

Possible Scenarios for Collective Action: How to Practice Collective Action in Emerging Markets

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1 Introduction

Combatting corruption and bribery remains a central hurdle in global growth and economic development. The issue is more sensitive in an emerging market context where corruption might be widespread, the framework to fight corruption might be weak, and there may be a lack of political will to fight against corruption. That said, fighting corruption on an international scale seemed implausible as corruption crimes have been regulated within the scope of territorial application of criminal laws. What national authorities were prosecuting corruption crimes perpetrated within their jurisdictions and leave cross-border prosecution to other national authorities. Therefore, corruption remained a national issue, and was prosecuted on a national scale. If a company conducted business in a jurisdiction with weak anti-corruption legal framework and enforcement, and its corruption crimes were unnoticed, there was little the other jurisdictions could do.

In recent decades, there has been a global shift in enforcing anti-corruption policies, making it an international issue. In 1977, the US Foreign Corrupt Practices Act (“FCPA”) was the first to shed light on this issue in the international arena. The FCPA challenged the conventional territorial application of criminal laws and included extraterritorial application by regulating that even if the act has not taken place on US soil, the accused may still be held liable. Following the US lead on combatting international corruption, the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (“Convention”) entered into force in 1999. The Convention required all signatories to criminalize bribery of foreign public officials. However, the international attention now bestowed upon anti-corruption matters did not occur albeit this framework, until the beginning of the widespread enforcement of the FCPA in the last two decades. Following this, regulators around the world, with the awareness that corruption can be fought at an international scale, began to enact legislation similar to the FCPA model. One of the most important of these regulations is the UK Bribery Act (“UKBA”) of 2011, also imposing extraterritorial jurisdiction for bribery of foreign public officials.

Now, four decades into the enactment of the FCPA, anti-corruption compliance is one of the top issues for many multi-national companies. Companies are aware that if they were to engage in corruption anywhere in the world, their crimes might be prosecuted irrespective of the jurisdiction in which they commit such crimes. Conducting business in emerging markets could be especially tricky for multi-national companies, as their obligation not to engage in corruption (sanctioned by skyrocketing fines and plummeting reputations) remain the same across jurisdictions, but the corruption risks nevertheless continue to rise significantly. The consequences of corruption crimes are difficult to compensate, even for the largest companies. Not only the perpetrators are severely fined and their employees and executives are jailed, but they also experience severe reputational loss with the stigma of corruption. To further emphasize the global pertinence of anti-corruption policies, both the FCPA and UKBA provide that subsidiaries and distributors that are not established in these jurisdictions are still a source of liability. In emerging market jurisdictions, multinational corporations are recommended not to wait for the emergence of stronger anti-corruption institutions and enforcement of anti-corruption legislations. In the fight against corruption, multi-national companies, which already risk severe sanctions for possible anti-corruption violations, are therefore urged to be pro-active, come together, unite other stakeholders, and create a firmer environment that mitigates anti-corruption risks.

Such a method for fighting corruption would be called collective action. Collective action in the anti-corruption realm aims to bring together the stakeholders in the field, such as the public and private sector as well as civil society, in order to come up with various preventative measures against corruption, such as project-based anti-corruption undertakings or long term anti-corruption initiatives aimed to raise awareness on the issue and educate the stakeholders. Collective action serves as a useful tool in emerging markets as it allows for the market players to work together to achieve a

common goal—that is to act as a catalyst for change even when there is local resistance. The targeted consequences of collective action triggered by the multi-national companies in emerging markets would be twofold: (i) to help ameliorate the legal framework and (ii) to render clean conduct as a competitive advantage in the relevant market.

In light of the above, this article will argue that collective action is a productive method to mitigate anti-corruption risks in emerging markets, review some of the existing collective action initiatives, as well as demonstrate the reasons for engaging in collective action initiatives.

