

2022

The Transnational Effects of Anti-Corruption Prosecutions By the US and How They Influence Societies, Based on the Examples of the FCPA Enforcement in Ukraine and Russia

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Recommended Citation

Imedidze, Anastasiia, "The Transnational Effects of Anti-Corruption Prosecutions By the US and How They Influence Societies, Based on the Examples of the FCPA Enforcement in Ukraine and Russia" (2022).

Dissertations and Honors Papers. 6.

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THE TRANSNATIONAL EFFECTS OF ANTI-CORRUPTION PROSECUTIONS BY THE US AND HOW THEY INFLUENCE SOCIETIES, BASED ON THE EXAMPLES OF THE FCPA ENFORCEMENT IN UKRAINE AND RUSSIA

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INTRODUCTION

The Foreign Corrupt Practice Act (FCPA) was the first extraterritorial law in the world that defined corruption of foreign officials as a crime instead of a means to “grease the wheels.” Cooperation with the Organization for Economic Cooperation and Development (OECD) and foreign countries made it possible to put that principle into practice. That changed and continues to change the way businesses develop worldwide, framing acceptable and plausible business practices.

Although all countries have their own legal traditions and cultures of doing business that might not eagerly accept the new anti-corruption rules, American companies establish their own standards consistent with the FCPA principles in the local environment. That allows American businesses to affect the systems of foreign countries “from the bottom:” local business partners have to accept and adhere to an anti-corruption framework that might be completely new for them.

In turn, FCPA enforcement proves the effectiveness of compliance systems for both companies that apply them and societies where violations take place. On one hand, compliance programs help organizations to minimize the burden of sanctions; on the other hand, such enforcements may uncover pivotal problems inherent to a specific society and may trigger changes.

I. Era of the FCPA

As a response to the numerous US businesses that made millions on bribing foreign officials, President Carter signed the FCPA in December 1977.¹ This federal law has extraterritorial effect that is applied to a broad category of persons: both those who have

¹ FCPA Enforcement Against U.S. and Non-U.S. Companies, Michael S. Diamant, Christopher W.H. Sullivan, Jason H. Smith, Michigan Business and Entrepreneurial Review Volume 8, Issue 2, 2019, 353-379p., p.356; <https://www.gibsondunn.com/wp-content/uploads/2019/09/Diamant-Sullivan-Smith-FCPA-Enforcement-Against-U.S.-and-Non-U.S.-Companies-Michigan-Business-Entrepreneurial-Law-Review-Spring-2019.pdf>.

formal ties with the US, and those who participate in furtherance of illegal activity while in the US.²

The FCPA has two parts: antibribery provisions that are enforced by the Department of Justice, and record keeping provisions that are enforced by the Securities Exchange Commission.³ Antibribery provisions prohibit:

“the use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to . . . any foreign official for purposes of . . . influencing any act or decision of the foreign official . . . securing any improper advantage; or . . . inducing such foreign official to use his influence with a foreign government or instrumentality thereof . . . in order to assist [the company] in obtaining or retaining business for or with, or directing business to, any person.”⁴

The record keeping provisions are applicable to the companies that trade their securities in the US and require such companies “to (a) make and keep books and records that accurately and fairly reflect the transactions of the corporation and (b) devise and maintain an adequate system of internal accounting controls.”⁵ False records in the books do not have to be linked to bribes to trigger enforcement of the FCPA’s bribery provisions.⁶

II. Anti-Corruption Compliance in US Companies

1. Trend on Corporate Anti-Corruption Compliance Programs

The US companies and some non-US companies became the subject of the FCPA after its enactment, but actual enforcement under this Act was not active: for the first two decades the DOJ and SEC initiated approximately 3 cases a year.⁷ After the Enron case, the government

² The Foreign Corrupt Practices Act: An Overview (January 2010); <https://www.jonesday.com/en/insights/2010/01/the-foreign-corrupt-practices-act-an-overview>.

³ Can Global Organizations use Values-Based Leadership to Combat Briberies and Corruption? Joseph J. Lestrage, Yulia Tolstikov-Mast, *Journal of Leadership, Accountability and Ethics* vol. 10(4) 2013, 41-56p., p. 43; http://www.na-businesspress.com/JLAE/Tolstikov-MastY_Web10_4_.pdf.

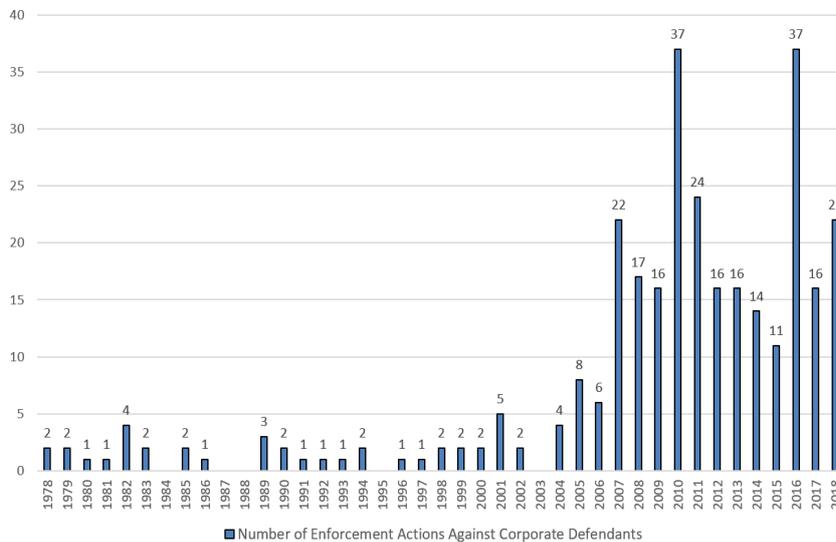
⁴ 15 U.S.C. § 78dd-1(a).

⁵ <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>.

⁶ 15 U.S.C. § 78dd-1(a).

⁷ FCPA Enforcement Against U.S. and Non-U.S. Companies, Michael S. Diamant, Christopher W.H. Sullivan, Jason H. Smith, *Michigan Business and Entrepreneurial Review* Volume 8, Issue 2, 2019, 353-379p., p.357;

seemed to pay close attention to companies' accounting and management procedures, as well as to cross-border transactions as the result of the US PATRIOT Act enactment⁸ in 2001.



<https://www.gibsondunn.com/2018-year-end-fcpa-update/>

It was long thought that the FCPA hinders business of US companies abroad in comparison with other companies that actively use bribery as a means of obtaining contracts and foreign markets. However, it was discovered that anti-corruption compliance is beneficial for companies. Most companies were willing to improve their corporate governance where it influenced external reputation. Companies that had robust anti-corruption systems experienced about 50% less corruption violations than companies without such systems and the business performance of the companies with anti-corruption compliance was more successful in comparison with the peers who used bribes.⁹

Now, under the pressure of the FCPA, the Anti-Bribery Conventions of the OECD and United Nations Organizations (UNO), the UK Bribery Act, and other anti-corruption

<https://www.gibsondunn.com/wp-content/uploads/2019/09/Diamant-Sullivan-Smith-FCPA-Enforcement-Against-U.S.-and-Non-U.S.-Companies-Michigan-Business-Entrepreneurial-Law-Review-Spring-2019.pdf>.

⁸ Can Global Organizations use Values-Based Leadership to Combat Briberies and Corruption? Joseph J. Lestrangle, Yulia Tolstikov-Mast, *Journal of Leadership, Accountability and Ethics* vol. 10(4) 2013, 41-56p., p. 43; http://www.na-businesspress.com/JLAE/Tolstikov-MastY_Web10_4_.pdf.

⁹ Can Global Organizations use Values-Based Leadership to Combat Briberies and Corruption? Joseph J. Lestrangle, Yulia Tolstikov-Mast, *Journal of Leadership, Accountability and Ethics* vol. 10(4) 2013, 41-56 p., p. 46; http://www.na-businesspress.com/JLAE/Tolstikov-MastY_Web10_4_.pdf.

legislation, combatting bribery and establishing anti-corruption systems in organizations became a trend.¹⁰ The OECD research found that the decision to establish compliance systems inside a company was in most cases affected by one of these reasons: (1) governmental requirement (26 out of 124 respondents – 21%), (2) the company board's requirement to elaborate the anti-corruption program (37 respondents – 29.8%, or (3) the company's executive management decision to establish the anti-corruption program (41 respondent – 33.1%). However, external and internal incentives might work together when a governmental authority requires a compliance program, and the board or management decides to do the same.¹¹

Also, respondents were asked about the motivation to develop an anti-corruption program: for 35 respondents out of 60 (58.3%), reputation was the top priority; for 19 respondents out of 60 (31.7%), avoidance of prosecution or other legal actions was the top priority.¹² Among other motives that were not measured were: to improve an organization's culture; to bid for customers and investors and require them to keep up with the company's established standards; to adhere to changes in home country legislation; and, to keep up with changes in the company's business activities.¹³ As we can see, companies caught the trend of compliance programs that was started by governments and realized how take advantage of it.

