

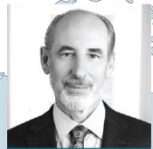


2018 Anti-Corruption Year-in-Review

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Topics for Discussion

- Enforcement Overview
- Enforcement Trends
- Highlights
 - France
 - U.S.
 - U.K. -- Case Study
- Compliance Tips for Global Companies

2018 ENFORCEMENT OVERVIEW

Top Ten Anti-Corruption Settlements

- 1. Petrobras (Brazil): \$1.78 billion (2018)**
2. Telia (Sweden): \$965 million (2017)
3. Siemens (Germany): \$800 million (2008)
4. VimpelCom (Holland): \$795 million (2016)
5. Alstom (France): \$772 million (2014)
- 6. Société Générale S.A. (France): \$585 million (2018)**
7. KBR / Halliburton (U.S.): \$579 million (2009)
8. Teva Pharmaceutical (Israel): \$519 million (2016)
9. Keppel Offshore & Marine (Singapore): \$422 million (2017)
10. Odebrecht/Braskem (Brazil): \$420 million (2016)

Petróleo Brasileiro S.A.

- Brazil's state energy company alleged to have paid bribes to politicians and political parties in Brazil
- No voluntary disclosure
- Company entered into a non-prosecution agreement with the DOJ that included a criminal penalty of \$853.2 million
 - 10 percent will be paid to the DOJ
 - 10 percent will be paid to the SEC
 - 80 percent (\$682.5 million) to the Ministerio Publico Federal in Brazil
- Additional disgorgement ordered by the SEC (\$933 million) deemed satisfied based on amount Company previously paid to settle a securities class action lawsuit in the US
 - May be a unicorn

Société Générale S.A.

- Allegations:
 - Between 2004 and 2009, company paid bribes to Libyan officials in exchange for investments worth more than \$3 billion and profits of approximately \$523 million from Libyan state-owned financial institutions
 - Company paid a broker who facilitated the bribes more than \$90 million in percentage-based commissions.
- No voluntary disclosure
- Deferred prosecution agreement (DPA) for parent company; subsidiary pled guilty to conspiracy to violate the anti-bribery provisions of the FCPA
- \$585 million settlement
 - Half to DOJ, half to Parquet National Financier (PNF)

2018 ENFORCEMENT TRENDS

Continuing Global Expansion

- More countries enacting anti-corruption laws and putting resources into enforcement, including:
 - India
 - UAE
 - Malaysia

Continuing Global Cooperation

- Multi-jurisdictional resolutions continue to rise
- Variations in laws require careful consideration
 - Cooperation
 - Privacy
 - Privilege
 - Recognition of voluntary disclosures
- These highlight the importance of sequencing for multi-jurisdictional cases

Rise of Settlements, Not Court Actions

- Most anti-corruption cases are settled out of court
- Enforcers choose what charges to bring and use the threat of potential penalties to encourage settlement
- Use of DPAs, CJAPs, NPAs by US, UK and French enforcers
- “Declinations” with disgorgement in the US

Example of Settlements Expanding the Law

- Not explicitly required under the FCPA

- BUT see *Sanofi* administrative order:

Sanofi agreed to a cease-and-desist order and to pay \$17.5 million in disgorgement, \$2.7 million in prejudgment interest, and a civil penalty of \$5 million in order to settle allegations that the company violated the FCPA's books and records and internal accounting controls provisions by failing to **detect and prevent** the making of improper payments to foreign officials

- Detect and prevent are not standards in the FCPA's books and records provision, which requires companies to “devise and maintain a system of internal **accounting controls** sufficient to provide reasonable assurances” to meet certain financial objectives.

But Courts Can Help Defendants

- *U.S. v. Hoskins*:
 - Non-U.S. citizen working for a UK subsidiary of French company charged with violations of the FCPA
 - Second Circuit rejected DOJ's attempt to use aiding and abetting and conspiracy theories to prosecute an individual who otherwise was not covered by the FCPA
 - Court's ruling contrary to SEC and DOJ guidance on potential individual liability

FRENCH HIGHLIGHTS

Sapin II: Scope

- Sapin II Law only entered into force on **June 1st 2017**
- Requires implementation of compliance programs to prevent and detect corruption (8 mandatory items provided for in Article 17 of Sapin II)
- Has created:
 - the French Anti-Corruption Agency (“*Agence française anticorruption*” or “*AFA*”), notably in charge of the controls over the implementation of the compliance programs
 - French Deferred Prosecution Agreement (“*Convention Judiciaire d’Intérêt Public*” or “*CJIP*”)
 - a new criminal offense related to bribery: influence peddling of foreign officials
 - Certain whistleblower protections

