



**ASSOCIATION OF EUROPEAN
BUSINESSES
IN THE RUSSIAN FEDERATION**

**The Voice of European Business
in Russia**



Main trends of the anticorruption policy: experience and tendencies

organized by AEB LEGAL COMMITTEE

December 11, 2008, Marriott Tverskaya, Moscow



**Business and Corruption:
problems of counteraction**

**Georgy Satarov,
President, INDEM fund**

AEB Open Event, December 11, 2008, Marriott Tverskaya, Moscow



ANTICORRUPTION POLICY IN RUSSIA

**Gennady Gudkov
Deputy Chairman,
RF State Duma Committee on security**

AEB LEGAL COMMITTEE OPEN EVENT

December 11, 2008, Marriott Tverskaya, Moscow



Corruption & Investment **Perspectives of Russia**

Elena Panfilova

General Director Center for Anti-corruption
Research and Initiative

Transparency International - R

AEB Open Event, December 11, 2008, Marriott Tverskaya, Moscow



Countering Money Laundering within the context of Russian legislation

Ivan Ryutov
11 December 2008



Money Laundering - Scale of Problem



In accordance with the research of International Monetary Fund (IMF), the approximate volume of Money Laundering all over the World combines to 2% - 5% of Global Gross Domestic Product.

Global Gross Domestic Product for 2007 was \$54.3 trillion (web.worldbank.org).

International Organisations involved into the Money Laundering Countering Activities

United Nations Organization (UN);

International Monetary Fund (IMF);

World Bank;

Financial Action Task Force on Money Laundering (FATF)
(www.fatf-gafi.org)

FATF was established on the G7 Summit in 1989.

Russia participates FATF since June 21, 2003

Russian regulator - RosFinMonitoring

The Committee of Financial Monitoring (CFM) was established November 1, 2001 for the purpose of Money Laundering Prevention in Russia. The CFM was reorganized to the Federal Agency of Financial Monitoring (Rosfinmonitoring) March 9, 2004.

RosFinMonitoring – main tasks

- Collection, processing and analysis in the established procedure of the information, documents and other materials on operations with monetary assets subject to control under the laws of the Russian Federation on counteracting legalization (laundering) of profits derived in a criminal way and the financing of terrorism;
- Establishment of a unified information system and keeping of a federal data base
- Direction of appropriate information to law enforcement bodies
- Interaction and information exchange with competent authorities of foreign states

FEDERAL LAW NO. 115-FZ OF AUGUST 7, 2001 ON COUNTERING THE LEGALISATION OF ILLEGAL EARNINGS (MONEY LAUNDERING) AND THE FINANCING OF TERRORISM

Goal of the Law:

Protecting the rights and lawful interests of citizens, society and the state by means of building up legal mechanism to counter the legalization of illegal earnings (money laundering) and the financing of terrorism

Applicability of the Law:

The relationships of citizens of the Russian Federation, foreign citizens and persons without citizenship, organizations accomplishing transactions in amounts of money or other property and also state bodies responsible for exercising control on the territory of the Russian Federation over the conduct of transactions in amounts of money or other property, for the purpose of preventing, detecting and putting an end to actions relating to the legalization (laundering) of illegal earnings and the financing of terrorism

Federal Law #115-FZ of August 7, 2001 - overview

The Measures for Countering the Legalization of Illegal Earnings (Money Laundering) and the Financing of Terrorism:

- ▶ compulsory bank internal control procedures;
- ▶ compulsory bank transactions control;
- ▶ a ban on informing clients and other persons about the measures taken to counter the legalization (laundering) of illegal earnings and the financing of terrorism.

Federal Law #115-FZ of August 7, 2001 - overview

The Organizations Accomplishing Transactions in Amounts of Money or Other Property

- ▶ credit organizations;
- ▶ professional participants in the securities market;
- ▶ insurance organizations and financial leasing companies;
- ▶ the organization of the federal postal service;
- ▶ pawn shops;
- ▶ the organizations buying up, purchasing or selling precious metals and gemstones, jewelry and scrap of such jewelry, etc.

Federal Law #115-FZ of August 7, 2001 - overview

Operations in Monetary Funds or Any Other Assets Subject to Compulsory Control

An operation in monetary funds or any other assets is subject to compulsory control, if the amount on which it is completed is equal to or exceeds 600 kRUR, or exceeds it, and by its character this operation refers to one of the following types of the operation:

- ▶ certain operations in monetary funds in cash
- ▶ transactions via bank accounts (deposits) were made in favor of third persons of an anonymous holder
- ▶ transactions which were made with the residents of non-cooperative countries in money laundering prevention international efforts
- ▶ other transactions in movable property: precious metals, gemstones, jewelry and scrap of such jewelry
- ▶ a transaction with immovable asset if the amount thereof is equal to or exceeds 3 mln. RUR

The information about operations which are the subject of compulsory control shall be submitted directly to the Rosfinmonitoring by the organizations carrying out operations in money or in any other assets.

Federal Law #115-FZ of August 7, 2001 - overview

The Rights and Duties of the Organizations Carrying out Operations in Money or Any Other Assets

The organizations accomplishing transactions in amounts of money or other assets shall:

- ▶ identify the client;
- ▶ take substantiated and possible in the given circumstances measures for establishing and identifying beneficiaries of payments;
- ▶ on a regular basis update information on clients and beneficiaries;
- ▶ keep documentary record of and provide the following information to the Rosfinmonitoring not later than on the working day following the date of the transaction on the transactions in amounts of money or other assets which are subject to compulsory control.