2. Anti-Corruption Compliance Programs in the US

As to the US, anti-corruption compliance programs are not obligatory for companies (except maybe some specific industries like banking), although they may help to mitigate or

¹⁰ Can Global Organizations use Values-Based Leadership to Combat Briberies and Corruption? Joseph J. Lestrangle, Yulia Tolstikov-Mast, *Journal of Leadership, Accountability and Ethics* vol. 10(4) 2013, 41-56p., p. 43; http://www.na-businesspress.com/JLAE/Tolstikov-MastY_Web10_4_.pdf.

¹¹ OECD (2020), *Corporate Anti-Corruption Compliance Drivers, Mechanisms, and Ideas for Change*, 90 p., p.14-16; <https://www.oecd.org/corruption/Corporate-anti-corruption-compliance-drivers-mechanisms-and-ideas-for-change.pdf>.

¹² *Id.*, p.18.

¹³ *Id.*, p. 21-26.

even avoid criminal prosecution.¹⁴ Before the DOJ enacted a consolidated manual on evaluation of corporate compliance programs in 2019¹⁵, guidance existed in the form of the US Sentencing Guidelines, the DOJ manual “Principles of Federal Prosecution of Business Organizations,” which instructed prosecutors to consider “the adequacy and effectiveness of the corporation’s compliance program at the time of the offense, as well as at the time of a charging decision,”¹⁶ and the corporation’s remedial efforts “to implement an adequate and effective corporate compliance program or to improve an existing one.”¹⁷ So, in the US, there was a long history of company investigations that took into account corporate compliance programs.

These documents are the framework for both investigators and companies for factors emphasized during an investigation and what to anticipate during a prosecution.¹⁸ Section 8B2.1 of the US Sentencing Guidelines define seven main elements of an effective compliance program: 1) standards and procedures to prevent and detect criminal conduct; 2) leaders’ governance and oversight over the compliance program to ensure its effectiveness and adequacy of support, and that specific people are empowered to implement the program; 3) no people at leadership positions engaged in illicit activities; 4) trainings and other ways of disseminating information about compliance and ethics programs; 5) monitoring, auditing, and evaluation of the program and establishing an anonymous reporting system; 6) appropriate incentives for complying with the ethics program, and discipline measures for engaging in criminal conduct and failing to prevent the violation; and, 7) response and

¹⁴ Anti-Corruption in the United States by John Meyer, William Devaney, and Peter Tomczak, part 5; <https://www.globalcompliancenews.com/anti-corruption/anti-corruption-in-the-united-states/>.

¹⁵ DOJ Updates Guidance on the Evaluation of Corporate Compliance Programs by Aisling O’Shea, Nicolas Bourtin, and Anthony Lewis, Sullivan & Cromwell LLP (June 20, 2020); <https://corpgov.law.harvard.edu/2020/06/20/doj-updates-guidance-on-the-evaluation-of-corporate-compliance-programs/#4b>.

¹⁶ JM § 9-28.300.

¹⁷ *Id.*

¹⁸ Anti-Corruption in the United States by John Meyer, William Devaney, and Peter Tomczak, part 5; <https://www.globalcompliancenews.com/anti-corruption/anti-corruption-in-the-united-states/>

prevention of further similar conduct.¹⁹ In the meantime, before establishing the compliance program, a company should provide a thorough risk assessment and define the areas of high risk. This “can [help to] escape the fate of painful compliance reviews and instead become a critical scale by which to assess and address potential pitfalls before they come to damaging fruition.”²⁰

In 2019, the DOJ’s Criminal Division created a general manual entitled “Evaluation of Corporate Compliance Program” that embraced all the guidance of other departments: the DOJ’s Fraud Section guidance as of February 2017, the DOJ’s FCPA Corporate Enforcement Policy for all Criminal Division cases as of March 2018, and the DOJ’s Criminal Division policy ‘concerning the selection and appointment of corporate compliance monitors’²¹ as of October 2018.²² This manual created a single standard for investigation of all criminal cases with companies and provided additional guidance in multifactor evaluation of compliance programs of organizations. In this manual, the DOJ challenges investigated companies to answer three questions: “1) is the program well designed? 2) Is the program effectively implemented? 3) Does the compliance program actually work in practice?”²³

Meanwhile, companies with corporate compliance programs (including anti-corruption) often fail in their anti-corruption efforts. Among the reasons of such failures are: 1) no adherence to the compliance by the senior management (if leaders do not take compliance seriously, nobody will do that in the organization); 2) ineffective use of technology (if

¹⁹ <https://guidelines.ussc.gov/gl/§8B2.1>.

²⁰ Building an effective compliance risk assessment programme for a financial institution, Stephanie Nicolas* and Paul V. May, *Journal of Securities Operations & Custody* Volume 9 Number 3 (January 20, 2017), 215-224 p., p.216;
<https://www.henrystewartpublications.com/sites/default/files/Nicolas%20Stephanie%20%26%20May%20Paul%20JSOC%209-3.pdf>.

²¹ DOJ Updates Guidance on the Evaluation of Corporate Compliance Programs by Aisling O’Shea, Nicolas Bourtin, and Anthony Lewis, Sullivan & Cromwell LLP (June 20, 2020);
<https://corpgov.law.harvard.edu/2020/06/20/doj-updates-guidance-on-the-evaluation-of-corporate-compliance-programs/#4b>.

²² *Id.*

²³ U.S. Department of Justice Criminal Division “Evaluation of Corporate Compliance Program”;
<https://www.justice.gov/criminal-fraud/page/file/937501/download>.

information is collected inaccurately, understanding of how the business is working is lost, which that leads to incorrect judgments on how to respond to the risks); 3) inadequate response to complaints and inadequate informational plumbing (an organization has to make sure that the employer received response on his report about misconduct); and, 4) failure to notice an employee's misconduct (one needs to engage with employees before the misconduct happens, communicate the compliance program, make sure that people understand it).²⁴ So, despite the existence of guidance, manuals, and cases, there are companies that face problems with their compliance systems that lead to investigations and loss of money and reputation. In the following cases we will see some of the abovementioned failures.

III. Case Studies

1. Alfred C. Toepfer International Ukraine Ltd. (a subsidiary of a US Archer Daniels Midland Company)

a) The Scheme in Ukraine

In 2013, Archer Daniels Midland Company (ADM), a food processing and commodities trading company,²⁵ entered into a non-prosecution agreement (NPA) with the Department of Justice (DOJ). It paid \$36.6 million for failing to establish effective internal accounting controls, which resulted in illegal payments by the subsidiaries in Ukraine and Venezuela.²⁶ Also that year, Alfred C. Toepfer International Ukraine Ltd. (ACTI Ukraine), an ADM indirect 80% subsidiary,²⁷ “pleaded guilty in the Central District of Illinois to one count of conspiracy to violate the anti-bribery provisions of the FCPA and agreed to pay \$17.8 million

²⁴ Corporate Compliance Programs: Everything You Need to Know, Matt Kelly (August 11, 2020); <https://www.ganintegrity.com/blog/corporate-compliance-program/#top>.

²⁵ [https://en.wikipedia.org/wiki/ADM_\(company\)](https://en.wikipedia.org/wiki/ADM_(company)).

²⁶ ADM Subsidiary Pleads Guilty to Conspiracy to Violate the Foreign Corrupt Practices Act, December 20, 2013. <https://www.justice.gov/opa/pr/adm-subsidiary-pleads-guilty-conspiracy-violate-foreign-corrupt-practices-act>.

