

More than the FCPA - European Anti-corruption Law

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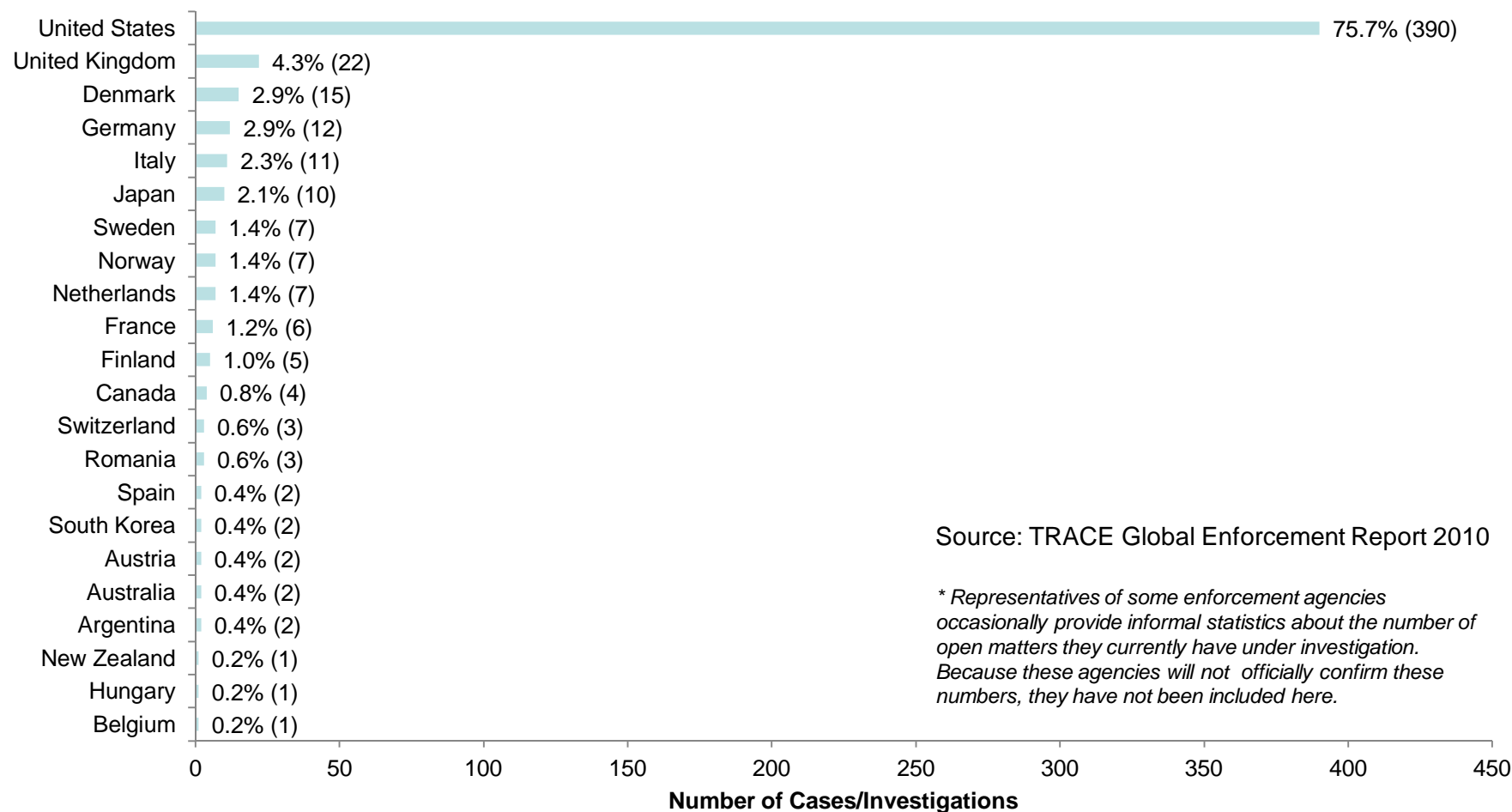
Agenda for this session

