

SAPIN II AND THIRD-PARTY INTEGRITY RELATED RISK MANAGEMENT IN COMPARATIVE LEGISLATION



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Ethics & Reputation Society

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Turkish Integrity Center of Excellence by İTEİD

hello

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Plan

- Sapin II
- Analysis on Corruption & Fraud
- Comparative Anti-Bribery Legislation (with Turkish practice)
- Coffee Break
- Third party integrity risk management
- Implementation of third party integrity risk management program



Sapin II Law: Background and History



- After FCPA(1977) European and French companies seen in the radar of the US authorities.
- In 2000, France brought the 1997 OECD Convention into domestic law, but prosecutions are rare, late and not severe, while the US authorities continued to pursue a high volume of cases.
- \$338 million for Technip in 2010, \$398 million for Total, \$772 million for Alstom in 2014.
- 2013 French Law on the fight against tax evasion and serious economic and financial crime increases the penalties applicable to corruption by establishing a financial prosecutor
- 2014 \$9 billion imposed on BNP Paribas for embargo violations
- 2016 Sapin II Law adopts part of its recommendations.



Sapin II Law -The French law targeting transparency, anti-corruption and economic modernization

- Named after Michel Sapin the former French Finance Minister (originally promoted a bill in the early 1990s labeled “Sapin I”)
- Sapin II Law entered into force on 11 December 2016, effective date for mandatory compliance programs is effective as of mid 2017.
- The establishment of a new anti-bribery agency, the Agence Française Anticorruption (AFA)
- Expanded extraterritorial effect (Prosecution of corruption may take place in French courts regardless of whether an official denunciation is made by the state in which the alleged breach occurs)
- Domestic bribery, Bribery to foreign officials and commercial bribery is in the scope by extraterritorial effect of French Criminal Law



Sapin II Law – Who are in Scope?

- **Legal entities:**

- any company located in France with 500 employees or more, and an annual turnover reaching at least EUR 100 million;
- any company belonging to a group whose headquarters located in France, with a minimum of 500 employees worldwide and an annual turnover of at least EUR 100 million;
- any French public entity with an industrial or commercial character, with at least 500 employees and an annual turnover of at least EUR 100 million;

- **Persons:**

- members of the executive board, presidents and directors of companies accountable under the law;
- CEOs and presidents of French public entities with a commercial character with at least 500 employees and an annual turnover of at least EUR 100 million



Sapin II Law– Mandatory compliance program (Article 17 Corruption prevention program)

Elements of Compliance Program:

- 1- Code of Conduct
- 2- Whistleblow process (speak up)
- 3- Risk mapping (assessment)
- 4- Third party Due Diligence
- 5- Accounting procedures
- 6- Effective Training program for managers and staff
- 7- Adoption of sanctions system for breaches
- 8- Internal control and measurement system



Sapin II Law – Deferred Prosecution Agreement French Model

- The introduction of a Judicial Agreement in the Public Interest **Convention judiciaire d'intérêt public**" (CJIP)
- The fine imposed on the company may be up to 30% of its average annual turnover within the last 3 years at the time the offence was committed. In addition, the company will be compelled to **implement a compliance program** under the control of the anti-corruption agency **for 3 years**. Notwithstanding any settlement, the representatives of the company may still be held liable for the offences committed.
- The first **CJIP** signed in November 2017 between the Public Prosecutor and **HSBC Private Bank**, the Swiss subsidiary of the British bank HSBC Holdings, which chose to pay a fine of €300 million to stop the prosecution. The precedent has been used in a case that concerned tax fraud, not corruption and the agreement has been published on the AFA website.



Sapin II – Whistleblower Protection

- **Definition:** “any individual who reveals or reports, disinterestedly and in good faith, a crime or offence; a serious and manifest breach of an international commitment duly ratified or approved by France, of an unilateral act of an international organization adopted on the basis of such commitment, or a serious breach of a law or regulation; or a serious threat or harm to the public interest, of which he/she has had personal knowledge.”
- **Confidentiality:** Protection of the confidentiality of the whistleblower, the object of the alert and the person concerned, under penalty punishable by two years of detention and €30,000 fine (€150,000 for legal entities).
- **Non-Retaliation:** Preventing a whistleblower from sending alerts to the competent persons is punishable by one year of imprisonment and a €15,000 fine. It is prohibited to discriminate against whistle-blowers, in the hiring process.



