

# Commonwealth Anti-Corruption Benchmarks

*Commonwealth Secretariat*

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Commonwealth Secretariat

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This publication provides 25 benchmarks of good anti-corruption practice for national governments and public sector bodies. These benchmarks are summarised in Section 2 (Principles) and specified in Section 3 (Benchmarks), with supporting guidance in Section 4 (Guidance).

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## About the Authors

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The Commonwealth Anti-Corruption Benchmarks were developed in consultation with representatives of the African Union, the International Monetary Fund, the United Nations Office on Drugs and Crime, and Commonwealth law ministries, anti-corruption agencies, and partner organisations. Catherine Stansbury, Director of the Global Infrastructure Anti-Corruption Centre, is the principal author. She was assisted by Neill Stansbury, Director of the Global Infrastructure Anti-Corruption Centre; Chris Alder, Director of Regulation, Royal Institution of Chartered Surveyors; and Matthew Moorhead, Office of Civil and Criminal Justice Reform, Commonwealth Secretariat.

## Publishing Organisations

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This document was produced by the Commonwealth Secretariat in collaboration with GIACC and RICS.

**The Commonwealth** is a voluntary association of 54 countries with a combined population of 2.4 billion. Its member countries cover 20 per cent of the world's land area, on six continents. **The Commonwealth Secretariat** was established in 1965 to help support member countries. Its vision is to help create and sustain a Commonwealth that is mutually respectful, resilient, peaceful and prosperous. The Governance and Peace Directorate of the Secretariat is responsible for helping member countries deliver more effective, efficient and equitable public governance.

**The Global Infrastructure Anti-Corruption Centre (GIACC)** is an independent not-for-profit organisation which provides resources to assist in the understanding, identification and prevention of corruption. GIACC's objective is to promote the implementation of anti-corruption measures as an integral part of government, corporate and project management. It also works through a network of international affiliates and alliances, and publishes the GIACC Resource Centre, which provides free online information, advice and tools on preventing corruption.

**The Royal Institution of Chartered Surveyors (RICS)** is the world's leading professional body for qualification, standards and regulation in land, real estate, infrastructure and construction, promoting and enforcing professional excellence internationally. RICS supports international agencies, governments, business and the public, setting and enforcing global standards for those working in the built and natural environment.

The text of this publication was written by GIACC, based on principles contained in recognised publications, with support and input from the Commonwealth Secretariat and RICS, and in consultation with Commonwealth member countries.

## Abbreviations and Acronyms

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ACA	anti-corruption agency
AML	anti-money laundering
CDPP	Commonwealth Director of Public Prosecutions (Australia)
DNFBP	designated non-financial businesses and professions
EU	European Union
FATF	Financial Action Task Force
FATF Recommendations	International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation – The FATF Recommendations (Adopted February 2012) (Updated June 2019)
GIACC	Global Infrastructure Anti-Corruption Centre
GPA	Government Procurement Agreement
IAP	International Association of Prosecutors
ICC	International Chamber of Commerce
ICT	information and communication technologies
IDEA	International Institute for Democracy and Electoral Assistance
International Code of Conduct for Public Officials	International Code of Conduct for Public Officials contained in the Annex to General Assembly Resolution 51/59 of 12 December 1996 (as referred to in UNCAC Article 8, paragraph 3)
IRMT	International Records Management Trust
PEFA	Public Expenditure and Financial Accountability
PEPs	politically exposed persons
RICS	Royal Institution of Chartered Surveyors
RSC	Revised Statutes of Canada
StAR	stolen asset recovery
UNODC	United Nations Office on Drugs and Crime
UNODC/IMF/ Commonwealth Model Provisions (2016)	Common Law Legal Systems Model Legislative Provisions on Money Laundering, Terrorism Financing, Preventive Measures and Proceeds of Crime (2016) (published by the Commonwealth Secretariat, UNODC and IMF)

## Abbreviations and Acronyms

UNCAC	United Nations Convention Against Corruption (entry into force 14 December 2005)
UNODC Guidebook on Anti-Corruption in Public Procurement (2013)	UNODC Guidebook on anti-corruption in public procurement and the management of public finances: Good practices in ensuring compliance with article 9 of the United Nations Convention against Corruption (2013)
UNODC Legislative Guide to UNCAC (2006)	UNODC's Legislative Guide for the Implementation of the United Nations Convention against Corruption (2006)
UNODC Technical Guide to UNCAC (2009)	UNODC's Technical Guide to the United Nations Convention against Corruption (2009)
UNODC State of Implementation of UNCAC (2017)	UNODC's State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation. Second Edition (2017)
VQA	vast quantities of assets
WTO	World Trade Organization

## Definitions

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The following definitions apply to the Benchmarks and to the Guidance to the Benchmarks:

activity	: any activity, action or transaction
appointment	: the selection of an individual for employment, and 'appointed' should be construed accordingly
asset	: anything which has a monetary value, including tangible assets (such as cash, equipment, facilities, land and real estate, machinery, mineral resources, precious stones, vehicles and works of art) and intangible assets (such as businesses, organisations, trusts, and financial instruments such as bonds, patents, shares and stocks)
asset recovery/asset recovery process or proceedings	: the process involving the identification, tracing, freezing, seizure, confiscation and forfeiture of proceeds of crime or of property, equipment or other instrumentalities used in or destined for use in a criminal offence
associated person	a person who performs services for or on behalf of an organisation in any capacity including, for example, as a joint venture partner, supplier, subsidiary or personnel of the organisation
authority	: a public sector organisation carrying out a public function(s) and having some official authority. Where a Benchmark refers to a single authority carrying out a function(s), this is for simplicity of wording. It is acknowledged that some States may have more than one authority carrying out such function(s). For example, Benchmark 2 refers to a single authority responsible for preventing corruption whereas, in a federal State, each constituent state may have its own such authority; and Benchmark 11 refers to a single employment authority whereas States may have separate regulatory authorities for different types of public official
beneficial owner	: an individual who ultimately owns or controls, whether directly or indirectly, wholly or in part, an asset, or who is entitled to receive a share of the capital in, or profits or other benefit derived from, an asset
beneficial ownership	: all beneficial owners of an asset
body	: where a Benchmark refers to a single body carrying out a function(s), this is for simplicity of wording. It is acknowledged that some States may have more than one body carrying out such function(s)
budget	: includes national, subnational, provincial and State budgets
business associate	: a person with which an organisation had, has, or intends to have a business relationship, including clients, consortium partners, customers, joint venture partners, purchasers and suppliers (as defined below), but excluding personnel of the organisation

## Definitions

combat corruption	: prevent, detect and deal with corruption
concession	: the right granted by a public sector organisation to an individual or organisation to operate a facility, resource or other asset (including those specified in Benchmark 16.2) and to receive revenue therefrom
corruption/ corrupt activity	: any activity that constitutes a corruption offence under Benchmark 1
corruption offence	: any corruption offence referred to in Benchmark 1
court administration/ court administrative functions	: includes all management and administrative functions which support the court system, such as procurement, financial management, human resource management, facilities management, and judicial support functions such as operation of court procedures and filing systems
court personnel	: all individuals, other than judges, involved in operating the court system
court system	: the system for delivering justice through the courts. Such system includes: (i) the judiciary and judicial functions, (ii) the courts and court processes, (iii) court administration, (iv) processes for the appointment, employment, promotion, demotion, transfer, regulation, disciplining, suspension and dismissal of members of the judiciary and court personnel, and (v) all persons involved in carrying out such matters
decision	: includes any approval, assessment, certification, confirmation, decision, determination, judgment, recommendation, refusal or rejection. This could include, for example, a decision to undertake an activity, an approval of changes to contract terms, an approval or rejection of quality of work, a recommendation for payment or a refusal to approve payment
employment	: includes the employment or engagement of an individual under contract or statute, and 'employed' should be construed accordingly
establish	: set up, operate, maintain
facilitation payment	: an illegal or unofficial payment which is solicited, accepted or demanded by a public official in return for services that the payer is legally entitled to receive without having to make such payment
implement	: design, develop, introduce, operate, maintain, monitor and continually improve
includes/including	: where one or more items follow the word 'includes' or 'including', such items are by way of example and are not intended to be a complete list
judges/the judiciary	: judges, magistrates, and any other persons exercising judicial functions
law enforcement/law enforcement processes or activities	: investigation, prosecution, asset recovery and policing
lobbying	: an attempt, through written or oral communication, to influence the actions or decisions of any public official

lobbyist	: any individual or organisation whose function, in whole or part, is to try to influence the actions or decisions of any public official
organisation	: any entity, association, or body of one or more individuals, which has legal rights and obligations, whether incorporated or not, in the public or private sector. It includes agency, authority, charity, company, corporation, enterprise, firm, government department, institution, organisation, partnership, sole trader or trust, or part or combination thereof
parliamentary administration/ parliamentary administrative functions	: includes all management and administrative functions which support the parliamentary system, such as procurement, financial management, human resource management, facilities management, and the operation of parliamentary procedures and filing systems
parliamentary personnel	: all individuals, other than elected members of parliament, involved in operating the parliamentary system
parliamentary system	: the system for operating parliamentary business. Such system includes: (i) members of parliament and their functions, (ii) parliament and parliamentary processes, (iii) parliamentary administration, (iv) processes for the election, appointment, employment, promotion, demotion, transfer, regulation, disciplining, suspension and dismissal of members of parliament and parliamentary personnel, and (v) all persons involved in carrying out such matters
participating suppliers	: those suppliers who are participating in a particular procurement process
permit	: any approval, consent, licence or permit issued by a public sector organisation, which grants permission to a person to carry out a specified activity, or which confirms that such activity is compliant with relevant regulations
person	: any individual or organisation
personnel	: directors, officers, employees, workers and volunteers of an organisation, whether full time or part time, permanent or temporary
political candidate	: an individual who is standing for election to public office
prescribed	: prescribed in the regulations relevant to the particular Benchmark
private sector	: all individuals not acting in the capacity of a public official and all organisations which are not public sector organisations
proceeds of crime	: property (including money) obtained by way of a criminal offence ('original property'); property the value of which corresponds to the value of such original property; property into which the original property has been transformed or converted; property acquired from legitimate sources and with which the original property has been intermingled; and income or other benefits derived from any of the above. 'Proceeds of corruption offences' should be construed accordingly
procurement/ procurement process	: the process by which a supplier is selected and contracted by a procuring entity to provide works, products, services, loans, assets, or the operation of a concession. 'Procure' should be construed accordingly

## Definitions

procurement personnel/ procurement officials	: personnel in a procuring entity who carry out or have any authority over a procurement process
procuring entity	: any public sector organisation which carries out procurement
public interest	: the interests of the public at large as objectively and independently determined
public international organisation	: an organisation established by a treaty or other instrument governed by international law and possessing its own international legal personality
public official	: any individual, whether appointed or elected, whether in a temporary or permanent position, whether paid or unpaid, and irrespective of seniority, who: (i) holds a legislative, executive, administrative or judicial office of a State or government; (ii) performs a public function, including for a public sector organisation, or provides a public service; (iii) is employed by, or authorised to act on behalf of, a public sector organisation; (iv) is defined as a 'public official' in the domestic law of a State; or, unless otherwise indicated, (v) is a public official of another State or government, or of a public international organisation
public sector organisation	: an organisation, whether domestic or international, which is owned or controlled in whole or in part by a State, or by any level of government
recovered assets	: (i) proceeds of crime, or (ii) property, equipment or other instrumentalities used in or destined for use in a criminal offence, which have been recovered by way of asset recovery proceedings
regulation	: a requirement regulating persons, activities or functions and which is enacted by law or issued pursuant to a law
remuneration	: salary and benefits
senior manager	: a director, officer or employee of an organisation who has a senior role in the establishment of the policies of the organisation or who manages at high level an important aspect of the organisation's activities. This would include, for example, anyone in top management (as defined below), a chief financial officer or functional head of procurement, sales or projects. 'Senior management' should be construed accordingly
solicitation document	: a document issued by a procuring entity in a procurement process which invites a submission from suppliers. Such documents include invitations to pre-qualify, invitations to tender, requests for proposals or quotations, and invitations to an electronic reverse auction
submission	: a document submitted by a supplier in a procurement process in response to a solicitation document. Such documents include a tender, proposal, offer, quotation or bid
sub-supplier	: a supplier which is or may be contracted to another supplier

## Definitions

supplier	: includes any agent, concession operator, consultant, contractor, distributor, lender, lessor, representative, seller, supplier, or other person offering or providing works, products, services or assets
top management	: the body or person(s) who control(s) the organisation at the highest level (for example, the board of directors, supervisory council, a chief executive officer or other top leadership individual(s) or body)

# Section 1

Introduction



# Section 1

## Introduction

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### **The need for further action against corruption**

Corruption undermines the proper functioning of society. It corrupts government, parliament, the judiciary, law enforcement, public sector functions, private sector commerce, and dealings between private individuals. It results in poor public services and in over-priced and dangerous infrastructure. It damages organisations, resulting in reduced project opportunities and financial loss. It harms individuals, resulting in poor education and health, poverty, hunger, and loss of life. It prevents the proper rule of law so that the innocent and vulnerable bear the consequences while the guilty escape sanction.

Over the last 25 years, significant national and international action has been taken to help prevent and address corruption. This has been driven by an increased recognition internationally of the damage caused by corruption and a growing determination to take effective action to minimise it. Under the United Nations Convention against Corruption, each State Party commits to take steps to prevent corruption. Target 16.5 of the United Nations Sustainable Development Goals is to ‘Substantially reduce corruption and bribery in all their forms’. The Commonwealth Charter commits member countries to good governance and transparency and to rooting out systemic corruption. Many countries have strengthened their anti-corruption laws, taken preventive action, and carried out education campaigns. There are now cases of successful prosecutions against organisations and individuals who have participated in corrupt conduct. Multilateral development banks, export credit agencies and commercial lenders have materially strengthened their anti-corruption procedures and enforcement. Many organisations have implemented anti-corruption procedures designed to prevent and deal with corrupt conduct by and against these organisations. The International Organization for Standardization (ISO) has published ISO 37001, an international anti-bribery standard for organisations. Professional institutions and business associations increasingly require members to commit to avoid corrupt practices and sanction members for breach. The national and international media frequently report stories of corrupt conduct, reflecting an increased public awareness and intolerance of such practices. There is an increased recognition that good anti-corruption practice leads to greater investment and more resilient democracy.

However, despite the above major advances, existing anti-corruption mechanisms still do not consistently and effectively discourage, prevent, detect or prosecute corruption. In all countries, to a greater or lesser degree, corruption continues to erode all areas of society. Public officials embezzle public funds. Government

ministers award contracts to political donors. Lobbyists improperly influence members of parliament. Law enforcement officers are bribed to tamper with evidence or bring false charges. Judges accept bribes to issue improper judgments. Officials misuse emergency procedures to bypass competitive tender requirements. Organisations bribe to win work, defraud their clients through false claims, and form cartels to win work at inflated prices. Organisations which are not prepared to bribe lose work to those which are. Individuals face extortion at police checkpoints or customs clearance, or to obtain utility services. Stolen money is laundered through the international financial system and stolen assets are hidden through concealed ownership mechanisms.

There is therefore a continuing and urgent need for determined and unified action to be taken by governments, organisations and individuals to help prevent corruption.

The Commonwealth Secretariat has worked with its members to strengthen anti-corruption measures for many years. In 2000, a Commonwealth Expert Group adopted the Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption. Commonwealth Heads of Government have called on member countries to sign, ratify and implement the United Nations Convention against Corruption. In May 2016, the Commonwealth Secretariat convened the Tackling Corruption Together conference, attracting a high level of participation and interest from around the world.

The Commonwealth Anti-Corruption Benchmarks seek to build on and advance the invaluable work that has been done to date to combat corruption.

### **The purpose and structure of the Commonwealth Anti-Corruption Benchmarks**

The Commonwealth Anti-Corruption Benchmarks are recommended as good practice anti-corruption measures. They are intended primarily to help governments and public sector organisations assess their anti-corruption laws, regulations, policies and procedures against international good practice, and consider implementing appropriate improvements. The Benchmark measures are designed to be achievable, practical and auditable.

There are 25 Benchmarks, each of which comprises a Principle supported by a corresponding Benchmark.

The Benchmarks address corruption across key areas of the public and private sectors which are either important for combating corruption or are vulnerable to significant corruption. In relation to each key area, the Benchmarks promote the concepts of honesty, impartiality, accountability and transparency and provide for specific anti-corruption measures.

## Introduction

The overall scheme of the Benchmarks is:

- 1) to establish the types of corrupt conduct in the public and private sectors that should be criminalised, and to recommend provisions for jurisdiction, liability, sanctions and remedies, so as to provide an adequate deterrent and penalty for offenders and adequate compensation for the victims of corruption (Benchmark 1);
- 2) to provide for a body or bodies with overall responsibility for developing and establishing national anti-corruption policies and practices, for encouraging and promoting their implementation in the public and private sectors, and for assessing their implementation and effectiveness. This role includes overseeing the effective implementation of the Benchmarks (Benchmark 2);
- 3) to ensure that those institutions (law enforcement, the courts and parliament) which are responsible for applying and enforcing anti-corruption law, and for legislating and holding the executive to account, are sufficiently competent and independent to do so, and are themselves free from corruption (Benchmarks 3, 4 and 5);
- 4) to ensure that there is adequate anti-corruption regulation in relation to those activities which impact on the public or which could cause significant harm or loss to the public, including public services (Benchmark 6), the financial system (Benchmark 7), asset ownership (Benchmark 8), and political lobbying, financing, spending and elections (Benchmark 9);
- 5) to ensure that all public sector organisations are subject to adequate anti-corruption controls, including in relation to their organisational management (Benchmark 10), personnel (Benchmark 11), and management functions (Benchmarks 12 to 17), and that there is independent monitoring and auditing of public sector organisations and contracts with the specific purpose of deterring and detecting corruption (Benchmarks 18 and 19);
- 6) to ensure that all public officials are subject to measures that promote integrity and combat corruption, including in relation to their employment, conduct, training and disciplining (Benchmark 11);
- 7) to ensure that there are reliable, accessible and properly advertised systems which enable public officials, businesspersons and members of the public to report corruption safely and confidentially and, if desired, anonymously, and with sufficient legal protections (Benchmark 20);
- 8) to ensure that proper anti-corruption training is provided to all public officials, and to all those private sector individuals who are involved in public sector work above a prescribed value threshold, so that they are

- aware of the risks of corruption, the damage it can cause, and how to prevent, deal with and report corruption (Benchmark 21);
- 9) to promote the development and implementation of national and international standards which are designed to ensure better compliance with laws, regulations and recognised good practice, and thereby help to deter corruption (Benchmark 22);
  - 10) to encourage and enable professional institutions and business associations to play a proactive role in combating corruption by developing and implementing professional, business and ethical standards and codes of conduct, with which their members should comply in the public interest (Benchmark 23);
  - 11) to ensure that there is transparency in relation to all public functions so that the public have sufficient understanding and knowledge to enable them to monitor and assess whether those functions are being carried out in accordance with the law and without corruption. (All Benchmarks provide for specific disclosures of information to the public.);
  - 12) to ensure that the public is freely able to participate in, report on, comment on, and lawfully protest against, the actions of government, public officials and public sector organisations (Benchmark 24);
  - 13) to ensure international co-operation in relation to the prevention of corruption, public education concerning corruption, the investigation and prosecution of corruption offences, and the recovery and return of the proceeds of crime (Benchmark 25);
  - 14) to ensure that those private sector organisations which carry out public sector work or receive public sector funds over a prescribed value threshold are subject to adequate anti-corruption measures in relation to their internal management and their external dealings (Annex to the Guidance).

For ease of use, and to avoid unnecessary repetition or duplication between anti-corruption measures, the Benchmarks have been structured on a modular basis. The modules, where necessary, cross-refer to each other. For example, Benchmark 10 (which provides for an anti-corruption management system for public sector organisations) cross-refers to other Benchmarks rather than repeat their provisions in Benchmark 10. Thus, it cross-refers to Benchmark 11 (Public officials) for anti-corruption controls in relation to the employment of its personnel; to Benchmarks 12 to 17 in relation to anti-corruption management of its functions; to Benchmarks 18 and 19 in relation to measures concerning monitoring and auditing; and to Benchmarks 20 and 21 in relation to measures concerning reporting systems and anti-corruption training.

## Introduction

The intention is that each Benchmark should be read with the Guidance to that Benchmark. The Guidance provides, for each Benchmark, a brief explanation of the purpose of the Benchmark, explanation of various provisions in each Benchmark, and references to published good practice.

The Benchmarks are largely based on key sources referenced in the Guidance. However, the Benchmarks do not attempt to replicate these sources in full. In cases where there may be no recognised international good practice, the Benchmarks propose a good practice measure. In some cases, the Benchmarks exceed a specified recommendation or requirement of a recognised international source: this has been done where it is perceived that the Commonwealth may aim for a higher level of ambition, promoting a good practice approach to anti-corruption action. In this way, the Benchmarks provide a core set of actions, consistent with, but often expanding upon, existing international standards.

### **Approval and implementation of the Benchmarks**

The approval or endorsement by a government of the Benchmarks does not impose any obligation or commitment, legal or otherwise, on governments or any other entity.

Governments may choose whether or not to implement the Benchmarks and may also choose to implement some Benchmarks and not others. Implementation may be in whatever manner and to whatever extent governments wish and may, for example, be in the format specified in the Benchmarks or in a format which is materially equivalent in purpose and effect to, or stricter than, relevant Benchmark provisions. It would be expected that governments that do implement the Benchmarks would do so in accordance with their country's constitutional structure, and in a reasonable and proportionate manner, taking into account the structure and resources of the relevant country or public sector organisation, and the extent of the relevant corruption risks which the Benchmark provision is designed to combat.

It is now widely recognised that exclusion and discrimination can be due to, or result in, corruption or entrenched corrupt power. Therefore, in interpreting and implementing the Benchmarks, and anti-corruption laws, regulations, policies and procedures, it would be expected that countries would ensure that the rights and interests of all persons are adequately taken into account and appropriately protected, regardless of their age, disability, gender re-assignment, marital status, pregnancy, race, religion, sex or sexual orientation.

The Benchmarks are offered as a holistic and interlocking system that aims to reduce and deal with the risk of corruption in the public and private sectors.



# Section 2

## Principles



## Section 2

### Principles

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#### **Benchmark 1: Corruption offences, sanctions and remedies**

Implement anti-corruption laws which establish the types of corrupt conduct that are criminalised and which provide for appropriate sanctions and remedies.

#### **Benchmark 2: Authority responsible for preventing corruption**

Establish or designate a public authority with responsibility for preventing corruption in the public and private sectors.

#### **Benchmark 3: Investigation, prosecution, asset recovery and policing**

Implement regulations which are designed to (i) combat corruption in investigation, prosecution, asset recovery and policing, and (ii) enable the effective investigation and prosecution of corruption and recovery of corruptly obtained assets.

#### **Benchmark 4: The court system**

Implement regulations which are designed to (i) combat corruption in the court system, (ii) enable the judiciary to operate effectively and independently, and (iii) enable the effective determination of corruption issues.

#### **Benchmark 5: Parliament**

Implement regulations which are designed to (i) combat corruption in parliament, and (ii) enable parliament effectively and independently to pass anti-corruption laws, approve budgets, and hold the executive to account.

#### **Benchmark 6: Regulatory authorities**

Establish or designate regulatory authorities with responsibility for regulating public sector and private sector activities which provide services to the public or which impact on the public, so as to combat corruption.

#### **Benchmark 7: Regulation of financial institutions and the financial system**

Implement regulations which are designed to combat (i) corruption in financial institutions and the financial system, and (ii) the laundering of the proceeds of crime.

**Benchmark 8: Transparency of asset ownership**

Implement regulations which promote transparency of legal and beneficial ownership of organisations, land and real estate, trusts, and high value movable property, so as to combat corruption.

**Benchmark 9: Political lobbying, financing, spending and elections**

Implement regulations which are designed to combat corruption in political lobbying, financing, spending and elections.

**Benchmark 10: Public sector organisations**

Implement regulations which require all public sector organisations to implement an effective anti-corruption management system designed to combat corruption by, on behalf of or against the organisation.

**Benchmark 11: Public officials**

Implement regulations which are designed to ensure the integrity of public officials and which provide for the sanctioning of corrupt public officials.

**Benchmark 12: Issuing permits**

Implement regulations which are designed to combat corruption in relation to the issuing of government permits.

**Benchmark 13: Procurement**

Implement regulations which are designed to combat corruption in public sector procurement.

**Benchmark 14: Contract management**

Implement regulations which are designed to combat corruption in public sector contract management.

**Benchmark 15: Financial management**

Implement regulations which are designed to combat corruption in public sector financial management.

**Benchmark 16: Concession management**

Implement regulations which are designed to combat corruption in public sector concession management.

**Benchmark 17: Asset management**

Implement regulations which are designed to combat corruption in public sector asset management.

### **Benchmark 18: Independent monitoring**

Implement regulations which require the independent monitoring of public sector contracts, with the purpose of combating corruption.

### **Benchmark 19: Independent auditing**

Implement regulations which require the independent financial, performance, and technical auditing of public sector organisations and contracts, with the purpose of combating corruption.

### **Benchmark 20: Anti-corruption training**

Implement regulations which require that appropriate anti-corruption training is provided to all public officials and to the relevant personnel of all private sector organisations which execute major public sector contracts.

### **Benchmark 21: Reporting corruption**

Implement regulations which enable persons to report suspicions of corruption in a safe and confidential manner to their employers or appropriate authorities.

### **Benchmark 22: Standards and certification**

Permit, promote and support the development and implementation of, and certification to, national and international standards which are designed to ensure better compliance by organisations and individuals with laws, regulations, and recognised good practice.

### **Benchmark 23: Professional institutions and business associations**

Permit, promote and support the establishment and operation of professional institutions and business associations.

### **Benchmark 24: Participation of society**

Implement regulations which require that the public is informed about, and is freely able to participate in, report on, comment on, and lawfully protest against, the actions of the government, public officials and public sector organisations.

### **Benchmark 25: International co-operation**

Implement regulations which require formal and informal co-operation between States in relation to the prevention of corruption, public education concerning corruption, the investigation and prosecution of corruption offences, and the recovery and return of the proceeds of crime.



# Section 3

## Benchmarks



# Benchmark 1

## Corruption offences, sanctions and remedies

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**Principle:** Implement anti-corruption laws which establish the types of corrupt conduct that are criminalised and which provide for appropriate sanctions and remedies.

1.1 **Corruption offences:** The following activities should be criminalised:

- 1) Bribery
- 2) Election bribery
- 3) Embezzlement
- 4) Extortion
- 5) Fraud
- 6) Cartel activity
- 7) Trading in influence
- 8) Abuse of functions by a public official
- 9) Illicit enrichment of a public official
- 10) Laundering of the proceeds of crime
- 11) Concealment or retention of property that is the result of a corruption offence
- 12) Obstruction of justice
- 13) Participating in, assisting or facilitating the commission of a corruption offence, or attempting or preparing to commit a corruption offence
- 14) Failure by an organisation to prevent a corruption offence which was committed by an associated person. It may be a defence or a mitigatory factor for the organisation to show that it had in place adequate procedures designed to prevent associated persons from committing such an offence
- 15) Offences (1), (2) and (7) should include both the active and passive forms.

1.2 **Criminal liability for corruption offences:**

- 1) In relation to the corruption offences in Benchmark 1.1, criminal liability should be provided for as follows:
  - a) Any individual or organisation may be liable for offences (1)–(7) and (10)–(13), including public officials, public sector organisations and individuals and organisations in the private sector.

- b) Any public official may be liable for offences (8) and (9).
  - c) Private or public sector organisations may be liable for offence (14).
- 2) Organisations should be criminally liable for a corruption offence where:
- a) the offence was committed by, or with the knowledge, consent or connivance of, a senior manager of the organisation who acted with the intention of obtaining business or an advantage for the organisation, or
  - b) it is an offence under Benchmark 1.1(14).
- 3) Criminal liability of organisations should be without prejudice to the criminal liability of the individuals who committed the corruption offences.
- 4) Where knowledge, intent or purpose are elements of a corruption offence, these should, where reasonable, be inferred from objective factual circumstances.
- 5) There should be no statute of limitations period for corruption offences.
- 1.3 **Jurisdiction for corruption offences:** The courts of a State should have jurisdiction in the following cases:
- 1) **Corruption offences committed in the State territory:** A State should have jurisdiction over corruption offences committed, by any individual or organisation: (i) in the territory of the State, or (ii) on an aircraft flying the flag of the State or on a ship registered under the laws of that State at the time the offence was committed.
  - 2) **Acts or omissions in other territories:** A State should have jurisdiction over an act or omission carried out in any other territory which would constitute a corruption offence if carried out within the State territory and which was carried out by:
    - a) an individual who is a national of that State, or is habitually resident in that State territory, or
    - b) an organisation which is incorporated or otherwise constituted in the State territory or carries on business or part of a business in the State territory.
- 1.4 **Immunity from prosecution, and defences and mitigation in relation to corruption offences:**
- 1) **No immunity for public officials et al:** There should be no immunity from investigation or prosecution, and no jurisdictional privilege, reduction of civil or criminal liability, or reduction of or exemption from sanctions for a corruption offence, on the basis that the person in question is a head of State, a minister, a member of parliament, other

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public official, a public sector organisation or a political party, or has any political affiliation.

- 2) **Genuine fear as defence or mitigatory factor:** States may provide that it is a defence or mitigatory factor in relation to liability for a corruption offence for an individual to prove that the only reason she/he participated in the corrupt action was a genuine fear of death or of serious physical harm to that individual or another.

### 1.5 **Criminal and administrative sanctions for corruption offences:**

- 1) **Criminal sanctions for all corruption offences:** There should be criminal sanctions for all corruption offences. Such sanctions should:
  - a) be effective and dissuasive
  - b) be proportionate to the gravity of the offence and to sanctions for other offences of equal gravity.
- 2) **Criminal sanctions for individuals convicted of corruption offences:** Depending on the gravity of the offence, criminal sanctions for individuals should include one or more of:
  - a) disqualification for an appropriate period of time, or permanently, from holding:
    - i) any position as a public official
    - ii) any executive, senior managerial or financial role in any private sector organisation
  - b) confiscation of the proceeds of crime and restitution of such proceeds to the victim of the offence
  - c) fines
  - d) custodial sentences.
- 3) **Criminal sanctions for organisations convicted of corruption offences:** Depending on the gravity of the offence, criminal sanctions for organisations should include one or more of:
  - a) fines
  - b) debarment from participating in public sector contracts or from receiving public sector funds
  - c) confiscation of the proceeds of crime and restitution of such proceeds to the victim of the offence
  - d) the requirement to establish an effective anti-corruption programme and for the implementation of such programme to be independently monitored for a specified period
  - e) a deferred prosecution agreement.

- 4) **Administrative sanctions:** In addition to providing for criminal sanctions, States may provide for administrative sanctions in respect of corruption offences.
- 5) **Reduced sanctions or immunity for self-reporting or co-operation:** States may provide for immunity or reduced penalty for individuals or organisations who have participated in the commission of a corruption offence, in exchange for:
  - a) their self-reporting the offence, and/or
  - b) their substantial co-operation in the investigation or prosecution of a corruption offence.

In determining whether to reduce a penalty or provide immunity, account should be taken of the gravity of the offence committed by the individual or organisation and whether the interests of justice would be better served by obtaining the proposed co-operation or by the conviction with full penalty of the person with whom it is proposed to make an agreement.

- 1.6 **Civil remedies for corruption:** The law should provide for the following for individuals and organisations who have suffered damage as a result of an act of corruption:
  - 1) the right to initiate proceedings against those responsible for such damage in order to obtain compensation
  - 2) remedies, including damages, annulling or rescinding a contract, or withdrawing a concession.
- 1.7 **Sanctions for failure to comply with regulations:** There should be appropriate civil, administrative and criminal sanctions on relevant organisations and individuals for failure to comply with regulations provided for in these Benchmarks.

## Benchmark 2

### Authority responsible for preventing corruption

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**Principle:** Establish or designate a public authority with responsibility for preventing corruption in the public and private sectors.

- 2.1 **Regulations:** Regulations should be implemented which are designed to prevent corruption in the public and private sectors. Such regulations should: be based on principles of honesty, impartiality, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.
- 2.2 **The authority:** An authority or authorities ('the corruption prevention authority') should be established or designated with responsibility for preventing corruption in the public and private sectors.
- 2.3 **Responsibilities of the corruption prevention authority in preventing corruption:** The corruption prevention authority should:
  - 1) develop and establish anti-corruption policies and practices, encourage and promote their implementation in the public and private sectors, and assess their implementation and effectiveness
  - 2) evaluate the effectiveness of anti-corruption laws and recommend new laws
  - 3) raise public awareness as to the laws relating to corruption offences, including the laws concerning liability, jurisdiction, immunity, sanctions and remedies (Benchmark 1)
  - 4) raise public awareness as to the risks of and damage caused by corruption and the measures being taken to prevent it
  - 5) encourage persons to report suspicions of corruption
  - 6) co-ordinate, oversee, and assess the effectiveness of the implementation of these Benchmarks
  - 7) assess the risks of corruption by, on behalf of or against the corruption prevention authority, and take adequate steps to combat such corruption.
- 2.4 **Consultation and legislation:**
  - 1) **Consultation:** In carrying out its responsibilities, the corruption prevention authority should:
    - a) consult with, and take account of the views of, other public authorities, the private sector, civil society and foreign and international agencies
    - b) be guided by international good practice.

- 2) **Legislation:** Where they would be effective in preventing or fighting corruption, the corruption prevention authority's recommendations for anti-corruption policies, practices and laws should be considered by the government and the legislature for adoption and/or enactment in law.
- 2.5 **Overriding duty of the corruption prevention authority and its personnel:** In carrying out the corruption prevention authority's responsibilities, the corruption prevention authority and its personnel should act effectively, honestly, impartially, independently and transparently.
- 2.6 **Anti-corruption management of the corruption prevention authority:** In order to combat corruption in relation to its activities, the corruption prevention authority should:
  - 1) put in place an anti-corruption management system in accordance with Benchmark 10 (Public sector organisations)
  - 2) ensure that its personnel are employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials).
- 2.7 **Independence of the corruption prevention authority:** In order to enable the corruption prevention authority to carry out its responsibilities independently and effectively:
  - 1) the corruption prevention authority should be provided with the necessary mandate, powers and financial autonomy; adequate funding, staff and resources; and independence from improper government, political or other influence or interference
  - 2) the head of the corruption prevention authority should be employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials) and the following provisions:
    - a) all processes and decisions required under Benchmark 11 or (b) below, in relation to the head of the corruption prevention authority, should be conducted and taken by an independent body
    - b) the head of the corruption prevention authority should have security of tenure for a reasonable prescribed maximum period and should be suspended or dismissed only for reasons of incapacity, misconduct or material non-performance that render her or him unfit to discharge her or his duties.
- 2.8 **Accountability of the corruption prevention authority:** The corruption prevention authority and its personnel should be accountable as follows:
  - 1) **Disciplinary procedures and sanctions for personnel of the corruption prevention authority:** Disciplinary action should be taken against personnel (including the head of the authority) as provided for in Benchmark 11.21 (Public officials).

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- 2) **Audit of the corruption prevention authority:** The corruption prevention authority should be audited on an annual basis by external audit in accordance with Benchmark 19 (Independent auditing) so as to assess whether it is acting in accordance with its responsibilities and duties under the regulations and the law, and without corruption.
- 3) **Review by parliament and the public:** The full audit report in (2) above should be submitted annually to parliament for its review and recommended actions and should be disclosed to the public. The corruption prevention authority should, as appropriate, modify and improve its performance to take account of the findings in the audit report, parliament's recommendations and comments from the public.
- 4) **Referral of suspected corruption to law enforcement authorities:** Where there are reasonable grounds to suspect corruption by the corruption prevention authority or its personnel, the matter should be referred to the law enforcement authorities for investigation and prosecution.

### 2.9 Complaints and reporting systems

- 1) **Complaints:** The corruption prevention authority should implement a system which enables confidential and anonymous questions, concerns and complaints to be raised, by any person, regarding the authority and its activities and responsibilities, and which provides a prompt and effective response to such questions, concerns and complaints, and implements measures to address them.
- 2) **Reporting corruption and breach of regulations:** The corruption prevention authority should implement a reporting system in accordance with Benchmark 21 (Reporting corruption).

### 2.10 Transparency to the public: Save to the extent contrary to the public interest, the corruption prevention authority should promptly provide the following information to the public:

- 1) **Website:** Up-to-date information should be published on a freely accessible public website(s):
  - a) to enable the public to have a good understanding and knowledge of:
    - i) the laws and regulations relating to corruption and the corruption prevention authority
    - ii) the structure, powers, duties, functions, activities and financing of the corruption prevention authority
  - b) to assist the public to assess whether the corruption prevention authority is acting in accordance with its responsibilities and duties under the regulations and the law, and without corruption.

- 2) **Such information should include the following:**
  - a) (links to) all laws and regulations relating to corruption offences (Benchmark 2.3(3)), and all guidance to such laws and regulations
  - b) (links to) all laws and regulations governing the corruption prevention authority
  - c) information in relation to the corruption prevention authority (Benchmark 10.22)
  - d) an explanation of the risks of and damage caused by corruption and the measures being taken to prevent it (Benchmark 2.3(4))
  - e) full audit reports relating to the corruption prevention authority (Benchmark 2.8(3))
  - f) parliament's reviews and recommended actions relating to the corruption prevention authority (Benchmarks 2.8(3) and 5.12(2) (i))
  - g) an explanation of the complaints and reporting systems (Benchmark 2.9)
  - h) an explanation of the public's entitlement to disclosure of information under this Benchmark.
- 3) **Responses to requests for information:** Information and documents reasonably requested by the public regarding any matter relating to the corruption prevention authority and its responsibilities, duties and activities should be provided within a reasonable period as prescribed by the regulations.

## Benchmark 3

### Investigation, prosecution, asset recovery and policing

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**Principle:** Implement regulations which are designed to (i) combat corruption in investigation, prosecution, asset recovery and policing, and (ii) enable the effective investigation and prosecution of corruption and recovery of corruptly obtained assets.

#### Regulations

- 3.1 **Regulations:** Regulations should be implemented which are designed to (i) combat corruption in investigation, prosecution, asset recovery and policing, and (ii) enable the effective investigation and prosecution of corruption and recovery of corruptly obtained assets. Such regulations should: be based on principles of honesty, impartiality, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.

#### Law enforcement authorities

- 3.2 **Law enforcement authorities:** An authority or authorities ('the law enforcement authorities') should be established or designated which have responsibility for law enforcement.
- 3.3 **Responsibilities of the law enforcement authorities in combating corruption:** In order to combat corruption, the law enforcement authorities should:
- 1) carry out all law enforcement without corruption
  - 2) investigate and prosecute corruption offences, and recover proceeds of corruption offences
  - 3) encourage persons to report suspicions of corruption
  - 4) collaborate with other public sector bodies, the private sector, civil society and foreign and international agencies
  - 5) be guided by international good practice in carrying out the above responsibilities
  - 6) assess the risks of corruption by, on behalf of or against the law enforcement authorities and take adequate steps to combat such corruption.

- 3.4 **Overriding duty of the law enforcement authorities and their personnel:** In carrying out their responsibilities, the law enforcement authorities and their personnel should act effectively, honestly, impartially, independently and transparently.
- 3.5 **Anti-corruption management of the law enforcement authorities:** In order to combat corruption in relation to their activities, the law enforcement authorities should:
- 1) put in place an anti-corruption management system in accordance with Benchmark 10 (Public sector organisations)
  - 2) ensure that their personnel are employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials).
- 3.6 **Independence of the law enforcement authorities:** In order to enable the law enforcement authorities to carry out their responsibilities independently and effectively:
- 1) the law enforcement authorities should be provided with the necessary mandate, powers and financial autonomy; adequate funding, staff and resources; and independence from improper government, political or other influence or interference
  - 2) the heads of the law enforcement authorities should be employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials) and the following provisions:
    - a) all processes and decisions required under Benchmark 11 or (b) below, in relation to the heads of the law enforcement authorities, should be conducted and taken by an independent body
    - b) heads of the law enforcement authorities should have security of tenure for a reasonable prescribed maximum period and should be suspended or dismissed only for reasons of incapacity, misconduct or material non-performance that render them unfit to discharge their duties.

## Measures to combat corruption in law enforcement

- 3.7 **Decisions regarding commencement, conduct and termination of law enforcement processes:**
- 1) **Proper assessment:** All suspected offences reported to the law enforcement authorities should be assessed to determine whether they merit investigation and prosecution, and if so, they should be properly investigated and prosecuted.

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- 2) **Guidelines:** Decisions regarding commencement, conduct or termination of law enforcement processes should be based on clear, definite, and predefined guidelines which relate only to matters of evidence or public interest. Such decisions should not be influenced by considerations of national economic interest, the potential effect upon relations with another State, or the identity of the individuals or organisations that would be the subject of or affected by such processes.
  - 3) **Independence:** The decisions in (2) above should be made independently by the law enforcement authorities and should not be subject to improper government, political or other influence or interference. Where States wish to retain government power to give instruction in relation to a law enforcement process, such instructions should be given in a transparent and accountable manner and accord with the guidelines in (2) above.
  - 4) **Decisions to be written and made public:** The decisions in (2) above should be issued in writing with full reasons. Unless public interest requires otherwise, they should be disclosed to the public together with the guidelines in (2) above and any government instructions in (3) above.
- 3.8 **Processes vulnerable to corruption:** Law enforcement processes which are vulnerable to corruption should require at least two law enforcement officers to be involved in a manner sufficient to minimise the risk of either officer taking corrupt action in relation to the process.
  - 3.9 **Equal treatment:** All law enforcement processes should be applied equally and proportionately, with no preferential treatment being afforded to particular persons.
  - 3.10 **Safeguards against abuse of powers:** All powers of the law enforcement authorities should be subject to safeguards to prevent such powers being abused for corrupt purposes. Such safeguards should include that these powers should be exercised only as required by law and under the appropriate direction and supervision of the courts.
  - 3.11 **No immunity for public officials et al:** In relation to all criminal offences, there should be no immunity from any law enforcement process, and no jurisdictional privilege, reduction of civil or criminal liability, or reduction of or exemption from sanctions, on the basis that the person in question is a head of State, a minister, a member of parliament, other public official, a public sector organisation or a political party, or has any political affiliation.
  - 3.12 **Law enforcement in respect of any suspected offence which may concern the law enforcement authorities:** Where a suspected offence may concern the law enforcement authorities or any of their personnel, any

law enforcement processes relating to such suspected offence should be conducted by law enforcement officers who have no connection with, and who will act impartially in relation to, such matter.

### 3.13 **Processes, evidence and records:**

- 1) **Processes:** Processes should be defined, documented and efficient, and be carried out without undue delay.
- 2) **Evidence:** Evidence should be safely stored so as to safeguard it from corrupt interference, and access to and use of evidence should be strictly controlled and tracked.
- 3) **Records:** The law enforcement authorities should document each law enforcement process and retain and safeguard all documents created or obtained in respect of such process, in accordance with Benchmark 10.21 (Public sector organisations).
- 4) **Retention of evidence and records:** Evidence and records should be retained for a minimum period prescribed by the regulations to enable their use in investigation or court proceedings and in any audit of or challenge to law enforcement processes.

### 3.14 **Asset recovery and management and distribution of recovered assets:**

There should be measures in place to ensure that the asset recovery process is not abused and that recovered assets are not misappropriated, including the following measures:

- 1) **Court supervision:** The court should supervise asset recovery and the management and distribution of recovered assets.
- 2) **Asset recovery:** Asset recovery should be carried out by the law enforcement authorities only pursuant to written court order(s) and under court supervision.
- 3) **Accounting for recovered assets:** The law enforcement authorities should report and account to the court for the nature, value and location of all recovered assets recovered by them.
- 4) **Management of recovered assets:** The court should appoint a person ('the responsible person') as responsible for taking possession of and managing the recovered assets as directed by the court. All management of recovered assets should be only for the purpose of preserving or enhancing the value of such assets. A recovered assets fund should be established to hold all recovered funds and any income derived from the investment of recovered funds.
- 5) **Distribution of recovered assets:** Distribution of recovered assets should be carried out only as ordered by the court. Such distribution should be applied so as to pay the reasonable costs of the asset recovery process and then to compensate, to the fullest extent possible, the

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legitimate owner of the recovered assets and the victim of the offence. Where no legitimate owner or victim can be identified, the distribution should be applied for the public interest.

- 6) **Records of recovered assets:** The responsible person should maintain detailed records of all recovered assets and of all dealings with and distribution of such assets.
- 7) **Accountability for recovered assets:**
  - a) **By the responsible person:** The responsible person should provide written and regular reports to the court providing details of the recovered assets and of how they have been dealt with and distributed in accordance with court orders.
  - b) **By those designated to receive recovered assets:** Those persons who are designated by the court to receive recovered assets should be required to provide written confirmation to the court as to whether or not such assets have been received by them.
  - c) **By public sector bodies which receive recovered assets:** Any public sector body which receives recovered assets should record such receipt in its accounts, and properly record and account for any dealing with those assets.
- 8) **Annual audit of recovered assets:** An annual audit by an independent body should be carried out to assess whether the above measures have been complied with in relation to all recovered assets. A full report of such audit should be submitted to court and to parliament and should be disclosed to the public.

## Measures to enable effective law enforcement in respect of corruption offences

- 3.15 **Training:** Law enforcement officers should be trained in relation to corruption law and the investigation and prosecution of corruption offences.
- 3.16 **Powers:** The law enforcement authorities should be provided with the necessary powers to carry out effective law enforcement in respect of corruption offences, including:
  - 1) **Adequate investigative powers:** Such powers should include powers to require production of documents and information (including bank, financial and commercial records), to search persons and premises, to seize evidence, and to use special investigative techniques.
  - 2) **Adequate asset recovery powers:** Such powers should enable inter alia the identification and tracing of proceeds of crime; the freezing and seizure of proceeds of crime so as to avoid dissipation or concealment;

the confiscation or forfeiture of proceeds of crime; and mechanisms for recovery of proceeds of crime through international co-operation.

- 3) **Power to apply for unexplained wealth orders:** Where there is reasonable evidence that a person's wealth exceeds the amount of wealth which that person could have lawfully acquired, unexplained wealth orders should be available to require such person to explain the nature and extent of their wealth, and how such wealth was obtained.
  - 4) **Safeguards:** The powers in (1) to (3) above should be subject to safeguards against abuse, as provided for in Benchmark 3.10.
- 3.17 **Secrecy laws:** Subject to adequate safeguards, secrecy laws or other confidentiality obligations applying to banks or financial, commercial or other public or private sector persons should not be a bar to exercise of the above powers.
- 3.18 **Protection for those who report to or co-operate with the law enforcement authorities, and for witnesses, experts and victims:** To encourage co-operation with law enforcement processes in respect of corruption offences, protection from potential retaliation or intimidation should be provided to:
- 1) persons who report in good faith or on reasonable grounds any matters concerning corruption offences
  - 2) persons (including those who have participated in a corruption offence) who co-operate with law enforcement authorities in relation to law enforcement regarding corruption offences
  - 3) witnesses and experts who provide testimony concerning corruption offences
  - 4) victims of corruption offences
  - 5) relatives and family members of, and other persons close to, any of the above persons and who may be at risk.
- 3.19 **International co-operation in relation to corruption offences:** The relevant competent authorities of States should co-operate so as to ensure effective law enforcement in relation to corruption offences. (Benchmark 25 (International co-operation)).

## Accountability, reporting and transparency

- 3.20 **Accountability of the law enforcement authorities:** The law enforcement authorities and their personnel should be accountable as follows:
- 1) **Disciplinary procedures and sanctions for personnel of the law enforcement authorities:** Disciplinary action should be taken against

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personnel (including the heads of the authorities) as provided for in Benchmark 11.21 (Public officials).

- 2) **Audit of the law enforcement authorities:** The law enforcement authorities should be audited on an annual basis by external audit in accordance with Benchmark 19 (Independent auditing) so as to assess whether they are acting in accordance with their responsibilities and duties under the regulations and the law, and without corruption.
- 3) **Review by the courts:** The actions of the law enforcement authorities should be subject to the scrutiny of the courts and to judicial review.
- 4) **Review by parliament and the public:** The full audit report in (2) above should be submitted annually to parliament for its review and recommended actions and disclosed to the public. The law enforcement authorities should modify and improve their performance, as appropriate, to take account of the findings in the audit report, parliament's recommendations and comments from the public.
- 5) **Referral of suspected corruption:** Where there are reasonable grounds to suspect corruption by the law enforcement authorities or their personnel, the matter should be referred for investigation and prosecution by the law enforcement authorities, subject to Benchmark 3.12.

### 3.21 Complaints and reporting systems

- 1) **Complaints:** The law enforcement authorities should implement a system which enables confidential and anonymous questions, concerns and complaints to be raised, by any person, regarding the authorities and their activities and responsibilities, and which provides a prompt and effective response to such questions, concerns and complaints, and implements measures to address them.
- 2) **Reporting corruption and breach of regulations:** The law enforcement authorities should implement a reporting system in accordance with Benchmark 21 (Reporting corruption).

### 3.22 Transparency to the public: Save to the extent contrary to the public interest, the law enforcement authorities should promptly provide the following information to the public:

- 1) **Website:** Up-to-date information should be published on a freely accessible public website(s):
  - a) to enable the public to have a good understanding and knowledge of:
    - i) the laws and regulations relating to law enforcement and the law enforcement authorities

- ii) the structure, powers, duties, functions, activities and financing of the law enforcement authorities
  - b) to assist the public in assessing whether the law enforcement authorities are acting in accordance with their responsibilities and duties under the regulations and the law, and without corruption.
- 2) **Such information should include the following:**
  - a) (links to) all laws and regulations relating to law enforcement
  - b) (links to) all laws and regulations governing the law enforcement authorities
  - c) information in relation to the law enforcement authorities (Benchmark 10.22)
  - d) full reasoned law enforcement decisions and guidelines and any government instructions in relation to such decisions (Benchmark 3.7(4))
  - e) full audit reports of recovered assets (Benchmark 3.14(8))
  - f) full audit reports relating to the law enforcement authorities (Benchmark 3.20(4))
  - g) parliament's reviews and recommended actions relating to the law enforcement authorities (Benchmarks 3.20(4) and 5.12(2)(i))
  - h) an explanation of the complaints and reporting systems (Benchmark 3.21)
  - i) an explanation of the public's entitlement to disclosure of information under this Benchmark.
- 3) **Responses to requests for information:** Information and documents reasonably requested by the public regarding any matter relating to the law enforcement authorities and their responsibilities, duties and activities should be provided within a reasonable period as prescribed by the regulations.

# Benchmark 4

## The court system

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**Principle:** Implement regulations which are designed to (i) combat corruption in the court system, (ii) enable the judiciary to operate effectively and independently, and (iii) enable the effective determination of corruption issues.

### Regulations

- 4.1 Without prejudice to the independence of the judiciary to exercise its judicial functions, regulations should be implemented which are designed to (i) combat corruption in the court system, (ii) enable the judiciary to operate effectively and independently, and (iii) enable the effective determination of corruption issues. Such regulations should: be based on principles of honesty, impartiality, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.

### The Judiciary

- 4.2 **Judiciary's role in combating corruption:** Members of the judiciary should:
- 1) exercise their functions effectively, honestly, impartially, independently and transparently
  - 2) be competent to determine disputes concerning corruption
  - 3) assess the corruption risks in the exercise of their functions and take appropriate steps to combat such corruption.
- 4.3 **Independence of the judiciary:** To ensure that the judiciary can carry out its functions independently:
- 1) the judiciary should have exclusive jurisdiction over all issues of a judicial nature
  - 2) members of the judiciary should, in the exercise of their judicial functions, have and be seen to have independence from any external influence or interference, including from the executive, the legislature, and other judges
  - 3) members of the judiciary should:
    - a) have security of tenure for a reasonable prescribed maximum period or until a reasonable prescribed age of retirement

- b) be suspended or dismissed only for reasons of incapacity or misbehaviour that clearly render them unfit to discharge their duties
- 4) an independent body should be responsible for regulating and oversight of the employment and conduct of members of the judiciary in accordance with Benchmark 11 and 4.3(3) above, including conducting all processes and making all decisions required in relation to the appointment, terms and conditions of employment, training, conduct, transfer, promotion, demotion, disciplining, suspension and dismissal of members of the judiciary. Such body should act effectively, honestly, impartially, independently and transparently and be subject to the provisions of Benchmark 6 (Regulatory Authorities).
- 4.4 **Impartiality of the judiciary:** Members of the judiciary should exercise their functions impartially and without favour, bias or prejudice. They should not engage in any activity which could compromise or be seen to compromise their independence or impartiality. Where members of the judiciary have a bias, prejudice or conflict of interest, or could be perceived to have such bias, prejudice or conflict of interest, they should recuse themselves from the matter.
- 4.5 **Judicial competence to determine corruption disputes:** The judiciary may choose to establish or designate specific courts or judges to determine civil and criminal cases relating to corruption. Judicial training should include training in the civil and criminal law relating to corruption so that relevant members of the judiciary are competent to determine issues concerning corruption.
- 4.6 **Employment, code of conduct and anti-corruption training:**
  - 1) **Employment:** Members of the judiciary should be employed in accordance with Benchmark 11 (Public officials) and Benchmarks 4.3(3) and (4) above.
  - 2) **Code of conduct:** The judiciary should adopt a judicial code of conduct which includes principles designed to combat corruption including the matters in Benchmark 11.10–11.18 (Public officials) and its members should be trained as to compliance with such code.
  - 3) **Anti-corruption training:** Members of the judiciary should be trained, in accordance with Benchmark 20 (Anti-corruption training), as to the risks of corruption in the court system, how corruption may be combated in the court system, and how to report suspected corruption.
- 4.7 **Accountability of the judiciary and independent body:**
  - 1) **Decisions of the judiciary:** All judgments and decisions of the judiciary should be published with full reasons and, save where contrary to

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the public interest, disclosed to the public. There should be an appeals process in accordance with Benchmark 4.8(7)(c).

- 2) **Disciplinary procedures and sanctions for members of the judiciary:** An independent body (Benchmark 4.3(4)) should be responsible for taking disciplinary action against members of the judiciary as provided for in Benchmark 11.21 (Public officials).
- 3) **Misconduct in the appointment etc of members of the judiciary:** There should be an independent, impartial and publicly declared process to determine allegations regarding misconduct by the independent body (referred to in Benchmark 4.3(4)) or any member thereof or by any other person in relation to the appointment, promotion, transfer, demotion, disciplining, suspension, dismissal or other matter regarding members of the judiciary.
- 4) **Suspected corruption:** The independent body under (2) above, and the independent process under (3) above, should refer to the law enforcement authorities for investigation and prosecution any matter which the said independent body or process determines shows reasonable grounds to suspect that a corruption offence may have been committed.
- 5) **Civil and criminal liability of the judiciary:** Members of the judiciary should have immunity from civil or criminal liability only in respect of the exercise of their judicial functions in good faith. They should not be entitled to immunity where, in the exercise of their judicial functions or otherwise, they commit corruption offences or other criminal offences.
- 6) **Report by judiciary:** The judiciary should publish an annual report of its activities. This should include: (i) all complaints and all reports of corruption or breach of regulations which have been made by or against or in connection with the activities of members of the judiciary or in connection with any other part of the court system, and (ii) how such complaints and reports have been dealt with. Pending determination of such complaints and reports, the annual report should provide details only of the nature and date of the complaint or report and should keep confidential the identity of the individual(s) against whom such complaints or reports have been made. The identity of the individual(s) should be published in the event that the complaint or the report is substantiated.
- 7) **Report by independent body:** The independent body responsible for the matters in Benchmark 4.3(4) should publish an annual report of its activities in relation to such matters.
- 8) **Review by parliament and the public:** The reports in (6) and (7) should be submitted to parliament for its review and disclosed to the public.

The judiciary and the independent body should, as appropriate, and provided that their independence is not compromised, modify and improve their performance to take account of the findings in the reports, parliament's comments, and comments from the public.

## Court processes

- 4.8 **Combating corruption in court processes:** Court processes should be efficient, impartial, fair and transparent, including as follows:
- 1) All persons should have unhindered access to the courts, be equal before the courts, and be provided with a fair hearing.
  - 2) Reasonable steps should be taken to ensure that all persons involved in court proceedings act honestly and in accordance with court procedures.
  - 3) Court proceedings and procedures should be:
    - a) defined, documented, efficient and avoid undue delay
    - b) subject to prescribed time limits which can only be amended by the proper exercise of judicial discretion
    - c) explained to the public by prominent display of notices in court buildings and online.
  - 4) Procedures for fixing court lists and assigning cases to judges should be impartial, based on efficiency and justice and publicly available.
  - 5) Court timetables, fixtures and fees should be disclosed on a timely basis to the public.
  - 6) Case management should be conducted and controlled so as to ensure efficiency, fairness and transparency.
  - 7) Judicial decisions and judgments should be:
    - a) determined only on the basis of the facts and the law
    - b) delivered within a reasonable time, be published in writing with full reasons, and should state the name(s) of the judge(s) who gave the decision or judgment and the date it was given
    - c) subject to an impartial, fair and transparent appeals process which operates without undue delay
    - d) overturned or declared void where it is established that such decision or judgment (including of a final court of appeal) was materially influenced by or materially based on a corrupt act or omission.
  - 8) Save where contrary to the public interest:
    - a) all court proceedings should be open to the public

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- b) all decisions and judgments of the judiciary should be disclosed, with full reasons, to the public.
- 9) Where possible there should be computerisation of court records, including of the court hearing schedule, and computerised case management systems.
- 10) Efficient and secure systems should be implemented to:
  - a) create and maintain comprehensive and accurate court records, including registers of court decisions and judgments
  - b) ensure that all court documents, records and evidence are:
    - i) managed and stored securely
    - ii) safeguarded from corrupt interference
    - iii) available to the public, save where contrary to the public interest
    - iv) retained for a prescribed minimum period.
- 11) The following should be maintained by the court:
  - a) registers of convictions of individuals and organisations for corruption offences, from which information should be disclosed, on request, to employers or procuring entities, in either the public or private sectors, for purposes of assessing the suitability of potential candidates for employment (Benchmark 11.4(2)(d)) or of potential suppliers (Benchmark 13.17(2)(e))
  - b) statistics of convictions and penalties imposed for corruption offences, which should be published to the public.
- 12) There should be measures to combat corruption in the jury process:
  - a) Potential jurors should be vetted to ensure as far as reasonable that they have no interest in, association with, or prejudice or bias in relation to, the matters which they may be appointed to determine, and should be required to disclose any conflict of interest.
  - b) Jurors should be provided with reasonable protection from intimidation or harm in connection with the performance of their jury duty.
  - c) Jurors should be provided with written directions as to the proper conduct of a juror, including that they should:
    - i) not participate in or condone corrupt activity, including soliciting or accepting bribes to influence their own or other jurors' verdicts
    - ii) report, in good faith or on reasonable grounds, any suspicion of corruption in the jury process, any attempts by any person

to interfere with the jury process, and any threats or actual harm to them or their families, relatives or other persons close to them carried out so as to interfere with the proper performance of their jury duty.

- 13) Court procedures should be regularly reviewed to ensure that they accord with international good practice.

## Court administration and court personnel

### 4.9 **Combating corruption in relation to court administration and personnel:**

In order to combat corruption in court administration and to ensure that court administrative functions provide adequate support to the judicial functions:

- 1) the body responsible for court administration should implement an anti-corruption management system in accordance with Benchmark 10 (Public sector organisations)
- 2) court personnel should be employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials)
- 3) court administrative functions should be adequately resourced, staffed and funded
- 4) the judiciary should have ultimate responsibility for monitoring and ensuring that court administrative functions provide adequate support to judicial functions.

### 4.10 **Accountability of court personnel and the body responsible for court administration**

- 1) **Disciplinary procedures and sanctions for court personnel:** Disciplinary action should be taken against court personnel by the relevant employer or regulatory body as provided for in Benchmark 11.21 (Public officials).
- 2) **Suspected corruption:** The relevant employer or regulatory body should refer to the law enforcement authorities, for investigation and prosecution, any matter which they determine shows reasonable grounds to suspect that a corruption offence may have been committed.
- 3) **Audit of the body responsible for court administration:** The body responsible for court administration should be audited on an annual basis by external audit in accordance with Benchmark 19 (Independent auditing) so as to assess whether it is acting in accordance with its responsibilities and duties under the regulations and the law, and without corruption.

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- 4) **Review by parliament and the public:** The full audit report in (3) above should be submitted annually to the judiciary and to parliament for their review and recommended actions and disclosed to the public. The body responsible for court administration should, as appropriate, modify and improve its performance, court processes and administrative functions, to take account of the findings in the audit report, the judiciary's and parliament's recommendations and comments from the public.

## The legal profession

### 4.11 Combating corruption in the legal profession:

- 1) In connection with the particular proceedings over which they are presiding, members of the judiciary should ensure, as far as reasonable, that the legal profession acts honestly, competently and in accordance with court procedures.
- 2) An independent regulatory body, which should comply with Benchmark 6 (Regulatory authorities), should be responsible for:
  - a) setting standards for, and regulating, the training, qualification and conduct of legal practitioners
  - b) establishing a code of conduct which includes principles designed to combat corruption and ensuring training of legal practitioners in relation to the code
  - c) adjudicating alleged breaches of the code of conduct and administering professional sanctions, including disbarment for serious malpractice
  - d) publishing the code of conduct to the public and informing the public as to how complaints and reports of suspected corruption which are in good faith or on reasonable grounds may be made regarding the legal profession.
- 3) **Suspected corruption:** The independent regulatory body should refer to the law enforcement authorities, for investigation and prosecution, any matter which it determines shows reasonable grounds to suspect that a corruption offence may have been committed.

## Reporting and transparency in the court system

### 4.12 Complaints and reporting systems

- 1) **Complaints:** A system should be implemented which enables confidential and anonymous questions, concerns and complaints to be raised by the public regarding the judiciary or any other part of the court system, which

provides a prompt and effective response to such questions, concerns and complaints, and which implements measures to address them.

- 2) **Reporting corruption and breach of regulations:** A reporting system should be implemented in accordance with Benchmark 21 (Reporting corruption).
- 4.13 **Transparency to the public:** Save to the extent contrary to the public interest, the following information should be provided promptly to the public by the body responsible for court administration, the body responsible for regulating the legal profession (in the case of items in (3)(b)), or other prescribed body:
- 1) **Court notices:** Notices should be displayed in the court buildings showing timetables and fixtures of proceedings, details of all court fees payable, and an explanation of the complaints and reporting systems (Benchmark 4.12).
  - 2) **Court website:** Up-to-date information should be published on a freely accessible public website(s):
    - a) to enable the public to have a good understanding and knowledge of:
      - i) the laws and regulations governing the court system
      - ii) the structure, powers, duties, functions, activities and financing of the court system
    - b) to assist the public in assessing whether all parties involved in the court system are acting in accordance with their responsibilities and duties under the regulations and the law, and without corruption.
  - 3) **The information in (2) above should include the following:**
    - a) **Information relating to the judiciary:**
      - i) (links to) all laws and regulations governing the judiciary
      - ii) information relating to the appointment, employment, conduct and disciplining of members of the judiciary (Benchmark 11.22)
      - iii) information relating to the independent body responsible, under Benchmark 4.3(4), for regulating and oversight of the judiciary (Benchmark 6.11)
      - iv) the identity and qualifications of all current judges
      - v) the judicial code of conduct (Benchmark 4.6(2))
      - vi) annual reports by the judiciary (Benchmark 4.7(8))

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- vii) reports by the independent body relating to the judiciary (Benchmark 4.7(8))
  - viii) parliament's annual review and recommended actions relating to the judiciary (Benchmark 4.7(8) and Benchmark 5.12(2)(i))
  - ix) how complaints and reports of suspected corruption regarding the judiciary may be made (Benchmark 4.12).
- b) **Information relating to the legal profession:**
- i) (links to) all laws and regulations governing the legal profession
  - ii) information relating to the body responsible for regulating the legal profession (Benchmark 10.22)
  - iii) the code of conduct of the legal profession
  - iv) how complaints and reports of suspected corruption regarding the legal profession may be made (Benchmark 4.11(2)(d)).
- c) **Information relating to the court system:**
- i) (links to) all laws and regulations governing the court system
  - ii) information in relation to the structure, powers, duties, functions, activities and financing of the court system
  - iii) information in relation to the body responsible for court administration (Benchmark 10.22)
  - iv) an explanation of court proceedings and procedures (Benchmark 4.8(3)(c))
  - v) an explanation of procedures for fixing court lists and assigning cases to judges (Benchmark 4.8(4))
  - vi) court timetables, fixtures and fees (Benchmark 4.8(5))
  - vii) court decisions and judgments, with full reasons (Benchmark 4.8(8)(b))
  - viii) court documents, evidence and records or means of accessing the same (Benchmark 4.8(10)(b)(iii))
  - ix) registers of convictions for corruption offences of individuals and organisations. (Such information should be disclosed, on request, to employers or procurers of goods or services in either the public or private sectors, for purposes of assessing the suitability of potential candidates for employment or suppliers for the supply of goods or services.) (Benchmark 4.8(11)(a))
  - x) statistics of convictions, and penalties imposed, for corruption offences (Benchmark 4.8(11)(b))

- xi) full audit reports relating to the body responsible for court administration (Benchmark 4.10(4))
  - xii) parliament's review and recommended actions relating to the body responsible for court administration (Benchmark 4.10(4) and Benchmark 5.12(2)(i))
  - xiii) how complaints and reports of suspected corruption in relation to the court system may be made (Benchmark 4.12).
- 4) **Public entitlement:** an explanation of the public's entitlement to disclosure of information under this Benchmark.
- 5) **Responses to requests for information:** Information and documents reasonably requested by the public regarding any matter relating to the court system or to any party involved in that system should be provided within a reasonable period as prescribed by the regulations.

# Benchmark 5

## Parliament

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**Principle:** Implement regulations which are designed to (i) combat corruption in parliament, and (ii) enable parliament effectively and independently to pass anti-corruption laws, approve budgets, and hold the executive to account.

### Regulations

- 5.1 Without prejudice to the independence of parliament to exercise its functions in accordance with the constitution, regulations should be implemented which are designed to (i) combat corruption in parliament and (ii) enable parliament effectively and independently to pass anti-corruption laws, to approve budgets, and to hold the executive to account. Such regulations should: be based on principles of honesty, impartiality, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.

### Parliament

- 5.2 **Parliament's role in combating corruption:** In order to combat corruption, parliament should:
- 1) exercise its functions effectively, honestly, impartially, independently and transparently
  - 2) propose, consider and pass laws designed to combat corruption
  - 3) consider, comment on and approve or reject budgets and taxation policies, with a view to ensuring they are free from, and do not enable, corruption
  - 4) scrutinise and report on government policies, expenditure and actions, with a view to ensuring they are free from, and do not enable, corruption
  - 5) review, comment on and make recommendations in relation to:
    - a) the external monitoring and audit reports submitted to parliament in relation to:
      - i) the corruption prevention authority (Benchmark 2.8(3))
      - ii) the law enforcement authorities (Benchmark 3.20(4))
      - iii) the body responsible for court administration (Benchmark 4.10(4))

- iv) all regulatory authorities (Benchmark 6.9(3))
  - v) the financial regulatory authority (Benchmark 7.9)
  - vi) the ownership authority (Benchmark 8.6)
  - vii) political lobbying, financing, spending and elections (Benchmark 9.16(4))
  - viii) the political regulatory authority (Benchmark 9.16(5))
  - ix) public sector procurement (Benchmark 13.31(4))
  - x) the procurement regulatory authority (Benchmark 13.32)
  - xi) monitoring of public sector contracts (Benchmark 18)
  - xii) auditing of public sector organisations and contracts (Benchmark 19)
  - b) the reports issued by the judiciary (Benchmark 4.7(8))
  - c) the reports issued by the independent body in relation to the judiciary (Benchmark 4.7(8))
  - d) international and regional anti-corruption instruments or conventions being negotiated or agreed to by the executive
  - e) anti-corruption issues
  - 6) represent the interests and concerns of the constituents of members of parliament in relation to:
    - a) combating corruption in the State
    - b) any suspicion or perception of corruption in the executive, judiciary or parliament
  - 7) assess the corruption risks in the exercise of its parliamentary and management functions and take adequate steps to combat such corruption.
- 5.3 **Independence of parliament:** To ensure that parliament has the necessary independence to carry out its responsibilities effectively, members of parliament should:
- 1) in the exercise of their functions, have independence, and be seen to have independence, from any improper external influence or interference, including from the executive and from business and financial interests
  - 2) be elected by processes which are independent, impartial, transparent, and in accordance with Benchmark 9 (Political lobbying, financing, spending and elections)
  - 3) be provided with adequate staff and resources
  - 4) have security of tenure during their elected term of office

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- 5) be suspended or dismissed only for material non-performance, or for reasons of incapacity or misconduct that render them unfit to discharge their duties, and only on the basis of an independent, impartial and publicly declared process.
- 5.4 **Impartiality of parliament:** Members of parliament should exercise their functions impartially and without favour, bias or prejudice. They should not engage in any activity which could compromise or be seen to compromise their independence or impartiality. Where they have a bias, prejudice or conflict of interest, or could be perceived to have such bias, prejudice or conflict of interest, they should recuse themselves from the matter.
- 5.5 **Specific committee(s) on corruption issues:** Parliament may choose to establish or designate a specific committee(s) to recommend or comment on proposed corruption legislation and scrutinise corruption issues.
- 5.6 **Employment, training and code of conduct:** Members of parliament should be employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials) and Benchmarks 5.3(4) and (5) above.