2 The Anti-Corruption Climate in Emerging Markets

Emerging markets constitute a particularly challenging environment for multi-national companies. This is mainly because corruption perceptions change with cultures and the employees. Thus, the third parties hired by the company may not understand or recognize that they are taking part in corrupt behavior because they have not been educated as to what constitutes corruption. Furthermore what is considered corruption under legal norms may be considered as the standard way of doing business. Through compliance programs, the companies should internally deal with educating their employees and breaking any habit to conduct business via corruption. For instance, in emerging markets, awarding a contract to a friend might be perceived by the employees as acting in good will, while legally this would constitute conflict of interest (at best) and could even be deemed as bid-rigging. Such variances, from a cultural point of view, are the *raison d'être* of the one-size-does-not-fit-all approach to fighting corruption. Being sensitive to culture plays an important role in combatting corruption because this method takes into account employees who will be implementing the policies and their perception of corruption and the employee's ability to take or refrain from action in certain situations. An example would be gift-giving behavior which might play an important role in business in certain cultures. In fact, in certain cultures, not to give or accept gifts to/from a current/potential business partner may even be considered as inappropriate. Under international legal norms; however, such gift giving is usually considered a bribe.

Although the company may mitigate such cultural risks on its own through trainings and incentives/disciplinary measures, there nevertheless remain risks that generate from the insufficient legal framework or lack of enforcement of such framework. For example, in some jurisdictions, bribery of foreign public officials may not have been criminalized yet, and employees or third parties, thinking that this is not a crime, might engage in such an act, leading to the liability of the parent company. Similarly, in the absence of legal enforcement, however up-to-date the legal framework may be the employees or third parties may have the reflex to breach the law, with the expectation that their acts will not be punished. Even if this might be the case in the emerging market, the company will be held liable for such breaches if it is subject to jurisdictions with legislation foreseeing extra-territorial application.

In light of such risks resulting from the external environment and which the companies cannot mitigate on their own (with just their compliance programs) companies are urged to come together to proactively set their own standards in the fight against corruption.

3 What is Collective Action?

Collective action is a collaborative and sustained process of cooperation amongst stakeholders.¹ In emerging markets which do not have a sufficient anti-corruption legal framework or there is a lack of political will to fight against corruption, the best method of implementing change is collective action. This is because corruption is a multidimensional problem and collective action allows all stakeholders (private sector, civil society and public sector), to come together and create multi-dimensional methods to combat corruption. From an emerging market perspective, collective action is especially useful because it allows players in the market working together to reach a common goal to act as a catalyst for change even when there is local resistance.

However, the formation of collective action initiatives is far from being an easy task. Even though collective action is one of the most effective ways to combat corruption and create a transparent and levelled playing field, it is not always easy to bring the stakeholders, especially the companies, together. Usually, at the formation phase of a collective action initiative, companies may not trust each other, since they are coming together with their competitors. This is best explained through the prisoner's dilemma doctrine. Under the doctrine, the parties may not be able to collectively work for the common good due to a suspicion that the other party may engage in the restricted conduct, leaving the other party deprived of the benefits of the relevant conduct. When the prohibited conduct is corruption, it is especially tricky for the parties to recognize as to whether the other party is acting corruptly, since it requires a secret pact between the bribe giver and the bribe taker. Hence, a facilitating institution, such as a reputable civil society organization in the field of anti-corruption, may come in handy at this stage of the collective action, to create the trust that the industry players may need to act together. Once the players are together, the initiative should set its core goals and through time, as the players start trusting each other, the initiative's goals might even expand.

The targeted consequences of collective action triggered by multi-national companies in emerging markets would be twofold. The first targeted consequence would be to remedy of the missing legal framework, in these jurisdictions. As such, collective action initiatives could change corruption perceptions and raise awareness in the market, which in turn could transform into a force that applies pressure to change the institutional framework. The second targeted consequence would be changing the status quo not through institutional framework but in practice. The more multinational companies demand clean conduct from their local counterparts and refuse to work with local agents who do not comply with their anti-corruption standards, the more clean conduct will emerge as a competitive advantage, adopted by an increasing number of players in the market.

4 The Method for Collective Action

Collective action can be practiced in different forms and may be long- or short-term (i.e. project-based) initiatives; may be binding or non-binding on the company. The World Bank lists four types of collective action as a reference. These consist of the following schemes, illustrated by examples.