²⁷ Attachment A, Statement of Facts, p. A-1. <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/01/03/adm-mpa.pdf>.

in criminal fines.”²⁸ In sum, ADM and its subsidiary paid around \$54 million. All these prosecutions and fines resulted partially from bribing Ukrainian officials through intermediaries with the aim to obtain a value added tax (VAT) refund.²⁹

The FCPA violation was triggered by the inability of ACTI Ukraine to obtain the VAT refund to which it was entitled from the state without making facilitation payments. Such a situation is not surprising as the Office of the US Trade Representative reported that “the [Ukraine State Tax Administration] instituted an automated system for VAT refunds, but non-transparent criteria have prevented most firms from participating in the system and receiving their refunds.”³⁰ Although obtaining the money was legal, the act was considered as illegal because the company obtained the refund “earlier than they otherwise would have” as the SEC noted.³¹

To speed up the process of the VAT refund, the management of ACTI Ukraine and Alfred C. Toepfer International G.m.b.H. (ACTI Hamburg), another ADM subsidiary, decided to provide “donations” to the Ukrainian governmental officials who facilitated the VAT refunds.³² Although the payments were named “donations,” in fact they were paid to the officials through fake agreements with Vendor 1 and 2.³³ To transfer funds to the Ukrainian governmental officials, two schemes were performed:

(1) From 2002 to 2008, ACTI Ukraine and ACTI Hamburg employed U.K. Vendor 1. They paid specific price to Vendor 1 for commodities. “Vendor 1 then sold those commodities to ACTI Hamburg for a higher price, which included the amount Vendor 1 paid

²⁸ ADM Subsidiary Pleads Guilty to Conspiracy to Violate the Foreign Corrupt Practices Act, December 20, 2013. <https://www.justice.gov/opa/pr/adm-subsidiary-pleads-guilty-conspiracy-violate-foreign-corrupt-practices-act>

²⁹ Although ADM subsidiaries also violated FCPA in Venezuela, for the purpose of this paper that will not be considered.

³⁰ <https://ustr.gov/sites/default/files/Ukraine.pdf>.

³¹ Supermarket to the World – the ADM FCPA Enforcement Action, <https://www.corporatecomplianceinsights.com/supermarket-to-the-world-the-adm-fcpa-enforcement-action/>.

³² Attachment A, Statement of Facts. <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/01/03/adm-mpa.pdf>.

³³ *Id.* at A-8.

for the commodities, shipping costs, the amount of the bribe, and a handling fee. The amount paid to Vendor 1 in connection with the bribe generally equaled eighteen (18) percent of the VAT refund obtained”³⁴; and,

(2) From 2007 to 2008, ACTI Ukraine purchased unnecessary insurance policies for its commodities from Ukrainian Vendor 2 in the amount that covered the price for the bribe. Insurance purchases took place right the day before or after the VAT refund.³⁵

The questions regarding suspicious donations were raised by ADM management through 2002-2007:

(1) in 2002, after meeting with ACTI Hamburg executives, the ADM management raised the questions: (a) whether donations to the Ukrainian governmental officials were illegal, (b) why the donations were not deductible, (c) whether such payments might be against the ADM compliance policy, (d) whether these donations are Subpart F income,³⁶ and (e) that the payments might not be booked in accordance with US GAAP;³⁷

(2) in 2004, ADM employed an accounting firm to check tax risks regarding creating a joint venture between ADM and a Swiss company in Ukraine. This firm reported that the schemes of VAT optimization that are applicable in Ukraine might pose tax and legal risks;³⁸

(3) in 2006-2007, ADM’s accounting firm found a “reserve” in ACTI Ukraine’s books that equaled to 20% of the VAT refund that was expected. ACTI Hamburg explained that the company is supposed to compensate the officials for the refund.³⁹

³⁴ Attachment A, Statement of Facts, p. A-3. <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/01/03/adm-npa.pdf>.

³⁵ *Id.* at A-2.

³⁶ “... Subpart F income include [among other things] ... illegal bribes and kickbacks” (<https://www.thetaxadviser.com/issues/2021/feb/gilti-subpart-f-distributions-appreciated-property.html>).

³⁷ Attachment A, Statement of Facts, p. A-5. <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/01/03/adm-npa.pdf>.

³⁸ *Id.* at A-6.

³⁹ *Id.* at A-6, A-7.

Throughout the period 2002-2008, ADM's management was reluctant to analyze the real nature of the payments to the Ukrainian officials. In early 2009,⁴⁰ the company disclosed information about its FCPA violations. After investigation, ADM was accused of the failure to build an anti-corruption compliance system, analyze transactions with vendors, and track down corrupt payments.⁴¹

b) NPA Requirements

As the result of entering into the NPA, ADM made a commitment to strengthen its anti-corruption compliance and periodically report to the DOJ "regarding remediation and implementation of the compliance program and internal controls, policies, and procedures."⁴² The DOJ gave general guidance of what it would expect to see in ADM's reports, although the company was free to adjust the requirements to enhance its compliance according to own needs and vision. The DOJ's general requirements included: (1) leadership commitment to the compliance; (2) a written anti-corruption system that would encourage ethical conduct and build effective financial procedures, (3) providing an annual risk-based assessment of the program that would concentrate on potential foreign bribery issues, (4) assigning a compliance officer or a team that would have enough autonomy to effectively execute its obligations and have a direct access to the board/board committee, (5) periodic training of all employees, including directors, and where appropriate business partners, and guidance in anti-corruption legislation, including of foreign law, for employees and business partners; (6) establishing a confidential (where possible) reporting system and investigation process; (7) establishing working incentivizing and disciplining procedures; (8) risk-based due diligence of business partners, including the necessity to insert certain terms in the contracts depending

⁴⁰ ADM holds settlement reserve at \$54 million, November 8, 2013, <https://fcpablog.com/2013/11/08/adm-holds-settlement-reserve-at-54-million/>.

⁴¹ Attachment A, Statement of Facts, p. A-8. <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/01/03/adm-mpa.pdf>.

⁴² *Id.* at 3.

on the circumstances; (9) providing due diligence when acquiring new businesses, including anti-corruption and FCPA due diligence and establishing anti-corruption policies in new companies; and, (10) monitoring and testing of anti-corruption system and improving it.⁴³

According to the NPA, decisions regarding unlawful payments to Ukrainian governmental officials were taken into consideration by ACTI Ukraine together with ACTI Hamburg. According to German law, facilitation payments (“payments of small amounts to public officials in order to induce them to perform their duties in a faster way”)⁴⁴ are forbidden to governmental officials both in Germany and the European Union (the EU)⁴⁵. Nevertheless, German law allows such payments outside the EU “as long as they are not made in order to obtain a *future* official act by which the foreign public official is violating his or her duties”⁴⁶ (although, it is hard to consider the payments made in ACTI Ukraine case were “of small amounts”). Such a vague wording in the German legislation might be interpreted as if Germany is lenient to bribes paid to non-EU officials that might be used in an unlawful way. In ACTI Ukraine, this gap in the legislation might have triggered ACTI Hamburg to play an active role in facilitating the bribery scheme.

c) Judicial Issues Regarding the Case

The ADM case brought questions among legal professionals regarding legality and expedience of the prosecution under FCPA. It is hard to trace all the necessary elements of FCPA crime in the ADM case: (1) corrupt intent (“evil motive or purpose”)⁴⁷; (2) intent to obtain or retain business (“the linkage to obtain or retain specific or even general business” in the ADM action seems “so tenuous as to be nonexistent”)⁴⁸; and, (3) facilitating payments

⁴³ *Id. at B-1 – B-8.*

⁴⁴ Bribery and Corruption Laws & Regulations 2022| Germany, <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/germany>

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Why You Should Be Alarmed By the ADM FCPA Enforcement Action, p.2, Mike Koehler, 2014, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2383938

⁴⁸ <https://www.shearman.com/~media/Files/Services/FCPA/2014/FCPADigestTPFCPA010614.pdf>

(DOJ “must bear the burden of negating the facilitating payments exception”⁴⁹; “It is ... difficult to see how the DOJ would have satisfied this pleading burden given that the DOJ itself alleged that VAT refunds were “owed” to ADM entities”⁵⁰). All of these reasons resulted in uncertainty in the legality of the whole procedure.

Meanwhile, the reason why ADM eagerly made the deal with DOJ might be because it was cheaper for ADM to agree on the proposed solution rather than spend huge amounts of money and time on litigation and be under the threat of harsher criminal punishment. Also, if the SEC found out about the doubtful transactions in the company’s books, ADM would have reputational risk and further negative legal implications with a higher penalty. That is why it was wiser for ADM to choose a “lesser evil” and self-report about the FCPA violation.

An FCPA violation is a serious transnational case that might affect Ukraine’s reputation as a favorable country for investment. In this regard, it is logical that this violation could/should attract the attention of Ukrainian government and law enforcement bodies, because bribery was (and still is) illegal in Ukraine.⁵¹ But, thorough research has not revealed any information on prosecution of governmental officials involved in the corruption scheme. It most probably means that nobody was prosecuted.

d) Compliance System Enhancement After the FCPA Violation

In his letter to the SEC in 2015 regarding FCPA violations committed by ADM, the company’s outside legal counsel mentioned steps that were undertaken in compliance-enhancing process: 1) employees who were involved in illegal scheme of ACTI Ukraine and ACTI Hamburg were fired or left the company; 2) ADM expanded the number of compliance personnel, including officers assigned for full support of anti-corruption efforts; 3) ADM

⁴⁹ *SEC v. Jackson*, 908 F. Supp.2d 834 (S.D. Tex. 2012).