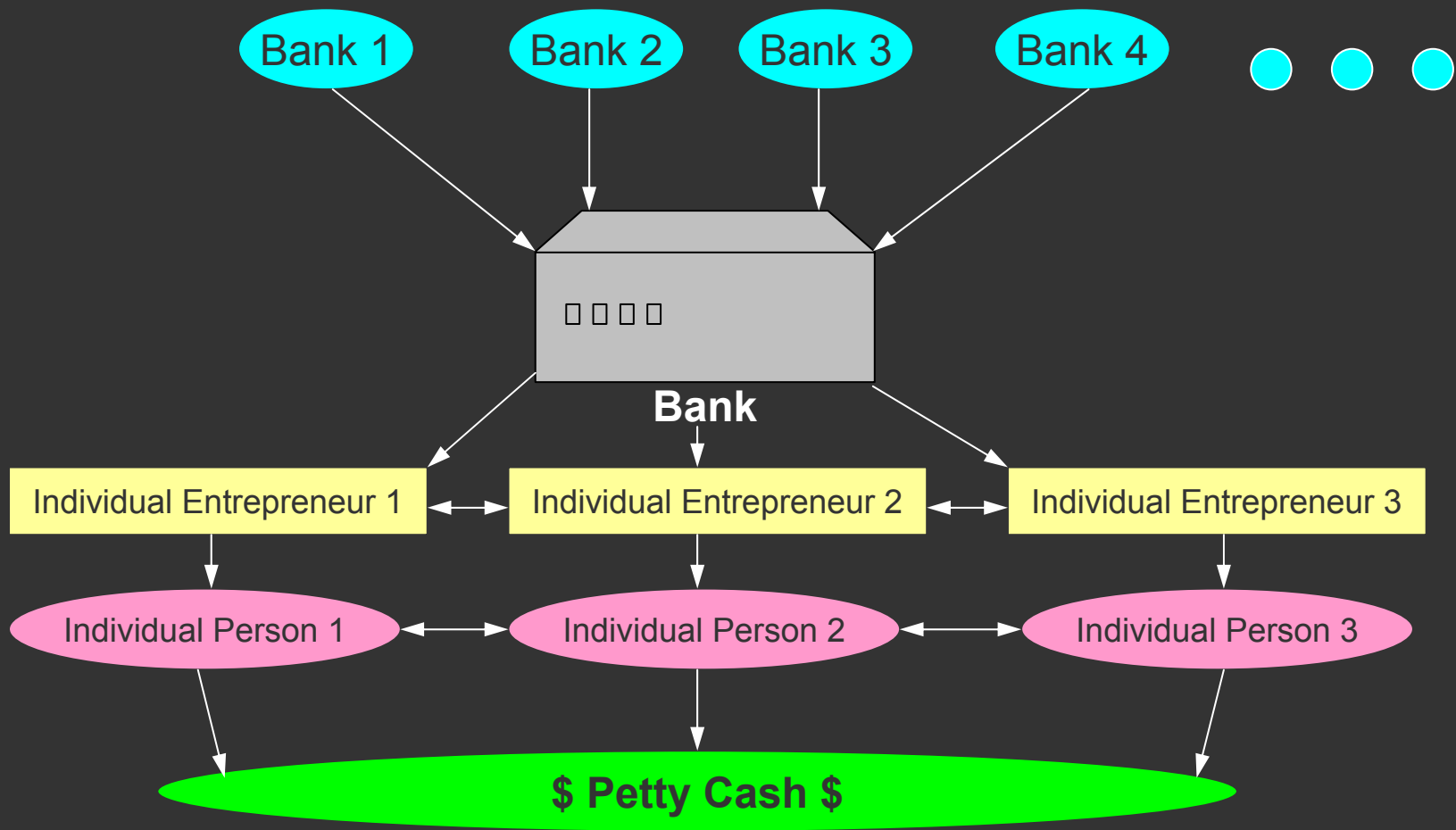
The system of Money Laundering Prevention

= I + II + III

- ▶ effective and up-to-date legislation;
 - ▶ supervision and control;
 - ▶ administration and management.
-  **I. Governmental Level Measures**
- ▶ effective internal control system and transactions monitoring;
 - ▶ KYC – know your client policy;
 - ▶ effective risk management system.
-  **II. Internal Bank Measures**
- ▶ ethical behavior of professionals;
 - ▶ audits;
 - ▶ employees trainings.
-  **III. Ethical Conduct (People)**

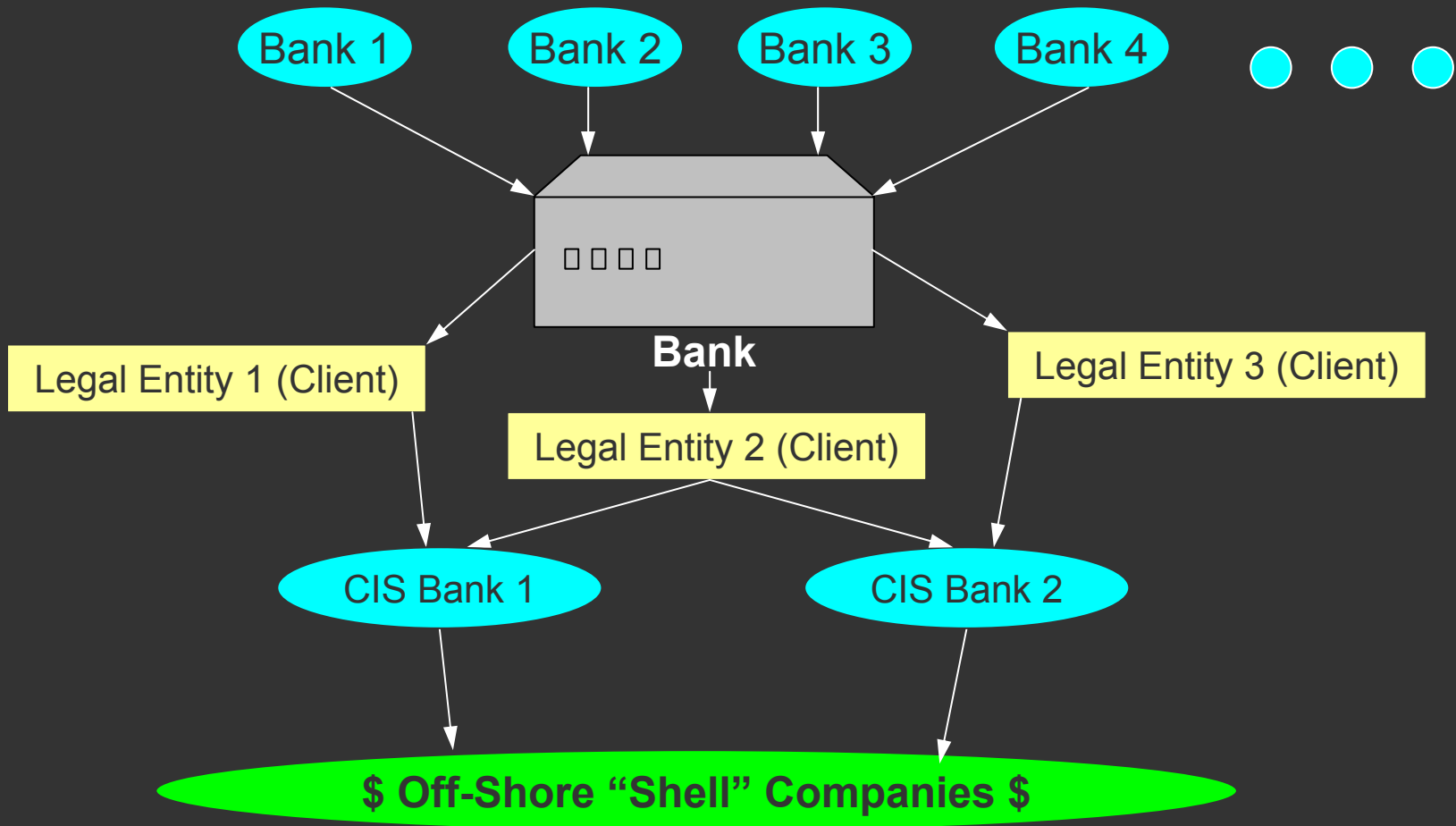
How this works?