## Parliamentary proceedings and administration

- 5.7 **Combating corruption in parliamentary proceedings and administration:**
  - 1) The body responsible for parliamentary administration should implement an anti-corruption management system in accordance with Benchmark 10 (Public sector organisations).
  - 2) All personnel of the body responsible for parliamentary administration should be employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials).
  - 3) Parliamentary administrative functions should be adequately resourced, staffed and funded to enable them to be carried out effectively and free from corruption.
  - 4) Parliamentary procedures and proceedings should be defined and documented and explained to the public.
  - 5) Procedures for fixing parliamentary debates and committee meetings, and assigning members of parliament to committees, should be impartial.
  - 6) Parliamentary proceedings should be efficient, avoid undue delay and be subject to prescribed time limits which can only be amended by the proper exercise of parliamentary discretion.
  - 7) The executive should not unlawfully dissolve parliament or restrict the ability of parliament to undertake its functions.
  - 8) Parliamentary procedures should be regularly reviewed to ensure that they accord with international good practice.

## Reporting, accountability and transparency

### 5.8 Accountability of members of parliament:

- 1) **Public access to deliberations of parliament:** Save where public access may endanger national security interests (such interests to be objectively determined by parliament), all parliamentary proceedings, both in the debating chamber and committee meetings:
  - a) should be open to the public
  - b) should be recorded by visual and audio record and written transcript, and such records should be published on parliament's public website.
- 2) **Conduct of members of parliament:** There should be an independent, impartial and publicly declared process for overseeing the conduct of members of parliament, including without limitation:
  - a) assessing their compliance with the code of conduct (Benchmark 5.7(2)) and whether members of parliament have any conflicts of interest
  - b) investigating and determining complaints and reports of corruption and breach of regulations in relation to members of parliament made under Benchmark 5.11
  - c) carrying out disciplinary procedures, including those in Benchmark 11.21 (Public officials).
- 3) **Misconduct in the appointment, regulation or dismissal of members of parliament:** There should be an independent, impartial and publicly declared process to determine allegations regarding misconduct in the appointment, regulation or dismissal of members of parliament.
- 4) **Civil and criminal liability of members of parliament:**
  - a) Members of parliament should have immunity from liability for defamation in respect of statements made in parliament.
  - b) Members of parliament should not be entitled to immunity from civil or criminal liability where, in the conduct of their office or otherwise, they commit corruption offences or other criminal offences.
- 5) **Report of parliamentary activities:** Parliament should publish an annual report of its activities which should include: (i) all complaints and reports of corruption or breach of regulations which have been made by or against, or in connection with the activities of parliament or members of parliament, and (ii) how such complaints and reports have been dealt with. Pending determination of such complaints and reports, the annual report should provide details only of the nature and date of the complaint or report and should keep confidential the identity of the individual(s) against whom such complaints or reports have been made.

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The identity of the individual(s) should be published in the event that the complaint or report is substantiated. Such annual reports should be disclosed to the public.

### 5.9 **Accountability of parliamentary personnel and the body responsible for parliamentary administration**

- 1) **Disciplinary procedures and sanctions for parliamentary personnel:** Disciplinary procedures and sanctions for parliamentary personnel should be as provided for in Benchmark 11.21 (Public officials).
- 2) **Audit of body responsible for parliamentary administration:** The body responsible for parliamentary administration should be audited on an annual basis by external audit in accordance with Benchmark 19 (Independent auditing) so as to assess whether it is acting in accordance with its responsibilities and duties under the regulations and the law, and without corruption. The full audit report should be disclosed to the public.

### 5.10 **Referral of suspected corruption to law enforcement authorities:** Where there are reasonable grounds to suspect corruption by members of parliament, parliamentary personnel or any other person involved in the parliamentary system, the matter should be referred to the law enforcement authorities for investigation and prosecution.

### 5.11 **Complaints and reporting systems**

- 1) **Complaints:** A system should be implemented which enables confidential and anonymous questions, concerns and complaints to be raised, by any person, regarding members of parliament or any other part of the parliamentary system, which provides a prompt and effective response to such questions, concerns and complaints, and which implements measures to address them.
- 2) **Reporting corruption and breach of regulations:** A reporting system should be implemented in accordance with Benchmark 21 (Reporting corruption).

### 5.12 **Transparency to the public:** Save to the extent contrary to the public interest, the following information should be provided promptly to the public by the body responsible for parliamentary administration or other prescribed body:

- 1) **Website:** Up-to-date information should be published on a freely accessible public website(s):
  - a) to enable the public to have a good understanding and knowledge of:
    - i) the laws and regulations governing the parliamentary system
    - ii) the structure, powers, duties, functions activities and financing of the parliamentary system

- b) to assist the public in assessing whether parties involved in the parliamentary system are acting in accordance with their responsibilities and duties under the regulations and the law, and without corruption.
- 2) **Such information should include the following:**
- a) (links to) all laws and regulations governing the parliamentary system
  - b) (links to) all laws passed by parliament
  - c) information in relation to:
    - i) the structure, powers, duties, functions, activities and financing of the parliamentary system
    - ii) the body responsible for parliamentary administration (Benchmark 10.22)
    - iii) the election of members of parliament (Benchmark 9.14 and 9.15)
    - iv) the employment, conduct and disciplining of members of parliament (Benchmark 11.22)
  - d) an explanation of parliamentary procedures and proceedings (Benchmark 5.7(4))
  - e) the identity and qualifications of all members of parliament
  - f) the parliamentary code of conduct
  - g) timetables and fixtures of parliamentary debates and committees
  - h) full records of parliamentary proceedings (Benchmark 5.8(1)(b))
  - i) all reports, reviews and recommendations issued by parliament (including those in Benchmark 5.2(5))
  - j) full reports of parliamentary activities (Benchmark 5.8(5))
  - k) full audit reports relating to the body responsible for parliamentary administration (Benchmark 5.9(2))
  - l) processes to determine allegations regarding misconduct in the appointment, regulation and dismissal of members of parliament (Benchmark 5.8(3))
  - m) an explanation of the complaints and reporting systems (Benchmark 5.11)
  - n) an explanation of the public's entitlement to disclosure of information under this Benchmark.
- 3) **Responses to requests for information:** Information or documents reasonably requested by the public regarding any matter relating to the parliamentary system should be provided within a reasonable period as prescribed by the regulations.

# Benchmark 6

## Regulatory authorities

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**Principle:** Establish or designate regulatory authorities with responsibility for regulating public sector and private sector activities which provide services to the public or which impact on the public, so as to combat corruption.

- 6.1 **Regulations:** Regulations should be implemented which regulate public sector and private sector activities which provide services to the public or which impact on the public, so as to combat corruption. Such regulations should: be based on principles of honesty, impartiality, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.
- 6.2 **Regulatory authorities:** Authorities ('regulatory authorities') should be established or designated with responsibility for regulating the activities in Benchmark 6.3 so as to ensure that those activities are carried out in accordance with the regulations and without corruption.
- 6.3 **Regulated activities:** Activities which provide services to the public or which impact on the public, whether carried out by public or private sector organisations or individuals, should be regulated so as to combat corruption in those activities. Such activities include:
- 1) the provision of education, employment, food and drugs, health, housing, infrastructure, prisons, security and defence, transportation (including shipping, aviation, road and rail), telecommunications, utilities, welfare systems, humanitarian assistance and foreign aid
  - 2) extractive industries
  - 3) accounting, auditing, legal (Benchmark 4.11) and medical services
  - 4) surveying, construction and engineering services
  - 5) banking and financial services (Benchmark 7)
  - 6) transparency of asset ownership (Benchmark 8)
  - 7) political lobbying, financing, spending and elections (Benchmark 9)
  - 8) public sector employment (Benchmark 11)
  - 9) public sector procurement (Benchmark 13).
- 6.4 **Responsibilities of the regulatory authorities:** Each regulatory authority should, in accordance with the provisions of this Benchmark:
- 1) develop regulations designed to ensure that the regulated activities which it is responsible for regulating are carried out without corruption

- 2) require the organisations and individuals which carry out the regulated activities to comply with the regulations, and communicate to those organisations and individuals the importance of anti-corruption measures and high standards of business and professional integrity
- 3) to the extent reasonable, monitor and audit the regulated organisations and individuals to assess their compliance with the regulations
- 4) administer proportionate sanctions for failure to comply with the regulations
- 5) refer to the law enforcement authorities any matter in respect of which there are reasonable grounds to suspect corruption by the regulated organisations or individuals
- 6) encourage persons to report suspicions of corruption in relation to the regulated activities
- 7) provide regular reports to the public in respect of the matters in (3) and (4) above
- 8) assess the risks of corruption by, on behalf of or against the regulatory authority and take adequate steps to combat such corruption.

#### 6.5 **Developing the regulations:**

- 1) The regulations should require (as appropriate to the particular regulated activity) that, in carrying out the regulated activities, organisations and individuals should:
  - a) comply with the applicable safety, quality, environmental, professional, financial and other regulations
  - b) provide works, products and services which are as contractually described and as required by statute or regulation
  - c) act effectively, honestly, impartially, independently and transparently
  - d) provide information that is honest and transparent
  - e) price honestly, fairly and transparently
  - f) not defraud any individual or organisation
  - g) not seek to unduly influence any individual or organisation, including the regulatory authority or any public official or function
  - h) not assist or facilitate corruption
  - i) operate a complaints system which deals promptly, honestly, fairly, transparently and effectively with questions, concerns and complaints regarding the regulated activities
  - j) where the regulated activity being carried out by the regulated person is over a prescribed value threshold, implement an

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anti-corruption management system in accordance with Benchmark 10 (where the regulated person is a public organisation) or the Annex to the Guidance (where the regulated person is a private sector organisation).

- 2) In developing the regulations, each regulatory authority should:
  - a) assess the corruption risks in the regulated activities which it is responsible for regulating
  - b) design measures to address such risks
  - c) invite, and take account of, any advice or criticism regarding the role of the regulatory authority and the adequacy of the regulations
  - d) consult and work with other public organisations, the private sector and foreign and international agencies, so as help prevent, detect and deal with corruption in relation to the regulated activities.

6.6 **Overriding duty of the regulatory authorities and their personnel:** In carrying out their responsibilities, the regulatory authorities and their personnel should act effectively, honestly, impartially, independently and transparently. In particular, they should not be improperly influenced in the design of the regulations, the monitoring or auditing of compliance with the regulations, or the sanctioning of individuals or organisations for failure to comply with the regulations.

6.7 **Anti-corruption management:** In order to combat corruption in relation to their activities, the regulatory authorities should each:

- 1) put in place an anti-corruption management system in accordance with Benchmark 10 (Public sector organisations)
- 2) ensure that their personnel are employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials).

6.8 **Independence of the regulatory authorities:** To ensure that the regulatory authorities have the necessary independence to carry out their responsibilities effectively:

- 1) the regulatory authorities should be provided with the necessary mandate, powers and financial autonomy; adequate funding, staff and resources; and independence from improper government, political or other influence or interference
- 2) the heads of the regulatory authorities should be employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials) and the following provisions:
  - a) all processes and decisions required under Benchmark 11 or (b) below, in relation to heads of the regulatory authorities, should be conducted and taken by an independent body

- b) heads of the regulatory authorities should have security of tenure for a reasonable prescribed maximum period and should be suspended or dismissed only for reasons of incapacity or misconduct or material non-performance that render them unfit to discharge their duties.

6.9 **Accountability:** The regulatory authorities and their personnel should be accountable as follows:

- 1) **Disciplinary procedures and sanctions for personnel of the regulatory authorities:** The regulatory authorities should take disciplinary action against personnel (including the heads of the regulatory authorities) as provided for in Benchmark 11.21 (Public officials).
- 2) **Audit of the regulatory authorities:** The regulatory authorities should be audited on an annual basis by external audit in accordance with Benchmark 19 (Independent auditing) so as to assess whether they are acting in accordance with their responsibilities and duties under the regulations and the law, and without corruption.
- 3) **Review by parliament and the public:** The full audit report in (2) above should be submitted annually to parliament for its review and recommended actions and disclosed to the public. The regulatory authorities should, as appropriate, modify and improve their performance to take account of the findings in the audit report, parliament's recommendations and comments from the public.
- 4) **Referral of suspected corruption:** Where there are reasonable grounds to suspect corruption by the regulatory authorities or their personnel, the matter should be referred to the law enforcement authorities.

6.10 **Complaints and reporting systems**

- 1) **Complaints:** The regulatory authorities should each implement a system which enables confidential and anonymous questions, concerns and complaints to be raised, by any person, regarding the regulatory authority and the activities and persons which it is responsible for regulating, and which provides a prompt and effective response to such questions, concerns and complaints, and implements measures to resolve them.
- 2) **Reporting corruption and breach of regulations:** The regulatory authorities should each implement a reporting system in accordance with Benchmark 21 (Reporting corruption).

6.11 **Transparency to the public:** Save to the extent contrary to the public interest, the regulatory authorities should each promptly provide the following information to the public:

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- 1) **Website:** Up-to-date information should be published on a freely accessible public website(s):
  - a) to enable the public to have a good understanding and knowledge of:
    - i) all laws and regulations governing the regulatory authority and the activities and persons which the authority is responsible for regulating
    - ii) the structure, powers, duties, functions, activities and financing of the regulatory authority
  - b) to assist the public in assessing whether:
    - i) the regulatory authority is acting in accordance with its responsibilities and duties under the regulations and the law, and without corruption
    - ii) the regulated activities are being carried out in accordance with the relevant laws and regulations and without corruption.
- 2) **Such information should include the following:**
  - a) (links to) all laws and regulations governing the activities and persons which the authority is responsible for regulating
  - b) (links to) all laws and regulations governing the regulatory authority
  - c) information in relation to the regulatory authority (Benchmark 10.22)
  - d) full reports, by the regulatory authority, in connection with its monitoring and auditing of, and sanctions imposed in relation to, the regulated activities (Benchmark 6.4(7))
  - e) full audit reports relating to the regulatory authority (Benchmark 6.9(3))
  - f) parliament's review and recommended actions relating to the regulatory authority (Benchmark 6.9(3) and Benchmark 5.12(2)(i))
  - g) an explanation of the complaints and reporting systems (Benchmark 6.10)
  - h) an explanation of the public's entitlement to disclosure of information under this Benchmark.
- 3) **Responses to requests for information:** Information or documents reasonably requested by the public regarding any matter relating to the regulatory authority, its responsibilities, duties and activities, the regulations or the regulated persons and activities should be provided to the public within a reasonable period as prescribed by the regulations.

## Benchmark 7

### Regulation of financial institutions and the financial system

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**Principle:** Implement regulations which are designed to combat (i) corruption in financial institutions and the financial system, and (ii) the laundering of the proceeds of crime.

- 7.1 **Regulations:** Regulations should be implemented which are designed to combat (i) corruption in financial institutions and the financial system, and (ii) the laundering of the proceeds of crime. Such regulations should: be based on principles of honesty, impartiality, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.

### Regulation of financial institutions and of designated non-financial businesses and professions

- 7.2 **Financial regulatory authority:** An authority or authorities ('the financial regulatory authority') should be established or designated which is subject to the requirements of Benchmark 6 (Regulatory authorities) and has responsibility for the following:
- 1) **Undertaking periodic risk assessments** which identify and assess:
    - a) the existing corruption risks relevant to the national and international financial system
    - b) the corruption risks that may arise in relation to the development of new products, business practices, delivery mechanisms or technologies
    - c) the sectors, businesses and professions which, due to the nature of their activities, pose a corruption risk in financial dealings.
  - 2) **Designing and implementing measures**, including those referred to in (3) to (13) below, which combat corruption. In particular:
    - a) designing the measures which are necessary to deal with the risks identified in the risk assessments
    - b) designating the specific categories of organisation to which these measures should apply, namely:

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- i) organisations involved in financial dealings ('financial institutions')
    - ii) businesses and professions, other than financial institutions, which, due to the nature of their activities, pose a corruption risk in financial dealings (designated non-financial businesses and professions: 'DNFBPs')
  - c) ensuring the effective implementation of these measures.
- Such measures should be designed and implemented in a manner reasonable and proportionate to the risks identified.
- 3) **Establishing regulations** with which financial institutions and DNFBPs must comply and which are designed to combat corruption in the national and international financial system.
  - 4) **Monitoring, supervising, and ensuring compliance** with such regulations, including by:
    - a) requiring financial institutions and DNFBPs to comply with the regulations as a condition of their being able to undertake the relevant regulated function
    - b) on a periodic basis, requiring and assessing reasonable proof of compliance from financial institutions and DNFBPs
    - c) compelling production of any specific information from financial institutions and DNFBPs that is relevant to monitoring, supervising, and ensuring such compliance.
  - 5) **Licensing financial institutions and DNFBPs**, so as to ensure that no financial institution or DNFBP can undertake the relevant regulated function unless it is licensed by the financial regulatory authority, is adequately regulated and is subject to adequate anti-corruption supervision.
  - 6) **Controlling money and value transfer services** by ensuring that organisations and individuals that provide money or value transfer services:
    - a) are licensed or registered
    - b) are subject either to the same regulations as financial institutions or to equivalent regulations.
  - 7) **Controlling cash movement** by implementing measures:
    - a) to detect the physical cross-border transportation of currency and bearer negotiable instruments, including through a declaration system and/or disclosure system
    - b) to stop or restrain currency or bearer negotiable instruments that are suspected to be related to corruption or are falsely declared.

- 8) **Preventing criminal ownership** by taking necessary legal or regulatory measures to prevent criminals or their associates from:
    - a) holding, or being the beneficial owner of, a significant or controlling interest in a financial institution or DNFBP
    - b) holding a management function in a financial institution or DNFBP.
  - 9) **Preventing illicit shell banks and shell companies** by ensuring that the establishment, or continued operation, of shell banks or shell companies which have no legitimate purpose is prohibited and prevented.
  - 10) **Administering non-criminal sanctions:** Impose effective, proportionate and dissuasive non-criminal sanctions on financial institutions and DNFBPs, and on their directors and senior management, for breach of the regulations. Such sanctions may include:
    - a) the withdrawal, restriction or suspension of the licence of the financial institutions or DNFBPs
    - b) fines levied on the financial institutions or DNFBPs
    - c) the barring of individuals from undertaking an ownership or management role in financial institutions or DNFBPs for a specified period of time.
  - 11) **Enabling criminal sanctions:** Identify and report, and require financial institutions and DNFBPs to identify and report, to the law enforcement authorities, any suspected criminal offence committed by financial institutions, DNFBPs, or their directors or senior management or other parties.
  - 12) **Promoting co-operation** with other national and international judicial, law enforcement and financial regulatory authorities in order to combat corruption in the national and international financial system.
  - 13) **Facilitating the exchange of information** at national and international level with other such authorities, and establish a financial intelligence unit for the collection, analysis and dissemination of information regarding potential corruption in the financial system.
- 7.3 **Anti-money laundering actions by the financial regulatory authority:** The financial regulatory authority, as part of its responsibility defined in Benchmark 7.2, should regulate, monitor and supervise financial dealings and designated sectors and professions, so as to prevent and deal with the laundering of the proceeds of crime ('money laundering'). In particular, the financial regulatory authority should require:
- 1) financial institutions to implement the regulations listed in Benchmark 7.4
  - 2) DNFBPs to implement the regulations listed in Benchmark 7.5.

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- 7.4 **Anti-money laundering regulations to be implemented by financial institutions:** Financial institutions should implement the following regulations so as to combat money laundering:
- 1) **Risk assessment and action:** Financial institutions should be required to undertake periodic risk assessments which identify and assess:
    - a) the existing money laundering risks relevant to their operations,
    - b) the money laundering risks that may arise in relation to the development of new products, business practices, delivery mechanisms or technologies, and to take appropriate measures to manage and mitigate such risks.
  - 2) **Customer due diligence:**
    - a) Financial institutions should be required to undertake customer due diligence measures when:
      - i) establishing business relations
      - ii) carrying out occasional transactions above a designated threshold or in designated circumstances
      - iii) there is a suspicion of money laundering
      - iv) there are doubts about the veracity or adequacy of previously obtained customer identification data.
    - b) Where the financial institution is unable to comply with the applicable requirements under (a) above, it should:
      - i) not open the account, commence business relations or perform the transaction
      - ii) terminate the business relationship
      - iii) consider making a report to the authorities in relation to the customer.
    - c) Financial institutions should be prohibited from keeping anonymous accounts or accounts in obviously fictitious names.
  - 3) **Record-keeping:** Financial institutions should be required to maintain, for a prescribed minimum period, all necessary records on customer due diligence and transactions, both domestic and international, and should make these promptly available upon request to the relevant authorities.
  - 4) **Politically exposed persons:** Financial institutions should be required, in relation to politically exposed persons (PEPs) (whether as customer or beneficial owner), and in addition to performing normal customer due diligence measures, to:
    - a) have appropriate risk management systems to determine whether the customer or the beneficial owner is a PEP

- b) obtain senior management approval for establishing (or continuing, for existing customers) business relationships with PEPs
- c) take reasonable measures to establish the source of wealth and source of funds
- d) conduct enhanced ongoing monitoring of the business relationship.

The requirements for PEPs should also apply to family members and close associates of such PEPs.

- 5) **Correspondent banking:** Financial institutions should be required, in relation to cross-border correspondent banking and other similar relationships, and in addition to performing normal customer due diligence measures, to:
- a) gather sufficient information about a respondent financial institution to understand fully the nature of the respondent's business, its reputation, the quality of supervision of its activities, and whether it has been subject to criminal or regulatory action
  - b) assess the respondent institution's controls
  - c) obtain approval from senior management before establishing the relationship
  - d) understand the respective responsibilities of each institution
  - e) with respect to 'payable-through accounts', be satisfied that the respondent financial institution has conducted effective customer due diligence and has retained and can make available adequate records.

Financial institutions should be prohibited from entering into, or continuing, a correspondent banking relationship with shell banks or with institutions which permit their accounts to be used by shell banks.

- 6) **Wire transfers:** Financial institutions should be required to:
- a) ensure that required and accurate originator and beneficiary information is included on wire transfers and related messages, and that the information remains throughout the payment chain
  - b) monitor wire transfers for the purpose of detecting those which lack required originator and/or beneficiary information and take appropriate measures.
- 7) **Reliance on third parties:** Where a third party performs customer due diligence on behalf of a financial institution, the financial institution should retain ultimate responsibility for the adequacy of the customer due diligence.
- 8) **Internal controls and foreign branches and subsidiaries:** Financial institutions should be required to implement controls against money

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laundering both within the organisation and within their foreign branches and majority owned subsidiaries.

- 9) **Higher risk customers, transactions and States:** Financial institutions should be required to apply effective and proportionate enhanced due diligence measures to higher risk customers and transactions, and to business relationships and transactions with organisations and individuals from higher risk States.
  - 10) **Reporting of suspicious transactions:** If a financial institution suspects, or has reasonable grounds to suspect, that funds are the proceeds of crime, it should be required to report promptly its suspicions to the relevant authorities.
- 7.5 **Anti-money laundering regulations to be implemented by DNFBPs:** So as to combat money laundering, DNFBPs in sectors and professions deemed by the financial regulatory authority to be of high risk of participating in or facilitating money laundering should, in prescribed circumstances, or in cases of transactions above a prescribed value threshold, implement the regulations specified in Benchmark 7.4 (1), (2), (3), (4), (7), (8), (9) and (10).
- 7.6 **Confidentiality and tipping-off:** Financial institutions, DNFBPs and their personnel should be:
- 1) protected by law from criminal and civil liability for breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, if they report their suspicions in good faith to the relevant authorities, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually occurred
  - 2) prohibited by law from disclosing ('tipping-off') the fact that a suspicious transaction has been reported.

## Regulation of accounts and audits

- 7.7 **Accounting and auditing regulations:** Accounting and auditing regulations which are designed to combat corruption should be implemented in relation to all public and private sector organisations including:
- 1) the requirement for organisations to maintain accurate and complete books, records and accounts in accordance with international good practice accounting procedures
  - 2) the requirement for organisations to file their accounts annually at a central registry, such accounts to contain at minimum a statement of the assets and liabilities, and revenue and expenditure, of the organisation for the relevant accounting period

- 3) enabling all accounts filed at such central registry to be viewed by the public
  - 4) the prohibition of accounting measures which may facilitate or conceal corruption, including practices such as:
    - a) the establishment of off-the-books accounts
    - b) the making of off-the-book or inadequately identified transactions
    - c) the recording of non-existent expenditure
    - d) the entry of liabilities with incorrect identification of their objects
    - e) the use of false documents
    - f) the intentional destruction of bookkeeping documents earlier than foreseen by the law
  - 5) the prohibition of the tax deductibility of expenses that:
    - a) constitute bribes, or
    - b) are incurred in furtherance of corrupt conduct
  - 6) the requirement on all organisations over a prescribed turnover and/or asset threshold to have their accounts externally audited in accordance with international good practice auditing procedures.
- 7.8 In addition, public sector organisations should comply with:
- 1) the accounting requirements specified in Benchmark 15 (Financial management)
  - 2) the audit requirements specified in Benchmark 19 (Independent auditing).

## Accountability, reporting and transparency

- 7.9 **Accountability of the financial regulatory authority:** The financial regulatory authority should be subject to the accountability requirements in Benchmark 6.9 (Regulatory authorities).
- 7.10 **Complaints and reporting systems:** The financial regulatory authority should implement complaints and reporting systems in accordance with Benchmark 6.10 (Regulatory authorities).
- 7.11 **Transparency to the public:** The financial regulatory authority should provide the following information to the public:
- 1) **Website:** Up-to-date information should be published on a freely accessible public website:
    - a) to enable the public to have a good understanding and knowledge of:

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- i) the laws and regulations relating to the financial regulatory authority and the activities and persons which the authority is responsible for regulating
    - ii) the structure, powers, duties, functions, activities and financing of the financial regulatory authority
  - b) to assist the public in assessing whether:
    - i) the financial regulatory authority is acting in accordance with its responsibilities and duties under the regulations and the law, and without corruption
    - ii) the regulated activities are being carried out in accordance with the regulations and the law, and without corruption.
- 2) **Such information should include the following:**
  - a) all information required in Benchmark 6.11 (Regulatory authorities)
  - b) an explanation of how the public may view the accounts of organisations filed at the central registry (Benchmark 7.7(3))
  - c) an explanation of the complaints and reporting systems (Benchmark 7.10)
  - d) an explanation of the public's entitlement to disclosure of information under this Benchmark.
- 3) **Responses to requests for information:** Information or documents reasonably requested by the public regarding any matter relating to the financial regulatory authority or the regulated activities and persons should be provided to the public within a reasonable period as prescribed by the regulations.

# Benchmark 8

## Transparency of asset ownership

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**Principle:** Implement regulations which promote transparency of legal and beneficial ownership of organisations, land and real estate, trusts, and high value movable property, so as to combat corruption.

- 8.1 **Regulations:** Regulations should be implemented which promote transparency of legal and beneficial ownership of organisations, land and real estate, trusts, and high value movable property, so as to combat corruption. Such regulations should: be based on principles of honesty, impartiality, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.
- 8.2 **The ownership authority:** An authority or authorities ('the ownership authority') should be established or designated which is subject to the requirements of Benchmark 6 (Regulatory authorities) and has responsibility for the following:
- 1) implementing the regulations, and monitoring and supervising compliance with the regulations
  - 2) the operation of the ownership registers (Benchmark 8.3)
  - 3) giving access to the ownership registers (Benchmark 8.5)
  - 4) the regular auditing of the ownership registers to assess as far as is reasonable:
    - a) whether details are being registered in accordance with Benchmarks 8.3 and 8.4 and whether they are complete, accurate and current
    - b) whether access to the registers is being granted in accordance with Benchmark 8.5
    - c) whether the registered details give rise to any suspicion of corrupt activity
  - 5) disclosing the full audit reports (produced under (4) above) to the public
  - 6) levying penalties for failure to comply with the regulations
  - 7) where there are reasonable grounds to suspect corruption, referring such matter to the law enforcement authorities.
- 8.3 **Registration of legal and beneficial ownership of organisations, land and real estate, trusts, and high value movable property:** Details of the

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legal and beneficial ownership of the following should be registered in an ownership register(s) in accordance with Benchmark 8.4:

- 1) **Organisations:** all organisations which are constituted, or carrying out any activity, in the territory of the State.
- 2) **Land and real estate:** all publicly or privately owned land and real estate located in the territory of the State.
- 3) **Trusts:** all express trusts where one of the following apply:
  - a) all individual trustees are resident in the territory of the State
  - b) the trust has a corporate trustee that is incorporated in the territory of the State
  - c) the trust was funded by someone who was resident or domiciled in the territory of the State at the time, and it has at least one trustee resident in the territory of the State
  - d) the trust is offshore but has assets in the territory of the State
  - e) the trust is offshore but has income from a source in the territory of the State.
- 4) **High value movable property:** all movable property above a prescribed value threshold which is licensed or located in the territory of the State.

### 8.4 Details of registration: In relation to such registration:

- 1) All information registered should be complete, accurate and current.
- 2) **Organisations:** Details to be registered in relation to organisations should include at least:
  - a) the organisation's name, identity number, date of incorporation, place of incorporation and address
  - b) details of all legal and beneficial owners of the organisation as follows:
    - i) where an owner is an individual: the individual's name, date of birth, nationality, passport or identity number, State of residence and address; the nature and extent of the legal or beneficial interest held; and the dates and period(s) for which it has been held
    - ii) where an owner is a public or private sector organisation: the organisation's name, identity number, date of incorporation, place of incorporation and address; the nature and extent of the legal or beneficial interest held; and the dates and period(s) for which it has been held
    - iii) where an organisation is owned in part by the private sector and in part by the public sector: details of each private sector

- owner should be as in (i) or (ii) above, and details of each public sector owner should be as in (ii) above
- iv) where an owner is a trust: details of the trustees and beneficiaries should be as for individuals and organisations in (i) and (ii) above.
- 3) **Land and real estate:** Details to be registered in relation to land and real estate should include at least:
- a) the name, if any, and address or identifying co-ordinates of the land or real estate
  - b) details of all legal and beneficial owners of the land or real estate, as in (2)(b) above.
- 4) **Trusts:** Details to be registered in relation to trusts should include at least:
- a) the name of the trust (if any) and contact address for the trust
  - b) the types of assets held by the trust
  - c) the identity of the settlor, the trustee(s), the protector (if any), the beneficiaries or class of beneficiaries, and any other individual or organisation exercising effective control over the trust. Details to be registered of such persons should be as in (2)(b) above.
- 5) **High value movable property:** Details to be registered in relation to movable property above the prescribed value threshold (Benchmark 8.3(4)) should include at least:
- a) the type of asset and its location and value
  - b) details of all legal and beneficial owners of the high value movable property, as in (2)(b) above.
- 6) All registration should be supported by documentary evidence of the registered details which should be lodged with the registration.
- 7) It should be the duty of the relevant:
- a) officer of the organisation
  - b) land or real estate owner
  - c) trustee
  - d) person in possession of or with control over the high value movable property,
- as prescribed by the regulations, to ensure that such registration is made, and that the information is complete, accurate and current, and is updated as soon as possible in the event of any change. Such person should be required to provide a signed declaration as to the accuracy of the registrations.

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- 8) The ownership authority should be entitled to levy proportionate fines on the persons in (7) above in the event of their failure to comply with the registration requirements.
- 9) Persistent, repeated or deliberate failure by the persons in (7) above to comply with the registration requirements should be a criminal offence which can be prosecuted by the ownership authority or by the law enforcement authorities.
- 10) There should be no exemption in relation to these registration requirements. All of the above details should always be registered.

### 8.5 Access to information:

- 1) The ownership registers should preferably be freely accessible by all members of the public, save for those details (such as passport or identity numbers) which should be kept confidential to guard against criminal activity.
- 2) If free public access as per (1) above is not granted by the regulations, then full access to relevant parts of the ownership registers should be granted at minimum to:
  - a) all government authorities reasonably requiring access to such information for the purposes of exercising their duties and powers
  - b) any person obliged by law to carry out customer due diligence
  - c) any person that can demonstrate a legitimate interest.
- 3) All information should be provided promptly.
- 4) Access should be given without giving notification to the organisations or individuals whose details are registered.

## Accountability, reporting and transparency

- 8.6 **Accountability of the ownership authority:** The ownership authority should be subject to the accountability requirements in Benchmark 6.9 (Regulatory authorities).
- 8.7 **Complaints and reporting systems:** The ownership authority should implement complaints and reporting systems in accordance with Benchmark 6.10 (Regulatory authorities).
- 8.8 **Transparency to the public:** Save to the extent contrary to the public interest, the ownership authority should promptly provide the following information to the public:
  - 1) **Website:** Up-to-date information should be published on a freely accessible public website(s):
    - a) to enable the public to have a good understanding and knowledge of:

- i) the laws and regulations relating to the ownership authority and to the transparency and registration of ownership
    - ii) the structure, powers, duties, functions, activities and financing of the ownership authority
  - b) to assist the public in assessing whether:
    - i) the ownership authority is acting in accordance with its responsibilities and duties under the regulations and the law, and without corruption
    - ii) the registration of ownership is being carried out in accordance with the regulations and the law, and without corruption
    - iii) the registered details give rise to any suspicion of corrupt activity.
- 2) **Such information should include the following:**
  - a) all information required in Benchmark 6.11
  - b) an explanation of the legal requirements governing registration of ownership (Benchmark 8.3 and 8.4)
  - c) an explanation of the entitlement to access information held on the ownership registers and how this information can be accessed (Benchmark 8.5)
  - d) the full audit reports in relation to the ownership registers (except that details of ongoing confidential investigations may be exempted from publication until the investigations are complete) (Benchmark 8.2(5))
  - e) an explanation of the complaints and reporting systems (Benchmark 8.7)
  - f) an explanation of the public's entitlement to disclosure of information under this Benchmark.
- 3) **Responses to requests for information:** Information or documents reasonably requested by the public regarding any matter relating to the ownership authority or the transparency or registration of ownership should be provided to the public within a reasonable period as prescribed by the regulations.

## Benchmark 9

### Political lobbying, financing, spending and elections

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**Principle:** Implement regulations which are designed to combat corruption in political lobbying, financing, spending and elections.

#### Regulations

- 9.1 **Regulations:** Regulations should be implemented which are designed to combat corruption in political lobbying, financing, spending and elections. Such regulations should: be based on principles of honesty, impartiality, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.
- 9.2 **Regulatory authority:** An authority or authorities ('the political regulatory authority') should be established or designated which is subject to the requirements of Benchmark 6 (Regulatory authorities) and has overall responsibility for regulating political lobbying, financing, spending and elections.

#### Political lobbying

- 9.3 **Political lobbying:**
  - 1) Political lobbyists should:
    - a) not seek to exert improper influence over political parties or candidates or any public official or body
    - b) not promise, offer or give any donations, gifts, hospitality, entertainment or other benefits to political parties, candidates or public officials, whether in connection with their lobbying or otherwise
    - c) keep sufficient records and accounts of their lobbying activities for a prescribed minimum period
    - d) register their details and details of their lobbying activities in a public register.
  - 2) All political candidates and public officials should register details of their meetings and communications with lobbyists in a public register.

- 3) Exemptions in relation to compliance with 9.3(1)(c) and (d) and 9.3(2) may be provided for in circumstances where the type of lobbying activity is highly unlikely to be corrupt.

## Political accounts

### 9.4 Political accounts:

- 1) Political parties should prepare accounting records which accord with international good practice and which provide an honest, transparent and complete record of all financial transactions. These should include entries showing from day to day all sums of money received and expended, the matters in respect of which the receipt and expenditure have taken place, a record of assets and liabilities, and all supporting documents. A statement of accounts should be prepared in respect of each financial year of the party and each election campaign.
- 2) Political candidates should prepare accounting records and financial statements as in (1) above in respect of their election campaigns.
- 3) Accounting records and financial statements should be retained by the party and candidate for a prescribed minimum period and should be independently audited.
- 4) All such accounting records, financial statements and audit reports should be disclosed to the public.

## Political financing

- 9.5 **State funding of political parties and candidates:** State funding of political parties and candidates should not be provided save where it is expressly permitted by law and is subject to adequate controls including the following:
  - 1) Eligibility and allocation criteria for permitted State funding should be transparent, impartial and fair, and should not unduly disadvantage small or emerging parties or candidates.
  - 2) Permitted State funding should be used only for lawful political purposes (Benchmark 9.10(2)).
  - 3) Permitted State funding should be limited in amount so that:
    - a) the amount is conscionable, taking into account that it is to be paid out of taxpayers' funds
    - b) taxpayers are not funding, to an unacceptable degree, political candidates or parties whose policies they do not support
    - c) there is no risk of over-dependency on State support by political parties and candidates.

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- 4) There should be adequate safeguards against abuse of permitted State funding.
- 5) Permitted State funding should be independently audited to ensure that political candidates and parties:
  - a) have received the amounts to which they are entitled
  - b) have not received amounts to which they are not entitled
  - c) have properly accounted for such funding in their accounts
  - d) are using such funding only for the permitted purposes.
- 6) The audit report, and a register showing criteria for and details of permitted State funding, should be disclosed to the public.

### 9.6 **Political fund-raising:** Political fund-raisers should:

- 1) not seek to exert improper influence over political parties or candidates
- 2) ensure that their fund-raising does not result in breach by the party or candidate of caps on political donations (Benchmark 9.7(3))
- 3) raise political funds only by lawful means and only from permissible donors (Benchmark 9.7(4))
- 4) keep complete records and accounts of their fund-raising activities for a prescribed minimum period
- 5) declare details of their political fund-raising in a public register.

### 9.7 **Political donations:** Political donations should not be made or accepted save where they are expressly permitted by law and are subject to adequate controls including the following:

- 1) **Definition of political donation:** For the purposes of this Benchmark, a political donation is a donation of anything of value given, directly or indirectly, at any time, and by any person, to a political party or candidate for purposes of routine or campaign spending (Benchmark 9.10(2)).
- 2) **Acceptable political donations:** A political donation should be made by a donor, and accepted by a political party or candidate, only where:
  - a) the political donation is within the permitted political donation caps (see (3) below)
  - b) the political donation is generated from lawful activities within the State territory
  - c) the donor is a permissible donor (see (4) below).
- 3) **Caps on political donations:** The amount of political donations that may be received, in total, and in total from any single donor, in a prescribed period, by a political party or candidate, should be capped so that:

- a) no political party or candidate has an undue advantage due to the total value of political donations received in the prescribed period
  - b) no person can acquire improper influence over a political party or candidate by virtue of the total value of political donations made by that person to the party or candidate
  - c) available political funds are kept within reasonable levels so as to reduce the risks of funds being used for corrupt purposes and of unconscionable spending by political parties and candidates.
- 4) **Permissible donors:** Permissible donors are either those who comply with all of (a) to (d) below:
- a) are clearly identified
  - b) have a close connection with the State where the election is taking place, or where the political party is constituted
  - c) demonstrate: (i) the ultimate source of their donations, (ii) that their donations are from lawful sources within the State territory, and (iii) that they are the lawful owners of the donations
  - d) provide a declaration and evidence confirming all such matters  
or, those who make a minor political donation below a prescribed value threshold, in which case (a) to (d) above need not apply.
- 5) **Records and audit:** Political parties and candidates should keep, for a prescribed minimum period, written records relating to political donations received and all declarations and evidence provided by donors under (4) above. These records should be independently audited to determine whether the provisions in relation to political donations have been complied with, and such audit reports should be disclosed to the public.
- 6) **Register of political donations:** A register showing criteria for acceptable political donations, the identity of each donor (other than for minor political donations under (4) above), and the value of the individual and total political donations made by each donor to each political party and candidate, should be maintained and disclosed to the public.
- 9.8 **Loans and related transactions:** Loans and other financial arrangements afforded to political parties or candidates should be regulated so as to ensure that they are on an arm's length and commercial basis and are not used to circumvent the regulations concerning political donations. They should be subject to equivalent controls as for political donations in Benchmark 9.7.
- 9.9 **Interests in public or private sector organisations:** In order to prevent conflicts of interest, political parties should be prohibited from having any

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ownership or management interest in public or private sector organisations. This restriction should not apply to the routine investment by political parties in managed funds which hold minority shareholdings in a wide spread of private sector organisations.

### Political spending

9.10 **Political spending** should be subject to controls, including the following:

- 1) **Definition of political spending:** For the purposes of this Benchmark, political spending means:
  - a) any spending by or on behalf of a political party, and
  - b) any spending by or on behalf of a candidate in order to procure the electoral success of that candidate.

Such spending includes all notional expenditure and expenditure by a third party from which the party or candidate benefit and which is known, or reasonably could have been expected to be known, to the political party or candidate.

- 2) **Lawful political purposes:** Political spending should be lawful, and only for the purposes of:
  - a) promoting the record and policies of the party or candidate in order to procure the electoral success of the party or candidate ('campaign spending')
  - b) supporting the integrity and sound management and operation of the party, and developing and disseminating party policies, other than for election purposes ('routine spending').
- 3) **Limits on spending:** Political spending for political candidates and parties should be limited to a cap prescribed by law so that:
  - a) only objectively reasonable amounts are available for the purposes in (2) above
  - b) amounts permitted to be spent are conscionable taking into account the income of the average citizen
  - c) wealthy parties and candidates do not have an undue advantage
  - d) illicit fund-raising is not encouraged.
- 4) **Spending by 'non-partisan' groups:** In order to prevent circumvention of the political spending limits, any spending by any group which purports to be non-partisan but where that spending is reasonably regarded as being directly or indirectly intended for the benefit of a political party or candidate should be treated as political spending by that political party or candidate and should be included when assessing

whether the political spending limit has been reached. A political party or candidate should declare any such political spending in its accounts and should not accept the benefit of such political spending where it goes beyond the political spending limits.

- 5) **Records, returns and audits:** The political party and candidate should keep, for a prescribed minimum period, all records of political spending. Such records should include the items on which the political spending was incurred and all evidence of invoicing and payment. Spending returns should be prepared which clearly identify the specific categories of political spending. These returns and records should be independently audited to determine whether the provisions in relation to political spending have been complied with.
- 6) **Publishing to the public:** All records of political spending and spending returns and all audit reports should be disclosed to the public.

## Political advertising: during and outside election campaigns

9.11 **Transparency and accuracy of political advertising:** All information and materials (including written, spoken and online) produced by political parties, candidates, campaigners or their agents, in order to promote the electoral success or policies of political parties or candidates, whether during or outside an election campaign, should:

- 1) include information or an imprint stating who has created and paid for the information or material, the cost of the information or material, and which political party, candidate or issue they are promoting
- 2) not be deliberately misleading, inaccurate or false.

9.12 **Digital platforms:** Political advertising and other political activity on social media or other digital platforms, whether during or outside an election campaign, should be regulated to ensure that:

- 1) there is full transparency as to the source and purpose of such activity
- 2) harmful or illegal content and improper influence or interference is excluded
- 3) all online political advertising is collected in a publicly accessible and searchable database so that the advertising in relation to any particular party or candidate is easily identifiable.

Such regulation should not be by way of self-regulation by social media companies.

9.13 **Personal data:** Use of personal data by political parties for political purposes, whether during or outside an election campaign, should be controlled so as

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not to abuse privacy and should be transparent and independently audited. Political parties should not use such data unless they have obtained the prior express consent of the individuals to whom the data relates and, in requesting such consent, should explain the nature of the particular personal data which it seeks to use, how it was or would be obtained, and the intended use of the data. This provision should apply to any personal data, including that which is specifically provided by an individual and that which is harvested from the individual's online activities or data.

## Elections

9.14 **Election candidates:** In order to help ensure that public officials act honestly, impartially, independently, transparently and accountably:

- 1) **Eligibility:** Political candidates should be eligible to stand for public office only where:
  - a) they have a close connection with the State of the election
  - b) they do not hold positions in the public sector which would prevent them acting independently or impartially in their elected public office
  - c) they have not, within a prescribed period of standing for public office, been convicted of a corruption offence or other offence involving dishonesty.
- 2) **Safeguards against abuse:** There should be safeguards against abuse of eligibility criteria.
- 3) **Transparency:** Eligibility criteria, and the reasons why any candidate has been disqualified, should be disclosed to the public.
- 4) **Elected public officials:** Elected public officials should be subject to the provisions of Benchmark 11 (Public officials).

9.15 **Elections:** In order to combat corruption, the election process should be regulated and monitored so as to ensure that:

- 1) the election process is independent of improper influence and interference and is impartial and transparent
- 2) there is an accurate and up-to-date register of eligible voters that is publicly available
- 3) for voting in person:
  - a) voters are given sufficient notice of polling times and locations
  - b) there is a system at polling stations for ensuring that only one vote is cast in respect of each eligible voter
  - c) ballot boxes are kept secure and not tampered with

- 4) for postal and proxy voting:
  - a) voters are given sufficient notice of postal and proxy voting methods
  - b) postal and proxy voting applications are securely handled
  - c) all postal ballot papers are returned directly to the relevant election officer
  - d) postal votes are kept secure and not tampered with
  - e) political campaigners are not involved in handling or completing postal or proxy voting applications or postal votes
- 5) fraudulent votes are not cast
- 6) counting of votes is honest, transparent and efficient
- 7) election results are honestly and publicly announced as soon as practically possible.

## Accountability, reporting, transparency

### 9.16 Accountability:

- 1) The political regulatory authority should monitor and regularly audit whether political parties, candidates, lobbyists, fund-raisers, donors, campaigners, social media companies and all other individuals and organisations involved in political lobbying, financing, spending, campaigning, advertising or elections are complying with their obligations under the regulations. For such purpose, the political regulatory authority should require submission of information to it at suitable intervals, and should have access to all relevant documents and records, including those held or created by the said individuals or organisations, and to all audit reports.
- 2) Non-compliance should be subject to proportionate and dissuasive administrative and/or criminal sanctions.
- 3) Where there are reasonable grounds to suspect corruption, the matter should be referred to the law enforcement authorities.
- 4) A full report of such monitoring and audit should be submitted annually to parliament for its review and recommended actions and to the public. Such report should include information as to all sanctions applied and referrals to the law enforcement authorities, and the reasons for the same.
- 5) The political regulatory authority should be subject to the accountability requirements in Benchmark 6.9 (Regulatory authorities).

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- 9.17 **Complaints and reporting systems:** The political regulatory authority should implement complaints and reporting systems in accordance with Benchmark 6.10 (Regulatory authorities).
- 9.18 **Transparency to the public:** Save to the extent contrary to the public interest, the political regulatory authority or other body prescribed by the regulations should promptly provide the public with the following information:
- 1) **Website:** Up-to-date information should be published on a freely accessible public website(s):
    - a) to enable the public to have a good understanding and knowledge of:
      - i) the laws and regulations relating to the political regulatory authority and to political lobbying, financing, spending and elections
      - ii) the structure, powers, duties, functions, activities and financing of the political regulatory authority
    - b) to assist the public in assessing whether:
      - i) the political regulatory authority is acting in accordance with its responsibilities and duties under the regulations and the law, and without corruption
      - ii) political lobbying, financing, spending and elections are being carried out in accordance with the regulations and the law, and without corruption.
  - 2) **Such information should include the following:**
    - a) in relation to the political regulatory authority, all information in Benchmark 6.11
    - b) a register of lobbyists' details and lobbying activities (Benchmark 9.3(1)(d) and 9.3(3))
    - c) a register of details of meetings etc. between political candidates or public officials and lobbyists (Benchmark 9.3(2) and 9.3(3))
    - d) accounting records, financial statements and audit reports in relation to political parties and candidates (Benchmark 9.4(4))
    - e) audit reports relating to permitted State funding of political parties and candidates, and a register showing criteria for and details of permitted State funding (Benchmark 9.5(6))
    - f) a register of details of political fund-raising (Benchmark 9.6(5))
    - g) audit reports of political donations (Benchmark 9.7(5))
    - h) a public register showing criteria for acceptable political donations and details of political donations made to political parties and candidates (Benchmark 9.7(6))

- i) a public register showing criteria for, and details of, loans (and related transactions) made to political parties and candidates (Benchmark 9.8)
  - j) records, returns and audit reports in relation to the political spending of political parties and candidates (Benchmark 9.10(6))
  - k) a searchable database of all online political advertising in relation to political parties and candidates (Benchmark 9.12(3))
  - l) eligibility criteria for political candidates to stand for public office and the reasons why any candidate has been disqualified (Benchmark 9.14(3))
  - m) a public register of eligible voters (Benchmark 9.15(2))
  - n) audit reports produced by the political regulatory authority in relation to the matters in Benchmark 9.16(1) (Benchmark 9.16(4))
  - o) parliament's review and recommended actions (Benchmarks 9.16(4) and 5.12(2)(i))
  - p) an explanation of the complaints and reporting systems (Benchmark 9.17)
  - q) an explanation of the public's entitlement to disclosure of information under this Benchmark.
- 3) **Responses to requests for information:** Information or documents reasonably requested by the public regarding any matter relating to the political regulatory authority or political lobbying, financing, spending and elections should be provided to the public within a reasonable period as prescribed by the regulations.

# Benchmark 10

## Public sector organisations

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**Principle:** Implement regulations which require all public sector organisations to implement an effective anti-corruption management system designed to combat corruption by, on behalf of or against the organisation.

10.1 **Regulations:** Regulations should be implemented which require all public sector organisations to implement an effective anti-corruption management system designed to combat corruption by, on behalf of or against the organisation. Such regulations should: be based on principles of honesty, impartiality, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.

References below in this Benchmark to 'organisation' are to the relevant public sector organisation implementing the management system.

10.2 **Anti-corruption policy:** The organisation should adopt an anti-corruption policy. The policy should be a commitment by the organisation that it:

- 1) prohibits corruption by, on behalf of or against the organisation
- 2) requires compliance by its personnel and business associates with all applicable anti-corruption laws
- 3) shall implement effective procedures:
  - a) to prevent corruption by, on behalf of or against the organisation
  - b) to detect, report and deal with any corruption which occurs.

10.3 **Anti-corruption procedures:** The organisation should implement anti-corruption procedures in order to give effect to the anti-corruption policy referred to in Benchmark 10.2. The procedures should:

- 1) comprise the procedures specified in this Benchmark
- 2) be implemented in a manner which is reasonable and proportionate having regard to the size, structure, activities and location of the organisation, and the nature and extent of corruption risks which the organisation faces.

10.4 **Top management responsibility for the anti-corruption policy and procedures:** The organisation's top management should:

- 1) have overall responsibility for the effective implementation by the organisation of, and compliance by the organisation with, the anti-corruption policy and procedures

- 2) ensure that the organisation's managers assume responsibility for overseeing day-to-day compliance by personnel within their department, function or project with the anti-corruption policy and procedures
- 3) provide the necessary leadership and example so that personnel believe in the necessity for, and importance of, compliance with the anti-corruption policy and procedures.

#### 10.5 **Communicating the anti-corruption policy and procedures:**

- 1) The anti-corruption policy should be communicated by the organisation:
  - a) to all personnel upon initial adoption of the policy by the organisation and upon any amendment to the policy
  - b) to all new personnel as soon as practicable after they have joined the organisation
  - c) to all business associates prior to or immediately upon entering into a contract with the business associate
  - d) to the public by being published and maintained:
    - i) on the organisation's website
    - ii) in a prominent location at any of the organisation's offices where the public receives information or services from the organisation.
- 2) All personnel should be required to confirm in writing or electronically that they have read and understood the anti-corruption policy and will comply with it.
- 3) The organisation's top management should issue a written or electronic statement to all personnel, upon initial adoption by the organisation of the policy and annually thereafter, confirming top management's commitment to the anti-corruption policy and procedures and requiring full compliance by all personnel with the policy and procedures.
- 4) The parts of the anti-corruption procedures relevant to personnel should be appropriately communicated to them.

#### 10.6 **Compliance manager:**

- 1) A senior manager of the organisation should be designated as compliance manager, and should be made responsible for:
  - a) overseeing the implementation by the organisation of, and compliance with, the anti-corruption policy and procedures
  - b) providing advice and guidance to personnel on the anti-corruption policy and procedures and on issues relating to corruption.

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- 2) The compliance manager should:
    - a) be provided with sufficient resources and authority so as to be able to undertake the role effectively
    - b) have direct and prompt access to top management in the event that any issue or concern in relation to the anti-corruption policy and procedures needs to be raised.
  - 3) This compliance responsibility can be on either a full-time or part-time basis, depending on the size of the organisation and the nature and extent of corruption risk which the organisation faces. If on a part-time basis, the compliance manager can combine the compliance function with other responsibilities.
- 10.7 **Resources:** The organisation should provide the resources needed to implement the anti-corruption procedures.
- 10.8 **Personnel:** The organisation should ensure that its personnel are employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials).
- 10.9 **Risk assessment:** The organisation should on a regular basis assess the risk of corruption in relation to its existing and proposed activities and business associates and assess whether its policies and procedures are adequate to reduce those risks to an acceptable level.
- 10.10 **Due diligence:** In the event that the organisation's risk assessment under Benchmark 10.9 identifies a more than low corruption risk in relation to any specific activity or business associate, the organisation should undertake further appropriate enquiries (due diligence) in order to learn more about the activity or business associate and the possible specific corruption risks it may pose. The organisation should then, based on this additional information, assess whether its policies and procedures are adequate to reduce those specific risks to an acceptable level.
- 10.11 **Managing inadequacy of policies and procedures:**
- 1) Where the risk assessment under Benchmark 10.9 establishes that the organisation's existing policies and procedures are not adequate to reduce the corruption risks in relation to any activity or business associate to an acceptable level, the organisation should implement additional or enhanced procedures or take other appropriate steps (such as changing the nature of the activity or business associate relationship) to enable the organisation to reduce the corruption risks to an acceptable level.
  - 2) Where additional or enhanced procedures or other appropriate steps would not be sufficient to reduce the corruption risks in relation to any

activity or business associate to an acceptable level, or the organisation cannot or does not wish to implement additional or enhanced procedures or take other appropriate steps, the organisation should:

- a) in the case of an existing activity or business associate relationship, take appropriate steps to terminate, discontinue, suspend or withdraw from the activity or relationship as soon as practicable
- b) in the case of a proposed new activity or relationship, postpone or decline to continue with it.

**10.12 Implementation of anti-corruption measures by controlled organisations:**

The organisation should require all other organisations over which it has control to implement anti-corruption procedures which are reasonable and proportionate having regard to the size, structure, activities and location of the controlled organisation, and the nature and extent of corruption risks which the controlled organisation faces.

**10.13 Implementation of anti-corruption measures by private sector entities which enter into contracts with the organisation:**

The organisation should require any private sector entity which enters into any contract over a reasonable prescribed value with the organisation to implement, and provide sufficient proof in the form of a reputable third party certification that it has implemented, an effective anti-corruption management system which at minimum is in accordance with the Annex to the Guidance (Private sector organisations).

**10.14 Decisions:**

- 1) In relation to all decisions required to be made by the organisation:
  - a) **No conflict of interest:** The person(s) making the decision should not have any conflict of interest in relation to the decision.
  - b) **Separation of functions:** In relation to any activity above a reasonable value threshold or which carries more than a low corruption risk, persons from the same department or function should not make more than one of the following decisions: (i) to initiate the activity, (ii) to approve matters in relation to the performance of that activity, or (iii) to approve payment in relation to that activity.
  - c) **Appropriate number, skill and seniority:** Decisions should be made by a manager(s) of a number, skill and seniority which is appropriate to the value and corruption risk of the relevant activity. Decisions relating to activities above a reasonable value threshold or which carry a more than low corruption risk should be made by more than one appropriate manager. In the case of activities of high value or high corruption risk, the decision of top management should be required.

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- d) All decisions should:
    - i) be recorded in writing and signed by the person(s) giving the decision
    - ii) record the date of the decision
    - iii) state the reasons for the decision and (if applicable) the procedures on which it was based
    - iv) be promptly communicated in writing to all persons affected by such decision.
  - 2) If any person affected by such decision makes a reasonable request for further explanation or reasons for the decision, these should be promptly provided by the organisation.
- 10.15 **Management functions:** The organisation should, in relation to the following management functions, implement procedures which minimise the risk of corruption, in accordance with the following Benchmarks:
- 1) **Issuing permits:** Benchmark 12
  - 2) **Procurement:** Benchmark 13
  - 3) **Contract management:** Benchmark 14
  - 4) **Financial management:** Benchmark 15
  - 5) **Concession management:** Benchmark 16
  - 6) **Asset management:** Benchmark 17
  - 7) **Other management functions:** In relation to any other management functions not covered by (1) to (6) above, the organisation should implement management procedures which minimise the risk of corruption.
- 10.16 **Independent monitoring:** The organisation should ensure that independent monitors are appointed to monitor its contracts in accordance with Benchmark 18 (Independent monitoring).
- 10.17 **Independent auditing:** The organisation should ensure that independent audits are carried out on the organisation and its contracts in accordance with Benchmark 19 (Independent auditing).
- 10.18 **Reviewing and improving the anti-corruption policy and procedures:**
- 1) The compliance manager should:
    - a) assess on a continual basis whether the anti-corruption policy and procedures:
      - i) are adequate to manage effectively the corruption risks faced by the organisation
      - ii) are being effectively implemented
      - iii) require any improvement

- b) report at least annually to top management on the adequacy and implementation of the anti-corruption policy and procedures.
- 2) Top management should review at least annually (taking account of the compliance manager report under (1) above, and any reports under Benchmarks 10.16, 10.17 and 10.19), whether the anti-corruption policy and procedures are adequate and are being effectively implemented, and whether any improvements are required.
- 3) The organisation should implement as soon as practicable any necessary improvements to the anti-corruption policy and procedures.

#### 10.19 **Complaints and reporting systems**

- 1) **Complaints:** The organisation should implement a system which enables confidential and anonymous questions, concerns and complaints to be raised, by any person, regarding the organisation, and which provides a prompt and effective response to such questions, concerns and complaints, and implements measures to address them.
- 2) **Reporting corruption and breach of regulations:** The organisation should implement a reporting system in accordance with Benchmark 21 (Reporting corruption).

#### 10.20 **Investigating and dealing with corruption:** The organisation should implement procedures which require:

- 1) appropriate investigation by the organisation of any corruption, breach of regulations or breach of the anti-corruption policy, procedures or code of conduct, which is reported, detected or reasonably suspected in relation to the organisation's activities
- 2) appropriate action by the organisation in the event that the investigation reveals corruption or any such breach
- 3) where there are reasonable grounds to suspect corruption, that such matter is reported by the organisation to the law enforcement authorities.

#### 10.21 **Records:**

- 1) The organisation should sufficiently document its procedures and activities. All material matters should be recorded in writing, in sufficient detail to explain and justify each step taken and each decision made, and any issues that arise and how those issues were dealt with. Such records should include all relevant times, dates and signatures, and reference all supporting documents.
- 2) The documents generated or received by the organisation during or in connection with its activities should be retained and safely stored by the organisation for a sufficient time to enable their use in any audit,

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investigation or legal dispute or to verify whether the organisation's activities have been properly conducted. A minimum period for retention of records should be prescribed by the regulations.

- 3) Procedures should be implemented to ensure the integrity of records and prevent interference with such records or their falsification, including the following procedures:
  - a) verification, by a second manager, of the accuracy and clarity of important records before the record is finalised
  - b) restricting access to those persons to whose roles the records are relevant
  - c) tracking and controlling versions of records, so that amendments made to them can be identified both by date and change made.
- 4) Personnel should be prohibited from amending or destroying records without legitimate authorisation.
- 5) Records may be maintained in hard copy or electronic versions.
- 6) Duplicates of important records should be retained in an alternative physical or electronic location so as to avoid the total loss of these records.

10.22 **Transparency to the public:** Save to the extent contrary to the public interest, the following information in relation to the organisation should be promptly provided by the organisation to the public:

- 1) **Website:** Up-to-date information should be published on a freely accessible public website(s):
  - a) to enable the public to have a good understanding and knowledge of:
    - i) the laws and regulations relating to the organisation
    - ii) the structure, powers, duties, functions, activities and financing of the organisation
  - b) to assist the public in assessing whether the organisation is acting in accordance with its responsibilities and duties under the regulations and the law, and without corruption.
- 2) **Such information should include the following:**
  - a) (links to) all laws and regulations governing the organisation
  - b) information relating to the structure, powers, duties, functions, activities and financing of the organisation
  - c) the organisation's anti-corruption policy (Benchmark 10.5(1)(d))

- d) a statement that the organisation has implemented anti-corruption procedures in order to give effect to the anti-corruption policy (Benchmark 10.3)
  - e) a statement that the organisation has appointed a compliance manager who is responsible for overseeing the implementation by the organisation of, and compliance with, the anti-corruption policy and procedures, and the contact details of the compliance manager (Benchmark 10.6)
  - f) full monitoring reports relating to the organisation's contracts (Benchmark 10.16)
  - g) full audit reports relating to the organisation and its contracts (Benchmark 10.17)
  - h) disclosures required under other Benchmarks, in relation to the following, as far as applicable to the organisation:
    - i) where the organisation is a body or authority required to provide disclosure under Benchmarks 2 to 9, the disclosures required under those Benchmarks (Benchmarks 2.10, 3.22, 4.13, 5.12, 6.11, 7.11, 8.8, 9.18)
    - ii) employment of personnel (Benchmark 11.22)
    - iii) issuing permits (Benchmark 12.14)
    - iv) procurement (Benchmark 13.34)
    - v) contract management (Benchmark 14.16)
    - vi) financial management (Benchmark 15.19)
    - vii) concession management (Benchmark 16.11)
    - viii) asset management (Benchmark 17.13)
  - i) an explanation of the organisation's complaints and reporting systems (Benchmark 10.19) and an encouragement to personnel, business associates and members of the public to report any concerns to the compliance manager and/or under the complaints and reporting systems
  - j) an explanation of the public's entitlement to disclosure of information under this Benchmark.
- 3) **Responses to requests for information:** Information or documents reasonably requested by the public regarding any matter relating to the organisation should be provided within a reasonable period as prescribed by the regulations.

# Benchmark 11

## Public officials

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**Principle:** Implement regulations which are designed to ensure the integrity of public officials and which provide for the sanctioning of corrupt public officials.

### Regulation

- 11.1 **Regulations:** Regulations should be implemented which are designed to ensure the integrity of public officials and which provide for the sanctioning of corrupt public officials. Such regulations should: be based on principles of honesty, impartiality, competition, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.
- 11.2 **Regulatory authority:** An authority or authorities ('the employment regulatory authority') should be established or designated as responsible for regulating the employment, training, conduct and disciplining of public officials. Where appropriate, there may be separate regulatory authorities for different types of public official (such as for members of the judiciary (Benchmark 4.3(4)). The measures in Benchmark 6 (Regulatory authorities) should apply to such authority.

### Scope of Benchmark

- 11.3 **Scope of application:** The regulations should apply to all public officials of the relevant State or government.

### Employment of public officials

- 11.4 **Appointment, transfer, promotion, demotion, suspension, dismissal of public officials:**
- 1) Public officials should be appointed, transferred, promoted, demoted, suspended and dismissed by way of processes which:
    - a) are fair, impartial, clear, predefined, in writing, transparent and publicly declared
    - b) are independent of improper government, political or other influence or interference
    - c) in relation to appointment, transfer and promotion, are competitive and based on criteria relating only to integrity, merit and impartiality

- d) comply with (2) to (5) below.
- 2) Prior to any appointment, transfer or promotion:
  - a) **Advertising of vacancies:** Vacancies for a public official position should be publicly advertised so as to enable sufficient competition and diversity in candidates.
  - b) **Vetting:** Candidates should be vetted so as to establish, as far as reasonable, that they are suitably qualified for the position, they are persons of integrity, and they will comply with the code of conduct referred to in Benchmark 11.10.
  - c) **Due diligence:** Steps should be taken to verify the accuracy of the information provided by candidates for appointment (including information relating to their identity, qualifications and references).
  - d) **Criminal record check:** A criminal record check should be carried out on candidates prior to appointment. Candidates applying for senior positions, positions which handle public funds, or positions which are vulnerable to more than a low corruption risk, should not be accepted if they have an unspent conviction for corruption.
  - e) **Disclosures:** Candidates who have been selected, and who would be in positions exposed to a risk of more than low value corruption, should, prior to appointment, make disclosures in accordance with Benchmarks 11.12 and 11.13 to enable assessment as to whether such disclosures indicate a corruption risk or any conflict of interest.
- 3) Suspension and dismissal should be based only on grounds which are fair and reasonable.
- 4) The provisions relating to appointment in Benchmark 11.4 do not apply to elected public officials.
- 5) For heads of relevant authorities, members of the judiciary and members of parliament, the following provisions also apply:
  - a) Head of the corruption prevention authority: Benchmark 2.7(2)
  - b) Heads of the law enforcement authorities: Benchmark 3.6(2)
  - c) Members of the judiciary: Benchmarks 4.3(3) and 4.3(4)
  - d) Members of parliament: Benchmarks 5.3(4) and 5.3(5)
  - e) Heads of the regulatory authorities: Benchmark 6.8(2).

#### 11.5 Terms and conditions of employment for public officials:

- 1) Terms and conditions of employment should be fair, impartial and consistent throughout the public sector. Public officials of equal seniority should have equal terms and conditions. Better terms and conditions should be provided according to seniority or skill only to the extent reasonable and justified.

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- 2) All terms and conditions of employment, including those relating to role, duties, responsibilities, remuneration, tenure, code of conduct and disciplinary procedures, should be set out clearly in writing, whether in a contract, statute or otherwise.
  - 3) It should be a condition of employment that public officials are required to:
    - a) comply with a code of conduct which includes the provisions in Benchmark 11.10 to 11.18, and be subject to sanctions if they fail to comply
    - b) undergo anti-corruption training, as provided for in Benchmark 11.19.
  - 4) All terms and conditions of employment for public officials should be available to the public.
- 11.6 **Reasonable remuneration for public officials:** Save for those in unpaid or honorary positions, public officials should receive remuneration that is reasonable and equitable taking into account the level of economic development of the State and the public official's duties, responsibilities and skill. Pay scales for public sector remuneration, and the method and criteria for determining such remuneration, should be available to the public. Salaries should be promptly and regularly paid, and benefits provided, in accordance with the public official's contractual entitlement.
- 11.7 **Protection for public officials:** Reasonable protection should be provided to public officials, and to their spouses and children, whose exercise of their public functions may put them at risk of threats or actual harm.
- 11.8 **Bonuses and targets for public officials:** Performance bonuses and targets and other incentives should have reasonable safeguards to ensure they do not encourage corruption.
- 11.9 **Personnel records of public officials:** Accurate and up-to-date personnel records should be kept and, where possible, computerised. Records should include all relevant details of the public officials, including details of their identity, appointment, employment terms and conditions (Benchmark 11.5(2)), positions held, disclosures made (Benchmarks 11.12 and 11.13) and any disciplinary action taken against them.

## Code of conduct

- 11.10 **Code of conduct for public officials:**
- 1) Public officials should comply with a code of conduct which includes principles designed to combat corruption. Such code of conduct should cater for the particular corruption risks inherent in the functions of the

public official and should provide for the matters in Benchmarks 11.11 to 11.18.

- 2) Separate codes of conduct, complying with (1) above, may be provided for different types of public officials, such as members of the judiciary, members of parliament and law enforcement officers, so as to take account of their different functions and responsibilities.

**11.11 Overriding duties of public officials in combating corruption:** Public officials should:

- 1) act effectively, honestly, impartially, transparently and free from improper influence
- 2) comply with the law and applicable public sector regulations, policies and procedures
- 3) use all reasonable endeavours to ensure that, in the function and department in which they are employed, matters are conducted and public resources are applied effectively, honestly, impartially, transparently, free from improper influence, and in accordance with the law and applicable public sector regulations, policies and procedures
- 4) be aware of corruption risks in their public functions, and of how to avoid, prevent and deal with corruption.

**11.12 Interests and assets of public officials:**

- 1) **Types of disclosures:** Public officials who are in positions which are vulnerable to a risk of more than low value corruption should:
  - a) disclose their outside activities, interests and affiliations, and their assets, investments, income, financial accounts, debts and other liabilities, including those:
    - i) in the State territory or in foreign jurisdictions
    - ii) that are current or were held within a previous period as prescribed by the regulations
    - iii) held directly or indirectly, or by way of legal or beneficial interest, by the public official or her/his spouse or children
    - iv) held by other persons for the benefit of the public official or her/his spouse or children
  - b) disclose the matters in (a) above of their spouses and children
  - c) allow monitoring of the accounts disclosed under (a) and (b) above
  - d) declare whether any of the matters in (a) or (b) above have any connection or dealings, directly or indirectly, with the public sector, and if so, the nature of the connection or dealings.

Such disclosures and declarations should be made to and monitored by an appropriate body designated for this purpose.

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- 2) **Timing and detail of disclosures:** Such disclosures and declarations should be made:
  - a) when the potential public official is selected for employment but prior to appointment (Benchmark 11.4(2)(e) above)
  - b) if employed, annually thereafter.

Such disclosures should be in sufficient detail so as to explain the nature and value of the matters disclosed and their location, and to enable assessment of whether they reveal any existing or potential conflict of interest, corruption risk or corrupt activity.

### 11.13 Conflicts of interest of public officials:

- 1) For the purposes of this Benchmark, a public official has a conflict of interest where the personal or business interests of the public official or those of her/his relatives, spouse or associates could interfere with the proper performance by the public official of her/his official duties.
- 2) Public officials should disclose, to an appropriate body designated for this purpose, all existing and potential conflicts of interest. Such disclosures should be made prior to appointment, and thereafter as and when any such conflicts of interest arise.
- 3) Public officials should not participate in any matter in connection with their public function where they have a conflict of interest and should withdraw from any matter in which a conflict of interest becomes apparent.
- 4) Public officials should not engage in any outside activity, or acquire any outside position or interest, which gives rise to a conflict of interest with their public functions.
- 5) Former public officials should not, for a prescribed reasonable period of time after leaving their public office, engage in activities or acquire any position or interest in the private sector where such activities, position or interest relate to, or are connected with, the functions previously held by the public official in the public sector.