- The US Foreign Corrupt Practices Act
 - In context
 - Extra-territoriality
 - Recent trends
- The UK Bribery Act 2010
 - Current status
 - ‘Adequate procedures’ to prevent bribery
 - Business response
- Bribery legislation in Italy and Spain
- Other notable European anti-bribery legislation

The US Foreign Corrupt Practices Act

- The world's first extra-territorial bribery and corruption law, passed in 1977 (revised 1988 and 1998)
- Dramatic rise in enforcement activity since 2004
- Remains the most feared and extensively enforced bribery and corruption legislation worldwide

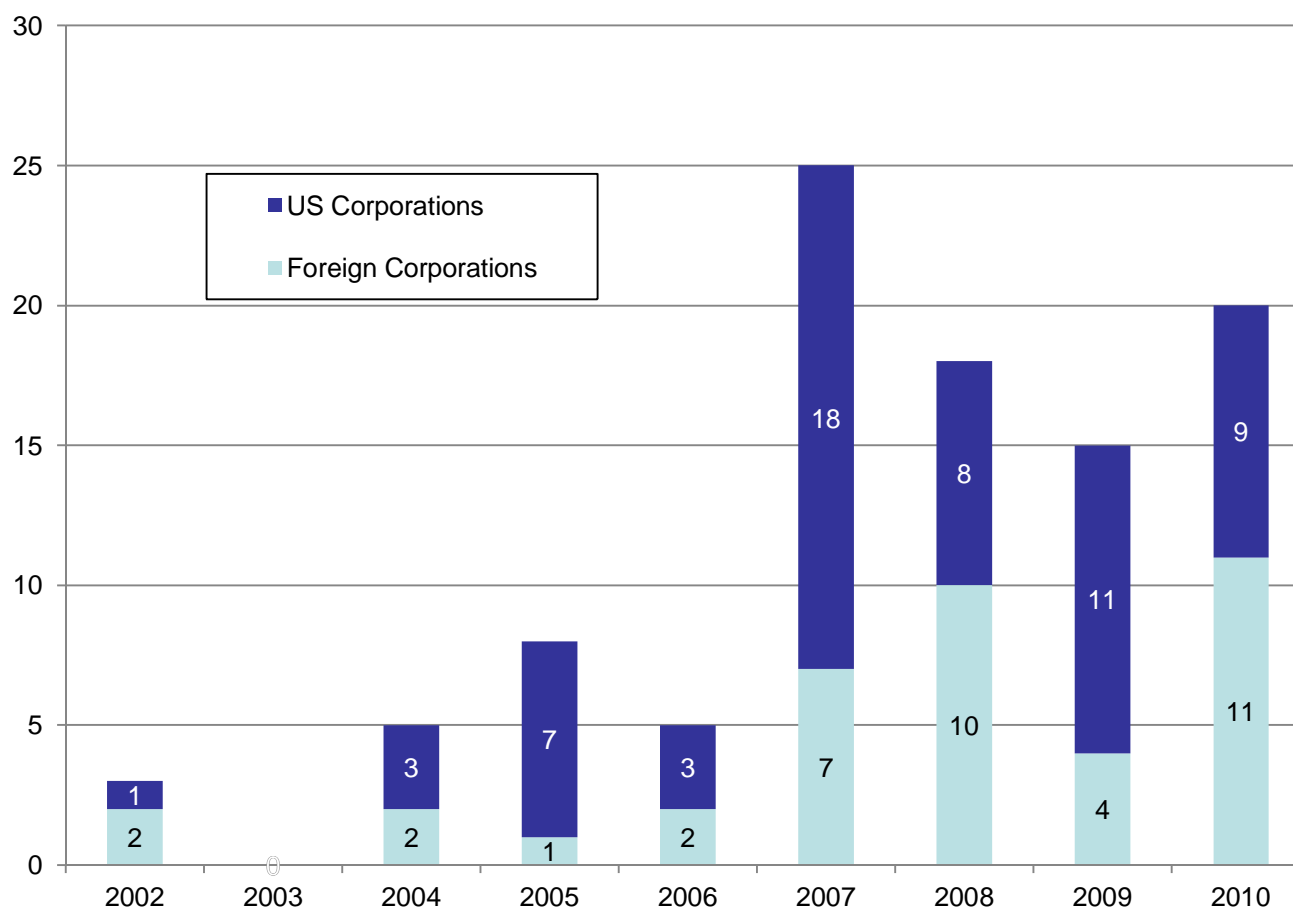
Foreign/Outbound Bribery Enforcement by Country, 1977 - June 2010*



