



Assessment of corruption risk

According to the Guidelines for Observation and Exclusion from the Government Pension Fund Global (GPF), the Council on Ethics may recommend the exclusion of a company if there is an unacceptable risk that the company contributes to or is responsible for gross corruption. Since 2013, the Council has not only assessed companies shown by news monitoring to have comprehensive corruption accusations levelled at them, but has also specifically reviewed companies in countries and sectors where international rankings show that the risk of corruption is assumed to be particularly high. The studies that the Council has conducted so far relate to companies with operations in the building and construction industry, oil and gas sector and defence industry. A telecommunications industry study has also just started.

The Council thoroughly investigates accusations of gross corruption against a company, including by contacting experts and public bodies and using consultants with specialist expertise in the relevant professional area. In its specific assessment of whether a company has been involved in "gross corruption", the Council places emphasis on factors such as the size of the amounts and whether there are repeated accusations against the company that may indicate a systematic use of corruption.

Following this, the Council assesses whether there is a risk that the gross corruption will continue, something which is crucial to whether the Council recommends excluding the company from the fund. Key to this assessment are the anti-corruption processes and controls implemented in the company. These measures are summarised in the company's anti-corruption programme, which is often an important part of the corporate compliance management systems. The objective of a company's anti-corruption programme is to prevent, discover and react to violations of internal and external laws and rules. The way in which the anti-corruption programme has been implemented may therefore say something about the risk of unlawful acts continuing to take place in the future.

The Council bases its assessment of a company's anti-corruption programme on established international norms and standards for best practice. The *Foreign Corruption Prevention Act (FCPA)* and associated sanction procedures gradually developed as corruption cases were settled between companies and the US authorities, as well as the *UK Bribery Act*, have helped to develop international anti-corruption standards for businesses. Brazil also passed a corresponding anti-corruption law in 2013, according to which companies are for the first time assigned civil-law and administrative liability for corruption-related acts. This is known as the *Clean Company Act*. In 2012, the US Department of Justice (DoJ) and Securities and Exchange Commission (SEC) published *A Resource Guide to the U.S. Foreign Corrupt Practices Act*¹ - a guide on how companies should act to avoid criminal liability pursuant to the FCPA. Useful guidelines for how companies are to prepare and implement anti-corruption programmes are also to be found in the UN's anti-corruption portal TRACK (*Tools and Resources for Anti-Corruption Knowledge*) and Global

Compact: A guide for anti-corruption risk-assessment, the OECD's *Good Practice Guidance on Internal Controls, Ethics and Compliance*, and Transparency International's *Business Principles for Countering Bribery*.

Many companies have now established internal anti-corruption processes and controls for their operations. The Council places emphasis on the degree to which these are incorporated into operational compliance procedures, how they are managed internally and communicated externally, the degree to which they are effectively implemented and the way in which the company has organised its anti-corruption work.

The Council reviews the publicly available information on corporate compliance management systems and anti-corruption processes and controls for the companies assessed. In addition, the Council meets with the companies in order to assess how these systems, processes and controls are implemented. Companies involved in corruption cases must be able to convince the Council that they have a plan for their anti-corruption work, that resources have been made available for this work and that the plan is being carried out. It is only if the company proves it probable that its corporate compliance management systems and anti-corruption processes and controls are properly organised and implemented effectively that the Council can conclude that the risk of future corruption has been reduced so that the company should not be excluded from the fund.