11.14 **Gifts, hospitality, entertainment, donations and other benefits for public officials:** Public officials and members of their family should not solicit or accept, directly or indirectly, any gifts, hospitality, entertainment, donations or other benefits in connection with the public official's functions, or that may influence the exercise of those functions.

11.15 **Facilitation payments:** Public officials should not solicit or accept facilitation payments.

11.16 **Expenses of public officials:** Public officials should be allowed, and should claim and be entitled to reimbursement for, only those expenses which are

reasonable, are solely and necessarily incurred for the purposes of their public function, are within pre-agreed limits set by their employment terms and conditions, and are fully substantiated.

- 11.17 **Reporting by public officials:** Public officials should make a report, to the appropriate body(ies) in Benchmark 21.2 or other body as prescribed by the regulations, where they believe in good faith or on reasonable grounds that any of the matters referred to in Benchmark 21.1 have occurred in relation to a public official or public sector organisation or its activities.
- 11.18 **Co-operation by public officials in relation to the investigation and prosecution of corruption offences:** Public officials should co-operate with the law enforcement authorities in relation to the investigation and prosecution of corruption offences and in relation to asset recovery.

## Training of public officials

- 11.19 In order to combat corruption, public officials should receive training to ensure they are competent to perform their public functions, training in relation to compliance with the code of conduct, and anti-corruption training in accordance with Benchmark 20 (Anti-corruption training).

## Assessment and monitoring

- 11.20 A body designated for such purpose should:
- 1) monitor and assess compliance by public officials with the relevant codes of conduct
  - 2) monitor the processes under Benchmarks 11.12 and 11.13 to ensure that the required disclosures and declarations are being made as required
  - 3) promptly assess such disclosures and declarations in order to determine whether they are accurate and complete, whether further information is required, whether they reveal any conflict of interest, corruption risk or corrupt activity, and what consequent action is required, if any
  - 4) ensure that such disclosures and declarations and any consequent action required are published to the public, save for those details (such as bank account numbers) which should be kept confidential to guard against criminal activity.

## Disciplinary procedures and sanctions for public officials

- 11.21 The following disciplinary procedures and sanctions for public officials should be applied by their employer or by the employment regulatory body responsible for disciplining the relevant public officials:

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- 1) **Misconduct by public officials:** Public officials should be disciplined for misconduct, including for any breach of their employment terms and conditions, their code of conduct or the regulations. Disciplinary processes should be fair, impartial, clear, predefined, in writing, transparent and disclosed to public officials and the public. Where breach is established, proportionate sanctions should be applied. Rights of appeal should be available to public officials against any disciplinary decision.
- 2) **Unexplained wealth of public officials:** Where the employer or regulatory body has reasonable grounds to suspect, whether from the disclosures under Benchmark 11.12 or otherwise, that a public official or her/his spouse or children, has assets or wealth that cannot reasonably be explained in relation to her, his or their lawful income, the employer or regulatory body should refer the matter to the law enforcement authorities.
- 3) **Unsupported debts and other liabilities of public officials:** Where the employer or regulatory body has reasonable grounds to suspect, whether from the disclosures under Benchmark 11.12 or otherwise, that a public official or her/his spouse or children, has significant unsupported debts and/or other liabilities, then the employer or regulatory body should:
  - a) in the case of an elected public official, publish the information to voters
  - b) in the case of public officials, require that the public official is excluded from positions or transactions where she/he may be vulnerable to a risk of more than low value corruption.
- 4) **Public officials accused or suspected of a corruption offence:** Where the employer or regulatory body has reasonable grounds to suspect that a corruption offence may have been committed by a public official, they should:
  - a) pending final determination of the allegation, require that the public official is suspended from her or his post, or reassigned to a post which is not vulnerable to more than a low risk of corruption
  - b) refer the matter to the law enforcement authorities for investigation and prosecution. Such investigation and prosecution, if any, should be carried out expeditiously.

If it is found that there is insufficient evidence against the official, or she or he is found to be not guilty of the allegation, then the official may be returned to the original post or to a materially equivalent post.

- 5) **Employment sanctions for public officials convicted of a corruption offence:** Where public officials are convicted of a corruption offence

then, depending on the gravity of the offence, and in addition to any criminal sanctions, they should be disqualified for an appropriate period of time or permanently from holding:

- a) any position as a public official
  - b) any executive, senior managerial or financial role in any private sector organisation
- 6) **No unjustified penalties for public officials:** Public officials should not be penalised (for example, by demotion, disciplinary action, transfer or dismissal) for (i) refusing to participate in activities in respect of which they have in good faith or on reasonable grounds judged there to be an unacceptable risk of corruption, or (ii) for reporting, in good faith or on reasonable grounds, suspected corruption or breach of the code of conduct or of the regulations.

## Transparency to the public

11.22 **Transparency to the public:** Save to the extent contrary to the public interest, each of the bodies in (4) below should, in respect of the public officials in (4) below, promptly provide the following information to the public:

- 1) **Website:** Up-to-date information should be published on a freely accessible public website(s):
  - a) to enable the public to have a good understanding and knowledge of the matters relating to the employment, conduct and disciplining of the public officials
  - b) to assist the public in assessing whether:
    - i) employment and disciplinary processes are being carried out in accordance with the regulations and the law, and without corruption
    - ii) the public officials are acting in accordance with their responsibilities and duties under the regulations and the law, and without corruption.
- 2) **Such information should include the following:**
  - a) (links to) all laws and regulations governing the employment, conduct and disciplining of the public officials
  - b) information relating to the relevant employment regulatory authority (Benchmark 6.11)
  - c) explanation of the processes concerning appointment, transfer, promotion, demotion, suspension and dismissal of the public officials (Benchmark 11.4)

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- d) vacancies for positions (Benchmark 11.4(2)(a))
  - e) terms and conditions of employment (Benchmarks 11.5(2) and 11.5(4))
  - f) pay scales for remuneration, and the method and criteria for determining such remuneration (Benchmark 11.6)
  - g) codes of conduct (Benchmark 11.10)
  - h) disclosures and declarations made under Benchmarks 11.12 and 11.13 by each public official (Benchmarks 11.20(2) to 11.20(4))
  - i) consequent actions required by the monitoring body in relation to such disclosures and declarations (Benchmark 11.20(4))
  - j) unsupported debts or liabilities of each elected public official (Benchmark 11.21 (3)(a))
  - k) the conduct and outcome of disciplinary and prosecution processes relating to each public official, including the sanctions imposed (Benchmark 11.21)
  - l) an explanation of how complaints and reports concerning public officials may be made (Benchmark 10.19)
  - m) an explanation of the public's entitlement to disclosure of information under this Benchmark.
- 3) **Responses to requests for information:** Information or documents reasonably requested by the public regarding any matter concerning the employment, conduct or disciplining of a public official should be provided to the public within a reasonable period as prescribed in the regulations.
- 4) **Responsibility for providing information:** The information in (1) to (3) above should be provided by the following:
- a) for employed public officials, the information should be provided by their public sector employer or the relevant regulatory authority (Benchmark 11.2)
  - b) for public officials who are not employed by a public sector employer, the information should be provided by the relevant body as prescribed by the regulations.

# Benchmark 12

## Issuing permits

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**Principle:** Implement regulations which are designed to combat corruption in relation to the issuing of government permits.

- 12.1 **Regulations:** Regulations should be implemented which are designed to combat corruption in relation to the issuing of government permits. Such regulations should: be based on principles of honesty, impartiality, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.
- 12.2 **Scope of application:** Such regulations should be complied with by all public sector organisations in relation to all government permits which they issue. References below in this Benchmark to 'organisation' are to the relevant public sector organisation implementing a permit issuing process.
- 12.3 **Permit issuing personnel:** All personnel who have any involvement with a permit issuing process on behalf of the organisation should be employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials).
- 12.4 **Assessment of the purpose of the permit:** The organisation issuing the permits, or an appropriate other person, should undertake an assessment of the following factors in relation to the purpose of the permits which the organisation is responsible for issuing:
  - 1) What is the purpose of the permit?
  - 2) Is the purpose necessary for good governance or the public interest?
  - 3) Does the permit usefully fulfil that purpose?
  - 4) If the permit is not necessary, or does not usefully fulfil its purpose, should it be:
    - a) changed or upgraded so that it is necessary and fulfils its purpose
    - b) replaced by an alternative control which is necessary and fulfils its purpose, or
    - c) abandoned?
- 12.5 **Assessment of the permit issuing process:** The organisation issuing the permits, or an appropriate other person, should undertake an assessment of the following factors in relation to the process by which the organisation issues permits:
  - 1) What are the steps in the process?

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- 2) Is each step necessary for good governance or the public interest?
  - 3) Does each step usefully fulfil its purpose?
  - 4) Could each step be carried out more efficiently?
  - 5) If a step is not necessary, does not usefully fulfil its purpose, and/or could be carried out more efficiently, should it be:
    - a) changed or upgraded so that it is necessary, fulfils its purpose, and/or is more efficient
    - b) replaced by an alternative step which is necessary, fulfils its purpose, and/or is more efficient, or
    - c) abandoned?
- 12.6 **Improvement of the permit issuing process:** Taking into account the outcome of the assessments in Benchmarks 12.4 and 12.5, the organisation should appropriately amend the required permits and permit issuing process so that:
- 1) all permits required are necessary for good governance or the public interest and usefully fulfil their purpose
  - 2) all steps in the permit issuing process are necessary for good governance or the public interest, usefully fulfil their purpose and are carried out efficiently.
- 12.7 **Repeat of assessments:** The organisation should periodically repeat the assessments in Benchmark 12.4 and 12.5 so as to ensure the continuing necessity and usefulness of the permits, and the necessity, usefulness and efficiency of the permit issuing process.
- 12.8 **Controls over the permit issuing process:** The organisation should implement controls over the permit issuing process which are designed to minimise the risk of corruption. These should include the following controls:
- 1) **Publication of permit issuing process:** The following information should be published by the organisation in an appropriately comprehensive and understandable format in a prominent and easily accessible location both on the organisation's website and at any of the organisation's offices which are attended by applicants for permits:
    - a) the conditions which govern the issuing of permits
    - b) the documents which need to be completed by the applicant and how these can be obtained (see (9) below)
    - c) the evidence which the applicant needs to provide to support the application
    - d) the factors which should be taken into account by the public official in deciding whether or not to issue the permit, and what conditions to apply

- e) the time which a permit should take to be issued, from moment of submission of application to moment of issue
  - f) the fee for the permit; if there are various categories of fee, then the different categories and fees should be clearly explained
  - g) the commitment of the organisation to deal with applications honestly, impartially, transparently and accountably
  - h) the right of the applicant:
    - i) to appeal against a decision not to issue a permit or against the conditions imposed on the permit (Benchmark 12.10)
    - ii) to complain in the event that the applicant believes that she/he has been unfairly or badly treated (Benchmark 12.13)
    - iii) to report any request from a public official for a bribe, or any other suspected corruption in the permit issuing process (Benchmark 12.13)
  - i) an explanation of how any appeal, complaint or report in (h) above can be made.
- 2) **Personnel:** All public officials involved in the issuance of government permits should have no conflict of interest in relation to the permit being issued, and should be expressly prohibited, in relation to the issue of government permits, from:
    - a) charging fees in excess of those legally due
    - b) unreasonably delaying, obstructing or refusing their issue
    - c) imposing any conditions other than those which are both permitted by the regulations and justified by the circumstances.
  - 3) **Minimisation of human discretion, interface and intervention:** The permit application process should as far as possible:
    - a) be decided on objective factors which do not require discretion
    - b) not require human interface
    - c) be automated so as not to require human intervention.
  - 4) **Complex decisions:** Complex decisions which involve more complex evidence, more subjective elements or higher value transactions, should be taken by more than one public official of appropriate skill and seniority.
  - 5) **Application tracking:** The permit application process should be tracked from the time of the application being logged to the time of issuing or rejection.
  - 6) **Decision timing:** The permit should be issued or rejected within a prescribed time after the application has been filed.

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- 7) **Notification of progress and decision:**
  - a) In the event of computerised application tracking under (5) above, the applicant should be able to track the progress of the application online.
  - b) The decision should be communicated to the applicant as soon as possible after it is made.
- 8) **Automation or separation of payment process:** The payment process for permits should either:
  - a) be automated by online or machine-controlled processes which can only accept the correct payment amount, or
  - b) be separated from the permit issuing process.
- 9) **Availability of permit application documents:** The documents which need to be completed by the applicant in order to obtain a permit should be available free of charge from either of:
  - a) an easily accessible location on the organisation's website, or
  - b) a publicly accessible place at the organisation's permit issuing office.

12.9 **Decisions impacting on other members of public:** Where a permit issuing decision impacts on members of the public other than the applicant then, in addition to the relevant controls in Benchmark 12.8, the following controls should be implemented by the organisation:

- 1) Prior to the decision on the permit being taken, the members of the public affected by the application should be notified of the application and that they have the right to submit comments on or objections to the application.
- 2) The method by which the organisation notifies the public under (1) above should be reasonable in the circumstances.
- 3) The organisation should allow a reasonable time between the notification to the public and its decision so as to allow public comment or objection.
- 4) The organisation should take into account any comments or objections of the public in coming to its decision on the permit.
- 5) The decision on the permit should be made by more than one person of appropriate seniority.
- 6) The decision should be promptly published on the organisation's website, together with all reasons for the decision and all documents taken into account in coming to the decision.

12.10 **Appeal process:**

- 1) An appeal process should be established under which an applicant who has been refused a permit, or on whom conditions have been applied, can appeal against the refusal and/or conditions.

- 2) The appeal should be dealt with by a different public official from the one who rejected the application or imposed the conditions.
  - 3) The appeal process must follow the same principles in relation to publication of the appeal process, availability of appeal documents, decision timing, decision notification, appeal tracking, separation of payment function (if there is a fee for the appeal), and auditing of the appeal process as those that are specified above in relation to the original application.
  - 4) The appeal decision may:
    - a) confirm the original decision
    - b) grant or revoke the permit
    - c) remove or amend the conditions of the permit.
- 12.11 **Auditing of permit issuing process:** The permit issuing process (Benchmarks 12.4 to 12.10) should be audited by an independent person in accordance with Benchmark 19 (Independent auditing) so as to assess whether it is being carried out in accordance with the regulations and without corruption. The full audit report should be disclosed to the public. This audit should include:
- 1) undertaking an appropriate number of sample audits of the permit issuing process
  - 2) undertaking specific audits of a specific public official or application in cases where:
    - a) the sample audit in (1) above has uncovered suspicious circumstances or patterns
    - b) a complaint or report has been made in relation to a specific public official or application.
- 12.12 **Records:** Comprehensive and accurate records of the permit issuing process should be prepared and retained in accordance with Benchmark 10.21 (Public sector organisations).
- 12.13 **Complaints and reporting systems:** The organisation should ensure that the complaints and reporting systems which it implements under Benchmark 10.19 allow for complaints and reports of suspected corruption in relation to the organisation's permit issuing processes.
- 12.14 **Transparency to the public:** Save to the extent contrary to the public interest, the organisation should promptly provide the following information to the public:
- 1) **Website:** Up-to-date information should be published on a freely accessible public website(s):

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- a) to enable the public to have a good understanding and knowledge of the permit issuing process
  - b) to assist the public in assessing whether the permit issuing process is being carried out in accordance with the regulations and the law, and without corruption.
- 2) **Such information should include the following:**
- a) (links to) all laws and regulations relating to permit issuing
  - b) an explanation of the permit issuing process (Benchmark 12.8(1))
  - c) an explanation of the controls over the permit issuing process (Benchmarks 12.8(2) to (8))
  - d) the permit application documents (Benchmark 12.8(9))
  - e) permit decisions which impact on other members of the public, together with all reasons for the decisions and all documents taken into account in coming to the decisions (Benchmark 12.9(6))
  - f) full audit reports of the permit issuing process (Benchmark 12.11)
  - g) an explanation of the complaints and reporting systems (Benchmark 12.13)
  - h) an explanation of the public's entitlement to disclosure of information under this Benchmark.
- 3) **Responses to requests for information:** Information and documents reasonably requested by the public regarding any matter relating to the permit issuing process should be provided within a reasonable period as prescribed by the regulations.

# Benchmark 13

## Procurement

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**Principle:** Implement regulations which are designed to combat corruption in public sector procurement.

### Regulations

- 13.1 **Regulations:** Regulations should be implemented which are designed to combat corruption in public sector procurement. Such regulations should: be based on principles of honesty, impartiality, competition, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.
- 13.2 **Regulatory authority:** An authority or authorities ('the procurement regulatory authority') should be designated or established which is subject to the measures in Benchmark 6 and has overall responsibility for regulating public sector procurement.

### General provisions

- 13.3 **Scope of application:** The procurement regulations should be complied with by all public sector organisations in relation to all public sector procurement.
- 13.4 **Overriding principle:** All procurement processes should be designed and carried out so as to ensure they are impartial and fair, maximise competition and transparency, meet the needs of the procuring entity, provide certainty and value for money, are accountable, and are in accordance with the procurement regulations.
- 13.5 **Overriding duties of the procuring entities and procurement personnel:** Procuring entities and procurement personnel should act honestly, impartially, independently, transparently and accountably, and in accordance with the procurement regulations.
- 13.6 **Procurement personnel:** All personnel who have any involvement with a procurement process on behalf of a procuring entity should be employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials).

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### 13.7 **Communications and dealings between the procuring entity and suppliers:**

- 1) Communications and dealings, whether direct or indirect, between the procuring entity and suppliers should be only as necessary for the legitimate purposes of the procurement and should be conducted by the procuring entity so as to ensure: equal and fair treatment of all suppliers; prompt and timely provision of all necessary information, notices, and decisions; confidentiality; and security.
- 2) All material communications and dealings should be in writing or, if initially oral, should as soon as possible be confirmed in writing, should state all material content, dates and times, and should be signed by the person(s) issuing, or preparing the record of, the communication. The date of transmission and receipt of communications should be recorded.

13.8 **Procurement records:** Comprehensive and accurate records of each procurement process should be prepared and retained by the procuring entity in accordance with Benchmark 10.21 (Public sector organisations). Such records should be retained for the period prescribed in the regulations.

13.9 **Management of the procurement:** The procuring entity should ensure that its procurements are effectively managed on an ongoing basis by an appropriate number of its managers who are of appropriate skill and seniority. In relation to each procurement they manage, such managers should ensure that:

- 1) the procurement is conducted in accordance with this Benchmark 13
- 2) all decisions required to be made by the procuring entity in the procurement process are made in accordance with Benchmark 10.14 (Public sector organisations)
- 3) no improper benefit or advantage is requested by, given to, or received from, any individual or organisation in connection with the procurement
- 4) no public official in a position of authority or influence in relation to the procurement has a conflict of interest in relation to the procurement
- 5) they are alert to any suspicions of corruption in relation to the procurement process and that any such suspicions are investigated and properly resolved
- 6) the contract is not awarded unless and until such suspicions have been satisfactorily resolved
- 7) where there are reasonable grounds to suspect corruption in relation to the procurement process, the matter is referred to the law enforcement authorities.

## The procurement process

- 13.10 **Procurement needs assessment:** Prior to the decision to make a procurement, the procuring entity should ensure that the envisaged procurement:
- 1) is for a legitimate purpose which is in accordance with the procuring entity's objectives
  - 2) is necessary for the procuring entity to be able to achieve that purpose
  - 3) is permitted by the procuring entity's budgetary requirements
  - 4) will provide value for money for the procuring entity
  - 5) in the case of procurements with an estimated value over a prescribed threshold, is shown to be justified by a written and objective needs assessment, technical assessment and value for money assessment provided by a suitably skilled and independent third party
  - 6) is approved in accordance with the decision-making procedures in Benchmark 10.14 (Public sector organisations).
- 13.11 **Procurement subject matter and its design:** The design of the procurement subject matter should be predetermined, based on the needs of the procuring entity, and described in terms that are clear, comprehensive, objective, functional and generic. The procurement subject matter should not be designed so as to favour any particular suppliers or to artificially narrow competition.
- 13.12 **Estimate of the contract value:** The procuring entity should prepare an estimate of the reasonable expected value of the procurement contract. The estimate should be used:
- 1) to determine where the procurement lies in relation to prescribed contract value thresholds. The procuring entity should not divide the procurement or use a valuation method for estimating the contract value so as to change where the procurement lies in relation to such value thresholds unless justified by objective reasons
  - 2) as a comparison for assessing whether offered prices appear to be unreasonably high or low. The procuring entity should not estimate a false or inappropriate contract value so as to provide a false or inappropriate basis of comparison for the offer evaluation.
- 13.13 **Economic offsets:** Economic offsets should not form part of the procurement arrangement. The subject matter of any proposed economic offset should be separately procured.
- 13.14 **Illicit contractors:** No individual or organisation should be nominated or allowed by the procuring entity to participate in any capacity in relation to the performance of a public sector contract or to receive any funds in relation to the performance of a public sector contract unless that individual

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or organisation has a genuine legitimate role in relation to the contract, is appropriately qualified to undertake such role, and has (where it is a supplier) been appointed in accordance with the procurement regulations.

- 13.15 **No negotiations or dialogue:** Save where permitted in accordance with Benchmark 13.16(4)), there should be no negotiations or dialogue between the procuring entity and suppliers during the procurement process.
- 13.16 **Procurement methods:** The procurement regulations should specify the procurement methods that may be used, define each method with all necessary steps and timetables, and state the precise criteria for using each such method. All methods should maximise competition and transparency as far as possible. All the provisions of Benchmark 13 should apply to all procurement methods specified below except to the extent expressly specified below or to the extent that a provision cannot apply due to the nature of the procurement method. The specified procurement methods should provide inter alia for the following:
- 1) **Open competitive process:** An open competitive process should be used for all procurement save as permitted under (2) to (5) below.
  - 2) **Low value competitive process:** Where the estimated contract value (Benchmark 13.12) is below the prescribed threshold for an open competitive process, the number of suppliers invited to participate may be restricted but should be as many as practicable, and at least three, so as to ensure adequate competition. A less onerous process than that required by Benchmark 13 may also be used for such low value procurement, subject to the overriding principle in Benchmark 13.4.
  - 3) **Restricted competitive process:** Where, according to prescribed criteria, the procurement necessitates a restricted competitive process, a minimum number of suppliers should be prescribed so as to ensure adequate competition. Where the restricted process requires suppliers to pre-qualify before being entitled to participate, the opportunity to pre-qualify should be open to all suppliers.
  - 4) **Negotiations or dialogue:** Where, according to prescribed criteria, the procurement necessitates negotiations or dialogue, safeguards should be implemented to ensure that the negotiations or dialogue are not used to favour a supplier or to the detriment of the procuring entity. A minimum number of suppliers should be prescribed so as to ensure adequate competition.
  - 5) **Single-source procurement:** Single-source procurement may be used only where and only to the extent that:
    - a) works, products, services, loans, assets, or operation of a concession to be procured are available only from a particular

- supplier, and where the specification has not been manipulated so as to restrict it to the particular supplier, or
- b) there is a need for standardisation or compatibility with existing works, products, services, loans, assets, or operation of a concession, or
  - c) it is essential for prescribed reasons of national security or emergency, and where such emergency was not foreseeable by the procuring entity and not due to delay on its part, and where Benchmark 13.16(9) has been followed.
- 6) **Restricted transparency:** The disclosure requirements in the procurement regulations, including those in Benchmark 13.34, may be limited only where and only to the extent essential for prescribed reasons of national security and where Benchmark 13.16(9) has been followed.
  - 7) **Expedited procurement:** The procurement process may be expedited only where and only to the extent essential for prescribed reasons of national security or emergency, where such emergency was not foreseeable by the procuring entity and not due to delay on its part, and where Benchmark 13.16(9) has been followed.
  - 8) **Mixed contracts:** In the event that part of a procurement qualifies for single-source procurement under (5) above, or for restricted transparency under (6) above, or for expedited procurement under (7) above, then only that part should be procured using single-source procurement, or restricted transparency, or expedited procurement. The remainder of the procurement should be placed under the appropriate method under (1) to (4) above and with full transparency and normal timetable and process.
  - 9) **Decision to use single-source procurement, or to restrict transparency, or to expedite procurement:** Where the estimated contract value is above a prescribed threshold (Benchmark 13.12(1)), the decision to use single-source procurement under (5) above, or to restrict transparency under (6) above, or to expedite procurement under (7) above, and to what extent to do so, should be determined by an independent body, honestly and impartially and on the basis of the objective and essential public interest. Any consequent procurement process should be monitored by the independent body to ensure that the procurement is carried out in compliance with the provisions of the procurement regulations. The independent body should provide written reports of its determination and monitoring to the procuring entity, the procurement regulatory authority, parliament and the public, subject to any necessary transparency restrictions under (6) above. Safeguards

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should be implemented in the relevant procurement processes to ensure that such single-source procurement, restricted transparency and expedited procurement are not used to provide preferential treatment to any supplier or for other corrupt purposes.

- 10) **Decision to use a particular procurement method:** Any decision to use a particular procurement method other than the open competitive process (Benchmark 13.16(1)) should be:
- a) properly justified in writing, with all necessary supporting evidence
  - b) approved in accordance with the decision-making procedures in Benchmark 10.14 (Public sector organisations).

### 13.17 Criteria in the procurement process:

- 1) **General principles:** All criteria for the procurement process should be predetermined, pre-disclosed, objective, relevant and proportionate to the subject matter of the contract, designed to maximise competition and value for money, designed to minimise the need for discretion by procurement personnel, and sufficiently clear, measurable and detailed to enable verification of whether the criteria have been satisfied. Criteria should not be designed with the intention of favouring any particular supplier and should not be changed in any negotiations or dialogue. The procuring entity should apply all criteria fairly and impartially and should use all reasonable endeavours to verify the accuracy of the information and evidence provided by the supplier.
- 2) **Criteria for pre-qualification and qualification:** In order to pre-qualify or qualify to participate in a procurement process, a supplier should provide a declaration and reasonable supporting evidence to the procuring entity that:
  - a) it has the necessary competence, resources and financial and legal standing to perform the contract.
  - b) it has no connection with any person that could constitute a conflict of interest in relation to the procurement (in relation to which the supplier should also provide details of its legal and beneficial ownership, and authorisations to enable the procuring entity to verify such ownership with relevant company registries or agents).
  - c) it has not been debarred from participating in public sector procurement.
  - d) it has implemented an anti-corruption management system in accordance with Benchmark 10 (where the supplier is a public sector organisation) or the Annex to the Guidance (where the supplier is a private sector organisation and the estimated contract value is over a prescribed threshold). In relation to such implementation, evidence

provided by the supplier should be in the form of a reputable third party certification.

- e) the supplier and its senior managers do not have unspent convictions for corruption offences. If the supplier has unspent convictions but can demonstrate that it has taken adequate measures, as prescribed in the procurement regulations, to prevent such further offences being committed, then the procuring entity may treat the conviction as nullified for purposes of pre-qualification and qualification.
- 3) **Criteria for mandatory exclusion:** At any point in the procurement process, a supplier should be excluded from the process if the procuring entity has sufficient plausible evidence to conclude that the supplier or its senior managers, or any of its sub-suppliers, whose estimated contract values are above a prescribed threshold, or their senior managers have, in relation to the procurement:
    - a) committed a corruption offence
    - b) obtained an improper competitive advantage
    - c) a connection with a person which constitutes a conflict of interest, or
    - d) provided information that is materially false or incomplete.
  - 4) **Supplier's sub-suppliers:** The supplier's sub-suppliers, whose estimated contract values are above a prescribed threshold, should also be subject to the criteria in (2) and (3) above.
  - 5) **Criteria for evaluating offers:** All submissions should be evaluated in accordance with evaluation criteria which accord with (1) above and which are based on the most economically advantageous offer, taking into account all relevant factors, such as price (including the assessment in 13.12(2)), whole life-cycle costing, quality, programme, safety, integrity and technical and financial capability. To the extent practicable, all non-price evaluation criteria should be objective, quantifiable and expressed in monetary terms.
- 13.18 **Notices of intended procurement:** At the outset of the procurement, the procuring entity should make known its intentions of planned procurement by the publication of a procurement notice which describes the subject matter of the intended procurement, the chosen procurement method and the reasons for this choice, and how the procurement process will proceed. Such notice should be published at the same time:
- 1) to suppliers of the number appropriate to the chosen method of procurement, and

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- 2) to the public. In cases of single-source procurement, the name of the selected supplier and the reason for the selection should also be included in the notice to the public, in addition to the information specified above.

### 13.19 **Solicitation documents:**

- 1) The procurement should be conducted on the basis of solicitation documents issued by the procuring entity. Such documents should be expressed impartially and in understandable terms, made equally available at the same time to all participating suppliers, should require a response by way of written submission by a specified deadline, and should contain all information necessary to enable the suppliers to provide a timely and responsive submission. Such documents should also state the minimum number of suppliers that will be invited to participate and the minimum qualification criteria to be met by all suppliers. The time and date of issue of solicitation documents should be recorded.
- 2) The terms and conditions of contract should be provided as part of the solicitation documents. They should include a contractual commitment by each of the supplier and the procuring entity to take all reasonable steps to prevent corruption by, on behalf of or for the benefit of, the supplier or the procuring entity in connection with the contract.
- 3) Any clarification of solicitation documents should be made only prior to the deadline specified for making of submissions and should be notified at the same time to all participating suppliers, giving them reasonable time to take such clarifications into account in their submissions. No clarification should be made with the intention of benefiting any particular supplier.
- 4) Solicitation documents should be published to the public at the same time as their issue to suppliers, as should any clarifications or modifications.

13.20 **Submissions:** All submissions by suppliers should be made in writing by a secure method within the deadline specified by the solicitation documents. The time and date of receipt of submissions should be recorded by the procuring entity. No changes should be permitted to submissions after the deadline for submission. Submissions should be kept secure to avoid any tampering with them prior to the opening time specified in the solicitation documents.

13.21 **Opening of submissions:** Submissions should be opened only after the deadline for submissions has expired and only at the time specified in the solicitation documents. At the opening, the procuring entity should announce the names of all suppliers who have made submissions and all other elements of the submissions which are necessary for applying the award criteria, and should then publish a written record of such information to all

participating suppliers and to the public. The procuring entity may request clarification of a submission provided such request is transparent and impartial, is notified to all participating suppliers, and does not result in any change to the submission. Where submissions contain purely arithmetical errors discovered during examination of the submissions, these may be corrected provided that prompt notice of such correction is given to all participating suppliers.

**13.22 Evaluation of submissions:** Evaluation of submissions should be carried out honestly and impartially, in accordance with the evaluation criteria, and by two or more procurement officials (the number, skill and seniority determined according to prescribed contract value thresholds (Benchmark 13.12(1))). During the evaluation process, no communication should take place between the evaluators (or other procurement official) and any participating supplier. The evaluators should be alert to any indication in the submissions of possible corruption in the procurement process. The evaluators should issue a written evaluation report, signed by them, and each evaluator should sign a declaration that they have made the evaluation honestly and in good faith and based on the evaluation criteria, and that they had no conflict of interest in respect of the evaluation.

**13.23 Rejection of submissions:** Submissions should be rejected only on grounds stated in the procurement regulations. Such grounds should be fair and reasonable and should relate only to the following:

- 1) the supplier does not meet the qualification requirements (including those in Benchmark 13.17(2))
- 2) there are grounds for mandatory exclusion of the supplier (including those in Benchmark 13.17(3))
- 3) the submission is not responsive
- 4) the submission is submitted late, or
- 5) the submission price is abnormally low or high in comparison to the estimated contract value (Benchmark 13.12(2)) or according to other objective assessment and where, having consulted the supplier, the procuring entity reasonably believes that the supplier has not adequately accounted for the low or high price.

Any rejection should be made fairly, transparently and impartially.

**13.24 Notice of outcome of the evaluation:** Following the evaluation, a notice should be provided promptly in writing and at the same time to all participating suppliers and to the public of the outcome of the evaluation. Such notice should:

- 1) identify the successful supplier

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- 2) provide sufficient information for suppliers to assess whether the procuring entity's decision was reasonably based
- 3) explain that unsuccessful suppliers are entitled to receive an explanation of why their submissions were not successful
- 4) explain the procuring entity's intention to accept the successful submission subject to providing opportunity for challenge to the evaluation decision
- 5) explain the standstill period (Benchmark 13.25) and how unsuccessful suppliers may challenge the evaluation decision should they wish to do so (Benchmark 13.29).

**13.25 Standstill period:** Following issue of the notice of outcome of the evaluation, there should be a reasonable prescribed standstill period during which time the procuring entity should not be permitted to enter into the procurement contract and unsuccessful suppliers may challenge the outcome of the evaluation by way of a process under BM 13.29. The procurement may proceed without a standstill period only on the grounds stated in Benchmark 13.16(7) and where Benchmark 13.16(9) has been followed.

**13.26 Acceptance of the successful submission:** The successful submission should be accepted only after:

- 1) the standstill period has ended
- 2) any challenge notified during the standstill period has been resolved and has not been successful
- 3) approval of the intended acceptance has been provided in writing and signed by two or more procurement officials (the number, skill and seniority determined according to prescribed contract value thresholds (Benchmark 13.12(1)) and who are different from and senior to those persons who evaluated the submissions).

Following (1) to (3) above, notice of the acceptance should be issued promptly, in writing, to the successful supplier, to unsuccessful suppliers and to the public, and should state the name of the successful supplier, the contract price, and other factors of the submission relevant to its success.

**13.27 Making of the contract:** The terms and conditions of contract should be at arm's length. The contract should be entered into in accordance with the mechanism specified in the solicitation documents and/or the regulations, which mechanism should require a written contract, signed and dated by both parties, and including all terms and conditions. All necessary documents, including specifications and technical information, should form part of and be attached to the contract. A signed copy of the contract should be provided to and retained by the procuring entity and the successful supplier. The contract should be disclosed to the public.

**13.28 Cancellation of the procurement process:**

- 1) A procurement process may be cancelled by the procuring entity only on objective, reasonable and prescribed grounds. Any decision to cancel a procurement process should be made by two or more procurement personnel of suitable seniority (the number, skill and seniority determined according to prescribed contract value thresholds (Benchmark 13.12(1))). Written notice of cancellation and reasons for the cancellation should be provided to all participating suppliers and to the public.
- 2) The procuring entity should be entitled to cancel the procurement process *inter alia* where the procuring entity has sufficient plausible evidence to conclude that there has been corruption by, on behalf of, or for the benefit of, one or more participating suppliers or other persons which has materially affected the integrity of the procurement process.

**13.29 Challenge to the procurement process, contract award, or cancellation of procurement:**

There should be an effective, fair, transparent, impartial and independent process by which the procuring entity or suppliers can seek, either during the procurement process or following contract award or cancellation of the procurement, a review of the procurement process and/or contract award and/or cancellation of the procurement on grounds *inter alia* that the procurement regulations were not followed or that there is evidence of corruption. Remedies should include interim measures such as suspension of the procurement process or the contract, corrective measures such as cancellation of the award and reinstatement of the procurement, and/or damages. There should be a right of appeal to the courts from any decision made. Prompt, written notice of the challenge and of the outcome of the review process and of any appeal should be provided to all participating suppliers and to the public. Such review process should be without prejudice to any separate rights in law to bring civil or criminal court action.

**13.30 Procurement report:** Following making of the contract award, the procuring entity should prepare a written report setting out and justifying all material steps taken in the procurement process, referencing all material information and documents, and stating where such material and documents can be found. In the event of any challenge to the award or cancellation of the procurement, the procurement report should be amended and re-issued with an explanation of these events and their outcomes. The report (and any re-issue) should be issued promptly to the procurement regulatory authority and to suppliers who participated in the relevant procurement and, for procurement processes over a prescribed value threshold (Benchmark 13.12(1)), to parliament and to the public.

## Accountability, reporting and transparency

### 13.31 Monitoring and review of the procurement process:

- 1) **Oversight committee:** The procuring entity should appoint a committee made up of senior procurement officials which has oversight of all of its procurement and to whom the procurement personnel should be obliged to report on a regular basis.
- 2) **Monitoring of the procurement process:** The procurement process, in relation to procurements over a prescribed value threshold, should be monitored in accordance with Benchmark 18 (Independent monitoring). Written monitoring reports should be issued promptly to the oversight committee, parliament and the public.
- 3) **Audit of the procurement process:** The procurement regulatory authority (or other prescribed body independent of the procuring entity) should, in relation to procurements over a prescribed value threshold and otherwise on a random sample basis, audit the procurement processes so as to assess whether the procurement processes are being carried out in accordance with the procurement regulations and the law, and without corruption. Such audits should be carried out in accordance with Benchmark 19 (Independent auditing). Written audit reports should be issued promptly to the oversight committee, parliament and the public.
- 4) **Review by parliament and the public:** The procurement reports (Benchmark 13.30), the monitoring reports (Benchmark 13.31(2)) and the audit reports (Benchmark 13.31(3)) should be reviewed by parliament. Any report issued by parliament should be disclosed to the public.
- 5) **Remedies and sanctions:** Remedies and sanctions should include:
  - a) **Disciplinary procedures and sanctions for procurement personnel:** Failure to follow the procurement regulations should result in proportionate disciplinary action against the responsible procurement personnel, as provided for in Benchmark 11.21 (Public officials).
  - b) **Setting aside of contracts:** Where it is found that a contract has been awarded on the basis of a materially flawed procurement process or corruption, the contract should be set aside or declared void.
  - c) **Referral for prosecution of corruption offences:** Where there are reasonable grounds to suspect that a corruption offence may have been committed, the matter should be referred to the law enforcement authorities for investigation and prosecution.

- 13.32 **Accountability of the procurement regulatory authority:** The procurement regulatory authority should be subject to the accountability requirements for regulatory authorities set out in Benchmark 6.9 (Regulatory authorities).
- 13.33 **Complaints and reporting systems:**
- 1) The procurement regulatory authority should implement complaints and reporting systems in accordance with Benchmark 6.10 (Regulatory authorities).
  - 2) Each procuring entity should ensure that the complaints and reporting systems which they implement under Benchmark 6.10 allow for complaints and reports in relation to their procurement processes.
- 13.34 **Transparency to the public:** Save to the extent that transparency should be restricted as determined under Benchmark 13.16(9), or to protect legitimate commercial proprietary interests of a supplier, or is otherwise contrary to the public interest, the following information should be promptly provided to the public:
- 1) **Information to be provided by the procurement regulatory authority:** The procurement regulatory authority should provide information to the public in accordance with Benchmark 6.11 (Regulatory authorities).
  - 2) **Information to be provided by the procuring entity:** Up-to-date information should be published by each procuring entity on a freely accessible public website:
    - a) to enable the public to have a good understanding and knowledge of:
      - i) the laws and regulations governing public sector procurement
      - ii) all procurements by the procuring entity above a prescribed value threshold
    - b) to assist the public to monitor and assess whether:
      - i) the procurement regulatory authority is acting in accordance with its responsibilities and duties under the regulations and the law, and without corruption
      - ii) the procurements in (a)(ii) above are being carried out, and the relevant contracts awarded, in accordance with the regulations and the law, and without corruption.
  - 3) **Such information should include the following in respect of each procurement in (2)(a)(ii) above:**
    - a) the needs assessment, technical assessment, and value for money assessment (Benchmark 13.10(5))
    - b) the estimated contract value and method of calculation (Benchmark 13.12)

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- c) the decision as to choice of procurement method and reasons for such choice (Benchmark 13.16(10))
  - d) the criteria used in the procurement process (Benchmark 13.17)
  - e) the notice of intended procurement (Benchmark 13.18(2))
  - f) any reports by the independent body in relation to whether single-source procurement, restricted transparency or expedited procurement are justified in relation to the procurement (Benchmark 13.16(9))
  - g) the solicitation documents (Benchmark 13.19(4))
  - h) the written record of submission information (Benchmark 13.21)
  - i) the notice of outcome of evaluation (Benchmark 13.24)
  - j) the notice of acceptance of successful submission (Benchmark 13.26)
  - k) the signed contract (Benchmark 13.27)
  - l) the identities and legal and beneficial ownership of the winning supplier and of its sub-suppliers whose contracts are above a prescribed value threshold (Benchmark 13.17(2)(b) and 13.17(4))
  - m) any notice of cancellation of the procurement process (Benchmark 13.28)
  - n) any notice of challenge (to the procurement process, contract award or cancellation of the procurement); outcome of any review process; and any appeal (Benchmark 13.29)
  - o) the procurement report (Benchmark 13.30)
  - p) the full independent monitoring report of the procurement process (Benchmark 13.31(2))
  - q) the full audit report of the procurement process (Benchmark 13.31(3))
  - r) parliament's report (Benchmark 13.31(4))
  - s) an explanation of the complaints and reporting systems (Benchmark 13.33)
  - t) an explanation of the public's entitlement to disclosure of information under this Benchmark.
- 4) **Responses to requests for information:** Information or documents reasonably requested by the public regarding any matter relating to the procurements referred to in (2) and (3) above should be provided by the procuring entity within a reasonable period as prescribed by the regulations.

# Benchmark 14

## Contract management

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**Principle:** Implement regulations which are designed to combat corruption in public sector contract management.

- 14.1 **Regulations:** Regulations should be implemented which are designed to combat corruption in public sector contract management. Such regulations should: be based on principles of honesty, impartiality, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.
- 14.2 **Scope of application:** The contract management regulations should be complied with by all public sector organisations in relation to all contracts with business associates. Reference below in this Benchmark to:
- 1) 'organisation' is to the relevant public sector organisation managing its contracts
  - 2) 'contract' is to a contract between the organisation and a business associate.
- 14.3 **Contract management personnel:** All personnel who have any involvement with a contract management process on behalf of the organisation should be employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials).
- 14.4 **Decisions:** All decisions by the organisation relating to contract management should be made in accordance with Benchmark 10.14 (Public sector organisations).
- 14.5 **Anti-corruption commitments:** The organisation should ensure that every contract contains a contractual commitment by each of the organisation and the contracting business associate to take all reasonable steps to prevent corruption by, on behalf of, or for the benefit of, the organisation or business associate in connection with the relevant contract.
- 14.6 **Management of the contract:** The organisation should ensure that its contracts are effectively managed on an ongoing basis by an appropriate number of its managers who are of appropriate skill and seniority. In relation to each contract they manage, such managers should ensure that:
- 1) the contract is at arm's length and on market terms and conditions
  - 2) where the contract is for the supply to the organisation of works, products, services, loans, assets or operation of a concession, the

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contract was awarded pursuant to a procurement process carried out in accordance with Benchmark 13 (Procurement)

- 3) the organisation and the contracting business associate have provided an anti-corruption commitment in accordance with Benchmark 14.5
- 4) the contract is being carried out in compliance with applicable laws
- 5) the contract terms and conditions are being complied with
- 6) the contract programme is being achieved
- 7) where a third party is issuing permits or providing approval or certification services on behalf of the organisation in relation to the contract, that such permits, approvals and certifications are being honestly and properly given
- 8) no modifications to the contract, contract claims or additional payments are agreed except in accordance with the contract and the contract management regulations (including Benchmark 14.7 in respect of modifications)
- 9) no improper benefit or advantage is requested by, given to, or received from, any individual or organisation in connection with the contract
- 10) no public official in a position of authority or influence in relation to the contract has a conflict of interest in relation to the contract
- 11) they are alert to any suspicions of corruption in relation to the contract and that any such suspicions are investigated and properly resolved
- 12) where there are reasonable grounds to suspect corruption in relation to the contract, the matter is referred to the law enforcement authorities.

### 14.7 Modifications to or under a contract:

- 1) Modifications to or under a contract should not be permitted where the modification:
  - a) is not necessary to achieve the organisation's objectives under the contract
  - b) materially changes the nature of the contract
  - c) results in the contract price increasing over a permitted percentage increase specified in the contract or in the contract management regulations
  - d) expands the scope of the contract, and it would be more beneficial for the organisation to procure such expanded scope under a separate competitive procurement process in accordance with Benchmark 13 (Procurement)
  - e) is detrimental to the organisation's interests.

- 2) Any permitted modification to or under a contract should be:
  - a) properly justified in writing, with all necessary supporting evidence
  - b) approved in accordance with the decision-making procedures in Benchmark 10.14 (Public sector organisations)
  - c) effected in writing, stating all material information and signed by all contracting parties.
- 3) Any modification which does not accord with (1) and (2) should be treated as void and of no effect.

#### 14.8 **Recommendation for payment:**

- 1) Recommendations for contract payments by the organisation should be made only:
  - a) in accordance with the decision-making procedures in Benchmark 10.14 (Public sector organisations), and
  - b) where the relevant managers have taken reasonable steps to verify that, and reasonably believe that the payment is contractually due, namely:
    - i) the contract obligations in respect of which the payment is to be made have been complied with in accordance with the contract
    - ii) the payment is for the correct amount due under the contract
    - iii) the proposed payee is the correct person to be paid under the contract
    - iv) there is no unresolved issue under Benchmarks 14.6, 14.7 or 14.8 which would materially affect recommendation for payment.
- 2) Such recommendations should be issued in writing to the organisation's finance function, confirming the reason for the payment, that such payment is due, and that the steps in (1) have been complied with. Appropriate supporting documentation should be annexed to the payment recommendation (or be readily retrievable and appropriately indexed) so that the justification for the payment can be readily determined and audited.
- 3) If there are any suspicions of corruption in relation to the payment, payment should not be recommended unless and until such suspicions have been satisfactorily resolved.

14.9 **Payment:** Payment by the organisation in relation to any contract should only be made in accordance with Benchmarks 15.11 and 15.12 (Financial management).

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**14.10 Termination of, or voiding, a contract:** The organisation should be entitled to terminate a contract during its performance, or have such contract set aside or declared void, where the organisation has obtained sufficient plausible evidence to conclude that:

- 1) the business associate should have been excluded from the procurement process under Benchmark 13.17(3) (Procurement), or
- 2) there has been corruption by, on behalf of, or for the benefit of, the business associate in connection with the contract.

Where evidence of corruption is identified under (1) or (2) above, the organisation should also refer the matter to the law enforcement authorities.

**14.11 Termination and re-award of contract:** Where a contract for the supply of works, products, services, loans, assets, or operation of a concession is terminated, the contract should be re-awarded to another supplier only following a new procurement process in accordance with Benchmark 13 (Procurement).

**14.12 Contract communications:**

- 1) The organisation should promptly communicate to a business associate all information necessary for the business associate to perform properly its obligations under the contract.
- 2) All material communications and dealings between the organisation and business associate in relation to the contract should be in writing or, if initially oral, should as soon as possible be confirmed in writing, should state all material content, dates and times, and should be signed by the person(s) issuing, or preparing the record of, the communication.
- 3) The date of transmission and receipt of communications should be recorded.

**14.13 Records:** Comprehensive and accurate records of the contract management process should be prepared and retained in accordance with Benchmark 10.21 (Public sector organisations).

**14.14 Monitoring and audit:** Performance and management of the organisation's contracts should be:

- 1) monitored in accordance with Benchmark 18 (Independent monitoring)
- 2) audited in accordance with Benchmark 19 (Independent auditing)

so as to assess whether the contracts are being performed and managed in accordance with the contracts, regulations and law and without corruption. Full monitoring and audit reports should be disclosed to the public.

**14.15 Complaints and reporting systems:** The organisation should ensure that the complaints and reporting systems which it implements under Benchmark

10.19 allow for complaints and reports of suspected corruption in relation to the organisation's contracts.

14.16 **Transparency to the public:** Save to the extent contrary to the public interest, the organisation should promptly provide the following information to the public:

- 1) **Website:** Up-to-date information should be published on the organisation's freely accessible public website:
  - a) to enable the public to have a good understanding and knowledge of:
    - i) the laws and regulations governing public sector contract management
    - ii) all of the organisation's contracts above a prescribed value threshold
  - b) to assist the public to monitor and assess whether such contracts are being procured, managed and performed in accordance with the contracts, regulations and the law, and without corruption.
- 2) **Such information should include the following in respect of each contract in (1)(a)(ii) above:**
  - a) (links to) all laws and regulations governing the contract and contract management
  - b) the identities and legal and beneficial ownership of all contract parties and of their sub-suppliers whose contracts are above a prescribed value threshold (Benchmarks 13.17(2)(b) and 13.17(4))
  - c) information in relation to any procurement process for the contract (which should already have been disclosed by the organisation in accordance with the transparency requirements in Benchmark 13.34)
  - d) the full contract document (Benchmark 13.27)
  - e) ongoing information, on at least an annual basis, as to the contract, contract progress, payments made and received by the organisation, and material contract modifications and their time and cost implications
  - f) a summary of the contract outcomes (including material contract modifications and their time and cost implications, total final payments made and received by the organisation, and date of completion)
  - g) the full independent monitor's reports (Benchmark 14.14(1))
  - h) the full audit reports (Benchmark 14.14(2))
  - i) an explanation of the complaints and reporting systems (Benchmark 14.15)

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- j) an explanation of the public's entitlement to disclosure of information under this Benchmark.
- 3) **Responses to requests for information:** Information or documents reasonably requested by the public regarding any matter in (1) or (2) above should be provided within a reasonable period as prescribed by the regulations.

# Benchmark 15

## Financial management

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**Principle:** Implement regulations which are designed to combat corruption in public sector financial management.

- 15.1 **Regulations:** Regulations should be implemented which are designed to combat corruption in public sector financial management. Such regulations should: be based on principles of honesty, impartiality, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.
- 15.2 **Scope of application:** The financial management regulations should be complied with by all public sector organisations in relation to all public sector financial management. Benchmarks 15.5 to 15.8 should apply only where appropriate to the organisation's function. References below in this Benchmark to 'organisation' are to the relevant public sector organisation carrying out a financial management function.
- 15.3 **Financial management personnel:** All personnel who have any involvement with a financial management process on behalf of the organisation should be employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials).
- 15.4 **Decisions:** All decisions made by the organisation in relation to financial management should be made in accordance with Benchmark 10.14 (Public sector organisations).

### National finances

- 15.5 **Adoption of the national budget:**
- 1) The anticipated public sector revenue, debt and expenditure should be identified at least annually in a formal budget produced by the government.
  - 2) All anticipated public sector revenue, debt and expenditure should be accurately and transparently included in the budget and should be only in respect of matters which are legitimate and for purposes of benefiting the public. No anticipated revenue, debt or expenditure should be concealed through 'off-budget' mechanisms.
  - 3) The budget should identify the level of revenue, debt and expenditure which is anticipated to be provided to, raised by, taken on by, or

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expended by, each subnational government, government department and public sector organisation.

- 4) The budget should identify the categories of revenue, debt and expenditure, and the major items of expenditure, for each subnational government, government department and public sector organisation.
- 5) The information on the anticipated revenue, debt and expenditure which makes up the budget should be sufficiently comprehensive to allow critical analysis.
- 6) Parliament should examine, debate, amend and approve the budget, at least annually, in sessions which are open to the public.

### 15.6 Tax collection and management:

- 1) Regulations should prescribe clear and transparent:
  - a) taxation principles, rates, thresholds, exemptions and allowances
  - b) tax assessment and collection procedures
  - c) times for tax filing and payment
  - d) right of appeal in the event that the taxpayer challenges the quantum of tax assessed
  - e) penalties for breach of the tax regulations.
- 2) Clear and complete information should be provided by the taxing organisation to taxpayers on their obligations and rights in relation to the matters listed in (1) above.
- 3) Any preferential tax treatment or exemptions should be objective, arm's length, and available to clearly defined categories of persons rather than to specifically selected persons.
- 4) An effective system should be implemented to:
  - a) register all persons who are liable to pay tax
  - b) assess the amount of tax due to be paid by persons
  - c) collect on time the amount of tax due.
- 5) The tax assessment function (which assesses the amount of tax payable by a person) should be a separate function with separate personnel from the tax collection function (which ensures payment of, and collects, the tax).
- 6) An independent body should be established which hears and determines appeals by taxpayers regarding the amount of tax levied on them.
- 7) The taxing organisation should measure the extent to which aggregate actual tax revenue reflects the amount originally approved in the budget and should identify and record the reasons for any differences.

**15.7 Non-tax revenue collection and management:**

- 1) Regulations should prescribe clear and transparent procedures for raising non-tax revenues.
- 2) Any revenue raised from the award of concessions should be managed in accordance with Benchmark 16 (Concession management).
- 3) Any preferential treatment or exemptions granted by any revenue raising process should be objective, arm's length, and available to clearly defined categories of persons rather than to specifically selected persons.
- 4) Clear and complete information should be provided by the revenue collecting organisation to payers on their obligations and rights in relation to the revenue raising procedures.
- 5) The revenue collecting organisation should measure the extent to which aggregate actual non-tax revenue reflects the equivalent amount originally approved in the budget and should identify and record the reasons for any differences.

**15.8 National public revenue, debt and expenditure:** All revenue, debt and expenditure raised and incurred by all public sector organisations should be reported and collated through a central process so as to show a complete picture of national public revenue, debt and expenditure.

## Finances of public sector organisations

**15.9 Debt management:**

- 1) Regulations should prescribe clear and transparent public sector debt management procedures.
- 2) Public sector organisations should not enter into a contractual commitment to receive a loan from a wholly or partly private sector lender unless such loan:
  - a) is for a legitimate purpose which is in accordance with the organisation's objectives
  - b) is necessary for the organisation to be able to achieve that purpose
  - c) is permitted by the organisation's budgetary requirements
  - d) will provide value for money for the organisation
  - e) is at arm's length and on market terms and conditions
  - f) is from a legitimate lender who is verified and contracted under a competitive process in accordance with Benchmark 13 (Procurement). In such case, as far as applicable, the references in Benchmark 13 to 'suppliers' and 'procurement process' should be

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read as referring respectively to the prospective lenders and the process to select a lender

- g) is approved in accordance with the decision-making procedures in Benchmark 10.14 (Public sector organisations).
- 3) The organisation should measure the extent to which aggregate actual loan obligations reflect the equivalent obligations originally approved in the budget and should identify and record the reasons for any differences.

### 15.10 Expenditure:

- 1) A public sector organisation should not enter into a commitment which will result in the organisation incurring expenditure unless such expenditure:
  - a) is for a legitimate purpose which is in accordance with the organisation's objectives
  - b) is necessary for the organisation to be able to achieve that purpose
  - c) is permitted by the organisation's budgetary requirements
  - d) will provide value for money for the organisation
  - e) will be under a contract which is at arm's length and on market terms and conditions
  - f) will, where the expenditure will be in relation to the supply of works, products, services, loans, assets or operation of a concession, be under a contract awarded pursuant to a procurement process carried out in accordance with Benchmark 13 (Procurement)
  - g) is approved in accordance with the decision-making procedures in Benchmark 10.14 (Public sector organisations)
  - h) in the case of projects requiring expenditure over a prescribed value threshold, is shown to be justified by a written and objective needs assessment, technical assessment, and value for money assessment provided by a suitably skilled and independent third party.
- 2) The organisation should measure the extent to which aggregate actual expenditure reflects the equivalent amount originally approved in the budget and should identify and record the reasons for any differences.

**15.11 Approving payments:** No payment should be made by or on behalf of a public sector organisation unless it has received prior approval. Such approval should be provided only:

- 1) in accordance with the decision-making procedures in Benchmark 10.14 (Public sector organisations), and

- 2) where, prior to giving such approval, the relevant managers have taken reasonable steps to verify, and reasonably believe, that payment is legitimate and due. In particular:
  - a) in respect of payments to business associates, the managers approving the payment should verify that:
    - i) there is a formal contract in respect of which the payment is to be made, the proposed payee is the correct person to be paid under the contract, and the payment is in accordance with the contract
    - ii) a payment recommendation has been properly completed and signed in accordance with the procedures for payment recommendations in Benchmark 14.8 (Contract management) and provides adequate justification for the proposed payment
  - b) in respect of payments to personnel, the managers approving the payment should verify that:
    - i) there is a formal contract of employment for the personnel in respect of which the payment is to be made, and the proposed payee is the correct person to be paid under the contract
    - ii) sufficient information and documentation have been provided by the relevant department of the organisation to justify that the payment is due and that the amount of the payment is correct
  - c) managers should be alert to suspicions of corruption in relation to any proposed payment and, if there are any such suspicions, payment should not be approved unless and until such suspicions have been satisfactorily resolved.

**15.12 Implementing payments:** The managers responsible for implementing payments should take reasonable steps to ensure as follows:

- 1) payment is made only where proper payment approvals have been received
- 2) payment is made as contractually required, in the correct amount and on time
- 3) payment is as far as possible carried out through the banking system, so as to leave an auditable trail. The use of cash should be limited to circumstances where there is no practical and reasonable alternative, and should be controlled, documented and receipted by the approved payee
- 4) the appropriate supporting documentation is annexed to the payment record (or is readily retrievable and appropriately indexed) so that the justification for the payment can be readily determined and audited.

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15.13 **Revenue:** The organisation should ensure that all sums due to the organisation:

- 1) are paid in full and on time
- 2) are paid into the organisation's legitimate bank accounts
- 3) are from legitimate persons and for legitimate purposes
- 4) are appropriately recorded in the organisation's accounts.

15.14 **Reporting on revenue, debt and expenditure:**

- 1) The organisation should issue periodically, and at least annually, a report showing all revenue, debt and expenditure raised and incurred during that period.
- 2) A timetable for the publication of such reports should be published and complied with.
- 3) The information provided in such reports should be sufficiently comprehensive so as to allow critical analysis.

15.15 **Accounting and auditing systems and related oversight** should be implemented by all public sector organisations including:

- 1) An effective accounting system which:
  - a) accurately records and reconciles:
    - i) all revenue and expenditure
    - ii) all assets and liabilities
  - b) complies with international good practice in accounting standards
  - c) complies with Benchmarks 7.7(4) and (5).

Full accounts should be disclosed to the public.
- 2) An effective auditing system which is in accordance with Benchmark 19 (Independent auditing) and which assesses, on a regular and appropriate sample basis, whether the organisation is carrying out its financial management functions in accordance with the financial management regulations and without corruption, and whether the organisation's financial records are accurate. Full audit reports should be disclosed to the public.
- 3) An effective oversight system which reviews, considers and questions the organisation's accounts, and which ensures that the organisation publishes accurate accounts on time in accordance with the regulations. This should include both:
  - a) an internal oversight body, such as a committee of the organisation's board, and
  - b) an external independent oversight body, such as a National Audit Office, Auditor-General or Public Accounts Committee of parliament.

Full oversight reports should be disclosed to the public.

### 15.16 **Communications:**

- 1) The organisation should promptly communicate to all business associates and personnel all information necessary for them to apply for and receive payments in accordance with their contracts.
- 2) All material communications and dealings between the organisation and business associates or personnel in relation to payment should be in writing or, if initially oral, should be confirmed in writing; should state all material content, dates and times; and should be signed by the person(s) issuing, or preparing the record of, the communication.
- 3) The date of transmission and receipt of communications should be recorded.

15.17 **Records:** Comprehensive and accurate records of the financial management process should be prepared and retained in accordance with Benchmark 10.21 (Public sector organisations).

15.18 **Complaints and reporting systems:** The organisation should ensure that the complaints and reporting systems which it implements under Benchmark 10.19 allow for complaints and reports of suspected corruption in relation to the organisation's financial management.

15.19 **Transparency to the public:** Save to the extent contrary to the public interest, the organisation should promptly provide the following information to the public:

- 1) **Website:** Up-to-date information should be published on a freely accessible public website(s):
  - a) to enable the public to have a good knowledge and understanding of:
    - i) the laws and regulations governing public sector financial management
    - ii) the organisation's financial management functions and activities
  - b) to assist the public to monitor and assess whether such functions and activities are being carried out in accordance with the regulations and the law, and without corruption.
- 2) **Such information should include the following (except (a) to (d) should be published only if appropriate to the organisation's function):**
  - a) **National budget:**
    - i) (links to) all laws and regulations governing the national budget
    - ii) the annual national budget (Benchmark 15.5)

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- iii) parliament's reviews and debates in relation to the national budget (Benchmark 15.5(6)).
  - b) **Taxation:**
    - i) (links to) all laws and regulations governing taxation
    - ii) an explanation of the obligations and rights of taxpayers in relation to the matters listed in Benchmark 15.6(1)
    - iii) actual tax revenue and deviation from budget (Benchmark 15.6(7)).
  - c) **Non-tax revenue:**
    - i) (links to) all laws and regulations governing non-tax revenue
    - ii) an explanation of the obligations and rights of payers of non-tax revenue (Benchmark 15.7(4))
    - iii) actual non-tax revenue and deviation from budget (Benchmark 15.7(5))
    - iv) disclosures relating to non-tax revenue derived from:
      - concession management (Benchmark 16.11)
      - asset management (Benchmark 17.13).
  - d) **Report on national public revenue, debt and expenditure** (Benchmark 15.8).
  - e) **The organisation's finances:**
    - i) (links to) laws and regulations governing the financial management of public sector organisations
    - ii) reports on the organisation's revenue, debt and expenditure (Benchmark 15.14(1))
    - iii) annual accounts (Benchmark 15.15(1))
    - iv) full financial internal and external audit reports (Benchmark 15.15(2))
    - v) full oversight reports of the organisation's accounts (Benchmark 15.15(3)).
  - f) An explanation of the complaints and reporting systems (Benchmark 15.18).
  - g) An explanation of the public's entitlement to disclosure of information under this Benchmark.
- 3) **Responses to requests for information:** Information or documents reasonably requested by the public regarding any matter in (1) or (2) above should be provided by the organisation within a reasonable period as prescribed by the regulations.

# Benchmark 16

## Concession management

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**Principle:** Implement regulations which are designed to combat corruption in public sector concession management.

16.1 **Regulations:** Regulations should be implemented which are designed to combat corruption in public sector concession management. Such regulations should: be based on principles of honesty, impartiality, competition, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.

16.2 **Scope of application:** The concession management regulations should be complied with by all public sector organisations in relation to the award and management of all public sector concessions, including for:

- 1) the extraction of oil, gas and minerals
- 2) the operation of telephone and internet networks
- 3) the provision of services to the public, such as railways, airports, ports, roads, power, water, gas, schools and hospitals.

References below in this Benchmark to 'organisation' are to the relevant public sector organisation managing a concession.

16.3 **Concession management personnel:** All personnel who have any involvement with a concession management process on behalf of the organisation should be employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials).

16.4 **Decisions:** All decisions made by the organisation in relation to concession management should be made in accordance with Benchmark 10.14 (Public sector organisations).

16.5 **Managing the award of concessions:**

- 1) The organisation should not award rights to operate a concession unless such award:
  - a) is for a legitimate purpose which is in accordance with the organisation's objectives
  - b) is permitted by the organisation's budgetary requirements
  - c) will provide value for money for the organisation
  - d) is to a legitimate concession operator who:

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- i) has the necessary technical, commercial, financial and management skills and resources to be able to operate the concession effectively in accordance with the contractual requirements
    - ii) will comply with all safety, environmental, quality and human rights requirements
  - e) is at arm's length and on market terms and conditions
  - f) is by way of contract awarded pursuant to a procurement process carried out in accordance with Benchmark 13 (Procurement). In such case, as far as applicable, the references in Benchmark 13 to 'suppliers' and 'procurement process' should be read as referring respectively to the prospective concession operators and to the process to select a concession operator
  - g) is approved in accordance with the decision-making procedures in Benchmark 10.14 (Public sector organisations)
  - h) requires the concession operator to publish to the public (i) details of all revenue received in relation to the concession, and (ii) all payments made by the operator in connection with the concession to the government, to any public sector organisation or public official, or to any organisation or individual connected with a public official.
- 2) Public official(s) should have no direct or indirect personal interest in the concession and should not receive directly or indirectly any income in relation to the concession.
  - 3) A legal entity should not be interposed between the organisation awarding the concession and the actual concession operator unless such entity is necessary to ensure the successful and legitimate financing or operation of the concession.

### 16.6 Managing the concession contract:

- 1) The management of concession contracts should be carried out in accordance with the relevant provisions of Benchmark 14 (Contract management).
- 2) The organisation should ensure that the performance of concession obligations is effectively managed on an ongoing basis by an appropriate number of managers of the organisation of appropriate skill and seniority, who should ensure that the activities under the concession agreement are being carried out by the concession operator in compliance with:
  - a) applicable laws
  - b) the conditions of the concession contract.

- 16.7 **Managing the revenue and payments in relation to concessions:**
- 1) The organisation should ensure that all revenue due to the organisation or other public sector body under a concession contract is paid in accordance with Benchmark 15.13 (Financial management) and is appropriately recorded in the relevant organisation's accounts.
  - 2) The organisation should ensure that any payment by the organisation in relation to a concession contract should be made in accordance with Benchmarks 15.11 and 15.12 (Financial management).
  - 3) The organisation should measure the extent to which aggregate actual revenue from concessions reflects the equivalent amount originally approved in the budget and should identify and record the reasons for any differences.
- 16.8 **Records:** Comprehensive and accurate records of the concession management process should be prepared and retained in accordance with Benchmark 10.21 (Public sector organisations).
- 16.9 **Monitoring and audit:** Performance and management of the organisation's concession contracts should be:
- 1) monitored in accordance with Benchmark 18 (Independent monitoring)
  - 2) audited in accordance with Benchmark 19 (Independent auditing)
- so as to assess whether the contracts are being performed and managed in accordance with the contracts, regulations and law, and without corruption. Full monitoring and audit reports should be disclosed to the public.
- 16.10 **Complaints and reporting systems:** The organisation should ensure that the complaints and reporting systems which it implements under Benchmark 10.19 allow for complaints and reports of suspected corruption in relation to the organisation's concession contracts.
- 16.11 **Transparency to the public:** Save to the extent contrary to the public interest, the following information should be promptly provided to the public:
- 1) **Information to be provided by the organisation:** Up-to-date information should be published on the organisation's freely accessible public website
    - a) to enable the public to have a good understanding and knowledge of:
      - i) the laws and regulations governing public sector concession management
      - ii) the award, management, performance and outcomes of each of the organisation's concession contracts above a prescribed value threshold
    - b) to assist the public to monitor and assess whether such contracts are being awarded, managed and performed in accordance with the contracts, regulations and the law, and without corruption.

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- 2) **Such information should include the following in respect of each contract in (1)(a)(ii) above:**
  - a) (links to) all laws and regulations governing the concession contract and public sector concessions
  - b) identities and legal and beneficial ownership of all parties to the concession contract and of their sub-suppliers whose contracts are above a prescribed value threshold (Benchmarks 13.17(2)(b) and 13.17(4))
  - c) information in relation to the procurement process for the concession contract (which should already have been disclosed in accordance with the transparency requirements of Benchmark 13.34)
  - d) the full concession contract document (and, if different, the full concession award document) (Benchmark 13.27)
  - e) ongoing information, on at least an annual basis, as to the concession contract, contract progress, expenditure by the organisation in relation to the concession, revenue received by the organisation in relation to the concession, and material contract modifications and their time and cost implications
  - f) a summary of the outcomes of the concession contract
  - g) the organisation's accounts showing all revenue and expenditure in relation to the concession (Benchmark 16.7)
  - h) the accounts of any other public sector body showing all revenue and expenditure in relation to the concession
  - i) the full independent monitoring report (Benchmark 16.9(1))
  - j) the full audit reports (Benchmark 16.9(2))
  - k) an explanation of the complaints and reporting systems (Benchmark 16.10)
  - l) an explanation of the public's entitlement to disclosure of information under this Benchmark.
- 3) **Information to be provided by the concession operator:** The concession operator should promptly publish, on a freely accessible public website, up-to-date details of:
  - a) all revenue received by the concession operator in relation to the concession
  - b) all payments made by the concession operator to each of the government, any public sector organisation or public official, or any organisation or individual connected with a public official. (Benchmark 16.5(1)(h))

- c) accounts showing all revenue and expenditure in relation to the concession.

Such information should be provided on at least an annual basis.

- 4) **Responses to requests for information:** Information or documents reasonably requested by the public regarding any matter in (1) to (3) above should be provided, by the organisation or concession operator as appropriate, within a reasonable period as prescribed by the regulations.

# Benchmark 17

## Asset management

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**Principle:** Implement regulations which are designed to combat corruption in public sector asset management.