Sapin II: Jurisdiction

- Companies which may be subject to AFA's administrative controls and sanctions regarding their compliance programs:
 - ❖ Companies having at least 500 employees, or belonging to any group whose parent company's headquarters is located in France and which has at least 500 employees, and whose annual turnover is more than €100 million;
 - ❖ French subsidiary of foreign groups falling in these thresholds must also comply with this obligation, unless the headquarter already implements a similar program.
- Prosecution in case of suspicions of bribery or influence peddling: extension of the jurisdiction
 - ❖ French Courts will be able to prosecute French citizens committing acts of bribery or influence peddling abroad regardless whether or not a complaint has been filed and any denunciation by the State where the offense has been perpetrated;
 - ❖ French Courts will be able to prosecute foreigners residing in France for acts of bribery or influence peddling committed abroad.

Controls implemented by the French Anticorruption Agency (“AFA”) in practice

- Controls implemented by the AFA:
 - ❖ **First controls notified in October 2017:** 5 private companies and 1 public company, (i) whose annual turnover is between EUR1.2 to 49 billion, (ii) employing between 2,000 to 80,000 people, (iii) having between 5 to 277 subsidiaries (2/3 of them being located outside of France) (source: AFA 2017 annual report released in June 2018)
 - ❖ **Since then:** other companies were controlled (around 40 in total since October 2017). Most of them usually apply to public procurements. So far no administrative sanctions imposed.
- Helpful materials released on the AFA’s website:
 - ❖ The questionnaire submitted to the companies in case of controls. More than 100 questions.
 - ❖ The charter of the rights and duties of the parties involved in the controls.

Support provided to the companies by the French Anticorruption Agency (“AFA”)

Release of **the Charter for the support to the economic actors** by the AFA on October 2, 2018:

The AFA is willing to provide various types of support to the economic actors and, notably:

- A **specific support**: methodological and legal support + technical workshops for a limited group (around 20 to 30) of economic actors (for instance: actors belonging to a same sector, group of professionals having the same function; actors interested by the same anticorruption theme).
- An **individual support**: 5 month-support provided to a determined economic actor:
 - ❖ **Scope**: all the companies, even those which are not included in the Sapin II Law scope (smaller companies).
 - ❖ **Limits**: neither a certification of the compliance program implemented by the company, nor a control in order to check the compliance of the company with the Sapin II Law. AFA agents providing said support are subject to professional secrecy (breaches may be criminally punished pursuant to Article 226-13 of the French Criminal Code).

US HIGHLIGHTS

FCPA: Scope

Anti-bribery Provisions

- Prohibits bribery of foreign government or political officials for the purpose of either:
 - Obtaining or retaining business
 - Securing any improper advantage
- Mainly enforced as criminal violations by the Department of Justice

Books and Records Provisions

- Requires SEC-registered or reporting issuers to:
 - Make and maintain accurate books and records and
 - Implement adequate internal accounting controls
- Mainly enforced as civil violations by the Securities and Exchange Commission

FCPA: Jurisdiction

- Any “issuer” that files reports to the SEC or trades equity or debt on a US exchange
 - Includes any foreign company that trades, for example, American Depository Receipts (ADRs) on a US exchange
- Any “domestic concern”
 - Includes US citizens, nationals, and residents as well as any entity (corporation, partnership, etc.) that is organized under the laws of the US or a US territory or that has its principal place of business in the US
- Any “person,” including an organization, wherever located, that while in a US territory, does any act in furtherance of the prohibited conduct
 - Government argues minimum contacts include emails, telephone calls, transfers through correspondent bank accounts in US intermediary banks

Cases/Trends

- Individuals
 - 12 individuals sentenced to terms between probation and 10 years
 - Steady stream of indictments and guilty pleas, but not generally out of the big settled cases
 - Bribe recipients charged with money laundering and wire fraud actions arising out of FCPA investigations
- PDVSA
 - Guilty pleas by 15 individuals
 - 10-year sentence for banker who laundered more than \$1 billion
 - PDVSA officials pleaded guilty

Significant DOJ Pronouncements

- Expansion and clarification of FCPA Corporate Enforcement Policy
- Individuals yes, but not necessarily *every* individual
- No piling on
- DOJ Compliance Counsel Expert not being replaced
- Record retention

UK HIGHLIGHTS

Bribery Act 2010

The Bribery Act 2010 has now been in force for some 7 years.