⁵⁰ <https://www.corporatecomplianceinsights.com/supermarket-to-the-world-the-adm-fcpa-enforcement-action/>

⁵⁰ Why You Should Be Alarmed By the ADM FCPA Enforcement Action, p.3, Mike Koehler, 2014,

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2383938

⁵¹ <https://zakon.rada.gov.ua/laws/show/2341-14/ed20130518#Text>

increased oversight and control over global operations to prevent the reoccurrence of the FCPA violations; 4) ADM strengthened its control over third-party engagement that included robust due diligent requirements, anti-corruption provisions in the contracts, and anti-corruption trainings; and 5) the company intensified its payment controls.⁵²

Following the FCPA investigation, ADM hired Ben Bard, a new Chief Compliance Officer (CCO) in 2014. Among his responsibilities was the overseeing of global compliance policies and programs, including anti-corruption policies. In 2018, Ben Bard, being the company's CCO, was named to Compliance Week's Top Minds 2018 as the best and brightest in governance and compliance profession. ADM Senior Vice President, General Counsel and Secretary Cameron Findlay mentioned that Bard rebuilt and created a high-profile agile compliance system in the company.⁵³ In 2020, ADM obtained recognition of "Ethisphere, a global leader in defining and advancing the standards of ethical business practices, as one of the 2020 World's Most Ethical Companies."⁵⁴

2. Teva Pharmaceutical Industries Ltd.

Teva Pharmaceutical Industries Ltd. (Teva) is an Israeli company. At the time of its FCPA violation, it was the biggest manufacturer of generic drugs in the world.⁵⁵ In December 2016, Teva entered into Deferred Prosecution Agreement (DPA) with DOJ "in connection with a criminal information ... charging the company with one count of conspiracy to violate the anti-bribery provisions of the FCPA and one count of failing to implement adequate internal controls."⁵⁶ The company paid a criminal penalty in the amount of \$283,177,348,

⁵² <https://www.sec.gov/divisions/corpfin/cf-noaction/2015/archer-daniels-midland-060315-405.pdf>

⁵³ <https://www.adm.com/news/news-releases/adm-chief-compliance-officer-ben-bard-named-to-compliance-week-top-minds-2018>

⁵⁴ <https://www.adm.com/news/news-releases/adm-named-one-of-2020-worlds-most-ethical-companies-by-ethisphere>

⁵⁵ https://en.wikipedia.org/wiki/Teva_Pharmaceuticals

⁵⁶ <https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrup>

agreed to strengthen its compliance system and internal controls, and hire an external compliance monitor for a 3 year period. Also, Teva paid \$236 million in disgorgement to SEC.⁵⁷ In total, the company paid around \$520 million. As to Teva LLC (Teva Russia), a wholly-owned subsidiary of Teva,⁵⁸ the company pleaded guilty “in one-count criminal information ... charging the company with conspiring to violate the anti-bribery provisions of the FCPA.”⁵⁹

In this case, Teva and its subsidiaries were engaged in illicit payments to Russian, Ukrainian, and Mexican authorities with the aim to spread its sclerosis drug Copaxone.⁶⁰ Also, Teva willfully failed to implement a robust anti-corruption system and accounting controls at its subsidiaries, which promoted corruption acts.⁶¹

a) The Scheme in Russia

Around 2007, Russian Ministry of Health announced seven diseases that are rare and expensive to treat. As the healthcare system in Russia provided universal healthcare to its citizens, the Ministry aimed to buy the needed treatment and supply it to patients for free. For that reason, the Ministry provided auctions among suppliers of the required treatment. Among the illnesses was multiple sclerosis, which was treated by Copaxone.

At that time, Teva and Teva Russia were on the lookout for the opportunity to increase sales of Copaxone to the Russian government. In October 2006, Teva Russia Executive informed Teva Executive that they found a Russian official who had influence on governmental procurement of medicine in Russia, had contacts in Knesset, and was an owner

⁵⁷ *Id.*

⁵⁸ United States of America v. Teva Pharmaceutical Industries Ltd., Deferred Prosecution Agreement, p.A-2, <https://www.justice.gov/criminal-fraud/file/920436/download>

⁵⁹ <https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt>

⁶⁰ In this paper, only violations in Russia and Ukraine will be discussed.

⁶¹ <https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt>

(technically, the owner was his wife) of several wholesale pharmaceutical companies (Russian company). Teva endorsed further cooperation with this Russian Official.

Even though the transparency of the Russian company was considered low, the Russian company executive was under investigation for corruption, and Teva's insurance company refused to insure transactions with the Russian company, the Teva executive and Teva Russia executive decided to go further and let the Russian company distribute Copaxone in Russia. In 2009, the Russian government decided to give preference to domestic medicine at auction; in mid-2010 the Russian company started repackaging of Teva's Copaxone so that it fell within the governmental domestic preference. When entering into the agreement with the Russian company, Teva Russia's Legal Director urged Teva to approve the deal, saying that the owner of the business was the Official's wife and that the Russian official did not have any control over the business, hiding some facts about the Russian company executive's corruption investigation, and reports from the news media about Russian Official's possible involvement in corruption schemes in governmental medicine procurement in the past. Despite all the red flags, the regional compliance officer approved the deal. During the time of cooperation, the Russian official successfully lobbied Copaxone in Russian governmental tenders.⁶²

Teva terminated cooperation with the Russian company in mid-2013 due to latter's refusal to comply with Teva's due diligence procedures. During the term of corrupt cooperation, the Russian Official received through his companies \$204,167,303.

b) The Scheme in Ukraine

In Ukraine, all medicine was (and still is) allowed to market and sale only after state testing and registration. For the period from 2001 to 2011, the Ukrainian Official who was

⁶² United States of America v. Teva Pharmaceutical Industries Ltd., Deferred Prosecution Agreement, p.A-6 – A-16, <https://www.justice.gov/criminal-fraud/file/920436/download>

able to influence registration decisions in the government was “employed” by Teva, and then Teva Ukraine, as a registration consultant under an annually-renewed consultancy agreement.

According to the agreement, the Ukrainian Official received a “consultancy fee.” In addition to the fees, the company provided bonuses in cash, travel expenses, and items of value. All these were done to incentivize the Ukrainian Official to improperly use his official post and influence the medicine registration, including registration of Copaxone, in the country. All the payments were knowingly approved by Teva. For the period from 2002 to 2011 Teva and Teva Ukraine paid approximately \$200,000 to the Ukrainian Official.⁶³

c) Actors Behind the Schemes

Unfortunately, the DPA did not disclose names of the officials who participated in the illegal schemes. Consequently, there is no available information regarding the corruption investigation in Ukraine. Nevertheless, some fruitful journalistic investigations regarding Teva corruption violations took place in Russia.

Although the name of the governmental official has not been disclosed, journalists found that it was likely to be Boris Shpigel, who was a senator in the Council of the Russian Federation (during 2003-2013) and simultaneously a shareholder of “Biotek” company. In 2008, this company obtained the exclusive right to packaging and distributing to the government Teva’s Copaxone. The author of the article claims that Boris Shpigel was personally acquainted with ex-President of Israel Shymon Peres and ex-Prime Minister Benjamin Netanyahu, and that Teva was in Israel as widespread as Apple is in the US. That is why it looked logical that Teva built connections with Mr. Shpigel.⁶⁴

In 2013, Teva unexpectedly unilaterally terminated the agreement with Biotek right before the auction. According to the official version, the reason for such termination was that

⁶³ United States of America v. Teva Pharmaceutical Industries Ltd., Deferred Prosecution Agreement, p. A-16 – A-19, <https://www.justice.gov/criminal-fraud/file/920436/download>

⁶⁴ <http://www.chechnyafree.ru/nws/4191457.html>

a new Teva CEO, Jeremy Levin, took active steps toward rebuilding the company's business practices towards European standards, instead of sometimes openly-corrupted operations. In the meantime, according to another version, this termination related to the DOJ investigation that had been going on for the past year. For Teva, it was better to pay penalties to Biotek due to unilateral termination of the contract rather than to continue business.

After finding in the media information regarding Teva's corruption violations in Russia, the Minister of Health referred to the General Prosecutor a request to check the information through international cooperation.⁶⁵ Nevertheless, there was no investigation initiated against Mr. Shpigel in Russia. Interestingly, Boris Shpigel was accused of corruption in 2021, but not in the Teva case.⁶⁶

d) DPA Requirements

According to the DPA, Teva had to strengthen its anti-corruption system. Although the company declared to uphold the highest ethical standards by having an anti-corruption policy, a reporting system (and even received reports), regular trainings for employees, an Audit Committee, a Compliance Committee, internal risk managers and monitors, and regional compliance officers according to its Corporate Social Responsibility Report within 2012-2015,⁶⁷ the DOJ provided Teva with general requirements similar to the ADM case regarding an anti-corruption compliance system. Those requirements included, among other things, high-level commitment of senior management to compliance, developing and promulgating policies that would prohibit FCPA violations, creating a system of internal and accounting procedures, internal reporting, and investigation and enforcement, and periodic risk-based review. The DOJ's actions prove that the company did not follow its own compliance policies before the investigation.

