveness needs to answer the question of how good are organizations at preventing and detecting corruption.[336] In 2021 the Transparency International UK (TI UK) published their new report "Make it count"[337] to help companies working in a highly corrupt environment understand whether their approach to anti-corruption works in practice.

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[334] 2021 Global Business Ethics Survey Report, supra note 332, at p.7.
[335] Rose Ackerman, 2002, supra note 49, at p. 1902.
[336] Make It Count. Understanding the current and emerging trends in measuring the effectiveness of corporate approaches to anti-corruption. / ed. by R. Paniagua; researcher: T. Prior, R. Donaldson. Transparency International UK, 2021. 32 p. URL: https://www.transparency.org.uk/sites/default/files/pdf/publications/Make%20it%20Count%20-%20Transparency%20International%20UK%20(web).pdf (date of access: 28.05.2021).
[337] Ibid.

One of the TI UK recent findings defines that companies are not disclosing meaningful anti-corruption information because they are not gathering and evaluating information of the corruption risks management. "Make it count" aimed to emphasize the importance of measuring the effectiveness of corporate anti-corruption measures, to explain methods and approaches to measuring, and justify that measuring helps to recognize the true consequences of corruption. Even international anti-corruption regulations and guidelines emphasize the need to ensure the effectiveness of the compliance program rather than its form. In a mentioned report, the TI UK also underlines the essential role of a new trend - "value-based compliance", where management and staff focused on the moral and ethical value of their work and business, rather than solely on the financials. So why do companies need to measure the effectiveness of their anti-corruption efforts? According to TI UK: [338]

(1) To comply with anti-corruption rules and regulations and avoid the costly consequences of a violation;
(2) To prevent misuse of funds and resources due to the bribery and corruption and "not just in terms of the value of actual bribes or stolen assets, but also in terms of lost productivity, efficiency in governance, and business value"[339];
(3) To identify whether the company's resources are appropriately allocated;
(4) To comply with ethical obligations, employee, investor, and counterparty expectations, and consumer requirements;
(5) Identify the most impactful risk-reducing activities related, which can be integrated into the anti-corruption program.

The recent bribery law enforcement measures (e.g., against Novartis Hellas S.A.C.I. (Novartis Greece), Alcon Pte Ltd, Airbus, Rolls Royce) also underlines "the importance of the effectiveness of a corporation's approach to anti-corruption."[340] As a basic standard, companies should measure the effectiveness of their anti-corruption efforts and make

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[338] Make It Count, Transparency International UK, supra note 336, at p.5-6.
[339] Ibid at p.5.
[340] Ibid at p.12.

constant improvements and updates in the compliance program according to the results of findings.

By drawing on two main recent trends (values-based compliance programs and effectiveness measurement), companies can build a robust compliance program, which can help them deter misconduct and create an environment where corruption is not tolerated. In doing so, companies can mitigate the negative impact of corruption, which eventually falls on society's most vulnerable groups.

Conclusion to CHAPTER 3

Corruption continues to be a severe problem for businesses in most regions of the world and across all industries. It reduces economic efficiency, creates disadvantages for businesses, and reduces shareholder value. Corruption exposes companies, their investors, and business partners to legal, financial, and reputational risks. As a practical matter, the most critical issue for companies facing corruption risks and operating in a highly corrupt environment is quite simple - to participate actively, quietly refuse to deal, or stand against corruption. **The corporate response to corruption is critical.**

Many companies invoke anti-corruption compliance programs as an effective tool to prevent corruption. However, establishing a robust compliance program within a firm is not about simply setting basic “laws of the game” to guide employees, to reveal all grey zones, and to fix the red lines that should not be crossed. Indeed, this approach is relatively common for organizations who prefer to have a "paper program," also common for organizations in Ukraine that participate in certain public tenders, and thus they are obliged to have a compliance program under the local laws. But the issue is that compliance programs in all mentioned cases are not treated appropriately, and such cases do not display a conscious choice toward compliant business practice. If implemented effectively, compliance programs can help prevent and detect the high-risk areas in business processes, prevent the misuse of the company's resources, and support the development the culture of business ethics and integrity. Thus, it is critical to remember that implementation of the compliance program requires an advanced view. It should be implemented with a certain substance,

under the values-based approach, it should be updated regularly and that is why its effectiveness should be measured. That will help to develop a robust compliance program that can be considered an effective instrument to fight corruption.

There are various recommendations on designing an effective compliance program with a broad list of critical elements. The importance of these recommendations should not be diminished. They bring real value, best practices, and guidance on implementing compliance programs that can be particularly valuable for companies operating in the immature compliance environment. However, the fundamental matter is whether the business organization held itself accountable for the compliance priorities it has defined in the program and if such organization put a real effort to fulfill the commitments recorded.