An offence under section 7 (an organisation's failure to prevent bribery) has been charged only twice.

- Sweett Group PLC (SFO - 2016)
- Skansen Interiors Ltd (CPS - 2018)

Potential offences under section 7 have also featured in Deferred Prosecution Agreements, most recently involving Rolls Royce.

Bribery Act, section 7

7 Failure of commercial organisations to prevent bribery

- (1) A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending—
- (a) to obtain or retain business for C, or
 - (b) to obtain or retain an advantage in the conduct of business for C.

Bribery Act, section 7 (cont.)

- (2) But it is a defence for C to prove that C had in place **adequate procedures** designed to prevent persons associated with C from undertaking such conduct...
(emphasis added)

Bribery Act, section 7 (cont,)

- (3) For the purposes of this section, A bribes another person if, and only if, A—
- (a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or
 - (b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.

'Adequate Procedures' – Issues of Law

Thus, as a matter of law :

- in order not to commit an offence; or
 - in order to defend itself against an allegation under section 7,
- a commercial organisation must have adequate procedures designed to prevent persons associated it from being involved in bribery.

'Adequate Procedures' – Issues of Fact

Question: What, as a matter of fact, must those procedures be?

Answer: It depends...

- Nature and size of commercial organisation
- Exposure to potential corruption
- Other risk factors

(See the 6 principles under the Bribery Act Guidance)

Bribery Act 2010 Guidance – The 6 principles

1. Proportionate procedures
2. Top-level commitment
3. Risk Assessment
4. Due diligence
5. Communication (including training)
6. Monitoring and review

Adequate Procedures – A Case Study

R v Skansen Interiors Ltd and others

Stephen Banks (former MD of Skansen – the company bidding for the contracts), Graham Deakin (Former Project Manager of DTZ – the company acting as the procurement agent in the bidding process) were each charged with three offences under the Bribery Act.

The facts are unremarkable in the context of companies engaged in building and renovation work which were subject to bidding procedures.

Skansen was a small company with its staff operating in open plan premises in a room of some 600 square feet.

Adequate Procedures – A Case Study

R v Skansen Interiors Ltd and others

The contracts were worth some £6m.

Skansen (through Banks) agreed to pay Deakin (through a company connected with Deakin's son – Goodier Property Services) for the provision of confidential information and for supporting Skansen's bids.

2 payments totalling £10,000 were made in May 2013 for:

“services in respect to initial site surveys/drawings and pre-construction consultancy including CAD drawings and health and safety set up as agreed”.

The final payment of £29,000 was to be paid in February 2014.

Adequate Procedures – A Case Study

R v Skansen Interiors Ltd and others

By the end of 2013, Skansen was experiencing severe financial difficulties and a new Chief Executive, Ian Pigden Bennett (“IPB”), was appointed in January 2014.

At a meeting to discuss the company’s financial affairs on 4 February, IPB was told by Banks that there was a “sales commission” due of £29,000 in addition to £10,000 paid the previous year.

On further investigation, IPB discovered irregularities with the earlier payments amounting to £10,000 including the fact that the original invoices could not be traced.

Adequate Procedures – A Case Study

R v Skansen Interiors Ltd and others

IPB also discovered that Skansen had not updated any of its Anti Bribery policies since before 2010.

On 14 February, he obtained a specimen ABC policy from the Institute of Directors which he adapted to fit Skansen. This was then distributed to all directors, employees and subcontractors to read, to confirm acceptance of its terms and then to sign.

Banks returned his signed version the same day.

Adequate Procedures – A Case Study

R v Skansen Interiors Ltd and others

However, within days of signing the ABC policy, Banks sought to process the further invoice for £29,000. His efforts were thwarted by IPB who suspended and thereafter dismissed him.

The matter was then reported to the City of London Police.

Adequate Procedures – A Case Study

R v Skansen Interiors Ltd and others

In due course, Banks and Deakin pleaded Guilty to the charges that they faced.

The Crown Prosecution Service and City of London Police considered whether Skansen's position could be dealt with by a Deferred Prosecution Agreement. Despite representations from Skansen's lawyers, they decided that because Skansen had, by mid 2014, become a dormant company, a DPA was not suitable.