Scheme #1: Petty Cash withdrawals



How this works?

Scheme #2: “Bank Transfer to the Shell (Off-Shore) Company”



Federal Law #115-FZ of August 7, 2001

The punishments for the Federal Law #115-FZ Violation are the following:

- ▶ Banking license suspension or revocation;
- ▶ Personal administrative, civil and criminal responsibilities.

In 2007 the 42 banking licenses were revoked by the reason of the Federal Law #115-FZ violation.



Thank You !

Ivan.V.Ryutov@ru.ey.com

(+7-495) 755-97-38





Coffee break

AEB LEGAL COMMITTEE Open Event

December 11, 2008, Marriott Tverskaya, Moscow

Anticorruption Laws: Russia's Status and Prospects

Presented by:

Rob Patterson

Maria Shangina

11 December 2008

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Some figures:

- US\$80 billion in bribes paid each year
- 40% of businesses pay bribes
- 15% in developed world pay bribes; 60% in FSU pay bribes

Corruption Perception Index by Country (Transparency International):

- Denmark/Sweden – 1/180
- Netherlands – 7/180
- Germany – 14/180
- UK – 16/180
- France – 23/180
- Italy – 55/180
- Russia – 147/180

- Russian Anti-Bribery Laws and Bills
- OECD Convention: provisions and implementation
- US Foreign Corrupt Practices Act
- Practical Guidance

РОССИЙСКОЕ АНТИКОРРУПЦИОННОЕ ЗАКОНОДАТЕЛЬСТВО

Состояние и перспективы

Меры по борьбе с коррупцией

- Уголовная ответственность за коррупционные действия
- Ограничения в отношении государственных служащих
- Ратификация международных конвенций
- Концепция административной реформы 2006-2010
- Национальный план противодействия коррупции
- «Антикоррупционный» пакет

Уголовная ответственность (1)

Преступлениями являются:

- Злоупотребление должностными полномочиями (ст. 285 УК РФ)
- Получение взятки (ст. 290 УК РФ)
- Дача взятки (ст. 291 УК РФ)
- Злоупотребление полномочиями (ст. 201 УК РФ)
- Коммерческий подкуп (ст. 204 УК РФ)
- Провокация взятки либо коммерческого подкупа (ст. 304 УК РФ)

Уголовная ответственность (2)

Особенности правового режима

- Нет исключений в отношении платежей за ускорение выполнения процедур должностными лицами
- Не установлена ответственность юридических лиц
- Не установлена ответственность за:
 - Обещание или предложение
 - Вымогательство
 - Принятие предложения или обещания
взятки или предмета коммерческого подкупа
 - Обещание, предложение или просьбу использовать полномочия вопреки законным интересам организации

Уголовная ответственность (3)

- Не установлена ответственность за коррупционные действия в отношении:
 - Должностных лиц других государств
 - Должностных лиц международных организаций
 - Членов парламентских собраний международных и наднациональных организаций
 - Судей и должностных лиц международных судов
- Не считаются взяткой подарки на сумму до 500 рублей (планируется повышение до 5000 рублей)
- Добровольные заявители освобождаются от ответственности
- Необходимо согласие или заявление потерпевшей коммерческой организации на уголовное преследование в отношении коммерческого подкупа

Ограничения в отношении госслужащих (1)

Государственным гражданским служащим запрещается:

- Осуществлять предпринимательскую деятельность
- Участвовать на платной основе в деятельности органов управления коммерческих организаций
- Участвовать в органах управления иностранных организаций
- Получать в связи с исполнением должностных обязанностей вознаграждения от физических и юридических лиц
 - Исключение: обычные подарки
- Публично высказываться о деятельности государственных органов
- Заниматься политикой

Ограничения в отношении госслужащих (2)

- Выезжать в связи с исполнением должностных обязанностей в служебные командировки за пределы РФ за счет физических и юридических лиц
 - Исключение: международные договоры
- Принимать без специального разрешения награды от иностранных государств
- В течение 2 лет после увольнения замещать должности и выполнять работу по гражданско-правовому договору в подконтрольной организации

Международные конвенции (1)

Конвенция Совета Европы об уголовной ответственности за коррупцию от 27.01.1999 г.

- Вступила в силу для России 01.02.2007 г.
- Предусматривает установление уголовной ответственности за коррупционные действия

Конвенция ООН против коррупции от 31.10.2003 г.