¹ http://info.worldbank.org/etools/docs/antic/Whole_guide_Oct.pdf

(i) Anti-corruption declarations are an example of project-based collective action initiatives where signatories are bound by anti-corruption principles relative to a given project. This publicized commitment is non-binding and enforced through peer pressure and during the process, corruption issues might be discussed among stakeholders. The resulting declaration can be shared with the public, and even with the third parties working with the parties to the collective action. An example for this would be the “Collective Action Agreement to Promote Integrity in the Legal Professions”. For this type of collective action, in-house lawyers from the Association of Corporate Counsel Latin America, Argentina Chapter committed themselves to anti-corruption standards.²

(ii) Principle-based initiatives are long-term, non-binding collective action methods encouraging the participants not to engage in corruption in their day-to-day businesses. This initiative involves the stakeholders in a given country or industry such as civil society organizations, public institutions and private enterprises. An example for this type of collective action is the Medicines Transparency Alliance (“MeTA”) that aims to create greater transparency in the field of medicine to increase access of healthcare to members of society who previously could not access such. The alliance brings together health workers, administrators, civil servants, politicians, pharmaceutical company employees, civil society and international organizations and the media. Governments taking part in MeTA would render a set of data regarding the medicine supply chain publicly available. Through the elimination of opacity in the sector, the problems in the pharmaceutical sector are expected to be tackled. MeTA is active in several countries including Ghana, Jordan, Kyrgyzstan, Philippines, Uganda, Peru and Zambia.³

(iii) Integrity pacts consist of formal and written contracts between the customer and the bidding companies, where bidding and implementation processes are monitored by an external party and violations are sanctioned. The Clean Games Inside and Outside of the Stadium is a Brazilian integrity pact which aims to oversee that the money invested for Brazil to build infrastructure for the 2016 Olympics to increase transparency, integrity and social control over how these investments are used. Between 2011 and 2016, more than \$3 million will be invested in within scope of the collective action project. The project aims to execute agreements with companies and transparency commitments between public officials. A legal committee which will analyze procurement contracts will be established and another committee will oversee sectoral agreements and aim to foster integrity relationships between the companies and the government.⁴

(iv) Certifying business coalitions are long-term initiatives also enforced through external monitoring. These coalitions require prospective members to comply with certain anti-corruption standards, compliance with which is monitored by external audits after an initial period. Depending on the results of the audits, the members are either certified or excluded from the coalition. Pacto Etico Comerical in South America aims to promote law-abiding, ethical business conduct and raise awareness of transparency issues. The initiative brings

² <http://cso.baselgovernance.org/staging.baselgovernance.org/initiatives-detail/199>

³ <http://collective-action.com/initiatives-detail/160>

⁴ <http://collective-action.com/initiatives-detail/103>

together a coalition of public-private sector as well as the civil society institutions. Pacto Etico also aims to develop a system of evaluating and certifying ethical business conduct.⁵

5 Collective Action Examples from Around the World

Many stakeholders are already utilizing collective action methods to battle corruption. In Turkey, the Private Sector Collective Action Center (“ÖSKEM”) was established with the collaboration of **TEID (Turkish Ethics and Reputation Society), and TKYD (Corporate Governance Association of Turkey), helped bring to life.** ÖSKEM aims for small and medium size enterprises (“SMEs”) to internalize the corporate governance and business ethics principles and aims to organize activities in different parts of Turkey. ÖSKEM was designed to raise awareness in the private sector for business ethics and prepare the necessary environment for the fight against corruption. Within the context of the project, a Collective Action Guide and the “SME’s Guide to Fight Against Corruption” has also been drafted to for the purpose of educating SMEs and family companies for effective management of corruption risks⁶.

Ethics Standards of Customs Brokers and Sectoral Compliance Pact is another initiative established in 2013. The standard setting initiative comprises of banking and finance, consulting and advisory services, customs brokers, transport sectors. The initiative aims to tackle corruption in customs, get customs sector members to sign an anti-corruption undertaking and bring together members of public sector and customs companies to discuss issues of corruption. On 26 January 2013, 250 eminent companies in Turkey in the customs sector signed the Ethics Standards of Custom Brokers and Sectoral Compliance Act marking the beginning of the project. An ethics committee consisting of members of five associations in different cities oversees the (i) formation of a joint committee with the ethics board of Ministry of Customs and Trade (ii) establishment a business ethics academy to train the individuals working in the customs operations and (iii) potential non-compliance of their pact members. Stakeholders meet every month.⁷

Leveling the playing field with Turkish Integrity Center of Excellence is another initiative established in 2015. For this project, sectoral and cross-sectoral surveys will be conducted on the effects of corruption and compliance officers will be certified and trained, and collective action initiatives will be facilitated and lead. The aim of this project is to manage the integrity risks in Turkey and fight corruption in the private sector through enhancing the implementation of global ethics standards.⁸

The SME Policy Advocacy in Russia is a Center for International Private Enterprise (CIPE) project and its main aim is to improve the business environment for SMEs in Russia. Members of the initiative comprised both of the private sector and civil society. Private sector was mainly represented through