(Compare and contrast the position taken by the SFO in XYZ Ltd)

Adequate Procedures – A Case Study

R v Skansan Interiors Ltd and others

Prior to trial, it was argued in court that the CPS position was arbitrary and contrary to the expectation that self reporting and complete co-operation would result in a DPA, if necessary, attached to a parent company. In any event, the prosecution was utterly pointless as the court would not be able to order any penalty at all as the company was dormant and impecunious.

The Court rejected that argument and ruled that it should not interfere in a decision made by the Director of Public Prosecutions to prosecute even if the proceedings might be regarded as pointless.

Adequate Procedures – A Case Study

R v Skansen Interiors Ltd and others

And so to trial.

The only real issue was whether the procedures prior to 14 February 2014 were “adequate.”

Skansen faced obvious problems.

The case was opened thus:

“the jury will have to determine whether, even though its MD was involved in bribery, it is nonetheless more likely than not that there had in fact been adequate procedures in place designed to prevent that from happening.”

Adequate Procedures – A Case Study

R v Skansen Interiors Ltd and others

The Judge's Directions:

Skansen Interiors Limited ("Skansen") is charged with failing to prevent bribery. In relation to this offence, there are two stages.

What the prosecution must prove and to what standard

*Firstly, the prosecution must **make you sure** that a person associated with Skansen, (Stephen Banks), bribed another person, (Graham Deakin) intending to obtain or retain business for Skansen, or to obtain or retain an advantage in the conduct of business for Skansen.*

As there is no dispute about this aspect of the case, and you have Agreed Facts that Mr Banks, who was associated with the company paid a bribe to Mr Deakin for behaving improperly as a project manager for DTZ in respect of 2 contracts at 100 Lower Thames Street and One Curzon Street, and has pleaded Guilty to 3 offences of Bribery you may feel that you have no difficulty in being sure of what the prosecution must prove.

Adequate Procedures – A Case Study

R v Skansen Interiors Ltd and others

What Skansen must prove and to what standard

*If you are sure of what the prosecution must prove, then it is for Skansen to show **on a balance of probabilities, ie that it is more likely than not that it had in place adequate procedures designed to prevent persons associated with the company from engaging in bribery.***

That is for you to decide and the words “adequate” and “procedures” have their everyday meaning.

Skansen does not have to call evidence. It can, and in this case, does rely on the evidence which has been given by prosecution witnesses, upon which it contends that you can decide that it is more likely than not that it had adequate procedures in place designed to prevent bribery.

Adequate Procedures – A Case Study

R v Skansen Interiors Ltd and others

THE CONVICTION OF STEPHEN BANKS

The conviction of Mr Banks forms part of the background to this case. But it is important that you treat it in the right way. Both the prosecution and Skansen agree that it is evidence that shows that Mr Banks bribed Mr Deakin, and that you can consider it in deciding whether Skansen had adequate procedures in place designed to prevent bribery.

*You must not assume that Skansen is Guilty merely because of Mr Banks's bribery. The company is not responsible for his unauthorised and illegal actions. Skansen is charged with a different offence. What the company is charged with is a failure of its own to **have in place adequate procedures to prevent** those actions occurring. So you must not jump to the conclusion that because Mr Banks bribed Mr Deakin the company are responsible for his actions and therefore Guilty of this different offence.*

Adequate Procedures – A Case Study

R v Skanssen Interiors Ltd and others

ROUTE TO VERDICT

You should ask yourselves

1) Am I sure that that a person associated with Skanssen, (Stephen Banks), bribed another person, (Graham Deakin) intending to obtain or retain business for Skanssen, or to obtain or retain an advantage in the conduct of business for Skanssen?

*If you are **NOT SURE** you must find Skanssen **NOT GUILTY***

*If you are **SURE** ask*

Adequate Procedures – A Case Study

R v Skansen Interiors Ltd and others

ROUTE TO VERDICT (cont.)

2) Is it more likely than not that Skansen had in place adequate procedures designed to prevent persons associated with the company from engaging in bribery?

*If you decide that it is more likely than not that Skansen did have adequate procedures, you must find Skansen **NOT GUILTY**.*

*If you decide that it is more likely than not that Skansen did not have adequate procedures, you must find Skansen **GUILTY**.*

Adequate Procedures – A Case Study

R v Skansen Interiors Ltd and others

In the event, the Jury found Skansen Guilty.