- Вступила в силу для России 08.06.2006 г.
- Предусматривает:
 - Меры по предупреждению коррупции
 - Установление уголовной ответственности за коррупционные действия
 - Установление ответственности юридических лиц

Международные конвенции (2)

- Термин «подкуп» включает:
 - Обещание, предложение или предоставление, прямо или косвенно, какого-либо неправомерного преимущества
 - Испрашивание или получение, прямо или косвенно, какого-либо неправомерного преимущества для себя или любого иного лица
 - Принятие предложения или обещания такого преимущества

Концепция административной реформы (1)

- Включает цели:
 - Оптимизация функционирования органов исполнительной власти
 - Введение механизмов противодействия коррупции в сферах деятельности органов исполнительной власти
- Предполагает:
 - Ликвидацию избыточных и дублирующих функций государства
 - Оптимизацию реализации контрольных и надзорных функций
 - Разработку и внедрение системы аутсорсинга административно-управленческих процессов
 - Повышение эффективности системы закупок для государственных нужд

Концепция административной реформы (2)

- Особые меры по противодействию коррупции
 - Разработка типовых механизмов государственного регулирования в коррупционно опасных сферах
 - Разработка ведомственных и региональных антикоррупционных программ
 - Внедрение ведомственных антикоррупционных программ в органах исполнительной власти
 - Разработка методики экспертизы нормативных правовых актов и их проектов на коррупциогенность
 - Проведение экспертизы нормативных правовых актов и их проектов на коррупциогенность

Национальный план противодействия коррупции

- Законодательное обеспечение противодействия коррупции
 - Принятие «антикоррупционного» пакета
- Совершенствование государственного управления
 - Улучшение государственного управления в социально-экономической сфере
 - Устранение дискриминации при доступе к инфраструктуре естественных монополий
 - Совершенствование порядка государственных закупок
 - Совершенствование функционирования государственного аппарата
 - Сокращение численности государственных и муниципальных служащих
 - Создание в госорганах подразделений по профилактике коррупционных правонарушений
- Повышение профессионального уровня юридических кадров и правовое просвещение

«Антикоррупционный» пакет (1)

- Включает:
 - Проект Федерального Закона «О противодействии коррупции»
 - Проекты изменений в 25 федеральных законов
- Принят в 1 чтении 07.11.2008 г.
- Устанавливает направления антикоррупционной деятельности государственных органов:
 - Создание механизмов общественного контроля за деятельностью государственных органов
 - Обеспечение доступа граждан к информации о деятельности органов власти и местного самоуправления
 - Устранение необоснованных запретов и ограничений, особенно в области экономической деятельности
 - Совершенствование порядка прохождения государственной и муниципальной службы, включая обязанности государственных служащих

«Антикоррупционный» пакет (2)

- Устанавливает требования к государственным служащим:
 - Регулярно представлять сведения о доходах, имуществе и обязательствах
 - Сообщать:
 - О совершении коррупционных правонарушений
 - О непредставлении сведений о доходах, имуществе и обязательствах
 - Об обращениях в целях склонения к совершению правонарушений
 - Принимать меры по предотвращению и урегулированию конфликта интересов, в т.ч.:
 - Передавать ценные бумаги в доверительное управление
 - Получать предварительное согласие на замещение должностей в организациях в течение 2 лет после увольнения с государственной службы

«Антикоррупционный» пакет (3)

- Уточняет статус судей:
 - Устанавливает требования к:
 - Квалификации и опыту работы
 - Характеристикам с предыдущих мест работы
 - Состоянию здоровья
 - Отсутствию судимости
 - Ужесточает запреты на занятие бизнесом и политическую деятельность
 - Упрощает процедуру возбуждения уголовного дела в отношении судьи
- Ужесточает ответственность за коррупционные действия:
 - Устанавливает дисциплинарную ответственность, включая увольнение
 - Вводит административную ответственность юридических лиц
 - Ужесточает уголовные наказания

OECD CONVENTION

OECD Convention (1)

- Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
- Signatory countries must pass laws that make it a crime to bribe foreign officials in business transactions.

OECD Convention (2)

- Each signatory must make it a criminal offence:
“for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.”

OECD Convention (3)

- A “foreign public official” is:
 - any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected,
 - any person exercising a public function for a foreign country, including for a public agency, public enterprise,
 - any official or agent of a public international organisation.”

OECD Convention Signatory Parties

Argentina	Australia	Austria	Belgium
Brazil	Bulgaria	Canada	Chile
Czech Republic	Denmark	Estonia	Finland
France	Germany	Greece	Hungary
Iceland	Ireland	Italy	Japan
Korea	Luxembourg	Mexico	Netherlands
New Zealand	Norway	Poland	Portugal
Slovak Republic	Slovenia	South Africa	Spain
Sweden	Switzerland	Turkey	United Kingdom
United States			

Other Conventions

- UN Convention against Corruption dated 31 October 2003
 - Ratified by Russia in 2006
- Council of Europe Criminal Law Convention on Corruption dated 27 January 1999
 - covers making a bribe to domestic and foreign public officials, domestic official receiving a bribe, and accounting offenses
 - Ratified by Russia in 2006
- OAS Convention Against Corruption
 - requires signatory States to criminalize both domestic and foreign bribery and to enact measures to combat “illicit enrichment” of government officials
 - Russia not a party
- Extractive Industries Transparency Initiative

UK REGULATIONS

Current UK Legislation

- Common law offence of bribery of a public official
- Public Bodies Corrupt Practices Act 1889
- Prevention of Corruption Acts 1906 and 1916
- Anti-Terrorism, Crime and Security Act 2001
 - Extends common law offence of bribery to persons holding public office outside the UK
 - Ensures the corruption offences in the 1889 and 1906 Acts cover the corruption of foreign public officials and foreign 'agents'
 - Extends jurisdiction of the UK courts to consider corruption and bribery offences committed by UK nationals or UK incorporated bodies in countries outside the UK
- Recent (20 November 2008) Law Commission Report