Sapin II – Penalties

- **Failure for implementing a compliance program:** even without an actual instance of bribery or corruption, a company can be sentenced in case of absence or failure of the program (fine of €1 million for companies, €200,000 for individuals). Finally, the penalty is likely to be published, creating a reputational risk for the company.
- A maximum of **five years** under the AFA's supervision to implement an **anti-corruption compliance program**. The convicted company will be responsible for bearing the monitoring costs (i.e. for the AFA's supervision). These costs could become so significant that lawmakers have decided to limit them to the maximum amount for a fine incurred (€1 million or twice the amount of the proceeds from corruption).
- Other bribery imprisonment penalties in French Criminal Code.





ANALYSIS ON CORRUPTION & FRAUD AND TURKEY'S POSITION



TWO NGO & TWO SURVEYS

**TRANSPARENCY
INTERNATIONAL**

2017 Corruption Perception Index

www.transparency.org



**ASSOCIATION OF CERTIFIED
FRAUD EXAMINERS**

2016 Report to the Nations on
Occupational Fraud and Abuse

www.acfe.com





**2017 CORRUPTION
PERCEPTION INDEX**

CORRUPTION PERCEPTIONS

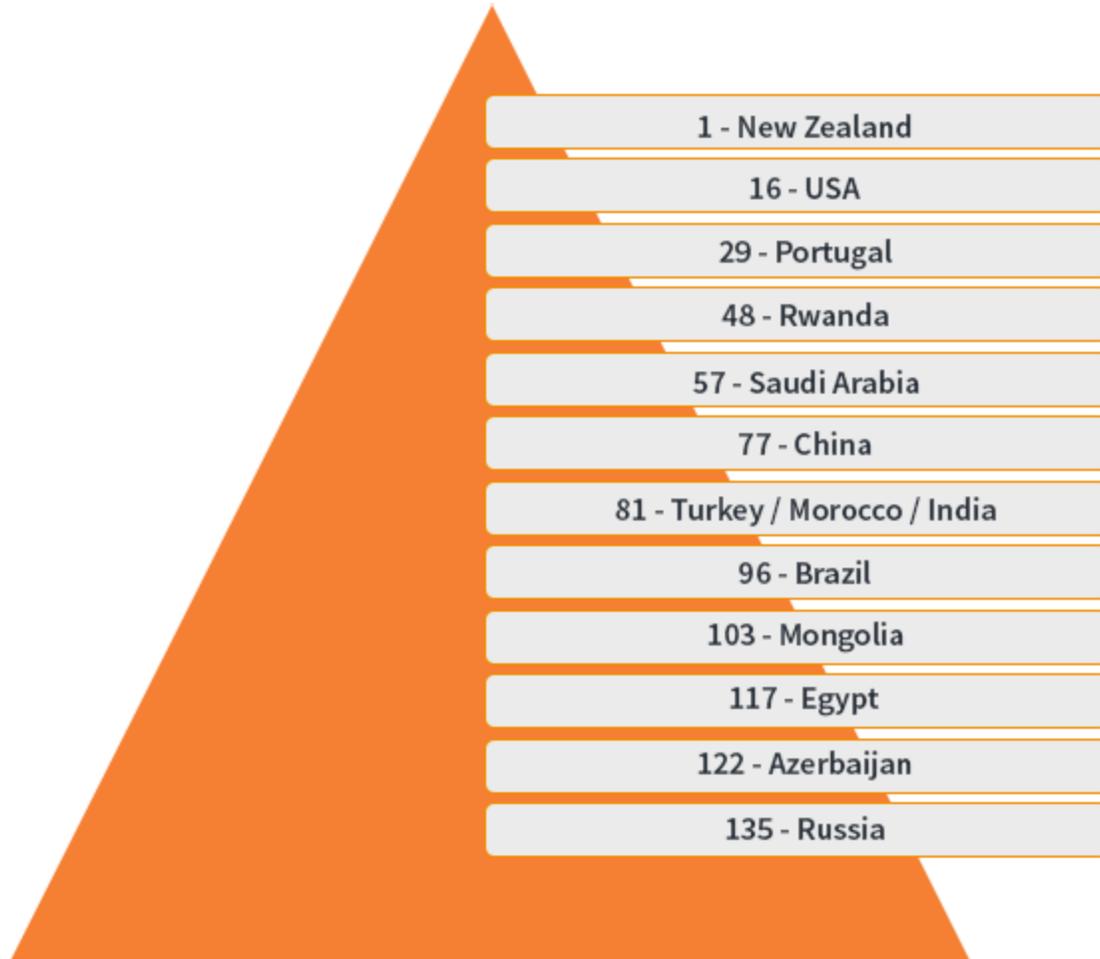
INDEX 2017



Less Risk More Risk

The index, which ranks 180 countries and territories by their perceived levels of public sector corruption according to experts and businesspeople, uses a scale of 0 to 100, where 0 is highly corrupt and 100 is very clean. This year, the index found that more than two-thirds of countries score below 50, with an average score of 43. Unfortunately, compared to recent years, this poor performance is nothing new.

2017 CORRUPTION PERCEPTION INDEX RANKING



Turkey's extremely poor performance in the index in recent years continued well into 2017, too. In 2017 Turkey dropped to the 81st place from 75th place in 2016. Unfortunately, Turkey is among the five worst-performing countries in corruption perceptions index from 2012 to 2107.

Since the Corruption Perceptions Index measures the public's corruption perception, naturally, the state of public sector in Turkey affects our position in the index. Possible circumstances that may have affected this tendency can be summarized as follows:

- For the last 19 months, Turkey has been in a state of emergency and governed by decree
- More than 40% of public purchases (tenders) are not subject to Public Procurement Law and 28% of those subject to this law are not conducted in an open tender
- The negative impression regarding the pressure on freedom of the press and civil society



2016 REPORT TO THE NATIONS ON OCCUPATIONAL FRAUD AND ABUSE





To help measure the financial damage caused by fraud, CFEs are asked to provide with their best estimate, based on their experience, of what percentage of revenues the typical organization loses in a given year as a result of fraud. The median estimate was that fraud costs organizations 5%.

CFES ESTIMATE THE TYPICAL ORGANIZATION LOSES 5% OF ANNUAL REVENUES TO FRAUD

SIMPLE CALCULATION !

(Billion USD Dolar)