⁵ <http://www.iadb.org/common/csramericas/2006/documento/presentations/Garay-Cook.pdf>

⁶ <http://www.tkyd.org/tr/faaliyetler-gundem-tkyd-bursa-seminerinde-stklar-ve-is-cevreleriyle-bulustu.html>;

⁷ <http://www.borsagundem.com/anlik-borsa-haberleri/20160527131719>

⁸ <http://collective-action.com/initiatives-detail/77>

⁸ <http://collective-action.com/initiatives-detail/660>

business associations. The initiative aimed to effect change with regard to administrative barriers, tax codes, access to information, property rights, inspections, take part in legislative review and monitoring implementation of the legislation. The initiative led to many legislative changes and helped businesses with regard to bureaucracy issues through hotlines and representations. The initiative shows that once private sector actors come together it is possible for this collective power to take part in the change of legislative frameworks.⁹

In Thailand, the Thai Collective Action Against Corruption Campaign is a multi-sector standard setting initiative designed and endorsed by many of Thailand's top business associations to fight against corruption. Members have to sign a Joint Declaration in Fighting Corruption compliance with which it is subsequently externally monitored. The initiative aims to implement policies and find effective preventative mechanisms in the fight against corruption.¹⁰

In India, an integrity pact entitled "Collective Action Project India" was developed by the UN Global Compact with the aim of ensuring participation of stakeholders in the anti-corruption dialogue, raise awareness on the issue, build a business case for ethical business and provide incentives for transparency. The initiative organizes seminars, workshops and stakeholder consultations to that end.¹¹

The Nigerian Economic Summit Group led the Building Trust through Public-Private Dialogue on Anti-Corruption alongside the UN Global Compact to create a platform for the dialogue for businesses and public officials on corruption. The initiative aimed to raise awareness through seminars and trainings and attempted to ensure participation of policy makers and private sector. Thus far, the initiative has proven successful in initiating dialogue in the oil and gas industry and between SMEs.¹²

Egypt launched the "Promoting Collective Action in Egypt" initiative in December 2010. The initiative particularly focuses on SMEs and aims to enhance transparency and integrity in public transactions, especially public procurement. The initiative establishes practice standards for businesses, provides a guidance manual, and members should sign an Integrity pledge. Further, creation of incentives for SMEs to adhere by the pledge is among the functions of the initiative.¹³

6 A method for Practicing Collective Action in Emerging Markets

While considering which collective action method to choose depends on the sensitivities of the jurisdiction the initiative will take place. In emerging markets where there might be insufficient legislation to fight corruption or lack of enforcement of an up-to-date legislation, multi-nationals can come together to mitigate their anti-corruption risks since they are the economic actors who would face the heaviest consequences in case of corrupt behavior.

One of the most risky areas in terms of anti-corruption for multinational companies is the local intermediaries they work with in emerging markets. This is also hinted in the OECD Foreign Bribery

⁹ <http://collective-action.com/initiatives-detail/102>

¹⁰ <http://collective-action.com/initiatives-detail/86>

¹¹ <http://collective-action.com/initiatives-detail/163>

¹² <http://collective-action.com/initiatives-detail/169>

¹³ <http://collective-action.com/initiatives-detail/168>

Report, which states that intermediaries are involved in three out of four foreign bribery cases.¹⁴ Therefore, multinationals can choose local intermediaries as the subject of their collective action. For practical reasons, companies separate the counterparts they work with (such as customs agents, architects, distributors, legal consultants) in accordance with the risk they bring with their operations, and start with those who represent the highest risk. Companies can ask the local entities to sign an undertaking stating they will comply with local and international anti-bribery legislations (UKBA or FCPA) and allow for all books and records to be audited. This initiative can also organize seminars and workshops where the public and private sectors are brought together to raise awareness on anti-corruption. Companies may make it mandatory for their intermediaries' managers to attend these activities. Such trainings would help overcome cultural barriers and clearly define the anti-corruption expectations of the multi-national corporation. In case of refusal of participation in this initiative by the local intermediary, the multi-national companies should refuse to work with them and approach the mid-sized local agents. The more multi-nationals choose not to work with the local third parties who refuse to participate in the initiative, the more clean conduct will emerge as a competitive advantage, adopted by an increasing number of players in the market, and set industry standards.