UK Law – Criminal Offences – Public Bodies

- Making Payments -
 - UK national/entity
 - corruptly gives or offers
 - any gift, loan, fee or advantage
 - to induce officer of public body
 - to do anything in respect of any matter or transaction
- Receiving such payments is also an offence
- Public body
 - probably any body performing any statutory duty for benefit of public
 - e.g. government departments, regulators, licensing authorities
- Recipient may be anywhere inside or outside UK

UK Law – Criminal Offences – Agents

- Making Payments -
 - UK national/entity
 - corruptly gives or offers
 - to any agent
 - any gift or consideration
 - as inducement/reward for any act relating to principal's affairs
- Receiving such payment is also offence
- Agent
 - person employed by, or acting for, another person
 - private or public sector
- Outside or inside UK

UK Law – Consequences of Violation

- 7 years imprisonment and/or an unlimited fine
- Company Directors Disqualification Act 1986
- The Proceeds of Crime Act 2002
- ECGD may invalidate cover, deny indemnification, interrupt loan disbursement and seek recourse from a corrupt entity

UK Law – Recent Proposals

November 2008 Law Commission Report:
proposes 2 new offences:

- bribing a foreign public official
- negligently failing to prevent bribery by an employee or agent

OECD – Implementation Elsewhere

France: Act No. 2000-595 of 30 June 2000
amending the Criminal Code

Germany: Act on Combating Bribery of Foreign
Public Officials

Italy: Article 322(2) of the Criminal Code

US REGULATIONS

US Foreign Corrupt Practices Act (FCPA)

The FCPA generally:

- prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business
- requires public companies to keep accurate books and records and maintain system of internal accounting controls

Enforced by DOJ and SEC.

FCPA – To whom does it apply? (1)

The anti-bribery provisions apply to:

- Any “issuer” (including foreign companies with ADRs trading on a US exchange)
- Any “domestic concern” (individual who is a citizen, national, or resident of U.S., and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship with its principal place of business in U.S. or organized under U.S. law)
- Any officer, director, employee, or agent of an issuer or domestic concern which makes use of instrumentalities of interstate commerce for payment prohibited under FCPA

FCPA – To whom does it apply? (2)

- Any U.S. person, if corrupt activity takes place outside U.S.
- Any entity which has its principal place of business in U.S., or which is organized under the laws of U.S. State or territory, if corrupt activity takes place outside the U.S.
- U.S. companies may be held liable for actions taken by agents outside of U.S.
- Any person or entity that commits any act in furtherance of corrupt payment in U.S.

FCPA – Penalties – Anti-Bribery Provisions ^{V&E}

I. Corporations or Other Entities

- \$2,000,000 fine (criminal)
- \$10,000 civil penalty
- Alternative fine can be up to twice gross gain to defendant or loss to victim

II. Officers, Directors and Other Persons Willfully Violating (Criminal)

- \$100,000 fine (or alternative fine)
- 5 years, or both

III. U.S. Employees or Agents (Criminal)

- \$100,000 fine (or alternative fine)
- 5 years, or both

I. SEC Civil Enforcement Action

- Additional fine not to exceed the greater of the gross amount of the pecuniary gain to the defendant as a result of the violation, or
- A specified dollar limitation based on the severity of the violation, ranging from \$5,000 to \$100,000 for a natural person and \$50,000 to \$500,000 for any other person.

II. DOJ or SEC may also bring a civil action to enjoin any act or practice of a company that appears to or will violate the FCPA

FCPA – Anti-Bribery Provisions (1)

The FCPA anti-bribery provisions prohibit:

1. The making of a payment or a gift (or an offer, or promise, of a payment or gift) of money or anything of value;
2. directly to any foreign governmental official (including officers or employees of a foreign government, department, or agency, or a public international organization, officials or employees of state-owned enterprises), to any foreign political party or official thereof, or to any foreign political candidate;
3. or indirectly to such persons, through any person, "while knowing" that the payment, gift, etc., will be passed on;
 - “knowing” includes conscious disregard/deliberate ignorance
 - “knowing” inferred where circumstances show high probability of improper payment

FCPA – Anti-Bribery Provisions (2)

4. if the purpose of the payment or gift is (a) to influence any act or decision of the foreign official in his official capacity, (b) to induce such official to do or omit to do any act in violation of his lawful duty, (c) to induce him to use his influence with the foreign government; or (d) to secure any improper advantage;
 - 1982 DOJ Advisory Opinion regarding business/entertainment gifts
 - nominal value; not cash; provided as courtesy, token of esteem, expression of gratitude; permitted under local law; of type and value that are unequivocally customary and appropriate for the occasion
5. in order to help the payer/giver obtain or retain business or direct business to anyone;
6. provided that some action in furtherance of the transaction took place in the United States, or the payment was made by a U.S. person or entity acting in another country.

FCPA – Affirmative Defenses

- I. Payment or Gift was Legal under Written Laws and Regulations of Host Country
- II. Payment was for Reasonable and Bona Fide Expenditures, such as Travel and Lodging, Incurred by or on behalf of Recipient and Directly Related to:
 - A. Promotion or demonstration of goods and services or
 - B. Execution or performance of contract with foreign government or agency

FCPA –“Facilitating Payment” Exception

- I. FCPA does not apply to facilitating/expediting payments to foreign recipient to expedite/secure performance of “Routine Governmental Action”
- II. Means Only Actions Ordinarily and Commonly Performed In certain defined actions, including:
 - A. Obtaining permits/licenses to qualify person to do business;
 - B. Processing government papers such as visas or work orders;
 - C. Providing police protection;
 - D. Providing utility services, protecting perishable goods.
- III. Excludes “any decision by a foreign official . . . or action taken by a foreign official to encourage a decision... to award new business to or to continue business with a particular party.”

PRACTICAL GUIDANCE

Preventative Measures (1)

- I. Establish Anti-Corruption Compliance Program that:
 - A. Establishes standards and procedures
 - B. Places senior official(s) in position to oversee compliance
 - C. Trains employees, agents, and consultants
 - D. Implements disciplinary mechanism for violators
 - E. Periodic audit/review of program

For FCPA purposes SEC/DOJ consider whether internal controls were in place in deciding whether to bring enforcement action or extent of penalty in event of violation.