GDP

74,160

800

FRAUD LOSS

3,708

40

Each Turkish Citizen
Pays Roughly
500 USD (2.000 TL)
for Fraud Loss

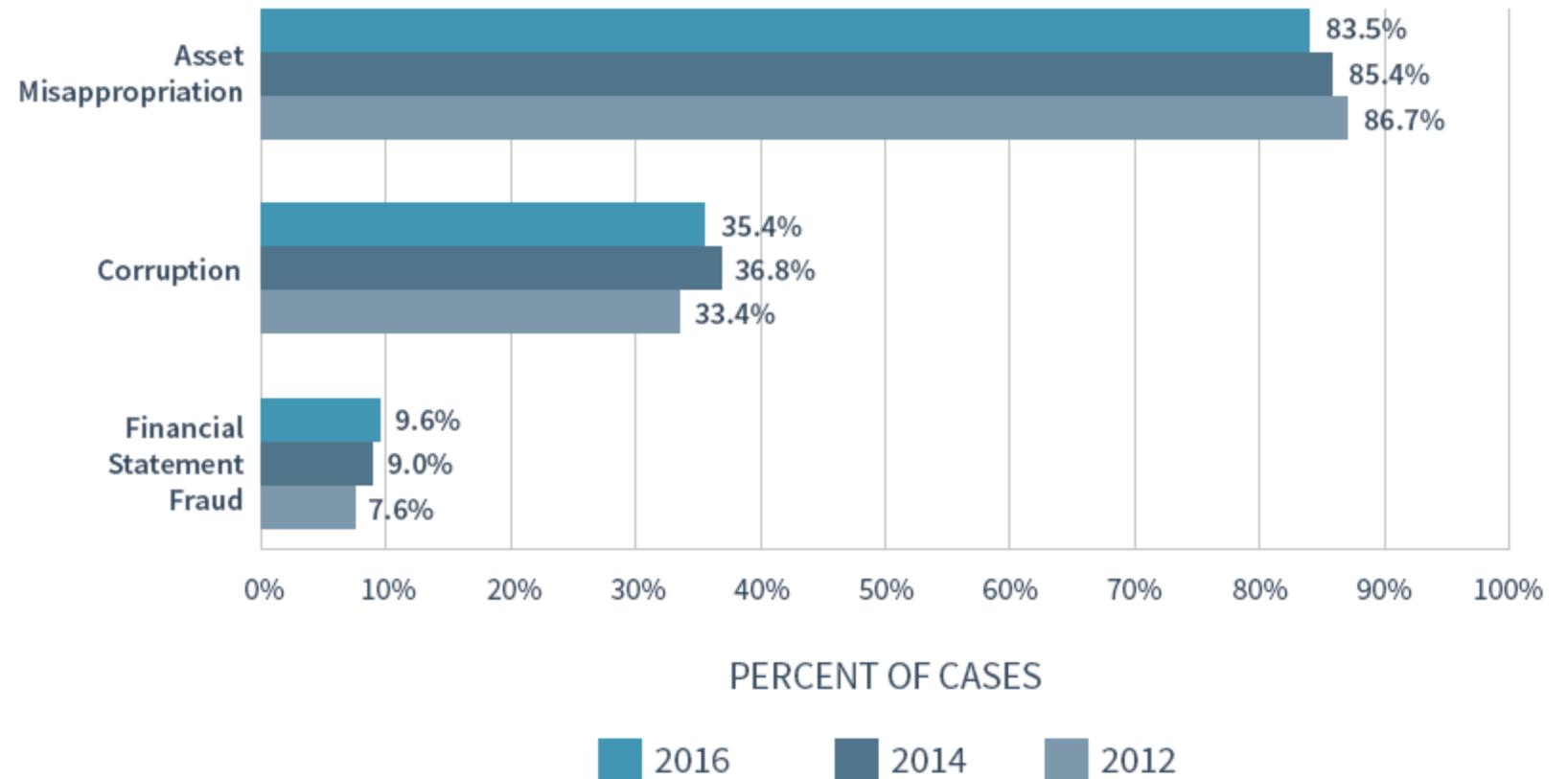


OCCUPATIONAL FRAUD AND ABUSE CLASSIFICATION SYSTEM (FRAUD TREE)

 CORRUPTION	 ASSET MISAPPROPRIATION	 FINANCIAL STATEMENT FRAUD
Conflict of Interest Bribery Illegal Gratuities Economic Extortion	Cash Fraudulent Disbursements Stocks Other Assets	Timing Differences Fictitious Revenues Concealed Liabilities and Expenses Improper Asset Valuation Improper Disclosures

FRAUD CATEGORY & FREQUENCY

Asset misappropriation was by far the most common form of occupational fraud, occurring in more than 83% of cases, but causing the smallest median loss of \$125,000. Financial statement fraud was on the other end of the spectrum, occurring in less than 10% of cases but causing a median loss of \$975,000. Corruption cases fell in the middle, with 35.4% of cases and a median loss of \$200,000.



SCHEME TYPES BY REGION

Western Europe			Eastern Europe/Western Central Asia			Middle East/North Africa		
Scheme	Number of Cases	Percent of Cases	Scheme	Number of Cases	Percent of Cases	Scheme	Number of Cases	Percent of Cases