- 17.1 **Regulations:** Regulations should be implemented which are designed to combat corruption in public sector asset management. Such regulations should: be based on principles of honesty, impartiality, competition, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.
- 17.2 **Scope of application:** The asset management regulations should be complied with by all public sector organisations in relation to all public sector asset management. References below in this Benchmark to 'organisation' are to the relevant public sector organisation managing an asset.
- 17.3 **Asset management personnel:** All personnel who have any involvement with an asset management process on behalf of the organisation should be employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials).
- 17.4 **Decisions:** All decisions made by the organisation in relation to asset management should be made in accordance with Benchmark 10.14 (Public sector organisations).
- 17.5 **Purchase of an asset:** The purchase of an asset by the organisation should be permitted only when such purchase:
- 1) is for a legitimate purpose which is in accordance with the organisation's objectives
  - 2) is necessary for the organisation to be able to achieve that purpose
  - 3) is permitted by the organisation's budgetary requirements
  - 4) will provide value for money for the organisation
  - 5) is at arm's length and on market terms and conditions
  - 6) is by way of contract awarded pursuant to a procurement process in accordance with Benchmark 13 (Procurement). In such case, as far as applicable, the references in Benchmark 13 to 'suppliers' and to 'procurement process' should be read as referring respectively to the prospective sellers of the asset and to the process to select the seller
  - 7) in the case of the purchase of an asset requiring expenditure over a prescribed value threshold, the purchase has been justified by a written

and objective needs assessment, technical assessment, and value for money assessment provided by a suitably skilled and independent third party

- 8) is approved in accordance with the decision-making procedures in Benchmark 10.14 (Public sector organisations).
- 17.6 **Management of an asset:** The assets owned by an organisation, or which it has responsibility for managing, should be managed, safeguarded, operated, maintained, repaired and insured in accordance with good asset management practices. All contracts placed by the organisation for such purposes should be:
- 1) placed in accordance with the organisation's procurement procedures (Benchmark 13 (Procurement))
  - 2) managed in accordance with the organisation's contract management procedures (Benchmark 14 (Contract management))
  - 3) paid for in accordance with the organisation's financial management procedures (Benchmarks 15.11 and 15.12 (Financial management)).
- 17.7 **Sale of an asset:** The sale of an asset by the organisation should be permitted only when such sale:
- 1) has a legitimate reason
  - 2) will provide value for money for the organisation
  - 3) is at arm's length and on market terms and conditions
  - 4) is by way of a contract awarded, as far as appropriate, in accordance with Benchmark 13 (Procurement) and which maximises as far as reasonable the number of potential buyers. In such case, as far as appropriate, the references in Benchmark 13 to 'suppliers' and 'procurement process' should be read as referring respectively to the prospective buyers of the asset and to the process to select the buyer
  - 5) is approved in accordance with the decision-making procedures in Benchmark 10.14 (Public sector organisations).
- 17.8 **Payment on purchase or sale of an asset:**
- 1) The organisation should ensure that all sums due to the organisation in respect of the sale of an asset are paid to the organisation in accordance with Benchmark 15.13 and are appropriately recorded in the organisation's accounts.
  - 2) The organisation should ensure that any payment by the organisation in relation to any asset purchase or sale should be made in accordance with Benchmarks 15.11 and 15.12 (Financial management).
- 17.9 **Register of assets:** A register of assets should be maintained by the organisation which shows sufficient details in relation to the purchase,

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management and sale of all public sector assets over a reasonable prescribed value threshold to facilitate the management, monitoring and audit of such assets. Such register should be disclosed to the public.

17.10 **Records:** Comprehensive and accurate records of the asset management process should be prepared and retained by the organisation in accordance with Benchmark 10.21 (Public sector organisations).

17.11 **Monitoring and audit:** Asset purchase, sale and management contracts should be:

- 1) monitored in accordance with Benchmark 18 (Independent monitoring)
- 2) audited in accordance with Benchmark 19 (Independent auditing)

so as to assess whether the performance and management of the contracts are being carried out in accordance with the contracts, regulations and law, and without corruption. Full monitoring and audit reports should be disclosed to the public.

17.12 **Complaints and reporting systems:** The organisation should ensure that the complaints and reporting systems which it implements under Benchmark 10.19 allow for complaints and reports of suspected corruption in relation to the sale, purchase and management of the organisation's assets.

17.13 **Transparency to the public:** Save to the extent contrary to the public interest, the organisation should promptly provide the following information to the public:

- 1) **Website:** Up-to-date information should be published on the organisation's freely accessible public website:
  - a) to enable the public to have a good understanding and knowledge of:
    - i) the laws and regulations governing public sector asset management
    - ii) the organisation's contracts for the purchase, management and sale of assets above a prescribed value threshold
  - b) to assist the public to monitor and assess whether such assets are being purchased, managed and sold in accordance with the contracts, regulations and the law, and without corruption.
- 2) **Such information should include the following in respect of each contract in (1)(a)(ii) above:**
  - a) (links to) all laws and regulations governing the sale, purchase and management of public sector assets
  - b) identities and legal and beneficial ownership of all parties to the contract (Benchmark 13.17(2)(b))

- c) information in relation to the procurement process relating to the contract (which should already have been disclosed in accordance with the transparency requirements of Benchmark 13.34)
  - d) the full contract document (Benchmark 13.27)
  - e) a statement of the legitimate purpose for the purchase or sale of the asset (Benchmark 17.5(1) and 17.7(1))
  - f) needs assessment, technical assessment, and value for money assessment (Benchmark 17.5(7))
  - g) a summary of the outcomes of the contract (including material contract modifications and their time and cost implications, total payments made and received by the organisation, and date of completion)
  - h) the asset register (Benchmark 17.9)
  - i) the full independent monitoring reports (Benchmark 17.11(1))
  - j) the full audit reports (Benchmark 17.11(2))
  - k) an explanation of the complaints and reporting systems (Benchmark 17.12)
  - l) an explanation of the public's entitlement to disclosure of information under this Benchmark.
- 3) **Responses to requests for information:** Information or documents reasonably requested by the public regarding any matter in (1) or (2) above should be provided by the organisation within a reasonable period as prescribed by the regulations.

# Benchmark 18

## Independent monitoring

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**Principle:** Implement regulations which require the independent monitoring of public sector contracts, with the purpose of combating corruption.

- 18.1 **Regulations:** Regulations should be implemented which require the independent monitoring of public sector contracts, with the purpose of combating corruption. Such regulations should: be based on principles of honesty, impartiality, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.
- 18.2 **Requirement for monitoring:** All contracts between a public sector organisation and a business associate and which are above a reasonable prescribed minimum value threshold ('qualifying contracts') should be independently monitored in accordance with the provisions of this Benchmark. References below in this Benchmark to 'organisation' are to the relevant public sector organisation which has qualifying contracts.
- 18.3 **Responsibility of organisation:** It should be the responsibility of the organisation to:
- 1) ensure that independent monitors are selected and appointed in accordance with Benchmark 18.4 to monitor each of its qualifying contracts in accordance with Benchmarks 18.5 to 18.10
  - 2) provide disclosure to the public in accordance with Benchmark 18.11.
- 18.4 **Selection, appointment, qualification and termination:**
- 1) The independent monitor should be selected by an independent body which should vet the monitor to ensure that the monitor is:
    - a) an individual of integrity or a reputable organisation
    - b) independent of government, the contract and the contract parties
    - c) without any conflict of interest in relation to the contract
    - d) appropriately qualified and experienced.
  - 2) The independent monitor should be appointed either by the organisation or by an independent body.
  - 3) The organisation should ensure that the independent monitor is able to undertake her/his responsibilities free from any interference or influence from the organisation or its personnel.

- 4) The independent monitor may be an individual or may be a public or private sector organisation which undertakes monitoring.
- 5) The appointment of the independent monitor should be terminated only in the event of any corruption, gross negligence or wilful misconduct on the part of the independent monitor, in which case a replacement should be promptly appointed in accordance with (1) to (4) above.

18.5 **Scope of monitoring:** The independent monitor should monitor the procurement, management and performance of the qualifying contracts for indications of corruption and breach of regulations. This should include monitoring of the following:

- 1) that there is a legitimate need for the contract
- 2) that the contract terms and conditions are at arm's length and on market terms and conditions
- 3) that there is no conflict of interest in respect of the business associate with whom the contract is to be made
- 4) where the contract is for the supply of works, products, services, loans, assets, or the operation of a concession, that the procurement process is being carried out in accordance with Benchmark 13
- 5) that contract management is being carried out in accordance with Benchmarks 14, 16 or 17 (as appropriate to the type of contract)
- 6) that contract performance is being carried out in accordance with the contract.

18.6 **Timing of monitoring:**

- 1) Monitoring should be carried out throughout the procurement and contract duration on major contracts, and on a sample basis on smaller contracts.
- 2) The monitoring appointment on a contract may be full time or part time, depending on the value of the contract, the complexity of the contract and the corruption risk.

18.7 **Access:** In relation to the performance of her/his duties under this Benchmark, the independent monitor should be allowed to have, without requiring advance notice, unrestricted access to any of the following in relation to the organisation, the business associate and its major sub-suppliers:

- 1) office and project premises
- 2) personnel
- 3) contract sites
- 4) contract works, products, services

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- 5) equipment and materials
  - 6) records and correspondence.
- 18.8 **Resources:** The independent monitor should be provided with sufficient funding and resources to be able to undertake the monitoring function effectively.
- 18.9 **Investigating and reporting corruption:**
- 1) The independent monitor should investigate matters of concern which may suggest corrupt activity.
  - 2) Where the independent monitor identifies reasonable grounds to suspect corruption, the monitor should report such suspicions to the audit committee of the organisation (Benchmark 19.11), to the appointing body of the monitor (if different to the organisation) and to the law enforcement authorities.
  - 3) In cases where the independent monitor believes that her/his report is not being, or will not be, appropriately addressed by the organisation or law enforcement authorities, then the monitor should submit her/his report to parliament.
- 18.10 **Record-keeping and reports:** The independent monitor should:
- 1) record in writing all activities, findings and outcomes of the monitoring process
  - 2) submit a detailed written report of these activities, findings and outcomes to the audit committee of the organisation (Benchmark 19.11), and to the appointing body of the independent monitor (if different to the organisation), at reasonable intervals as prescribed by the regulations, together with copies of, or reference to, all relevant documents
  - 3) retain these records and reports for a sufficient time, as prescribed by the regulations, to enable their use in any challenge to the procurement, contract or monitoring processes, or to verify at a later stage whether such processes have been properly conducted in a manner free from corruption.
- 18.11 **Transparency to the public:** The full independent monitor's reports (Benchmark 18.10) should be published promptly, by the relevant public sector organisation, on its freely accessible public website.

# Benchmark 19

## Independent auditing

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**Principle:** Implement regulations which require the independent financial, performance and technical auditing of public sector organisations and contracts, with the purpose of combating corruption.

- 19.1 **Regulations:** Regulations should be implemented which require the independent financial, performance and technical auditing of public sector organisations and contracts, with the purpose of combating corruption. Such regulations should: be based on principles of honesty, impartiality, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.
- 19.2 **Regulatory authority:** In cases where the State has established a national audit or other body responsible for undertaking or regulating the auditing of public sector organisations and contracts, then this body should operate independently of government, and should comply with Benchmark 6 (Regulatory authorities).
- 19.3 **Requirement for auditing:** The following independent audits should be carried out in accordance with this Benchmark:
- 1) Financial and performance audits should be carried out on all public sector organisations.
  - 2) Financial, performance and technical audits should be carried out on all contracts between a public sector organisation and a business associate and which are above a reasonable prescribed minimum value threshold, and otherwise on a sample basis.

References below in this Benchmark to 'organisation' are to the relevant public sector organisation which is required, or whose contracts are required, to be audited under the regulations.

- 19.4 **Responsibility of organisation:** It should be the responsibility of the organisation to:
- 1) ensure that independent auditors are selected and appointed in accordance with Benchmark 19.5 to audit the organisation and its contracts in accordance with Benchmarks 19.6 to 19.13
  - 2) provide disclosure to the public in accordance with Benchmark 19.14.
- 19.5 **Selection, appointment and qualification:**
- 1) The independent auditor should be selected by an independent body which should vet the auditor to ensure that the auditor is:

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- a) an individual of integrity or a reputable organisation
  - b) independent of:
    - i) government
    - ii) the organisation which is being audited
    - iii) (in the case of a contract audit) the contract and the contract parties
  - c) without any conflict of interest
  - d) appropriately qualified and experienced.
- 2) The independent auditor should be appointed either by the organisation or by an independent body.
  - 3) The organisation should ensure that the independent auditor is able to undertake her/his responsibilities free from any interference or influence from the organisation or its personnel.
  - 4) The independent auditor may be an individual or may be a public or private sector organisation which undertakes audits.
  - 5) The same independent auditor should not be entitled to audit the same organisation or contract for longer than a period prescribed in the regulations (except where the audit organisation is an independent public sector body established for purposes of public sector auditing).

19.6 **Scope of auditing:** The following audits should be carried out by the independent auditor in order to deter and detect corruption and breach of regulations:

- 1) **Audits of the organisation:**
  - a) **Financial audits:** These audits should assess inter alia whether:
    - i) all payments by the organisation have been properly made to legitimate persons and for legitimate purposes
    - ii) all revenues due to the organisation have been received in full and are from legitimate persons and for legitimate purposes
    - iii) the organisation is properly recording and accounting for its revenue, expenditure, assets and liabilities
    - iv) the financial records of the organisation are accurate
    - v) the organisation is complying with the provisions of Benchmark 15 (Financial management).
  - b) **Performance audits:** These audits should assess inter alia whether the organisation is:
    - i) complying with its obligations, duties and procedures (including those provided for in these Benchmarks)
    - ii) providing good value for money to the public.

- 2) **Audits of the organisation's contracts:** The following audits should be carried out in respect of each of the organisation's contracts above a reasonable prescribed minimum value threshold and for other contracts on a random sample basis:
- a) **Financial audits:** These audits should assess whether:
    - i) all payments by the organisation in respect of the contract have been properly made to legitimate persons and for legitimate purposes
    - ii) all revenues due to the organisation in respect of the contract have been received in full, and are from legitimate persons and for legitimate purposes.
  - b) **Performance audits:** These audits should assess whether:
    - i) there was a legitimate need for the contract
    - ii) the contract terms and conditions were at arm's length and on market terms and conditions
    - iii) there was any conflict of interest in respect of the business associate with whom the contract was made
    - iv) where the contract was for the supply of works, products, services, loans, assets, or the operation of a concession, the procurement of the contract was carried out in accordance with Benchmark 13
    - v) the management of the contract was carried out in accordance with Benchmarks 14, 16 and 17 (as appropriate to the type of contract)
    - vi) the contract was properly performed in accordance with the contract
    - vii) the contract was properly monitored in accordance with Benchmark 18.
  - c) **Technical audits:** These audits should assess whether:
    - i) there was a genuine need for the product supplied under the contract
    - ii) the contract has been designed and specified in accordance with good technical practice and provides good value for money
    - iii) the contract product has been properly built or provided in accordance with the contract design and specification.
- 3) **Identifying corruption:** In carrying out the audits in (1) and (2) above, the independent auditor should seek to identify any suspicion of corruption and whether any issues or deficiencies found during these audits may have been caused by corruption. If the auditor identifies

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any such issues, the auditor should investigate and report such issues in accordance with Benchmark 19.12.

19.7 **Standard of audit:** The independent auditor should undertake the audit in compliance with recognised international audit standards.

19.8 **Timing of audits:**

1) **Audits of the organisation:**

- a) **Financial audits:** The audits in Benchmark 19.6(1)(a) should be carried out at least annually.
- b) **Performance audits:** The audits in Benchmark 19.6(1)(b) should be carried out at reasonable routine intervals prescribed by the regulations. The audit regulations may permit the independent auditor to audit approximately one third of the organisation's functions, procedures, controls and systems every year, with the intention that all of them are audited at least once every three years.

2) **Audits of the organisation's contracts:**

- a) **Financial and performance audits:** The audits in Benchmarks 19.6(2)(a) and (b) should be carried out:
  - i) annually for contracts of a duration in excess of a year
  - ii) upon completion of the project.
- b) **Technical audits:** The audits in Benchmark 19.6(2)(c) should be carried out upon completion of the contract.

19.9 **Access:** In relation to the performance of her/his duties, the independent auditor should be allowed to have, without requiring advance notice, unrestricted access to any of the following in relation to the organisation and its procurements and contracts:

- 1) office and project premises
- 2) personnel
- 3) contract sites
- 4) contract works, products and services
- 5) equipment and materials
- 6) records and correspondence.

19.10 **Resources:** The independent auditor should be provided with sufficient funding and resources to be able to undertake the auditing function effectively.

19.11 **Audit committee:**

- 1) The organisation should establish an audit committee, which should be a committee of the board or equivalent top-level management body of the organisation.

- 2) The duties of the audit committee should be to:
  - a) ensure that the required audits are undertaken by appropriately qualified and independent auditors in accordance with this Benchmark
  - b) receive and consider the audit reports
  - c) ensure that any adverse findings in the audit reports are appropriately followed up and dealt with by the organisation
  - d) ensure that, where there are reasonable grounds to suspect corruption, the matter is reported to the law enforcement authorities.

**19.12 Investigating and reporting corruption:**

- 1) The independent auditor should investigate matters of concern which may suggest corrupt activity.
- 2) Where the independent auditor identifies reasonable grounds to suspect corruption, the independent auditor should report such suspicions to the audit committee of the organisation, to the appointing body of the independent auditor (if different to the organisation) and to the law enforcement authorities.
- 3) In cases where the independent auditor believes that her/his report is not being, or will not be, appropriately addressed by the organisation or law enforcement authorities, then the auditor should submit her/his report to parliament.

**19.13 Record-keeping and reports:** The independent auditor should:

- 1) record in writing all activities, findings and outcomes of the auditing process
- 2) upon completion of the audit, submit a detailed written audit report of these activities, findings and outcomes to the audit committee of the organisation, and to the appointing body of the independent auditor (if different to the organisation), together with copies of, or reference to, all relevant documents
- 3) retain these records and reports for a sufficient time, as prescribed by the regulations, to enable their use in any challenge to, or investigation arising out of, the audit process.

**19.14 Transparency to the public:** All audit reports required under this Benchmark should be published promptly and in full, by the organisation, on its freely accessible public website.

# Benchmark 20

## Anti-corruption training

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**Principle:** Implement regulations which require that appropriate anti-corruption training is provided to all public officials and to the relevant personnel of all private sector organisations which execute major public sector contracts.

20.1 **Regulations:** Regulations should be implemented which require that appropriate anti-corruption training is provided to all public officials, and to the relevant personnel of all private sector organisations which execute major public sector contracts (which are contracts above a prescribed contract value threshold(s)). Such regulations should: be based on principles of honesty, impartiality, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.

20.2 **Responsibility for providing training:** Responsibility for providing appropriate anti-corruption training should be as follows:

- 1) Public sector organisations should be responsible for providing training to their personnel (Benchmark 10.8).
- 2) In relation to public officials who are not employed by a public sector organisation, the relevant body responsible for their regulation should be responsible for providing them with training.
- 3) Responsibility for training of the personnel of relevant private sector organisations should be as provided for in Benchmark 20.11.

References below in this Benchmark to ‘organisation’ are to the relevant organisation or body required to implement anti-corruption training in accordance with this Benchmark.

20.3 **Training requirements:** The organisation should ensure that the following individuals (‘trainees’) receive anti-corruption training appropriate to their role:

- 1) the organisation’s personnel and any other public officials for which the organisation is responsible for providing anti-corruption training
- 2) relevant personnel of all private sector organisations which execute major public sector contracts for the organisation.

20.4 **Training programme:** The organisation should establish an anti-corruption training programme which identifies and governs the organisation’s training requirements, including in particular:

- 1) the purpose of the training
  - 2) the content of the training
  - 3) to whom and by whom the training should be provided
  - 4) when and where the training should be provided
  - 5) how frequently the training should be repeated and updated.
- 20.5 **Identifying the level of training:** The training should be appropriate to the skills and roles of the trainees and the corruption risks faced by them and by the organisation in those roles:
- 1) Trainees who in their day-to-day functions face a low level of corruption risk may receive a proportionately simple level of training as specified in Benchmark 20.6.
  - 2) Trainees who in their day-to-day functions face a more than low level of corruption risk should receive a comprehensive level of training as specified in Benchmark 20.7.
- 20.6 **Simple anti-corruption training:** The simple level of anti-corruption training provided to trainees under this programme should include at minimum the following elements:
- 1) the organisation's anti-corruption policy
  - 2) a simple explanation of the different types of corruption offences and penalties
  - 3) the reason why corruption is damaging to the public, the organisation and the trainee
  - 4) that the trainee must not get involved in any types of corruption
  - 5) the trainee's reporting obligations under Benchmark 11.17
  - 6) an explanation of the reporting systems and protections that are in place within the organisation for reporting corruption
  - 7) the name of the person in the organisation to whom the trainee can speak if they have questions or concerns.
- 20.7 **Comprehensive anti-corruption training:** The comprehensive level of anti-corruption training provided to trainees under this programme should include at minimum the following elements, to the extent applicable to the trainees:
- 1) the organisation's anti-corruption policy
  - 2) the organisation's anti-corruption procedures relevant to the trainee's role
  - 3) the code of conduct relevant to the trainee's role
  - 4) the importance of compliance with the policy, procedures and code of conduct

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- 5) a simple explanation of the different types of corruption offences and penalties
  - 6) a more detailed explanation of the different corruption offences and regulations relevant to the trainee's role, and the penalties that apply
  - 7) how these corruption offences might occur in the role or function in which the trainee is employed, and how to identify them
  - 8) what actions relevant to the trainee's role would be corrupt, and what actions would not be corrupt
  - 9) the damage caused by corruption generally and the damage it may cause specifically to the public, the organisation and the trainee, in relation to the activities in which the trainee is engaged
  - 10) the risk of criminal liability for the trainee personally and for the organisation as a result of corrupt activity, and the consequent criminal sanctions and loss of employment, reputation and business
  - 11) the risk of civil and administrative sanctions for involvement in corrupt activity
  - 12) the steps that the trainee can take to prevent and avoid corruption
  - 13) what the trainee should do if the trainee encounters corruption
  - 14) that the trainee must not get involved in any types of corruption
  - 15) the trainee's reporting obligations under Benchmark 11.17
  - 16) an explanation of the reporting systems and protections that are in place within the organisation for reporting corruption
  - 17) the name of the person in the organisation to whom the trainee can speak if they have questions or concerns.
- 20.8 **Trainer skills:** The persons who write and/or provide the anti-corruption training should be suitably skilled in the subject.
- 20.9 **Training records:** In respect of both simple and comprehensive anti-corruption training, the organisation should make and retain records of:
- 1) the trainees who received training
  - 2) the date they received training
  - 3) the content of the training
  - 4) any scope for improvement in the training method or content
  - 5) any weaknesses in the organisation's anti-corruption policy, procedures or relevant code of conduct which are identified during the training.
- 20.10 **Follow up:** The organisation should take appropriate follow-up action consequent on the training provided. In particular:

- 1) the organisation should improve the training to take account of any new circumstances and identified areas of improvement in the method or content of training
  - 2) in the event that any weaknesses in the organisation's anti-corruption policy, procedures or relevant code of conduct are identified during the training, the organisation should take appropriate steps to rectify these weaknesses, such rectification where appropriate to be in accordance with Benchmark 10.18 (Public sector organisations)
  - 3) in the event that any suspicions of corruption in relation to the organisation's or trainees' activities are identified during the training, the organisation should take appropriate steps to investigate and, where such investigation establishes reasonable grounds to suspect corruption, it should refer the matter to the law enforcement authorities for investigation and prosecution.
- 20.11 **Training for personnel of private sector organisations:** Where private sector organisations are required to implement an anti-corruption management system under Benchmark 10.13:
- 1) the organisation may accept third party certification that such private sector organisations have provided appropriate training to their relevant personnel in accordance with the Annex to the Guidance (paragraph AN 8)
  - 2) alternatively, the organisation may require all relevant personnel of such private sector organisation to undertake the same training as the organisation provides to its own personnel.

# Benchmark 21

## Reporting corruption

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**Principle:** Implement regulations which enable persons to report suspicions of corruption in a safe and confidential manner to their employers or appropriate authorities.

21.1 **Regulations:** Regulations should be implemented which enable persons to report, in a safe and confidential or anonymous manner:

- 1) suspected or actual corruption
- 2) breach of an organisation's anti-corruption policy, procedures or code of conduct
- 3) failure by an organisation to implement regulations provided for in these Benchmarks
- 4) breach by an individual or organisation of regulations provided for in these Benchmarks.

Such regulations should: be based on principles of honesty, impartiality, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.

21.2 **Responsibility for providing reporting systems:** A safe and confidential system for reporting the matters specified in Benchmark 21.1 should be provided by each of the following organisations, in accordance with this Benchmark:

- 1) the corruption prevention authority (Benchmark 2.9)
- 2) the law enforcement authorities (Benchmark 3.21)
- 3) regulatory authorities (Benchmark 6.10)
- 4) all public sector organisations (Benchmark 10.19)
- 5) the prescribed bodies in relation to reports concerning the court system (Benchmark 4.12) and the parliamentary system (Benchmark 5.11)
- 6) professional institutions and business associations (Benchmark 23.4(2)).

References below in this Benchmark to 'organisation' are to the relevant organisation or body required to provide a reporting system in accordance with this Benchmark.

21.3 **Scope of reporting systems:** In relation to Benchmark 21.2:

- 1) The reporting system provided by each of the authorities in Benchmark 21.2 (1) and (2) should:

- a) enable reporting by any person of any matter in Benchmark 21.1
  - b) require reporting by its personnel in accordance with Benchmark 21.6(2).
- 2) The reporting system provided by each of the regulatory authorities in Benchmark 21.2 (3) should:
- a) enable reporting by any person of any matter in Benchmark 21.1 in relation to the activities of that authority, or in relation to the activities or persons which that authority regulates
  - b) require reporting by its personnel in accordance with Benchmark 21.6(2).
- 3) The reporting system provided by each of the organisations in Benchmark 21.2 (4) should:
- a) enable reporting by any person of any matter in Benchmark 21.1 in relation to the activities of that organisation
  - b) require reporting by its personnel in accordance with Benchmark 21.6(2).
- 4) The reporting system provided by each of the prescribed bodies in Benchmark 21.2 (5) should:
- a) enable reporting by any person of any matter in Benchmark 21.1 in relation to the prescribed body or the court system or parliamentary system as appropriate
  - b) require reporting by the public officials in the court system or parliamentary system, as appropriate, in accordance with Benchmark 21.6(2).
- 5) The reporting system provided by each of the organisations in Benchmark 21.2(6) should:
- a) enable reporting by any person of any matter in Benchmark 21.1 in relation to the activities of that organisation or its members
  - b) require reporting by its personnel and members in accordance with Benchmark 21.6 (2) or (3), as appropriate.
- 21.4 **Features of the reporting system:** Such reporting system should include the following features:
- 1) It should enable reports to be made in a safe and confidential or, if desired, anonymous manner.
  - 2) It should provide the information set out in Benchmark 21.5.
  - 3) Reports should be received, investigated and managed securely and confidentially, by or on behalf of the organisation which receives the

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report, by a person who is sufficiently independent of the persons or activities which are the subject of the report.

- 4) All reports should be appropriately investigated by or on behalf of the organisation receiving the report. If this investigation reveals reasonable grounds to suspect corruption, the report should be forwarded promptly by the organisation to the law enforcement authorities.
- 5) The reporting person should be informed, to the extent that this does not prejudice any investigation, of the action that has been taken with regard to the report and of the outcome of such action.
- 6) The reporting person should have the obligations, rights and protections stated in Benchmark 21.6.

### 21.5 Publicising the reporting system:

- 1) The organisation providing the reporting system should take reasonable steps to:
  - a) ensure that any persons who may wish to make a report are aware of:
    - i) the reporting system
    - ii) in what circumstances they have a legal duty to report
    - iii) how to report in a safe and confidential or anonymous manner
    - iv) who to report to
    - v) their obligations, rights and protections if they report (Benchmark 21.6)
  - b) encourage all persons to report where they believe in good faith or on reasonable grounds that any matter referred to in Benchmark 21.1(1) to (4) has occurred, even in circumstances where there is no legal duty to report
  - c) inform persons about how to seek advice from an appropriate person on what to do if faced with a concern or situation which could involve corruption
  - d) inform persons who intend to report that legal protections under Benchmark 21.6(5) will be available only where reports are made in good faith or on reasonable grounds.
- 2) Information as to the matters in (1) above should be made easily and obviously available so that persons are aware of them prior to making any report.

### 21.6 Obligations, rights and protections for those reporting corruption:

- 1) All persons should be required to report suspected or actual corruption where there is any specific duty imposed by law to report.

- 2) A public official should be required to make a report where she/he believes in good faith or on reasonable grounds that any of the matters referred to in Benchmark 21.1 have occurred in relation to a public official or public sector organisation or its activities.
  - 3) An individual in the private sector should be required to make a report where she/he believes in good faith or on reasonable grounds that there has been corruption in relation to any activity with which she/he has an involvement and which is wholly or partly funded by public funds.
  - 4) Anonymous reporting of suspected corruption should be permitted.
  - 5) Measures should be enacted to protect a person, in the public or private sectors, who makes a report in good faith or on reasonable grounds ('the reporting person') including as follows:
    - a) The identity of the reporting person should not be disclosed without her/his prior consent.
    - b) Identities, information, records and documents delivered or referred to by the reporting person should be kept confidential except in so far as necessary to further an investigation or prosecution.
    - c) The reporting person should be protected against civil or criminal court action, or any other legal proceedings related to such report, even if the facts presented by the reporting person were not sufficient to support a decision to prosecute or to convict.
    - d) The reporting person should be protected against retaliation, discriminatory treatment, disciplinary sanctions or other unjustified treatment related to such report.
  - 6) Reports in (1) to (3) above should be made to the appropriate body(ies) in Benchmark 21.2 or other body as prescribed by the regulations.
- 21.7 **Records:** Comprehensive and accurate records of the reporting system, and of all reports made under the system, and of all follow-up investigative and enforcement action taken, should be prepared and retained in accordance with Benchmark 10.21 (Public sector organisations).
- 21.8 **Audit:** The availability, operation and effectiveness of the reporting system should be audited periodically as part of the organisation's performance audit in accordance with Benchmark 19 (Independent auditing).

# Benchmark 22

## Standards and certification

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**Principle:** Permit, promote and support the development and implementation of, and certification to, national and international standards which are designed to ensure better compliance by organisations and individuals with laws, regulations and recognised good practice.

22.1 **Government support:** The government should permit, promote and support the development and implementation of, and certification to, national and international standards which are designed to ensure better compliance by organisations and individuals with laws, regulations and recognised good practice. It should do so by undertaking the following actions:

- 1) establish, or support the establishment of, a national standards body, or affiliate with another State's national standards body, which:
  - a) develops and publishes national standards
  - b) supports and participates in the development and publication of international standards
- 2) raise the awareness of business and professional sectors of the existence and benefits of relevant standards
- 3) promote compliance by individuals and organisations with relevant standards
- 4) provide, or support the provision of, published materials which guide individuals and organisations on how to implement and comply with relevant standards
- 5) encourage third party certification of individuals' and organisations' compliance with such standards
- 6) where compliance by suppliers with a standard will help assure that the provision of works, products and services to the public sector are legally, honestly and properly provided, then all public sector organisations should make compliance with such standard, certified by an appropriate third party, a pre-condition to the award of public sector contracts over a reasonable prescribed value threshold to any suppliers.

## Benchmark 23

### Professional institutions and business associations

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**Principle:** Permit, promote and support the establishment and operation of professional institutions and business associations.

- 23.1 **Government support:** The government should permit, promote and support the establishment and operation of professional institutions and business associations in accordance with the provisions of this Benchmark.
- 23.2 **Independence:** Professional institutions and business associations should be permitted to be established and operated independently of government and free from government disruption or interference with their lawful activities.
- 23.3 **Government actions:** The government should undertake, at no cost to the professional institution or business association, the following actions:
- 1) provide reasonable advice and guidance to the persons establishing and managing the professional institutions and business associations on:
    - a) the legal and taxation regulations which impact on the professional institution or business association during its establishment or operation
    - b) the anti-corruption laws and government anti-corruption actions which are relevant to the professional institution or business association, and its members
  - 2) provide advice on the types of anti-corruption training which should be provided or promoted by the professional institution and business association
  - 3) provide any available and relevant anti-corruption training materials for use by the professional institutions and business associations
  - 4) take account of the views of professional institutions and business associations when developing and implementing laws, regulations and government policies.
- 23.4 **Professional institution and business association activities:** Professional institutions and business associations should be permitted and encouraged by government to undertake inter alia the following activities:
- 1) to develop, promote and implement minimum professional, business and ethical standards and/or codes of conduct which are in the public

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interest and with which their members must comply, with the purpose of ensuring that their members:

- a) act with high standards of ethics, integrity and honesty
- b) practise competently
- c) report, in good faith or on reasonable grounds, suspicions of corruption to one or more of:
  - i) their employer
  - ii) the professional institution or business association, or
  - iii) one or more of the organisations in Benchmark 21.2, as appropriate to the nature of the suspected corruption
- 2) to set up a reporting system in accordance with Benchmark 21, so as to enable reports to be made in accordance with (1)(c)(ii) above
- 3) to apply reasonable and proportionate sanctions to any member who fails to report suspicions of corruption, who fails to comply with the standards or codes in (1) above, or who is found to have participated in corruption, which sanctions could include, as appropriate:
  - a) monitoring of the member's business or professional activities
  - b) restrictions on the member's ability to undertake a business or profession
  - c) suspension or dismissal from membership
  - d) fines
- 4) to publish on the professional institution's and business association's website the names and details of any offence and sanction imposed by the professional institution or business association on their members
- 5) to decline to accept as a member any organisation or individual who has been suspended or dismissed from membership by another professional institution or business association for as long as the suspension period applies, or until reasonably satisfied that the member has taken effective steps to:
  - a) remedy as far as possible the consequences of their action which led to the suspension or dismissal
  - b) avoid a repetition of the action which led to the suspension or dismissal
- 6) to increase awareness among their members and relevant professions and sectors of:
  - a) the existence of corruption and its consequences
  - b) the circumstances where corrupt practices may occur
  - c) how corruption can be prevented and reported

- 7) to require (where the professional institution or business association has the power to make such requirement) or encourage the inclusion of anti-corruption training as an essential part of:
  - a) university and technical college courses
  - b) professional qualification
  - c) continuing professional development requirements
- 8) to publicly speak out against corruption
- 9) to report suspicions of corruption to the law enforcement authorities
- 10) to encourage effective anti-corruption law enforcement and the implementation of anti-corruption measures by public and private sector organisations
- 11) to collaborate with other relevant professional institutions and business associations with a view to developing, improving and implementing common standards and/or codes of conduct and uniform compliance with these standards and/or codes of conduct
- 12) to promote and support the development and implementation of, and certification to, national and international standards which are designed to ensure better compliance by organisations and individuals with laws, regulations and recognised good practice (Benchmark 22 (Standards and certification))
- 13) to collaborate with law enforcement, regulatory and anti-corruption authorities nationally and internationally to share intelligence and information with the intention of combating corruption
- 14) to encourage the regulation by law of professional and business sectors or activities where regulation would have a positive impact in requiring and enforcing minimum standards so as to reduce the risk of corruption
- 15) to publicise their objectives and activities.

# Benchmark 24

## Participation of society

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**Principle:** Implement regulations which require that the public is informed about, and is freely able to participate in, report on, comment on and lawfully protest against, the actions of the government, public officials and public sector organisations.

### 24.1. Participation of society:

- 1) Regulations should be implemented which require that the public is informed about, and is freely able to participate in, report on, comment on and lawfully protest against, the actions of the government, public officials and public sector organisations. Such regulations should: be based on principles of honesty, impartiality, transparency and accountability; provide for the matters in this Benchmark; be documented in writing; and accord with international good practice.
- 2) The public referred to in (1) above and in this Benchmark should include civil society, the press, non-governmental organisations, public sector and private sector organisations, professional institutions, business associations, community-based organisations, faith-based organisations, public officials and individual members of the public.

24.2. **Freedom of expression:** The law should permit, and the government should promote, and take adequate steps to ensure, the right to freedom of opinion and expression. This should include:

- 1) the freedom of all persons to hold and express opinions without interference, and to seek, receive and impart information and ideas through any media
- 2) ensuring that defamation (libel and slander) is a civil and not a criminal action, and that defamation laws are not framed in a manner which permits them to be used to restrict legitimate criticism
- 3) taking reasonable steps to ensure the safety of journalists who are threatened as a result of their journalistic activities
- 4) ensuring that journalists are not required by any law or government action to disclose their confidential sources of information
- 5) allowing restrictions on freedom of expression only when:
  - a) such expression is intended to incite hatred, violence or discrimination on the basis of one's age, disability, gender

re-assignment, marital status, pregnancy, race (including colour, nationality, ethnic or national origin), religion, sex or sexual orientation, or

- b) a control on such freedom is necessary for national security, such restrictions to be reasonably and objectively determined by law.

**24.3. Public demonstrations and protests:**

- 1) The law should permit and the government should promote, and take adequate steps to ensure, the right of all persons to organise and participate in non-violent public demonstrations and protests aimed at highlighting issues of public concern (including issues of corruption and integrity in public office).
- 2) No restrictions should be placed on the exercise of this right other than those reasonably imposed in conformity with the law, and which are necessary in a democratic society in the interests of national security, public safety, public order, the protection of public health, or the protection of the rights and freedoms of others (which should be reasonably and objectively determined by law).

**24.4. Participation in development of laws etc:** The government should request and adequately take account of the views of all persons in relation to the development and implementation of strategies, laws, regulations, procedures and decisions.

**24.5. Inclusivity and non-discrimination:** Recognising that exclusion and discrimination can be due to or result in corruption or entrenched corrupt power:

- 1) The law should guarantee equal opportunities and equal rights to all persons
- 2) The government should promote, and take adequate steps to ensure, that all persons can participate fully and equally in society without distinction as to age, disability, gender re-assignment, marital status, pregnancy, race (including colour, nationality, ethnic or national origin), religion, sex or sexual orientation.

**24.6. Raising awareness:** The government should raise public awareness with regard to the existence, causes, types and consequences of corruption, and the steps which can be taken to combat corruption. Such steps which should be taken by government to raise awareness include, without limitation:

- 1) the measures in Benchmark 2 (Authority responsible for preventing corruption)
- 2) commissioning and publishing reports, surveys and brochures
- 3) broadcasting on the media

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- 4) arranging or supporting public information activities and public education programmes, including in school, university and professional qualification curricula.
- 24.7. **Public reporting of corruption:** The law should permit, and the government should promote, and take adequate steps to ensure, that all persons can report suspicions of corruption, in good faith or on reasonable grounds, to the relevant organisation or authority. For such purpose, reporting systems should be established in accordance with Benchmark 21 (Reporting corruption).
- 24.8. **Transparency and freedom of information:**
- 1) Save to the extent contrary to public interest, the law should require, and the government should promote, and take adequate steps to ensure, transparency and freedom of information to the public in relation to:
    - a) public affairs
    - b) the public's right to participate in, report on, comment on and lawfully protest against public affairs.
  - 2) **In relation to government:** Up-to-date information should be published on a freely accessible public website(s):
    - a) to enable the public to have a good understanding and knowledge of:
      - i) the structure, powers, duties, functions, decisions, activities and financing of the government
      - ii) the employment, conduct and disciplining of government public officials (Benchmark 11.22)
      - iii) the laws and regulations governing (i) and (ii) above
    - b) to assist the public in assessing whether the government and government public officials are acting in accordance with their duties and the law.
  - 3) **In relation to public sector organisations, public officials and public sector functions:** Disclosure to the public should be provided in respect of public sector organisations, public officials and public sector functions as provided for in Benchmarks 2–19 and 25.

# Benchmark 25

## International co-operation

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**Principle:** Implement regulations which require formal and informal co-operation between States in relation to the prevention of corruption, public education concerning corruption, the investigation and prosecution of corruption offences, and the recovery and return of the proceeds of crime.

25.1. **Regulations:** Regulations should be implemented which require appropriate formal and informal co-operation between States in relation to the prevention of corruption, public education concerning corruption, the investigation and prosecution of corruption offences, and the recovery and return of the proceeds of crime. This co-operation should include the following by each State:

- 1) **Extradition:** Where extradition arrangements agreed with another territory are in place, assisting in relation to the extradition of a person present in its territory to the other territory for a corruption offence committed by that person.
- 2) **Transfer of sentenced persons:** Considering the transfer to their home territory of persons sentenced to imprisonment for a corruption offence, in order that they may complete their sentences in their home territory.
- 3) **Informal co-operation:** Using, where appropriate, informal co-operation mechanisms before engaging with other States through the formal mutual legal assistance process.
- 4) **Mutual legal assistance:** Affording other States the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to corruption offences, including the sharing of evidence.
- 5) **Transfer of criminal proceedings:** Considering transferring to another State proceedings for the prosecution of a corruption offence, where such transfer is considered to be in the interests of the proper administration of justice.
- 6) **Law enforcement co-operation:** Co-operating closely with other States consistent with their respective domestic legal and administrative systems to enhance the effectiveness of law enforcement action to combat corruption.
- 7) **Joint investigations:** Considering establishing joint investigations with other States.

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- 8) **Special investigative techniques:** Concluding appropriate international agreements or arrangements for the use of special investigative techniques.
  - 9) **Asset recovery:** Assisting in the recovery and return of assets to the jurisdictions from which they were stolen.
  - 10) **Asset verification:** Co-operating to verify asset disclosures made by public officials and to provide information regarding assets not disclosed by public officials.
  - 11) **Beneficial ownership:** Co-operating to provide details of beneficial ownership of assets in the requested jurisdiction.
  - 12) **Sharing information on corruption:** Developing and sharing information on corruption with other States and international and regional organisations, with a view to enhancing best practices to combat corruption and anti-corruption training and education.
  - 13) **Co-operation on civil and administrative matters:** Where appropriate and consistent with the domestic legal system, considering assisting other States in investigations of and proceedings in civil and administrative matters relating to corruption.
  - 14) **Co-operation on laws, regulations and standards:** Co-operating closely with other States consistent with their respective domestic legal and administrative systems to adopt laws, regulations and standards which are effective in combating corruption.
- 25.2. **Central authority:** The government should designate a central authority which has responsibility and power (i) to receive requests for mutual legal assistance related to corruption offences and (ii) to execute such requests or to transmit them to the competent authorities for execution.
- 25.3. **Spirit of co-operation:** The government should co-operate with other States and international and regional organisations in respect of the matters specified in Benchmark 25.1:
- 1) in a spirit of positive co-operation
  - 2) in a timely and efficient manner
  - 3) with the intent of helping to combat corruption.
- 25.4. **Transparency to the public:** Save where contrary to the public interest, the government should disclose on a freely accessible public website the following:
- 1) the international agreements relating to the matters specified in this Benchmark
  - 2) an outline of all international co-operation actions taken by it pursuant to Benchmark 25.1
  - 3) the States and other parties involved in such actions
  - 4) the outcome of such actions.



# Section 4

Guidance to the  
Benchmarks



# Guidance to Benchmark 1

## Corruption offences, sanctions and remedies

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### BM 1 Purpose of Benchmark:

- A) The threat of criminal investigation, liability and sanctions is necessary in order to deter criminal activity. Thus, corrupt conduct, whether in the public or private sectors, should be criminalised and subject to sanctions which are proportionate to the gravity of the offence and which are sufficiently severe to constitute an adequate deterrent.
- B) Both individuals and organisations should be able to incur liability for corruption offences. Some of the most significant corruption, involving huge sums of public sector funds and with significant public detriment, is carried out by public officials who are currently, in some States, protected by immunity, or by private sector organisations which currently, in some States, cannot incur liability. This is inequitable and unjustified.
- C) There should also be no limitation period in respect of prosecution of corruption offences. Individuals and organisations who have deliberately set out to bribe, embezzle, extort, defraud, or abuse their positions of trust, knowing that their actions may or will result in significant physical or financial harm to others, should not be allowed the protection of the expiry of a limitation period. The balance of public interest lies in favour of keeping open indefinitely the possibility of prosecuting such individuals and organisations.
- D) In consequence, Benchmark 1 provides for:
  - a) the criminalisation of 14 types of corrupt conduct (which include the UNCAC offences in Chapter III of UNCAC)
  - b) liability and sanctions applying to all individuals and organisations
  - c) no immunity on grounds that a person is a public official, a public sector organisation or a political party
  - d) no limitation period.
- E) The text of Benchmark 1 is based to a large extent on UNCAC, as UNCAC is the only legally binding universal anti-corruption instrument and the vast majority of United Nations Member States are parties to the Convention.

## BM 1.1 Corruption offences:

### General comparison with UNCAC:

- A) **The UNCAC corruption offences:** There is no universal definition of corruption and thus no universal criteria as to what should constitute a corruption offence. UNCAC does not prescribe any such criteria. UNCAC Articles 15–25 and 27 provide for a spectrum of corruption offences ranging from bribery to laundering the proceeds of any crime. These offences are: bribery of national and foreign public officials and officials of public international organisations (Articles 15 and 16); embezzlement by public officials, trading in influence, abuse of functions by public officials, and illicit enrichment of public officials (Articles 17 to 20); bribery and embezzlement in the private sector (Articles 21 and 22); laundering of the proceeds of crime (Article 23); concealment or retention of the proceeds of crime (Article 24); obstruction of justice (Article 25); and participation in, or attempt or preparation to commit, a corruption offence (Article 27).
- B) **Reasons for including additional corruption offences in Benchmark 1.1:** The Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption recognises that *'States may criminalize or have already criminalized conduct other than the offences listed in this Chapter [i.e. Chapter III of UNCAC] as corrupt conduct'* (A/58/422/Add.1, para 22, quoted in UNODC Legislative Guide to UNCAC (2006), paragraph 179). Benchmark 1.1 includes all of the UNCAC offences but also provides for five further offences: election bribery, extortion, fraud, cartel activity and failure by an organisation to prevent a corruption offence which was committed by an associated person. It was felt necessary to include these additional offences in Benchmark 1.1 as they have similar characteristics involving deception, breach of trust and sometimes abuse of function, and are a serious threat to the proper and fair functioning of society, in the following ways:
- a) **Election bribery** threatens the integrity of the democratic process.
  - b) **Extortion** undermines public and private sector processes by requiring an illicit benefit as a condition of performing a function. This affects processes ranging from those, such as customs clearances and driving licences, where only minor sums may be extorted, to those, such as the issue of completion certificates for major construction projects, where large sums may be extorted.
  - c) **Fraud** permeates and corrupts many processes of the public and private sectors.
  - d) **Cartels** undermine and distort procurement outcomes.

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- e) **Corruption committed on behalf of organisations** damages both the public and private sectors, yet currently in many jurisdictions there is difficulty in convicting organisations for such corruption notwithstanding that their senior managers may have known of and instigated the corruption and notwithstanding that the organisations were one of the primary beneficiaries of the corruption.

The above offences thus warrant the same preventive, detective and deterrent measures as other corrupt conduct.

- C) **Reasons for providing that all the corruption offences listed in Benchmark 1.1 should be criminalised:** UNCAC provides for mandatory criminalisation only in respect of some of the UNCAC offences (see UNODC Legislative Guide to UNCAC (2006), paragraphs 177–179). In contrast to this, Benchmark 1.1 provides that all corruption offences listed in Benchmark 1.1 (which include all the UNCAC offences) should be criminalised. This is because such offences are serious and thus warrant criminalisation in order to allow for sufficiently severe penalties, which in turn would provide for a greater deterrent effect. It would also assist in the harmonisation of criminalisation across States. It is acknowledged that such criminalisation may currently present difficulties for certain States whose laws do not provide for corporate criminal liability or do not allow a reverse burden of proof or do not allow strict liability. In regard to this:
- a) **Re criminal liability for organisations:** See the discussion in Guidance BM 1.2(1), paragraph (B) below.
  - b) **Re the reverse burden of proof:** See the discussion in Guidance BM 1.1(9), paragraph (C) below in relation to illicit enrichment, which is the only Benchmark offence involving a reverse burden of proof.
  - c) **Re strict liability:** See the discussion in Guidance BM 1.1(14), paragraphs (E) and (F) below in relation to the offence in Benchmark 1.1(14) (failure by an organisation to prevent a corruption offence which was committed by an associated person), which is the only Benchmark offence involving strict liability.
- D) **Reasons for extending the offences in Benchmark 1.1 to foreign officials and officials of public international organisations:** UNCAC includes liability for foreign officials and officials of public international organisations only in relation to the bribery offences in UNCAC Article 16. In the other UNCAC offences relating specifically to public officials (i.e. those in Articles 17, 19 and 20: embezzlement, abuse of functions and illicit enrichment), UNCAC refers only to '*public officials*', i.e. only national public officials (see definition in UNCAC Article 2, paragraphs (a), (b) and (c)) and therefore appears not to include foreign officials or

officials of public international organisations. (It is not clear whether Article 18 (Trading in influence) is intended to relate also to foreign public officials and officials of public international organisations as it refers to ‘*public official or any other person*’ committing the offence.) In contrast to this, the Benchmark offences are intended to extend to all public officials, whether national, foreign or of public international organisations, subject to the State having jurisdiction. The rationale for widening the offences in this way is that it would then enable, for example, a foreign public official to be prosecuted in the State where she or he committed the corruption offence. This would be of significant benefit in the fight against corruption as it would cater for the risk that the official would not be prosecuted for this offence in her or his home State (if, for example, she or he wields significant power or if that State has been captured by corrupt elements or if that State’s law does not provide for the necessary jurisdiction) and so would escape justice.

- E) **Outline descriptions of the Benchmark offences and comparison with UNCAC definitions:** The Guidance notes below provide an outline description of each Benchmark offence. These descriptions are explanatory as to the type of conduct that should be criminalised and are not intended to be a definition of the offence. These descriptions do not follow exact UNCAC wording and sometimes go wider than the UNCAC definition (as explained below in relation to the individual offences). It is for each State to decide how to formulate a new offence or amend an existing offence, so as to meet the Benchmark.

#### **BM 1.1(1) Bribery:**

- A) **Outline description of Benchmark offence:** ‘*Where an undue advantage is, directly or indirectly, promised, offered or given to, or solicited or accepted by, any person, with the intention of inducing a person to exercise a function improperly.*’ (This is intended to be descriptive, not a definition. See Guidance BM 1.1, paragraph (E) above.)
- B) In relation to this offence:
- a) Both active and passive bribery should be provided for (i.e. promising, offering or giving a bribe, and soliciting or accepting a bribe), as stated in Benchmark 1.1(15).
  - b) It should also be provided that such bribery may be committed by any individual or organisation, including: public officials, whether national, foreign or of a public international organisation; public sector organisations; and individuals and organisations in the private sector, as stated in Benchmark 1.2(1).
- C) Examples of how organisations may commit this offence include:

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- a) Active bribery: A private sector contractor may decide, at senior management level, to pay a bribe to a public official in order that the contractor obtains a contract or a government permit.
  - b) Passive bribery: A private sector organisation which is responsible for issuing permits or approvals may decide, at senior management level, to accept bribes to issue permits improperly.
  - c) Public sector organisations (for example a state-owned construction company), may bribe or be bribed in the same way as a private sector organisation.
- D) For discussion on criminal liability of organisations, see Guidance BM 1.2(1) below.

### References

- i) UNCAC Articles 15, 16 and 21 provide for bribery offences. However, UNCAC requires mandatory criminalisation only of active and passive bribery of national public officials (Article 15) and active bribery of foreign public officials and officials of public international organisations (Article 16, paragraph 1). It does not require mandatory criminalisation of passive bribery of foreign public officials or officials of public international organisations (Article 16, paragraph 2), or of active or passive bribery in the private sector (Article 21). Benchmark 1.1 provides that all such offences should be criminalised for the reasons given in Guidance BM 1.1, paragraphs (C) and (D) above.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 192–213, 271–279, 298–308
- iii) UK: Bribery Act 2010 and Ministry of Justice Guidance on the Bribery Act 2010

### **BM 1.1(2) Election bribery:**

- A) **Outline description of Benchmark offence:** *‘Where an undue advantage is, directly or indirectly, promised, offered or given to, or solicited or accepted by, any person, with the intention of inducing a voter to vote in a particular manner or to refrain from voting, or inducing a person to stand for election or refrain from standing.’* (This is intended to be descriptive, not a definition. See Guidance BM 1.1, paragraph (E) above.)
- B) In relation to this offence:
  - a) Both active and passive bribery should be provided for (i.e. promising, offering or giving a bribe, and soliciting or accepting a bribe), as stated in Benchmark 1.1(15).
  - b) It should also be provided that both active and passive bribery may be committed by any individual or organisation, including: public

officials, whether national, foreign or of a public international organisation; public sector organisations (e.g. state-owned enterprises); and individuals and organisations in the private sector, as stated in Benchmark 1.2(1).

- C) For discussion on criminal liability of organisations, see Guidance BM 1.2(1) below.

#### References

- i) UNCAC: This offence is not provided for in UNCAC. UNCAC Article 15 provides for bribery of national public officials but election candidates would not fall within this definition. (See definition of public official in UNCAC Article 2, paragraph (a).) Similarly, the private sector bribery offence in UNCAC Article 21 refers only to bribery of individuals working for a private sector organisation and to their breaching their duties. This would not cover bribery of voters or election candidates. This offence is included in Benchmark 1 for the reasons given in Guidance BM 1.1, paragraph (B) above.
- ii) For an example of formulation of this offence, see:
- Kenya: Election Offences Act, section 9 (No. 37 of 2016)

#### **BM 1.1(3) Embezzlement:**

- A) **Outline description of Benchmark offence:** *‘The embezzlement, misappropriation or other diversion by any person of anything of value which was entrusted to that person by virtue of her, his or its position or employment.’* (This is intended to be descriptive, not a definition. See Guidance BM 1.1, paragraph (E) above.)
- B) It should also be provided that this offence may be committed by any individual or organisation. This would therefore include: public officials, whether national, foreign or of a public international organisation; public sector organisations (e.g. state-owned enterprises); and individuals and organisations in the private sector, as stated in Benchmark 1.2(1).
- C) For discussion on criminal liability of organisations, see Guidance BM 1.2(1) below.

#### References

- i) UNCAC Articles 17 and 22 provide for this offence. However, UNCAC requires mandatory criminalisation only of embezzlement by national public officials (the Article 17 offence). It does not require mandatory criminalisation of embezzlement in the private sector (the Article 22 offence). It also does not apply the offence to foreign public officials or officials of public international organisations. Benchmark 1 provides that all such offences should be criminalised and should apply to any person

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(including any public official), for the reasons given in Guidance BM 1.1, paragraphs (C) and (D) above.

- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 214–219 and 309–311

### **BM 1.1(4) Extortion:**

- A) **Outline description of Benchmark offence:** *‘The making of threats by a person (person A) of adverse consequences (which may include physical, financial or administrative harm) to person B or another person unless person B meets the illicit demands of person A.’* (This is intended to be descriptive, not a definition. See Guidance BM 1.1, paragraph (E) above.)
- B) It should also be provided that this offence may be committed by any individual or organisation. This would therefore include public officials, whether national, foreign or of a public international organisation; public sector organisations (e.g. state-owned enterprises); and individuals and organisations in the private sector, as stated in Benchmark 1.2(1).
- C) The extortion may constitute, for example, refusal to provide customs clearance for equipment or materials in circumstances where they should have been cleared, or refusal to make payments or issue certificates that are due, unless illicit payments are made. Demands for facilitation payments may constitute this offence and may frequently be a problem where private sector organisations or members of the public are dealing with public officials.
- D) For discussion on criminal liability of organisations, see Guidance BM 1.2(1) below.

#### References

- i) UNCAC: This offence is not provided for in UNCAC. It is included in Benchmark 1 for the reasons given in Guidance BM 1.1, paragraph (B) above.
- ii) For an example of formulation of this offence, see:
  - Singapore: Penal Code, Chapter 224, sections 383–389

### **BM 1.1(5) Fraud:**

- A) **Outline description of Benchmark offence:** *‘Where a person acts dishonestly, for example by false representation or by concealing information, with intent to make a gain for herself, himself or another, or to cause loss to another.’* (This is intended to be descriptive, not a definition. See Guidance BM 1.1, paragraph (E) above.)
- B) It should also be provided that this offence may be committed by any individual or organisation. This would therefore include: public officials,

whether national, foreign or of a public international organisation; public sector organisations; and individuals and organisations in the private sector, as stated in Benchmark 1.2(1).

- C) For discussion on criminal liability of organisations, see Guidance BM 1.2(1) below.

#### References

- i) UNCAC: This offence is not provided for in UNCAC. It is included in Benchmark 1 for the reasons given in Guidance BM 1.1, paragraph (B) above.
- ii) For examples of formulation of this offence, see:
  - Australia: Criminal Code Act 1995, Volume 1, Schedule, Ch 7, Part 7.3 (Fraudulent Conduct)
  - Canada: Criminal Code (RSC, 1985, c. C-46), section 380 (Fraud)
  - New Zealand: Crimes Act 1961, section 240 (Obtaining by deception or causing loss by deception)
  - Singapore: Penal Code, sections 415–424A (Cheating and Fraudulent Deeds and Disposition of Property)
  - UK: Fraud Act 2006

#### BM 1.1(6) Cartel activity:

- A) **Outline description of Benchmark offence:** *An agreement, by two or more persons, to prevent, restrict or distort competition, including by way of price fixing, market sharing, bid-rigging, or limiting output in relation to the supply of works, products or services.* (This is intended to be descriptive, not a definition. See Guidance BM 1.1, paragraph (E) above.) For purposes of this description, the meaning of relevant terms is as follows:
- a) *‘price fixing’*: to fix or control the price for the supply of works, products or services
  - b) *‘market sharing’*: to allocate sales, territories, customers or markets for the production or supply of works, products or services
  - c) *‘bid-rigging’*: to agree with competitors to not submit a bid, or to withdraw a bid, or to submit a bid whose terms have been agreed with competitors, and where such agreement is not known to the party calling for the bid
  - d) *‘limiting output’*: to fix, maintain, control, prevent, reduce or eliminate the production or supply of works, products or services.
- B) In relation to this offence:
- a) All persons who are party to such agreement should be guilty of the offence.

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- b) It should also be provided that this offence may be committed by any individual or organisation. This would therefore include public officials, whether national, foreign or of a public international organisation; public sector organisations; and individuals and organisations in the private sector, as stated in Benchmark 1.2(1).
- C) Examples of cartel activity by a public sector organisation or public official:
  - a) a bidding state-owned contractor may be involved in cartel activity with other bidding private sector contractors.
  - b) a public official managing a procurement may collude with bidding contractors who are in a cartel so as to allow the contractor chosen by the cartel to win the contract at an inflated price.
- D) For discussion on criminal liability of organisations, see Guidance BM 1.2(1) below.

### References

- i) UNCAC: This offence is not provided for in UNCAC. It is included in Benchmark 1 for the reasons given in Guidance BM 1.1, paragraph (B) above.
- ii) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), page 9: *‘Competition is a key factor for governments (and their citizens) to achieve best value-for-money. ... Importantly, real competition only ensues in the absence of collusive tendering, which represents one of the most prominent examples of corruption in public procurement.’*
- iii) In proposing a bill to criminalise cartel conduct in February 2018, the New Zealand Minister of Commerce and Consumer Affairs stated: *‘I do not believe New Zealand’s existing civil regime provides sufficient disincentives for cartel conduct so we are acting to stop it ... My hope is that the risk of imprisonment acts as a strong deterrent and reflects the seriousness of the harm that can be caused ... this Government wants to take a strong stance against businesspeople who collude against the interests of consumers.’* (Beehive.govt.nz: 15 February 2018)
- iv) For examples of formulation of this offence, see:
  - Australia: Competition and Consumer Act 2010, Part IV, Division 1 (Cartel conduct)
  - Canada: Competition Act, RSC 1985, c. C-34, Part VI, sections 45–47 (Conspiracies, agreements or arrangements between competitors and Bid-rigging)
  - New Zealand: Commerce (Criminalisation of Cartels) Amendment Act 2019, sections 82B to 82E (Criminalisation of cartels)

- Singapore: Competition Act (Cap. 50B), section 34 (Agreements etc. preventing, restricting or distorting competition)
- UK: Enterprise Act 2002, sections 188–191 (Cartel offence)

#### **BM 1.1(7) Trading in influence:**

- A) **Outline description of Benchmark offence:** *‘Where an undue advantage is, directly or indirectly, promised, offered or given to, or solicited or accepted by, a person, with the intention of inducing that person to exercise her or his influence improperly in order to obtain an undue advantage from a public sector organisation or public official for the benefit of any person.’* (This is intended to be descriptive, not a definition. See Guidance BM 1.1, paragraph (E) above.)
- B) In relation to this offence:
- a) Both active and passive trading in influence should be provided for (i.e. promising, offering or giving an undue advantage, and soliciting or accepting an undue advantage), as stated in Benchmark 1.1(15).
  - b) It should also be provided that both active and passive trading in influence may be committed by any individual or organisation, including: public officials, whether national, foreign or of a public international organisation; public sector organisations (e.g. state-owned enterprises); and individuals and organisations in the private sector, as stated in Benchmark 1.2(1).
- C) For discussion on criminal liability of organisations, see Guidance BM 1.2(1) below.

#### **References**

- i) UNCAC Article 18 provides for this offence but does not require its mandatory criminalisation. It also appears not to apply the offence to foreign public officials or officials of public international organisations (although this is not clear, as it refers to *‘public official or any other person’*). Benchmark 1 provides that all such offences should be criminalised and should apply to any person (including any public official), for the reasons given in Guidance BM 1.1, paragraphs (C) and (D) above.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 280–290

#### **BM 1.1(8) Abuse of functions by a public official:**

- A) **Outline description of Benchmark offence:** *‘Where a public official, in the exercise of her or his functions and so as to obtain an undue advantage for herself, himself or another person, fails to act honestly, impartially, transparently, free from improper influence, and in accordance with the*

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*law.* (This is intended to be descriptive, not a definition. See Guidance BM 1.1, paragraph (E) above.)

- B) This abuse of functions would include, for example, where a public official:
- a) commits another corruption offence (e.g. bribery or fraud) in the exercise of her or his public functions, or
  - b) uses her or his power to appoint a relative or an associate to a position without following the proper impartial appointment process and in order to provide a benefit to that relative or associate.

### References

- i) UNCAC Article 19 provides for this offence but does not require its mandatory criminalisation. It also does not apply the offence to foreign public officials or officials of public international organisations. Benchmark 1 provides that all such offences should be criminalised and should apply to any public official, for the reasons given in Guidance BM 1.1, paragraphs (C) and (D) above.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 291–293

### **BM 1.1(9) Illicit enrichment of a public official:**

- A) **Outline description of Benchmark offence:** *‘Where a public official has a standard of living or has or is in control of significant wealth or assets that he or she cannot reasonably explain in relation to her or his lawful income.’* (This is intended to be descriptive, not a definition. See Guidance BM 1.1, paragraph (E) above.)
- B) In establishing this offence, States may choose to allow the unexplained wealth of a public official’s family members, close relatives and close associates to be attributed to the public official where there is evidence to support this, as corrupt public officials may choose to have corrupt funds paid to such persons in an attempt to conceal such funds.
- C) **Reverse burden of proof:** In this offence, the burden of proving that the person’s wealth is not lawfully acquired lies on the public official (rather than the prosecution). This is a reverse burden of proof which may not be provided for in some jurisdictions. However, where there are reasonable grounds to suspect that illicit wealth is held by a public official or person connected with that official and thus likely to have come from public funds, the public interest would lie in favour of allowing a reverse burden of proof in such scenario rather than in protecting the suspect. Such an offence would be a valuable tool in combating corruption. The World Bank states as follows in relation to this offence:

*“The latest publication of the World Bank’s Stolen Asset Recovery Initiative (StAR) takes a long hard look at illicit enrichment, along with the potential benefits and difficulties of criminalizing the offense. The guide – “On the Take: Criminalizing Illicit Enrichment to Fight Corruption,” is based upon the experiences of the forty four countries around the world that have undertaken this move, highlighting both its benefits and difficulties. These countries are among the one hundred and forty signatories to the United Nations Convention against Corruption.*

*The study by StAR sets out the importance that many of the countries give to criminalization as a valuable complement to the traditional toolkit in combating corruption, but it also highlights the challenges they have in pursuing illicit enrichment through the courts. The extensive resources and know-how needed to track detect and preserve the evidence and proceeds of the crime, are often beyond the reach of the authorities in developing states. The illicit enrichment offense is also controversial in some jurisdictions as it can be understood as placing the burden of proof upon the accused and not the prosecution – raising important issues of presumption of innocence and human rights. These are legal and practical challenges that need to be very carefully considered and balanced and are not in this way unique to illicit enrichment. In addition, some countries which are home to financial centres do not recognize illicit enrichment as an offense, further complicating the tracing and recovering assets through mutual legal assistance.*

*Notwithstanding these challenges, “On the Take” reveals the potential of the offense as a tool to fight corruption and help with asset recovery. Easing the process by which the prosecution can convict corrupt officials and confiscate stolen assets, can be a deterrent. Additionally the study illustrates with examples from differing countries with varied legal backgrounds, how – with effective safeguards to protect the rights of the accused – prosecuting illicit enrichment can be done in a way that is compatible with both strong constitutional protections, and international human rights.*

*Developing countries lose an estimated US \$20-40 billion in total each year to corruption. Well designed and properly implemented, illicit enrichment can be an important weapon in the battle to combat this global blight.’ (<https://blogs.worldbank.org/psd/illicit-enrichment-uncovered-and-discovering-the-best-ways-to-fight-it> (2012))*

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### References

- i) UNCAC Article 20 provides for this offence but relates it only to ‘a significant *increase* in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income’. It also does not require the mandatory criminalisation of the offence and does not apply the offence to foreign public officials or officials of public international organisations. In contrast, Benchmark 1 relates the offence to where the public official ‘*has a standard of living or has or is in control of significant wealth or assets that he or she cannot reasonably explain in relation to her or his lawful income*’ (similar to the Hong Kong law – see (iii) below) and provides that such offence should be criminalised and should apply to any public official, for the reasons given in Guidance BM 1.1, paragraphs (C) and (D) above.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 294–297: ‘296. *The establishment of illicit enrichment as an offence has been found helpful in a number of jurisdictions. It addresses the difficulty faced by the prosecution when it must prove that a public official solicited or accepted bribes in cases where his or her enrichment is so disproportionate to his or her lawful income that a prima facie case of corruption can be made. The creation of the offence of illicit enrichment has also been found useful as a deterrent to corruption among public officials.*’
- iii) For example of formulation of such offence, see:
  - Hong Kong: Cap. 201, Prevention of Bribery Ordinance, section 10 (Possession of unexplained property)

### **BM 1.1(10) Laundering of the proceeds of crime:**

- A) **Outline description of Benchmark offence:** ‘*Acquiring, possessing, using, converting, transferring, concealing, or otherwise dealing with property, or disguising its origin, nature or other aspect, while knowing it is the proceeds of crime.*’ (This is intended to be descriptive, not a definition. See Guidance BM 1.1, paragraph (E) above.)
- B) It should also be provided that this offence may be committed by any individual or organisation. This would therefore include: public officials, whether national, foreign or of a public international organisation; public sector organisations (e.g. state-owned enterprises); and individuals and organisations in the private sector, as stated in Benchmark 1.2(1)).
- C) States may also consider criminalising the following:
  - a) the ‘failure to disclose’ offence: which is where persons fail to make disclosures, required by law, to the law enforcement authorities when they know, suspect or have reasonable grounds to suspect that money laundering activity is taking place.

- b) the ‘tipping-off’ offence: which is where persons disclose information (e.g. to the person who is the subject of a money laundering investigation) that is likely to prejudice a money laundering investigation that is taking place.

For examples of the formulation of the above two offences, see the UK Proceeds of Crime Act 2002, sections 330–333 (Failure to disclose and Tipping off offences).

- D) For discussion on criminal liability of organisations, see Guidance BM 1.2(1) below.

#### References

- i) UNCAC Article 23 provides for the laundering of proceeds of crime offence and requires its mandatory criminalisation. In cases of converting or transferring proceeds of crime, the UNCAC definition of the offence requires both knowledge that these are proceeds of crime and an intention to disguise the origin or nature of the property or to help the person who committed the predicate offence to evade justice. The Benchmark description of the offence does not require this latter intention. UNCAC does not provide for the failure to disclose or tipping-off offences (referred to in paragraph (C) above).
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 220–251
- iii) FATF Recommendations: Recommendation 3 (Money laundering offence) and Interpretive Note to Recommendation 3 (pages 32–33)
- iv) UNODC/IMF/Commonwealth Model Provisions (2016), Part IV, section 36 (Money Laundering Offences)

#### **BM 1.1(11) Concealment or retention of property that is the result of a corruption offence:**

- A) **Outline description of Benchmark offence:** *‘Concealing or continuing to retain property, knowing that it is the result of a corruption offence.’* (This is intended to be descriptive, not a definition. See Guidance BM 1.1, paragraph (E) above.)
- B) It should also be provided that this offence may be committed by any individual or organisation. This would therefore include: public officials, whether national, foreign or of a public international organisation; public sector organisations (e.g. state-owned enterprises); and individuals and organisations in the private sector, as stated in Benchmark 1.2(1).
- C) For discussion on criminal liability of organisations, see Guidance BM 1.2(1) below.
- D) Both this offence and the money laundering offence(s) (in Benchmark 1.1(10)) are provided for as separate offences in UNCAC Articles 23 and

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24. They are therefore treated as separate offences in Benchmark 1 so as to be consistent with UNCAC. It should be noted that there may be some overlap between these offences where they relate to concealment of proceeds of a corruption offence.

### References

- i) UNCAC Article 24 provides for this offence but does not require its mandatory criminalisation. Benchmark 1 provides that this offence should be criminalised, for the reasons given in Guidance BM1.1, paragraph (C) above.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 312–314

### **BM 1.1(12) Obstruction of justice:**

- A) **Outline description of Benchmark offence:** *‘Using force or intimidation, or promising, offering or giving an undue advantage, in order to interfere in or influence investigations, evidence, or proceedings concerning a corruption offence.’* (This is intended to be descriptive, not a definition. See Guidance BM 1.1, paragraph (E) above.)
- B) It should also be provided that this offence may be committed by any individual or organisation. This would therefore include: public officials, whether national, foreign or of a public international organisation; public sector organisations (e.g. state-owned enterprises); and individuals and organisations in the private sector, as stated in Benchmark 1.2(1).
- C) Such interference may include bribing or intimidating: (i) witnesses so as to influence or prevent their testimony or production of evidence, or (ii) law enforcement officers so as to discourage proper investigation, prosecution and asset recovery.
- D) For discussion on criminal liability of organisations, see Guidance BM 1.2(1) below.