⁶⁵ <https://www.vedomosti.ru/politics/articles/2016/12/23/670958-minzdrav-obratitsya-genprokuraturu>

⁶⁶ <https://www.bbc.com/russian/news-56482827>

⁶⁷ <https://www.tevapharm.com/our-impact/previous-reports/>

Further, Teva had to hire an independent monitor for three years. The main role of an external monitor is to monitor a company's conformity with the DPA, assess the compliance system that the company implements, and mitigate the risk of recurrence of the misconduct. Teva provided the monitor with access to any documents, facilities, employees, or vendors. The monitor had to, among other things, periodically make plans regarding the company's further effective development, initial and follow-up reviews, and report on potential or actual misconduct.⁶⁸

Teva also had to remove fifteen employees that were engaged in corruption matters; establish a global compliance group that audited internal transactions; and strengthen its due diligence function, including third party due diligence.⁶⁹

e) Compliance System Enhancement After the FCPA Violation

In its 2020 Environmental, Social and Governance Report (the Report), Teva declared that over the last six years it had strengthened its compliance policy in its companies around the globe. Considering dates, the company started the process of rebuilding its global compliance system with the new CEO Jeremy Levin, after the FCPA violation occurred and before self-reporting to the US officials. More than a year before settlement, the company hired Lori Queisser, who had 30 years' experience in compliance in pharmaceuticals industry, as senior vice president and global chief compliance officer with to tackle compliance issues.⁷⁰

In the Report, Teva announced first that: the CCO reports directly to the CEO and that the Board's Compliance Committee oversees and reviews policies and practices. Teva's Global Compliance and Ethics Department makes sure that the company is the relevant partner for

⁶⁸ United States of America v. Teva Pharmaceutical Industries Ltd., Deferred Prosecution Agreement, p. C-1 – C-8, D-1 – D11, <https://www.justice.gov/criminal-fraud/file/920436/download>

⁶⁹ <https://www.complianceweek.com/anti-corruption-compliance-lessons-from-tevas-fcpa-case/2808.article>

⁷⁰ Teva Pharmaceutical Reengineers Compliance with Data Analytics, p.2, <https://s3.amazonaws.com/marketing.mitsmr.com/custom/CSEYCase2020/MITSMR-Connections-EY-Teva-Case-Study-2020.pdf>

other businesses on all levels of work. Second, it stated that an essential part of the Company's Code of Conduct is the Policy on the Prevention of Corruption, which establishes minimum standards for corruption prevention, including internal controls of books and records. This is the policy that fulfills the DOJ's requirement regarding the anti-corruption program).⁷¹ Third, the Report details extensive risk-based global corruption trainings for personnel that are held periodically and include Code of Conduct Training. Fourth, the company described providing separate compliance trainings for board members that foster a compliance culture inside the whole organization. Fifth, the company established an effective compliance system that detects potential risk in daily operations, tracks and reports payments to the members of healthcare community, and ensures integrity of books and records. Finally, Teva established an Office of Business Integrity to investigate misconduct allegations and address the issues with the company, and eventually strengthen its compliance policy.⁷²

It worth mentioning that an immense amount of work has been provided behind reconstructions mentioned in the Report. After entering into the DPA with the DOJ, the company seriously aimed to “build the best and most respected global compliance program in the industry — a program that works in partnership with the business to prevent issues.”⁷³

Nevertheless, changes brought substantial expenses (\$3bln) and put additional legal burden on the approval process of vendors and customers. In these circumstances, the company could manually process only around 2,000 requests to use third parties instead of actual 500,000 requests.⁷⁴ Meanwhile, this process cost millions of dollars and did not help to

⁷¹ United States of America v. Teva Pharmaceutical Industries Ltd., Deferred Prosecution Agreement, p. C-1 – C-3, <https://www.justice.gov/criminal-fraud/file/920436/download>

⁷² <https://www.tevapharm.com/our-impact/esg-progress-report/teva-maintaining-an-ethical-and-compliant-business/>

⁷³ https://www.ey.com/en_us/forensic-integrity-services/how-teva-pharmaceutical-is-managing-third-party-risk-better

⁷⁴ How Teva Pharmaceutical is managing third party risk better; https://www.ey.com/en_us/forensic-integrity-services/how-teva-pharmaceutical-is-managing-third-party-risk-better

reduce the risks. At the time, Lori Queisser stated that it was the biggest gap in the compliance system, and they needed to do something.⁷⁵

With the help of an external consultant, Teva created and implemented a pre-screening data analytics tool that automatically assigns a risk level to the third party. This tool contains about 25 million records and can access information from open public databases to effectively screen vendors and customers. Instead of waiting days and even months for approval, the process takes several hours for most operations. That allows Teva to concentrate on higher risk operations that are more efficient in terms of compliance.⁷⁶ The company is continuing exploring new ways to employ artificial intelligence to enhance third-party diligence as it is a substantial burden and the hardest part of compliance with FCPA.⁷⁷

3. Lessons Drawn from the Cases

In the Teva and ADM cases we can see general features inherent in almost all companies involved in FCPA investigations. To begin with, a parent company experienced hardships in exercising control over its subsidiaries abroad.⁷⁸ ADM did not diligently consider issues connected to the business in Ukraine, although the red flags were in place: reports from accounting firms and ACTI Ukraine's books. In Teva, management authorized most of the illegal actions, although Teva Russia's CEO and company's lawyer hid some information from the Teva management. Next, accounting provisions of the FCPA hold parent companies liable for their subsidiaries' illicit payments⁷⁹ Both Teva Pharmaceutical and ADM were sanctioned for failing to establish robust accounting control inside their whole business

⁷⁵ Teva Pharmaceutical Reengineers Compliance with Data Analytics, p.3, <https://s3.amazonaws.com/marketing.mitsmr.com/custom/CSEYCase2020/MITSMR-Connections-EY-Teva-Case-Study-2020.pdf>

⁷⁶ https://www.ey.com/en_us/forensic-integrity-services/how-teva-pharmaceutical-is-managing-third-party-risk-better

⁷⁷ Teva Pharmaceutical Reengineers Compliance with Data Analytics, p.10, <https://s3.amazonaws.com/marketing.mitsmr.com/custom/CSEYCase2020/MITSMR-Connections-EY-Teva-Case-Study-2020.pdf>

⁷⁸ The FCPA and the OECS Convention% Some Lessons from the US Experience, *Journal of Business Ethics* Vol. 93, No. 2 (May 2010), pp. 255-276, p. 266; <https://www-jstor-org.ezproxy.lib.uconn.edu/stable/40605340?seq=12>

⁷⁹ *Id.*

structures. Next, the companies obtained substantial benefits from the bribes.⁸⁰ Teva Pharmaceutical became the sole Copaxon supplier for the Russian government, obtained quick formal registration of the medicine in Ukraine, and sold its medicine through bribed doctors in Mexico; ACTI Ukraine obtained the VAT refunds through illegal facilitation payments. Further, the bribery cost was relatively small in comparison with expected illegal gains.⁸¹ For example, in Russia, Teva earned \$200 million and spent on bribes \$65 million;⁸² in ADM, subsidiaries paid around \$22 million for bribes and received \$100 million for the VAT refund.⁸³ Next, privileged foreign officials used their offices for personal gains.⁸⁴ In both cases officials' ability to make decisions in the name of their governments opened lucrative financial opportunities for them. Finally, top management was involved in large-scale corruption issues.⁸⁵ In Teva, the parent company authorized the corruption scheme; in ADM, subsidiaries management provided all the transactions, and parent company management was reluctant to police such actions.

Further, in both the Teva and ADM cases, there were no corruption investigations against the bribed officials in their countries. Although the media covered the FCPA investigations against the companies, they stayed silent as to the identities of the governmental officials. There was a journalistic investigation in Russia regarding Teva case that revealed the hidden scheme of corrupt cooperation, but official media did not raise the issue among the society and officials kept the things quiet.

Such a situation is not surprising considering corruption practices in these countries. The reason for such an attitude is grounded in the weak tone at the top of the country that led to

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² <https://www.justice.gov/opa/pr/teva-pharmaceutical-industries-ltd-agrees-pay-more-283-million-resolve-foreign-corrupt>

⁸³ <https://www.justice.gov/opa/pr/adm-subsiary-pleads-guilty-conspiracy-violate-foreign-corrupt-practices-act>

⁸⁴ *Id.*

⁸⁵ *Id.*

the lack of resources to prosecute the cases, illegal connections with the officials from law enforcement bodies, bribes from law enforcement bodies, and maybe even fear to prosecute a high-ranked official, which could have negative repercussions for a prosecutor.