One might take Turkey as a pilot country for such a collective action initiative. Turkey has a relatively sufficient anti-corruption legal framework arguably with a lack of sufficient enforcement. Multi-nationals willing to practice collective action in Turkey could first select the category on intermediaries. For instance, construction is one of the most active sectors in Turkey and according to data of Ministry of Economy, in 2016, construction sector received \$100 million worth of foreign direct investment.¹⁵ Local and global companies work in this sector and several surveys show that construction sector is a very problematic sector regarding corruption (55% of the participants said that they think construction sector is the most corrupt sector in Turkey¹⁶). To tackle this obstacle, multi-national companies could come together under the umbrella of NGOs that are working in the field of ethics and anti-corruption and sign an anti-corruption declaration to set their standards for the sector. From that point on, they might apply these standards to their intermediaries in the construction sector.

In order to constitute an understanding for the local firms, so that they might consider signing the undertaking, the initiative can first organize seminars and workshops that communicate the importance of compliance with corruption rules due to the extraterritorial laws, and that they may be held accountable for the activities of their intermediaries. Then the members of the collective action can prepare the anti-corruption undertaking, sign it themselves, publicize it and have the intermediaries to also sign it. Multi-nationals may choose not work with those local firms who refuse to sign the undertaking. Following the signature of the undertaking, members of the collective action initiative can publish a guideline for the local firms so that they can understand how they can abide by the anti-corruption undertaking from an operational point of view. Meanwhile, the initiative could continue its awareness raising activities through seminars and workshops, bringing stakeholders together, so that through this dialogue, both the undertaking and the guidelines can be updated.

Chambers of commerce and other professional organizations might also play a part in the initiative by providing trainings and programs in order to educate their members. Even the undertaking can be signed through these associations, and the names of the intermediaries who signed the undertaking can be made public through the association web-sites. This way, multi-national companies who are not members to the initiative can also determine which intermediaries signed the undertaking and choose their third parties accordingly. In addition, chambers of commerce or professional organizations might establish ethics committees to oversee the actions of their members. Once the principles of the undertaking are breached, these committees might warn the members and subsequently expel the members in case of recurrence of the relevant action. As the collective action continues, the initiative

¹⁴ <http://www.oecd.org/newsroom/scale-of-international-bribery-laid-bare-by-new-oecd-report.htm>

¹⁵ <http://www.ekonomi.gov.tr/portal/content/conn/UCM/uid/dDocName:EK-229352>

¹⁶ <http://www.sozcu.com.tr/2016/ekonomi/en-fazla-yolsuzluk-gumruk-ve-insaatta-1262918/>

can even turn itself into a certifying coalition where companies would complete a certain training program in exchange for certification. It would be advisable to repeat these programs, as frequent as the risk of the sector requires.

7 Conclusion

Multi-national companies face many risks and challenges when they enter new markets, but more so in emerging markets. Due to the extra-territorial effects of anti-corruption legislations such as the FCPA and UKBA, they have to be extra vigilant to not be corrupt. This is because in addition to sky rocket fines resulting from the spillover effect, companies also face extreme loss of reputation. In emerging markets, it is usually the culture and perception of corruption which creates the risky zone for multi-national companies. In order to overcome these cultural barriers, multi-national companies must change the perception of their employees through trainings, communicating that the company would be liable in foreign jurisdictions for their actions in the local market. However, it is harder for a company to deal within its own processes with a jurisdiction's insufficient anti-corruption legal framework and lack of political will for enforcement of the framework. Multi-national companies cannot compensate to wait for a better anti-corruption to form within the jurisdiction, they have to engage in collective action to mitigate their risks.

Collective action is one of the most appropriate methods of combatting anti-corruption when spreading UKBA and FCPA standards to multi-national businesses in emerging markets. Collective action acts as a catalyst for change starting from the multi-national corporation level and can lead to a nationwide change in business norms. Through collective action, the company can contribute to the awareness raising activities with regard to corruption which might in turn constitute the public pressure to incite the lawmakers to enact an up-to-date legal framework. Further, through competitive pressures, clean conduct can emerge as the new industry standard. This can be reached through a collective action method, where multi-nationals can come together and oblige a certain local intermediary group to abide by their anti-corruption standards. As a result, companies and the markets can enhance their reputations, countries can receive more investments and the economic conditions change both for the countries and companies. Collective action creates a level playing field by leading to a more transparent and equal competitive market.