The US Foreign Corrupt Practices Act

- Enforced by the Department of Justice and the SEC
- DoJ focuses on the criminal provisions of the Act
- SEC focuses on the accounting provisions of the Act
 - ‘Books and records’ provision requires issuers to make and keep accurate books, records, and accounts, which accurately and fairly reflect the issuer's transactions and disposition of assets
 - internal controls provision requires that issuers devise and maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations
- FCPA applies to issuers, domestic concerns, and agents acting on behalf of issuers and domestic concerns, as well as to any person that violates the FCPA while in the territory of the United States

Total FCPA corporate matters initiated by the DoJ and SEC: 2002-2010



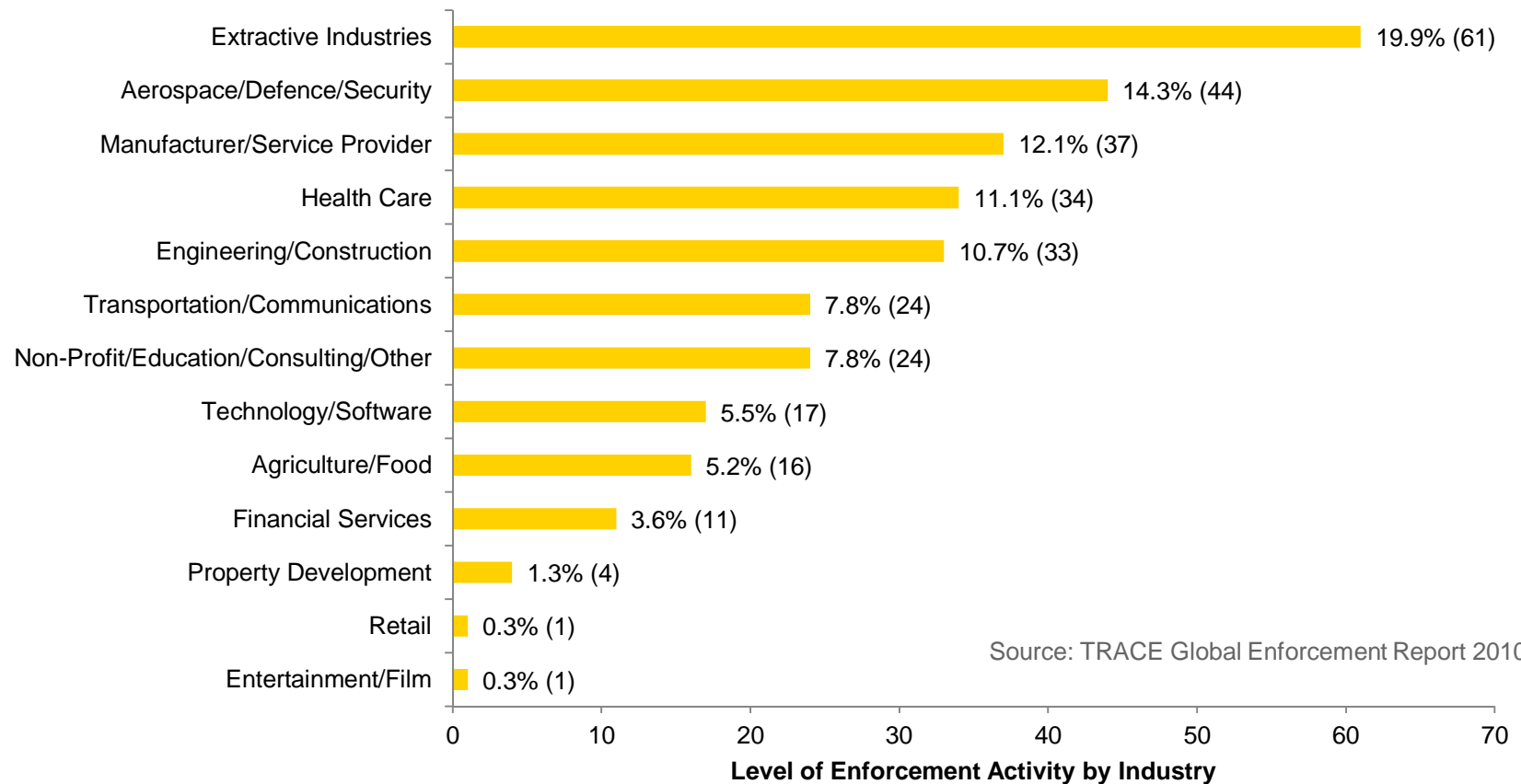
Source:
Shearman &
Sterling

FCPA recent trends

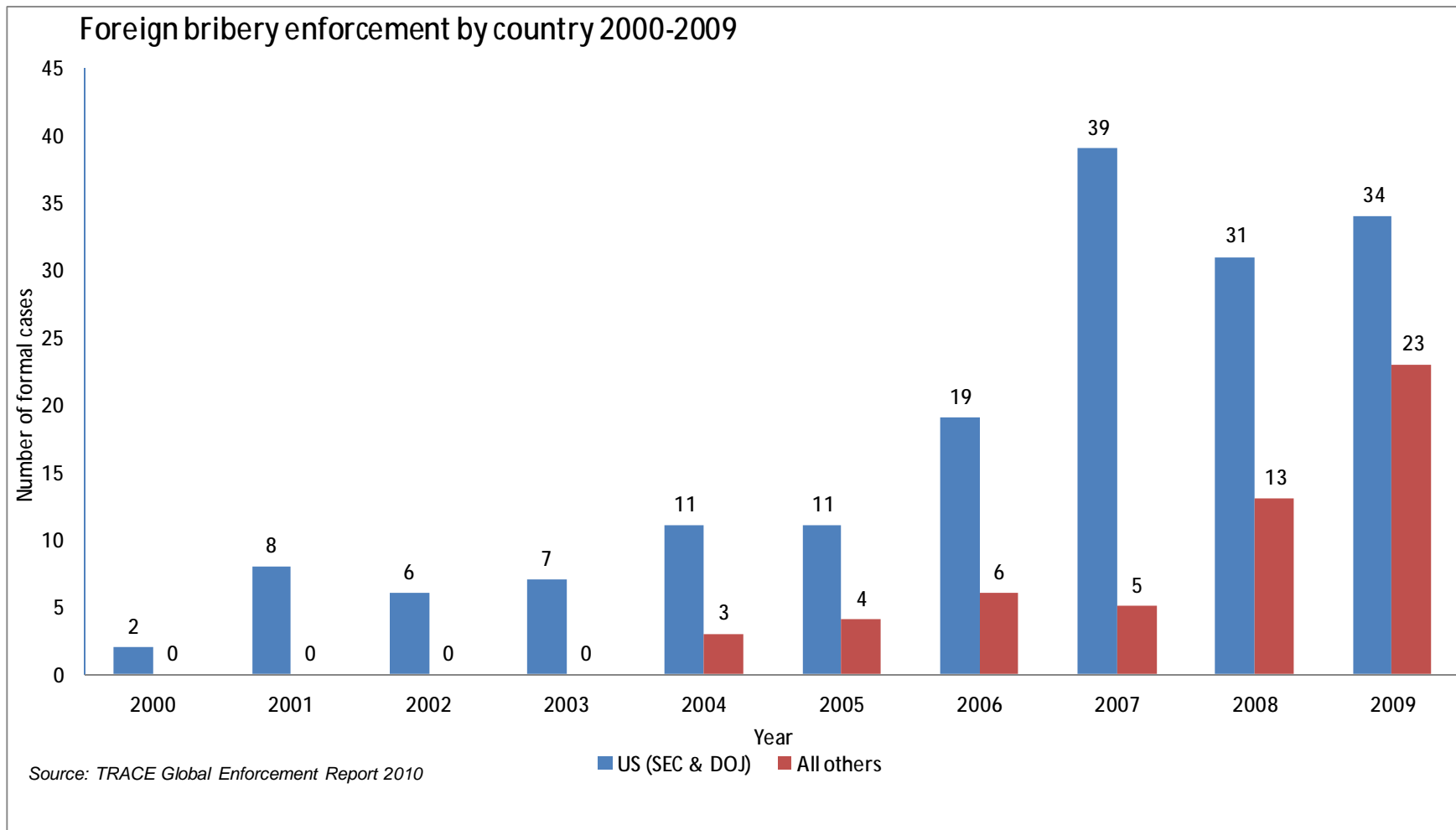
- Penalties
- Trials
- Monitoring
- Industry targeting
- “Non –issuers” in scope
- Exchange of information among different authorities