Corruption	44	40.0%	Corruption	54	55.1%	Corruption	45	57.0%
Non-Cash	28	25.5%	Non-Cash	18	18.4%	Non-Cash	21	26.6%
Billing	21	19.1%	Billing	18	18.4%	Cash on Hand	15	19.0%
Expense Reimbursements	20	18.2%	Financial Statement Fraud	17	17.3%	Billing	12	15.2%
Financial Statement Fraud	19	17.3%	Cash on Hand	10	10.2%	Expense Reimbursements	9	11.4%
Cash on Hand	10	9.1%	Expense Reimbursements	10	10.2%	Skimming	9	11.4%
Check Tampering	9	8.2%	Cash Larceny	7	7.1%	Check Tampering	6	7.6%
Payroll	9	8.2%	Payroll	6	6.1%	Financial Statement Fraud	5	6.3%
Cash Larceny	4	3.6%	Check Tampering	4	4.1%	Cash Larceny	4	5.1%
Skimming	4	3.6%	Register Disbursements	3	3.1%	Payroll	2	2.5%
Register Disbursements	3	2.7%	Skimming	2	2.0%	Register Disbursements	1	1.3%

Corruption stands out in every region

Global Comparative Anti-Bribery Legislation

- **US Foreign Corrupt Practices Act (FCPA), 1977**
- **UK BRIBERY ACT 2010**
- **BRAZIL - Clean Company Act 2014**

- GERMANY Law on Fighting Corruption 2015
- G. AFRİKA Prevention and Combating of Corrupt Activities Act, 2004