The judge ordered (as she was bound to do) an Absolute Discharge. The Prosecution could not apply for an order that Skansen pay any of the Prosecution costs.

The CPS celebrated the verdict as demonstrating a vindication for its position.

Virtually every lawyer in the White Collar sphere denounced the CPS's actions as disproportionate and likely to cause a chilling effect in the self reporting of bribery.

Adequate Procedures – A Case Study

R v Skansan Interiors Ltd and others

The Critical Takeaways:

Adequate procedures are a matter of fact to be determined in the context of each individual case.

There is no “One size fits all.”

Everything will depend on the nature and size of the organisation. The more complex the organisation, the more it is involved in any high risk activity, the more robust its ABC policy will need to be.

The risks of getting it wrong are simply too great.

COMPLIANCE TIPS FOR GLOBAL COMPANIES

Essential Elements to Compliance Programs

- Risk assessment
- Tone at the top – commitment from senior management and clearly articulated policies
- Code of conduct, compliance policies & procedures
- Oversight, autonomy, and resources
- Training and continuing advice
- Incentives and disciplinary measures
- Third-party due diligence
- Confidential reporting and internal investigation

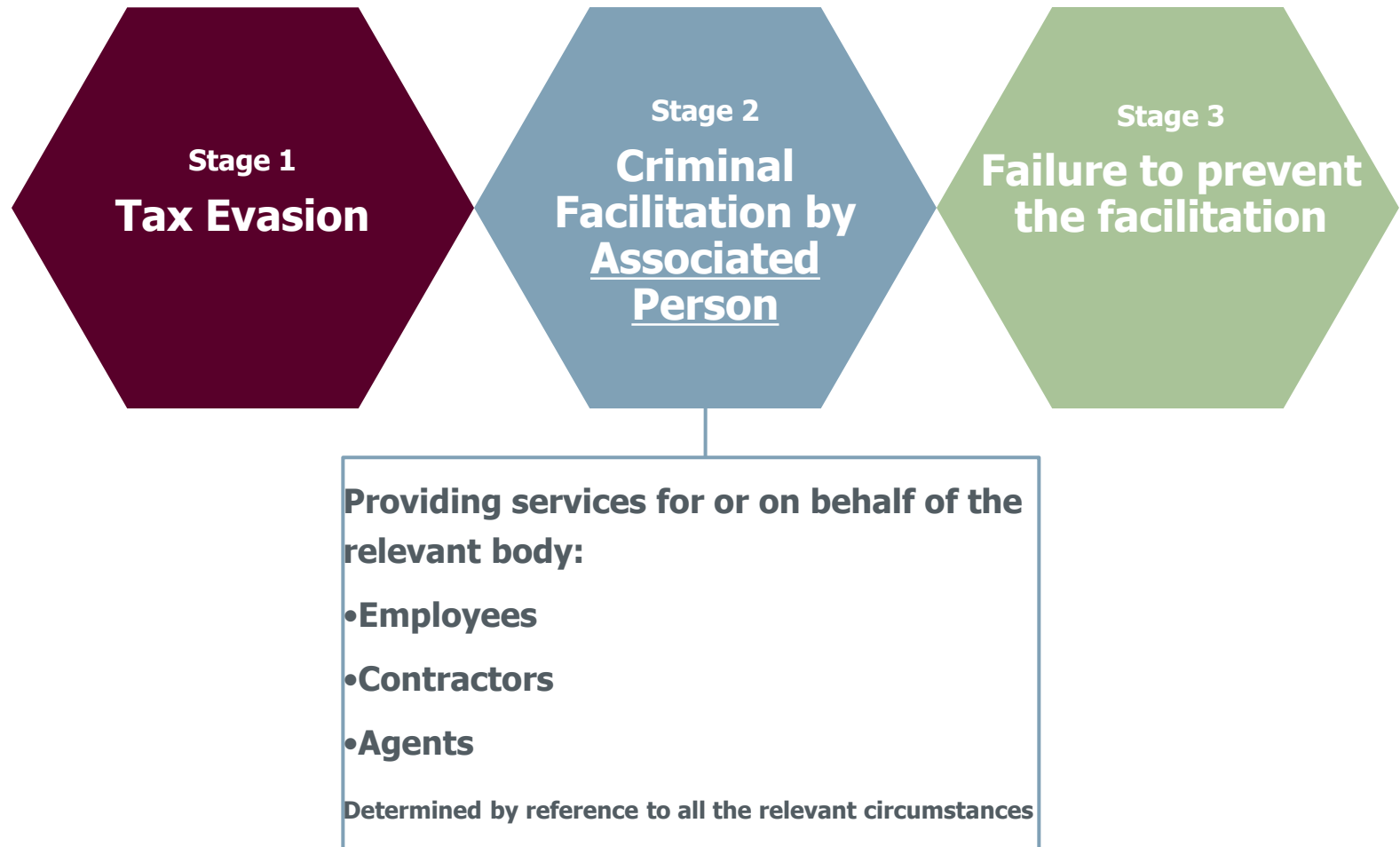
Give Your Employees Tools to Comply

- Does your anti-corruption training identify internships or employment in its discussion of “things of value” that are implicated by the FCPA?
- Do your employees receive training regarding the FCPA?
 - Sales
 - Others who interact with customers
 - Others who interact with agents or third-parties
 - Human Resources
- Do your anti-corruption procedures explicitly address how to handle improper requests from customers?
 - Stronger procedures make it easier for your employees to decline these requests