Recent trends

International Enforcement Activity By Industry, 1977 - June 2010



Increased global enforcement



The Ernst & Young 2011 European Fraud Survey

Why FCPA should matter in Europe ? See the JGC Case

- April 6 2011: DOJ announces that JGC Corporation has resolved allegations made under the FCPA, agreeing to pay \$218.8 million in penalties for its role in an alleged decade-long conspiracy to bribe Nigerian government officials.
- Last in a series of four settlements involving partners of TSKJ, a Nigerian joint venture alleged to bribe Nigerian officials to secure lucrative construction contracts. In total, these settlements resulted in more than \$1.5 billion dollars in criminal and civil penalties: four of the 10 largest FCPA settlements of all time.
- Lesson learned: the JGC resolution highlights the Act's expansive jurisdictional reach and the extended span for cooperation among international enforcers.

UK Bribery Act: recent background

► Overseas Corruption Unit of the UK Serious Fraud Office set up in December 2007

► New management at the SFO in April 2008 – “open door” policy

► New self-reporting guidelines issued by SFO in July 2009

► Closer international co-operation and birth of “global settlements”

► Use of Civil Recovery Orders

► Bribery Act - 8 April 2010

► Adequate procedures published March 2011

► Prosecution guidance March 2011

► Implementation 1 July 2011

2009

- Balfour Beatty: £2.25 million for failure to keep accurate records on Egyptian project
- Mabey and Johnson: £6.6m fine and reparations following admission of overseas corruption in Ghana
- AMEC: £4.9 million for failure to keep accurate records in relation to Korean project

2010

- BAE: £30 million and \$400m for failure to keep accurate records in relation to its activities in Tanzania (not yet sanctioned by the UK courts)
- Innospec: Plea bargain with SFO and DoJ
- Alstom: 3 UK based board directors arrested and subsequently released without charge
- Johnson & Johnson: Executive jailed for 12 months – overturned on appeal
- Macmillan publishing: Debarred from government tenders as a result of guilty plea following investigation by World Bank
- KPMG investigated by AADB in relation to commission payments and advice provided to BAE

UK Bribery Act 2010

- UK law on 8 April 2010. Enforceable from 1 July 2011

Offences

- Two general offences: bribing another and requesting/receiving a bribe
- Bribery of foreign public official
- Failure to prevent bribery: the new strict liability corporate offence, with defence of “adequate procedures”

UK Bribery Act 2010

Penalties for breaches

- 10 years in jail
- Unlimited corporate fines for failure to prevent bribery
- Reputation damage, potential debarment from EU contracts, costly monitor, management time, director exposure, potential shareholder action

Jurisdictional reach

- British citizens (operating anywhere in the world)
- Individuals ordinarily UK resident
- Corporate bodies incorporated in UK
- Corporate bodies who carry on a business, or part of a business, in the UK