- MONTENEGRO Law on Prevention of Corruption 2016
- RUSSIA Federal Anti-Corruption Law No:273 - 2013



FCPA -Foreign Corrupt Practices Act

(1977 revision 1988 – 1998)

- Extra-territorial effect
- Wide implementation
- Wide scope
- Facilitation payments exemption
- Regulatory Bodies: DOJ ve SEC
- Public Foreign Officers
- Whistleblower protection and awarding system
- Disgorgement process



FPCA top ten list*

- 1. Telia Company AB (Sweden): \$965 million in 2017.
- 2. Siemens (Germany): \$800 million in 2008.
- 3. VimpelCom (Holland) \$795 million in 2016.
- 4. Alstom (France): \$772 million in 2014.
- 5. KBR / Halliburton (United States): \$579 million in 2009.
- 6. Teva Pharmaceutical (Israel): \$519 million in 2016.
- 7. Keppel Offshore & Marine Ltd.(Singapore): \$422 million in 2017.
- 8. Och-Ziff (United States): \$412 million in 2016.
- 9. BAE (UK): \$400 million in 2010.
- 10. Total SA (France) \$398 million in 2013.

*Resource: <http://www.fcpablog.com/blog/2017/12/26/keppel-offshore-lands-seventh-on-our-top-ten-list.html>



FPCA: Turkey related investigations

Companies related to bribery in foreign countries including Turkey:

- Smith & Wesson (2014)
- Tyco International (2012)
- Daimler AG (2010)
- York International Corp. (2007)
- Delta & Pine Land Co. (2007)
- Micrus Corp. (2005)

Some companies made self disclosures for Turkey related matters:

- 3M (2010)
- Novartis (2016)
- Teradata (2017)



UK BRIBERY ACT – 2010

- Extra-territorial scope
- Penalties: Imprisonment up to 10 years and fines depending on the severity of the bribery
- Regulatory Body: «Serious Fraud Office»
- DPA model is similar to FCPA
- Private to private is under the scope unlike FCPA
- No facilitation payment exemption unlike FCPA
- Failure to prevent bribery is a specific crime



Turkish Anti Bribery Practice

- No extra-territorial legal framework comparable to Global AB legislation.
- Bribery to public officials is regulated under Turkish Criminal Code article 252, with imprisonment from four to twelve years
- Personal criminal liability is in the scope of the criminal law. Legal entities and companies can be subject to security measures. One exemption is Misdemeanours Law regulates the liability of legal entities which provides that administrative fines in some circumstances.
- There is no facilitation payment definition or distinction from bribery.



Coffee Break





THIRD PARTY INTEGRITY RISK MANAGEMENT





Third parties are critical to companies. The modern global enterprise is an extended enterprise - the creator and hub of a complex and symbiotic network of third parties. By using the skills and resources of third parties a company can grow its business, access new markets and harness innovation and resources.

CRITICAL ROLE OF THIRD PARTIES FOR MULTINATIONAL COMPANIES



THIRD PARTY UNIVERSE

- Vendors/suppliers
- Distributors/resellers
- Joint venture partners/consortium partners
- Advisors and consultants (tax, legal, nancial, business)
- Service providers (logistics, supply chain management, storage, maintenance, processing)
- Contractors/subcontractors
- Lobbyists
- Marketing and sales agents
- Customs or visa agents
- Other Intermediaries