Preventative Measures (2)

II. Use Caution in Hiring Agents

- A. Agreements with Agents to include representations/undertakings regarding compliance with FCPA and other laws
- B. Due Diligence – investigate potential agents before entering business agreement to determine:
 - qualifications
 - ties to foreign governments/officials
 - number and reputation of clientele
 - reputation with Embassy or Consulate and local bankers, clients, and other business associates
- C. Be aware of “red flags” when dealing with Agents:
 - refusal to agree compliance provisions
 - lack of transparency in accounting/expense records
 - apparent lack of qualifications/resources to perform services

III. Keep Transparent and Accurate Books and Records

I. DOJ Opinion Procedure

- FCPA Opinion Procedure – U.S. company may request statement of DOJ's enforcement intentions regarding proposed business conduct
- Opinions not binding “precedent” but provide guide for what DOJ considers to be appropriate conduct

II. Voluntary Disclosure

- Voluntary disclosure of potential violations to DOJ/SEC may avoid or mitigate enforcement action
- SEC and DOJ consider controls in place, disclosure, and any remedial action taken

New Investments/Acquisitions

- Why Important?
 - Liability of target
 - Liability of management
 - Disruption Risk
 - Reputation Risk
- Due Diligence
 - Sellers
 - Target and target's business
 - Intermediaries/introducers.
- Robust reps and warranties regarding anti-corruption compliance

THANK YOU

Vinson & Elkins LLP

Novinsky Boulevard, 31, 6th Floor
123242, Moscow, Russian Federation

Tel +(7) 495.544.5800

Fax +(7) 495.544.5801



Main trends of the anticorruption policy: experience and tendencies

AEB LEGAL COMMITTEE OPEN EVENT

December 11, 2008, Marriott Tverskaya, Moscow

Self-cleaning: A tool to fight corruption in public procurement

Dr Hans-Joachim Prieß
Moscow, December 11, 2008

DAC4462341



FRESHFIELDS BRUCKHAUS DERINGER

Introduction

Procurement Law Sanctions for Corruption: Exclusion/Debarment

- As a general rule public procurement law provides for excluding tenderers who are unreliable
- Corruption leads to unreliability of the tenderer
- Tenderers face a choice if they find out about corrupt practices:
 - either keep quiet and try to hide what happened
 - or self-clean themselves, ensuring no recurrence of corruption
- Legal policy goal: promote self-cleaning in order to prevent corruption
- Incentive: self-cleaned tenderers are not excluded/debarred from public tenders



Concept of Self-cleaning

- Unreliable tenderer takes effective measures to ensure that wrongful acts will not recur in the future and thereby regains reliability:
 - personnel measures
 - implementation of a strict state-of-the-art compliance system



Self-cleaning in other Jurisdictions

- European institutions' procurement rules: Article 133a para 1 of Regulation 2342/2002/EC
- Austria: Section 73 (1) Federal Procurement Act
- Italy: Article 38 lit. d) of the Code on Public Works, Supplies and Service Contracts
- Germany: Well established case-law but no statutory provision
- Non-European jurisdictions: Israel, Mexico, USA,



Concept of Self-cleaning

Requirements

Concept of Self-cleaning – Requirements

- Clarification of the relevant facts and circumstances
- Cooperation with prosecutors and regulatory authorities
- Repairing the damage
- Personnel measures
- Structural and organisational measures (compliance system)



Clarification of Facts

- Tenderer should actively contribute to clarifying the facts and the responsibilities of all persons involved in a quickly and comprehensive manner
- Clarification could ideally be achieved through special audits by outside certified public accountants or other independent persons

Cooperation with Prosecutors and Regulatory Authorities

- Active cooperation
- No destruction of evidence (World Bank Case)



Repairing the Damage

- If the tenderer has caused any financial damage he should pay damages or compensation to competitors and contracting authorities/tax authorities
- This may also be done quickly by recognizing an obligation to pay damages and the amount of such damages in a binding manner



Personnel Measures

- The tenderer should dismiss primarily responsible partners, executives and employees concerned, immediately and comprehensively
- The tenderer has to ensure that all persons who have been involved in the wrongdoing are given notice of dismissal in accordance with the relevant provisions of labor law
 - Area of conflict between two legal regimes; difficult for companies in practice to solve this conflict
- In cases where the participation was of a less serious nature less severe measures may be applied (reprimand, relocation etc.)



Structural and Organisational Measures (1)

Tenderer should take a broad spectrum of preventive measures, which may comprise:

- Promulgation of binding company guidelines
- In-house training for staff members
- Establishment of an effective internal control system
- Introduction of regular staff rotation



Structural and Organisational Measures (2)

- Separation of administrative and operational departments
- Appointment of a compliance officer or an ombudsman
- Introduction of a value management process



Complementary Measure by Contracting Authorities: Integrity Pacts

- Agreement between contracting authority or other authorities and private undertakings which contains rights and obligations, e.g.:
 - duty of both sides not to engage in corruption related conduct
 - duty to disclose certain facts e.g. to the Commission and similar expenses paid in connection with particular contract
 - acceptance of sanctions if obligations are not met (i.e. contractual penalties, debarment etc.)
- Examples: India, Germany



Concept of Self-cleaning

Legal Classification

Concept of Self-cleaning – Legal Classification

- Exception to the public procurement rules on exclusion/debarment due to unreliability
- Required by principles of proportionality and equal treatment



Principle of Proportionality

- Exclusion of corrupt tenderers is justified in order to ensure that public authorities do not contract with unreliable tenderers
- Self-cleaning measures assure that corruption related activities will not recur, therefore a self-cleaned tenderer is not unreliable any more
- In order to ensure that the government does not contract with unreliable tenderers exclusion is no longer necessary



Principle of Equal Treatment

- Candidates who have taken comprehensive and promising self-cleaning measures have to be treated differently from candidates who have made no effort to eliminate the causes of their wrongdoings
- No objective justification for treating both groups equally, as successful self-cleaning measures ensure that the reliability of the tenderer is restored