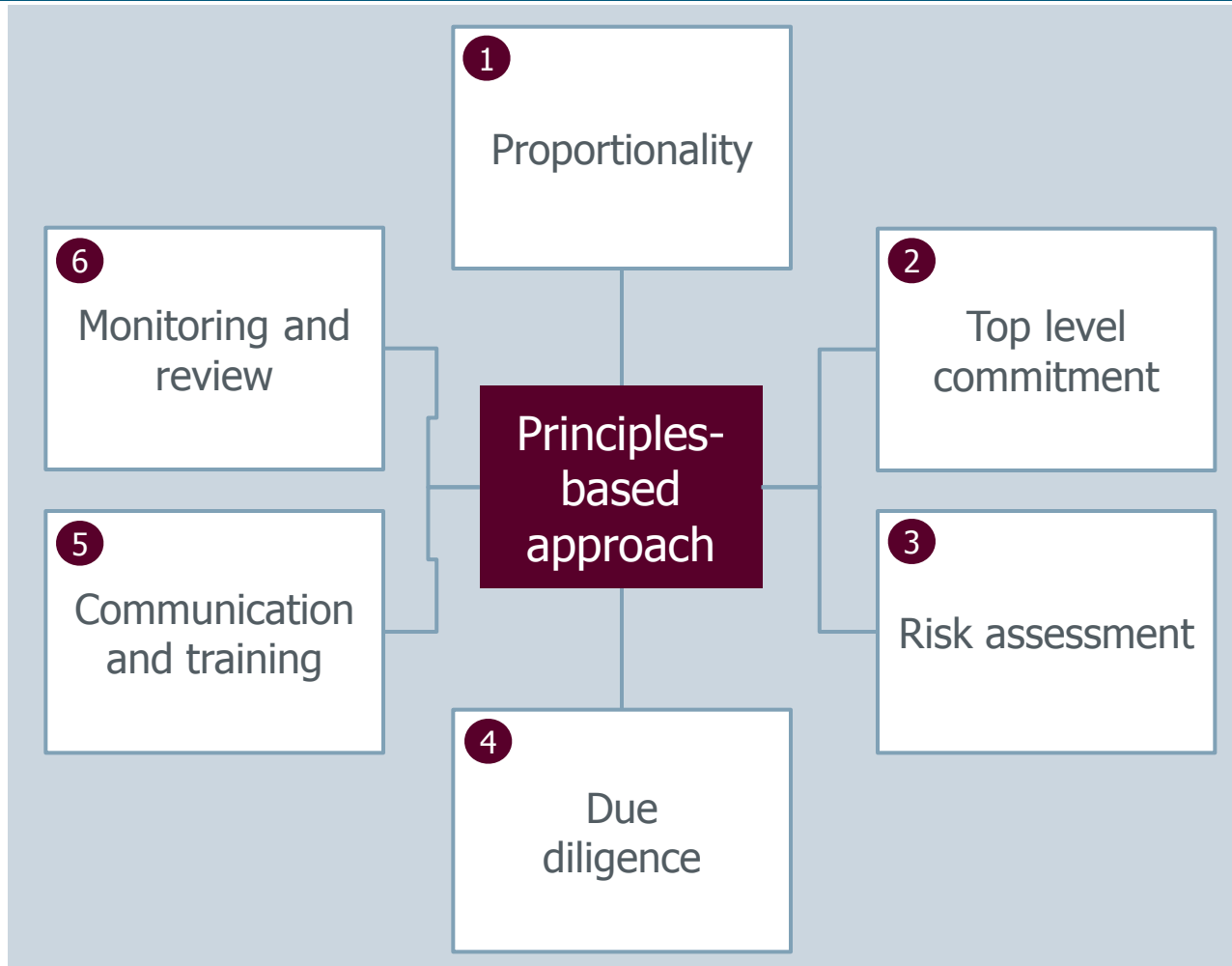
Auditing and Monitoring

- Does your company document due diligence?
- Does your company have mechanisms in place to monitor compliance with your policies and procedures?
 - Do you conduct annual reviews or require annual certifications?
 - Do you conduct spot checks?
 - Do you have controls in place for on-boarding new interns/employees?