PARTIES

1. Party
(Company
itself)

3. Party
(Supplier/
Service
Provider)

4. Party
(Sub-contractor)

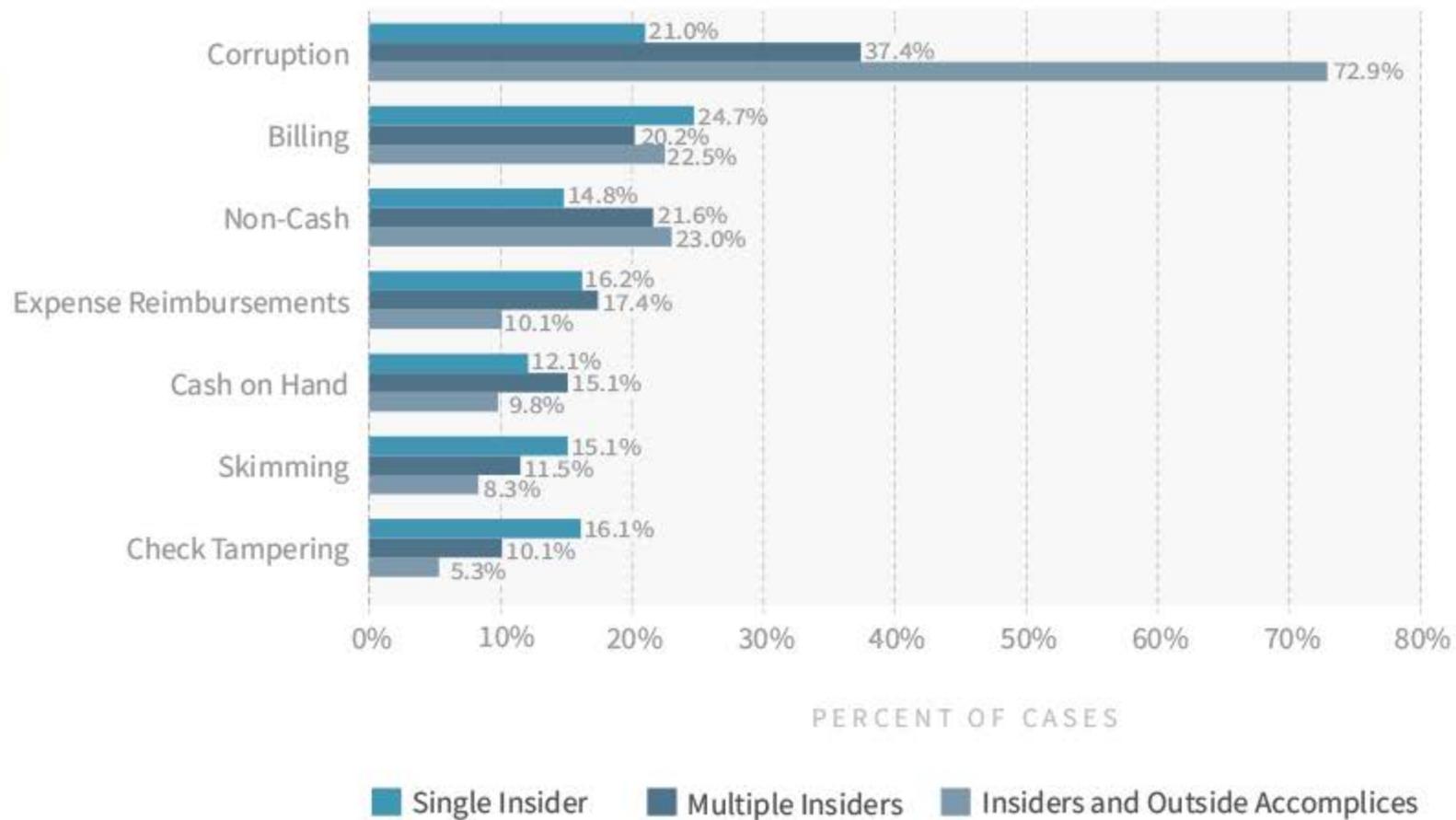
?

2. Party
(Customer)

MOVEMENT OF GOODS AND
SERVICES FROM VENDORS
TO CUSTOMERS

SUPPLY CHAIN

SCHEME TYPE BASED ON PERPETRATORS' RELATIONSHIP TO VICTIM



WHERE IS THE SOURCE OF ANTI-BRIBERY RISK?

Originated
within the
company
itself?



Originated
with third
parties?

BRIBERY INSTIGATED FROM WITHIN COMPANY & CHANNELED THROUGH THIRD PARTIES

Bribery and fraudulent activity is triggered (motivation, rationalization, opportunity)

Employee or bribe taker collects money

Employee at victim company designs fraud scheme

Employee and corrupt vendor form conspiracy

Vendor issues inflated or fictitious invoice to victim company

Payment is made to vendor by the authorisation of employee

Slush fund is accumulated at vendor

Bribes is paid by vendor, either to employee or bribe taker.

IMPLEMENTATION OF THIRD PARTY RISK MANAGEMENT PROGRAM



First: Act Like A Photographer!

- Learn and analyze the Dynamics of the company

Some questions worth to consider:

- What is the business Dynamics? SWOT analyze, what are the main drivers for revenue and expenses
- Is there a procurement department and process designed?
- Which departments are working with which third parties?
- List of all third parties with detailed info on contracts
- Which services are taken and are they in line with the scope of the business of the company?
- Is it really necessary to use the third party?