Concept of Self-cleaning

Compatibility with Political and Economic
Objectives of Exclusion

Political and Economical Objectives of Exclusion

- Self-cleaning measures serve political and economical objectives of exclusion
- Objectives of exclusion:
 - Protection of public funds
 - General preventive effect
 - Fair competition



Protection of Public Funds

- Self-cleaning measures effectively prevent corruption related activities from recurring
- Admission of self-cleaned tenderers to the award procedure enhances competition, since potentially more companies take part in the procurement
- More competition implies more offers to choose from and may also contribute to reducing the offering price, which, in turn, benefits public funds



General Preventive Effect

- Self-cleaning measures do not question the deterrent effect of exclusion
- General preventative effect of exclusion provisions is not reduced by the admission of exceptions in reasoned individual cases
- Self-cleaning measures require a substantial investment of time and money, without a guarantee of recognition by procurement offices



Fair Competition

- Self-cleaning measures ensure that competition is on a level playing field
- Reparation for damages and costs for implementing strict compliance systems rebalance illegal advantages gained by corruption
- Tenderer has no advantage over its competitors that needs to be remedied by an exclusion
- To the contrary, because there remains no advantage it would be incompatible with the objective of fair competition to exclude the tenderer



Contact:

Dr Hans-Joachim Prieß, LL.M.
Partner
Freshfields Bruckhaus Deringer
Potsdamer Platz 1
10785 Berlin/GERMANY

Phone: 030 20 28 36 00

Fax: 030 20 28 37 66

E-Mail: hans-joachim.priess@freshfields.com



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Company internal controls to prevent corruption

Tjerk Schlufte
General Counsel Russia/Central Asia

Moscow, December 11, 2008

Create environment to ensure effective controls

communicate clear rules (Code of Ethics, Business Conduct Guidelines)

assess the corruption exposure of the company, detect current weaknesses

allocate sufficient and well - qualified resources to manage and monitor controls, empower them accordingly and provide necessary budget

ensure independence of control departments (reporting to Company Management or Supervisory Board)

Corruption prevention is Management Task (communication, review)

Trainings for control staff

provide easy access to assistance for employees (Helpdesks)

Customers

Have an overview over company's spending on gifts, sponsoring, funding, donations (e.g. one account for these expenses)

Install transparent approval processes for these expenses

Set up a clear gift policy (and control it)

Encourage customers to raise corruption concerns anonymously (via hotline or an independent ombudsman)

Assess your corruption risk for every major project (depending on branch, country etc.)

Procurement

Involve supply chain in anticorruption efforts
(commitment to Code of Ethics etc.)

Conduct checks on suppliers (due diligences) and their key personnel

Setup a transparent procurement policy (i.e. segregation of ordering and payment processes)

Additional controls for special types of supply agreements (Consulting agreements, other service agreements, intermediaries) – e.g. additional approval by independent department (e.g. compliance officer)

Demonstrate that standards set are not only paper expectations
(respond to violations, conduct regular audits)

Payments

Reduce cash transaction to an absolute minimum

Know all back accounts in the company, centralize payments

Install a process to identify and approve high risk payments
(even amounts, recipient is government intermediary, consultants).

No payment without invoice

3-way match: order, invoice and confirmation of services received

establish process for exceptions in cases where not applicable

Segregation of duties

Personnel Processes

commit personnel to compliant behavior (as integral part of labour contracts)

Train personnel on compliance issues

ensure ethical history and perception of senior management

encourage personnel to raise corruption concerns to management or
anonymously through an ombudsman