Bribery Act vs. Foreign Corrupt Practices Act

The UK Bribery Act differs from the FCPA legislation in three key ways:

Bribery of private individuals and companies

The Bribery Act sets a higher standard than the FCPA in that it covers bribery of private individuals and companies as well as foreign officials

Corporate failure to prevent bribery

The Bribery Act incorporates an offence of 'corporate failure to prevent bribery' which applies to all commercial organisations compared to the FCPA which applies only to publicly-traded companies

Facilitation payments

Unlike the FCPA, the Bribery Act makes no carve out for facilitation payments

Multinational entities are struggling with effective responses

- Facilitation payments
- 'Associated persons' and due diligence
- Gifts and entertainment
- The role of financial controls

The six principles of Adequate Procedures

Monitoring and review

- Continuous monitoring and approval – internal “checks and balances”
- Adjustments made as business risks change
- Systems to deter, detect and monitor
- Internal audit, staff surveys, feedback from training
- Triggers for full risk assessment or compliance programme review
- External verification or assurance

Proportionate procedures

- Action taken on policies and procedures should be proportionate to the risks faced and the complexity of nature, location and scale of commercial activities
- Clear, practical, accessible, effectively implemented and enforced
- Applies to all other principles
- Guidance on gifts, hospitality, political and charitable donations, demands for facilitation payments
- Established response to allegations

Top level commitment

- Commitment by, and involvement of, board and owners to preventing bribery by associated persons
- Likely to include as minimum (i) communication of zero tolerance anti-bribery stance and (ii) involvement in developing prevention procedures
- Involvement: Selection of ABAC leaders, endorsement of publications, awareness raising, engagement with external bodies, oversight of breaches, risk assessment assurance

Communication (including training)

- Ensure policies and procedures are embedded and understood throughout
- Effective v “paper compliance”
- Development of implementation strategy to cover responsibility, nature and content of training (internal and external), communication plan, monitoring plans, review dates
- Ensure ‘speak up’ channels available

Due diligence

- In respect of those that perform services **for or on behalf of** the organisation to mitigate risks NB Most suppliers will be excluded
- Part of the risk assessment and a risk mitigation step
- Proportionate and risk based approach
- To cover all parties to business relationship (supply chain, intermediaries and agents), joint ventures, all markets
- At appointment and ongoing
- Acquisitions, senior/high risk recruitment

Risk assessment

- Aimed at ensuring response is proportional to size, structure, nature and location of activities
- Periodic, informed and documented
- Must be aware of current bribery risks: country, sectoral, transaction, business opportunity, business partnership
- Use of internal and external data sources and consider internal and external risk factors
- Risk assessors must be adequately skilled
- Will evolve with the business

Italy - the Legislative Decree n° 231/2001

- q Leg. Decree n.° 231/2001: context and subjects
- q Violations and sanctions
- q How to prevent/limit liability: the “*Modello di Organizzazione e Controllo*” - purpose and description
- q The Surveillance Body: role, activity, members, issues
- q Synergies with other compliance tools in the company

Legislative Decree n° 231/2001: the framework

- q It's a regulation regarding an “administrative” liability of legal entities
- q They can be held responsible and be subject to fines for any offences committed by employees or agents “*in the interest or to the advantage*” of the legal entity
- q Background: FCPA - OECD Convention on Corruption
- q Subjects: all legal entities, not only corporations (including no profit?)
- q Who: directors/managers and/or employees, agents
- q Liability of entities does not exclude personal criminal liability