UK corporate criminal offences of failure to prevent facilitation of tax evasion

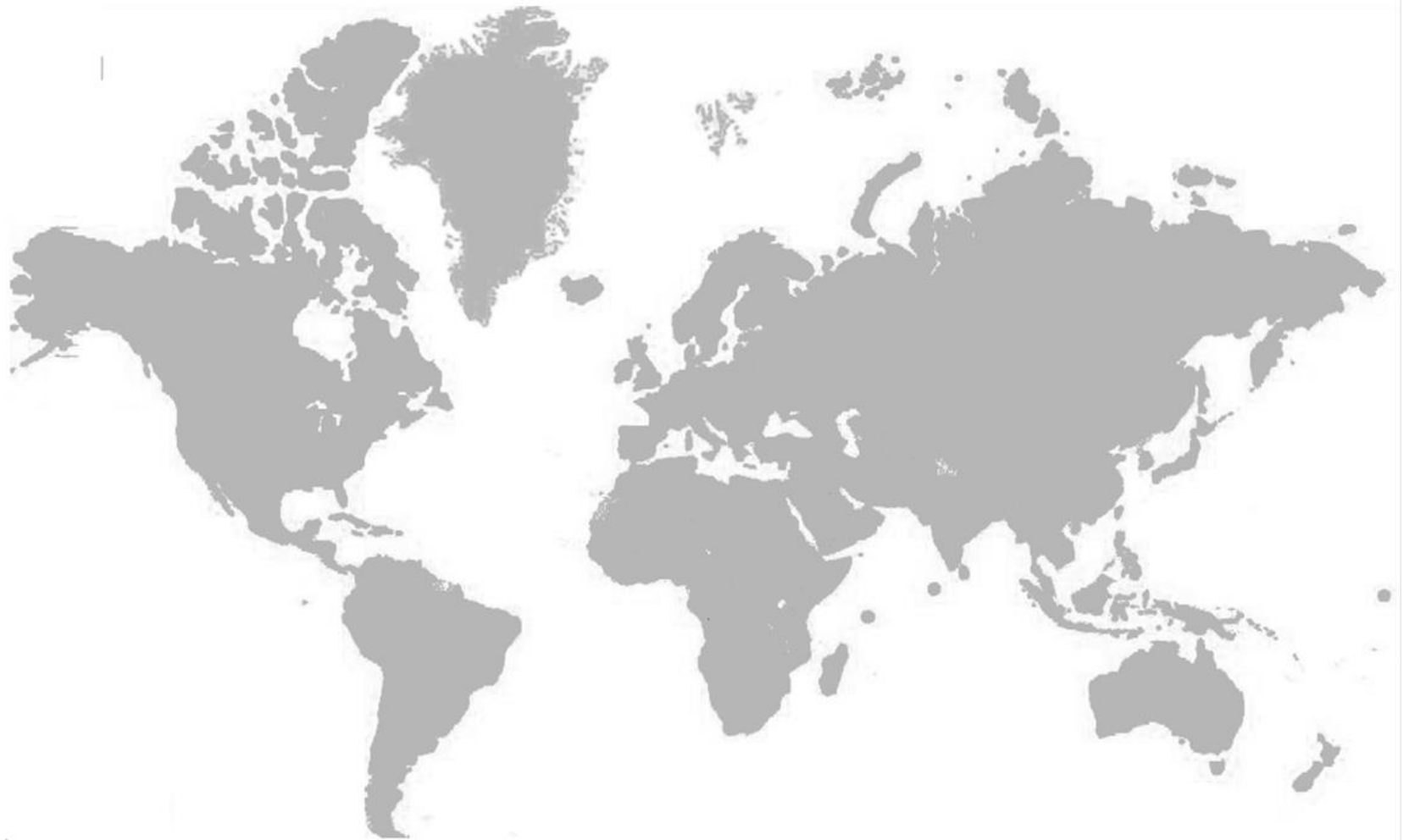


Reasonable prevention procedures: A principles-based approach