### References

- i) UNCAC Article 25 provides for this offence and requires its mandatory criminalisation.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 252–261

### **BM 1.1(13) Participating etc. in a corruption offence:**

- A) **Outline description of Benchmark offence:** *‘Participating in, assisting or facilitating, the commission of a corruption offence, or attempting or preparing to commit a corruption offence.’* (This is intended to be descriptive, not a definition. See Guidance BM 1.1, paragraph (E) above.)
- B) It should also be provided that this offence may be committed by any individual or organisation. This would therefore include: public officials,

whether national, foreign or of a public international organisation; public sector organisations (e.g. state-owned enterprises); and individuals and organisations in the private sector, as stated in Benchmark 1.2(1).

- C) For discussion on criminal liability of organisations, see Guidance BM 1.2(1) below.

#### References

- i) UNCAC Article 27 provides for this offence but requires mandatory criminalisation only of participation in a corruption offence (Article 27(1)), and not of attempt or preparation to commit a corruption offence (Article 27(2) and (3)). Benchmark 1 provides that all such offences should be criminalised, for the reasons given in Guidance BM 1.1, paragraph (C) above.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 341–346

#### **BM 1.1(14) Failure by an organisation to prevent a corruption offence which was committed by an associated person:**

- A) **Outline description of Benchmark offence:** *'An organisation commits an offence where an associated person of the organisation commits a corruption offence in order to obtain business or an advantage for that organisation'*. (This is intended to be descriptive, not a definition. See Guidance BM 1.1, paragraph (E) above.)
- B) **'associated person'** is defined in the Benchmark Definitions as *'a person who performs services for or on behalf of an organisation in any capacity including, for example, as a joint venture partner, supplier, subsidiary or personnel of the organisation'*.
- C) **Rationale for this corporate offence:** This offence is included so as to address the difficulty, in some jurisdictions, in convicting organisations for corruption offences with the result that organisations may avoid conviction notwithstanding that they were one of the primary beneficiaries of a corruption offence.
- D) **Gravity of offence:** This offence by the organisation should be treated as being at least of equal gravity to the underlying offence committed by the associated person, as the organisation is intended and is likely to be a primary beneficiary of the offence.
- E) **Strict liability:** In order to establish the organisation's liability for this offence, it is not required to prove that the underlying corruption offence (e.g. a subcontractor of the organisation bribes a public official to award a contract to the organisation) was committed by the organisation. The only proof required is that the underlying offence was committed by an associated person in order to obtain business or an advantage for the

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organisation. Thus, this offence by the organisation is a strict liability offence (subject to the adequate procedures defence – see paragraph (G) below).

- F) **Where jurisdictions do not allow strict liability offences:** Jurisdictions which do not allow strict liability offences may instead formulate the offence, for example, as follows: *‘Where a corruption offence is committed by an associated person of an organisation in order to obtain business or an advantage for that organisation and where the organisation did not have in place adequate procedures to prevent such a corruption offence, then the organisation will be guilty of an offence.’* This then would put the burden on the prosecution of proving both that the associated person committed an underlying corruption offence in order to obtain business or an advantage for the organisation and that the organisation did not have adequate procedures in place. In such cases, in formulating the relevant law, States may also consider: (a) whether lack of adequate procedures can be inferred in certain circumstances; and (b) whether the prosecution could be given power to require the organisation to hand over its procedures (if any) to assist the prosecution in proving whether or not they are adequate.
- G) **Adequate procedures defence:** It is for States to formulate their own defence(s) to the offence in Benchmark 1.1(14). However, the Benchmark provides that it may be a defence or mitigatory factor for the organisation to show that it had in place adequate procedures designed to prevent associated persons from committing such an offence. It is for States to determine the nature of the adequate procedures which would constitute such a defence and States should also provide clarity by publishing guidance on this issue to organisations and to the public. However, such adequate procedures should at minimum meet the requirements of Benchmark 10 (Public sector organisations) and the Annex to the Guidance (Private sector organisations) which respectively provide for anti-corruption management systems to be implemented by public and private sector organisations. Where the corruption offence was committed by, or with the knowledge, consent or connivance of a senior manager of the organisation (see definition in paragraph (H) below), then any procedures in place should be treated as not being adequate. This would in any case be a separate ground for liability, as provided for in Benchmark 1.2(2)(a).
- H) The following terms referred to in paragraph (G) above are defined in the Benchmark Definitions as follows:
- a) **‘senior manager’:** *‘a director, officer or employee of an organisation who has a senior role in the establishment of the policies of the*

*organisation or who manages at high level an important aspect of the organisation's activities. This would include, for example, anyone in top management (as defined in the Benchmark Definitions), a chief financial officer, or functional head of procurement, sales or projects'*

- b) **'top management'**: *'the body or person(s) who control(s) the organisation at the highest level (for example, the board of directors, supervisory council, chief executive, or other top leadership individual(s) or body)'*.
- I) For discussion on criminal liability of organisations, see Guidance BM 1.2(1) below.

#### References

- i) UNCAC: This offence is not provided for in UNCAC. It is included in Benchmark 1 for the reasons given in Guidance BM 1.1, paragraph (B) above.
- ii) Example: UK: Bribery Act 2010, section 7, has a similar offence to the offence in Benchmark 1.1(14). However, the UK Section 7 offence applies only to bribery. Section 7(2) of the Bribery Act provides for an adequate procedures defence.

## BM 1.2 Criminal liability for corruption offences:

### BM 1.2(1) 'In relation to the corruption offences in Benchmark 1.1, criminal liability should be provided for as follows ...':

- A) This Benchmark provision provides that there should be criminal liability for individuals and organisations in relation to corruption offences. This differs from UNCAC which, in Article 26, paragraph 1, requires liability of legal persons for corruption offences to be established but only to the extent that this is consistent with a State's legal principles, and, in Article 26, paragraph 2, provides that liability of legal persons may be civil, administrative or criminal. (See discussion in UNODC Legislative Guide to UNCAC (2006), paragraphs 315–329.)
- B) **Reasons for including criminal liability for organisations in Benchmark:** Some jurisdictions may not provide for criminal liability for organisations. However, organisations are frequently the instigators and primary beneficiaries of corrupt activity and, given the extent of corrupt activity carried out through or under cover of organisations, *'the view has been gaining ground that the only way to remove this instrument and shield of serious crime is to introduce legal liability for legal entities'* (UNODC Legislative Guide to UNCAC (2006), paragraph 315). In order, therefore,

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to combat corruption effectively, the law should provide for criminal liability and sufficient penalty for organisations so as to constitute a sufficient deterrent. There should also be a degree of consistency across States in relation to such liability and penalty so that organisations are not able to choose more lenient jurisdictions in which to incorporate or operate from. The UNODC Legislative Guide to UNCAC (2006) states:

*‘315. Serious and sophisticated crime is frequently committed by, through or under the cover of legal entities, such as companies, corporations or charitable organizations. Complex corporate structures can effectively hide the true ownership, clients or specific transactions related to serious crimes, including the corrupt acts criminalised in accordance with the Convention against Corruption ... Thus, the view has been gaining ground that the only way to remove this instrument and shield of serious crime is to introduce legal liability for legal entities.*

*316. Criminal liability of a legal entity may also have a deterrent effect, partly because reputational damage and monetary sanctions can be very costly and partly because it may act as a catalyst for more effective management and supervisory structures to ensure compliance with the law...’*

*‘327. The concern is not theoretical or simply about potential risks. Legal persons have been found repeatedly to commit business and high-level corruption. Normative standards regarding their liability are indispensable. The Organized Crime Convention and the Criminal Law Convention on Corruption of the Council of Europe provide for criminal or other liability of legal persons relative to the offences of active and passive corruption and money-laundering.’*

*‘335 ... When an individual commits a crime on behalf of a legal entity, it must be possible to prosecute and sanction them both.’*

### References

- i) UNCAC Article 26, paragraphs 1 and 2 require States to adopt measures to provide for the criminal, civil or administrative liability of legal persons to be established in relation to the UNCAC offences to the extent consistent with States’ legal principles. Thus, in providing that there should be criminal liability, the Benchmark goes further than UNCAC.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 315–340
- iii) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019), Recommendation 61:

*‘The legal sanctions for legal entities engaged in corruption involving vast quantities of assets should be effective, proportionate and dissuasive, and established by law.’*

**BM 1.2(2) ‘Organisations should be criminally liable for a corruption offence where ...’:**

This Benchmark provision provides for two bases of criminal liability for organisations. This is consistent with the UNODC Legislative Guide to UNCAC (2006) paragraph 326 which cites a green paper issued by the Commission of the European Communities that provides for two bases of criminal liability for organisations in relation to corruption offences, namely, where the offences are:

- *‘committed on their [the organisations] behalf by any person who exercises managerial authority within them’* or
- *‘where defective supervision or management by such a person made it possible for a person under his authority to commit the offences on behalf of the legal person.’*

States may choose to establish a wider basis of liability for organisations than that set out in this Benchmark.

**BM 1.2(2)(a) ‘the offence was committed by, or with the knowledge, consent or connivance of, a senior manager of the organisation who acted with the intention of obtaining business or an advantage for the organisation’**

The following Benchmark Definitions apply to this Benchmark provision:

- a) **‘senior manager’:** *‘a director, officer or employee of an organisation who has a senior role in the establishment of the policies of the organisation or who manages at high level an important aspect of the organisation’s activities. This would include, for example, anyone in top management (as defined in the Benchmark Definitions), a chief financial officer, or functional head of procurement, sales or projects’.*
- b) **‘top management’:** *‘the body or person(s) who control(s) the organisation at the highest level (for example, the board of directors, supervisory council, a chief executive officer, or other top leadership individual(s) or body)’.*

**References**

- i) UNCAC Article 26
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 315–329
- iii) UK: Crown Prosecution Service, Legal Guidance, Corporate Prosecutions, paragraph 18: This discusses the case of *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 which holds that the mind and will of the company should be identified with *‘the actions of the Board of Directors, the Managing Director and perhaps other superior officers who carry out functions of management and speak and act as the company’.*

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### **BM 1.2(3) ‘Criminal liability of organisations should be without prejudice to the criminal liability of the individuals who committed the corruption offences’:**

#### References

- i) UNCAC Article 26, paragraph 3: The Benchmark provision follows UNCAC.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraph 335: *‘The liability of natural persons who perpetrated the acts, therefore, is in addition to any corporate liability and must not be affected in any way by the latter.’*

### **BM 1.2(4) ‘Where knowledge, intent or purpose are elements of a corruption offence, these should, where reasonable, be inferred from objective factual circumstances’:**

#### References

- i) UNCAC Article 28 provides that knowledge, intent or purpose may be inferred from objective factual circumstances. The Benchmark goes wider than this by providing that they should, where reasonable, be inferred. The rationale for this wider provision is that knowledge, intent or purpose can be difficult to prove in corruption offences and so these should be able to be inferred, where reasonable to do so.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraph 368
- iii) Singapore: Prevention of Corruption Act (Chapter 241), section 8 (Presumption of corruption in certain cases)

### **BM 1.2(5) ‘There should be no statute of limitations period for corruption offences’:**

In committing corruption offences, offenders have set out deliberately to bribe, embezzle, extort, defraud, abuse their positions of trust, or illicitly enrich themselves knowing that their actions may or will result in significant physical or financial harm to others. Such offenders should not be able to escape justice and enjoy the illicit profits they have gained, at the expense of the taxpayer or others, simply due to the expiry of a limitation period. The balance of public interest lies in favour of keeping open indefinitely the possibility of prosecuting such individuals and organisations. The Benchmark therefore provides that there should be no statute of limitations for these offences.

#### References

- i) UNCAC Article 29 provides that there shall be a long statute of limitations period in respect of the UNCAC offences and a longer period, or suspension of the period, where the alleged offender has evaded

the administration of justice. This differs from the Benchmark, which provides for no limitation period in respect of corruption offences.

- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 369–374

## BM 1.3 Jurisdiction for corruption offences:

### BM 1.3(1) Corruption offences committed in the State territory:

#### References

- i) UNCAC Article 42, paragraph 1: The Benchmark provision follows UNCAC.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 491–519.

### BM 1.3(2) Acts or omissions in other territories:

- A) This Benchmark provision provides that jurisdiction should be established for individuals who are State nationals or habitually resident in the State territory, and for organisations incorporated or otherwise constituted in, or carrying on business or part of a business in, the State territory.
- B) States may also wish to provide for a further ground of jurisdiction in respect of persons (individuals or organisations) who otherwise have a close connection with the State in terms of types of citizenship or residency (in the case of individuals) or constitution (in the case of entities). In such cases, it is for States to determine the criteria to establish that there is a close connection. See, for example, the categories of close connection in the UK Bribery Act 2010, section 12(4).

#### References

- i) UNCAC Article 42, paragraphs 2(a)–(d) provide for circumstances where a State may establish jurisdiction over acts or omissions in other territories. The Benchmark provision differs from UNCAC Article 42 as follows:
  - The Benchmark provision caters for Article 42, paragraph 2(b), but goes further than UNCAC in providing that, in such cases, a State should establish jurisdiction. Also the UNCAC habitual residence provision applies only to stateless persons, while the Benchmark applies to any person who is habitually resident in the State.
  - The Benchmark provision does not cater for UNCAC Article 42, paragraphs 2(a), (c) and (d) (which are not mandatory under UNCAC).
  - The Benchmark provision in paragraph 1.3(2)(b) is not included in UNCAC.

## BM 1.4 Immunity from prosecution, and defences and mitigation in relation to corruption offences:

### BM 1.4(1) No immunity for public officials et al:

- A) In order for public functions to be properly performed, it is important to ensure that they are carried out without corruption. There should, therefore, be sufficient deterrent, by way of a real threat of investigation and prosecution of corruption. There is no legitimate justification to allow immunity. To do so would merely provide unwarranted protection for criminal acts, thereby creating a sense of impunity and undermining the public function and public trust and confidence. It is the public function that should be protected from corruption by the public official, not the corrupt public official from liability for such corruption.
- B) This Benchmark thus provides that there should be no immunity from investigation or prosecution, and no jurisdictional privilege, reduction of civil or criminal liability, or reduction of or exemption from sanctions for a corruption offence, on the basis that the person in question is a head of State, a minister, a member of parliament, other public official, a public sector organisation or a political party, or has any political affiliation.
- C) The UNODC Legislative Guide for UNCAC (2006) states in paragraph 387: *‘It would be highly damaging to the legitimacy of the overall anti-corruption strategy ... if corrupt public officials were able to shield themselves from accountability and investigation or prosecution for serious offences.’*

### References

- i) UNCAC: Article 30, paragraph 2 provides that each State *‘shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention’*. In contrast to this, the Benchmark provides for no immunity and so is wider than UNCAC.
- ii) UNODC Legislative Guide for UNCAC (2006), paragraphs 104–106 and 387
- iii) UNODC Technical Guide to UNCAC (2009), pages 85–87: *‘... immunities can create difficulties as they can appear to render public officials effectively above and beyond the reach of the law. It is not unusual for immunity from prosecution to be perceived as the main cause for increased corruption levels as investigations into high-level corruption may be significantly impeded by claims of political immunity. In view of such*

*implications, several States around the world have amended and are to amend their immunity rules.’ (page 85, second paragraph)*

- iv) UNODC Implementation guide and evaluative framework for Article 11, paragraphs 78 and 79 (in relation to the judiciary):

*‘78. ...While the principle that a judge should be free to act upon his or her convictions without fear of personal consequence is of the highest importance for the proper administration of justice, this principle is, of course, without prejudice to the right which an individual should have to compensation from the State for injury incurred by reason of negligence or fraudulent or malicious abuse of authority by a court. Effective remedies should also be provided where such injury is proved to have been caused.*

*79. A key principle in this regard is that a judge should be criminally liable under the general law for an offence of general application committed by him or her and should not be permitted to claim immunity from ordinary criminal process. This principle must apply to corruption offences for which no form of immunity should be granted. Where reasonable cause exists to warrant investigation by police and other public bodies of suspected criminal offences on the part of a judge, such investigations should take their ordinary course, according to law.’ (pages 35 and 36)*

- v) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019), Recommendation 43:

*‘No functional immunity from prosecution should be granted to public officials engaged in corruption involving VQA (Vast Quantities of Assets).’*

#### **BM 1.4(2) Genuine fear as defence or mitigatory factor:**

States may wish to provide for this defence or mitigatory factor. There will be a need to balance between protecting those persons who participated in a corrupt act because they were genuinely in fear and ensuring that guilty persons do not escape justice by falsely claiming that they were in fear. For an illustration of the various factors to be considered when formulating such a defence or mitigation, see <https://www.cps.gov.uk/legal-guidance/defences-duress-and-necessity> where the UK defence of duress is discussed by the UK Crown Prosecution Service.

## **BM 1.5 Criminal and administrative sanctions for corruption offences:**

### **BM 1.5(1) Criminal sanctions for all corruption offences:**

This Benchmark provision provides that sanctions for corruption offences should be:

- a) **criminal:** This is so as to enable sufficiently severe sanctions to be applied.

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- b) **effective and dissuasive:** Such sanctions should be sufficiently severe so as to be an effective deterrent. This means that sanctions should outweigh the benefits of the crime, thus avoiding *‘the perception that certain types of crime “pay”, even if the offenders are convicted’*. (UNODC Legislative Guide to UNCAC (2006), paragraph 376)
- c) **proportionate to the gravity of the offence and to sanctions for other offences of equal gravity:** This is to help ensure fair treatment of offenders across all offences and to guard against the risk that more lenient sanctions may be applied so as to protect certain categories of offender.

### References

- i) UNCAC Article 30, paragraph 1 provides that sanctions should take into account the gravity of the offence. In relation to legal persons, UNCAC Article 26, paragraph 4 allows for sanctions to be non-criminal or criminal and provides that they should be effective, proportionate and dissuasive. The Benchmark provision differs from these UNCAC provisions in that it provides (for the reasons given in (a) to (c) above) that, for individuals and organisations, there should be effective, proportionate and dissuasive criminal sanctions which are proportionate to the gravity of the offence and proportionate to sanctions for other offences of equal gravity.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 375, 376 and 382–385
- iii) UNODC Technical Guide to UNCAC (2009), page 51 (first complete paragraph)

### **BM 1.5(2) Criminal sanctions for individuals convicted of corruption offences:**

#### References

- i) UNCAC Article 30, paragraph 7 provides, in relation to sanctions for individuals convicted of a corruption offence, that States shall consider establishing provisions for disqualification from holding public office or office in an enterprise owned wholly or in part by the State. The Benchmark goes further than UNCAC in that it provides for the following sanctions to be established:
  - **Disqualification from holding any position as a public official (which, as defined in the Benchmark Definitions, would include an officer in an enterprise owned in whole or in part by the State):** This sanction is provided for in UNCAC Article 30, paragraphs 7 (a) and (b) save that these UNCAC provisions are not mandatory. The Benchmark provides for mandatory disqualification, in order

to protect the public function, as well as this being a penalty and deterrent.

- **Disqualification from holding any executive, senior managerial or financial role in any private sector organisation:** This disqualification is not provided for in UNCAC. The Benchmark provides for these sanctions because proper performance of executive, senior managerial and financial roles rely heavily on the integrity of the individual and these roles also help to determine the ethical culture of the organisation. Thus, individuals convicted of corruption should be disqualified from holding such office so as to provide protection for private sector organisations and for the public using the services of private sector organisations, as well as this being a penalty and deterrent.
  - **Confiscation, restitution, fines and custodial sentences:** These sanctions are not provided for in UNCAC. The Benchmark provides for confiscation in order to prevent an offender benefiting from the corruption offence and for restitution to give redress to the victim. Fines and custodial sentences should be applied where these are appropriate to the gravity of the offence so as to constitute a sufficient deterrent.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 382–384
  - iii) Singapore: Prevention of Corruption Act (Chapter 241), sections 5–14 (Offences and penalties)
  - iv) UK: Company Directors Disqualification Act 1986, sections 2(1) and 2(2) (b) (Disqualification on conviction of indictable offence)

### **BM 1.5(3) Criminal sanctions for organisations convicted of corruption offences:**

#### **BM 1.5(3)(b) ‘debarment from participating in public sector contracts or from receiving public sector funds’:**

This could, for example, include conditional non-debarment, debarment with conditional release, debarment for a specified period, or permanent debarment. See, for example: World Bank Sanctioning Guidelines:

<https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/World%20Bank%20Group%20Sanctioning%20Guidelines%20January%202011.pdf>

#### **BM 1.5(3)(e) ‘a deferred prosecution agreement’:**

This is an agreement under which an organisation may, in lieu of being prosecuted for a criminal offence, agree to a fine and/or implementing an anti-corruption programme, with criminal prosecution being reinstated if the organisation reoffends or breaches the sanctions.

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### References

- i) UNCAC Article 26, paragraph 4 requires States to ensure that there are criminal or non-criminal sanctions for legal persons. Thus, it gives an option only for non-criminal sanctions. The Benchmark provision differs from this in that it provides that there should be criminal sanctions for organisations.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraph 336–339
- iii) Canada: Criminal Code (RSC 1985, c. C-46), Part XXII.1 (Remediation agreements)
- iv) UK: Bribery Act 2010, section 11(2) and (3) (Penalties for bribery)
- v) UK: Serious Fraud Office: <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/> (Deferred prosecution agreements)

### **BM 1.5(5) Reduced sanctions or immunity for self-reporting or co-operation:**

In order to assist in the detection, investigation and prosecution of corruption, it is important to encourage persons who have committed a corruption offence to self-report and to co-operate with the investigation or prosecution of that offence and any other corruption offences. This can be done by providing for immunity or reduced sanctions for such persons. However, such immunity or reduced sanctions should be allowed only where it has been assessed that this would be in the best interests of justice, taking into account the gravity of the offence (as provided for in the final paragraph of Benchmark 1.5(5)).

### References

- i) UNCAC Article 37, paragraphs 2–4 provides that States ‘shall consider providing’ for mitigation or immunity where a person provides substantial co-operation in relation to the investigation or prosecution of an UNCAC offence. The Benchmark provision differs from this in that it also includes self-reporting as grounds for reduction of sanctions.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 466–477
- iii) UK: Crown Prosecution Service, Legal Guidance, Queen’s Evidence – Immunities, Undertakings and Agreements

### **BM 1.6 Civil remedies for corruption:**

### References

- i) UNCAC Articles 34 and 35 provide for these requirements.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 455–461

# Guidance to Benchmark 2

## Authority responsible for preventing corruption

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### BM 2 Purpose of Benchmark:

- A) The existence of a body or bodies with overall responsibility for preventing corruption in the public and private sectors greatly assists the combating of corruption.
- B) UNCAC Article 6 provides that a State shall *'in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as (a) implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies; (b) increasing and disseminating knowledge about the prevention of corruption'*.
- C) Benchmark 2 provides for measures in relation to this body.

### BM 2.2 The authority:

States may choose how to allocate the corruption prevention functions. The Benchmark uses the term 'authority' for convenience to mean the authority that exercises these functions. This does not mean that there should necessarily be one separate authority with these functions alone. The functions may be exercised by one or more new or existing authorities, either alone or alongside other responsibilities. Federal States may have such an authority(ies) in each constituent state, in which case there should be provision to ensure common standards and co-operation between those different authorities.

#### References

- i) UNCAC provides that *'States shall ... ensure the existence of a body or bodies, as appropriate, that prevent corruption ...'* (Article 6)
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 52–57
- iii) UNODC Technical Guide to UNCAC (2009), pages 7–12
- iv) UNODC State of Implementation of UNCAC (2017), pages 163–166: *'Most countries have opted for a single or central specialized anti-corruption agency ... either as an independent structure or within the institutional framework of the national ministry of justice, prosecutor general's office or national police service. In federal States, however, there may be central authorities in each of the constituent states...'* (page 163)

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*‘...Moreover, some anti-corruption bodies with investigative and law enforcement powers also fulfil preventive functions, such as education, awareness-raising and coordination ... It is up to the national authorities to decide whether law enforcement and prevention both come under the mandate of a single body or whether preventive functions will be assigned to one or more separate entities.’ (page 164)*

- v) Jakarta Statement on Principles for Anti-Corruption Agencies (2012), paragraph 1: Mandate: *‘ACAs should have clear mandates to tackle corruption through prevention, education, awareness raising, investigation and prosecution, either through one agency or multiple coordinated agencies.’*

### BM 2.3 Responsibilities of the corruption prevention authority in preventing corruption:

#### **BM 2.3(1) ‘The corruption prevention authority should ... develop and establish anti-corruption policies and practices’:**

Policy development should include:

- a) identifying how corruption may take place in all areas of the public and private sectors
- b) assessing the likely frequency and impact of such corruption and the areas particularly vulnerable to corruption
- c) determining policies and practices which are appropriate and proportionate to the corruption risks identified.

#### References

- i) UNCAC: Article 5 requires a State to *‘1. Develop and implement or maintain effective, coordinated anti-corruption policies ...; 2. ... endeavour to establish and promote effective practices aimed at the prevention of corruption...’*
- ii) UNODC Technical Guide to UNCAC (2009), page 10

#### **BM 2.3(2) ‘The corruption prevention authority should ... evaluate the effectiveness of anti-corruption laws and recommend new laws’:**

This function should include:

- a) assessing whether all significant corrupt activity has been or should be criminalised
- b) assessing the sanctions that should apply
- c) assessing whether existing laws appear to be effective

- d) making representations to the legislature for appropriate amendments or additions to the law.

#### References

- i) UNCAC: Article 5 requires a State to ‘3. ... endeavour to periodically evaluate ... legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption’.
- ii) UNODC Technical Guide to UNCAC (2009), page 10
- iii) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019), Recommendation 12:  
*‘EFFECTIVENESS AND MONITORING: The evaluation of anti-corruption and anti-money-laundering systems should continue to go beyond formal compliance with international standards and also assess their effectiveness, including by collecting relevant data and encouraging its publication. Synergies among anti-corruption mechanisms should be further pursued to strengthen the impact of these mechanisms on evaluating and improving the effectiveness of States’ anti-corruption measures.’*

#### **BM 2.3(3) ‘The corruption prevention authority should ... raise public awareness as to the laws relating to corruption offences ...’**

Public awareness could be raised by:

- a) information on the authority’s public website (see Benchmark 2.10)
- b) advertising campaigns on television, radio and printed media
- c) brochures and reports
- d) public posters
- e) training seminars
- f) modules in schools, colleges and universities.

#### **BM 2.3(4) ‘The corruption prevention authority should ... raise public awareness as to the risks of and damage caused by corruption and the measures being taken to prevent it’:**

These functions should include raising public awareness, including by the means listed in Guidance BM 2.3(3), as to:

- a) the functions and activities of the corruption prevention authority and the law enforcement authorities
- b) how corruption may occur in the public or private sectors
- c) the damage that can be caused to society by corruption

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- d) the anti-corruption laws, policies and practices that are in place or being promoted in the public and private sectors (this is covered specifically in Benchmark 2.3(3))
- e) how individuals or organisations, in the public or private sectors, may incur liability for corruption offences
- f) the sanctions that may apply to individuals and organisations who are convicted of corruption offences
- g) judgments and convictions in relation to corruption offences and sanctions imposed (see disclosures under Benchmark 4.13(3)(c)(vii), (ix) and (x))
- h) how individuals and organisations can engage in the fight against corruption
- i) the adoption and implementation of these Benchmarks and other anti-corruption instruments.

### References

- i) UNCAC:
  - Article 6 requires that States ‘ensure the existence of a body or bodies that prevent corruption by ... increasing and disseminating knowledge about the prevention of corruption’.
  - Article 13, paragraph 1 requires that States promote the active participation of persons in the combating of corruption and raise public awareness regarding the risks etc., of corruption.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 61–65
- iii) UNODC Technical Guide to UNCAC (2009), pages 10 and 61–64
- iv) Jakarta Statement on Principles for Anti-Corruption Agencies (2012):
  - ‘1. PUBLIC COMMUNICATION AND ENGAGEMENT: ACAs shall communicate and engage with the public regularly in order to ensure public confidence in its independence, fairness and effectiveness.’
  - ‘3. Encourage ACAs to promote these principles to assist members of the executive and the legislature, criminal justice practitioners and the public in general, to better understand and support ACAs in carrying out their functions.’

### **BM 2.3(5) ‘The corruption prevention authority should ... encourage persons to report suspicions of corruption’:**

Such encouragement should also explain:

- a) the authority’s corruption reporting system under Benchmark 2.9(2)

- b) that persons should make reports only where they believe, in good faith or on reasonable grounds, that there has been corruption
- c) the matters in Benchmark 21.4–21.6 (Reporting corruption).

#### References

- i) UNCAC:
  - Article 13, paragraph 2 requires that the public should have access to ‘*relevant anti-corruption bodies*’ for the reporting of corruption
  - Article 39, paragraph 2 requires that States should consider encouraging reporting of corruption to the ‘*national investigating and prosecuting authorities*’

#### **BM 2.3(6) ‘The corruption prevention authority should ... co-ordinate, oversee, and assess the effectiveness of the implementation of these Benchmarks’:**

In order for the recommendations in Benchmarks 1 to 25 to be effectively implemented across all public sector bodies in the State, an appropriate public sector body should have overall co-ordination responsibility for their implementation. This responsibility is probably most effectively held by the corruption prevention authority. It would not be possible for the corruption prevention authority to ensure the implementation of these Benchmarks. However, it should take responsibility for co-ordinating their implementation, assisting and advising other public sector bodies in their implementation, and monitoring the progress and effectiveness of such implementation.

#### References

- i) UNCAC: Article 6 requires that States ‘*ensure the existence of a body or bodies that prevent corruption by such means as implementing the policies referred to in Article 5 and, where appropriate, overseeing and coordinating the implementation of those policies; ...*’
- ii) Jakarta Statement on Principles for Anti-Corruption Agencies (2012): ‘*3. Encourage ACAs to promote these principles to assist members of the executive and the legislature, criminal justice practitioners and the public in general, to better understand and support ACAs in carrying out their functions.*’

#### **BM 2.3(7) ‘The corruption prevention authority should ... assess the risks of corruption by, on behalf of or against the corruption prevention authority, and take adequate steps to combat such corruption’:**

Assessing these risks and taking adequate preventive steps are provided for in the anti-corruption management system discussed in Guidance BM 2.6 below.

## BM 2.4 Consultation and legislation:

### BM 2.4(1) Consultation:

#### References

- i) UNCAC: Article 5 requires States to ‘4. ... collaborate with each other and with other relevant international and regional organizations in promoting and developing the measures referred to in this article...’
- ii) UNODC Technical Guide to UNCAC (2009), page 10
- iii) Jakarta Statement on Principles for Anti-Corruption Agencies (2012):
  - ‘1. COLLABORATION: ACAs shall not operate in isolation. They shall foster good working relations with state agencies, civil society, the private sector and other stakeholders, including international cooperation
  - ‘2. Encourage ACAs to promote the above principles within their respective agencies, countries and regional networks of ACAs’
  - ‘4. Call upon ACAs to appeal to their respective Governments and other stakeholders to promote the above principles in international fora on anti-corruption.’

## BM 2.6 Anti-corruption management of the corruption prevention authority:

There is a risk of corruption in relation to:

- a) the performance of the corruption prevention authority’s functions (such as the design and implementation of anti-corruption policies), and
- b) the management processes which support those functions (such as procurement of its premises, equipment and resources, the employment of its staff and the management of its contracts and finances).

In order to combat such corruption, the Benchmark provides that the authority should implement an anti-corruption management system in accordance with Benchmark 10 (Public sector organisations) and should employ and manage its personnel in accordance with Benchmark 11 (Public officials).

## BM 2.7 Independence of the corruption prevention authority:

**BM 2.7(1) ‘the corruption prevention authority should be provided with the necessary mandate, powers and financial autonomy; adequate funding, staff and resources; and independence from improper government, political or other influence or interference’:**

- A) The matters in Benchmark 2.7(1) should, subject to adequate accountability, be granted to the authority. This is to help ensure that the authority is able to carry out its functions effectively and free from interference by government, politicians, powerful individuals, companies and other parties who may seek to interfere in the authority's activities by, for example, seeking to block or corruptly influence its corruption prevention policies.
- B) Financial autonomy should include an allocated adequate budget over which the authority has management and control subject to full accountability and transparency and compliance with accounting and auditing standards.

#### References

- i) UNCAC Article 6, paragraph 2 requires that the anti-corruption body should have the necessary independence, freedom from undue influence, material resources and staff to enable it to carry out its functions effectively.
- ii) UNODC Technical Guide to UNCAC (2009), page 11 (first and second paragraphs) states, in relation to anti-corruption bodies: *'The legislative framework should ensure operational independence of the body or bodies so that it or they may determine its or their own work agenda and how it or they perform their mandated functions. In addressing independence, consideration would need to be given to the following issues: ... suitable financial resources and remuneration for staff; an appropriate budget ...'*
- iii) Jakarta Statement on Principles for Anti-Corruption Agencies (2012), paragraph 1 recommends the following principles to ensure the independence and effectiveness of ACAs:
- *'MANDATE: ACAs shall have clear mandates to tackle corruption through prevention, education, awareness raising, investigation and prosecution, either through one agency or multiple coordinated agencies*
  - *PERMANENCE: ACAs shall, in accordance with the basic legal principles of their countries, be established by proper and stable legal framework, such as the Constitution or a special law to ensure continuity of the ACA*
  - *REMUNERATION: ACA employees shall be remunerated at a level that would allow for the employment of sufficient number of qualified staff*
  - *AUTHORITY OVER HUMAN RESOURCES: ACAs shall have the power to recruit and dismiss their own staff according to internal clear and transparent procedures*

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- *ADEQUATE AND RELIABLE RESOURCES: ACAs shall have sufficient financial resources to carry out their tasks, taking into account the country’s budgetary resources, population size and land area. ACAs shall be entitled to timely, planned, reliable and adequate resources for the gradual capacity development and improvement of the ACA’s operations and fulfilment of the ACA’s mandate*
- *FINANCIAL AUTONOMY: ACAs shall receive a budgetary allocation over which ACAs have full management and control without prejudice to the appropriate accounting standards and auditing requirements.’*

**BM 2.7(2) ‘the head of the corruption prevention authority should be employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials) and the following provisions’:**

The head of the corruption prevention authority has a critical role in helping to shape the State’s anti-corruption policies and activities and in overseeing their implementation. It is, therefore, essential that measures are taken to help ensure that no corrupt appointment is made and that, once appointed, the head of the authority operates with integrity and free from improper influence. To help ensure this, the Benchmark provides that the head of the authority should be employed, trained, and disciplined, and comply with a code of conduct, in accordance with Benchmark 11 (Public officials) and be protected from improper influence or dismissal by the provisions of Benchmark 2.7(2)(a) and (b), as explained below.

**BM 2.7(2)(a) ‘all processes and decisions required under Benchmark 11 or (b) below, in relation to the head of the corruption prevention authority, should be conducted and taken by an independent body’:**

In order to help ensure the independence of the head of the corruption prevention authority, the Benchmark provides that all processes and decisions under Benchmark 11 and Benchmark 2.7(2)(b), relating to the employment, training, conduct, disciplining and dismissal of the head of the authority, should be conducted and made by an independent body. It is for States to determine how to establish such a body. The criteria for selection and dismissal of its members should be fair and impartial. The selection and dismissal criteria and processes, the identity and qualifications of the selected and dismissed members, and the reasons for their selection or dismissal, should be publicly declared. Members of this body should not have any conflict of interest. The body should not be controlled by government members and so should either not have any government members or, where there are government members, they should be outnumbered by members of equivalent seniority who have no government connection. Where government or parliament has any right to appoint or dismiss members to or from this body,

this should only be allowed based on independent, impartial and transparent procedures.

#### References

- i) UNODC State of Implementation of UNCAC (2017), page 166 states, in relation to law enforcement heads (under UNCAC Article 36), that there should be ‘*constitutional guarantees of their independence and the manner of appointment and removal from office of their members and leaders (e.g., by parliamentary decision after open, consultative procedures)*’.
- ii) UNODC Technical Guide to UNCAC (2009), page 11 (first and second paragraphs) states: ‘*In addressing independence [for anti-corruption bodies], consideration would need to be given to the following issues: Rules and procedures governing ... the appointment, tenure and dismissal of the Director and other designated senior personnel; the composition of the body and/or any supervisory board; ... ; suitable recruitment, appointment/election, evaluation and promotion procedures...*’
- iii) Jakarta Statement on Principles for Anti-Corruption Agencies (2012), paragraph 1 recommends the following principles to ensure the independence and effectiveness of ACAs:
  - ‘*APPOINTMENT: ACA heads shall be appointed through a process that ensures his or her apolitical stance, impartiality, neutrality, integrity and competence.*’

**BM 2.7(2)(b) ‘the head of the corruption prevention authority should have security of tenure for a reasonable prescribed maximum period and be suspended or dismissed only for reasons of etc. ....’:**

Having security of tenure allows the head of the corruption prevention authority to act without fearing that her or his actions may displease a political figure and therefore lead to her or his dismissal.

#### References

- i) UNODC State of Implementation of UNCAC (2017), page 166 which states, in relation to the law enforcement heads (under UNCAC Article 36), that there should be ‘*constitutional guarantees of their independence and the manner of appointment and removal from office of their members and leaders (e.g., by parliamentary decision after open, consultative procedures)*.’
- ii) UNODC Technical Guide to UNCAC (2009), pages 53, 54 and 116:  
Page 116 (second paragraph): ‘*The independence of specialized authorities should be governed by legislation, ... States Parties may want to consider*

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*fixed-term appointments [of senior management] to avoid dependency on the executive for reappointment.'*

- iii) Jakarta Statement on Principles for Anti-Corruption Agencies (2012), paragraph 1 recommends the following principles to ensure the independence and effectiveness of ACAs:
  - *'REMOVAL: ACA heads shall have security of tenure and shall be removed only through a legally established procedure equivalent to the procedure for the removal of a key independent authority specially protected by law (such as the Chief Justice).'*

## BM 2.8 Accountability of the corruption prevention authority:

- A) Despite provisions for its independence, the corruption prevention authority should be fully accountable and transparent in the performance of its functions. Benchmark 2.8 provides for this accountability and transparency, together with Benchmark 2.9 (Complaints and reporting systems) and Benchmark 2.10 (Transparency).
- B) The UNODC Technical Guide to UNCAC (2009), page 11 (first, second and fourth paragraphs) provides as follows:

*'In addressing independence, consideration would need to be given to the following issues: ... periodic reporting obligations to another public body, such as the legislature; formal paths to allow cooperation and exchange of information with other agencies; arrangements to determine the involvement of civil society and the media... Independence should not be perceived as contradictory to accountability. Anti-corruption bodies should operate within an established governance system that includes appropriate and functioning checks and balances and in which nobody and nothing is above the law. Independence needs to be balanced by mechanisms to ensure the transparency and accountability of the body or bodies, such as through reporting to or being the subject of review by competent institutions, such as parliamentary committees, or by being subject to reporting to parliament, annual external audit and where relevant to the courts through judicial review...'*

### References

- i) UNCAC:
  - UNCAC Article 10 provides that each State should take measures as necessary to enhance transparency in its public administration.
  - UNCAC Article 10, paragraph (c) provides that the administration should publish periodic reports on the risks of corruption in the public administration.

- ii) UNODC Technical Guide to UNCAC (2009), page 11: (quoted above)
- iii) Latimer House Principles, Principle VII(a): *‘Executive accountability to parliament: Parliaments and governments should maintain high standards of accountability, transparency and responsibility in the conduct of all public business. Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to Parliament.’*
- iv) Jakarta Statement on Principles for Anti-Corruption Agencies (2012), paragraph 1: Internal Accountability, External Accountability, Public Reporting

## BM 2.9 Complaints and reporting systems:

- A) In order that complaints and reports are properly addressed, both systems should ensure that complaints and reports, as appropriate, are made to and dealt with by persons who are sufficiently independent from those against whom the complaints or reports are being made.
- B) For guidance on implementation of these systems, see:
  - a) **For the complaints system:** Guidance BM 10.19(1) (Public sector organisations)
  - b) **For the reporting system:** Benchmark 21 (Reporting corruption) and Guidance BM 21.

### References

- i) UNCAC: UNCAC Article 13, paragraph 2 requires that the public should have access to *‘relevant anti-corruption bodies’* for the reporting of corruption.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraph 64 (Reporting)
- iii) UNODC Technical Guide to UNCAC (2009), page 64 (Reporting)

## BM 2.10 Transparency to the public:

- A) This Benchmark provision provides that the corruption prevention authority should proactively provide information to the public, in addition to responding to requests for information. This will facilitate the public’s understanding of the authority and its functions and activities and help the public to hold the authority to account. It will also help to build public confidence in the public sector and to create a culture in the public sector where the provision of information to the public is part of its regular function.

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- B) **‘Save to the extent contrary to the public interest’:** This would include, for example, not disclosing confidential details of ongoing corruption investigations until the investigations are complete. In the Benchmarks Definitions, ‘public interest’ is defined as *‘the interests of the public at large as objectively and independently determined’*. The public interest exception would not allow the withholding of information simply because it may be embarrassing to an individual or organisation (e.g. if it shows a failure to manage a process appropriately or effectively).
- C) **‘promptly’:** Information should be published as soon as possible after it becomes available so that, as far as possible, the public has current information enabling it to monitor the relevant matters as they proceed. In this way, any ongoing corruption or risk of corrupt activity in such matters may be able to be prevented, or at least identified early.

## References

- i) UNCAC: The following provisions provide that *‘Each State Party shall, in accordance with the fundamental principles of its legal system:’*
- UNCAC Article 5, paragraph 1:  
*‘... develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of ... transparency and accountability.’*
  - UNCAC Article 6, paragraph 1(b):  
*‘... ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as: ... (b) Increasing and disseminating knowledge about the prevention of corruption.’*
  - UNCAC Article 10:  
*‘... take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia: (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public; (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and (c) Publishing information,*

*which may include periodic reports on the risks of corruption in its public administration.'*

- UNCAC Article 13, paragraph 1(b):

*'... take appropriate measures, ... , to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as: (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes; (b) Ensuring that the public has effective access to information.'*

- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 58–65
- iii) UNODC Technical Guide to UNCAC (2009), pages 42–46 and 63
- iv) Jakarta Statement on Principles for Anti-Corruption Agencies (2012), paragraph 1: Public Reporting and Public Communication and Engagement

## Guidance to Benchmark 3

### Investigation, prosecution, asset recovery and policing

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#### BM 3 Purpose of Benchmark:

In relation to law enforcement, corruption should be addressed in two ways:

- a) All law enforcement should be carried out in a manner which is free from corruption. Such corruption may include, for example, extortion of money from suspects, tampering with or destroying evidence, bribery to influence investigations or prosecutions, or providing favoured treatment to particular suspects or accused persons.
- b) Corruption offences should be effectively investigated and prosecuted.

This Benchmark provides for appropriate measures to enable the above.

#### BM 3.1 Regulations:

##### References

- i) UNODC Technical Guide to UNCAC (2009), page 52 (fourth paragraph): *‘Measures may be required to ensure that prosecutors perform their duties in accordance with the law, and in a fair, consistent and expeditious manner, as well as respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.’*
- ii) The United Nations Guidelines on the Role of Prosecutors, Guideline 12

#### BM 3.2 Law enforcement authorities:

States may choose how to allocate the law enforcement functions. The Benchmark uses the term ‘authorities’ for convenience to mean the authorities that exercise those functions. This does not mean that there should necessarily be a number of authorities with these functions alone. The functions may be exercised by one or more new or existing authorities, either alone or alongside other responsibilities. Federal States may have such an authority (or authorities) in each constituent state, in which case there should be provision to ensure common standards and co-operation between those different authorities.

## References

- i) UNCAC Article 36 provides that there should be ‘*a body or bodies or persons*’ specialised in combating corruption through law enforcement.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 57 and 462–465
- iii) UNODC Technical Guide to UNCAC (2009), pages 113–115
- iv) UNODC State of Implementation of UNCAC (2017), pages 163–166: ‘*Most countries have opted for a single or central specialized anti-corruption agency ... either as an independent structure or within the institutional framework of the national ministry of justice, prosecutor general’s office or national police service. In federal States, however, there may be central authorities in each of the constituent states. These anti-corruption entities are empowered to various degrees to investigate and/or prosecute corruption-related offences, to coordinate national operations, to pursue the return of property and proceeds arising from corruption and to centralize information relating to the modes and methods used to commit the corruption-related offences...*’ (page 163, last paragraph) ‘*... Moreover, some anti-corruption bodies with investigative and law enforcement powers also fulfil preventive functions, such as education, awareness-raising and coordination ... It is up to the national authorities to decide whether law enforcement and prevention both come under the mandate of a single body or whether preventive functions will be assigned to one or more separate entities.*’ (pages 163–164)
- v) Jakarta Statement on Principles for Anti-Corruption Agencies (2012), paragraph 1: Mandate: ‘*ACAs should have clear mandates to tackle corruption through prevention, education, awareness raising, investigation and prosecution, either through one agency or multiple coordinated agencies.*’

### BM 3.3 Responsibilities of the law enforcement authorities in combating corruption:

#### BM 3.3(3) ‘... the law enforcement authorities should ... encourage persons to report suspicions of corruption’

Such encouragement should also explain:

- a) the authority’s corruption reporting system under Benchmark 3.21(2)
- b) that persons should make reports only where they believe, in good faith or on reasonable grounds, that there has been corruption
- c) the matters in Benchmark 21.4–21.6 (Reporting corruption).

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### References

- i) UNCAC:
  - Article 13, paragraph 2 requires that the public should have access to ‘*relevant anti-corruption bodies*’ for the reporting of corruption.
  - Article 39, paragraph 2 requires that States should consider encouraging reporting of corruption to the ‘*national investigating and prosecuting authorities*’.
- ii) UNODC Technical Guide to UNCAC (2009), page 64, Section II.8 and pages 123–124: Re UNCAC Article 39 and reporting.
- iii) Jakarta Statement on Principles for Anti-Corruption Agencies (2012), paragraph 1: Public Communication and Engagement and paragraphs 2–4.

**BM 3.3(6) ‘... the law enforcement authorities should ... assess the risks of corruption by, on behalf of or against the law enforcement authorities, and take adequate steps to combat such corruption’:**

Assessing these risks and taking adequate preventive steps are provided for in the anti-corruption management system discussed in Guidance BM 3.5 below.

## BM 3.4 Overriding duty of the law enforcement authorities and their personnel:

**‘In carrying out their responsibilities, the law enforcement authorities should act ... impartially’:**

### References

- i) UNODC Technical Guide to UNCAC (2009), page 54: ‘*Generally, prosecutors should perform their duties without fear, favour or prejudice and in particular carry out their functions impartially.*’
- ii) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraph 144

## BM 3.5 Anti-corruption management of the law enforcement authorities:

There is a risk of corruption in relation to:

- a) the performance of law enforcement functions (such as dealing with suspects or evidence, or the conduct of investigations or prosecutions), and

- b) the management processes which support those functions (such as procurement of premises, equipment and resources, the employment of staff and the management of contracts and finances).

In order to combat such corruption, the Benchmark provides that the authorities should implement an anti-corruption management system in accordance with Benchmark 10 (Public sector organisations) and should employ and manage their personnel in accordance with Benchmark 11 (Public officials).

#### References

- i) UNCAC: Article 11, paragraph 2 requires measures to be taken to strengthen the integrity of, and prevent corruption in, the prosecution services.
- ii) UNODC Technical Guide to UNCAC (2009), pages 52–54, Sections II.4–II.6

## BM 3.6 Independence of the law enforcement authorities:

**BM 3.6(1) ‘the law enforcement authorities should be provided with the necessary mandate, powers and financial autonomy; adequate funding, staff and resources; and independence from improper government, political or other influence or interference’:**

- A) The matters in Benchmark 3.6(1) should, subject to adequate accountability, be granted to the authorities. This is to help ensure that the authorities are able to carry out their functions effectively and free from interference by government, politicians, powerful individuals, companies and other parties who may seek to interfere in the authorities’ activities by, for example, seeking to block or corruptly influence an investigation or prosecution.
- B) Financial autonomy should include an allocated adequate budget over which the authorities have management and control subject to full accountability and transparency and compliance with accounting and auditing standards

#### References

- i) UNCAC Article 36 provides that the law enforcement body or bodies should have the necessary independence, freedom from undue influence, material resources and staff to be able to carry out their functions effectively.
- ii) UNODC State of Implementation of UNCAC (2017), page 166: ‘... *Among the elements assessed regarding the implementation of article 36*

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*are the resources, budget and fiscal autonomy of the bodies concerned, the existence of constitutional guarantees of their independence ...'*

iii) UNODC Legislative Guide to UNCAC (2006), paragraph 464

**BM 3.6(2) 'the heads of the law enforcement authorities should be employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials) and the following provisions':**

The heads of the law enforcement authorities have an important role in determining which investigations, prosecutions and asset recovery actions should be initiated, continued or terminated, and in ensuring that the authorities carry out their functions effectively and free from corruption. Measures should, therefore, be taken to help ensure that no corrupt appointments are made and that, once appointed, the heads of the authorities operate with integrity and free from improper influence. To help ensure this, the Benchmark provides that the heads of the authorities should be employed, trained, and disciplined, and comply with a code of conduct, in accordance with Benchmark 11 (Public officials) and should be protected from improper influence or dismissal by the provisions of Benchmark 3.6(2)(a) and (b), as explained below.

**BM 3.6(2)(a) 'all processes and decisions required under Benchmark 11 or (b) below, in relation to the heads of the law enforcement authorities, should be conducted and taken by an independent body':**

In order to help ensure the independence of the heads of the law enforcement authorities, the Benchmark provides that all processes and decisions under Benchmark 11 and Benchmark 3.6(2)(b), relating to the employment, training, conduct, disciplining and dismissal of the heads of the authorities should be conducted and made by an independent body. It is for States to determine how to establish such a body. The criteria for selection and dismissal of its members should be fair and impartial. The selection and dismissal criteria and processes, the identity and qualifications of the selected and dismissed members, and the reasons for their selection or dismissal, should be publicly declared. Members of this body should not have any conflict of interest. The body should not be controlled by government members and so should either not have any government members or, where there are government members, they should be outnumbered by members of equivalent seniority who have no government connection. Where government or parliament has any right to appoint or dismiss members to or from this body, this should only be allowed based on independent, impartial and transparent procedures.

## References

- i) UNODC State of Implementation of UNCAC (2017), page 166: ‘... Among the elements assessed regarding the implementation of article 36 are ... the manner of appointment and removal from office of their members and leaders (e.g., by parliamentary decision after open, consultative procedures).’
- ii) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraph 150
- iii) UNODC Technical Guide to UNCAC (2009), pages 53, 54 and 116:
  - Page 11: ‘In addressing independence [for anti-corruption bodies], consideration would need to be given to the following issues: Rules and procedures governing ... the appointment, tenure and dismissal of the Director and other designated senior personnel; the composition of the body and/or any supervisory board; ... ; suitable recruitment, appointment/election, evaluation and promotion procedures...’
  - Page 116 (second paragraph): ‘The independence of specialized authorities should be governed by legislation, whereby the recruitment, appointment, disciplinary and removal criteria for the senior management are clearly established (one possible model to follow may be the terms governing the judiciary). States Parties may want to consider fixed-term appointments to avoid dependency on the executive for reappointment.’
- iv) UNODC and IAP Guide on the Status and Role of Prosecutors (2014): pages 9–12
- v) Jakarta Statement on Principles for Anti-Corruption Agencies (2012), paragraph 1 recommends the following principles to ensure the independence and effectiveness of ACAs:
  - ‘APPOINTMENT: ACA heads shall be appointed through a process that ensures his or her apolitical stance, impartiality, neutrality, integrity and competence.’

**BM 3.6(2)(b) ‘heads of the law enforcement authorities should have security of tenure for a reasonable prescribed maximum period and be suspended or dismissed only for reasons of etc. ...?’:**

Having security of tenure allows the heads of the law enforcement authorities to act without fearing that their actions may displease a political figure and therefore lead to their dismissal.

## References

- i) UNODC State of Implementation of UNCAC (2017), page 166 which states, in relation to the law enforcement heads (under UNCAC Article 36), that there should be ‘constitutional guarantees of their independence

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*and the manner of appointment and removal from office of their members and leaders (e.g., by parliamentary decision after open, consultative procedures)’.*

- ii) UNODC Technical Guide to UNCAC (2009), pages 53, 54 and 116:
  - Page 116 (second paragraph): *‘The independence of specialized authorities should be governed by legislation, ... States Parties may want to consider fixed-term appointments [of senior management] to avoid dependency on the executive for reappointment.’*
- iii) Jakarta Statement on Principles for Anti-Corruption Agencies (2012), paragraph 1 recommends the following principles to ensure the independence and effectiveness of ACAs:
  - *‘REMOVAL: ACA heads shall have security of tenure and shall be removed only through a legally established procedure equivalent to the procedure for the removal of a key independent authority specially protected by law (such as the Chief Justice).’*

## BM 3.7 Decisions regarding commencement, conduct and termination of law enforcement processes:

### BM 3.7(2) Guidelines:

- A) **Guidelines:** Guidelines as required under Benchmark 3.7(2) would help to prevent the law enforcement authorities from making arbitrary or corrupt decisions, and would also enable the authorities to resist government or political pressure to initiate or stop a law enforcement process for corrupt reasons. (See, for example, the following published guidelines: the UK Prosecution Code, the Prosecution Policy of Australia’s Federal Prosecution Service (CDPP) and Canada’s PPSC DESKBOOK Directives of the Attorney General and Guidelines of the Director of Public Prosecutions.)
- B) **Guidelines should ‘relate only to matters of evidence or public interest’:** Evidence and public interest should be the applicable bases for deciding whether to investigate or prosecute an offence. (These are the criteria specified, for example, in: the UK Prosecution Code, the Prosecution Policy of Australia’s Federal Prosecution Service (CDPP) and Canada’s PPSC DESKBOOK Directives of the Attorney General and Guidelines of the Director of Public Prosecutions.) Public interest should be determined according to objective criteria as to the public interest at large (which should include consideration of the interests of the accused and the victim).

- C) **Decisions ‘should not be influenced by considerations of national economic interest, the potential effect upon relations with another State, or the identity of the individuals or organisations that would be the subject of or affected by the investigation or prosecution’:** This Benchmark provision is based on Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions which provides that: *‘Investigation and prosecution of the bribery of a foreign public official ... shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.’* If such considerations were allowed to influence prosecutorial discretion, this could, for example, result in the condoning of bribery where the rulers of a State demand significant bribes to allow certain types of trade or to enable contractors to win contracts. This would not be acceptable and should not be justified in terms of protecting trade or economic interests.

#### References

- i) UNCAC Article 30, paragraph 3 provides that any discretionary legal powers relating to the prosecution of corruption offences should be *‘exercised so as to maximise effectiveness of law enforcement and with due regard to the need to deter the commission of such offences’*.
- ii) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015):
  - Paragraph 143: *‘The decision whether or not to commence a prosecution should not be motivated by improper considerations, but by the interests of justice. Political advantage or disadvantage, or factors such as the gender, colour, race, religion, political opinion, sexual orientation or ethnic origin of the suspected person or the victim, are wholly irrelevant.’*
  - See also paragraphs 157–172
- iii) UNODC Technical Guide to UNCAC (2009), pages 52–53, Sections II.4–II.6
- iv) OHCHR Guidelines on the Role of Prosecutors (1990): Guideline 17: *‘In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.’*
- v) Article 5 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (quoted under paragraph (C) above).

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**BM 3.7(3) Independence:**

- A) Decisions regarding whether to investigate, prosecute or recover assets, and how to conduct such processes, should be made independently by the law enforcement authorities so that such decisions are not influenced by political, executive or other considerations or persons. Such influence could enable a corrupt government to block a prosecution of members of government or of persons favoured by members of government, or to require a prosecution to be brought so as to victimise political opponents. It could also affect the conduct of a prosecution; for example by determining that particular evidence should not be made available or that a witness should not be called.
- B) As stated in paragraph (A) above, it is preferable that the executive should have no involvement in law enforcement decisions and processes. However, where a State wishes to retain power for the executive to give instructions regarding a law enforcement process, then in such a case the executive should be bound by the same criteria as would have been applied by the law enforcement authorities, and such instructions should be transparent with full reasons given. Also, unless public interest requires otherwise, such instructions, together with full justification for such instructions, should be made available to the public.
- C) In relation to this issue, the IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (1999), Standard 2, states as follows:
- ‘2. Independence*
- 2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.*
- 2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be: transparent; consistent with lawful authority; subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.*
- 2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.’*
- D) The UNODC and IAP Guide on the Status and Role of Prosecutors (2014) states:
- ‘Independence of prosecutorial decision-making is recognized as being necessary as prosecutors play an important role and functions in relation to the executive branch. An independent prosecution service helps ensure that the Government and the administration are held to account for*

*their actions. In order to fulfil this role and ensure the completely free and unfettered exercise of its independent prosecutorial judgement, a prosecution service cannot be party to inappropriate connections with other branches of government, as that can lead to the prosecution service being subject to inappropriate influences from those other branches. Prosecutorial independence thus serves as the guarantee of impartiality, which in turn leads to a transparent and robust prosecution service with strong ethics and integrity based on the rule of law.’ (page 10, last paragraph – page 11)*

*‘Instructions to prosecutors from outside sources are particularly sensitive, as they can potentially give rise to actual or perceived abuse and improper influence. It is suggested that instructions given by the executive branch to the prosecution service be guided by the Constitution or by legislation. Legislation, guidelines, and procedures must safeguard prosecutorial independence. If outside authorities are legally mandated to give general instructions (such as giving priority to certain types of crime) or specific instructions to prosecutors (including instructions to institute or terminate specific proceedings), such instructions must be consistent with lawful authority and be given in a transparent and accountable manner.’ (page 16, paragraph (d))*

#### References

- i) UNCAC Article 36 provides that the law enforcement body or bodies or persons specialising in combating corruption should have the necessary independence, freedom from undue influence, material resources and staff to be able to carry out their functions effectively.
- ii) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraph 144: *‘A prosecutor should not be subject to direction from any external source...’*
- iii) UNODC Legislative Guide to UNCAC (2006), paragraph 464
- iv) UNODC Technical Guide to UNCAC (2009), pages 53, 54 and 116:
  - Page 53 (second paragraph): *‘As public officials, able to carry out their professional responsibilities independently ..., prosecutors should be protected against arbitrary action by governments and from compliance with an unlawful order or an order which is contrary to professional standards or ethics.’*
  - Page 54 (second paragraph): *‘Generally, prosecutors should perform their duties without fear, favour or prejudice and in particular carry out their functions impartially.’*
- v) UNODC State of Implementation of UNCAC (2017), page 166 (second paragraph)

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- vi) IAP Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (1999), Standard 2 (quoted in paragraph (C) above)
- vii) UNODC and IAP Guide on the Status and Role of Prosecutors (2014), pages 9–12 and 16 (partly quoted in paragraph (D) above).

### **BM 3.7(4) Decisions to be written and made public:**

Unless contrary to the public interest, law enforcement guidelines, full reasoned decisions regarding commencement, conduct or termination of law enforcement processes, and any instructions given by government in relation to such decisions should be disclosed to the public. Without such transparency, the public would have no means of assessing whether law enforcement processes are being carried out properly and without corruption. Decisions not to prosecute would be entirely unaccountable, as there would be no case to be heard in court and, even where a decision to prosecute was made, sufficient accountability would not necessarily be provided by the courts as the courts may or may not scrutinise the decision to prosecute or may or may not do so adequately. Consequently, the public should be enabled to assess all prosecutorial decisions by being provided with the disclosures required under Benchmark 3.7(4). The exception of public interest should apply only in specific cases of genuine public interest which necessitate non-disclosure. It should not be used unjustifiably as a general blanket reason not to provide the disclosures under Benchmark 3.7(4).

#### References

- i) Jakarta Statement on Principles for Anti-Corruption Agencies (2012), paragraph 1: *‘EXTERNAL ACCOUNTABILITY: ACAs shall strictly adhere to the rule of law and be accountable to mechanisms established to prevent any abuse of power.’*

### **BM 3.8 Processes vulnerable to corruption:**

- A) Certain law enforcement activities will be particularly vulnerable to corruption because:
  - a) they are activities (such as dealing with evidence, the decision to prosecute, or the presentation of a case in court) which can significantly alter the outcome of an investigation or prosecution,
  - b) they involve persons who are in positions which make them vulnerable to extortion (such as suspects, witnesses, or people stopped for alleged traffic or drug offences, etc.), or
  - c) they involve dealing with money or assets (such as in asset recovery).

- B) Such vulnerable activities would include the following activities:
  - a) the decision whether to initiate, continue or terminate a law enforcement process
  - b) interviews with suspects or witnesses
  - c) collection, recording and safeguarding of evidence
  - d) preparation of a case for prosecution
  - e) presentation of a case in court
  - f) settlement discussions with a defendant
  - g) deciding what penalty should be sought
  - h) implementing any penalty imposed
  - i) identifying stolen assets for recovery
  - j) securing and collecting stolen assets ordered to be recovered
  - k) distributing recovered assets.
- C) The involvement of two or more officers may not necessarily be required during the entire activity but should be required at critical points so as to help ensure that matters are being dealt with properly.

### BM 3.9 Equal treatment:

Different suspects and accused persons may be treated unequally by the law enforcement authorities for corrupt reasons. Law enforcement authorities may or may not pursue investigations, bring prosecutions or properly conduct prosecutions according to whether or not they have a corrupt connection with the suspect or accused in question. Such corrupt connection may be due to political pressure, to family or friendship connections, to bribery, or to a general culture that protects the powerful. An example of the latter case is where prosecutions of large influential companies may be concluded by way of a Deferred Prosecution Agreement and with no individual directors or shareholders being prosecuted, while for a similar offence smaller companies (the 'low hanging fruit') may be more severely punished with disproportionately large fines and with directors and/or shareholders being prosecuted and jailed. The result is that the more serious offences (committed by the larger organisations or more powerful individuals) go unpunished or are more leniently punished. The law enforcement authorities should treat all persons equally.

### BM 3.10 Safeguards against abuse of powers:

Safeguards against abuse of law enforcement powers are important from an anti-corruption perspective to help ensure that such powers are not abused for corrupt purposes. Such safeguards should include, for example, that powers should be used only where:

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- a) there is a clear legal framework for their use
- b) where appropriate, their use is subject to specific prior court authorisation and ongoing supervision by the court
- c) such court authorisation should be obtainable only by way of written application identifying, where appropriate, the individual law enforcement officer(s) responsible for the application, and attaching supporting evidence, including an affidavit by the officer stating her or his belief as to the grounds for the application. Such officer should remain accountable to the court for the proper exercise of the order
- d) there is adequate protection for the rights of third parties
- e) such powers are required and granted only for a specific identified purpose which is necessary for and proportionate to the matter being investigated
- f) operational guidelines are provided in relation to the use of such powers.

### References

- i) UNODC Technical Guide to UNCAC (2009), pages 125–129, Sections II.4–II.9 (Challenges re overriding bank secrecy laws, etc.) and page 184 (Section II.1: Safeguards in relation to Special Investigative Techniques)

## BM 3.11 No immunity for public officials et al:

- A) This Benchmark provision is the same as the provision in Benchmark 1.4(1), save that this Benchmark provision provides that, in relation to all criminal offences, there should be no immunity from any law enforcement process, and no jurisdictional privilege, reduction of civil or criminal liability, or reduction of or exemption from sanctions, on the basis that the person in question is a head of State, a minister, a member of parliament, other public official, a public sector organisation or a political party, or has any political affiliation. In contrast, the similar provision in Benchmark 1.4(1) relates only to corruption offences.
- B) This block on immunity for all offences is an important requirement so as to avoid an unjustified impunity for certain categories of persons, and to help ensure that public positions are held by people of integrity and that public functions are carried out without criminal activity. There is no legitimate justification for allowing immunity. To do so would merely provide unwarranted protection for criminal acts, undermine the public function and undermine public trust and confidence. It is the public function that should be protected from criminality of the public official, not the public official from liability for such criminality.

### References

Some of the following references apply to corruption offences, but they are equally relevant to other criminal offences:

- i) UNODC Legislative Guide for UNCAC (2006), paragraphs 104–106 and 387:
 

*‘... It would be highly damaging to the legitimacy of the overall anti-corruption strategy ... if corrupt public officials were able to shield themselves from accountability and investigation or prosecution for serious offences.’* (paragraph 387)
- ii) UNODC Technical Guide to UNCAC (2009), pages 85–87:
 

*‘... immunities can create difficulties as they can appear to render public officials effectively above and beyond the reach of the law. It is not unusual for immunity from prosecution to be perceived as the main cause for increased corruption levels as investigations into high-level corruption may be significantly impeded by claims of political immunity. ...’* (page 85, second complete paragraph)
- iii) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019), Recommendation 43:
 

*‘No functional immunity from prosecution should be granted to public officials engaged in corruption involving VQA (Vast Quantities of Assets).’*

## BM 3.13 Processes, evidence and records:

### BM 3.13(4) ‘Evidence and records should be retained for a minimum period prescribed by the regulations ...’:

The prescribed period in the regulations for retention of documents and evidence should take account of relevant limitation periods so that such documents and evidence are, as far as possible, available for any future challenge, audit, litigation or prosecution. In cases where there is a risk of corruption and where there is no limitation period for corruption offences (as is recommended for corruption offences in Benchmark 1.2(5)), the period prescribed for retention of documents and evidence should be indefinite or as long as practicable. The right to erasure under data protection laws should not allow for destruction of documents that may be needed for corruption investigations.

## BM 3.14 Asset recovery and management and distribution of recovered assets:

Assets recovered through the asset recovery process are highly vulnerable to misappropriation by those carrying out asset recovery and the management

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and distribution of recovered assets. Such misappropriation could be either on the initiative of such persons or as instructed by others who may exert influence over them. As such assets may be stolen at any point in the recovery, management and distribution process, they should be monitored at every stage. The provisions in Benchmark 3.14 are designed to provide the basis for such monitoring.

### References

- i) UNCAC Article 31, paragraph 3 requires States to adopt measures to regulate the administration by the competent authorities of frozen, seized or confiscated property.
- ii) UNODC/IMF/Commonwealth Model Provisions (2016): Part XI (Asset Management) and Part XII (Recovered Assets Fund)

### **BM 3.14(1) Court supervision:**

Court supervision is important to help ensure that the persons recovering assets and managing and distributing the recovered assets are accountable on a transparent, regular and ongoing basis, and that the assets are properly recovered, managed and distributed.

### **BM 3.14(2) Asset recovery:**

#### References

- i) UNODC/IMF/Commonwealth Model Provisions (2016): Part V (Conviction-based Confiscation, Benefit Recovery and Extended Benefit Recovery Orders)

### **BM 3.14(4) Management of recovered assets:**

- A) **Responsible person:** In some jurisdictions, a court-appointed receiver is appointed to administer recovered assets. However, this can be a costly option where the receiver is a private sector organisation, and can lead to erosion, by way of high fees, of much or all of the recovered assets. An alternative is to make a public sector authority responsible for this function (such as the law enforcement authorities). However, if this latter option is chosen, safeguards should be put in place to counter the potential conflict of interest that may arise where surplus recovered funds are permitted to be distributed to such public sector authority (see Benchmark 3.14(5) and Guidance BM 3.14(5), paragraph (D)), as the public sector authority may then be incentivised to manipulate distribution of the assets to ensure that it receives more funds.

- B) **Management of recovered assets** may include, for example, the safe keeping, insuring or sale of recovered assets, and investment of recovered funds.

#### References

- i) UNODC/IMF/Commonwealth Model Provisions (2016), Part XI and Part XII

#### **BM 3.14(5) Distribution of recovered assets:**

- A) This Benchmark provision differs, for example, from the UNODC/IMF/Commonwealth Model Provisions (2016), Part XII, section 118(2) which provides that an authority may authorise payments from the recovered assets fund. However, this may allow an opportunity for misappropriation of recovered assets. Accordingly, the Benchmark provides that recovered assets should be distributed only as supervised by the court. While it is also possible that court supervision could also be subject to corrupt influences, this is nevertheless an additional safeguard.
- B) **‘pay the reasonable costs of the asset recovery process’**: States may wish to consider whether reimbursement of costs should be made only to the extent that the State or party seeking reimbursement of costs did not assist, facilitate or turn a blind eye to the original offence or to any movement, retention or concealment of the stolen assets.
- C) **‘legitimate owner of the recovered assets and the victim of the offence’**: Such persons may be a public sector organisation, a private sector organisation, a community or group of persons or an individual. Where the funds that were stolen had been intended to be used by a public sector organisation for the benefit of a community or group of persons, then that community or group of persons should be treated as the primary victim of the offence. This approach is supported by the UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019), Recommendation 64, which provides as follows:
- ‘Assets recovered from corruption involving VQA [Vast Quantities of Assets] should benefit, to the extent possible, the victims, the society and local communities that have been harmed by the corruption in accordance with principles of domestic law. Experts, civil society and grassroots organizations and the private sector should be invited to significantly participate in the decision-making process over the managing and disposition of parts of returned assets for compensation of social damage, in line with national legislation. When States decide to enter into case-specific arrangements, as foreseen in article 57 of UNCAC, such arrangements can serve to further promote the principles of UNCAC to ensure transparency,*

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*as well as the accountable use of repatriated funds for the benefit of people harmed by the corruption. Such arrangements should not in any way interfere in the domestic affairs.’*

- D) **‘distribution should be applied for the public interest’:** This could, for example, mean allocation to a community project, or to one or more public sector authorities (e.g. the law enforcement authorities to fund law enforcement or to support witness protection and compensation), where appropriate. However, care should be taken to monitor any potential conflict of interest that may arise if, for example, the law enforcement authorities are responsible for administering the recovered assets and are also entitled to receive any surplus assets not otherwise distributed (see Guidance BM 3.14(4), paragraph (A) above). In determining how recovered assets could be distributed in the public interest:
- a) national development priorities could be taken into consideration
  - b) civil society organisations could play a role
  - c) recovered assets could be used for strengthening anti-corruption and law enforcement institutions.