Incentivize compliant behavior and anticorruption efforts of personnel

sanction violations

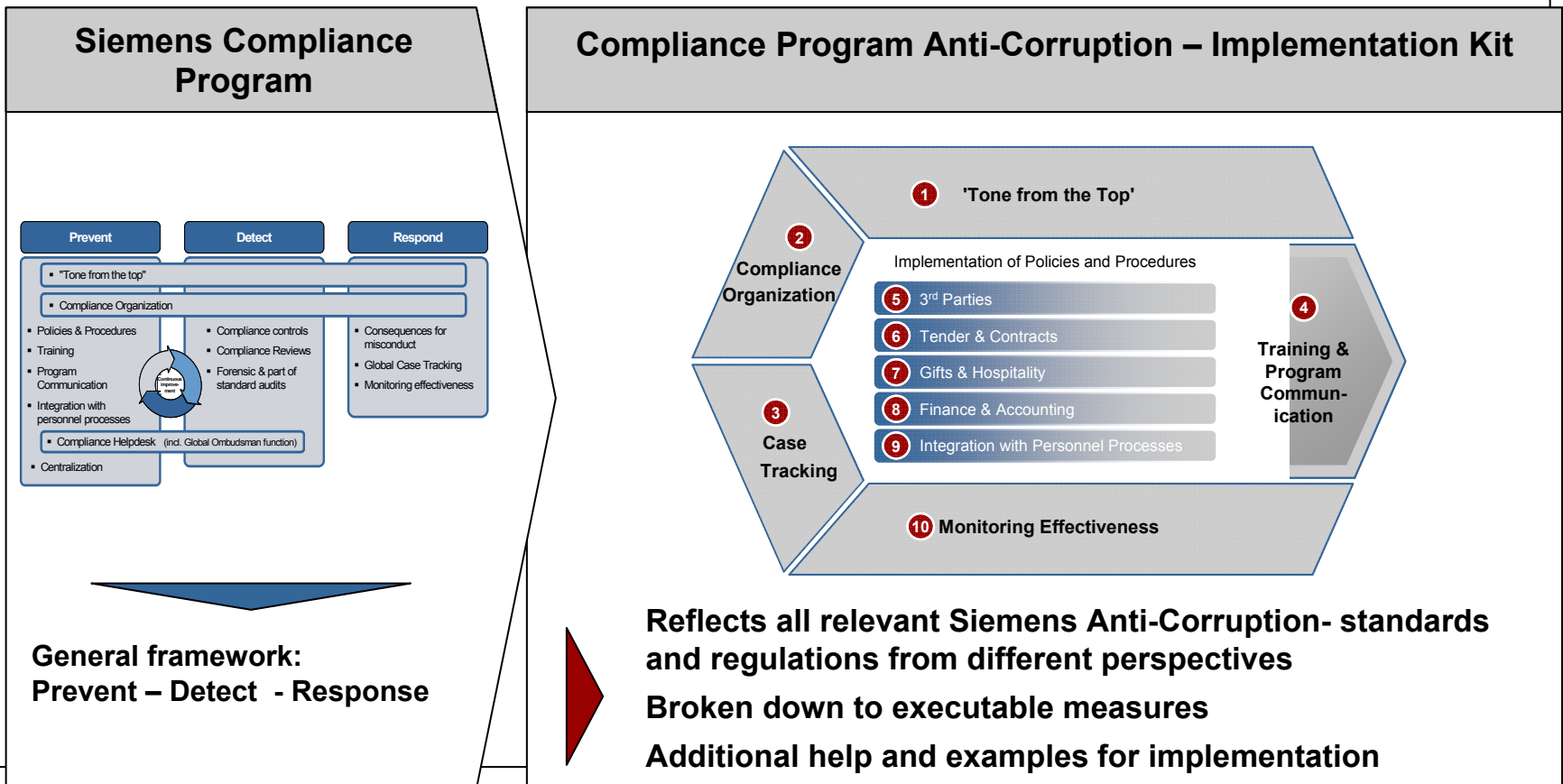
M&A

focus on compliance issues in the preparation of M&A transactions (due diligence)

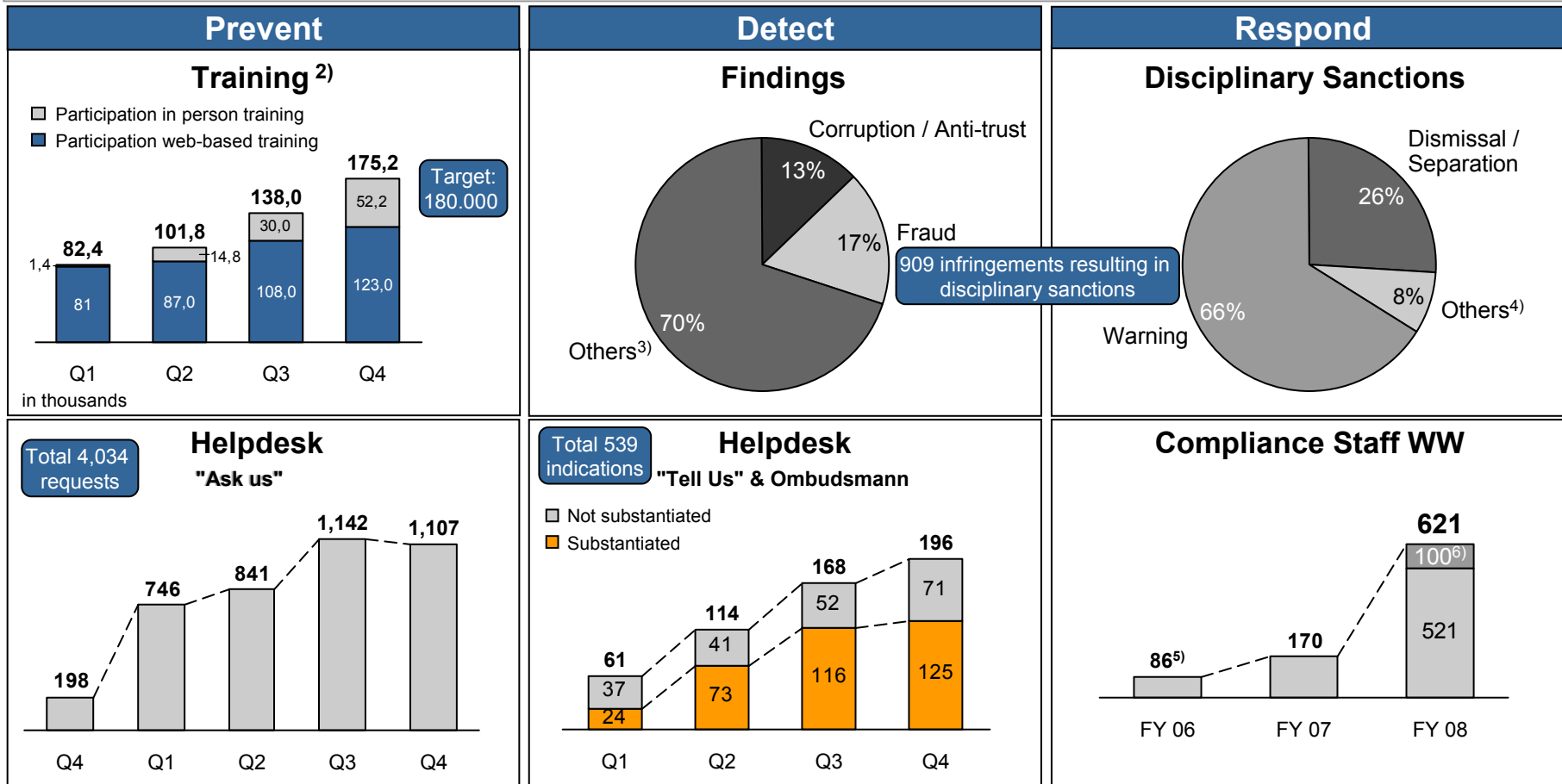
commit future partner on compliance

"Compliance Program Anti-Corruption – Implementation Kit" **SIEMENS** covers all relevant Siemens standards and regulations

Interrelation of Compliance Program and Implementation Kit



Compliance – Progress Report FY 2008¹⁾



- Compliance Roadshows in more than 50 countries
- Compliance Perception Survey: Overall positive perceptions of Siemens' compliance performance (score in Compliance Performance Index 81%)
- Anti-corruption compliance remediation program in all large and medium sized entities implemented



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