Take a glance to compliance program

- Is there a compliance department and how is it positioned within the company?
- Is there a pre-designed compliance program and what are the elements of it? (Anti-Bribery, Code of Conduct, Conflict of Interest, AML, Sanctions, Data Privacy, Third Parties, Speak up and etc...)
- Is there a compliance training and communication program? How are the trainings monitored?
- Is there an effective speak up program and hotlines?
- Tone at the top and middle?
- Risk assessment & monitoring?



Take a glance to third party risk management

- How is the third party selection process designed?
- Is there an effective due diligence process defined?
- Do the third parties use vendors?
- Do the third parties have an access to whistleblowing lines?(hotlines)
- Do we have effective contracts with third parties?
(compliance provisions, data privacy, right to audit and etc..)

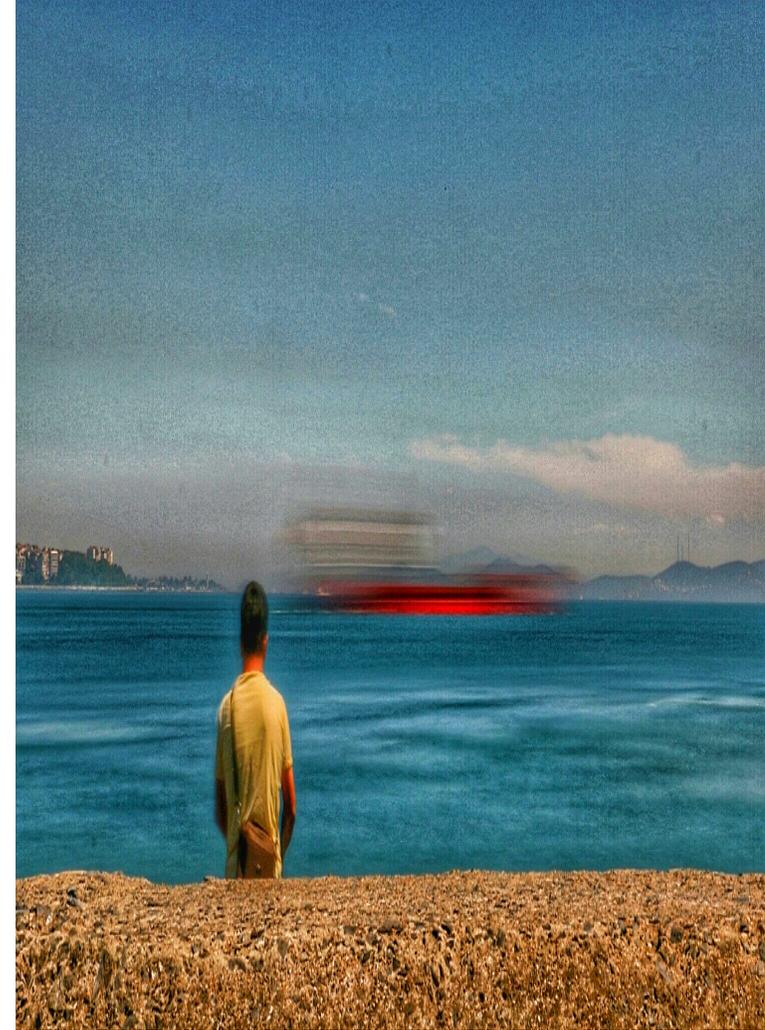


Third Party Due Diligence (dd)



Process Engineering

- Who will be the owner of the process?
- Who will conduct the dd?
- When will a dd be renewed?
- Who will communicate with the third party??
- How will the dd process be imposed on third parties? What will be the outcome for the ones who do not will to participate?