In all cases, there should be full disclosure to the public of how the recovered assets were distributed and full accountability in relation to their receipt and use (see Benchmark 3.14(7)).

### References

- i) UNODC/IMF/Commonwealth Model Provisions (2016), Part XII, section 118(2)

### **BM 3.14(6) Records of recovered assets:**

#### References

- i) UNODC/IMF/Commonwealth Model Provisions (2016), Part XII, section 115(2)

### **BM 3.14(7) Accountability for recovered assets:**

There are many junctures at which recovered assets could be misappropriated including: between point of recovery of those assets and their being put into the hands of the responsible person; in dealings by the responsible person; during distribution of those assets; and following distribution of those assets where, for example, having been received by the correct public body, the funds are then embezzled or redirected for corrupt purposes. Thus, in order to prevent the misappropriation or misuse of recovered assets, the relevant parties should account to the courts at each such juncture.

**BM 3.14(7)(a) By the responsible person:**

These details should include:

- a) the identity, value and location of the assets at the time of their recovery
- b) all dealings with the assets
- c) if sold, the value realised
- d) all final distributions of the assets
- e) final use of returned assets
- f) full accounts showing asset values, and all income and expenditure in relation to dealings with the assets.

**BM 3.14(7)(b) By those designated to receive recovered assets:**

All those persons who are designated to receive recovered assets should provide a written confirmation of whether or not the assets have been received. Such persons include States and all public and private sector individuals and organisations.

**BM 3.14(7)(c) By public sector bodies which receive recovered assets:**

- A) All public sector bodies which receive recovered assets should be required to properly record and account for them. Such public sector bodies include States, public sector organisations and bodies representing local communities.
- B) This should include recording and accounting for the receipt of the recovered assets and for any dealings with the recovered assets including, for example, sale of an asset and use of the sale proceeds, or expenditure of recovered funds.

**BM 3.14(8) Annual audit of recovered assets:**

References

- i) UNODC/IMF/Commonwealth Model Provisions (2016), Part XII, section 119 (Annual Report and Audit)

**BM 3.15–3.19 Measures to enable effective law enforcement in respect of corruption offences:****BM 3.15 Training:**

References

- i) UNODC State of Implementation of UNCAC (2017): Page 168: *'Further to the independence of specialized authorities, States parties*

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*must ensure that the persons involved have the appropriate training and resources to carry out their often considerably challenging tasks ... The design of a training module on corruption offences specifically for judges and prosecutors, which touches upon, inter alia, the requirements of the Convention, was noted as a good practice conducive to the effective capacity-building of law enforcement authorities tasked with countering corruption.'*

### BM 3.16 Powers:

#### BM 3.16(1) Adequate investigative powers:

- A) Investigative powers should be sufficiently advanced to deal with the covert nature of corruption offences and the complex international financial transactions that may be involved.
- B) Special investigative techniques may include, for example, undercover operations, interception of communications and accessing computer systems.

#### References

- i) UNCAC:
  - Article 31, paragraph 7: Court orders for seizure of bank, financial or commercial records (in relation to Articles 31 and 55)
  - Article 50: Special investigative techniques
  - Articles 53–58: International cooperation in asset recovery
- ii) UNODC Technical Guide to UNCAC (2009):
  - Page 115 (second paragraph): *'... To be effective in contemporary investigations of serious and complex cases of corruption and financial crime, specialized authorities would require the appropriate substantive and procedural framework. That framework should afford specialized authorities specific contemporary powers on disclosure of documents or other pertinent information and evidence; access to financial reporting; restraint of assets and confiscation. To fulfil their role, specialized authorities would also require powers regarding access to financial and criminal intelligence, criminal investigation, prosecution and civil asset recovery.'*
  - Pages 182–187 (Special Investigative Techniques)
- iii) FATF Recommendations: Recommendation 31 (Powers of law enforcement and investigative authorities – in relation to money-laundering etc.)

**BM 3.16(2) Adequate asset recovery powers:**

## References

- i) UNCAC:
  - Article 14: Measures to prevent money laundering
  - Article 31: Freezing, seizure and confiscation
  - Articles 53–58 (International cooperation in asset recovery)
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 396–429 (Asset recovery)
- iii) UNODC Technical Guide to UNCAC (2009), pages 90–100 (Asset recovery)
- iv) UNODC/IMF/Commonwealth Model Provisions (2016), Parts V–XII (Asset recovery)
- v) FATF Recommendations:
  - Recommendation 4 (Confiscation and provisional measures)
  - Recommendation 30 (Responsibilities of law enforcement and investigative authorities)

**BM 3.16(3) Power to apply for unexplained wealth orders:**

- A) In determining whether a person has unexplained wealth, States may choose to allow the unexplained wealth of the person's family members, close relatives and close associates to be attributed to the person where there is evidence to support this, as corrupt persons may choose to have corrupt funds paid to family members, close relatives or close associates in an attempt to conceal such funds.
- B) Depending on a State's laws, the information provided in compliance with an unexplained wealth order could be used as a basis for confiscation of the unexplained assets and/or to help in the investigation and prosecution of a charge of illicit enrichment (see Benchmark 1.1(9)).

## References

- i) UNCAC Article 31, paragraph 8 provides that States may consider requiring that an offender *'demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings'*.
- ii) UNODC/IMF/Commonwealth Model Provisions (2016), Part X, sections 106–111 (Unexplained wealth orders)
- iii) For an example of similar orders, see:
  - Australian Commonwealth (Proceeds of Crime Act 2002), Chapter 2, Part 2–6 (Unexplained Wealth Orders)

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- Singapore: Corruption, Drug Trafficking and Serious Crimes (Confiscation of Benefits) Act, section 47AA (Possessing or using property reasonably suspected to be benefits from drug dealing or criminal conduct)
- UK: Proceeds of Crime Act, section 362A (Unexplained Wealth Orders)

### BM 3.17 Secrecy laws:

The overriding of secrecy laws may, for example, enable the following orders relating to disclosure of financial information to be obtained:

- a) customer information orders requiring an institution to provide specified information as to whether a person has held an account(s) at the institution, and if so, to provide specified information in relation to that person and the account(s)
- b) account monitoring orders requiring a financial institution to provide information, for a specified period, in relation to a specified account
- c) production orders requiring the production of, or allowing access to, material specified in the order; this might include documents such as bank statements.

#### References

- i) UNCAC: The Benchmark provision goes wider than UNCAC in that the Benchmark provides that, subject to adequate safeguards, secrecy laws in the public or private sectors should not be a bar to investigation. UNCAC provides only that bank secrecy should not be an obstacle. See:
  - Article 31, paragraph 7: relating to orders of the court or other competent authorities for production or seizure of bank, financial or commercial records, notwithstanding bank secrecy.
  - Article 40: relating to appropriate mechanisms to overcome obstacles that may arise out of the application of bank secrecy laws.
  - Article 46, paragraph 8 requires that States should not decline to render mutual legal assistance on the grounds of bank secrecy.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 421, 487–488 and 611
- iii) UNODC Technical Guide to UNCAC (2009), pages 124–129 (Bank secrecy)
- iv) FATF Recommendations: Recommendation 9 (Financial institution secrecy laws): ‘Countries should ensure that financial institution secrecy laws do not inhibit implementation of the FATF Recommendations.’

- v) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019), Recommendation 17:

*‘... In the context of investigations, legal professionals should cooperate with law enforcement, whenever a disclosure requirement for beneficial ownership information exists and make such information readily available to law enforcement.’*

### **BM 3.18 ‘Protection for those who report to or co-operate with the law enforcement authorities, and for witnesses, experts and victims’:**

In view of the potential large corrupt rewards at stake and the potential severe penalties, those who provide evidence or co-operate in relation to the prosecution of corruption offences may be at considerable risk. Consequently, protection should be provided to them, and to their relatives, family members and other persons close to them.

#### References

- i) UNCAC Article 32, paragraphs 1–4, Article 33 and Article 37, paragraph 4. The Benchmark goes wider than UNCAC in that it provides for protection for relatives, family members and other close persons of all categories of protected persons listed in Benchmark 3.18, whereas UNCAC provides for protection of relatives and other close persons only in relation to witnesses and experts.

### **BM 3.19 International co-operation in relation to corruption offences:**

See Benchmark 25 (International co-operation).

#### References

- i) UNCAC Articles 44–59 re extradition, transfer of sentenced persons, mutual legal assistance, transfer of criminal proceedings, law enforcement co-operation, joint investigations, special investigative techniques and asset recovery.
- ii) FATF Recommendations: Recommendations 36–40 and Interpretive Notes to those Recommendations (pages 106–110)
- iii) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019), Recommendations 36–39 and 44–45
- iv) Example of international co-operation: The International Anti-Corruption Coordination Centre was set up in 2017 with the

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objective of bringing together specialist law enforcement officers from multiple agencies around the world to tackle allegations of grand corruption. <https://nationalcrimeagency.gov.uk/what-we-do/crime-threats/bribery-corruption-and-sanctions-evasion/international-anti-corruption-centre>

### BM 3.20 Accountability of the law enforcement authorities:

- A) Despite provisions for their independence, the law enforcement authorities should be fully accountable and transparent in the performance of their functions. Benchmark 3.20 provides for this accountability and transparency, together with Benchmark 3.21 (Complaints and reporting systems) and Benchmark 3.22 (Transparency).
- B) The UNODC Technical Guide to UNCAC (2009), page 11 (first, second and fourth paragraphs) provides as follows:

*‘In addressing independence, consideration would need to be given to the following issues: ... periodic reporting obligations to another public body, such as the legislature; formal paths to allow cooperation and exchange of information with other agencies; arrangements to determine the involvement of civil society and the media... Independence should not be perceived as contradictory to accountability. Anti-corruption bodies should operate within an established governance system that includes appropriate and functioning checks and balances and in which nobody and nothing is above the law. Independence needs to be balanced by mechanisms to ensure the transparency and accountability of the body or bodies, such as through reporting to or being the subject of review by competent institutions, such as parliamentary committees, or by being subject to reporting to parliament, annual external audit and where relevant to the courts through judicial review...’*

#### References

- i) UNCAC:
- UNCAC Article 10 provides that States should take measures as necessary to enhance transparency in its public administration.
  - UNCAC Article 10, paragraph (c) provides that the administration should publish periodic reports on the risks of corruption in the public administration.
  - UNCAC Article 11, paragraph 2 provides that measures should be taken to strengthen integrity and to prevent opportunities for corruption within the prosecution service.

- ii) Jakarta Statement on Principles for Anti-Corruption Agencies (2012), paragraph 1: Internal Accountability, External Accountability, Public Reporting
- iii) Latimer House Principles, Principle VII(a): *‘(a) Executive accountability to parliament: Parliaments ... should maintain high standards of accountability, transparency and responsibility in the conduct of all public business. Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to Parliament.’*
- iv) UNODC and IAP Guide on the Status and Role of Prosecutors (2014), pages 17–19:
  - Section 2: Accountability: *‘As noted above, the independence of the prosecutor does not mean that a prosecutor is completely autonomous and accountable to no one. Prosecution services are accountable to the executive and legislative branches of government, to the public and to an extent the judiciary. “Accountability” of the prosecutor means that a prosecution service may be required to account for its actions either by filing reports, responding to inquiries or, in some situations, acting as a respondent in a court hearing. Accountability may also mean that a prosecution service can potentially be held liable as a result of inefficiencies and abuses of its authority. Individual prosecutors are also accountable for their decisions and actions, through the courts, the hierarchies of their prosecution services, their professional associations and the media and public interest in their professional conduct. ... Accountability also involves accountability to other branches of government and the general public.’* (page 17, last paragraph – page 18)
  - Section 2.1: Accountability to the executive and legislative branches of government
  - Section 2.2: Accountability to the courts
  - Section 2.3: Accountability to the public

### BM 3.21 Complaints and reporting systems:

- A) In order that complaints and reports are properly addressed, both systems should ensure that complaints and reports, as appropriate, are made to and dealt with by persons who are sufficiently independent from those against whom the complaints or reports are being made.
- B) For guidance on implementation of these systems, see:
  - a) **For the complaints system:** Guidance BM 10.19(1) (Public sector organisations).
  - b) **For the reporting system:** Benchmark 21 (Reporting corruption) and Guidance BM 21.

## BM 3.22 Transparency to the public:

- A) This Benchmark provision provides that the law enforcement authorities should proactively provide information to the public, in addition to responding to requests for information. This will facilitate the public's understanding of the authorities and their functions and activities and help the public to hold the authorities to account. It will also help to build public confidence in the public sector and to create a culture in the public sector where the provision of information to the public is part of its regular function.
- B) **'Save to the extent contrary to the public interest'**: This would include, for example, not disclosing confidential details of ongoing corruption investigations until the investigations are complete. In the Benchmarks Definitions, 'public interest' is defined as *'the interests of the public at large as objectively and independently determined'*. The public interest exception would not allow the withholding of information simply because it may be embarrassing to an individual or organisation (e.g. if it shows a failure to manage a process appropriately or effectively).
- C) **'promptly'**: Information should be published as soon as possible after it becomes available so that, as far as possible, the public has current information enabling it to monitor the relevant matters as they proceed. In this way, any ongoing corruption or risk of corrupt activity in such matters may be able to be prevented, or at least identified early.

### References

- i) UNCAC: The following provisions provide that *'Each State Party shall, in accordance with the fundamental principles of its legal system:'*
- UNCAC Article 5, paragraph 1:  
*'... develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of ... transparency and accountability.'*
  - UNCAC Article 10:  
*'... take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia: (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public; (b) Simplifying*

*administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and (c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.'*

- UNCAC Article 13, paragraph 1(b):  
*'... take appropriate measures, ... , to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as: (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes; (b) Ensuring that the public has effective access to information.'*
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 58–65
- iii) UNODC Technical Guide to UNCAC (2009), pages 42–46 and 63
- iv) Jakarta Statement on Principles for Anti-Corruption Agencies (2012), paragraph 1: Public Reporting and Public Communication and Engagement

# Guidance to Benchmark 4

## The court system

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### BM 4 Purpose of Benchmark:

- A) The Limassol Conclusions on Combating Corruption within the Judiciary (2002) state that:

*‘a judicial system free from corruption is an essential component of a truly democratic country and is critical to national development and the eradication of poverty. ... The Colloquium encourages the formulation of national strategies aimed at eliminating conflicts of interest and corrupt practices within the judiciary’* (paragraphs 3 and 8.iii).

- B) Regarding the extent of corruption in the court system, the UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015) writes:

*‘47. In the past two decades, evidence of corruption in the administration of justice has steadily and increasingly surfaced in many parts of the world. In terms of public perception of corruption in the judiciary, there are some troubling signs. Transparency International’s 2013 Global Corruption Barometer found that the judiciary is perceived as the fifth institution most affected by corruption. In 20 countries, the judiciary is perceived to be the most corrupt institution. More worrying still, these perceptions seem to have some basis in these countries, as an average of 30 per cent of the people coming into contact with the judiciary reported that they had to pay a bribe...*

*‘48. Evidence of the existence and impact of corruption in the judiciary is also available from a number of other sources, particularly the reports of independent commissions of inquiry. One such report documented instances of court personnel demanding bribes to open files or destroy case files; magistrates accepting bribes to grant improper “court injunctions”; accused persons, either voluntarily or under compulsion, offering bribes to magistrates to obtain light sentences; magistrates and prosecutors accepting bribes to reduce sentences or dismiss cases;... court personnel accepting bribes to produce copies of judgments; magistrates accepting bribes from lawyers in exchange for favourable judgments; trial court judges refusing to give copies of judgments to people who had lost their cases so as to prevent them from appealing to higher courts, thereby protecting those who had fraudulently obtained their judgments; and magistrates colluding with auctioneers in selling property belonging to litigants who had lost their civil cases, and sharing the receipts...*

*'50. Corruption in the judiciary is not limited to conventional bribery. An insidious and equally damaging form of corruption arises from the interaction between members of the judiciary and external, powerful, political or economic interests. For example, the political patronage through which a judge acquires his or her office, a promotion, an extension of service, preferential treatment, or the promise of employment after retirement, can give rise to corruption. Frequent socializing with local or high-level political figures is almost certain to raise, in the minds of others, the suspicion that the judge is susceptible to undue influence in the discharge of his or her duties. With respect to this form of corruption too, hard evidence has surfaced of judges being pressurized by executive authorities to render justice contrary to law, and of being victimized in the event of failure to do so; of opportunism among judges whereby they seek to obtain material and moral advantages and benefits from the executive for themselves or family members; and of political protection for corrupt judges.'*

- C) Corruption can occur in any part of the court system, whether:
- a) in the determination of judicial issues (e.g. the bribery of a judge to deliver a false judgment),
  - b) in court processes (e.g. bribery by a lawyer of a court clerk to 'lose' or fabricate a court document),
  - c) in the appointment, promotion, transfer or dismissal of a judge, or
  - d) in purely administrative matters (e.g. suppliers bribing court staff responsible for procurement to purchase their equipment at an overvalue, or embezzlement of court funds by court staff responsible for dealing with administrative payments).

Such matters prevent the courts delivering justice in a manner that is effective, honest, impartial and independent. Consequently, corruption across the court system as a whole should be addressed.

- D) The Benchmark addresses such corruption by way of four categories: (1) The judiciary; (2) Court processes; (3) Court administration and court personnel; and (4) The legal profession. All of these categories are involved in the delivery of justice and they are all vulnerable to corruption.

## BM 4.1 Regulations:

### References

Benchmark 4.1 provides for regulation of the whole court system, including the judiciary. The following references apply only to regulation of the judiciary.

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- i) UNCAC Article 11, paragraph 1:  
*‘Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary.’*
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 98 and 100:  
*‘98. In accordance with Article 11, paragraph 1 [of UNCAC], States parties must take measures to strengthen integrity and prevent corruption in the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary ...*  
*‘100. The introduction of these measures may require legislation, without prejudice to the independence of the judiciary, depending on the existing legal framework of each State party.’*
- iii) Example of regulation of the judiciary:
  - The UK Constitutional Reform Act 2005 provides for laws regulating the judiciary, while also guaranteeing the independence of the judiciary in sections 3 and 17 of the Act.

## BM 4.2 The Judiciary:

**BM 4.2(1) ‘Members of the judiciary should ... exercise their functions effectively, honestly, impartially, independently and transparently’**

### References

- i) Bangalore Principles of Judicial Conduct (2002): Value 1 (Independence), Value 2 (Impartiality), Value 3 (Integrity), Value 4 (Propriety), Value 5 (Equality)

**BM 4.2(2) ‘Members of the judiciary should ... be competent to determine disputes concerning corruption’**

### References

- i) Bangalore Principles of Judicial Conduct (2002): Value 6 (Competence and Diligence)

## BM 4.3 Independence of the judiciary:

**BM 4.3(1) ‘the judiciary should have exclusive jurisdiction over all issues of a judicial nature’:**

The judiciary should have exclusive jurisdiction over judicial matters in order to help ensure that such matters are dealt with by competent judicial bodies and

without corrupt interference or overreach by government, the law enforcement authorities or other persons.

#### References

- i) UN Basic Principles on the Independence of the Judiciary (1985), paragraph 3: *‘The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.’*

**BM 4.3(2) ‘members of the judiciary should, in the exercise of their judicial functions, have and be seen to have independence from any external influence or interference, including from the executive, the legislature, and other judges’:**

#### References

- i) UN Basic Principles on the Independence of the Judiciary (1985), paragraph 4:
 

*‘There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.’*
- ii) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015):
  - Paragraph 21 (Independence) (page 11): *‘The core of the principle of judicial independence is the complete liberty of the judge to hear and decide the cases that come before the court. No outsider – be it government, pressure group, individual or even another judge – should interfere or attempt to interfere with the way in which a judge conducts a case and makes a decision. A judge should not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free from such connections and influence.’*
  - Paragraphs 90–91 (Protection against interference by the executive and the legislature)
- iii) Bangalore Principles of Judicial Conduct (2002), Value 1 (Independence):
 

*‘1.1 A judge shall exercise the judicial function independently on the basis of the judge’s assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.’*

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*1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.*

*1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.*

*1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.'*

- iv) Latimer House Principles (2004), Principle (IV) (Independence of the Judiciary)
- v) Example of legislation guaranteeing the independence of the judiciary:  
UK: Constitutional Reform Act 2005, section 3

### **BM 4.3(3)(a) 'members of the judiciary should ... have security of tenure for a reasonable prescribed maximum period or until a reasonable prescribed age of retirement':**

Benchmark 4.3(3)(a) provides for security of tenure for a '*reasonable prescribed maximum period or until a reasonable prescribed age of retirement*'. It does not provide for permanent tenure or tenure for life as this could lead to an increased risk of corruption where, for example, a judge who has tenure for life is able to establish an entrenched corrupt system which is not at risk of being discovered by a successor. This Benchmark provision differs from Reference (iii) below.

#### References

- i) UN Basic Principles on the Independence of the Judiciary (1985), paragraph 12:  
*'12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.'*
- ii) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraphs 60–65 and 74–77 (re tenure and removal of the judiciary):  
*'60. It is a fundamental tenet of judicial independence that a judge should have a constitutionally guaranteed tenure for life; until a mandatory retirement age; or the expiry of a fixed term of office.'* (The footnote to this passage states that: '*National practice appears to favour a specified retirement age for judges of superior courts.'*)
- iii) Latimer House Principles (2004), Principles (IV)(b) and (d):

- Principle (IV)(b): *‘Arrangements for appropriate security of tenure ... must be in place;’*
- Guidelines (II)1 (fourth paragraph): *‘Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure.’*

**BM 4.3(3)(b) ‘members of the judiciary should ... be suspended or dismissed only for reasons of incapacity or misbehaviour that clearly render them unfit to discharge their duties’:**

Misbehaviour would include conviction for any corruption offence or any ‘*offence of moral turpitude*’ (see Reference (iii) below). It would also include ‘*failure to discharge without reasonable excuse the functions of the office for a continuous period of at least three months*’ (see Reference (iii) below). In the latter case, such failure may, for example, be due to corrupt influence.

References

- i) UN Basic Principles on the Independence of the Judiciary (1985), paragraph 18:
  - *‘18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.’*
- ii) Latimer House Principles (2004), Principles (IV)(b) and (d):
  - Principle (IV)(d): *‘Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.’*
- iii) Commonwealth’s Model Law on Judicial Services Commissions (2018), section 10(3):
 

*‘The grounds for disciplining, or advising removal of, a judicial officer are that the officer:*

  - a) *has acted or behaved in a way which is incompatible with his or her office*
  - b) *has failed without reasonable excuse to discharge the functions of the office for a continuous period of at least three months*
  - c) *has been convicted of an offence of moral turpitude*
  - d) *is otherwise unfit to hold office or unable properly to discharge the functions of that office.’*

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### **BM 4.3(4) ‘an independent body should be responsible for regulating and oversight of the employment and conduct of members of the judiciary in accordance with ...’:**

- A) **The need for an independent body:** In order to help protect members of the judiciary from corrupt interference or influence, both from outside and within the judiciary, Benchmark 4.3(4) provides that an independent body should be responsible for regulating and oversight of the employment and conduct of members of the judiciary. This Benchmark provision is in accordance with References (i)–(v) below, which variously express the view that an independent body should be responsible for determining matters concerning the appointment, dismissal, salaries, benefits, inspection of assets, liabilities and conflict of interest disclosures, disciplining and general oversight of the judiciary.
- B) **Composition of the independent body:** It is for States to determine how such independent body should be established or designated and whether the body for regulation of the judiciary should, for example, be different to the one for appointment. However, in order to guarantee its independence, it is essential that any such independent body should be constituted so that it is not controlled by either the government or the judiciary. This would ensure that the body is not subject to corrupt government influence or to pressures of ‘*self-interest, self-protection and cronyism*’ by the judiciary or perception of such pressures (see Reference (viii) below). Thus, non-government and non-judiciary members (which may include members of the legal profession) should outnumber government and judiciary members. Reference (vi) below lists References that support the view that the independent body should comprise a majority of non-judiciary members. Reference (vii) lists References that provide that members of the judiciary and the legal profession should constitute at least half of the members, thus also allowing that members of the judiciary may constitute less than half. Reference (viii) lists References that provide for a body which includes members of the judiciary and non-judiciary members and where the body’s composition should ‘*guarantee its independence*’ and avoid the perception of self-interest.

#### References

- i) Independent body in relation to appointment and promotion:
- UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraph 57 states: ‘*Recent international and regional initiatives indicate a strong preference for the appointment and promotion of judges to be made by an independent body, such*

*as a Council for the Judiciary or a Judicial Service Commission, with the formal intervention of the Head of State with respect to higher appointments'*

- Latimer House Guidelines (II) 1 states: *'Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission. The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary.'*
- ii) Independent body in relation to dismissal:
  - Latimer House Guidelines (VI)1 provides that in cases where a judge is at risk of removal, the matter should be judged by an independent and impartial tribunal.
- iii) Independent body in relation to salaries and benefits:
  - Latimer House Guidelines (II)2 provides that judicial salaries and benefits should be set by an independent body.
- iv) Independent body in relation to inspection of disclosures by the judiciary and general oversight of the judiciary:
  - UNODC Technical Guide to UNCAC (2009) (page 51, fourth complete paragraph) states that disclosures by the judiciary of assets, liabilities and conflicts of interest *'should be inspected after appointment and monitored from time to time by an independent official as part of the work of a judicial oversight body or the body or bodies established under article 6 [which relates to anti-corruption bodies]'*.
- v) Independent body in relation to disciplining of the judiciary:
  - Limassol Conclusions on Combating Corruption within the Judiciary (2002), paragraph 5 states: *'There should be procedures to discipline or dismiss them [judges] if they act improperly or otherwise fail in the performance of their duties to society. These procedures should be transparent and administered by institutions which are themselves independent and impartial.'*
  - UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraph 29 states: *'... the State party should consider encouraging the judiciary to establish a mechanism to receive, inquire into, resolve and determine complaints of unethical conduct of members of the judiciary, where*

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*no provision exists for the reference of such complaints to a court. To enhance the transparency and legitimacy of such a mechanism, many States have considered it not appropriate for it to be uniquely controlled by the judiciary. Instead, efforts have been made in many States to involve bodies outside of the judiciary in the application and enforcement of codes of judicial conduct. Associating persons external to the judiciary (lawyers, academics and representatives of the community) in the monitoring of ethical principles will prevent a possible perception of self-interest and self-protection, while ensuring that judges are not deprived of the power to determine their own professional ethics.'*

- vi) Independent body where the number of members of the judiciary is less than the number of non-judiciary members:
  - Commonwealth Model Law on Judicial Service Commissions (2018), section 3 provides that the members of the Judicial Service Commission (responsible for appointing and disciplining the judiciary) should comprise five members of the judiciary (i.e. the Chief Justice, the President of the Court of Appeal, two other senior judicial officers and the Chief Magistrate); and eight non-judiciary members (i.e. two practising members of the legal profession; a teacher of law, and five lay members who are not members of the executive or parliament).
  - UK Constitutional Reform Act 2005, Schedule 12, section 3A provides that, in relation to the Judicial Services Commission, *'the number of Commissioners who are holders of judicial office must be less than the number of Commissioners (including the chairman) who are not holders of judicial office'*.
- vii) Independent body where members of the judiciary and the legal profession should constitute at least half of the members – thus allowing that members of the judiciary may constitute less than half:
  - The Appointment, Tenure and Removal of Judges under Commonwealth Principles (2015), paragraph 1.6 (third and fourth paragraphs) provides, in relation to judicial appointments commissions, that:
 

*'It is important to ensure that judicial appointment commissions are genuinely independent and that their members have among them sufficient expertise and experience to assess the quality of candidates. An emerging standard of best practice is that judges and representatives of the legal profession (academic and practising) should constitute at least half the members of the commission, which is the case in 63% of Commonwealth jurisdictions. It may also be valuable for a commission*

*to include 'lay' members who offer a civil society perspective on the court system, or contribute expertise in other relevant disciplines such as human resources. The legal framework should ensure that the selection of lay members does not fall under political control. The need for gender balance and the representation of minorities on the commission should also be considered.'*

- viii) Independent body which includes members of the judiciary and non-judiciary members and where the body's composition should 'guarantee its independence' and avoid perception of self-interest:
  - UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraph 57 states, in relation to an independent body for the appointment and promotion of judges, that: '*... In such a body, members of the judiciary and members of the community may each play appropriately defined roles in the selection of candidates suitable for judicial office. The composition of such a body should be such as to guarantee its independence and enable it to carry out its functions effectively.*'
  - UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraph 57: '*A mixed composition [of the independent body] avoids the perception of self-interest, self-protection and cronyism, and reflects the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy.*'

## BM 4.4 Impartiality of the judiciary:

### References

- i) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraphs 21 (page 11) (Impartiality) and 41–46 (Conflicts of interest).
- ii) UNODC Technical Guide to UNCAC (2009), page 51 (third complete paragraph): '*... Judicial education should include instruction concerning judicial bias (actual and apparent) and judicial obligations to disqualify oneself for actual or perceived partiality.*'
- iii) UN Basic Principles on the Independence of the Judiciary (1985), paragraph 2: '*The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*'
- iv) Bangalore Principles of Judicial Conduct (2002): Value 2 (Impartiality): '*2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice...*

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*‘2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.’*

- v) Latimer House Principles (2004), Principle (IV): *‘An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice.’*

## BM 4.5 Judicial competence to determine corruption disputes:

### References

- i) UNODC Technical Guide to UNCAC (2009), page 52 (second complete paragraph): *‘... States should also consider providing specialist training on corruption matters to judges in view of the complex nature of corruption cases.’*
- ii) UNODC State of Implementation of UNCAC (2017), page 168 (first complete paragraph): *‘... The design of a training module on corruption offences specifically for judges and prosecutors, which touches upon, inter alia, the requirements of the Convention, was noted as a good practice conducive to the effective capacity-building of law enforcement authorities tasked with countering corruption.’*
- iii) Latimer House Principles (2004), Guideline (II)3: *‘[Judicial] Training should be organised, systematic and ongoing and under the control of an adequately funded judicial body. Judicial training should include the teaching of the law, judicial skills and the social context including ethnic and gender issues. The curriculum should be controlled by judicial officers who should have the assistance of lay specialists.’*
- iv) Limassol Conclusions on Combating Corruption within the Judiciary (2002), paragraphs 9 and 13 and Annex A:
  - *‘9. ... the Colloquium expresses the view that – vii. judicial training programmes should be available and should include training on ethical and corruption issues’*

## BM 4.6 Employment, code of conduct, and anti-corruption training:

**BM 4.6(1) ‘Members of the judiciary should be employed in accordance with Benchmark 11 (Public officials) and Benchmarks 4.3(3) and (4) above’:**

Members of the judiciary are public officials and paid from public funds. Consequently, to the extent compatible with their independence and constitutional

protections, they should be subject to the same employment and conduct provisions as for other public officials. These provisions are provided for in Benchmark 11 and Benchmark 4.3(3) and (4) and cover matters such as fair, impartial and publicly declared appointment, disciplinary and dismissal processes, vetting prior to appointment, reasonable remuneration, fair employment terms and security of tenure.

**BM 4.6(2) Code of conduct:**

**BM 4.6(3) Anti-corruption training:**

References

i) UNCAC Article 11:

*‘Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.’*

ii) UNODC Technical Guide to UNCAC (2009), page 51 (third–fifth complete paragraphs):

*‘Judicial education should include instruction concerning judicial bias (actual and apparent) and judicial obligations to disqualify oneself for actual or perceived partiality. Another measure is the adoption of, and compliance with, a national code of judicial conduct that reflects contemporary international standards...’*

iii) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015): paragraphs 23–40, including:

- *‘23. The adoption of a code of judicial conduct is a crucial aspect of any effective approach to supporting judiciary integrity. The importance of such a measure to the implementation of article 11 is reflected in the fact that it is identified as one method of enhancing judiciary integrity within the text of the article itself...’*
- *‘26. ... attempts are increasingly being made to consult other stakeholders such as court users, civil society and academia in the development of codes of conduct and ethics. Such an approach is consistent with the principle of judicial independence and separation of powers but can also be of great assistance in ensuring that the code provides meaningful and clear guidelines tailored to the specificities of the legal system in which the judiciary works.’*

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- ‘28. ... It is also necessary that judicial ethics, based on such code, are integral in the initial and continuing training of judges. In this connection, there are a number of examples of judiciaries and judicial training institutes in certain countries that have sought to actively disseminate the domestic code of conduct, and other materials such as the Commentary on the Bangalore Principles of Judicial Conduct among judges and the wider community.’
- iv) Latimer House Principles (2004), Principle (VI) and Guideline (V) 1(a):
  - Principle (VI): ‘Ministers, Members of Parliament, judicial officers and public office holders in each jurisdiction should respectively develop, adopt, and periodically review appropriate guidelines for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence.’
  - Guideline (V)1(a): ‘A Code of Ethics and Conduct should be developed and adopted by each judiciary as a means of ensuring the accountability of judges.’
- v) Limassol Conclusions on Combating Corruption within the Judiciary (2002), paragraphs 8(i) and 9 and Annex A:
  - ‘8.i The Colloquium recommends the adoption of guidelines on judicial ethics as a means of underpinning the integrity of the judiciary and promoting better public awareness of the requisite ethical standards. Such guidelines should be formulated by judicial officers and kept under constant review by them. Judicial officers should take responsibility for ensuring compliance with those guidelines.’
  - ‘9. ...the Colloquium expresses the view that ... vii. judicial training programmes should be available and should include training on ethical and corruption issues’
  - Annex A: ‘Recommendations of the Colloquium for judicial education on issues relating to corruption and judicial integrity.’

## BM 4.7 Accountability of the judiciary and independent body:

**BM 4.7(1) ‘All judgments and decisions of the judiciary should be published with full reasons and, save where contrary to the public interest, disclosed to the public. There should be an appeals process in accordance with 4.8(7)(c)’:**

- A) **‘Judgments and decisions’:** This includes judgments and decisions at all levels of the justice system, including decisions in the lower courts and judgments on appeal to the higher courts.

- B) **Accountability in relation to judgments and decisions:** Members of the judiciary should be free to make decisions and judgments independently. However, they should nevertheless be accountable for such decisions and judgments. Such accountability should be threefold:
- a) they should provide detailed written reasons for their decisions and judgments,
  - b) such reasoned decisions and judgments should be publicly available, save where public interest requires otherwise, so that they are subject to public scrutiny, and
  - c) their decisions and judgments should be subject to the scrutiny of more senior judges by way of an appeals system.

#### References

- i) UNODC Technical Guide to UNCAC (2009), page 50 (first paragraph): *'... Judges should be obliged by law to give reasons for their decisions. To ensure the integrity of the judiciary, including the availability of an effective appeals process, the reasons for judges' decisions should also be recorded.'*
- ii) Limassol Conclusions on Combating Corruption within the Judiciary (2002), paragraph 12(xvi): *'[The Colloquium] recommends that judicial officers should ensure that their judgments are well reasoned and delivered within a reasonable time.'*
- iii) Re making judgments available to the public, see References for Guidance BM 4.8(8)(b)

#### **BM 4.7(2) 'An independent body (Benchmark 4.3(4)) should be responsible for taking disciplinary action against members of the judiciary as provided for in Benchmark 11.21 (Public officials)':**

Self-regulation of judicial conduct cannot be relied on as this would not protect against inter alia circumstances where the judiciary is reluctant to regulate its own members properly or is captive to corrupt or self-interested elements. An independent body should be responsible for taking disciplinary action against members of the judiciary. (See Guidance BM 4.3(4) generally for discussion on the independent body and its composition.)

#### References

- i) UNODC Technical Guide to UNCAC (2009), page 51: *'... A code of conduct will be effective only if its application is regularly monitored, and a credible mechanism is established, to receive, investigate and determine complaints against judges and court personnel, fairly and expeditiously. Appropriate provision for due process in the case of a judge under investigation should be established bearing in mind the vulnerability*

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*of judges to false and malicious allegations of corruption by disappointed litigants and others.'*

ii) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraphs 29 and 68:

- *'29. A code of judicial conduct will do little to improve judicial performance and enhance public confidence if it is not enforceable. Therefore, the State party should consider encouraging the judiciary to establish a mechanism to receive, inquire into, resolve and determine complaints of unethical conduct of members of the judiciary, where no provision exists for the reference of such complaints to a court. To enhance the transparency and legitimacy of such a mechanism, many States have considered it not appropriate for it to be uniquely controlled by the judiciary. Instead, efforts have been made in many States to involve bodies outside of the judiciary in the application and enforcement of codes of judicial conduct. Associating persons external to the judiciary (lawyers, academics and representatives of the community) in the monitoring of ethical principles will prevent a possible perception of self-interest and self-protection, while ensuring that judges are not deprived of the power to determine their own professional ethics.'*
- *'68. The discipline and potential removal of judges from office represent a meeting point between measures aimed at enhancing the accountability of judges and the key principle of independence of the judiciary. Both accountability and independence are crucial if integrity amongst the judiciary is to be supported and opportunities for corruption reduced...'*

iii) Latimer House Principles (2004), Principle (VII)(b) and Guideline (VI)1(a)(i):

- *Guideline (VI)1(a)(i): 'In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence and to be judged by an independent and impartial tribunal.'*

iv) Limassol Conclusions on Combating Corruption within the Judiciary, paragraph 5:

*'Judicial independence does not imply a lack of accountability. Judges should act properly in accordance with their office and should be subject to the ordinary criminal laws of the land. There should be procedures to discipline or dismiss them if they act improperly or otherwise fail in the performance of their duties to society. These procedures should be transparent and administered by institutions which are themselves independent and impartial.'*

**BM 4.7(5) ‘Members of the judiciary should have immunity from civil or criminal liability only in respect of the exercise of their judicial functions in good faith. They should not be entitled to immunity where, in the exercise of their judicial functions or otherwise, they commit corruption offences or other criminal offences.’:**

- A) It is important to ensure that members of the judiciary are free to make their judicial decisions, including decisions relating to corruption issues, without fear of being sued or prosecuted in relation to decisions that have been made in good faith.
- B) However, it is also important, as provided for in Benchmark 4.7(5), to ensure that the judiciary can incur criminal liability for corruption and other criminal activities. If the judiciary was immune from such liability, this could lead to a sense of judicial impunity which could severely undermine the administration of justice and the rule of law.
- C) See also Benchmarks 1.4(1) and 3.11 (and Guidance BM 1.4(1) and BM 3.11) which apply to all public officials.

#### References

- i) UNODC Legislative Guide to UNCAC (2006), paragraphs 104–106
- ii) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraphs 30 and 78–81:
  - ‘30. ... Where the charge [against the member of the judiciary] is criminal in nature, the disciplinary body should cooperate fully with the relevant law enforcement agency.’
  - ‘78. Related to the question of discipline and removal, and again requiring balance between the principles of accountability, integrity and independence, the issue of the extent to which members of the judiciary should be immune from criminal or civil liability is a key point to be addressed when considering the implementation of article 11 of the Convention. While the principle that a judge should be free to act upon his or her convictions without fear of personal consequence is of the highest importance for the proper administration of justice, this principle is, of course, without prejudice to the right which an individual should have to compensation from the State for injury incurred by reason of negligence or fraudulent or malicious abuse of authority by a court. Effective remedies should also be provided where such injury is proved to have been caused.
  - 79. A key principle in this regard is that a judge should be criminally liable under the general law for an offence of general application committed by him or her and should not be permitted to claim immunity from ordinary criminal process. This principle must apply to

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*corruption offences for which no form of immunity should be granted. Where reasonable cause exists to warrant investigation by police and other public bodies of suspected criminal offences on the part of a judge, such investigations should take their ordinary course, according to law.'*

- iii) Limassol Conclusions on Combating Corruption within the Judiciary, paragraph 5:

*'Judicial Officers re-affirmed the statement of Heads of Government in the Framework that – ... Judges should act properly in accordance with their office and should be subject to the ordinary criminal laws of the land.'*

**BM 4.7(6) Report by judiciary:**

## References

- i) Limassol Conclusions on Combating Corruption within the Judiciary:  
*'12. In dealing with the issue of judicial accountability, the Colloquium ... xiii. notes with approval that in some jurisdictions the judiciary publishes periodic reports of its activities. The Colloquium considers that this is a desirable practice for purposes of accountability and promoting greater understanding of its role.'*

**BM 4.8 Combating corruption in court processes:****BM 4.8(1) 'All persons should have unhindered access to the courts, be equal before the courts, and be provided with a fair hearing':**

## References

- i) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraphs 114–121
- ii) Latimer House Principles (2004), Guideline (I)6:  
*'People should have easy and unhindered access to courts, particularly to enforce their fundamental rights. Any existing procedural obstacles to access to justice should be removed.'*

**BM 4.8(3) 'Court proceedings and procedures should be etc...':**

## References

- i) UNODC Technical Guide to UNCAC (2009), page 50 (second paragraph):  
*'The daily administration of the judicial process is an important component in preventing corruption. Elements of effective administration of court proceedings include:*
- *The prominent display of notices (in at least court buildings) describing procedures and proceedings; ...*

- *The introduction of fixed deadlines for legal steps that must be taken in the preparation of a case for hearing; ...*

*Judges must take responsibility for reducing delay in the conduct and conclusion of court proceedings and discourage undue delay. Judges should introduce transparent mechanisms to allow the legal profession and litigants to know the status of court proceedings.'*

**BM 4.8(4) 'Procedures for fixing court lists and assigning cases to judges should be impartial, based on efficiency and justice and publicly available':**

References

- i) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraphs 101–105 and 110:
  - *'101. The assignment of cases among the judges of a court is a potential source of corruption in the judicial system. For example, the practice of "judge shopping" in which the process of the assignment of cases is manipulated is a common feature in some jurisdictions...*
  - *'102. Court systems vary in the procedures they utilize to assign cases to judges. In some countries, the head of the court is responsible for determining the distribution of cases. In others, case assignment is a function managed by court administrators rather than judges. A third option is the random assignment of cases, either manually or automated. Finally, case assignment may be based on informal criteria, such as long-established court practices, or more formal rules and laws governing the court. Whichever method is chosen, the procedure to assign cases to judges should be strictly related to key values such as independence and impartiality, transparency, efficiency, flexibility, equal distribution of the caseload, and quality in judicial decision-making...*
  - *'110. ... In order to prevent judicial corruption, efforts generally focus on ensuring that none of the parties could affect the selection of the judge who will hear their case. One effective means of doing this is the introduction of systems of random distribution of the cases, including through information technology.'*
- ii) UNODC Technical Guide to UNCAC (2009), page 50 (last paragraph):
 

*'The judiciary should adopt a transparent and publicly known procedure for the assignment of cases to particular judges to combat the actuality or perception of litigant control over the decision maker. Procedures should be adopted within judicial systems, as appropriate, to ensure regular change of the assignments of judges having regard to appropriate factors including gender, race, tribe, religion, minority involvement and other features of the judge. Such rotation should be adopted to avoid the appearance of partiality.'*

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### **BM 4.8(6) ‘Case management should be conducted and controlled so as to ensure efficiency, fairness and transparency’:**

#### References

- i) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraphs 109–114. See particularly:
  - ‘109. Case management has been defined as: “the entire set of actions that a court takes to monitor and control the progress of cases, from initiation through trial or other initial disposition to the completion of all post-disposition court work, to make sure that justice is done promptly”. Both judicial and administrative corruption in courts may be facilitated by poor case management. Assignment of a case to a “benevolent” judge makes judicial corruption possible and may compromise the integrity of the process; lack of organization in file-keeping, archives, management of documents makes administrative corruption more likely. Different approaches to case management exist, depending on the specific problem they try to address. ...
  - ‘112. In many jurisdictions, judges have begun to play a more active role in case management by monitoring and controlling the progress of a case from institution to judgment, including the completion of all the post-judgment steps.’
- ii) UNODC Technical Guide to UNCAC (2009), page 50 (third and fourth paragraphs):
 

*‘Judges must take responsibility for reducing delay in the conduct and conclusion of court proceedings and discourage undue delay. Judges should institute transparent mechanisms to allow the legal profession and litigants to know the status of court proceedings. ...*

*The judiciary must take necessary steps to prevent court records from disappearing or being withheld. Such steps may include the computerization of court records. They should also institute systems for the investigation of the loss and disappearance of court files. Where wrongdoing is suspected, they should ensure the investigation of the loss of files, which is always to be regarded as a serious breach of the judicial process. In the case of lost files, they should institute action to reconstruct the record and institute procedures to avoid future losses.’*

### **BM 4.8(7)(a) ‘Judicial decisions and judgments should be ... determined only on the basis of the facts and the law’:**

#### References

- i) UN Basic Principles on the Independence of the Judiciary (1985), paragraph 2:

*‘The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.’*

**BM 4.8(7)(b) ‘Judicial decisions and judgments should be ... delivered within a reasonable time ... with full reasons’:**

**BM 4.8(7)(c) ‘Judicial decisions and judgments should be ... subject to an impartial, fair and transparent appeals process which operates without undue delay’:**

#### References

- i) UNODC Technical Guide to UNCAC (2009), page 50 (first paragraph):  
*‘... Judges should be obliged by law to give reasons for their decisions. To ensure the integrity of the judiciary, including the availability of an effective appeals process, the reasons for judges’ decisions should also be recorded.’*
- iii) Limassol Conclusions on Combating Corruption within the Judiciary (2002), paragraph 12(xvi):  
*‘[The Colloquium] recommends that judicial officers should ensure that their judgments are well reasoned and delivered within a reasonable time.’*

**BM 4.8(8)(a) ‘Save where contrary to the public interest ... all court proceedings should be open to the public’:**

#### References

- i) UNODC Technical Guide to UNCAC (2009), page 50 (first paragraph):  
*‘... States Parties should help strengthen the integrity of the judiciary by ensuring that the judicial process is open and accessible. Barring exceptional circumstances, which should be determined by law, judicial proceedings should be open to the public.’*
- ii) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraphs 122–129
- iii) Latimer House Principles (2004):
  - Principle (IV) (page 11): *‘Court proceedings should, unless the law or overriding public interest otherwise dictates, be open to the public.’*
  - Guideline (VI)1(b): *‘(i) Legitimate public criticism of judicial performance is a means of ensuring accountability; (ii) The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.’*

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- iv) Limassol Conclusions on Combating Corruption within the Judiciary (2002):

*'12. (xv) In order to maintain public confidence in the judicial system, [the Colloquium] recommends that the Courts should at all times ensure that their rules and procedures are simplified and that, except for good cause, cases should be heard in public.'*

### **BM 4.8(8)(b) 'Save where contrary to the public interest ... all decisions and judgments of the judiciary should be disclosed, with full reasons, to the public':**

Latimer House Principle (IV) states that '*superior court decisions*' should be made available to the public (see Reference (ii) below). However, the Benchmark goes wider than this in providing that all judicial decisions should be made available to the public. This is because any judicial decision may be corrupt but not all such decisions will be heard by superior courts or appealed, for example because the defendant/respondent cannot fund an appeal or believes that the corrupt decision will not be properly heard on appeal. Thus it is important that all decisions are, as far as possible, made publicly available and thereby exposed to public scrutiny.

#### References

- i) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraphs 122–129
- ii) Latimer House Principles (2004):
  - Principle (IV) (page 11): '*Superior Court decisions should be published and accessible to the public and be given in a timely manner.*'
  - Guideline (VI)1(b): '*(i) Legitimate public criticism of judicial performance is a means of ensuring accountability; (ii) The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.*'
- iii) Examples of judgment databases: Australia:
  - Database of the High Court of Australia at <http://eresources.hcourt.gov.au/>
  - Database of the Federal Court of Australia at <https://www.fedcourt.gov.au/digital-law-library/judgments>)

### **BM 4.8(9) 'Where possible there should be computerisation of court records, including of the court hearing schedule, and computerised case management systems':**

Adequate funding for court administration (see Benchmark 4.9(3)) should include, where budget allows, funding to enable the court administration to have up-to-date facilities, such as a computerised document system. This will increase efficiency and reduce opportunity for corruption.

## References

- i) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraph 108:

*‘The State should, therefore, assist the judiciary to complement (or replace, where resources permit) the paper-based court record systems with electronic information and communication technologies (ICT). ICT will enable case records to be kept up to date, accurately, promptly and in an easily accessible form, and will contribute to strengthening the transparency, integrity and efficiency of justice. The computerization of case records will also avoid the reality or appearance, common in some jurisdictions, of court files being “lost”, and “fees” being required for their retrieval or substitution. As an example, in the United States, the Case Management/Electronic Case Files system allows courts to accept filings and provide access to filed documents over the Internet while also giving concurrent access to case files by multiple parties, and offering expanded search and reporting capabilities. The system also enables pleadings to be filed electronically with the court and documents to be downloaded and printed directly from the court system.’*

- ii) UNODC Technical Guide to UNCAC (2009), page 50 (second and fourth paragraphs):

*‘The daily administration of the judicial process is an important component in preventing corruption. Elements of effective administration of court proceedings include: ...*

- *The introduction of computerization of court records, including of the court hearing schedule, and computerized case management systems; ...*
- ... The judiciary must take necessary steps to prevent court records from disappearing or being withheld. Such steps may include the computerization of court records.’*

**BM 4.8(10)(b) (iv) ‘Efficient and secure systems should be implemented to ensure that all court documents, records and evidence are ... retained for a prescribed minimum period’:**

The prescribed period in the regulations for retention of documents, records and evidence should take account of relevant limitation periods so that such documents, records and evidence are, as far as possible, available for any future challenge, audit, litigation or prosecution. In cases where there is a risk of corruption and where there is no limitation period for corruption offences (as is recommended for corruption offences in Benchmark 1.2(5)), the period prescribed for retention should be indefinite or as long as practicable. The right to erasure under data protection laws should not allow for destruction of documents that may be needed for corruption investigations.

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References for all of BM 4.8(10)

- i) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraphs 106–108
- ii) UNODC Technical Guide to UNCAC (2009), page 50:
 

*‘The daily administration of the judicial process is an important component in preventing corruption. Elements of effective administration of court proceedings include: ...*

  - *Efficient systems to maintain and manage court records, including registries of court decisions; ...*

*... The judiciary must take necessary steps to prevent court records from disappearing or being withheld. Such steps may include the computerization of court records. They should also institute systems for the investigation of the loss and disappearance of court files.’*

**BM 4.8(12)(c) (ii) ‘Jurors should ... report, in good faith or on reasonable grounds, ...’:**

For meaning of ‘in good faith or on reasonable grounds’, see Guidance BM 21.6(5).

## BM 4.9 Combating corruption in relation to court administration and court personnel:

**BM 4.9(1) ‘the body responsible for court administration should implement an anti-corruption management system in accordance with Benchmark 10 (Public sector organisations)’:**

**BM 4.9(2) ‘court personnel should be employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials)’:**

- A) The court administration process provides the system of support functions that is necessary to enable the court system to operate effectively. Such functions may include procurement, financial management, human resource management, facilities management and judicial support functions, such as operation of court procedures and filing systems.
- B) Depending on the arrangements in individual States, it will be for the judiciary and/or the executive to determine how court administration should be operated and structured and which administrative functions should be delegated to a separate body and which retained in the direct control of the judiciary.
- C) However, whatever the structure, steps should be taken to ensure that there are adequate anti-corruption measures in place in relation to court

administration to help prevent corruption by court personnel or by others in relation to court administration functions. (Examples of how corruption can occur in court administration and non-judicial court functions are given in Guidance BM 4, paragraphs (B) and (C) above.) Consequently, the body responsible for court administration should implement an anti-corruption management system in accordance with Benchmark 10 (Public sector organisations) and court personnel should be employed, trained, and disciplined in accordance with Benchmark 11 (Public officials).

#### References

- i) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraphs 93 and 98:

- ‘93. ... *Court personnel are also responsible for the administrative and technical non-judicial tasks that contribute to the outcome of a judicial proceeding. ... They have the potential to undermine the integrity of the judicial process, through neglect of duty, abuse of power or corruption. Therefore, non-judicial court personnel, who constitute the bulk of the judiciary staff, are crucial to any measures that aim at strengthening the integrity and capacity of the judicial system.*
- ‘98. *Ethical standards for court personnel are as important as ethical standards for judges. Establishing ethical standards for court personnel is a relatively new, but growing, trend in judiciaries across the world and is consistent with article 8 of the Convention...*’

- ii) Example of court administrative structure: UK:

In the UK, HMCTS (Her Majesty’s Courts and Tribunals Service), which is an agency of the Ministry of Justice, provides the support system for court business. It operates on the basis of a partnership between the Lord Chancellor and the Lord Chief Justice. The Lord Chancellor has a statutory responsibility to ensure that there is an efficient and effective support system to support the business of the courts, resourcing the system adequately. The Lord Chancellor and Lord Chief Justice do not intervene (whether directly or indirectly) in the day-to-day operations of the agency and have placed the responsibility for overseeing the leadership and direction of HM Courts & Tribunals Service in the hands of its Board. (See: HM Courts & Tribunals Service Framework:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/384922/hmcts-framework-document-2014.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384922/hmcts-framework-document-2014.pdf))

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### **BM 4.9(3) ‘court administrative functions should be adequately resourced, staffed and funded’:**

#### References

- i) Latimer House Principles (2004):
  - Principle (IV)(c): *‘Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought.’*
  - Guideline (II)2: *‘Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.’*  
*Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary.’*
- ii) UN Basic Principles on the Independence of the Judiciary (1985), paragraph 7:  
*‘It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.’*
- iii) Example of state guaranteeing adequate resources for the courts: UK Constitutional Reform Act 2005, section 17 provides for an oath to be sworn by the Lord Chancellor to: *‘defend the independence of the judiciary and discharge my duty to ensure the provision of resources for the efficient and effective support of the courts for which I am responsible’.*

### **BM 4.9(4) ‘the judiciary should have ultimate responsibility for monitoring and ensuring that court administrative functions provide adequate support to judicial functions’:**

The judiciary should have this ultimate responsibility as it is only the judiciary that will be aware as to whether court administration is providing adequate support to the judicial function and be in a position to require improved performance, where necessary. This may include, for example, having appropriate mechanisms in place to identify the type and scale of problems in the support functions and to ensure that they are resolved.

#### References

- i) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraph 99:  
*‘The principal responsibility for court administration should vest in the judiciary or in a body subject to its direction and control. This includes*

*the appointment, supervision and disciplinary control of court personnel. However, the introduction into court systems, in recent decades, of a variety of management principles and practices oriented toward achieving increased productivity, improved case processing and reduced costs, has highlighted the need for a more professional approach to court administration. The skills and abilities that are now required, including familiarity with technological developments, do not fit the traditional job description of judges. Consequently, in many jurisdictions, a court administrator now has authority over all non-judicial court management and administrative functions. These include long-range administrative planning, finance, budget, procurement, human resources, facilities management, court security, and employee discipline, in addition to judicial support functions. The judge is thereby liberated from having to invest considerable time and energy in non-judicial functions for which he or she may not have been trained, and is able to focus more effectively on the judicial function. However, since the overall functioning of a court depends on the interplay between the judge and the administrative staff, there should be a shared responsibility between the head of the court and the court administrator for the overall management of the court.'*

- ii) Limassol Conclusions on Combating Corruption within the Judiciary, paragraph 12(xiv):

*'[The Colloquium] expresses its view that there should be a greater degree of judicial awareness of the work of the court staff and liaison with the said staff should be encouraged in order to ensure the smooth operation of the judicial system.'*

## BM 4.11 Combating corruption in the legal profession:

The legal profession plays a fundamental role in the court system, including in preparing and arguing civil and criminal cases in the courts, and so a corrupt legal profession will seriously undermine the delivery of justice. Corrupt lawyers may initiate corruption (e.g. by bribing court clerks to 'lose' documents or reallocate a court hearing, or bribing judges to determine a case in their favour) or may be subject to corrupt pressures (e.g. being bribed to present their own case poorly or to lie in court). Thus, steps should be taken to combat corruption in the legal profession. See also Benchmark 23 (Professional institutions and business associations).

### References

- i) UNODC Technical Guide to UNCAC (2009), page 51 (final paragraph):  
*'Yet another measure [to promote the integrity of the judicial process] concerns the responsibility of Bar Associations or Law Societies to promote*

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*professional standards. Such bodies have an obligation to report to the appropriate authorities instances of corruption which are reasonably suspected. They also have the obligation to explain to clients and the public the principles and procedures for handling complaints against judges and court personnel. Such bodies also have a duty to institute effective means to discipline their own members who are alleged to have been engaged in corruption of the judiciary or court personnel. In the event of proof of the involvement of a member of the legal profession in corruption, whether of a judge or of court personnel or of each other, appropriate means should be in place for investigation and, where proved, disbarment of the persons concerned.'*

- ii) Latimer House Principles (2004), Principle (IV):  
*'An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary.'*
- iii) Limassol Conclusions on Combating Corruption within the Judiciary, paragraph 8(ii):  
*'The Colloquium urges all national and international legal professional organisations within the Commonwealth to promote anticorruption programmes for the legal profession.'*

### **BM 4.11(2)(d) 'in good faith or on reasonable grounds'**

For meaning of 'in good faith or on reasonable grounds', see Guidance BM 21.6(5).

## **BM 4.12 Complaints and reporting systems:**

- A) The regulations should prescribe a body or bodies to be responsible for operating these systems.
- B) In order that complaints and reports are properly addressed, both systems should ensure that complaints and reports, as appropriate, are made to and dealt with by persons who are sufficiently independent from those against whom the complaints or reports are being made. Thus, for example, complaints or reports against members of the judiciary should not be dealt with by members of the judiciary alone, but by an independent body. (For discussion on the independent body, see Guidance BM 4.3(4) above.)
- C) For guidance on implementation of these systems, see:
  - a) **For the complaints system:** Guidance BM 10.19(1) (Public sector organisations).
  - b) **For the reporting system:** Benchmark 21 (Reporting corruption) and Guidance BM 21.

## References

- i) UNODC Technical Guide to UNCAC (2009), page 50:  
*'The daily administration of the judicial process is an important component in preventing corruption. Elements of effective administration of court proceedings include: ...*
  - *The prompt and effective response by the court system to public complaints...'*
- ii) Latimer House Principles (2004), Guideline (VI)1(b):  
*'(i) Legitimate public criticism of judicial performance is a means of ensuring accountability; (ii) The criminal law and contempt proceedings are not appropriate mechanisms for restricting legitimate criticism of the courts.'*

### BM 4.13 Transparency to the public:

- A) This Benchmark provision provides that the relevant prescribed bodies should proactively provide information to the public, in addition to responding to requests for information. This will facilitate the public's understanding of the court system and help the public to hold the court system to account. It will also help to build public confidence in the public sector and to create a culture in the public sector where the provision of information to the public is part of its regular function.
- B) **'Save to the extent contrary to the public interest'**: This would include, for example, not disclosing confidential details of ongoing corruption investigations until the investigations are complete. In the Benchmarks Definitions, 'public interest' is defined as *'the interests of the public at large as objectively and independently determined'*. The public interest exception would not allow the withholding of information simply because it may be embarrassing to an individual or organisation (e.g. if it shows a failure to manage a process appropriately or effectively).
- C) **'promptly'**: Information should be published as soon as possible after it becomes available so that, as far as possible, the public has current information enabling it to monitor the relevant matters as they proceed. In this way, any ongoing corruption or risk of corrupt activity in such matters may be able to be prevented, or at least identified early.
- D) **'the following information should be provided ... by the body responsible for court administration, the body responsible for regulating the legal profession (in the case of items in (3)(b)), or other prescribed body'**: As the implementation of the transparency requirements in Benchmark 4.13 is largely an administrative process,

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the appropriate person(s) to provide transparency will depend on the structure of a State's court system and how the administrative functions are allocated. Thus, the regulations should prescribe the appropriate bodies to provide the relevant disclosures.

### References

- i) UNCAC: The following provisions provide that 'Each State Party shall, in accordance with the fundamental principles of its legal system:'
  - UNCAC Article 5, paragraph 1:
 

*'... develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of ... transparency and accountability.'*
  - UNCAC Article 10:
 

*'... take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia: (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public; (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and (c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.'*
  - UNCAC Article 13, paragraph 1(b):
 

*'... take appropriate measures, ..., to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as: (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes; (b) Ensuring that the public has effective access to information...'*
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 58–65
- iii) UNODC Technical Guide to UNCAC (2009), pages 42–46 and 61–63
- iv) UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraphs 28 and 122–129:

- ‘28. In order to achieve these objectives, it is necessary that the judiciary should not only adopt a code of conduct, but that such a code is widely disseminated in the community.’
  - ‘124. States parties should seek to ensure that, subject to judicial supervision, the public, the media and court users should have reliable access to information pertaining to judicial proceedings, both pending and concluded (except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children). Such access could be provided on a court website or through appropriate and accessible records. Such information should include reasoned judgments, pleadings, motions and evidence. Affidavits or similar evidentiary documents that have not yet been accepted by the court as evidence may be excluded. Access to court documents should not be limited to case-related material, but should also include court-related administrative information such as statistics on the caseload and case clearance rates, as well as budget-related data, e.g. collection of court fees and the use of budgetary allocations.’
- v) Limassol Conclusions on Combating Corruption within the Judiciary, paragraph 8(iv):
- ‘The Colloquium, recognising that transparency assists in combating corruption, encourages judicial officers and their court staff to foster greater public awareness of the court’s operations, role and function.’*
- vi) Example of publication of complaints: UK:
- The Judicial Conduct Investigations Office publishes statements about complaints resulting in disciplinary sanctions on its website. Statements about sanctions below removal from office are deleted after one year. Statements about removal from office are deleted after five years. It does not publish details of complaints that are outside its remit or dismissed with no finding of misconduct. However, statistical information about the complaints it receives is available in its annual reports.
- (<https://judicialconduct.judiciary.gov.uk/faqs/>)

# Guidance to Benchmark 5

## Parliament

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### BM 5 Purpose of Benchmark:

- A) Parliament has a fundamental role in combating corruption including primarily by way of:
  - a) its legislative function, in passing laws which provide for transparency and accountability in the public sector, which criminalise corrupt actions and provide for sanctions, and which regulate the public and private sectors so as to minimise opportunity for corruption
  - b) its authorising of government expenditure, in approving the budget and ensuring that expenditure is fair, transparent and accountable
  - c) its oversight function, in scrutinising government policies and actions and holding government and public sector bodies to account
  - d) its representative function, in representing the public's concerns relating to corruption.
- B) In addition, parliament should implement processes to combat corruption within the parliamentary system itself, where corruption can occur, for example, by:
  - a) improper influencing of parliamentary business by corrupt funding of political parties or bribery of individual members of parliament
  - b) abuse of expense allowances by members of parliament
  - c) bribery and fraud in the procurement and management of contracts in relation to parliamentary administration
  - d) embezzlement in the management of parliament's finances.
- C) This Benchmark proposes measures to enable parliament to combat corruption.

### BM 5.2 Parliament's role in combating corruption:

**BM 5.2(2) 'In order to combat corruption, parliament should ... propose, consider and pass laws designed to combat corruption':**

Such laws would include, for example, laws to:

- a) increase transparency and accountability in the public sector
- b) minimise opportunity for corruption in the public sector by requiring simplification of procedures involving interaction with private sector organisations and the public

- c) criminalise corrupt activity and provide for proportionate and dissuasive sanctions
- d) protect freedom of speech and protect whistle-blowers, inter alia where suspected or actual corruption is being exposed
- e) implement the regulations provided for in the Benchmarks.

#### References

- i) Latimer House Principles (2004):
  - Principle (VIII): The Law-making Process:  
*‘In order to enhance the effectiveness of law making as an essential element of the good governance agenda:*
    - *There should be adequate parliamentary examination of proposed legislation;*
    - *Where appropriate, opportunity should be given for public input into the legislative process;*
    - *Parliaments should, where relevant, be given the opportunity to consider international instruments or regional conventions agreed to by governments.’*
  - Guideline (VII): The Law-Making Process

#### **BM 5.2(3) ‘In order to combat corruption, parliament should ... consider, comment on and approve or reject budgets and taxation policies, with a view to ensuring they are free from, and do not enable, corruption?’:**

- A) **Budgets:** Parliament should scrutinise proposed budgets to ensure that they are genuine, realistic and evidence-based estimates of revenue and spending, and that public resources are allocated transparently, accountably, fairly and in the interests of the public at large. Parliament should be alert to any factors in the budget which may enable misappropriation of public funds or preferential treatment of any person or sector. Parliament should not accept:
  - the inclusion of non-transparent or unclear provisions in the budget
  - the allocation of funds outside the budget
  - the allocation of funds which appear to be unfair or to favour persons in power or those with whom such persons are connected.
- B) **Taxation policies:** Parliament should scrutinise proposed and existing taxes to ensure that they are not designed to improperly benefit any person or category of person(s) or for other corrupt purpose.

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**BM 5.2(4) ‘In order to combat corruption, parliament should ... scrutinise and report on government policies, expenditure and actions, with a view to ensuring they are free from, and do not enable, corruption’:**

## References

- i) Latimer House Principles (2004):
  - Principle (VII): Accountability Mechanisms:
    - ‘(a) *Executive Accountability to Parliament*  
*Parliaments and governments should maintain high standards of accountability, transparency, and responsibility in the conduct of all public business.*  
*Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to Parliament.’*
  - Guideline (VI)2(a): Accountability of the Executive to Parliament:
    - ‘*Parliamentary procedures should provide adequate mechanisms to enforce the accountability of the executive to parliament. These should include:*
      - i) *a committee structure appropriate to the size of parliament, adequately resourced and with the power to summon witnesses, including ministers. Governments should be required to announce publicly, within a defined time period, their responses to committee reports;*
      - ii) *standing orders should provide appropriate opportunities for members to question ministers and full debate on legislative proposals;*
      - iii) *the public accounts should be independently audited by the Auditor General who is responsible to and must report directly to parliament;*
      - iv) *the chair of the Public Accounts Committee should normally be an opposition member;*
      - v) *offices of the Ombudsman, Human Rights Commissions and Access to Information Commissioners should report regularly to parliament.’*

**BM 5.2(6)(a) ‘In order to combat corruption, parliament should ... represent the interests and concerns of the constituents of members of parliament in relation to ... combating corruption in the State’:**

## References

- i) Latimer House Principles (2004):
  - Principle (VIII): The Law-making Process: ‘*In order to enhance the effectiveness of law making as an essential element of the good governance agenda: ... Where appropriate, opportunity should be given for public input into the legislative process; ...*’

**BM 5.2(7) ‘In order to combat corruption, parliament should ... assess the corruption risks in the exercise of its parliamentary and management functions and take adequate steps to combat such corruption’:**

Assessing these risks and taking adequate steps are provided for in the anti-corruption management system discussed in Guidance BM 5.7 below.

### **BM 5.3 Independence of parliament:**

**BM 5.3(1) ‘... members of parliament should ... in the exercise of their functions, have independence, and be seen to have independence, from any improper external influence or interference, including from the executive and from business and financial interests’:**

Improper external influence or interference includes:

- a) improper influence or interference by members of government
- b) improper influence by lobbyists or special interest groups
- c) the use of criminal, defamation, or contempt of parliament laws in order to restrict legitimate criticism by members of parliament
- d) the use of privilege laws in order to restrict legitimate reporting of parliamentary proceedings
- e) improper influence where members of parliament fail to recuse themselves from parliamentary business in which they have an actual or perceived conflict of interest.

#### References

- i) Latimer House Principles (2004)
  - Principle (III): Independence of parliamentarians:
    - ‘(a) *Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the Constitution, free from unlawful interference.*
    - ‘(b) *Criminal and defamation laws should not be used to restrict legitimate criticism of Parliament; the offence of contempt of parliament should be narrowly drawn and reporting of the proceedings of parliament should not be unduly restricted by narrow application of the defence of qualified privilege.*’

**BM 5.3(3) ‘... members of parliament should ... be provided with adequate staff and resources’:**

#### References

- i) Latimer House Principles (2004), Guideline (VII): The Law-Making Process:

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- ‘4. *Parliament should be serviced by a professional staff independent of the regular public service.*
5. *Adequate resources to government and non-government backbenchers should be provided to improve parliamentary input and should include provision for:*
  - a) *training of new members;*
  - b) *secretarial, office, library and research facilities;*
  - c) *drafting assistance including private members’ bills.*
6. *An all-party committee of members of parliament should review and administer parliament’s budget which should not be subject to amendment by the executive.’*

### **BM 5.3(4) ‘... members of parliament should ... have security of tenure during their elected term of office’:**

#### References

- i) Latimer House Principles (2004), Guideline (III): Preserving the Independence of Parliamentarians:
  - ‘2. *Security of members during their parliamentary term is fundamental to parliamentary independence and therefore:*
    - a) *the expulsion of members from parliament as a penalty for leaving their parties (floor-crossing) should be viewed as a possible infringement of members’ independence; anti-defection measures may be necessary in some jurisdictions to deal with corrupt practices*
    - b) *laws allowing for the recall of members during their elected term should be viewed with caution, as a potential threat to the independence of members*
    - c) *the cessation of membership of a political party of itself should not lead to the loss of a member’s seat.’*

### **BM 5.4 Impartiality of parliament:**

#### References

- i) Latimer House Principles (2004)
  - Guideline (V)2: Parliamentary Ethics:
    - a) *‘Conflict of interest guidelines and codes of conduct should require full disclosure by ministers and members of their financial and business interests*
    - b) ....