IV. Analysis of the Impact on the Society

1. General Corruption Situation in the Eastern Europe Region

It is considered that the Eastern European countries have much more work to do in fighting corruption that became part of their political cultures due to their Soviet past.⁸⁶ After the USSR collapsed, corruption in the Eastern Europe region inherited the following features: 1) it was relatively inexpensive because bureaucrats have low salaries –corruption payments might be estimated as token payment in other countries; 2) bureaucrats found new lucrative monetary opportunities that their posts provided them with in the new capitalistic world; 3) numerous new anti-corruption laws were enacted, but were reluctantly followed; and, 4) businessmen relied on bribes while doing business.⁸⁷

Corruption is still a problem that affects both public and private sectors of the countries in Eastern Europe and Central Asia, despite numerous reforms.⁸⁸ OECD launched a peer review program in the frame of Anti-Corruption Network for Eastern Europe and Central Asia (ACN) to trace the efficiency of fighting corruption in the region. The Istanbul Anti-Corruption Action Plan (IAP) was launched in 2003 as a sub-section of this peer review

⁸⁶ Popescu, Ada-Iuliana (2016) : Political Process Drivers of Corruption in Eastern Europe, CES Working Papers, ISSN 2067-7693, Alexandru Ioan Cuza University of Iasi, Centre for European Studies, Iasi, Vol. 8, Iss. 4, pp. 705-715, 706, <https://www.econstor.eu/bitstream/10419/198488/1/ceswp-v08-i4-p705-715.pdf>

⁸⁷ *The American Journal of International Law*, Vol. 91, No. 2 (Apr., 1997), pp. 378-379, https://www-jstor-org.ezproxy.law.uconn.edu/stable/2954220?Search=yes&resultItemClick=true&searchText=%28FCPA%29&searchUri=%2Faction%2FdoAdvancedSearch%3Fgroup%3Dnone%26q0%3DFCPA%26q1%3D%26q2%3D%26q3%3D%26q4%3D%26q5%3D%26q6%3D%26sd%3D1996%26ed%3D1998%26pt%3D%26isbn%3D%26f0%3Dall%26c1%3DAND%26f1%3Dall%26c2%3DAND%26f2%3Dall%26c3%3DAND%26f3%3Dall%26c4%3DAND%26f4%3Dall%26c5%3DAND%26f5%3Dall%26c6%3DAND%26f6%3Dall%26acc%3Don%26la%3D%26so%3Drel&ab_segments=0%2Fbasic_search_gsv2%2Fcontrol&refreqid=fastly-default%3Af05a7953a14900ba1064637dea841611&seq=2

⁸⁸ Anti-Corruption Reforms in Eastern Europe and Central Asia. Progress and Challenges 2016-2019, OECD, 414 p., p.19, <https://www.oecd.org/corruption/Anti-Corruption-Reforms-Eastern-Europe-Central-Asia-2016-2019-ENG.pdf>

action⁸⁹ that includes Ukraine, Armenia, Azerbaidjan, Georgia, Kazakhstan, Kyrgyzstan, Mongolia, Tajikistan, Uzbekistan⁹⁰ (Russia is in another anti-corruption network).⁹¹

During the fourth review round in 2016-2019 under the peer review program, OECD claimed that the corruption level was still high in the region and had not changed visibly since last review⁹² (2013-2015).⁹³ According to Transparency International, 56% of the respondents in Ukraine and 39% in Russia indicated that corruption/bribery was one of the three main problems that the governments should deal with.⁹⁴ Interestingly, respondents were not also satisfied with governments' actions to address corruption: 86% of respondents in Ukraine and 62% in Russia thought that the government poorly addressed corruption.⁹⁵ Also, the average score of Corruption Perception Index in the region in 2018 was 35 (out of 100 where 0 very clean and 100 is highly corrupt). "Eastern Europe and Central Asia is the second lowest scoring region in the index, ahead of Sub-Saharan Africa which has an average score of 32."⁹⁶

Nevertheless, the parties of ACN and IAP are taking steps to address corruption by implementing international treaties and taking part in periodic peer reviews. For example, all the member countries of ACN and IAP implemented "the UN Convention against Corruption and participate in its Implementation Review Mechanism."⁹⁷

⁸⁹ <https://www.oecd.org/corruption/acn/istanbul-action-plan.htm>

⁹⁰ Anti-Corruption Reforms in Eastern Europe and Central Asia. Progress and Challenges 2016-2019, OECD, 414 p., p.26

⁹¹ *Id.*

⁹² Anti-Corruption Reforms in Eastern Europe and Central Asia. Progress and Challenges 2016-2019, OECD, 414 p., p.19, <https://www.oecd.org/corruption/Anti-Corruption-Reforms-Eastern-Europe-Central-Asia-2016-2019-ENG.pdf>

⁹³ <https://www.oecd.org/corruption/acn/istanbul-action-plan.htm>

⁹⁴ Transparency International, Global Corruption Barometer, People and Corruption: Europe and Central Asia, 2016. www.transparency.org/whatwedo/publication/people_and_corruption_europe_and_central_asia_2016.

⁹⁵ *Id.*

⁹⁶ Eastern Europe and Central Asia: Weak Checks and Balances Threaten Anti-Corruption Efforts 1/29/2019, <https://www.transparency.org/en/news/weak-checks-and-balances-threaten-anti-corruption-efforts-across-eastern-eu>

⁹⁷ Anti-Corruption Reforms in Eastern Europe and Central Asia. Progress and Challenges 2016-2019, OECD, 414 p., p.25

2. Corruption Situation in Russia

Historically, in the Russian social conscience, private and public interests are intermingled, which defines people's tolerance to corruption.⁹⁸ Russian legal tradition to tolerate corruption can be characterized by legal nihilism (people did not believe in law because it was a means of suppression); laws were not deeply accepted by people as authorities applied them in arbitrary ways; and contempt of laws was expressed by academics) and ethical dualism (for peasants, it was unacceptable to deceive a neighbor, but it was a different matter to deceive a landlord or governmental official).⁹⁹

By the time of the USSR collapse in 1991, Russia already had a history of deep-rooted corruption.¹⁰⁰ After 1991, when old rules and institutions were knocked down and a new system was not yet created, the society was ruled through “informal practices” of ex-Soviet politicians and officials. This was the period when the political elite (that eventually became “oligarchs”) obtained public property through illegal privatizations (the same situation with chaotic privatization was also in Ukraine). That allowed a newly-appeared elite to concentrate money and power and create a kleptocratic regime.¹⁰¹ In addition to this, the work of law enforcement bodies such as police, prosecutors, and courts was not satisfactory due to lack of financing, training, and experience.¹⁰²

Since the beginning of Mr. Putin's presidency in 2000, the corruption situation has not significantly changed, although several strategies aimed to reduce the level of corruption were formally applied.¹⁰³ But something has definitely changed: the so-called “oligarchs”

⁹⁸ *Id.*, p. 387.

⁹⁹ *Id.*, p. 387-394.

¹⁰⁰ Corruption In Russia – Historic Legacy and Systemic Nature, Gunter G. Schule, Nikita Zakharov, CESifo Working Paper Series No. 6864, 22 p. (February 5, 2018); https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3143406

¹⁰¹ *Id.*, p.9.

¹⁰² Corruption in Russia: Historical Prospective, Manabu Suhara, 383-403 p., p. 386-87; https://src-h.slav.hokudai.ac.jp/sympo/03september/pdf/M_Suhara.pdf

¹⁰³ Fighting Corruption in Russia: Its Characteristics and Purpose, Leanid Kazyrytski (July 2, 2019); <https://journals-sagepub-com.ezproxy.law.uconn.edu/doi/full/10.1177/0964663919859052>

turned out to be “cronies,” who only have their power because of their ties to the president.¹⁰⁴ These cronies fulfill different tasks, both internally and externally, from “financing elections and supporting local political figures, using money coming from the state budget via procurement orders, to buying international support and strategic investments abroad.”¹⁰⁵ The entire inner policy structure is affected by the interests of different groups of oligarchs that can influence the state authority at all levels.¹⁰⁶

The president in Russia has enormous power to appoint ministers in the government, judges of the Constitutional and Supreme Court, federal judges, and senior criminal justice officials; the majority in the Parliament is under the president’s control. It means that the top-down system of vertical power and the entire corruption mechanism is under Putin’s control. In this regard, Russia can be characterized as an authoritarian country with state-corporatist capitalism, aimed to protect and promote the interests of those close to the President and other officials who show loyalty to the President’s regime.¹⁰⁷

In Teva, the corrupt activity fell within the logic of described system and was possible due to the involvement of a high-ranking official: the Council of the Russian Federation Boris Shpigel, who had connections in the Ministry of Health in Russia and was a shareholder of the company that supplied medicine to the government. After Teva broke its ties with Boris Shpigel, the company lost its access to governmental procurement in Russia.¹⁰⁸ So, if one does not have connections to the “right” people, opportunities for a big business become very limited.