Specific cases

The Council investigated many companies in relation to the corruption criterion in 2015. These are companies listed on stock exchanges on all continents and the relevant acts of corruption were alleged to have taken place in very many different countries. The cases assessed by the Council in 2015 confirm several points stated in the OECD's 2014 Foreign Bribery Report, which presented the results of a review of all the transnational, judicially determined corruption cases in OECD countries during the period from when the OECD's Anti-Bribery Convention entered into force in 1999 and until 2014: that corruption is not a typical developing country problem but takes place in all countries, that senior executives are often directly

involved in the acts of corruption and that corruption to a great extent takes place in connection with public-sector contracts.²

ZTE Corporation

The Council has known for many years that ZTE Corporation (ZTE) is being investigated for corruption in numerous countries. It has been difficult to obtain sufficient information on the various investigations because these have taken place in several countries where such information is not disclosed to the public. In 2015, however, the number of corruption accusations and investigations had reached a level which indicated that, in the Council's view, there was a clear risk of gross corruption in the company. ZTE had by then been accused of corruption in a total of 18 countries and been investigated for corruption in 10 of these. Only one of the investigations had resulted in a conviction, although this was without the company's representatives being present during the criminal proceedings in court (in absentia proceedings). The Council also placed emphasis on the fact that the company's employees had left the country as soon as an investigation started, something that made it impossible to fully investigate the accusations.

The Council based its assessment of the future risk on the fact that ZTE ought to have sound systems in place to prevent corruption in light of the many serious corruption accusations against it and the corruption risk in sectors and countries where it operates. The Council did not find that ZTE had proven it probable that it had such systems or that the systems which existed were organised and implemented in a sufficiently effective manner. In its communication with the Council, ZTE provided little information on its anti-corruption work and did not give good answers to questions about what it did to prevent corruption. The Council therefore recommended the exclusion of ZTE.

ZTE operates in a sector where large public-sector contracts are common and has allegedly repeatedly paid large bribes so that public-sector employees will favour it in competitive tenders. This has supposedly taken place in countries such as Zambia, the Philippines, Papua New Guinea, Liberia, Myanmar and Nigeria. This type of corruption often has major social consequences in that countries with a huge need for

development have their treasuries drained. One of several specific examples in this case is a school project that ZTE was to help establish on Papua New Guinea in 2010. As far as the Council knows, this project has so far not been realised but has cost the country's inhabitants USD 35 million.

Petroleo Brasileiro SA (Petrobras)

For several years, the Council has known about corruption accusations involving Petrobras. However, it was not until 2014, when the scope of the accusations became generally known, that the Council decided to contact the company and investigate the accusations with the aim of recommending exclusion. The Council's view is that the information which became publicly known in 2014 and 2015 indicates that the company is responsible for gross corruption. This applies to both active and passive corruption.

The Council based its assessment of the future risk on the assumption that the company should have sound systems in place to prevent corruption in light of the serious corruption accusations that became known in 2014 and 2015 and the risk of corruption in countries and sectors where the company operates. The Council did not find that Petrobras proved it probable that its anti-corruption procedures are organised and implemented in a sufficiently effective fashion. The company's response to the corruption accusations was also of significant importance to the Council. Petrobras underlined both publicly and to the Council that it is a victim of some individual employees' acts. In light of the extensive acts of corruption involving senior Petrobras employees, this appears to be a repudiation of liability by the company. However, the Council found that companies which have recently established internal preventive systems must be given some time to implement them properly. In addition, the Council placed emphasis on the fact that the great attention given to the case both nationally and internationally will probably force the company to take further steps in the right direction. The Council therefore recommended putting the company under observation instead of exclusion from the fund. The Council will reassess this case in 2016.

This is the first corruption case where the Council has given weight to passive corruption, i.e. the demanding

or receiving of bribes. The passive corruption cases previously considered by the Council have involved individual employees who have enriched themselves. In order for passive corruption alone to form a basis for exclusion, the Council takes the view that the corruption must be extensive and/or systematic and that it must be possible to blame the company for this. In the Petrobras case, the Council believes that

what is blameworthy is that the internal anti-corruption systems failed and that it was probably defects in the internal controls that allowed the extensive corruption to take place over so many years. The Council finds that passive corruption on this scale is, like active corruption, a barrier to social and economic development.

Noter

1. This guide is available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.
2. The report is available at <http://www.oecd.org/corruption/oecd-foreign-bribery-report-9789264226616-en.htm>.