- c) *whilst responsive to the needs of society and recognising minority views in society, members of parliament should avoid excessive influence of lobbyists and special interest groups.*

## BM 5.7 Combating corruption in parliamentary proceedings and administration:

**BM 5.7(1) ‘The body responsible for parliamentary administration should implement an anti-corruption management system in accordance with Benchmark 10 (Public sector organisations):’**

**BM 5.7(2) ‘All personnel of the body responsible for parliamentary administration should be employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials):’**

- A) The body responsible for parliamentary administration provides the system of support that is necessary to enable parliament to operate effectively. Its functions may include, for example, procurement, financial management, human resource management, facilities management and support functions for members of parliament, such as the operation of parliamentary procedures and filing systems.
- B) There is a risk of corruption in relation to the functions of the body responsible for parliamentary administration. Consequently, this body should implement an effective anti-corruption management system, as provided for in Benchmark 10 (Public sector organisations) and its staff should be employed in accordance with Benchmark 11 (Public officials).

## BM 5.8 Accountability of members of parliament:

### References

- i) Latimer House Principles (2004):
- Principle (VII): Accountability Mechanisms: *‘Parliaments ... should maintain high standards of accountability, transparency, and responsibility in the conduct of all public business.’*

**BM 5.8(4)(b) ‘Members of parliament should not be entitled to immunity from civil or criminal liability where, in the conduct of their office or otherwise, they commit corruption offences or other criminal offences.’**

See also Benchmarks 1.4(1) and 3.11 (and Guidance BM 1.4(1) and BM 3.11) which apply to all public officials.

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**BM 5.11 Complaints and reporting systems:**

- A) The regulations should prescribe a body or bodies to be responsible for operating these systems.
- B) In order that complaints and reports are properly addressed, both systems should ensure that complaints and reports, as appropriate, are made to and dealt with by persons who are sufficiently independent from those against whom the complaints or reports are being made. Thus, for example, complaints or reports against members of parliament should not be dealt with by members of parliament alone, but by an independent body.
- C) For guidance on implementation of these systems, see:
  - a) **For the complaints system:** Guidance BM 10.19(1) (Public sector organisations).
  - b) **For the reporting system:** Benchmark 21 (Reporting corruption) and Guidance BM 21.

**BM 5.12 Transparency to the public:**

- A) This Benchmark provision provides that the relevant prescribed body should proactively provide information to the public, in addition to responding to requests for information. This will facilitate the public's understanding of the parliamentary system and help the public to hold it to account. It will also help to build public confidence in the public sector and to create a culture in the public sector where the provision of information to the public is part of its regular function.
- B) **'Save to the extent contrary to the public interest':** This would include, for example, not disclosing confidential details of ongoing corruption investigations until the investigations are complete. In the Benchmarks Definitions, 'public interest' is defined as *'the interests of the public at large as objectively and independently determined'*. The public interest exception would not allow the withholding of information simply because it may be embarrassing to an individual or organisation (e.g. if it shows a failure to manage a process appropriately or effectively).
- C) **'promptly':** Information should be published as soon as possible after it becomes available so that, as far as possible, the public has current information enabling it to monitor the relevant matters as they proceed. In this way, any ongoing corruption or risk of corrupt activity in such matters may be able to be prevented, or at least identified early.

## References

- i) UNCAC: The following provisions provide that *‘Each State Party shall, in accordance with the fundamental principles of its legal system’*:
  - UNCAC Article 5, paragraph 1:
 

*‘... develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of ... transparency and accountability.’*
  - UNCAC Article 10:
 

*‘... take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia: (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public; (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and (c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.’*
  - UNCAC Article 13, paragraph 1(b):
 

*‘... take appropriate measures, ... , to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as: (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes; (b) Ensuring that the public has effective access to information.’*
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 58–65
- iii) UNODC Technical Guide to UNCAC (2009), pages 42–46 and 63
- iv) The Commonwealth Parliamentary Association: Recommended Benchmarks for Democratic Legislatures:
 

*‘11.1.1 Legislators should maintain high standards of accountability, transparency, responsibility and propriety in the conduct of all public and parliamentary matters including strict adherence to codes of conduct, and interest disclosure rules.’*

# Guidance to Benchmark 6

## Regulatory authorities

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### BM 6 Purpose of Benchmark:

- A) Regulatory authorities regulate activities (such as those in Benchmark 6.3) carried out by public or private sector organisations which provide services to the public or which impact on the public:
  - a) In the case of services provided to the public, regulation is required so as to ensure that proper services are provided and that the public are adequately protected. If poorly performed, such services could have significant detrimental impact on the public. The regulation of such services relates inter alia to matters such as quality, safety and the environment.
  - b) In the case of services which impact on the public in that they involve public funds and resources (e.g. public sector procurement, extractive industries and foreign aid), regulation is required to ensure that public funds and resources are protected.
- B) Significant corruption risks exist in such activities and are often closely intertwined with failure to meet the quality, safety and other regulations that apply. For example:
  - a) an organisation may deliberately and deceptively provide poor quality products which do not meet their product description, so as to make a bigger profit. This could be a breach of quality regulations as well as fraud
  - b) an organisation could install flammable cladding on a building while representing that it is non-flammable and also bribe the building inspector to certify it as non-flammable. This could be a breach of safety regulations as well as fraud and bribery
  - c) a government contract for the supply of medical clothing and equipment may be awarded corruptly to a government ally, or a public sector concession contract could be corruptly granted to a favoured contractor and the revenues shared with a corrupt government official. In both of these cases, a breach of procurement regulations as well as corruption is involved.
- C) In addition to the risk of corruption in the regulated activities, there is also a risk of corruption involving the regulatory authorities themselves where they may be bribed not to regulate certain activities, or to overlook

a breach of regulations, or to approve products which do not comply with the regulations. There is also the risk of corruption in relation to their management functions, such as procurement of supplies and internal financial management.

- D) Consequently, in order to carry out their regulatory functions effectively, the regulatory authorities need to be alert to the risk of corruption both in the activities they are regulating and also in relation to their own performance and internal management. Where the regulatory authorities identify reasonable grounds to suspect corruption, they should ensure that such matter is reported to the law enforcement authorities.

## BM 6.1 Regulations:

### References

- i) UNCAC: UNCAC does not include general provisions relating to regulated activities. However, it does require policies and practices to be implemented for the proper management of public affairs and public property and also for measures to prevent corruption in certain sectors, as follows:
  - UNCAC Article 5, paragraphs 1 and 2 provide for policies and practices to promote the proper management of public affairs and public property
  - UNCAC Article 11 provides for measures to prevent corruption in the judiciary and prosecution services
  - UNCAC Article 12 provides for measures to prevent corruption in the private sector, including standards to safeguard the integrity of private entities including the proper performance of business activities (paragraph 2(b)) and enhancing accounting and auditing standards (paragraphs 1, 2(f) and 3)
  - UNCAC Article 14 provides for measures to prevent money laundering, including a regulatory and supervisory regime for banks and non-bank financial institutions
- ii) UNODC Technical Guide to UNCAC (2009), pages 4–6
- iii) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019),

### Recommendation 8:

*‘Strategies to reduce the risks of corruption involving vast quantities of assets should be developed for corruption-prone sectors, including security and defence, infrastructure, energy, extractive industries, water, health, education, sports, election administration, humanitarian, assistance and foreign aid.’*

## BM 6.2 Regulatory authorities:

- A) States may choose how to allocate the regulatory functions. The Benchmark uses the term ‘authorities’ for convenience to mean the authorities that exercise the relevant regulatory functions. This does not mean that there should necessarily be separate authorities with these functions alone. The functions may be exercised by new or existing authorities, either alone or alongside other responsibilities. Federal States may have such authorities in each constituent state, in which case there should be provision to ensure common standards and co-operation between those different authorities.
- B) There will be different types of regulatory authorities depending on the type of regulated activities (such as those activities listed in Benchmark 6.3). Even within such activities, different regulatory bodies may be appropriate. For example, in relation to public sector employment, there may be different types of regulatory authority for different types of public official, such as for the judiciary or for members of parliament (see Benchmark 11.2).

## BM 6.4 Responsibilities of the regulatory authorities:

### BM 6.4(6) ‘encourage persons to report suspicions of corruption in relation to the regulated activities’

Such encouragement should also explain:

- a) the authority’s corruption reporting system under Benchmark 6.10(2)
- b) that persons should make reports only where they believe, in good faith or on reasonable grounds, that there has been corruption
- c) the matters in Benchmark 21.4–21.6 (Reporting corruption).

## BM 6.5 Developing the regulations:

This Benchmark provision focuses on regulations to prevent corrupt activity. Apart from a general reference in Benchmark 6.5(1)(a), it does not deal with regulation in connection with matters such as safety, quality or the environment, nor with monitoring the organisations to ensure their compliance with such regulations.

## BM 6.7 Anti-corruption management:

There is a risk of corruption in relation to:

- a) the performance of the regulatory authorities’ functions (such as in the monitoring of compliance with regulations)

- b) the management processes which support those functions (for example, the procurement of premises, equipment and resources, the employment of staff and the management of their contracts and finances).

In order to combat such corruption, the Benchmark provides that the authorities should each implement an anti-corruption management system in accordance with Benchmark 10 (Public sector organisations) and should employ and manage their officers and employees in accordance with Benchmark 11 (Public officials).

## BM 6.8 Independence of the regulatory authorities:

**BM 6.8(1) ‘the regulatory authorities should be provided with the necessary mandate, powers and financial autonomy; adequate funding, staff and resources; and independence from improper government, political or other influence or interference’:**

- A) The matters in Benchmark 6.8(1) should, subject to adequate accountability, be granted to the authorities. This is to help ensure that the authorities are able to carry out their functions effectively and free from interference by government, politicians, powerful individuals, companies and other parties who may seek to interfere in the authorities’ activities by, for example, seeking to block or corruptly influence their activities.
- B) Financial autonomy should include an allocated adequate budget over which the authorities have management and control subject to full accountability and transparency and compliance with accounting and auditing standards.

### References

The following references apply to authorities responsible for preventing corruption. However, the principles apply equally to regulatory authorities:

- i) UNCAC Article 6, paragraph 2 requires that the body responsible for preventing corruption should have the necessary independence, freedom from undue influence, material resources and staff to enable it to carry out its functions effectively.
- ii) UNODC Technical Guide to UNCAC (2009), page 11: *‘The legislative framework should ensure operational independence of the body or bodies so that they may determine its or their own work agenda and how it or they perform their mandated functions. In addressing independence, consideration would need to be given to the following issues: Rules and procedures governing the appointment, tenure and dismissal of the Director and other designated senior personnel; the composition of the body and/*

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*or any supervisory board; suitable financial resources and remuneration for staff; an appropriate budget; suitable recruitment, appointment/election, evaluation and promotion procedures; periodic reporting obligations to another public body, such as the legislature; formal paths to allow cooperation and exchange of information with other agencies; arrangements to determine the involvement of civil society and the media.'*

### **BM 6.8(2) 'the heads of the regulatory authorities should be employed, trained, disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials) and the following provisions':**

The head of each regulatory authority has a critical role in helping to shape the authority's policies and the relevant regulations and overseeing their implementation. It is therefore essential that measures are taken to help ensure that no corrupt appointment is made and that, once appointed, the head of the authority operates with integrity and free from improper influence. To help ensure this, the Benchmark provides that the heads of the authorities should be employed, trained, and disciplined and comply with a code of conduct, in accordance with Benchmark 11 (Public officials) and should be protected from improper influence or dismissal by the provisions of Benchmark 6.8(2)(a) and (b), as explained below.

### **BM 6.8(2)(a) 'all processes and decisions required under Benchmark 11 or (b) below, in relation to heads of the regulatory authorities, should be conducted and taken by an independent body':**

In order to help ensure the independence of the head of an authority, the Benchmark provides that all processes and decisions under Benchmark 11 and Benchmark 6.8(2)(b), relating to the employment, training, conduct, disciplining and dismissal of the head of an authority, should be conducted and made by an independent body. It is for States to determine how to establish such a body. The criteria for selection and dismissal of its members should be fair and impartial. The selection and dismissal criteria and processes, the identity and qualifications of the selected and dismissed members, and the reasons for their selection or dismissal should be publicly declared. Members of this body should not have any conflict of interest. The body should not be controlled by government members and so should either not have any government members or, where there are government members, they should be outnumbered by members of equivalent seniority who have no government connection. Where government or parliament has any right to appoint or dismiss members to or from this body, this should only be allowed based on independent, impartial and transparent procedures.

#### References

The following references apply to authorities responsible for preventing corruption. However, the principles apply equally to regulatory authorities:

- i) Jakarta Statement on Principles for Anti-Corruption Agencies (2012), Paragraph 1 provides:
  - ‘*APPOINTMENT: ACA heads shall be appointed through a process that ensures his or her apolitical stance, impartiality, neutrality, integrity and competence;*’
- ii) UNODC State of Implementation of UNCAC (2017), page 166 states, in relation to the law enforcement heads (under UNCAC Article 36), that there should be ‘*constitutional guarantees of their independence and the manner of appointment and removal from office of their members and leaders (e.g., by parliamentary decision after open, consultative procedures)*’.
- iii) UNODC Technical Guide to UNCAC (2009), page 11 (first and second paragraphs) states: ‘*In addressing independence [for anti-corruption bodies], consideration would need to be given to the following issues: Rules and procedures governing ... the appointment, tenure and dismissal of the Director and other designated senior personnel; the composition of the body and/or any supervisory board; ... ; suitable recruitment, appointment/ election, evaluation and promotion procedures...*’

**BM 6.8(2)(b) ‘heads of the regulatory authorities should have security of tenure for a reasonable prescribed maximum period and be suspended or dismissed only for reasons of etc. ...’:**

#### References

The following references apply to authorities responsible for preventing corruption. However, the principles apply equally to regulatory authorities:

- i) UNODC State of Implementation of UNCAC (2017), page 166 which states, in relation to the law enforcement heads (under UNCAC Article 36), that there should be ‘*constitutional guarantees of their independence and the manner of appointment and removal from office of their members and leaders (e.g., by parliamentary decision after open, consultative procedures)*’.
- ii) Jakarta Statement on Principles for Anti-Corruption Agencies (2012), paragraph 1 recommends the following principles to ensure the independence and effectiveness of ACAs:
  - ‘*REMOVAL: ACA heads shall have security of tenure and shall be removed only through a legally established procedure equivalent to the procedure for the removal of a key independent authority specially protected by law (such as the Chief Justice).*’

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**BM 6.9 Accountability:**

## References

The following reference applies to authorities responsible for preventing corruption. However, the principles apply equally to regulatory authorities:

- i) Jakarta Statement on Principles for Anti-Corruption Agencies (2012), Paragraph 1: Internal Accountability, External Accountability, Public Reporting

**BM 6.10 Complaints and reporting systems:**

- A) In order that complaints and reports are properly addressed, both systems should ensure that complaints and reports, as appropriate, are made to and dealt with by persons who are sufficiently independent from those against whom the complaints or reports are being made.
- B) For guidance on implementation of these systems, see:
  - a) **For the complaints system:** Guidance BM 10.19(1) (Public sector organisations).
  - b) **For the reporting system:** Benchmark 21 (Reporting corruption) and Guidance BM 21.

**BM 6.11 Transparency to the public:**

- A) This Benchmark provision provides that each regulatory authority should proactively provide information to the public, in addition to responding to requests for information. This will facilitate the public's understanding of the regulatory authorities and their functions and activities and help the public to hold the authorities to account and to monitor the regulated activities. It will also help to build public confidence in the public sector and to create a culture in the public sector where the provision of information to the public is part of its regular function.
- B) **'Save to the extent contrary to the public interest':** This would include, for example, not disclosing confidential details of ongoing corruption investigations until the investigations are complete. In the Benchmarks Definitions, 'public interest' is defined as *'the interests of the public at large as objectively and independently determined'*. The public interest exception would not allow the withholding of information simply because it may be embarrassing to an individual or organisation (e.g. if it shows a failure to manage a process appropriately or effectively).
- C) **'promptly':** Information should be published as soon as possible after it becomes available so that, as far as possible, the public has current information enabling it to monitor the relevant matters as they proceed.

In this way, any ongoing corruption or risk of corrupt activity in such matters may be able to be prevented, or at least identified early.

#### References

- i) UNCAC: The following provisions provide that *‘Each State Party shall, in accordance with the fundamental principles of its legal system:’*
  - UNCAC Article 5, paragraph 1:  
*‘... develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of ... transparency and accountability.’*
  - UNCAC Article 10:  
*‘... take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia: (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public; (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and (c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.’*
  - UNCAC Article 13, paragraph 1(b):  
*‘... take appropriate measures, ... , to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as: (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes; (b) Ensuring that the public has effective access to information.’*
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 58–65
- iii) UNODC Technical Guide to UNCAC (2009), pages 42–46 and 63

# Guidance to Benchmark 7

## Regulation of financial institutions and the financial system

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### BM 7 Purpose of Benchmark:

- A) Significant corruption can take place in the national and international financial system. For example:
  - a) customers' bank or investment funds may be stolen
  - b) corrupt bank loans may be made through bribery of bank officials or by bank officials who have a personal interest in such loans
  - c) corrupt financial transactions may involve mis-sale of financial instruments, deception as to the true nature of transactions, or conspiracy to defraud between officials of different financial institutions
  - d) the financial system may be used for money laundering. Proceeds of crime may be transmitted through cash transfer agencies or through the banking system using complex transactions and offshore companies to obscure the audit trail. They may be integrated into the legitimate economy by financial investment, purchase of assets, or through casino operations. Organisations may help to conceal these corrupt transactions through false accounting.
- B) In order to prevent such corrupt activity, the financial system should be adequately regulated, monitored and supervised, and there should be adequate accounting and independent auditing requirements for larger organisations.
- C) This Benchmark specifies measures which can be taken in this regard. There is a considerable amount of detailed guidance published in this area. Therefore, rather than repeat or recreate this information, the Benchmark summarises key principles which are taken from relevant guidance. The resources listed below should be looked to for detailed requirements, recommendations and guidance in relation to the relevant Benchmark provision.
- D) This Benchmark 7 (Regulation of financial institutions and the financial system) is distinct from Benchmark 15 (Financial management).
  - a) Benchmark 7 provides for:

- i) the regulation of financial institutions and designated non-financial businesses and professions (DNFBPs), whether in the public or private sector, so as to prevent corruption (and in particular money laundering) in the financial system
  - ii) the regulation of accounts and audits for all organisations in the public or private sector.
- b) Benchmark 15 provides for anti-corruption controls in relation to the management of national finances (such as the budget and taxation) and in relation to the internal financial management of public sector organisations.

#### References

- i) UNCAC Articles 14 and 52
- ii) FATF Recommendations
- iii) UNODC/IMF/Commonwealth Model Provisions (2016), Parts II, III, IV and VIII

## BM 7.2 Financial regulatory authority:

#### References

- i) FATF Recommendations, Recommendations 26 to 28
- ii) UNODC/IMF/Commonwealth Model Provisions (2016), Part II, section 23 (Authorities Responsible for Supervision)

### BM 7.2(1) Undertaking periodic risk assessments:

#### References

- i) FATF Recommendations, Recommendations 1 and 15

### BM 7.2(2) Designing and implementing measures:

#### References

- i) FATF Recommendations, Recommendation 1

### BM 7.2(3) Establishing regulations:

#### References

- i) FATF Recommendations, Recommendations 9 to 35 (Sections D, E and F)
- ii) UNCAC Article 14, paragraph 1(a), 2 and 3
- iii) UNCAC Article 52, paragraphs 1–4
- iv) UNODC/IMF/Commonwealth Model Provisions (2016), Part II, Section 23(2)

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### **BM 7.2(4) Monitoring, supervising, and ensuring compliance:**

#### References

- i) FATF Recommendations, Recommendations 26 to 28
- ii) UNCAC Article 14, paragraphs 2 and 3
- iii) UNODC/IMF/Commonwealth Model Provisions (2016), Part II, Section 23(2)

### **BM 7.2(5) Licensing financial institutions and DNFBPs:**

#### References

- i) FATF Recommendations, Recommendation 26

### **BM 7.2(6) Controlling money and value transfer services:**

#### References

- i) FATF Recommendations, Recommendation 14

### **BM 7.2(7) Controlling cash movement:**

#### References

- i) FATF Recommendations, Recommendation 32

### **BM 7.2(8) Preventing criminal ownership:**

#### References

- i) FATF Recommendations, Recommendation 26
- ii) UNODC/IMF/Commonwealth Model Provisions (2016), Part II, Section 23

### **BM 7.2(9) Preventing illicit shell banks and shell companies:**

#### References

- i) FATF Recommendations, Recommendation 26
- ii) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019), Recommendation 18.

### **BM 7.2(10) Administering non-criminal sanctions:**

#### References

- i) FATF Recommendations, Recommendations 26 to 28 and 35
- ii) UNODC/IMF/Commonwealth Model Provisions (2016), Part II, Section 23

**BM 7.2(11) Enabling criminal sanctions:**

## References

- i) FATF Recommendations, Recommendations 20, 21, 30 and 31
- ii) UNODC/IMF/Commonwealth Model Provisions (2016), Part II, Section 23

**BM 7.2(12) Promoting co-operation:**

## References

- i) FATF Recommendations, Recommendations 2 and 36 to 40
- ii) UNCAC Article 14, paragraphs 1(b) and 5
- iii) UNODC/IMF/Commonwealth Model Provisions (2016), Part II, Section 23

**BM 7.2(13) Facilitating the exchange of information:**

## References

- i) FATF Recommendations, Recommendations 2 and 29
- ii) UNCAC Article 14, paragraph 1(b)
- iii) UNODC/IMF/Commonwealth Model Provisions (2016), Part III, Sections 31–35

**BM 7.4 Anti-money laundering regulations to be implemented by financial institutions:****BM 7.4(1) Risk assessment and action:**

## References

- i) FATF Recommendations, Recommendations 1 and 15

**BM 7.4(2) Customer due diligence:**

## References

- i) FATF Recommendations, Recommendation 10

**BM 7.4(3) Record-keeping:**

## References

- i) FATF Recommendations, Recommendation 11

**BM 7.4(4) Politically exposed persons:**

Definition: PEPS are defined in the FATF Recommendations Glossary (page 123) as:

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***Foreign PEPs** are individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations, important political party officials.*

***Domestic PEPs** are individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state-owned corporations, important political party officials.*

***Persons who are or have been entrusted with a prominent function by an international organisation** refers to members of senior management, i.e. directors, deputy directors and members of the board or equivalent functions.*

*The definition of PEPs is not intended to cover middle ranking or more junior individuals in the foregoing categories.'*

### References

- i) FATF Recommendations, Recommendation 12

### **BM 7.4(5) Correspondent banking:**

#### References

- i) FATF Recommendations, Recommendation 13

### **BM 7.4(6) Wire transfers:**

#### References

- i) FATF Recommendations, Recommendation 16

### **BM 7.4(7) Reliance on third parties:**

#### References

- i) FATF Recommendations, Recommendation 17

### **BM 7.4(8) Internal controls and foreign branches and subsidiaries:**

#### References

- i) FATF Recommendations, Recommendation 18

### **BM 7.4(9) Higher risk customers, transactions and States:**

#### References

- i) FATF Recommendations, Recommendation 19

**BM 7.4(10) Reporting of suspicious transactions:**

## References

- i) FATF Recommendations, Recommendation 20

**BM 7.5 Anti-money laundering regulations to be implemented by DNFBPs:**

Examples of sectors or professions which could be at heightened risk of participating in or facilitating money laundering may include: casinos; real estate agents; dealers in precious metals or stones; lawyers, notaries, other legal professionals and accountants; trust and company service providers.

## References

- i) FATF Recommendations, Recommendations 22 and 23

**BM 7.6 Confidentiality and tipping-off:**

## References

- i) FATF Recommendations, Recommendation 21

**BM 7.7 Accounting and auditing regulations:**

## References

- i) UNCAC Article 12, paragraphs 1, 2(f), 3 and 4

**BM 7.11 Transparency to the public:**

- A) This Benchmark provision provides that the financial regulatory authority should proactively provide information to the public, in addition to responding to requests for information. This will facilitate the public's understanding of the financial system and the functions and activities of the financial regulatory authority and help the public to hold the authority, financial institutions and DNFBPs to account. It will also help to build public confidence in the public sector and to create a culture in the public sector where the provision of information to the public is part of its regular function.
- B) **'Save to the extent contrary to the public interest'**: This would include, for example, not disclosing confidential details of ongoing corruption investigations until the investigations are complete. In the Benchmarks Definitions, 'public interest' is defined as *'the interests of the public at large as objectively and independently determined'*. The public interest exception would not allow the withholding of information simply

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because it may be embarrassing to an individual or organisation (e.g. if it shows a failure to manage a process appropriately or effectively).

- C) **‘promptly’**: Information should be published as soon as possible after it becomes available so that, as far as possible, the public has current information enabling it to monitor the relevant matters as they proceed. In this way, any ongoing corruption or risk of corrupt activity in such matters may be able to be prevented, or at least identified early.

### References

- i) UNCAC: The following provisions provide that *‘Each State Party shall, in accordance with the fundamental principles of its legal system:’*
  - UNCAC Article 5, paragraph 1:
 

*‘... develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of ... transparency and accountability.’*
  - UNCAC Article 10:
 

*‘... take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia: (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public; (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and (c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.’*
  - UNCAC Article 13, paragraph 1(b):
 

*‘... take appropriate measures, ... to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as: (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes; (b) Ensuring that the public has effective access to information.’*
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 58–65
- iii) UNODC Technical Guide to UNCAC (2009), pages 42–46 and 63

# Guidance to Benchmark 8

## Transparency of asset ownership

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### BM 8 Purpose of Benchmark:

- A) From an anti-corruption perspective, it is important that conflicts of interest, unexplained wealth and proceeds of crime can be identified. This process is made significantly more difficult if the true (or beneficial) ownership of assets is allowed to remain secret.
- B) Permitting beneficial ownership to remain secret enables corrupt persons:
  - a) to conceal conflicts of interest, thus enabling them to participate in and distort the outcome of transactions in their favour. For example, a government minister may arrange for government contracts to be awarded to an organisation in which she or he has a secret interest
  - b) to hide proceeds of crime by placing or investing them in assets or accounts whose beneficial ownership cannot be identified, thus making it difficult to prove that an offence has been committed or to recover the proceeds of crime. For example, proceeds of crime may be hidden by:
    - i) establishing a company in a jurisdiction which does not release details of beneficial ownership and transferring proceeds of crime to bank accounts held in the company's name
    - ii) using the proceeds of crime to purchase land which is then allowed to be registered in the name of a nominee, with no requirement to register the beneficial owner
    - iii) setting up a secret trust, with nominee trustees, to hold the proceeds of crime.

In each case, the permitted secret beneficial ownership of the company, the land and the trust facilitates the laundering of the proceeds of crime.
- C) It is therefore critical that the beneficial ownership of assets can be readily identified. This requires registration of both the legal and beneficial ownership of organisations, land and real estate, trusts, and high value movable property, and for access to the relevant registers to be made available to the law enforcement authorities, interested parties, and, save for cases which would be contrary to the public interest, the public.
- D) Such registration and access would enable inter alia the following to be more easily traced or identified:

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- a) conflicts of interest of persons with decision-making functions (as it will be possible to identify whether they or their family members or close associates are beneficial owners of the organisations, land, trust or assets in respect of which they are making decisions)
  - b) the beneficial owners of accounts or assets into which proceeds of crime have been placed or invested, who will either be, or have links to, the relevant offenders
  - c) whether public officials are beneficial owners of organisations, land, trusts or assets and thus whether they have unexplained wealth, namely assets greater than their legitimate income, and who thus should be asked to explain the source of such assets under an unexplained wealth order (Benchmark 3.16(3)) and, if unable to do so, may be prosecuted for illicit enrichment (Benchmark 1.1(9)).
- E) The benefit of general public access to the registers as opposed to limited interested party access is that:
- a) it reduces the risk that information may be suppressed
  - b) it increases the chance that corruption may be uncovered, as members of the public would be able to follow up suspicious indicators (e.g. in their work, or in their dealings with public officials) by checking the registers and reporting to the law enforcement authorities if their suspicions are backed up by evidence on the registers
  - c) investigative journalists could more easily carry out investigation without needing to establish the burden of ‘legitimate interest’ (and which could also possibly result in a tip-off of the suspect).
- F) The argument against public access to the register is the right of persons to privacy, including privacy as to their wealth. However, the problem of corruption, facilitated by the concealment of corrupt assets, is so widespread and severe that it is likely that the balance of interest lies in favour of full public access to the registers.

### References

- i) UNCAC Article 12, paragraph 2(c) which provides for:
 

*‘Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities.’*
- ii) FATF Recommendations, Recommendations 24 and 25 and Interpretive Notes to those Recommendations (pages 86–93) and definition of ‘beneficial owner’ (page 113)

- iii) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019), Recommendations 7, 9, 10 and 45. Recommendation 10 states:

*‘RECOMMENDATION 10: Global standards on beneficial ownership transparency could be further developed following in-depth study of the existing and emerging systems. Public beneficial ownership registries of legal entities, such as companies, trusts, and limited liability partnerships, should be considered for introduction in all jurisdictions.’*

- iv) G8 action plan principles to prevent the misuse of companies and legal arrangements (June 2013)
- v) EU Fourth Anti-Money Laundering (AML) Directive (Directive 2015/849), Chapter III, Articles 30 and 31, as amended by EU Fifth AML Directive 2018/843, Article 1, paragraphs (15) and (16). See also Recitals (25)–(36).
- vi) Example of registers of beneficial ownership: UK: Registers of Beneficial Ownership (2018) – Published by the UK House of Commons: Briefing Paper 8259 (7 August 2019)

*‘The UK has registers of beneficial ownership for three different types of assets: companies, properties and land, and trusts. Information on the beneficial ownership of companies is publicly available. For properties owned by overseas companies and legal entities, the Government plans to launch a public beneficial ownership register in 2021. The register for trusts is not public.’*

### BM 8.3 Registration of legal and beneficial ownership of organisations, land and real estate, trusts, and high value movable property:

The terms ‘beneficial owner’, ‘beneficial ownership’ and ‘organisation’ are defined in the Benchmark Definitions as follows:

- a) **‘beneficial owner’:** *‘an individual who ultimately owns or controls, whether directly or indirectly, wholly or in part, an asset, or who is entitled to receive a share of the capital in, or profits or other benefit derived from, an asset’*
- b) **‘beneficial ownership’:** *‘all beneficial owners of an asset’*
- c) **‘organisation’:** *‘any entity, association, or body of one or more individuals, which has legal rights and obligations, whether incorporated or not, in the public or private sector. It includes agency, authority, charity, company, corporation, enterprise, firm, government department, institution, organisation, partnership, sole-trader, or trust, or part or combination thereof.’*

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### **BM 8.3(1) Organisations:**

The requirement for disclosure of beneficial ownership applies to both public and private sector organisations. This is to ensure that there is full transparency, clarity and certainty of information.

#### References

- i) See References under Guidance BM 8 above

### **BM 8.3(2) Land and real estate:**

#### References

- i) Example of registers of beneficial ownership: UK: Registers of Beneficial Ownership (2018) – Published by the UK House of Commons: Briefing Paper 8259.

### **BM 8.3(3) Trusts:**

An express trust is an arrangement where there is a clear and express intention of a settlor to create a trust. It is usually created by a written document (a trust deed).

#### References

- i) FATF Recommendations, Recommendation 25, Interpretive Note to Recommendation 25 (pages 91–93) and Glossary (page 118: Definition of express trust)
- ii) EU Fourth AML Directive (Directive 2015/849), Chapter III, Article 31, as amended by EU Fifth AML Directive (Directive 2018/843), Article 1, paragraph (16). See also Recitals (25)–(36).
- iii) Example of registers of beneficial ownership: UK: Registers of Beneficial Ownership (2018) – Published by the UK House of Commons: Briefing Paper 8259.

### **BM 8.3(4) High value movable property:**

The regulations should specify the types of movable property (namely, property other than land or real estate) whose ownership should be disclosed. These should include all types of property which are above a prescribed value threshold(s) and which could have been acquired by corrupt funds (e.g. high value yachts, aircraft, cars, art works).

#### References

- i) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019), Recommendation 9:

*‘The ultimate beneficial ownership information of high-value real estate, yachts, aircraft, and other vehicles, and art works should be maintained, so it can be accessible to the appropriate public authorities, including law enforcement.’*

## BM 8.4 Details of registration:

### References

- i) EU Fourth AML Directive (Directive 2015/849), Chapter III, Articles 30 and 31, as amended by EU Fifth AML Directive 2018/843, Article 1, paragraphs (15) and (16). See also Recitals (25)–(36).

## BM 8.5 Access to information:

To maximise the benefits of the ownership register, the register should be computerised so that information is easily searchable by name of organisation, name of trust, name or location of land or real estate, type of asset and name of individual. Enabling search by name of individual will make it possible to identify the full extent of an individual’s registered beneficial ownership.

**BM 8.5(1) ‘The ownership registers should preferably be freely accessible by all members of the public ...’**

See Guidance BM 8, paragraphs (E) and (F) above which discuss the benefits of allowing the public to have free access to the ownership registers.

**BM 8.5(2)(c) ‘If free public access as per (1) above is not granted by the regulations, then full access to relevant parts of the ownership registers should be granted at minimum to ... any person that can demonstrate a legitimate interest’:**

‘**Legitimate interest**’ would need to be defined by the regulations. It could include, for example, family members who may be entitled to financial support from the suspected beneficial owner, beneficiaries under a will seeking to locate the deceased’s assets, business partners who believe that business assets may have gone missing, or investigative journalists or NGOs who may be investigating the assets of a public official in the public interest.

### References

- i) FATF Recommendations, Recommendations 24 and 25 and Interpretive Notes to those Recommendations (pages 86–93)
- ii) EU Fourth AML Directive (Directive 2015/849), Chapter III, Articles 30 and 31, as amended by EU Fifth AML Directive 2018/843), Article 1,

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paragraphs (15) and (16). See also Recitals (25)–(36). Under the Fifth AML Directive, all EU Member States are required to pass legislation creating publicly accessible registers of beneficial ownership information by 10 January 2020. In support of this, Recital 30 states:

*‘Public access to beneficial ownership information allows greater scrutiny of information by civil society, including by the press or civil society organisations, and contributes to preserving trust in the integrity of business transactions and of the financial system. It can contribute to combating the misuse of corporate and other legal entities and legal arrangements for the purposes of money laundering or terrorist financing, both by helping investigations and through reputational effects, given that anyone who could enter into transactions is aware of the identity of the beneficial owners. It also facilitates the timely and efficient availability of information for financial institutions as well as authorities, including authorities of third countries, involved in combating such offences. The access to that information would also help investigations on money laundering, associated predicate offences and terrorist financing.’*

- iii) Example of registers of beneficial ownership: UK: ‘Registers of Beneficial Ownership’ (2018) – Published by the UK House of Commons: Briefing Paper 8259.

### BM 8.8 Transparency to the public:

- A) This Benchmark provision provides that the ownership authority should proactively provide information to the public, in addition to responding to requests for information. This will facilitate the public’s understanding of the transparency requirements relating to beneficial ownership and of the functions and activities of the ownership authority and help the public to hold the authority to account and to monitor the ownership register. It will also help to build public confidence in the public sector and to create a culture in the public sector where the provision of information to the public is part of its regular function.
- B) **‘Save to the extent contrary to the public interest’**: This would include, for example, not disclosing confidential details of ongoing corruption investigations until the investigations are complete. In the Benchmarks Definitions, ‘public interest’ is defined as *‘the interests of the public at large as objectively and independently determined’*. The public interest exception would not allow the withholding of information simply because it may be embarrassing to an individual or organisation (e.g. if it shows a failure to manage a process appropriately or effectively).

- C) **‘promptly’**: Information should be published as soon as possible after it becomes available so that, as far as possible, the public has current information enabling it to monitor the relevant matters as they proceed. In this way, any ongoing corruption or risk of corrupt activity in such matters may be able to be prevented, or at least identified early.

#### References

- i) UNCAC: The following provisions provide that *‘Each State Party shall, in accordance with the fundamental principles of its legal system:’*
- UNCAC Article 5, paragraph 1:  
*‘... develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of ... transparency and accountability.’*
  - UNCAC Article 10:  
*‘... take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia: (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public; (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and (c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.’*
  - UNCAC Article 13, paragraph 1(b):  
*‘... take appropriate measures, ..., to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as: (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes; (b) Ensuring that the public has effective access to information.’*
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 58–65  
iii) UNODC Technical Guide to UNCAC (2009), pages 42–46 and 63

# Guidance to Benchmark 9

## Political lobbying, financing, spending and elections

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### BM 9 Purpose of Benchmark:

- A) There are considerable risks of corruption in relation to political lobbying, financing, spending and elections. For example:
  - a) Lobbyists, retained or funded by large private companies (e.g. in the oil sector), may bribe legislators (e.g. by way of cash, luxury items or lavish hospitality), to change the law in favour of the companies (e.g. to allow oil concessions in protected land).
  - b) Party donors may donate large sums of money to a political party in return for illicit rewards (e.g. being awarded a large State contract without a competitive process).
  - c) Political parties may pay cash bribes to voters to vote for their party or candidate.
  - d) Political parties may arrange for false information to be advertised on digital media, or may not correct false information shown on digital media.
  - e) Candidates for political office may bribe or improperly influence the law enforcement authorities to ensure the improper conviction of political opponents in order to prevent such opponents from standing in the elections.
- B) Political lobbying, financing, spending and elections should therefore be regulated so as to minimise the risk of, and deal with, conflicts of interest and corruption. This Benchmark provides measures designed to deal with these risks.

### BM 9.1 Regulations:

#### References

- i) UNCAC Article 7, paragraphs 2 and 3 provide that States shall consider taking appropriate legislative and administrative measures *'to prescribe criteria concerning candidature for and election to public office'* and *'to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties'*.

- ii) UNODC Technical Guide to UNCAC (2009), pages 17–18:
 

*‘II.6. Transparency in campaign and political party financing: Putting in place appropriate rules and procedures to govern the finance of political campaigns and the financing of political parties has proved crucial in preventing and controlling corruption.’* (page 17, third complete paragraph)
- iii) The Commonwealth Parliamentary Association: Recommended Benchmarks for Democratic Legislatures:
 

*‘4.1.2 The public and private funding of political parties and candidates should be transparent and accountable.’*

## BM 9.2 Regulatory authority:

- A) States may choose how to allocate the political regulatory functions. The Benchmark uses the term ‘authority’ for convenience to mean the authority that exercises these functions. This does not mean that there should necessarily be a separate authority with these functions alone. The functions may be exercised by one or more new or existing authorities, either alone or alongside other responsibilities. Federal States may have such an authority(ies) in each constituent state, in which case there should be provision to ensure common standards and co-operation between those different authorities.
- B) Benchmark 9.2 provides that Benchmark 6 (Regulatory authorities) should apply to the political regulatory authority. Benchmark 6.8(1) provides that regulatory authorities should have the necessary powers to enable them to carry out their responsibilities effectively. For the political regulatory authority, such powers should include, for example, powers to:
  - a) obtain all relevant evidence from any party (including social media companies) involved in political lobbying, financing, spending or elections
  - b) trace and identify campaign spending by all campaign participants, and all routine spending by political parties
  - c) trace campaign and party funding back to its ultimate sources
  - d) carry out no notice inspections and compulsory audits
  - e) regulate, monitor and investigate digital campaigning and political engagement. Some sources maintain that, due to the size of the task and technical knowledge required, there should be a separate body to carry out this latter responsibility.

The authority should also be provided with sufficient capacity and resources to exercise such powers properly.

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### References

- i) UNODC Technical Guide to UNCAC (2009), page 17:
 

*‘II. 6. Transparency in campaign and political party financing  
... A number of States Parties have set up one or more public bodies to be responsible for registering voters and managing elections, registering parties, monitoring party finances, reviewing candidate eligibility and financial disclosures, administering campaign finance laws and investigating any associated offences.’*
- ii) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019), Recommendation 56:
 

*‘Any authority mandated to oversee and enforce political finance regulations should be granted the necessary powers, independence, and resources required to fulfil its role, as well as the support of other enforcement agencies, where appropriate.’*
- iii) Example of regulatory authority with inadequate powers: UK Electoral Commission:
 

*‘The Electoral Commission found its investigations into alleged breaches equally challenging and complicated. It lacked the powers to require relevant evidence from the technology platforms (most notably Facebook), it struggled to keep track of spending by all campaign participants, and it was unable to trace campaign funding back to its ultimate source. Eventually, when it found evidence to suggest criminal offences had been committed it had to pass responsibility onto the National Crime Agency since it lacked the remit and capacity to trace the origins of the money.’ (Electoral Reform Society: Reining in the Political ‘Wild West’: Campaign Rules for the 21st Century (2019), Chapter 4: ‘The risks of inaction’)*

### BM 9.3 Political lobbying:

- A) In order to prevent corrupt influence of legislation and the decisions of public officials, lobbying should be regulated and monitored. Freely accessible registers disclosing information regarding lobbyists’ activities, including the identity of their funders and who they are lobbying on behalf of, will help media and civil society keep track of potential improper influence on political decision-making.
- B) The following terms are defined in the Benchmark Definitions as follows:
  - a) **‘lobbying’**: *‘an attempt, through written or oral communication, to influence the actions or decisions of any public official’.*

- b) **‘lobbyist’**: *‘any individual or organisation whose function, in whole or part, is to try to influence the actions or decisions of any public official’.*
- c) Think tanks would fall within the definition of lobbyist. They play a significant role in influencing political decision-making and may do so on behalf of their funders. Consequently, there is always the risk that the views they espouse are not objective but are heavily slanted in favour of their funders. For example, tobacco, alcohol and food companies may finance a think tank which may then advise the government that essential public health protections (which would impact negatively on their funders) are not part of the government’s role or may be economically damaging. Or other States may finance or operate think tanks which may attempt to influence a government’s policies. It is critical therefore that think tanks, as well as other types of lobbyists, are required to comply with the provisions in this Benchmark. Without such compliance, think tanks would be able to allow anonymous donors to influence policy with no accountability.

**BM 9.3(1)(a) ‘Political lobbyists should ... not seek to exert improper influence over political parties or candidates or any public official or body’:**

**BM 9.3(1)(b) ‘Political lobbyists should ... not promise, offer or give any donations, gifts, hospitality, entertainment or other benefits to political parties, candidates or public officials, whether in connection with their lobbying or otherwise’:**

- A) Benchmark 9.3(1)(a) and (b) provide that lobbyists should not seek to exert improper influence over inter alia public officials or bodies, or promise gifts etc. The converse of these provisions is as provided in Benchmark 11 (Public officials), namely that public officials should act free from improper influence (Benchmark 11.11(1) and 11.13) and should not solicit or accept gifts etc. (Benchmark 11.14).
- B) **‘whether in connection with their lobbying or otherwise’**: This provision means that all gifts etc. by lobbyists are banned. As the whole intent of lobbying is to influence public officials, public bodies, political parties or political candidates, it would be impossible to distinguish any gift or donation, etc. from that intention. Thus, lobbyists should be prohibited from making any gifts, donations etc. to public officials, public bodies, political parties or political candidates.

**BM 9.3(1)(c) ‘Political lobbyists should ... keep sufficient records and accounts of their lobbying activities for a prescribed minimum period’:**

Such records should include:

- a) the identity and location of the lobbyist’s funder(s), and the amount and ultimate source of funding provided by each funder. (The ultimate source should help to identify whether funding has come from another State.)

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- b) the identity of all public officials who have any direct or indirect connection with the lobbyist
- c) the identity and location of the persons on behalf of whom lobbying activity is undertaken
- d) the identity of the public officials or institutions being lobbied on behalf of those persons
- e) the nature and objectives of such lobbying
- f) the amount and nature of expenditure on the lobbying
- g) the periods during which the lobbying occurred
- h) the outcomes of the lobbying
- i) supporting documentation for all of the above.

### **BM 9.3(1)(d) ‘Political lobbyists should ... register their details and details of their lobbying activities in a public register’:**

The details to be registered in the public register should include:

- a) Details of the lobbying individual or organisation including: name, nationality or State of incorporation, sector, type of organisation, contact details, person with legal responsibility for the organisation, and areas of interest.
- b) The details listed in Guidance BM 9.3(1)(c) above, and information as to how the supporting documentation can be accessed.

Registration should be required to be made on a regular prescribed basis (such as on a monthly basis).

### **BM 9.3(3) ‘Exemptions in relation to compliance with 9.3(1)(c) and (d) and 9.3(2) may be provided for in circumstances where the type of lobbying activity is highly unlikely to be corrupt’:**

Such exemptions would apply where individuals or organisations are making representations on their own behalf. This may include, for example:

- a) statements made orally in a public forum by members of the public or by private sector organisations speaking on their own behalf
- b) representations made by local constituents to their members of parliament in relation to matters concerning the community as a whole
- c) written or oral submissions made, by members of the public or by private sector organisations speaking on their own behalf, in relation to a government consultation where such submissions are published publicly by the government.

Such exemptions should not apply to any individual or organisation who is a lobbyist.

## References

- i) EU Transparency Register
- ii) Transparency International EU Integrity Watch

## BM 9.4 Political accounts:

### BM 9.4(1) ‘... These should include ... all supporting documents’:

Such supporting documents should include all invoices, receipts, bank statements, documents evidencing ownership, acquisition and sale of assets, documents evidencing debts and liabilities and all other documentation required to evidence the accuracy of entries and statements in the accounts.

## References

- i) Example: UK: Political Parties, Elections and Referendums Act 2000, sections 41–49

## BM 9.5 State funding of political parties and candidates:

- A) State funding of political parties and candidates means the provision of money or subsidies from State funds and/or allowing the use of State resources, free of charge or at reduced rates. For example, use of State resources may include: access to public media, use of State property for the purpose of campaigning, or use of State postal and printing services for electoral materials.
- B) It is for States to determine whether to permit State funding for political parties and candidates. However, if it is permitted, it should be adequately controlled so as to be fair, impartial and safeguarded against abuse.
- C) **‘State funding of political parties and candidates should not be provided save where it is expressly permitted by law and is subject to adequate controls including the following ...’:** This prohibition in the opening paragraph of Benchmark 9.5 is to ensure that there should be no State funding unless it is expressly permitted by law and has adequate controls. The purpose of the prohibition is inter alia to prevent incumbent political candidates or parties taking advantage of their position to misuse public funds and resources for their campaigns and so gain a significant advantage over other contenders. Thus, this prohibition means that, save as expressly permitted by law, all access to or provision of State funds, subsidies and resources should be prohibited, including, for example, the prohibition of biased reporting in State-controlled

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media, public officials campaigning while on duty, and the use of government vehicles in election campaigns.

### **BM 9.5(1) ‘Eligibility and allocation criteria ... should not unduly disadvantage small or emerging parties or candidates’:**

Such criteria should not disadvantage small or emerging parties or lesser-known or emerging candidates. Thus, while criteria such as number of seats or votes obtained in a previous election may be valid, they should not be the only criteria used, as this would only serve to entrench the incumbent or more successful parties or candidates.

### **BM 9.5(3)(c) ‘Permitted State funding should be limited in amount so that ... there is no risk of over-dependency on State support by political parties and candidates’:**

This means that State funding should not be so high as to enable a candidate or party to rely on State support, thereby removing the need to engender public support.

### **BM 9.5(4) ‘There should be adequate safeguards against abuse of permitted State funding’:**

Such abuse could arise where, for example, due to their control over State funds and resources, an incumbent political party or candidate is able to illicitly use such funds and resources so as to exceed the State funding allowance. This may occur particularly in relation to indirect State funding, such as use of State resources for access to public media, use of State property for the purpose of campaigning, or use of State postal and printing services. Use of State funding and resources should therefore be carefully monitored and controlled.

### **BM 9.5(6) ‘The audit report, and a register showing criteria for and details of permitted State funding, should be disclosed to the public’:**

Details disclosed to the public should include:

- a) the eligibility and allocation criteria for permitted State funding
- b) the amount of State funding permitted to each party or candidate
- c) the method by which that amount was determined
- d) the identity of the political parties and candidates who are eligible to receive State funding
- e) the identity of the political parties and candidates who have received State funding and the amounts they have each received.

## References

- i) UNODC Technical Guide to UNCAC (2009), page 17:
  - *‘II.6. Transparency in campaign and political party financing*
  - *... For States Parties relying on public funding for elections and parties there are also issues relating to the calculations of the level of subsidy, how to encourage the development of new parties (while avoiding the creation of parties whose prime purpose is to access funding), and access to public broadcasting.’*
- ii) OSCE Handbook for the Observation of Campaign Finance: page 18 (Public campaign financing)
- iii) IDEA Database: (IDEA statistics quoted are correct as at 10 April 2020):
  - *‘14. Are there bans on state resources being used in favour or against a political party or candidate?’*: IDEA cites that 111 out of 149 countries (where data was available) have such bans. (<https://www.idea.int/data-tools/question-view/559>)
  - *‘15. Is there a ban on state resources being given to or received by political candidates or parties (excluding regulated public funding)?’*: IDEA cites that 94 out of 141 countries (where data was available) have such bans. (<https://www.idea.int/data-tools/question-view/540>)
  - *‘30. Are there provisions for direct public funding to political parties?’*: IDEA cites that, out of 169 countries (where data was available): 61 regularly provide public funding to parties, 43 provide regular and campaign public funding to parties, 14 provide public funding in relation to campaigns, and 51 do not provide any public funding. (<https://www.idea.int/data-tools/question-view/548>)
  - *‘31. If there are provisions for direct public funding to political parties, what are the eligibility criteria?’* (<https://www.idea.int/data-tools/question-view/549>)
  - *‘33. If there are provisions for direct public funding to political parties, are there provisions for how it should be used (‘ear marking’)?’* (e.g. campaign spending, research and policy initiatives and ongoing party activities). (<https://www.idea.int/data-tools/question-view/551>)
- iv) ACE: The Electoral Knowledge Network: Campaign Finance: This cites the following as potential weaknesses of public funding:
  - *‘Risk of over-dependency on financial state support; Weakening of links between the political parties, candidates and their electorate; Harming political pluralism and emerging small parties and candidates when eligibility threshold and allocation criteria are vaguely defined or too restrictive/high.’* (<http://aceproject.org/ace-en/focus/campaign-finance/assessment-of-strengths-and-weaknesses-of-existing>)

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- v) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019), Recommendation 57:
  - *‘Civil society and media should provide oversight over political financing and be encouraged to monitor the sources of funds, costs, and expenditures of political campaigns and parties, and they should be afforded the necessary protections to do so.’*

## BM 9.6 Political fund-raising:

### BM 9.6(4) ‘Political fund-raisers should ... keep complete records and accounts of their fund-raising activities for a prescribed minimum period’:

- A) Such records should include:
  - a) details of the identity of the political party or candidate for whom funds are being raised
  - b) the amount and nature of funds raised
  - c) the means by which the funds were raised
  - d) the identity and address of each source who provided the funds
  - e) all supporting documents evidencing such matters.
- B) The name of each donor should not be required where the donations are minor donations raised through street or door-to-door collections, but the total amount of such donations should be listed, together with details of who made such collections, their contact details and their signed record of the collections made.

### BM 9.6(5) ‘Political fund-raisers should ... declare details of their political fund-raising in a public register’:

Such details should include:

- a) the identity of the fund-raiser
- b) the details listed under Guidance BM 9.6(4) above
- c) information on how to access the supporting documents under Guidance BM 9.6(4) above.

#### References

- i) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019), Recommendation 57:
  - ‘Civil society and media should provide oversight over political financing and be encouraged to monitor the sources of funds, costs, and expenditures of political campaigns and parties, and they should be afforded the necessary protections to do so.’*

## BM 9.7 Political donations:

### BM 9.7(1) Definition of political donation:

#### A) Definition of ‘political donation’:

- a) It is for States to determine the definition of ‘political donations’. However, in order to prevent circumvention of controls on political donations, the definition should be sufficiently wide so as to catch the provision of anything of value (including all money, property, facilities and services), given directly or indirectly, by any person, whenever provided, for the purpose of political spending. (For the definition of political spending, see Benchmark 9.10(1) and the discussion in Guidance BM 9.10(1).)
- b) There should also be criteria to distinguish whether the donations are provided for purposes of campaign spending or routine spending. (For the definition of campaign and routine spending, see Benchmark 9.10(2) and the discussion in Guidance BM 9.10(2).)
- c) With regard to campaign spending, care should be taken to ensure that the definition of campaign donations does not relate exclusively to a ‘campaign period’, as this may then not catch donations made for the purposes of a campaign even though made outside the campaign period. In such cases, for example, in order to try to circumvent caps on donations, donations could be made before the candidate has formally declared that she/he will stand for election.
- d) Thus the time when a donation is made should not be determinative as to whether or not it is a donation or as to the type of donation, and the use of the phrase ‘at whatever time’ may be more appropriate. The important factor is the purpose for which the donation is made. In assessing the purpose of donations, all circumstances should be considered to establish the actual, as opposed to the purported or expressed, purpose of the donation.

#### B) **Examples of types of political donations** include the following, provided by any person, directly or indirectly, and whenever provided:

- a) gifts
- b) sponsorships
- c) subscriptions or other fees paid for affiliation to, or membership of, a political party
- d) payment of expenses incurred directly or indirectly by the party or candidate in relation to a campaign or routine party spending
- e) disproportionately high payment for services or events provided or attended by the party or candidate (e.g. where party supporters

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pay very large sums to attend a dinner or sports event with a senior member of the party or with the candidate, or to have her or him speak at events)

- f) the provision, at an undervalue or otherwise on non-commercial terms, of any loans, property, services or facilities for the use or benefit of the party or candidate
- g) anything given or transferred to the party or candidate
- h) anything given or transferred to any other person where the same will be used for the benefit of the party or candidate.

### References

- i) ACE: The Electoral Knowledge Network: Campaign Finance: This states that there is a potential weakness where inadequate limits on private contributions may allow ‘*Circumvention of rules when limitations/ bans only apply to election campaigns and not to political party financing*’. (<http://aceproject.org/ace-en/focus/campaign-finance/assessment-of-strengths-and-weaknesses-of-existing> )
- ii) Example: UK:
  - Political Parties, Elections and Referendums Act 2000, sections 50–61

**BM 9.7(2)(b) ‘A political donation should be made by a donor, and accepted by a political party or candidate, only where ... the political donation is generated from lawful activities within the State territory’:**

### References

- i) UK: Electoral Reform Society: Reining in the Political ‘Wild West’: Campaign Rules for the 21st Century (2019): Chapter 3: ‘Giving voters greater confidence’:
 

*‘UK election law is based on a clear principle that funding from abroad is not allowed. Since 2013, we have recommended that company donations should be funded from UK-generated activities only. This would require a change to the law in this area, as the current requirement is for companies to be registered and carry on business in the UK – but not for the companies’ funds to have originated through UK-based activities. In the digital era, this is an overdue safeguard to help ensure that online and other campaign activities are not funded by foreign sources.’*

**BM 9.7(3) Caps on political donations:**

- A) **Justification for a cap on total political donations:** A party and candidate require only sufficient funds to enable them to carry out

their legitimate objectives at a moderate cost. There is no need, therefore, for either a party or candidate to be entitled to receive unlimited political donations. Furthermore, allowing unlimited political donations carries the following corruption risks and risks to good governance:

- a) It could significantly benefit incumbent, or historically more popular or more influential parties or candidates, as they are likely to have greater influence and power to enable them to raise funds and so increase their re-election or election prospects.
  - b) It would increase the risk of wealthy donors gaining power and influence over political candidates and parties.
  - c) It would fuel the 'arms race' in political financing and expenditure, and thus increase the risk of parties and candidates being tempted to use corrupt methods to raise funding.
  - d) It would increase the amount of funding available to parties and candidates, and thus increase the risk of funds being available to be used for corrupt purposes (e.g. vote buying or paying people to intimidate voters or tamper with the voting process).
  - e) It would increase the risk of excessive and unconscionable spending by parties and candidates, which erodes public confidence in the integrity of politicians.
- B) **Justification for a cap on political donations from each donor:** Political donations from each donor should be capped to prevent any particular donor gaining influence over any candidate or party by making large political donations, which influence may then be used for corrupt purposes.
- C) **The amount of the cap:** In order to address the risks in (A) and (B) above, political donations should be capped so as to limit for each party and each candidate:
- a) the total political donations per prescribed period
  - b) the total political donations from any one donor per prescribed period
  - c) the total political donations for purposes of an election
  - d) the total political donations from any one donor for purposes of an election.
- D) When calculating available funds for determining an acceptable political donation cap, all State funding should be taken into account (see Benchmark 9.5).

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### References

- i) UNODC Technical Guide to UNCAC (2009), page 17:
  - ‘II.6. *Transparency in campaign and political party financing*
  - ... *There are a number of issues to be addressed to encourage transparent funding, including: setting the parameters for the limits, purpose and time periods of campaign expenditures; limits on contributions; identification of donors (including whether or not anonymous, overseas and third-party donations or loans are permissible, restricted or prohibited); what types of benefits-in-kind are allowable; the form and timing of submission of, and publication of, accounts and expenditure by party organizations; means to verify income and expenditure; whether tax relief is allowed on donations or loans; and means to dissuade governments from using State resources for electoral purposes.*’
- ii) IDEA Database: (IDEA statistics quoted are correct as at 10 April 2020):
  - ‘*Question 16. Is there a limit on the amount a donor can contribute to a political party over a time period (not election specific)?*’: IDEA cites that, out of 169 countries (where data was available): 79 have some cap on contributions (whether from natural or legal persons or from both), and 90 have no cap. (<https://www.idea.int/data-tools/question-view/542>)
  - ‘*Question 18. Is there a limit on the amount a donor can contribute to a party in relation to an election?*’: IDEA cites that, out of 159 countries (where data was available): 38 cap donations by natural or legal persons; 15 cap donations by natural persons; 2 cap donations by legal persons; 104 do not cap donations. (<https://www.idea.int/data-tools/question-view/544>)
  - ‘*Question 20. Is there a limit on the amount a donor can contribute to a candidate?*’: IDEA cites that, out of 160 countries (where data was available): 43 cap donations by natural or legal persons, 20 cap donations by natural persons, 1 caps donations by legal persons, and 96 do not cap donations. (<https://www.idea.int/data-tools/question-view/546>)
  - See also Questions 17, 19, 21–24 regarding limits on donations. (<https://www.idea.int/data-tools/data/political-finance-database>: See Question Box on right hand side of this webpage for links to the relevant questions.)
- iii) UK: Electoral Reform Society: *Reining in the Political ‘Wild West’: Campaign Rules for the 21st Century* (2019): Chapter 7: ‘Avoiding the American model’

- *‘Re-democratise democracy by keeping big money out of politics. The most powerful constituency in a democracy should be the voters themselves. This should be self-evident, but we are dealing with a democratic landscape where that is no longer the case. Historically, the strict spending controls in UK elections have ensured a level of fairness in elections. As a result of structural changes both to how spending rules work and the means by which campaigners campaign, this system is no longer fit for purpose. While spending caps should remain (and be better enforced, see point two below), the EU referendum and, in particular, the £8 million donation from Arron Banks have made it abundantly clear that our democracy also needs funding caps. These should not only limit the amount an individual, company, organisation or entity can give, but also require a clear trail to be certain of the source. These caps should be in place all the time, not just during an election campaign. There is no point restricting funding, if from five years to one minute before the regulated period someone can completely escape scrutiny.’*

**BM 9.7(4) Permissible donors:**

The purpose of this Benchmark is to reduce the risk of illicit or foreign funding being used which could result in criminal elements or foreign persons exercising improper influence over the democratic process, the legislature and the executive.

**BM 9.7(4)(a) Permissible donors should be ‘... clearly identified’:**

The requirement for donors to be clearly identified (which thereby bans anonymous donors) is to help ensure that donations are fully transparent and that the amount of donations provided by any donor can be properly traced.

**BM 9.7(4)(b) Permissible donors should have ‘... a close connection with the State where the election is taking place, or where the political party is constituted...’:**

- A) It is for States to determine the exact definition of this close connection. However, to help ensure the factors in paragraph (B) below, such definition could comprise:
- natural persons who are citizens of the State territory, and
  - organisations which are incorporated in the State territory.
- and could exclude all donors of foreign status including:
- individuals who are citizens of another State
  - organisations which are incorporated in another State
  - foreign State governments
  - foreign political organisations.

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- B) The exclusion of foreign donors helps ensure that:
  - a) the source of donations can be more effectively traced
  - b) proceeds of crime, particularly organised crime, are not used to fund candidates or parties, allowing criminal elements to influence the democratic process
  - c) foreign elements (such as foreign governments) are less able to undermine a State's democratic processes or gain influence over elected officials or parties.

### **BM 9.7(4)(d) Permissible donors should ‘... provide a declaration and evidence confirming all such matters’:**

Such declarations should provide inter alia the following:

- a) details of the identity and address of the donor
- b) the amount and type of donation(s) and the date they were provided
- c) information showing that the donor has a close connection with the State where the election is taking place, or where the political party is constituted
- d) information showing: (i) the ultimate source of the donation(s), (ii) that such sources are lawful sources within the State territory, and (iii) that the donor is the lawful owner of the donated funds
- e) documentary evidence supporting all the above
- f) a statement that the donor is aware that making any false statement recklessly or deliberately in the declaration is a criminal offence.

### References

- i) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019), Recommendation 58:
  - ‘*Addressing state capture, foreign funding in politics and the penetration of political parties by organized crime groups should be prioritized by national and international stakeholders.*’
- ii) The Expert Group Meeting on Transparency in Political Finance (21 May 2019) (attended inter alia by UNODC, UNDP, OECD and IDEA):
  - ‘*On the matter of foreign influence, it was noted that it has always been part of certain political systems and that it was now considered one of the biggest threats to established democracies in some countries.*’ (page 3, last paragraph)
- iii) IDEA Database: (IDEA statistics quoted are correct as at 10 April 2020):
  - ‘*Question 1. Is there a ban on donations from foreign interests to political parties?*’: IDEA cites that, out of 177 countries (where data

was available), 122 countries ban donations by foreign interests to political parties: <https://www.idea.int/data-tools/question-view/527>

- ‘Question 2. Is there a ban on donations from foreign interests to candidates?’: IDEA cites that, out of 173 countries (where data was available), 99 countries ban donations by foreign interests to political candidates: <https://www.idea.int/data-tools/question-view/528>

iv) Examples: UK:

- Political Parties, Elections and Referendums Act 2000, section 54, 54(A), 54(B)

### **BM 9.7(5) Records and audit:**

Written records should include:

- a) the declarations required under Benchmark 9.7(4)(d) (which should include all the matters listed in Guidance BM 9.7(4)(d) above)
- b) information as to how the donated amounts have been accounted for in the accounts of the political party or candidate.

### **BM 9.7(6) Register of political donations:**

References

- i) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019), Recommendation 57:  
*‘Civil society and media should provide oversight over political financing and be encouraged to monitor the sources of funds, costs, and expenditures of political campaigns and parties, and they should be afforded the necessary protections to do so.’*
- ii) Example: UK: Political Parties, Elections and Referendums Act 2000, section 69

## **BM 9.8 Loans and related transactions:**

It is possible that parties or candidates may seek to conceal political donations by:

- a) taking out what appear to be commercial loans, but whose terms are in fact non-commercial, or
- b) taking out loans which are initially commercial but are later changed to make them either outright gifts or loans on non-commercial terms.

Consequently, all loans should be monitored to ensure they are disclosed and to determine whether they are in fact wholly or partly donations or later become donations.

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### References

- i) Example: UK: Political Parties, Elections and Referendums Act 2000, sections 71F–71Y

## BM 9.9 Interests in public or private sector organisations:

Political parties should not be permitted to have interests in public or private sector organisations as:

- a) this can create a conflict of interest in that the policies the parties promote could be designed to promote their business interests, rather than the public interest
- b) parties in power could use State resources and assets for purposes of their commercial interests
- c) parties in power could ensure that State contracts are awarded to those organisations in which they have interests.

## BM 9.10 Political spending:

### BM 9.10(1) Definition of political spending:

- A) The definition of political spending (in relation to routine spending and campaign spending – see Benchmark 9.10(2)) should be sufficiently broad so as to prevent parties or candidates from circumventing the spending limits. This may happen, for example, if the definition of campaign spending is based on too narrow a list of types of electoral expenditure (e.g. does not include third party spending) and/or is restricted to spending during the period of the electoral campaign. Such inadequate definition may enable parties or candidates to not count, for purposes of the spending limit, spending outside the specified electoral period or by persons not caught by the definition. The definitions for each of campaign and routine spending should be wide enough to capture all aspects of such spending. The important factor is the purpose for which the spending is made. In assessing the purpose of spending, all circumstances should be considered to establish the actual, as opposed to the purported or expressed, purpose of the spending.
- B) **‘notional expenditure’** means the market value that would have been payable in respect of property or services which were transferred or provided free of charge or at a discount to a party or candidate (e.g. the provision of personnel, office space, equipment or transportation free of charge).

#### References

- i) ACE: The Electoral Knowledge Network: Campaign Finance: <http://aceproject.org/ace-en/focus/campaign-finance/assessment-of-strengths-and-weaknesses-of-existing>
- ii) Examples: UK:
  - Political Parties, Elections and Referendums Act 2000, Part V and Schedule 8

#### **BM 9.10(2) Lawful political purposes:**

By requiring that political spending should be lawful and used only for the specified legitimate political purposes, this provision helps to ensure that:

- a) political spending is not used for corrupt purposes (e.g. vote buying or investing in criminal undertakings)
- b) donated funds are used for their intended purpose and not, for example, for the commercial interests of a political party or for the personal or commercial interests of the candidate.

#### **BM 9.10(3) Limits on spending:**

In order to support the democratic process, reasonable amounts should be permitted for political spending. However, in order to combat corruption, spending should also be limited to reasonable amounts in order to:

- a) prevent unconscionable and unjustifiable amounts of money being spent by parties, particularly on election campaigns, and particularly in States where there is widespread poverty. Such spending can only help to distance politicians from the ordinary citizen and erode public confidence in the integrity of politicians
- b) ensure that wealthy parties and candidates do not have an undue advantage as this can lead to entrenched interests. Such entrenchment can make political change more difficult and can lead to a sense of impunity for entrenched parties and candidates
- c) prevent an ‘arms race’ in spending which would otherwise increase the risk of candidates seeking illicit sources to fund such spending.

#### References

- i) UNODC Technical Guide to UNCAC (2009), page 17:  
*‘II.6. Transparency in campaign and political party financing*  
*There are a number of issues to be addressed to encourage transparent funding, including: setting the parameters for the limits, purpose and time periods of campaign expenditures; ... the form and timing of submission*

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*of, and publication of, accounts and expenditure by party organizations; means to verify income and expenditure.'*

- ii) Examples: UK:
  - Political Parties, Elections and Referendums Act 2000, Parts V and VI

### **BM 9.10(4) Spending by 'non-partisan' groups:**

#### References

- i) UK: Electoral Reform Society: Reining in the Political 'Wild West': Campaign Rules for the 21st Century (2019): Chapter 7: 'Avoiding the American model'

### **BM 9.10(5) Records, returns and audits:**

- A) This Benchmark provides that records of all spending should be kept. This is so as to enable the auditing process to identify whether there has been any spending for any non-lawful purposes or for purposes that were not permitted by the regulations. Although it is possible that a political party or candidate may conceal any such wrongful spending, a requirement of full disclosure of spending information and records may nevertheless help to deter and detect illicit spending.
- B) Records of political spending should include:
  - a) written records detailing each item of expenditure, the amount of such expenditure, the identity of the relevant supplier and description of the goods or services supplied, the date of supply, the reason for the expenditure, any unpaid amounts due or claimed, and any item given free of charge or at a discount together with the market value of the item. Such records should include clear information on digital campaign spending
  - b) all supporting documents including bills, receipts, claims and correspondence
  - c) records of how such expenditure was funded – such records are already required under Benchmark 9.4.

#### References

- i) UK: Electoral Reform Society: Reining in the Political 'Wild West': Campaign Rules for the 21st Century (2019): Chapter 3: 'Giving voters greater confidence':
 

*'The UK's government should update the law so that campaigners are required to provide more detailed information about how they have spent money on digital campaigns. The invoices and spending returns of campaigners often do not provide a clear picture of their digital*

*activities. This needs to change so that these documents give voters greater transparency about campaign spending. It would also give us more information to check whether campaigners are following the spending rules, and a better basis to investigate where we suspect something is not right.'*

- ii) Example: UK: Political Parties, Elections and Referendums Act 2000, sections 80–84

### **BM 9.10(6) Publishing to the public:**

#### References

- i) UK: Electoral Reform Society: Reining in the Political 'Wild West': Campaign Rules for the 21st Century (2019): Chapter 3: 'Giving voters greater confidence':

*'Election spending should be reported in near real-time on a national online database that is easily and publicly accessible and searchable. This should include copies of all leaflets and digital ads produced, alongside audience details (who received what and why) and detailed reports of spend, reach and so on, which can then be cross-referenced against publicly available records held by online platforms themselves. This is easily the simplest way to push for rapid rule-following.'*

- ii) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019), Recommendation 57:

*'Civil society and media should provide oversight over political financing and be encouraged to monitor the sources of funds, costs, and expenditures of political campaigns and parties, and they should be afforded the necessary protections to do so.'*

### **BM 9.11 Transparency and accuracy of political advertising:**

- A) With the proliferation of 'fake news' and misinformation, particularly on digital media, it is becoming increasingly important for measures to be taken to try to ensure that information provided to the public in relation to political issues is accurate. To allow any information which is untrue or misleading to be promulgated is extremely damaging to the democratic process as voters will be shaping their views and voting on the basis of false information.
- B) There are strong arguments for the view that deliberately or recklessly providing or not correcting false information in election material (such as in a manifesto or in any form of political advertising) should be treated as a criminal offence akin to fraud.