¹⁰⁴ Corruption in Russia: An Overview, Helsinki Commission Report, 4p., p.1 (October 23, 2017); <https://www.csce.gov/sites/helsinkicommission.house.gov/files/Report%20-%20Corruption%20in%20Russia%20-%20Design%20FINAL.pdf>

¹⁰⁵ *Id.*, p.2.

¹⁰⁶ Fighting Corruption in Russia: Its Characteristics and Purpose, Leanid Kazyrytski (July 2, 2019); <https://journals-sagepub-com.ezproxy.law.uconn.edu/doi/full/10.1177/0964663919859052>

¹⁰⁷ *Id.*

¹⁰⁸ <http://www.chechnyafree.ru/nws/4191457.html>

In general, the situation with corruption in Russia looks even worse than in Ukraine. According to Transparency International, Russia was ranked 136 out of 180 countries in 2021;¹⁰⁹ also, from 2016 until 2021 the country stayed on the same score level: 29 points.¹¹⁰ The country's formal signing of such treaties as "Criminal Law Convention on Corruption and its monitoring body, the Group of States against Corruption (GRECO) which are both part of the Council of Europe, along with commitments from the 2016 Anti-Corruption Summit ... the Civil Law Convention on Corruption which allows citizens and private sector actors to seek redress for corruption cases"¹¹¹ does not seem to work in practice and show results.¹¹²

3. Corruption Situation in Ukraine

Since Ukraine declared its independence in 1991 until today the country remains affected by corruption. The political system in Ukraine can be described in two words: state capture.¹¹³ High-ranking officials' offices depend on "masters", who need to be paid "rents"; almost all spheres of life of the society (for example, visit to doctor, business transactions, and political campaigns) have been penetrated by corruption. Society considers everyday bribery as a means for the needed things to be done, which results in a high tolerance of corruption.¹¹⁴

Corruption has caused numerous hindrances for foreign companies. Among them are delays of VAT refunds that ranged from several month to more than a year - sometimes tax

¹⁰⁹ <https://www.transparency.org/en/countries/russia>

¹¹⁰ <https://www.transparency.org/en/cpi/2021/index/rus>

¹¹¹ Eastern Europe and Central Asia: Weak Checks and Balances Threaten Anti-Corruption Efforts 1/29/2019, <https://www.transparency.org/en/news/weak-checks-and-balances-threaten-anti-corruption-efforts-across-eastern-eu>

¹¹² *Id.*

¹¹³ Fighting a Culture of Corruption in Ukraine, Thomas De Waal (April 18, 2016); <https://carnegieeurope.eu/2016/04/18/fighting-culture-of-corruption-in-ukraine-pub-63364>

¹¹⁴ Fighting a Culture of Corruption in Ukraine, Thomas De Waal (April 18, 2016); <https://carnegieeurope.eu/2016/04/18/fighting-culture-of-corruption-in-ukraine-pub-63364>.

authorities found pretexts not to refund at all.¹¹⁵ In 2017 ex-President Petro Poroshenko admitted in an interview that the system of VAT refund was opaque and allowed to “postpone without explanations, abolish or exclude from the [VAT] register.”¹¹⁶

In such an environment, doing business in Ukraine without paying bribes looked fantastical rather than realistic. ACTI Ukraine’s involvement with illicit payments was not surprising, considering that the company aimed to receive legitimate tax refunds, but did not have mechanisms to influence the tax authority and change the system in a legal way.

After revolution in 2014, the “system was shaken but not broken.”¹¹⁷ Although there were created specific bodies in the EU that supported Ukraine (the Support Group for Ukraine and the EU Advisory Mission) and “provided expert assistance in drafting the laws, setting-up the new anti-corruption institutions, or defining conditions applying to the EU’s financial assistance,”¹¹⁸ a lot of predecessors from the previous regime stayed in positions of power, and continued to abuse their official positions.

Nevertheless, the revolution in 2014 triggered some changes in the society: 1) there were settled e-declarations¹¹⁹ for officials who performed the functions of state or local governments;¹²⁰ 2) there were changes to the members of the High Council of Justice, the body that appoints justices, and the Supreme Court was restructured and new judges were selected; 3) the prosecutors’ system was reorganized; 4) new bodies charged with fighting corruption were created: the Specialized Anti-Corruption Prosecutor’s Office, the National

¹¹⁵ <https://www.kyivpost.com/article/content/business/us-prosecutors-expose-ukraines-corruption-in-vat-refund-payments-2-334308.html>.

¹¹⁶ Ukraine launches reform to tackle bribe culture in tax service, Natalia Zinets (April 3, 2017); <https://www.reuters.com/article/us-ukraine-tax/ukraine-launches-reform-to-tackle-bribe-culture-in-tax-service-idUSKBN1751QH>.

¹¹⁷ Fighting a Culture of Corruption in Ukraine, Thomas De Waal (April 18, 2016); <https://carnegieeurope.eu/2016/04/18/fighting-culture-of-corruption-in-ukraine-pub-63364>.

¹¹⁸ Importing EU norms: the case of anti-corruption norms in Ukraine, Marta Kralikova (January 21, 2021), <https://www.tandfonline.com/doi/full/10.1080/07036337.2021.1872559>.

¹¹⁹ According to the Ukrainian Law on Corruption Prevention, an e-declaration or electronic declaration is an annual report on the financial condition of a governmental official.

¹²⁰ Fighting a Culture of Corruption in Ukraine, Thomas De Waal (April 18, 2016); <https://carnegieeurope.eu/2016/04/18/fighting-culture-of-corruption-in-ukraine-pub-63364>.

Anti-Corruption Bureau of Ukraine (which has investigative and certain law-enforcement powers), the National Agency for Prevention of Corruption (which monitors senior official declarations and other data), the National Asset Recovery and Management Agency,¹²¹ and the High Anti-Corruption Court of Ukraine.¹²²

It is notable that Ukrainian officials obstructed implementation of the newly built anti-corruption system in Ukraine. Among the obstructions were: ‘technical problems’ with the e-declaration system; political conflict in appointing the head of the National Agency for Prevention of Corruption; conflicts between the newly-created National Anti-Corruption Bureau of Ukraine and the General Prosecutor’s Office;¹²³ the inability to find high-level, well-paid professionals; and, insufficient funding of the new bodies (for example, only under the pressure of the Western partners did the annual budget of the National Anti-Corruption Bureau of Ukraine increase from \$4 million to \$31 million).¹²⁴

According to Corruption Perception Index, Ukraine gained only 6 points for the period 2014-2021 and scored from 26 to 32 (where 0 is the most corrupt and 100 the least).¹²⁵ This shows a still high level of corruption in the country (in 2021, Ukraine ranked 122 out of 180 countries according to Transparency International ranking)¹²⁶. To compare, in 2021, Belarus was ranked 41, Poland – 56, Slovakia – 52, Moldova - 36, Hungary – 43, Romania – 45.¹²⁷ Although anti-corruption reform was announced and new governmental bodies were established in 2014, this did not bring noticeable results and criminal investigations.

¹²¹ *Id.*

¹²² https://en.wikipedia.org/wiki/High_Anti-Corruption_Court_of_Ukraine.

¹²³ Importing EU norms: the case of anti-corruption norms in Ukraine, Marta Kralikova (January 21, 2021), <https://www.tandfonline.com/doi/full/10.1080/07036337.2021.1872559>.

¹²⁴ Fighting a Culture of Corruption in Ukraine, Thomas De Waal (April 18, 2016); <https://carnegieeurope.eu/2016/04/18/fighting-culture-of-corruption-in-ukraine-pub-63364>.

¹²⁵ <https://ti-ukraine.org/en/news/no-progress-ukraine-s-result-in-the-corruption-perceptions-index-2021/>.

¹²⁶ <https://www.transparency.org/en/countries/ukraine>.