Risk Based Approach

- Risk mapping and risk assessment of the company and the related industry.
- Classification of third parties based on risks (high, medium, low as an example)
- Considering to deep dive over sub-vendors, board members and shareholders of third parties



Preparation for DD

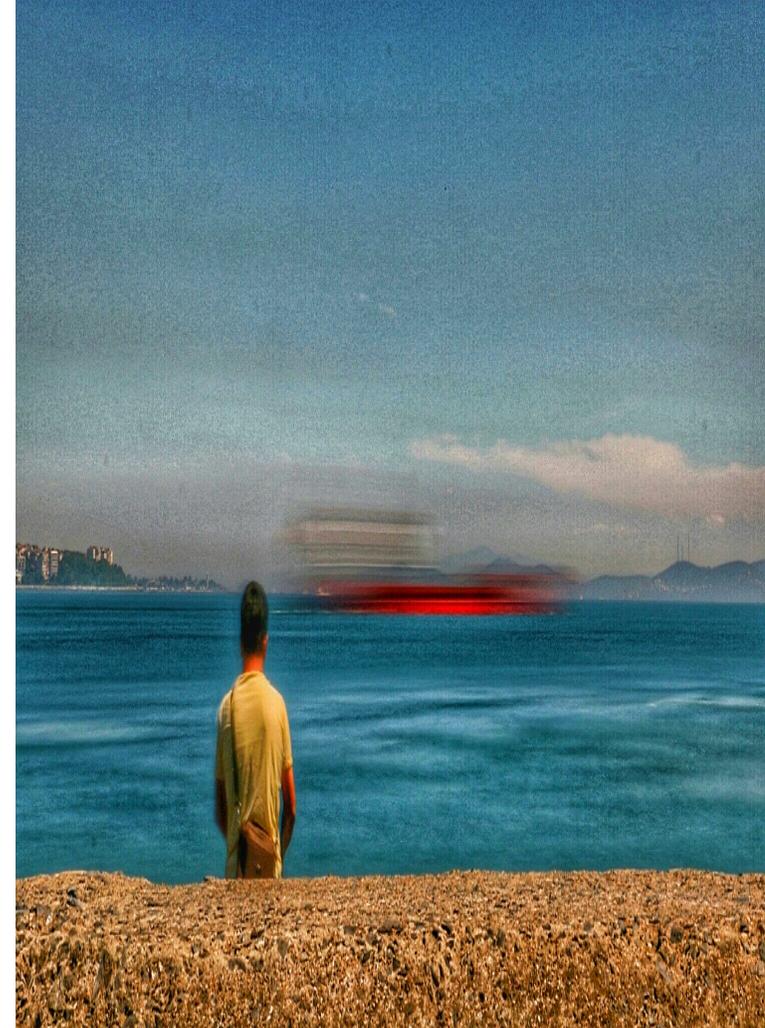
DD checklist/questionnaire

History of the third party

Reference check

Documentation requests

- Trade Registry documents
- Financial Data
- Important Litigation and sanction process
- Compliance culture and program



On site visit

- Facility on site check
- Interviews with key stakeholders
- Additional documentation review on site
 - Books and records
 - Cash and bank flow data
 - Grants and donations
 - Travel, entertainment and hospitality expenses
 - Contracts with sub-vendors
 - Quality certificates and audit reports
 - Similar documentation previously aligned with third party



DD report and contract process

A report with additional assessment on risk areas (red flags) needs to be prepared and shared with the decision makers.

Decision:

Approve, approve with conditions or reject

- Assessment and remediation of red flags
- Contract process with effective compliance provisions
- Communication of the outcome with third party
- Renewal of the process



Quality of the due diligence

- Considering to implement automated process and AI for a efficient and fast assessment (especially for high volume of third parties)
- Ask for outsource help when needed
- Effective communication with third parties



US DOJ Guidelines for an effective compliance program – questions to consider for an effective third party risk management

- **Risk-Based and Integrated Processes** – How has the company's third-party management process corresponded to the nature and level of the enterprise risk identified by the company? How has this process been integrated into the relevant procurement and vendor management processes?
- **Appropriate Controls** – What was the business rationale for the use of the third parties in question? What mechanisms have existed to ensure that the contract terms specifically described 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?



US DOJ Guidelines for an effective compliance program – questions to consider for an effective third party risk management

- **Management of Relationships** – How has the company considered and analyzed the third party’s incentive model against compliance risks? How has the company monitored the third parties in question? How has the company trained the relationship managers about what the compliance risks are and how to manage them? How has the company incentivized compliance and ethical behavior by third parties?
- **Real Actions and Consequences** – Were red flags identified from the due diligence of the third parties involved in the misconduct and how were they resolved? Has a similar third party been suspended, terminated, or audited as a result of compliance issues? How has the company monitored these actions (e.g., ensuring that the vendor is not used again in case of termination)?



**“If you think
compliance is expensive,
try non-compliance.”**

- Paul McNulty, former U.S. Deputy Attorney General

thank you

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