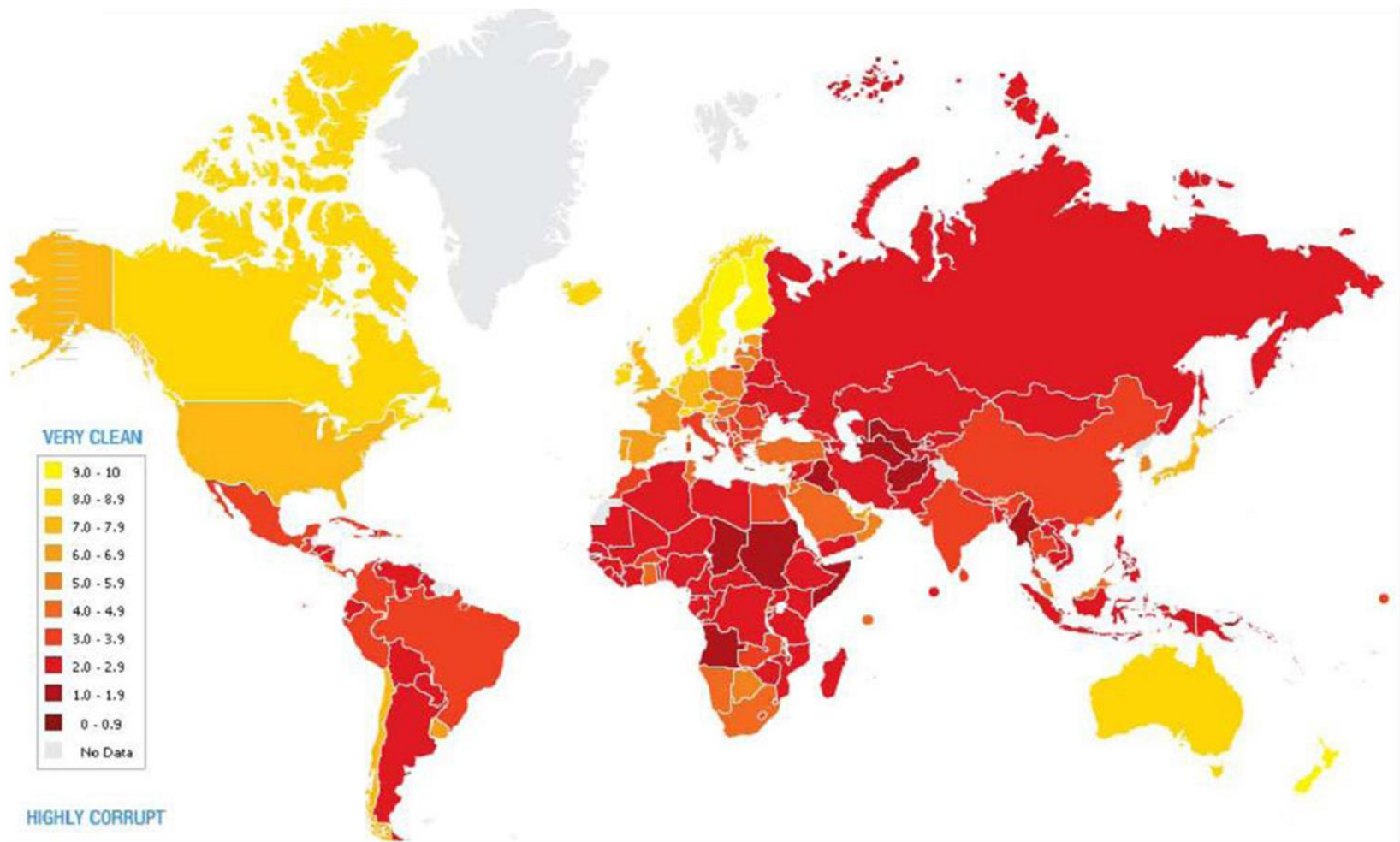


CONCLUSION

You See...



Prosecutors See...



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