CONCLUSIONS

1. Even though it is frequently assumed that only the public sector is concerned with corruption, business organizations and corporations also can be immersed in the corruption in frames of their cooperation with government authorities, within the cooperation with other private sector actors, or even during their internal transactions. The corrosive effect of corruption goes beyond social or political systems; it also influences the business environment generally, especially in developing countries. It undermines the fair market competition principles, obstruct growth, causes organizational disorder and limits organization's growth. Corruption is a significant compliance risk for business organizations. This statement was pointed out repeatedly and reaffirmed by recent business surveys. Among others, such surveys were conducted by Deloitte in 2019[341] (results published in 2020) and by KPMG (in 2020) in the CIS region.[342] Respondents within both surveys confirmed that they consider corruption within the most severe risks, whiles the anti-corruption compliance program is considered the main priority (according to around 93% of respondents) for business organizations. Relying on the research results and theoretical works, it can be declared that corruption in the private sector is a grave problem, just as serious as corruption in the public sector. According to Argandona, this issue deserves to be taken seriously by companies, as corruption in the private sector has a heavy price - not only in terms of financial loss (economic costs, inefficiency, fines, etc.), but also legal (charges, claims and punishment), social (loss of reputation, creating an atmosphere conducive to corruption, etc.), and ethical (worsening of people's values in the organization and worsening of organization's rules and culture).[343] Argandona additionally defined that "the battle against private-to-private corruption must be fought mainly on two fronts."[344] The first frontline consists of legal regulations, the second one - of the company's self-

[341] Compliance development trends in Russia and the CIS in 2020. Participant Survey Results. Deloitte, 2020. 24 p. URL: https://www2.deloitte.com/content/dam/Deloitte/kz/Documents/financial-services/Brochures_2020/compliance-development-trends-in-russia-and-cis.pdf (date of access: 30.05.2021).
[342] Compliance in the CIS and Post-Soviet Countries: Current Issues and Trends, KPMG, 2020, supra note 17.
[343] Argandona, 2003, supra note 7, at p.17.
[344] Ibid.

regulation, voluntary actions to combat corruption. A similar two-front approach is needed to address the phenomenon of corruption on the whole - joint actions of public and private sector actors.

2. The global response to corruption in the private sector is significant. One of the key changes in the anti-corruption legislation affecting the private sector refers to introducing the FCPA in 1977. It was the first law of this sort with extra-territorial reach. The next recognizable rise in the global fight against corruption originated from the introduction of the UK Bribery Act that was more severe, had a wider extra-territorial reach in comparison to the FCPA, and comprised all forms of bribery (active and passive bribery, private-to-private bribery, and bribery of a foreign public official). Both the FCPA and the Bribery Act actuated business organizations to develop anti-corruption compliance programs. The international anti-corruption framework was swelled by the international organizations that also considered the regulation of the private sector bribery. Such organizations as ICC, CIPE, UNDP introduced various handbooks, guidelines, recommendations for, inter alia, business organizations to help design and implement robust anti-corruption programs. These recommendations and best practices bring invaluable knowledge for business organizations in developing countries, where compliance is not a common value so far; however, focusing merely on the regulations and standards will not make a difference in combating corruption. An effective compliance program should go beyond standard rules and should promote a culture of business ethics and integrity.
3. According to the performed research the thesis summarizes several common elements of the robust compliance program outlined within known handbooks and guidelines: regular risk assessment, proportional procedures and policies, effective communication and training activities, established and maintained reporting line, approved process for handling violations, top-level management commitment, monitoring and review, due diligence of third parties. As stated in several guidelines, each compliance program should be modified to meet the needs of the particular organization (considering its business challenges, high-risk areas of operations, business profile, and values). This underlines once again that there is no one-size-fits-all program.

4. Compliance programs can be used to develop ethical values and principles inside the organization. The research results reflect that compliance programs, even those implemented according to the best standards, can be wasteful if implemented like a “cosmetic” compliance program. It is critically important if the company brings the actual value to the declared principles and how this company promotes compliance and integrity within the organization. According to Campbell and Göritz “corruption can work because corrupt organizations implement a corrupt organizational culture that supports employees’ corruption.”[345] The influence of the corporate culture on employee behavior was considered in detail by Campbell and Göritz in their research of the corporate culture of corrupt organizations. Employees in such organizations similarly act in accordance with the established values. Provided that such values tolerate or encourage corrupt behavior, employees will act accordingly. Companies burden employees with impractical goals that can be achieved only by virtue of corrupt conduct, and in case the goal is accomplished, employees get rewarded despite the methods used to achieve it.[346] Employees can even sense a negative consequence of their possible ethical conduct (e.g., exclusion from a corporate social system) as far as a corrupt behavior considered appropriate in their company.[347] This thesis argues that in case of establishing a value-based compliance program, organizations can improve the corporate compliance culture and take advantage of the compliance program as an effective tool to fight corruption in the private sector. Engagement of private organizations and corporations in the anti-corruption efforts and their contribution will bring a powerful force.[348] Supposedly it won’t unleash the vicious circle of corruption immediately; however, it will definitely have an impact on the business community and the developing of business integrity.

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[345] Campbell J.-L., Göritz A. S. Culture Corrupts! A Qualitative Study of Organizational Culture in Corrupt Organizations. Journal of Business Ethics. 2014. 120 (3). P. 292. URL: https://doi.org/10.1007/s10551-013-1665-7 (date of access: 07.06.2021).
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