Two laws, same scope

q ITALIAN
LEGISLATION
q Corporate
Responsibility



Lgs. Decree N° 231
Implementing OECD
Convention

q US LEGISLATION
q Personal and Corporate
Responsibility



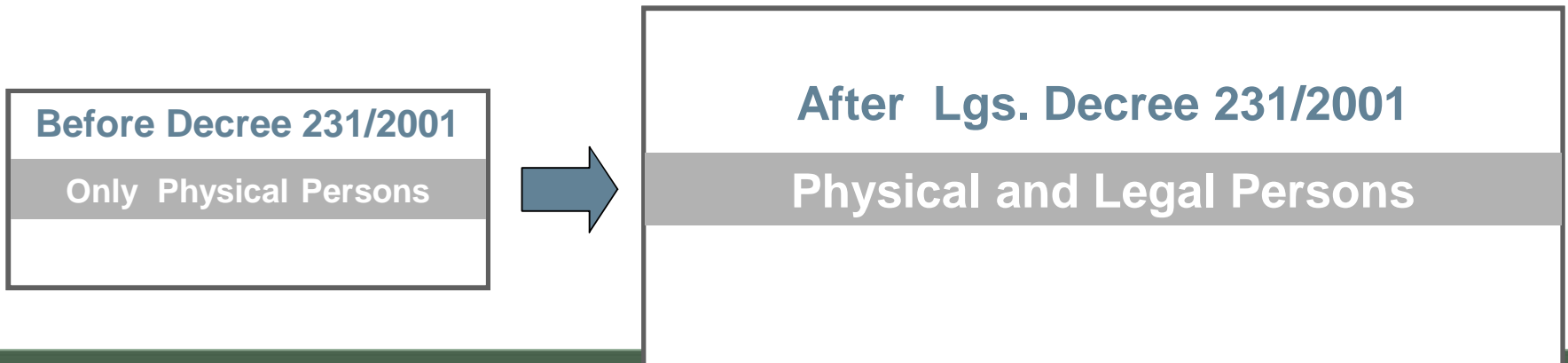
FCPA
(Foreign Corrupt Practices Act)



Discouraging corporate crimes and corruption

The key concept:

- administrative liability of the legal entity is coupled with personal criminal liability of the author of the acts or omissions
- High sanctions, serious reputational and economic damage



- Crimes against Public Administration (bribery, fraud)
- Corporate crimes (es: false comunicazione sociali, dei soci, dei revisori)
- Terrorism (ex: promoting terroristic associations)
- Crimes against individuals (es: exploitation of prostitution)
- Health and Safety law violations resulting in death or serious harm
- Computer crimes and illicit data processing
- Association for crimes such as (ass. delinquere di tipo mafioso, ricettazione, riciclaggio ed impiego di proventi di attività criminose)
- IP crimes

Leg. Decree n° 231/2001: liability and exemptions

Ø No liability upon legal entities if they prove that:

- Ø An “Organizational Model” provided for by the Law Decree had already been adopted and is monitored and enforced effectively
- Ø A Surveillance Body (“*Organismo di Vigilanza*”) has been set up, is independent, has supervisory and control powers
- Ø Offender has intentionally violated the Organization Model
- Ø The Surveillance Body has properly supervised the organization

Ø What matters: Establishment and effectiveness of the Surveillance Body

Leg. Decree n° 231/2001: recent case law

- q Siemens, Enelpower, Snamprogetti, Tecnimont, Ansaldo, Foster Wheeler, Agip B.V., Snamprogetti
 - almost 100 people charged with corruption related to public tenders and 40 companies prosecuted under Leg. Decree 231/01

- q Siemens A.G.
 - Ban on bids for contracts with any public administration
 - €180 MM illegal profits returned to Enelpower

- q Impregilo 2009 and ThyssenKrupp 2011

Business disruption and ban on public bids

Leg. Decree n° 231/2001: how is an Organizational Model construed?