¹²⁷ *Id.*

However, with the pressure of civil society and the international community growing, we might see positive changes in the years to come.¹²⁸

For businesses, situation in Ukraine is still tough. Manager of Danone Ukraine, a subsidiary of the French food group, stated that although during the Yanukovich presidency they luckily were not targeted by illegal tax collection, after the Revolution in 2014 they were faced with “a completely unprofessional mafia [tax authority] who are there simply to extort as much as they can while in office.”¹²⁹ Also, a big agricultural company reported to Reuters that the company had lost a case in the court because they did not pay a judge bribe in the amount of \$30,000.¹³⁰

As we see, the system in Ukraine was (and still is) ripe for corruption. Weak compliance and management made it possible for Teva to be engaged into bribery; the company used a lucrative opportunity to obtain a license to sell pills and gain a part of the Ukrainian pharmaceutical market by means of illegal payments. The corrupt state system that was (and still is) predisposed to corruption gave a relatively cheap (in comparison with gained profits) opportunity to circumvent the law.

4. The FCPA Enforcement Tendencies

The FCPA enforcement against companies¹³¹ in 1977-2017 had the following tendencies: 1) until 2005, there was virtually no enforcement against non-US companies; 2) enforcement actions were concentrated mostly on the countries that were participants of the OECD Anti-Bribery Convention and paid bribes to officials from highly corrupt countries according to Transparency International; and, 3) most of the non-US companies investigations had “a US

¹²⁸ <https://www.transparency.org/en/news/weak-checks-and-balances-threaten-anti-corruption-efforts-across-eastern-eu>.

¹²⁹ Breaking the Bribe Culture is Still a Challenge for Ukraine, Alessandra Prentice, Pavel Polityuk (January 26, 2016); <https://www.reuters.com/article/us-ukraine-crisis-corruption/breaking-the-bribe-culture-is-still-a-challenge-for-ukraine-idUSKCN0V41CD>.

¹³⁰ *Id.*

¹³¹ Were considered only enforcement actions against companies for illicit payments to governmental officials.

cross-listing, significant US operations, and/or high internal control risk.”¹³² The Teva and ACTI Ukraine cases fall under these tendencies as violations occurred in the countries with high level of corruption and had a US cross-listing (Teva) and high internal control risk (although the parent company ADM was an American company that was investigated as well).

Also, it was found that the quantity of the FCPA investigations depends on a country’s economic activity rather than on its corruption level.¹³³ The FCPA enforcement is not very active in the territories of Ukraine and Russia. Such countries as China, Brazil, India, and Indonesia have much higher FCPA investigation statistics than Russia (and, obviously, Ukraine). To compare, there are 150 China-based companies that are traded on U.S. securities exchanges and only 8 Russian (in Ukraine only two).¹³⁴ In the meantime, both China and Russia have a high corruption rate according to Corruption Perception Index.¹³⁵

Publicly traded companies have usually more precise attention paid to their anti-bribery and internal controls provisions by the SEC. Nevertheless, U.S. authorities can target U.S. companies that have operations in Russia - but low economic activity results in low FCPA enforcement in the area. Statistics prove that: in the last 5 years, around 40 percent of all FCPA settlements involved violations that took place in China and only 7 percent in Russia.¹³⁶

¹³² Policemen for the World: The Rise of Extraterritorial Police Enforcement and Foreign Investment Competition, Hans B. Christensen, Mark Maffett, and Thomas Rauter, 46 p., p.5 (June 2020); <https://www.hbs.edu/faculty/Shared%20Documents/conferences/imo-2020/Hans%20Christensen%20Paper.pdf>.

¹³³ Russia’s Invasion of Ukraine: Effects on regional FCPA enforcement, <https://www.reuters.com/legal/legalindustry/russias-invasion-ukraine-effects-regional-fcpa-enforcement-2022-03-22/>.

¹³⁴ <https://www.sec.gov/enforce/sec-enforcement-actions-fcpa-cases>.

¹³⁵ Russia’s Invasion of Ukraine: Effects on regional FCPA enforcement, <https://www.reuters.com/legal/legalindustry/russias-invasion-ukraine-effects-regional-fcpa-enforcement-2022-03-22/>.

¹³⁶ Russia’s Invasion of Ukraine: Effects on regional FCPA enforcement, <https://www.reuters.com/legal/legalindustry/russias-invasion-ukraine-effects-regional-fcpa-enforcement-2022-03-22/>.

After the Russian invasion of Ukraine, the dynamic of FCPA enforcement in the Eastern Europe and Commonwealth of Independent States (CIS)¹³⁷ may change. Operations with Russian companies and oligarchs will be under close attention of the U.S. authorities. Also, countries from that region might have close ties with the Kremlin, which potentially makes them targets for FCPA enforcement. Moreover, in 2021, President Biden declared the strengthening of anti-corruption efforts, including aggressive enforcement and expansion of the FCPA around the world.¹³⁸ The pool of companies that worked in Russia, however, shrank significantly after February 24, 2022. In combination with sanctions imposed, that will reduce economic activity in the country even more. That means that businesses that stayed or will appear in the future are likely to get underenforcement of the FCPA because such companies could just be ‘unnoticeable’ for the foreign law-enforcement bodies.¹³⁹

Considering the high level of corruption in Ukraine and Russia, entrepreneurs that are doing business in these countries are under constant ‘pressure.’ The companies that have connections with the US or European countries are under double pressure due to their anti-corruption laws, which track companies’ corruption activities abroad and severely punish for them (for example, the FCPA in the US, the Bribery Act in the UK, Sections 331 and 333 of German Criminal Code, etc.).

On the one hand, it might look like local companies are restricted only by the local anti-corruption legislation and are not affected by the fierce sanctions under foreign extraterritorial legislation. Also, it seems that they might have more opportunities to bribe officials and obtain advantages in the market over the US and European companies.

¹³⁷ Member states: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

¹³⁸ The Biden Administration’s Aggressive Policy Changes to Combat Corruption, Brandon D.Fox, Keisha N. Stanford, Tessa J.G. Roberts, Annie R. (January 25, 2022); <https://www.lawfareblog.com/biden-administrations-aggressive-policy-changes-combat-corruption>.

¹³⁹ Russia’s Invasion of Ukraine: Effects on regional FCPA enforcement, <https://www.reuters.com/legal/legalindustry/russias-invasion-ukraine-effects-regional-fcpa-enforcement-2022-03-22/>.

On the other hand, statistics shows that, for example, from 2004 to 2018, the FCPA monetary resolution against domestic (US) corporations amounted to \$21,182,931 and \$75,016,934 against non-US companies.¹⁴⁰ These unequivocally demonstrate that foreign companies fall under the FCPA enforcement even more often than domestic companies. In the meantime, local companies that do not have connections with foreign countries might have opportunities to bribe officials and rely on local weak systems; this risk cannot be eliminated completely without robust anti-corruption enforcement within the country.

Considering changes that are going on in the world today, the FCPA enforcement trends might change, and the FCPA enforcement may concentrate on Eastern European countries. Nevertheless, the countries with high population still will attract the attention of US governmental agencies due to their high economic activity and ties with the US economy and business.

CONCLUSION

It is difficult to claim that FCPA enforcement always changes societies. As it is clear from the paper, there are multiple factors that should be considered when considering this influence. Among these factors are: 1) the region where the country is situated, 2) local culture and traditions, including business traditions, 3) how corruption penetrated social and political life and the size of the economy, 4) the legal framework of the country, 5) political will to 'notice' and combat bribery, 6) the reaction of society to corruption issues, and 7) the quantity of the FCPA enforcement actions that were initiated in the region.

Taking into consideration the number of FCPA enforcement actions in Ukraine and Russia, it is hard to affirm that they affected the attitude to corruption in societies. They rather confirm the systemic problems in place. Meanwhile, we cannot deny the growing

¹⁴⁰ FCPA Enforcement Against U.S. and Non-U.S. Companies, Michael S. Diamant, Christopher W.H. Sullivan, Jason H. Smith, Michigan Business and Entrepreneurial Review Volume 8, Issue 2, 2019, 353-379p., p.371; <https://www.gibsondunn.com/wp-content/uploads/2019/09/Diamant-Sullivan-Smith-FCPA-Enforcement-Against-U.S.-and-Non-U.S.-Companies-Michigan-Business-Entrepreneurial-Law-Review-Spring-2019.pdf>.

tendency of establishing compliance systems inside the organizations around the world and increasing enforcement of anti-corruption legislation.

Regardless of high corruption levels in Ukraine and Russia, Teva and ADM changed their business practices, built robust anticorruption systems, and continued doing business in the countries. Since the DOJ and SEC supervised the companies' inner changes after entering into the NPA and DPA, and closed the cases after 3 years, it is possible to claim that it was possible for the companies to operate in a corrupted environment without being engaged in illegal activities. This fact shows that western companies are able to work in Ukraine and Russia without being engaged in bribery.

In addition to the companies' desire to cope with illegal practices, further positive changes are possible in a long run with the support of numerous law enforcement actions, work of non-governmental organizations, and help of developed countries.