- q Start: summarize the risk assessment performed to identify potential risk areas for the company
- q Set procedures regulating decision-making process and its implementation/control
- q Create/review procedures to ensure proper financial resources management
- q Set up information duties for the base towards Supervisory Committee
- q Establish applicable disciplinary sanctions for breach of the rules provided by the Organization Model (considering national labor law)

O.M. despite not mandatory, must be recognized from prosecutors as being able to identify and prevent commission of crimes

Leg. Decree n° 231/2001: the Surveillance Body

- q Supervises Organization Model effectiveness and efficiency
- q Ensures provision of training throughout the organization
- q Proposes and manages updates of the Organizational Model based on business, organization and legislative changes
- q Performs regular meetings + audits to ensure Model's effectiveness
- q Provides the Board of Directors and the Statutory Auditors with regular reports on its activities
- q Reports Organizational Model violations to the Board of Directors

Violations can be reported to SC directly (mailbox) or through other compliance channels of the organization

Leg. Decree n° 231/2001: Synergies with Compliance

- ❑ Fines under Leg. Decree 231/01 could have a significant impact on company's business, not only at local level
- ❑ An existing Code of Conduct can be “used” as a key element of the Organizational Model
- ❑ Corporate policies are valuable tools to prove effectiveness of controls
- ❑ In a company having a compliance program it requires less efforts than in other organizations to implement this Legislative Decree 231 and to create an effective Organization Model
- ❑ Compliance is already part of company's culture

Leg. Decree n° 231/2001: structure of an Organizational Model

q Code of Conduct

- Designed to address Leg. Decree 231/01 crimes and regularly updated

q Procedures addressing risk areas not covered by policies

q Supervisory Committee

- An independent member, HR Director, a member of the Law Dept

q Disciplinary Code

- Based on collective labor agreements

The trend beyond cross-border impact of FCPA: fighting corruption in the private sector

The Spanish example

A recent modification of the Spanish Criminal Code, approved by the **Law 5/2010**, has introduced a **new crime of bribery in relation to commercial transactions in the private sector**

Reform implementing the European Council Framework Decision 2003/568/JHA of 22 July 2003, on Combating Corruption in the Private Sector

1/2 – Features

- Includes, beside private corruption in general, ref. to corruption in the sports sector (targeting “match fixing”)
- can be prosecuted by public authorities without any private accusation or claim by the injured person;
- Promising or granting to managers, directors, employees or collaborators of an enterprise or a corporation, association, foundation or organization an unjustified profit or a benefit of any nature in its favor or in favor of a third party;
- Receiving, requiring or accepting an unjustified profit or a benefit of any nature by a manager, director, employee or collaborator of a company, association etc.

2/2 - Features

- Legal persons such as corporations can also be held liable for these offences.
- The most likely penalty for a company will be a fine, although other penalties include disqualification from public subsidies or grants, prohibition from contracting with Public Administrations, tax penalties, the closure of premises, suspension of specific activities and even dissolution of the company.
- No extra-territorial reach, like UK Bribery Act

Other notable European anti-bribery legislation - France

- French Criminal Code, last amended in 2007
- Acts of bribery and corruption committed abroad by French individuals/companies are only investigated if a final decision in the foreign courts has been reached
- Currently only state prosecutor can instigate proceedings however this has been challenged by Transparency International
- Statutory limitation period of 3 years has also been criticised
- Can only try French nationals for offences abroad if they are against a French national or 'serious offences' under French law.

Other notable European anti-bribery legislation - Germany

- German Criminal Code
- Legislation allows for facilitation payments up to €50
- Fines up to €1m for offences but allows for disgorgement penalties so in practice the consequences are much greater
- Allows for prosecution for acts abroad but only if committed by German nationals or against German / EU member state officials
- Germany has been active having prosecuted a total of 110 bribery cases, including Siemens. It is the third most active enforcer after the US and UK
- Compliance officers have specific liability. The German courts found a head of compliance guilty of 'assisted fraud'

Summary

- The **FCPA** remains the **most widely recognised and most actively enforced** bribery and corruption legislation. The pattern of increasing enforcement looks likely to continue.
- However **European legislation**, in particular the UK Bribery Act, **is at least as powerful**
- It remains to be seen whether the **appetite for its enforcement** and its jurisdictional reach will be as great as the FCPA. The **role of the US** in applying pressure to stamp out bribery and corruption across the globe **will remain key**
- In the meantime European **business is struggling to respond** in the uncertainty and commonly **complains that its competitiveness**, in comparison to those operating less scrupulous jurisdictions, **is harmed by the cost of compliance**