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### References

- i) UK: Electoral Reform Society: Reining in the Political ‘Wild West’: Campaign Rules for the 21st Century (2019):
  - Chapter 3: ‘Giving voters greater confidence’: *‘Online materials produced by parties, candidates and campaigners should include an imprint stating who has created them. This would mean that, when voters scroll through their social media feeds and see an eye-catching advert trying to influence their vote, they know who is targeting them...’*
  - Chapter 9: ‘Reining in the tech giants’

## BM 9.12 Digital platforms:

### References

- i) UK: Electoral Reform Society: Reining in the Political ‘Wild West’: Campaign Rules for the 21st Century (2019):
  - Chapter 3: ‘Giving voters greater confidence’: *‘In the UK, we want to see them [social media companies] deliver on their proposals for clarity about where political adverts come from, and to publish online databases of political adverts in time for planned elections in 2019 and 2020. Over the past year, we have been talking with the social media companies to make sure they understand the UK’s electoral laws and can design their tools to work well here. Facebook has launched a UK political ad library, and we are looking at how much useful information it provides to voters and regulators. We are still waiting to see how others, such as Twitter and Google, will adapt the tools they have trialled in the US to work in the UK. If voluntary action by social media companies is insufficient, the UK’s governments should consider direct regulation.’*
  - Chapter 10: ‘A New Office for Responsible Technology’: *‘The world is changing fast and our regulations cannot keep pace. Technologies transform at speed but legislation lags behind. This revolution is happening in every part of what is now a digital-first society. But there are few areas that expose the gap between digital practices and analogue rules as glaringly as digital political campaigning. And there are few areas where the effects of regulation’s failure to adapt are more acutely felt.’*

## BM 9.13 Personal data:

### References

- i) UK: Electoral Reform Society: Reining in the Political ‘Wild West’: Campaign Rules for the 21st Century (2019):

- Chapter 4: ‘The risks of inaction’: *‘Since all major political parties have been criticised for processing data unlawfully and breaching consent rules, the ICO is calling for a statutory code of conduct to clarify the existing rules on data use by political parties and tie them in to a shared and agreed regime. In order to make sure such a code – and the law – is adhered to, it has said there should be an independent audit of each campaign’s use of personal data following future elections or referendums.’*
- Chapter 6: ‘The legal landscape’: *‘The evolution of data-driven political campaigning has spawned an entire industry that has capitalised personal data for political ends. The scandal around the deceptive and opaque use of personal data and the global web of connections between political campaigns and corporate interests has exposed an approach towards the electorate that seeks to cajole and steer it, not through open and robust debate but through personalised, localised and private digital advertisements. Such forms of political communication can be positive and empowering, but can also contain misleading, inaccurate or false information that cannot be easily scrutinised ... There is nothing to prevent the marketisation of data for political purposes. There is also nothing that regulates political communication outside of TV and radio political party broadcasts. Therefore, guidance on how micro-targeting can be consistent with the Data Protection Act 2018 would be welcome, bearing in mind the need for a distinction between when an individual is targeted based on data given freely with explicit consent and when an individual is targeted after the processing of other data sets to infer their political views.’*
- Chapter 8: ‘Increasing the resilience of our democracy’: *‘In the UK, there are a number of steps that the government needs to take to update our election law to make it fit for purpose in the digital age, and to protect the integrity of our democracy. The first is to mandate transparency for political advertising by collecting adverts into an online, publicly searchable database in real time, in machine-readable formats. The second is for the imprint rule (information about who is campaigning) to apply online as well as in print ... Any election or referendum conducted under the current rules would be vulnerable to abuse. Currently, it is possible for a candidate to run a thousand different political campaigns in the same election, promising something different to each group it targets. If we do not act, we risk undermining the principle that democracy is a shared experience.’*

## BM 9.14 Election candidates:

### BM 9.14(1) Eligibility:

States will have their own criteria of eligibility for elected public office. The Benchmark deals only with those criteria relevant to reducing the risk of corruption.

#### **BM 9.14(1)(a) ‘Political candidates should be eligible to stand for public office only where ... they have a close connection with the State of the election’:**

The purpose of this requirement is to exclude the risk of foreign interference in the democratic process. It is for States to determine the precise requirements. However, such requirements may include, for example, that the candidate should be a citizen of the State in which they are standing for election. For example, the UK provides that candidates must be a British citizen, a citizen of the Republic of Ireland, or an eligible Commonwealth citizen. It also provides that citizens of other States (including EU member States other than the UK, Republic of Ireland, Cyprus and Malta) are not eligible to become a member of the UK parliament. (See UK Parliamentary General Election Guidance for Candidates and Agents (November 2018) issued by the Electoral Commission, paras 1.1–1.3.)

#### **BM 9.14(1)(b) ‘Political candidates should be eligible to stand for public office only where ... they do not hold positions in the public sector which would prevent them acting independently or impartially in their elected public office’:**

Such positions will depend on the type of elected office. When standing for election as an MP, some examples of such positions may include civil servants, members of police forces or the armed forces and members of the judiciary. States should provide a list of posts which would be incompatible with elected public office. (See, for example, UK Parliamentary General Election Guidance for Candidates and Agents (November 2018), paras 1.5–1.7 which specifies disqualifying offices and incompatible offices.)

#### **BM 9.14(1)(c) ‘Political candidates should be eligible to stand for public office only where ... they have not, within a prescribed period of standing for public office, been convicted of a corruption offence or other offence involving dishonesty’:**

It is for States to determine the relevant period(s). Such period(s) may differ according to the gravity of the offence. States may choose the period to coincide with the period after which a conviction is spent.

## References for all of BM 9.14(1)

- i) UNCAC Article 7, paragraph 2 provides that States shall consider taking appropriate legislative and administrative measures  
*‘to prescribe criteria concerning candidature for and election to public office’*,
- ii) UNODC Technical Guide to UNCAC (2009):  
*‘States Parties, however, may also wish to consider ensuring that those seeking or holding public office also adhere to high ethical standards. This may involve laws or regulations that limit the political involvement, such as party membership or standing for elected office, for certain categories of public official. They may list those existing elected and appointed posts that would be incompatible with seeking a new or additional elected public office. They may have provisions to debar those with convictions for certain criminal activity, including corruption, from seeking or holding public office. They may require candidates to make a full disclosure of their assets and include provisions to void elections if a candidate or the candidate’s party or supporters are involved in electoral corruption.’* (page 17, second paragraph)
- iii) The Commonwealth Parliamentary Association: Recommended Benchmarks for Democratic Legislatures: *‘1.3.3 A legislator may not simultaneously serve in the judicial branch or as a civil servant of the executive branch.’*
- iv) UK Parliamentary General Election Guidance for Candidates and Agents (November 2018)

**BM 9.14(2) Safeguards against abuse:**

Such abuse includes, for example, where those in power or with influence over law enforcement authorities or the judiciary may contrive to bring about the (wrongful) conviction of a political opponent for a disqualifying offence so as to prevent her or him from standing for political office.

**BM 9.15 Elections:**

**BM 9.15(3)(b) ‘In order to combat corruption, the election process should be regulated and monitored so as to ensure that ... there is a system at polling stations for ensuring that only one vote is cast in respect of each eligible voter’:**

This could be ensured, for example, by pre-issuing all eligible voters with polling cards and for these cards to be collected and ticked off in a register at the polling station. This would not ensure that the person named in the polling card has cast the vote, but it would at least ensure that only one vote is cast in respect of that

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polling card. This system would also have to ensure that each eligible voter is registered at only one polling station.

### BM 9.16 Accountability:

#### BM 9.16(2) ‘Non-compliance should be subject to proportionate and dissuasive administrative and/or criminal sanctions’:

In order to be an effective deterrent, the political regulatory authority should have the power to administer proportionate sanctions including substantial fines. Criminal sanctions should include imprisonment (where proportionate to the offence).

#### References

- i) Reining in the Political ‘Wild West’: Campaign Rules for the 21st Century (2019): Chapter 3: ‘Giving voters greater confidence’  
*‘Finally, the Electoral Commission needs the right tools to enable us to enforce electoral law in the digital era. This includes a significant increase to the maximum fine that we can impose on those who break the rules. This is currently £20,000 per offence. We are concerned that political parties and campaigners will simply accept our current fines as the cost of doing business. We need the power to impose sanctions that genuinely deter breaches of electoral law. We also want clearer powers to compel campaign suppliers, including social media companies, to provide us with information when we suspect the rules may have been broken. These powers would be similar to those recently given to the Information Commissioner.’*

### BM 9.18 Transparency to the public:

- A) This Benchmark provides that the political regulatory authority or other prescribed body should proactively provide information to the public, in addition to responding to requests for information. This will facilitate the public’s understanding of the requirements relating to political lobbying, financing, spending and elections and of the functions and activities of the political regulatory authority, and help the public to hold the authority to account and to monitor the relevant political activities. It will also help to build public confidence in the public sector and to create a culture in the public sector where the provision of information to the public is part of its regular function.
- B) **‘Save to the extent contrary to the public interest’:** This would include, for example, not disclosing confidential details of ongoing

corruption investigations until the investigations are complete. In the Benchmarks Definitions, ‘public interest’ is defined as *‘the interests of the public at large as objectively and independently determined’*. The public interest exception would not allow the withholding of information simply because it may be embarrassing to an individual or organisation (e.g. if it shows a failure to manage a process appropriately or effectively).

- C) **‘promptly’**: Information should be published as soon as possible after it becomes available so that, as far as possible, the public has current information enabling it to monitor the relevant matters as they proceed. In this way, any ongoing corruption or risk of corrupt activity in such matters may be able to be prevented, or at least identified early.

#### References

- i) UNCAC: The following provisions provide that *‘Each State Party shall, in accordance with the fundamental principles of its legal system:’*
- UNCAC Article 5, paragraph 1:  
*‘... develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of ... transparency and accountability.’*
  - UNCAC Article 10:  
*‘... take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia: (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public; (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and (c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.’*
  - UNCAC Article 13, paragraph 1(b):  
*‘... take appropriate measures, ... , to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat*

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*posed by corruption. This participation should be strengthened by such measures as: (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes; (b) Ensuring that the public has effective access to information...'*

- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 58–65
- iii) UNODC Technical Guide to UNCAC (2009), pages 42–46 and 63
- iv) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019),

Recommendation 57:

*'Civil society and media should provide oversight over political financing and be encouraged to monitor the sources of funds, costs, and expenditures of political campaigns and parties, and they should be afforded the necessary protections to do so.'*

# Guidance to Benchmark 10

## Public sector organisations

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### BM 10 Purpose of Benchmark:

- A) **Overview:** The implementation by organisations, in both the public and private sectors, of management procedures designed to prevent corruption by, on behalf of or against the organisation, is a widely recognised and effective form of corruption prevention. These procedures are designed to prevent, detect and deal with corruption in relation to the core management functions of the organisation, such as employment of personnel, procurement, contract management and financial management. The procedures require leadership from top management, vetting and training of personnel, the implementation of effective policies and procedures in the organisation's management functions, reporting of corruption and investigating and dealing with any corruption which occurs. Numerous organisations worldwide in both the public and private sectors have implemented such procedures. In most cases, these procedures are implemented voluntarily by organisations in order to reduce and manage their corruption risks, but in some cases these procedures are imposed on organisations: (i) by law; (ii) as part of the settlement of or penalty consequent on prosecution for a corruption offence; or (iii) as a condition of entering into a contract. The totality of these procedures is often referred to as an 'anti-corruption management system' or 'anti-corruption programme', as the procedures are most effective if they are treated as a holistic management system and integrated into the organisation's general policies and procedures. In this respect, these anti-corruption procedures are similar in concept to those adopted by an organisation in order to manage its safety, quality, environmental and other risks and requirements.
- B) **Good practice:** There are various published good practice standards and guidance on the implementation by organisations of anti-bribery and anti-corruption management systems (see References below). Some of these are specifically anti-bribery systems (such as ISO 37001) and others are broader anti-corruption systems. Anti-bribery systems such as ISO 37001 could be expanded to cover other corruption offences (see Reference (ii) below).
- C) **Benchmark 10 and public sector organisations:** Benchmark 10 contains key principles of an anti-corruption management system for public

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sector organisations. It applies to all types of public sector organisation, including, for example, government departments, the corruption prevention authority, the law enforcement authorities, regulatory authorities and state-owned enterprises. All of these have corruption risks, to differing extents, in their various functions. For example, all of these types of public sector organisation are likely to develop regulations and procedures, employ personnel, place contracts, make payments and make decisions which impact on the public, all of which carry corruption risks. In implementing Benchmark 10, the public sector organisation should adapt the requirements of Benchmark 10 in a reasonable and proportionate manner so as to fit the organisation's specific functions, requirements and corruption risks.

- D) **Benchmark 10 and private sector organisations:** Benchmark 10 is also relevant to private sector organisations. Benchmark 10.13 provides that a public sector organisation which enters into any contract over a reasonable prescribed value with a private sector organisation should require that organisation to implement an anti-corruption management system in accordance with the Annex to the Guidance (which contains key principles of an anti-corruption management system for private sector organisations). The core principles of Benchmark 10 (for public sector organisations) and the Annex to the Guidance (for private sector organisations) are the same. The differences between them are that:
- a) Benchmark 10 (for public sector organisations) incorporates by cross-reference the specific detailed public sector requirements specified in other Benchmarks (e.g. employment terms for public officials; procurement, contract and financial management; training; auditing; monitoring; and reporting).
  - b) The Annex to the Guidance (for private sector organisations) is a stand-alone document, without cross-references. As such, it can be used by a private sector organisation without needing to refer to any other part of the Benchmarks.
- E) **'By, on behalf of or against the organisation':** Benchmark 10 and the Annex to the Guidance recommend the implementation of regulations which require all public sector organisations (Benchmark 10) and relevant private sector organisations (the Annex to the Guidance) to implement an effective anti-corruption management system designed to combat corruption '*by, on behalf of or against the organisation*'. The examples below explain what is meant by the terms '*by, on behalf of or against the organisation*'. The examples assume that the organisation referred to is either a state-owned or private sector contractor working both domestically and internationally.

- a) Corruption by the organisation could include, for example:
  - i) the board of the organisation deciding that the organisation will pay a bribe to win a contract
  - ii) a senior project manager of the organisation paying a bribe to a customs official to ensure that the organisation's equipment is quickly cleared through customs.
- b) Corruption on behalf of the organisation could include, for example:
  - i) an agent of the organisation who receives a commission if the organisation wins a contract, paying part of the commission in a bribe to a procurement official to ensure that the organisation wins the contract
  - ii) a subcontractor appointed by the organisation to transport the organisation's equipment paying a bribe to get the equipment through a roadblock.
- c) Corruption against the organisation could include, for example:
  - i) a supplier paying a bribe to the organisation's procurement manager so that the organisation grants a contract to the supplier
  - ii) a supplier paying a bribe to the organisation's site supervisor to approve defective equipment provided by the supplier.

In the case of (a) and (b) above, the organisation is the perpetrator of a corruption offence, either directly under (a) (through its senior management, as provided for in Benchmark 1.2(2)(a)) or indirectly under (b) (through its associated persons, as provided for in Benchmark 1.2(2)(b)). In the case of (c) above, the organisation is the victim of the corrupt act.

- F) **Adequate procedures defence:** In relation to the corruption offence described in Benchmark 1.1(14) of '*Failure by an organisation to prevent a corruption offence which was committed by an associated person*', Benchmark 1.1(14) provides that it may be a defence or a mitigatory factor for the organisation to show that it had in place adequate procedures designed to prevent associated persons from committing such an offence. It is for States to determine the nature of the adequate procedures which would constitute such a defence or mitigation, and States should also provide clarity for organisations by issuing guidance on this issue. However, such adequate procedures should at minimum meet the requirements of Benchmark 10 (for public sector organisations) and the Annex to the Guidance (for private sector organisations). (See also Guidance BM 1.1(14), paragraph (G).)

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- G) **What system to use:** To meet Benchmark 10, States could either:
- a) require public sector organisations to implement Benchmark 10 (which contains key principles of an anti-corruption management system for public sector organisations), and require relevant private sector organisations to implement the Annex to the Guidance (which contains key principles of an anti-corruption management system for private sector organisations), or
  - b) develop their own systems or implement an existing published system (such as ISO 37001, suitably adapted to apply to all types of corruption – see Reference (ii) below). In either case, such systems should at minimum meet the requirements of Benchmark 10 (for public sector organisations) and the Annex to the Guidance (for private sector organisations).

### References

The provisions of Benchmark 10 and the Annex to the Guidance are derived from the sources listed in these References.

- i) UNCAC: Articles 5, 7, 9 and 12: UNCAC does not specifically require organisations to implement an anti-corruption management system. However:
  - a) In respect of the public sector, such a management system can be derived from Articles 5, 7 and 9 of UNCAC. Article 5 provides for States to adopt anti-corruption policies to promote the proper management of public affairs and public property; Article 7 provides for States to adopt systems for employment of public officials; and Article 9 provides for States to establish systems of procurement to prevent corruption and to take measures to promote transparency and accountability in the management of public finances.
  - b) In respect of the private sector, such a management system can be derived from Article 12 of UNCAC which provides for States to take measures to prevent corruption involving the private sector and that such measures may include: *‘Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State’*

(Article 12, paragraph 2(b)). This UNCAC provision refers only to private sector organisations. However, public sector organisations are vulnerable to corruption in a similar way to private sector organisations. Therefore, similar measures should apply to public sector organisations.

- ii) ISO 37001: 2016 – Anti-bribery management systems standard:
  - a) ISO 37001 is an anti-bribery management system standard published by the International Organization for Standardization (ISO). It is a minimum requirements standard in that an organisation which seeks to comply with it must comply with all of its requirements. It is applicable to both public sector and private sector organisations. Compliance with ISO 37001 can be certified by third party auditors. Accordingly, it is an effective tool both to help an organisation to implement an anti-bribery management system and to prove to third parties that it has implemented such a system. ISO 37001 has a similar methodology and template to the other ISO management standards, such as ISO 9001 quality management, ISO 14001 environmental management and ISO 45001 health and safety management. ISO 37001 provides guidance on its implementation.  
<https://www.iso.org/standard/65034.html>
  - b) The requirements of Benchmark 10 and the Annex to the Guidance are simpler and less prescriptive than ISO 37001 but are consistent with the core anti-corruption requirements contained in ISO 37001. However, Benchmark 10 applies to all types of corruption (as per the corruption offences in Benchmark 1), whereas ISO 37001 applies only to bribery. ISO 37001 could be expanded by an implementing organisation to include all types of corruption.
- iii) GIACC Resource Centre: This resource provides detailed guidance on implementing an anti-corruption management system which is consistent with the Benchmark requirements.  
[http://www.giaccentre.org/project\\_companies.php](http://www.giaccentre.org/project_companies.php)
- iv) ICC Rules on Combating Corruption (2011 edition)
- v) OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance (adopted 18 February 2010)
- vi) Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019): Recommendation 5
- vii) Transparency International's Business Principles for Countering Bribery:  
[https://www.transparency.org/whatwedo/publication/business\\_principles\\_for\\_countering\\_bribery](https://www.transparency.org/whatwedo/publication/business_principles_for_countering_bribery)

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### BM 10.1 Regulations:

- A) **‘implement’** is defined in the Benchmark Definitions as *‘design, develop, introduce, operate, maintain, monitor and continually improve’*.
- B) **‘by, on behalf of or against the organisation’**: See Guidance BM 10, paragraph (E) above.

### BM 10.2 Anti-corruption policy:

- A) The following terms are defined in the Benchmark Definitions as follows:
  - a) **‘personnel’**: *‘directors, officers, employees, workers and volunteers of an organisation, whether full time or part time, permanent or temporary’*
  - b) **‘business associate’**: *‘a person with which an organisation had, has, or intends to have a business relationship, including clients, consortium partners, customers, joint venture partners, purchasers and suppliers (as defined in the Benchmark Definitions) but excluding personnel of the organisation’*
  - c) **‘supplier’**: *‘includes any agent, concession operator, consultant, contractor, distributor, lender, lessor, representative, seller, supplier, or other person offering or providing works, products, services or assets’*.
- B) **‘by, on behalf of or against the organisation’**: See Guidance BM 10, paragraph (E) above.

### BM 10.4 Top management responsibility for the anti-corruption policy and procedures:

**‘top management’** is defined in the Benchmark Definitions as *‘the body or person(s) who control(s) the organisation at the highest level (e.g. the board of directors, supervisory council, chief executive, or other top leadership individual(s) or body)’*.

### BM 10.5 Communicating the anti-corruption policy and procedures:

**10.5(4) ‘The parts of the anti-corruption procedures relevant to personnel should be appropriately communicated to them’:**

For example, the parts of the anti-corruption procedures relevant to the finance function should be communicated to finance personnel.

## BM 10.7 Resources:

These resources may include, for example, office space, personnel and equipment.

## BM 10.11 Managing inadequacy of policies and procedures:

**BM 10.11(2) ‘Where additional or enhanced procedures or other appropriate steps would not be sufficient to reduce the corruption risks in relation to any activity or business associate to an acceptable level ...’:**

The provisions of Benchmark 10.11(2) are more likely to apply to a state-owned enterprise than to a government department or authority. For example, if a state-owned contractor or investor is proposing to participate in a construction joint venture in a high-risk overseas territory, it may determine that the corruption risk is too high to participate in that transaction and it should accordingly withdraw. However, withdrawal from an activity is not an option where such activity is a core function of a government department or authority. For example, if a government department issues permits, and the corruption risk is very high, it cannot withdraw from the permit issuing activity – it should appropriately improve the permit issuing controls so as to minimise the corruption risk.

## BM 10.12 Implementation of anti-corruption measures by controlled organisations:

An organisation might have control, for example over a subsidiary, joint venture or consortium, either through exercising management control or through having a majority ownership interest.

## BM 10.13 Implementation of anti-corruption measures by private sector entities which enter into contracts with the organisation:

- A) In entering into a contract with a public sector organisation, the private sector entity will be receiving public funds. It is therefore reasonable for the private sector entity to be required to show that it has implemented an anti-corruption management system which will help prevent public funds being misappropriated or wasted. It would be unreasonable and disproportionate to require private sector entities which only enter into low value contracts to go to the expense of implementing an anti-corruption management system. There should therefore be a reasonable contract value threshold over which this requirement

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applies. This threshold should be fixed at a level at which it would, in the circumstances, be reasonable and proportionate to expect a private sector entity to have implemented such a system.

- B) **‘an effective anti-corruption management system which at minimum is in accordance with the Annex to the Guidance’:** The public sector organisation could require the private sector entity to implement, and provide certification that it is in compliance with:
  - a) the requirements in the Annex to the Guidance (the anti-corruption management system for private sector organisations), or
  - b) an equivalent system (such as ISO 37001), provided that such equivalent system covers all those offences referred to in Benchmark 1 and is at minimum in accordance with the requirements of the Annex to the Guidance. (See Guidance BM 10, Reference (ii) for discussion of ISO 37001.)
- C) The private sector entity should implement the anti-corruption management system in a manner which is reasonable and proportionate to the corruption risks faced or posed by the private sector entity.

### BM 10.14 Decisions:

- A) **‘Decision’** is defined in the Benchmarks Definitions as including *‘any approval, assessment, certification, confirmation, decision, determination, judgment, recommendation, refusal or rejection’*. This could include, for example, a decision to undertake an activity, an approval of changes to contract terms, an approval or rejection of quality of work, a recommendation for payment or a refusal to approve payment.
- B) The provisions of BM 10.14 are designed to ensure that decisions are made by persons of a number, skill and seniority appropriate to the size and corruption risk of the transaction, and who are without conflict of interest.

#### **BM 10.14(1)(a) ‘The person(s) making the decision should not have any conflict of interest in relation to the decision’:**

An example of conflict of interest is where a person involved in approving payment of a supplier has a personal or business connection with that supplier. (See also Benchmark 11.13 relating to conflict of interests of public officials.)

### BM 10.15 Management functions:

#### **BM 10.15(7) Other management functions:**

The type of such other management functions will depend on the activities of the organisation and the manner in which the organisation is structured. It could

include functions such as sales and legal. The organisation should assess the corruption risk in relation to the activities of such functions and should ensure that adequate procedures are in place which minimise the corruption risk in relation to such functions.

## BM 10.19 Complaints and reporting systems:

### BM 10.19(1) Complaints system:

- A) The process should allow questions, concerns and complaints to be raised openly and confidentially or anonymously.
- B) Any person should be able to raise a question, concern or complaint, including personnel, business associates and members of the public.
- C) Any concern or complaint should be investigated and appropriately dealt with by a function which is independent of the function against which the concern or complaint is being raised.
- D) The investigation of the concern or complaint should be completed within a reasonable time, and the outcome of the concern or complaint should be communicated as soon as possible to the person raising it.
- E) The organisation should take appropriate steps to resolve the cause of any valid concern or complaint so as to prevent recurrence.

## BM 10.21 Records:

- A) The matters in respect of which records should be made and kept should include, for example, regulations, policies and procedures, employment processes and personnel details, procurement and contract management processes, contract documents, changes to contract terms, communications, decisions, assessments, approvals, measurements, delivery records, programmes, payment records, invoices, receipts, accounting records, training materials, records of training attendance, meeting minutes, performance evaluations and audits.
- B) Proper records in permanent written form are necessary to provide certainty as to the procedure or activity, and as to how it was actually carried out. This is important not only to ensure correct implementation of the procedure or activity, but also for any subsequent audit or challenge, or any litigation or prosecution.
- C) **Dates to be recorded:** As part of the material information, records should show the date they were created. In addition, times and dates of material events should be recorded. For example, in a procurement process there should be a record of the time and date of sending out of

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procurement notices and solicitation documents, receipt of submissions from suppliers and opening of tenders.

- D) **Persons to be recorded:** As part of the material information, records should show all persons with any material involvement in the recorded matters. The person(s) who created the record should sign and be identified in the record. This is important for identifying responsibility for an action. It is easier for responsibility for corrupt activity to be concealed where actions are anonymous.
- E) **Minimum period for retention of records:** The prescribed period in the regulations for retention of records should take account of relevant limitation periods, so that such records are, as far as possible, available for any future challenge, audit, litigation or prosecution. In cases where there is a risk of corruption and where there is no limitation period for corruption offences (as is recommended in Benchmark 1.2(5)), the period prescribed for their retention should be indefinite or as long as practicable. The right to erasure under data protection laws should not allow for destruction of documents that may be needed for corruption investigations.

### References

- i) UNCAC Article 9, paragraph 3:  
*‘Each State Party shall take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of its domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents.’*
- ii) ISO 15489-1: 2016: Information and documentation – Records management standard
- iii) International Records Management Trust (IRMT). (This organisation has closed but its products are still available for public use.)

## BM 10.22 Transparency to the public:

- A) This Benchmark provision provides that the organisation should proactively provide information to the public, in addition to responding to requests for information. This transparency will facilitate the public’s understanding of the public sector and enable the public to hold the organisation to account. It will also help to build public confidence in the public sector and to create a culture in the public sector where the provision of information to the public is part of its regular function.

- B) **‘save to the extent contrary to the public interest’**: This would include, for example, not disclosing confidential details of ongoing corruption investigations until the investigations are complete. In the Benchmarks Definitions, ‘public interest’ is defined as *‘the interests of the public at large as objectively and independently determined’*. This public interest exception would not cover the organisation withholding information simply because it may be embarrassing to the organisation’s managers (i.e. a failure by the manager to prevent corrupt conduct or to manage a contract appropriately or effectively).
- C) **‘promptly’**: As far as possible, the public should be given contemporaneous information by the organisation so that the public can monitor each contract as it proceeds. In this way, any ongoing corruption or risk of corrupt activity in such contracts may be able to be prevented, or at least identified early.

#### References

- i) UNCAC: The following provisions provide that *‘Each State Party shall, in accordance with the fundamental principles of its legal system:’*
- UNCAC Article 5, paragraph 1:  
*‘... develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of ... transparency and accountability.’*
  - UNCAC Article 10:  
*‘... take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia: (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public; (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and (c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.’*
  - UNCAC Article 13, paragraph 1(b):  
*‘... take appropriate measures, ... , to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public*

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*awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as: (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes; (b) Ensuring that the public has effective access to information.'*

- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 58–65
- iii) UNODC Technical Guide to UNCAC (2009), pages 42–46 and 63
- iv) Jakarta Statement on Principles for Anti-Corruption Agencies (2012), paragraph 1: Public Reporting and Public Communication and Engagement
- v) Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019):

RECOMMENDATION 4:

*'State-owned or controlled enterprises, should disclose their management structures, revenues, expenditures, and profits, and disclosure should be required of the beneficial ownership of the supplier companies providing services or goods, and the value accrued by public officials or PEPs through contracts to private companies during their tenure at State-owned or controlled enterprises, in line with national legislation.'*

# Guidance to Benchmark 11

## Public officials

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### BM 11 Purpose of Benchmark:

In order to combat public sector corruption, there should be measures to ensure that persons of integrity are employed as public officials, that their terms of employment are fair and reasonable, that their conduct is governed by a code of conduct which includes anti-corruption principles, that they are aware of the risks of corruption and how to address them, and that there are adequate and fair disciplinary procedures and sanctions for corrupt activity.

This Benchmark provides for such measures.

### BM 11.1 Regulations:

#### References

- i) UNCAC Article 7, paragraph 1 and 1(a):

*1. 'Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials:*

*(a) That are based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude;...'*

- ii) UNODC Technical Guide to UNCAC (2009), page 13:

*'Appointed public office should be based, on recruitment and throughout a career, on merit with transparent policies and procedures. Those elected to public office should also uphold standards similar to those expected from appointed public officials. Thus, ethical and anti-corruption requirements are an integral part of public office and concern all types of elected or appointed public officials as defined in article 2.'*

### BM 11.2 Regulatory authority:

States may choose how to allocate these regulatory functions. The Benchmark uses the term 'authority' for convenience to mean the authority that exercises these functions. This does not mean that there should necessarily be one separate

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authority with these functions alone. The functions may be exercised by one or more new or existing authorities, either alone or alongside other responsibilities. There may also be different authorities for different types of public official. For example, members of the judiciary or members of parliament may be regulated by authorities which are different from the regulatory authority(ies) for other public officials as such regulatory authorities may require, to some extent, different expertise and knowledge. For example, the regulatory body for the judiciary may include members of the judiciary and the legal profession. (See Benchmark 4.3(4) and Guidance BM 4.3(4).) Federal States may have such an authority(ies) in each constituent state, in which case there should be provision to ensure common standards and co-operation between those different authorities.

### References

- i) UNODC Technical Guide to UNCAC (2009), page 14:  
*‘A fundamental pillar for an efficient, transparent and effective State free of corruption is a public service staffed with individuals of the highest level of skill and integrity. States Parties should consider developing a system to attract and retain such individuals. This may be achieved through the establishment of an institution such as a public service commission to handle or provide guidance on recruitment, employment, and promotion procedures. Whether or not such an institution is advisory (where individual departments manage their own staffing) or executive (where the institution itself is responsible for staffing issues), it is important that procedures are, as far as possible, uniform, transparent and equitable.’*

## BM 11.4 Appointment, transfer, promotion, demotion, suspension, dismissal of public officials:

- A) There can be corruption in the appointment, transfer, promotion, demotion, suspension and dismissal of public officials. For example:
  - a) Bribes may be paid by individuals in order to secure public sector employment for themselves or members of their family
  - b) Senior government officials may use their power and influence to secure public sector positions for their family or friends (‘nepotism’ or ‘cronyism’)
  - c) Senior officials may use threats of dismissal or demotion in order to extort money from junior employees
  - d) Officials (such as law enforcement officials or public officials with an audit function) may be threatened or bribed with suspension or dismissal if they investigate or reveal corruption by another public official

- e) A change of government may result in corrupt appointments, promotions, demotions and dismissals so as to put in place or promote public officials who support the government and remove those who do not.
- B) It is therefore critical that public officials should be appointed, transferred, promoted, demoted, suspended and dismissed by processes that are fair, impartial, clear, predefined, in writing, transparent and publicly declared, and free from improper influence, and that all appointments, promotions and transfers are by way of processes which are competitive and based on integrity, merit and impartiality.

**BM 11.4(1)(a) ‘by way of processes which are ... publicly declared’:**

The public should be provided with full information as to the processes for appointment, transfer, promotion, demotion, suspension and dismissal of all public officials, including all heads of authorities and members of the judiciary. This information should include publicly declaring:

- a) all vacancies
- b) the criteria for appointment, transfer, promotion, demotion, suspension and dismissal for all the different types of public official
- c) In relation to heads of authorities and members of the judiciary:
  - the composition and selection criteria for the independent body(ies) who are responsible for regulating and conducting the above processes in relation to different types of public official
  - the outcome of the various processes, including the terms and conditions of any appointment, transfer or promotion, the sanctions applied in any disciplinary process, the reasons for any suspension and dismissal, and referrals to law enforcement authorities.

Paragraph (c) above would apply, for example to: the head of the corruption prevention authority (Benchmark 2.7(2)(a)), the heads of the law enforcement authorities (Benchmark 3.6(2)(a)), members of the judiciary (Benchmark 4.3(4)), and the heads of the regulatory authorities (Benchmark 6.8(2)(a)).

**BM 11.4(1)(c) ‘by way of processes which ... are competitive and based on criteria relating only to integrity, merit and impartiality’:**

- A) All appointments, transfers and promotions should be by way of a competitive process so as to:
  - a) prevent such appointments, transfers and promotions being corruptly used by those in power to favour their supporters, thus fostering a culture of cronyism

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- b) ensure that public sector appointments, transfers and promotions are based on merit, integrity and impartiality which will in turn help to ensure better performance of public functions.
- B) Applicants should:
  - a) be appropriately trained and qualified
  - b) have a record of employment which demonstrates integrity and impartiality
  - c) be willing and able to comply with the code of conduct (Benchmark 11.10).

### References

- i) Re public officials generally:
  - UNCAC Article 7, paragraph 1 and 1(a)
  - Commonwealth Latimer House Principles (2004), Principle (V):  
*‘Public Office Holders:  
(a) Merit and proven integrity, should be the criteria of eligibility for appointment to public office;’*
- ii) Re the judiciary:
  - Latimer House Principles (2004), Principle (IV)(a):  
*‘Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure ... appointment on merit...’*
  - Opinion No. 1 of the Consultative Council of European Judges (CCJE):  
*‘73. (2) The authorities responsible in each member State for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria with the aim of ensuring that the selection and career of judges are based on merit having regard to qualification, integrity, ability and efficiency’* (<https://rm.coe.int/1680747830>)
- iii) Re law enforcement officers:
  - UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraph 150:  
*‘... The State party should take necessary steps to ensure that recruitment and promotion [of prosecutors] are based on objective factors, and in particular on professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures. The recruitment procedures should*

*embody safeguards against any approach which favours the interests of specific groups, and should exclude discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, sexual orientation, national or social origin, property, birth or other status.'*

- UNODC and IAP Guide on the Status and Role of Prosecutors (2014): page 14:

*'Clear criteria for appointment to office should be established. Vacancies should be advertised and suitable candidates invited to apply. There should be input into the selection process from suitably qualified persons with suitable expertise and of high reputation.'*

#### **BM 11.4(2)(a) Advertising of vacancies:**

##### References

##### i) Re public officials generally:

- UNODC Technical Guide to UNCAC (2009), page 14:

*'Thus procedures should cover the need for job profiles for new posts, with stated requirements and qualifications. Posts should be openly advertised and filled under agreed recruitment procedures which would range from transparent procedures for selection and appointment criteria, to the confirmation of qualifications and references for successful candidates.'*

##### ii) Re the judiciary:

- UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015):

*'54. All judicial vacancies should be advertised in such a way as to invite applications by, or nominations of, suitable candidates for appointment. That would ensure that procedures for judicial appointment and promotion based on merit are opened to a pool of candidates as diverse and reflective of society as a whole as possible. The publication of the list of vacant posts and the list of candidates for those posts will also permit public scrutiny of the appointment process.'*

##### iii) Re law enforcement officers:

- UNODC and IAP Guide on the Status and Role of Prosecutors (2014): page 14:

*'Clear criteria for appointment to office should be established. Vacancies should be advertised and suitable candidates invited to apply. There should be input into the selection process from suitably qualified persons with suitable expertise and of high reputation.'*

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### BM 11.4(2)(e) Disclosures:

- A) These disclosures should be made by candidates who have been selected for appointment but not yet appointed. Such disclosures give the employer the opportunity, prior to appointment, to determine whether the candidate poses too high a risk of corruption to be suitable for the position.
- B) For further discussion of such disclosures, see Guidance BM 11.12 and BM 11.13

### BM 11.5 Terms and conditions of employment for public officials:

- A) Public officials should be treated fairly. This means not only fair across the same or equivalent posts, but also within the hierarchy of officials. As it is senior officials who may determine terms of employment, there is a risk that they will provide for unduly preferential terms of employment for themselves and other senior officials. This risk applies equally to those officers of the body(ies) responsible for regulating employment who may set the standards for employment and levels of pay.
- B) To provide certainty and transparency, and to prevent corruption amongst public officials (e.g. where a more senior public official may demand a payment from a more junior public official in order to give her/him better contract terms), contracts of employment should be in writing, stating all necessary terms, and be standardised across the public sector.

#### References

- i) UNCAC Article 7, paragraph 1(a) requires that employment of public officials should inter alia be based on transparency and equity.

### BM 11.6 Reasonable remuneration for public officials:

- A) '**remuneration**' is defined in the Benchmark Definitions as '*salary and benefits*'.
- B) '**... public officials should receive remuneration that is reasonable and equitable ...**': Unreasonable and inequitable remuneration can lead to corruption inter alia in the following ways:
  - a) Remuneration that is too low to provide for a reasonable standard of living may incentivise public officials to resort to corruption in their public function in order to increase their income (e.g. officials may require bribes to issue permits, or policemen may extort payments at roadblocks).

- b) Where senior public officials award each other employment terms which provide for excessive remuneration and benefits, this could constitute an abuse of function (see Benchmark 1.1(8)) as such officials are using taxpayers' money to provide each other with an undue advantage. This type of corruption is a risk where a culture of excessive pay and benefits has come to be entrenched so that such levels of remuneration are seen as normal and legitimate within the circles of more senior public officials and where any change is strongly resisted.
  - c) Failure to manage remuneration properly by setting fair and equitable pay and benefit scales can add to or lead to a sense of injustice (for those who are underpaid) and impunity (for those who are overpaid) which corrodes integrity within the public sector and also undermines public confidence in the public sector. If junior public officials believe that senior officials are unjustly awarding themselves excessive benefits, junior officials may be more tempted to try to supplement their own incomes through corrupt acts.
- C) **Reasonable and equitable remuneration** is that which:
- a) provides a reasonable standard of living relative to the population as a whole
  - b) is commensurate with the public official's duties and responsibilities and with other similar posts
  - c) is increased according to seniority or skill only to the extent justified and not so as to be disproportionately more than those of lower seniority or skill
  - d) is at levels which are justified and conscionable to be paid from taxpayers' money.
- D) **Benefits:** Benefits include matters such as pension, health insurance, housing and vehicle allowance. These should be included in the assessment of the overall remuneration of the public official, including when assessing whether it is proportionate to the remuneration of those more junior employees who may not receive such benefits.
- E) **Unreasonable or excessive benefits:** These should not be permitted no matter how senior the public official. Excessive benefits would include, for example, the provision of, or allowance for, luxury vehicles, luxury accommodation, or an overly generous pension or health insurance. It would not be conscionable to fund such benefits out of taxpayer funds.

#### References

- i) UNCAC Article 7, paragraph 1(c) provides for adequate remuneration and equitable pay scales taking into account the level of economic development of the State.

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- ii) UNODC Technical Guide to UNCAC (2009), page 16:  
*‘Both the level and certainty of payment may encourage a range of unacceptable conduct, from taking time from official responsibilities to undertake secondary employment to the susceptibility to bribery. “Adequate” means that, at the least, pay scales should allow public officials to enjoy the means to meet living costs commensurate with their position and responsibilities and comparable with similar positions in other sectors. States Parties should also ensure that the pay scales are linked to career progression, qualifications and promotion opportunities. The method of determining public sector pay and the criteria by which it is determined should be public.’*
- iii) Re the judiciary: Latimer House Principles (2004): Guideline (II)2 (second and third paragraphs):  
*‘Appropriate salaries and benefits, supporting staff, resources and equipment are essential to the proper functioning of the judiciary. As a matter of principal, judicial salaries and benefits should be set by an independent body and their value should be maintained.’*

## BM 11.7 Protection for public officials:

### References

- i) Re law enforcement officers:
- UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015):  
*‘154. ... Prosecutors and their families should be physically protected by the State, at places of work and at home, when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions.’*
- ii) Re the judiciary:
- Limassol Conclusions on Combating Corruption within the Judiciary, paragraph 10 (xii):  
*‘Governments, in the light of threats to the personal safety of judicial officers, should provide adequate personal protection for all judicial officers particularly those who are regularly required to adjudicate on serious criminal offences.’*
  - UNODC Implementation Guide and Evaluative Framework for Article 11, paragraphs 82 and 83

## BM 11.8 Bonuses and targets for public officials:

Some types of performance bonuses or targets may encourage corruption in the public sector. These may include, for example, the following:

- a) Where bonuses are based on targets for expenditure cuts, this may encourage public officials to improperly delay payment to, or resist valid claims from, suppliers, or to purchase substandard goods or services, in order to meet the reduced expenditure targets.
- b) Where bonuses are based on profit targets in state-owned enterprises, this may encourage public officials to pay bribes to win contracts or to commit fraud by claims inflation, in order to meet the profit targets.

## BM 11.9 Personnel records of public officials:

- A) Public sector organisations should maintain an accurate record of all personnel employed by the organisation which is immediately updated upon new personnel being employed and personnel ceasing to be employed.
- B) To limit the corruption risk of false personnel payments being used to embezzle funds, public sector organisations should verify that:
  - a) personnel records record only genuine employees
  - b) personnel are not duplicated on the records so as to result in double payment
  - c) personnel stated in payment records as receiving payment are in fact receiving the stated payments.

### References

- i) UNODC Technical Guide to UNCAC (2009), page 14:  
*'States Parties should ensure that all ministries and departments maintain accurate personnel records for all recruitment, promotion, retirement and resignation, and other staffing issues. Since the wage bill is usually one of the biggest items of government expenditure and susceptible to weak controls, payroll records should be underpinned by a centralized or institutional personnel database against which to verify the approved post establishment list and the individual personnel records (or staff files).'*

## BM 11.10 Code of conduct for public officials:

- A) Codes of conduct may differ between different categories of public officials according to their public functions; for example, codes of conduct for the judiciary, law enforcement officers and administrative

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personnel. However, all such codes of conduct should include principles designed to combat corruption and help engender a culture of integrity and compliance in the public sector.

- B) Public officials should be able to obtain advice or guidance on ethical issues from the organisation's compliance manager (see Benchmark 10.6, Public sector organisations). Information on who to seek guidance from should be provided to the public official in training (Benchmark 20.6(7) (Anti-corruption training)).

### References

- i) UNCAC:
- Article 7, paragraph 1(d) provides for training of public officials to enable the proper and honourable performance of their functions and to enhance their awareness of the risks of corruption inherent in the performance of their functions
  - Article 7, paragraph 4 provides for measures to promote transparency and avoid conflicts of interest
  - Article 8, paragraphs 1 and 2 provide that, in order to fight corruption, States shall promote integrity, honesty and responsibility among public officials and, in particular, shall endeavour to provide codes of conduct for public officials.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 90–93
- iii) UNODC Technical Guide to UNCAC (2009), pages 18–24:
- ‘Codes will state the standards of behaviour of public officials and translate them into specific and clear expectations and requirements of conduct. These identify the boundaries between desirable and undesirable behaviour and would often be grouped in a variety of ways, e.g., according to the boundaries of key relationships, or according to groups to whom responsibilities are owed.*
- ‘Thus codes should address issues of public service (e.g., procedures to ensure fairness and transparency in providing public services and information) and political activities (e.g., placing restrictions on political activities and ensuring that political activities do not influence or conflict with public office duties). They will state clearly the requirements relating to both financial conflicts of interest (e.g., where a public official is working on matters in his official capacity that would affect his personal financial interest or the financial interests of those close to him) and conflicts of interest based on non-financial concerns (e.g., where a public official is working on matters that affect persons or entities with whom he has close personal, ethnic, religious or political affiliations). Codes should*

*include clear and unambiguous provisions on acceptance or rejection of gifts, hospitality, and other benefits, especially addressing restrictions on acceptance of gifts from persons or entities that have business with the organization, any outside employment (e.g., ensuring that outside work does not conflict with official work) and the use of government resources (e.g., using Government resources only for Government purposes, or protecting non-public information). Finally codes should deal with post resignation and post-employment restrictions (e.g., restrictions on former public officials representing a new employer before their former agency or taking confidential information to new employers)’ (pages 21–22)*

- iv) UN International Code of Conduct for Public Officials
- v) Commonwealth Latimer House Principles (2004), Principle (VI):  
*‘Ethical Governance*  
*Ministers, Members of Parliament, judicial officers and public office holders in each jurisdiction should respectively develop, adopt and periodically review appropriate guidelines for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence.’*
- vi) For codes of conduct re members of parliament:
  - The Commonwealth Parliamentary Association: Recommended Benchmarks for Democratic Legislatures:  
*‘11.1.2 The Legislature shall approve and enforce a code of conduct, including rules on conflicts of interest and the acceptance of gifts.’*
  - Latimer House Principles (2004), Principle (VI): Ethical Governance:  
*‘... Members of Parliament ... and public office holders in each jurisdiction should respectively develop, adopt and periodically review appropriate guidelines for ethical conduct. These should address the issue of conflict of interest, whether actual or perceived, with a view to enhancing transparency, accountability and public confidence.’*
- vii) For codes of conduct re the judiciary: See References under Guidance BM 4.6(2) and BM 4.6(3) above.
- viii) For codes of conduct re law enforcement officers:
  - UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015), paragraphs 151–155:  
*‘151. ... To the extent that there is a code of conduct for prosecutors or other professional guidelines governing the role and conduct of the prosecution service, these materials should form a central part of the initial training of new prosecutors in integrity, accountability and professionalism. ...*

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*'152. In an attempt to enhance the integrity of members of the prosecution service and raise awareness of corruption risks within the prosecution service, many States have now begun to develop specialized ethics and training programmes for both new and experienced prosecutors.*

*'155. In the performance of their duties, prosecutors should be bound by a code of conduct that incorporates contemporary international standards of professional conduct.'*

## BM 11.11 Overriding duties of public officials in combating corruption:

### References

- i) UN International Code of Conduct for Public Officials:
  - 1) *A public office, as defined by national law, is a position of trust, implying a duty to act in the public interest. Therefore, the ultimate loyalty of public officials shall be to the public interests of their country as expressed through the democratic institutions of government.*
  - 2) *Public officials shall ensure that they perform their duties and functions efficiently, effectively and with integrity, in accordance with laws or administrative policies. They shall at all times seek to ensure that public resources for which they are responsible are administered in the most effective and efficient manner.*
  - 3) *Public officials shall be attentive, fair, and impartial in the performance of their functions and, in particular, in their relations with the public. They shall at no time afford any undue preferential treatment to any group or individual or improperly discriminate against any group or individual, or otherwise abuse the power and authority vested in them.'*
- ii) Re members of parliament:
  - The Commonwealth Parliamentary Association: Recommended Benchmarks for Democratic Legislatures:
 

*'11.1.1 Legislators should maintain high standards of accountability, transparency, responsibility and propriety in the conduct of all public and parliamentary matters including strict adherence to codes of conduct, and interest disclosure rules.'*
- iii) Re members of the judiciary:
  - Bangalore Principles of Judicial Conduct (2002): Value 1 (Independence), Value 2 (Impartiality), Value 3 (Integrity), Value 4 (Propriety), Value 5 (Equality), Value 6 (Competence and Diligence)

## BM 11.12 Interests and assets of public officials:

### BM 11.12(1) ‘Types of disclosures: Public officials who are in positions which are vulnerable to a risk of more than low value corruption’:

Such officials would include:

- a) heads of government, ministers, members of parliament and members of the judiciary
- b) other public officials with decision-making authority or managerial power, such as heads of authorities or organisations, directors, functional heads, procurement managers, sales managers, contract managers, concession managers and public officials issuing permits of significant value.

### BM 11.12(1)(a) ‘their outside activities, interests and affiliations, and their assets, investments, income, financial accounts, debts and other liabilities’:

- A) ‘**their outside activities, interests and affiliations**’: Disclosures of outside activities, interests and affiliations should include inter alia all outside:
  - employment
  - business and financial interests
  - affiliations with businesses such as board memberships
  - connections with non-governmental or charitable organisations
  - connections with think tanks or other lobbying organisations
  - any unpaid or volunteer activities.

Each disclosure should specify inter alia:

- the nature of the activity, interest or affiliation
  - the nature and functions of the body in which there is an interest or affiliation, and whether such body has any dealings with the public sector, and if so, the nature of those dealings.
- B) ‘**assets, investments**’: Disclosures of assets and investments should specify inter alia the nature and value of the asset or investment. Where there is ownership or interest in an organisation, disclosures should also specify the identity of the organisation, and whether the organisation has any dealings, directly or indirectly, with the public sector, and if so, the nature of those dealings.
  - C) ‘**income**’: Disclosure of income should include all types of income, including inter alia investment income, rental income, income from assets and all employment income.
  - D) ‘**financial accounts**’: Disclosures of financial accounts should include accounts in the official’s name and those in which the public official or

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his spouse or children have any interest in or signature or other authority over.

- E) **‘debts and other liabilities’:** Disclosures of debts and other liabilities should include inter alia overdrafts, loans, mortgages and credit card liabilities. In each case, the amount of the debt or liability, name of the persons to whom the liability is owed, the terms of repayment, and whether payments are overdue should also be disclosed.
- F) **Gifts, hospitality, entertainment, donations and other benefits:** This Benchmark provision does not require disclosure of gifts, hospitality, entertainment, donations and other benefits received by public officials as these are not permitted to be received by public officials under Benchmark 11.14. However, if a State were to permit any type of gift, hospitality, entertainment, donation or other benefit to be received, then the relevant public officials should be required to record these gifts etc. fully and promptly in a register which should be regularly monitored and disclosed to the public. (See further discussion in Guidance BM 11.14 below.)

### **BM 11.12(1)(b) ‘disclose the matters in (a) above of their spouses and children’:**

This includes adult and non-adult children, as they could be used to hold corrupt assets obtained by the public official through her or his public functions.

### **BM 11.12(2) Timing and detail of disclosures:**

- A) **Timing:** These disclosures should be made:
  - a) prior to appointment, by candidates who have been selected for appointment but not yet appointed (as required under Benchmark 11.4(2)(e)). Such disclosures thereby give the employer the opportunity, prior to appointment, to determine whether the candidate poses too high a risk of corruption to be suitable for the position.
  - b) annually thereafter, by those who are employed.
- B) **‘sufficient detail’ of disclosures:** Sufficient detail of disclosures should be provided in order to enable assessment of whether the disclosures show:
  - a) existing or potential conflicts of interest (such as interests in suppliers who may work for the organisation)
  - b) corruption risk or corrupt activity; for example, wealth that appears to exceed that which could have been lawfully obtained
  - c) interests in organisations (such as charitable organisations) which could be used as a vehicle for bribery of the public official
  - d) debts and liabilities that could make the public official vulnerable to corruption.

## References

- i) UNCAC:
  - Article 8, paragraph 5 provides for States to endeavour to establish measures and systems requiring public officials to make declarations regarding inter alia their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result.
  - Article 52, paragraph 5 provides for States to consider establishing financial disclosure systems for appropriate public officials and sharing such information with other States' authorities for the investigation etc. of UNCAC offences.
  - Article 52, paragraph 6 provides for States to consider requiring public officials to disclose any interest in or signature or other authority over a financial account in a foreign country.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraph 96
- iii) UNODC Technical Guide to UNCAC (2009), pages 15 and 25–27:
 

*'Management should also introduce specific support and oversight procedures for public officials in positions that are especially vulnerable to corruption, including regular appraisals, confidential reporting, registration and declaration of interests, assets, hospitality and gifts, as well as efficient procedures to regularly monitor the accuracy of the declarations...'*

*'It may also be advisable to explore ways to monitor lifestyles of certain key officials. This would admittedly be a rather delicate matter and would need to be approached with due regard to, and in compliance with, applicable laws for the protection of privacy. Such monitoring may include looking for tell-tale signs in living accommodations, use of vehicles or standards of vacations which may not be consistent with known salary levels. Individuals' bank accounts may also need to be monitored, provided that such monitoring is approved by employees in their contracts.'* (page 15)
- iv) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019):
 

*'RECOMMENDATION 1: Asset declarations systems for Politically Exposed Persons (PEPs) should be established, including regular reporting, as well as sanctions for non-compliance, and public disclosure of those declarations should be encouraged, with due regard for national legislation.'*

*RECOMMENDATION 6: Not-for-profit organizations established or controlled by individuals holding high political office, their families and associates should provide full transparency on their revenues and expenditures, in line with national legislation.'*

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## v) UN International Code of Conduct for Public Officials:

*'5. Public officials, to the extent required by their position, shall, in accordance with laws or administrative policies, declare business, commercial and financial interests or activities undertaken for financial gain that may raise a possible conflict of interest. In situations of possible or perceived conflict of interest between the duties and private interests of public officials, they shall comply with the measures established to reduce or eliminate such conflict of interest.*

...

*8. Public officials shall, in accord with their position and as permitted or required by law and administrative policies, comply with requirements to declare or to disclose personal assets and liabilities, as well as, if possible, those of their spouses and/or dependants.'*

## vi) Re disclosures by the judiciary:

## – UNODC Technical Guide to UNCAC 2009 (page 51):

*'A number of measures may be taken to promote the integrity of the judicial process. ... Judicial education should include instruction concerning judicial bias (actual and apparent) and judicial obligations to disqualify oneself for actual or perceived partiality.*

*Another measure is the adoption of, and compliance with, a national code of judicial conduct that reflects contemporary international standards. The code should at the least impose an obligation on all judges publicly to declare their assets and liabilities and those of their family members. It should also reflect the guidance provided in article 8 relating to the disclosure of more general conflicts of interests. Such declarations should be regularly updated. They should be inspected after appointment and monitored from time to time by an independent official as part of the work of a judicial oversight body or the body or bodies established under article 6.'*

## – UNODC Implementation Guide and Evaluative Framework for UNCAC Article 11 (2015) paragraphs 41–46 (Conflicts of interest and disclosure of financial interests and affiliations). See in particular:

*'45. It has been increasingly recognized that in order for declaration systems to be a truly effective tool in relation to the identification of potential or actual conflicts of interest, judges should provide information in such declarations in relation to their outside affiliations and interests, in addition to financial interests. Types of information requested in this regard may include pre-tenure activities, affiliations with businesses such as board memberships, connections with non-governmental or lobbying organizations and any unpaid or volunteer activities.'*

- vii) Re disclosures by law enforcement officers:
  - UNODC Implementation Guide and Evaluative Framework for Article 11, paragraphs 178–180 regarding disclosure of assets by prosecutors
- viii) Re disclosures by members of parliament:
  - The Commonwealth Parliamentary Association: Recommended Benchmarks for Democratic Legislatures:
    - ‘11.1.3 Legislatures shall require legislators to periodically, fully and publicly disclose their financial and other relevant interests.’
  - Latimer House Principles (2004), Guideline (V)2: Parliamentary Ethics:
    - ‘(a) Conflict of interest guidelines and codes of conduct should require full disclosure by ministers and members of their financial and business interests’
- ix) Re disclosures by elected officials:
  - IDEA Database: (IDEA statistics quoted are correct as at 10 April 2020): ‘68. Are elected officials required to submit reports regarding their finances?’: IDEA cites that, out of 85 countries (where data was available), 52 countries require elected officials to submit reports regarding their finances: <https://www.idea.int/data-tools/question-view/284667>

### BM 11.13 Conflicts of interest of public officials:

**BM 11.13(5) ‘Former public officials should not, for a prescribed reasonable period of time after leaving their public office, engage in activities or acquire any position or interest in the private sector where such activities, position or interest relate to, or are connected with, the functions previously held by the public official in the public sector.’**

The purpose of this Benchmark provision is to place restrictions on the employment, activities or interests which public officials may take up once they leave their public sector positions. If there were no such restrictions, this could create inter alia the following corruption risks:

- a) **Conflicts of interest during public sector employment:** Conflicts of interest could arise while the public official is employed in her or his public sector position as she or he may be tempted to give preferential treatment (e.g. awarding contracts or concessions) to prospective private sector employers. For example, a public official at a defence ministry may award contracts to a defence contractor in the hope of or in return for

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a promise of a senior position at that defence contractor following the official's retirement from public office.

- b) **Misuse of information to provide unfair advantage:** Once the public official moves to the private sector position (such as the defence contractor in the previous example), she or he may retain sufficient contacts or knowledge of the particular public department (such as the defence ministry) to be able to provide their new private sector employer with an unfair advantage over other private sector competitors.

### References

- i) UNCAC:
- Article 7, paragraph 4 provides that States should endeavour to adopt systems that promote transparency and avoid conflicts of interest in the public sector
  - Article 12, paragraph 2(e) provides for employment restrictions for former public officials.

- ii) UNODC Legislative Guide to UNCAC (2006), paragraph 96

- iii) UNODC Technical Guide to UNCAC (2009), page 25:

*'In general terms conflict-of-interest regulations should cover major types of conflict of interest, which have been the source of concern in a given country. Appropriate procedures need to exist for action when a conflict of interest is likely to occur or is already detected. In situations where conflicts of interest cannot be avoided (e.g., in small communities), there must be procedures which safeguard the public interest without paralyzing the work of the agency in question. Public officials who are subject to the regulations should be aware of, understand and accept the concept of conflict of interest and of applicable regulations. Information and consultations should be available for public officials on how to act in case of doubt about their possible conflict of interest. It would be useful to put in place an informal consultation process or mechanism of which public officials can readily avail themselves to seek clarifications and advice in particular situations. A body/bodies should be assigned to investigate and obtain all necessary information regarding possible conflicts of interest. Legislation, delegated authority and/or contracts of employment should provide appropriate penalties for failure to comply with conflict-of-interest regulations. Information about the conflict-of-interest requirements for public officials should be available to the public.'*

- iv) UN International Code of Conduct for Public Officials:

*'II. CONFLICT OF INTEREST AND DISQUALIFICATION*

4. *Public officials shall ... not engage in any transaction, acquire any position or function or have any financial, commercial or other comparable interest that is incompatible with their office, functions and duties or the discharge thereof.*

5. *Public officials, to the extent required by their position, shall, in accordance with laws or administrative policies, declare business, commercial and financial interests or activities undertaken for financial gain that may raise a possible conflict of interest. In situations of possible or perceived conflict of interest between the duties and private interests of public officials, they shall comply with the measures established to reduce or eliminate such conflict of interest.'*

## BM 11.14 Gifts, hospitality, entertainment, donations and other benefits for public officials

- A) Benchmark 11.14 prohibits public officials and their family members from soliciting or accepting gifts, hospitality, entertainment, donations or other benefits. In contrast to this, some authoritative texts permit gifts etc to be received and recommend only that public officials be required to register gifts and hospitality received. (See for example UNODC Technical Guide to UNCAC (2009), page 15, third paragraph.)
- B) However, permitting gifts to be received increases the corruption risk in that:
  - a) it increases temptation and opportunity to solicit, accept, offer or give corrupt gifts,
  - b) it increases the perception of corruption.
- C) Furthermore, generally, there is no good reason for a public official to solicit or receive, or to be offered or given, any such gift etc. Such gifts etc. are not necessary to facilitate bona fide working relations. Good relations can be fostered by, for example, sharing a modest meal or event where all parties pay their own way or where public officials' costs are treated as a public expense. More often than not, the only motive for such gifts etc. is to seek to improperly influence the public official in some way.
- D) Where gifts to officials may be the custom, it may be preferable for the custom to be abandoned in favour of creating a gift-free culture so as to reduce the perception of corruption.
- E) If, contrary to Benchmark 11.14, a State were to permit gifts, hospitality, entertainment, donations or other benefits for public officials in any form, then any such permitted gifts etc. should be strictly limited to a low value which would not be sufficient to improperly influence a public

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official, and the public officials who receive such gifts etc. should be required to record them fully and promptly in a register which should be regularly monitored and disclosed to the public.

### References

- i) UNCAC Article 8, paragraph 1 requires States to promote integrity, honesty and responsibility among their public officials.
- ii) UNODC Technical Guide to UNCAC (2009), pages 15 and 27
- iii) UN International Code of Conduct for Public Officials:
 

*‘IV. ACCEPTANCE OF GIFTS OR OTHER FAVOURS*

*9. Public officials shall not solicit or receive directly or indirectly any gift or other favour that may influence the exercise of their functions, the performance of their duties or their judgement.’*
- iv) Re the judiciary:
  - Bangalore Principles of Judicial Conduct:
 

*‘4.14 A judge and members of the judge’s family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.*

*4.15 A judge shall not knowingly permit court staff or others subject to the judge’s influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.’*
- v) Re members of parliament:
  - The Commonwealth Parliamentary Association: Recommended Benchmarks for Democratic Legislatures:
 

*‘11.1.2 The Legislature shall approve and enforce a code of conduct, including rules on conflicts of interest and the acceptance of gifts.’*

## BM 11.15 Facilitation payments:

- A) **‘Facilitation payment’** is defined in the Benchmark Definitions as *‘an illegal or unofficial payment which is solicited, accepted or demanded by a public official in return for services that the payer is legally entitled to receive without having to make such payment’.*
- B) A facilitation payment is normally a relatively minor payment made to a public official or person with a certifying function in order to secure or expedite the performance of a routine or necessary action, such as the issuing of a visa, work permit, customs clearance, or installation of

a utility service. Although facilitation payments are often regarded as different in nature to, for example, a bribe paid to win business, they are illegal in most locations and they should be prohibited.

#### References

- i) UNCAC:
  - Article 8, paragraph 1 requires States to promote integrity, honesty and responsibility among their public officials.
  - Article 12, paragraph 2(d) requires States to take measures to prevent corruption involving the private sector which may include *‘preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities’*.

### BM 11.16 Expenses of public officials:

- A) Failure to manage expenses of public officials may constitute a misuse of taxpayers’ funds where:
  - a) expense allowances are permitted to be unreasonably high or to include expenses that are not solely and necessarily incurred in connection with the official’s public function. (This may be an abuse of function – see paragraph (B)(c) below), or
  - b) claims for and reimbursement of expenses are not carefully monitored thereby enabling false claims to be made and paid. (This may be fraud – see paragraph (D)(b) below.)
- B) **‘... expenses which are reasonable ...’:**
  - a) **Reasonable expenses:** Permitted expenses should be reasonable; namely, they should be set at levels which are based on expenditure relative to the population as a whole, are commensurate with the public official’s duties and responsibilities and with other similar posts, are increased according to seniority or skill only to the extent justified and not so as to be disproportionately more than those of lower seniority, and are justified and conscionable to be paid from taxpayers’ money.
  - b) **Examples of unconscionable and unjustifiable levels of expenses:** Unconscionable and unjustifiable levels of expenses would include, for example, expense allowances that cover luxury dining, luxury entertainment (or any entertainment that is not strictly necessary for the public function), luxury hotel accommodation or first-class air travel. Such expenses should not be borne by the taxpayer.

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- c) **Abuse of function:** A public official may be guilty of abuse of function (Benchmark 1.1(8)) where she or he authorises (for another official) or accepts (for her/himself) a level of expense allowance which is not reasonable (as defined in (a) above). There is an increased risk of this type of corruption where a culture of excessive expenses has come to be entrenched, particularly within the circles of more senior public officials.
- C) ‘... expenses which are ... solely and necessarily incurred for the purposes of their public function’:
- It is unjustifiable to expect the taxpayer to fund expenses which are not solely and necessarily incurred for the public function. Such expenses would include, for example:
- a) private expenses of the public official, such as shopping, entertainment or personal travel, even if incurred during a public event (such as a State visit to a foreign State)
  - b) normal living expenses which the public official would in any case incur regardless of the public function
  - c) normal maintenance costs, such as household rent, maintenance or furnishings, or vehicle repairs on privately owned or rented property or vehicles, which the public official would in any case incur regardless of the public function.
- D) ‘... expenses which are ... within pre-agreed limits set by their employment terms and conditions and are fully substantiated’:
- a) Public officials should be required to submit full substantiation of their expenses claims and these should be carefully checked by the finance function.
  - b) **Fraud:** A public official may be guilty of fraud (Benchmark 1.1(5)) where she or he applies for reimbursement of expenses which are in excess of her or his actual expenses or of her or his expense allowance. Any official (such as an official in the finance function) who facilitates such fraud, for example by overlooking the absence of substantiation, may also be guilty of a corruption offence. Where such malpractice runs unchecked and unsanctioned, it can lead to considerable sums being defrauded and may also encourage others to do the same.

## References

- i) UNCAC: Article 8, paragraphs 1 and 2 provide for States to promote integrity, honesty and responsibility among public officials.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 90–93
- iii) UNODC Technical Guide to UNCAC (2009), pages 18–24

## BM 11.17 Reporting by public officials:

- A) Benchmark 11.17 provides that public officials should report (rather than be encouraged to report) matters in Benchmark 21.1. The rationale for this duty is that the salaries of public officials are paid by the public and, as public officials, they also have a duty to act in the public interest and may be in a position to identify corruption in the public sector. It should therefore be incumbent on public officials to make a report where they believe in good faith or on reasonable grounds that there is suspected or actual corruption or breach of regulations in connection with a public official or public sector organisation or its activities.
- B) Benchmark 11.17 provides that public officials should report corruption only in **'good faith or on reasonable grounds'**: For meaning of this phrase, see discussion in Guidance BM 21.6(5).
- C) Benchmark 11.17 provides that public officials should make a report to the appropriate body(ies) in Benchmark 21.2 or other body as prescribed by the regulations. Benchmark 21 inter alia provides for the various systems via which a public official could report suspected corruption or breach of the regulations. Benchmark 21 also provides for protections which should be available to those who report suspected corruption in good faith or on reasonable grounds.
- D) With regard to reporting of suspected corruption, Benchmark 11.17 is to some extent based on the UNCAC Article 8, paragraph 4, Article 33 and Article 38 (all quoted in Reference (i) below). However, the Benchmark differs from these provisions as follows:
- a) Benchmark 11.17 provides that public officials should report any suspected corruption. However, UNCAC Article 33 provides that States should consider establishing measures to facilitate reporting by public officials. The rationale for this reporting duty in the Benchmark is explained in paragraph (A) above.
  - b) Benchmark 11.17 provides that public officials should report any suspected corruption. UNCAC Article 33 also appears to provide for reporting of any acts of corruption. However, Article 38 relates only to reporting of *'the offences established in accordance with articles 15, 21 and 23 of this Convention'* (i.e. bribery of national public officials, bribery in the private sector and laundering of the proceeds of crime).
  - c) Benchmark 11.17 provides that public officials should make a report where they suspect *'in good faith or on reasonable grounds'* that there has been corruption, and Benchmark 21.6(5) provides for legal protections in respect of such reporting. In contrast, UNCAC

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Article 33 provides for protection only where reports are made ‘*in good faith and on reasonable grounds*’, and UNCAC Article 38, paragraph (a) refers only to reports made ‘*where there are reasonable grounds to believe*’. The Benchmark basis for reporting (in good faith or on reasonable grounds) is a less onerous standard and so is likely to encourage, rather than discourage, persons to report. For further discussion, see Guidance BM 21.6(5).

- d) Benchmark 21 (referred to in Benchmark 11.17) provides that corruption reporting systems should be set up, whereas UNCAC Article 8, paragraph 4 provides that States should consider setting up such systems.

### References

- i) UNCAC:
- Article 8, paragraph 4: ‘*Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.*’
  - Article 33: Protection of reporting persons: ‘*Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.*’
  - Article 38: ‘*Each State Party shall take such measures as may be necessary to encourage, ... cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:*
    - *Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; ...*’
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 94–95
- iii) UNODC Technical Guide to UNCAC (2009), page 24
- iv) UNODC State of Implementation of UNCAC (2017), pages 176 and 177, which notes that some States have made it an obligation for public officials to report.

## BM 11.18 Co-operation by public officials in relation to the investigation and prosecution of corruption offences:

### References

- i) UNCAC Article 38 requires States to take measures to encourage co-operation between public authorities and public officials, on the one hand, and law enforcement authorities on the other. The Benchmark goes wider than this UNCAC provision in that it provides that public officials should co-operate, whereas UNCAC requires States to encourage such co-operation.
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 94–95
- iii) UNODC Technical Guide to UNCAC (2009), page 24
- iv) UNODC State of Implementation of UNCAC (2017), pages 176 and 177: *‘The collaboration of public authorities and officials with the agencies and authorities in charge of investigating and prosecuting criminal offences is essential to overall anti-corruption efforts.’*

## BM 11.19 Training of public officials:

### References

- i) UNCAC Article 7, paragraph 1(d) provides for training of public officials to enable the proper and honourable performance of their functions and enhance their awareness of the risks of corruption.
- ii) UNODC Technical Guide to UNCAC (2009), page 16 (Training public officials in ethics)
- iii) UNODC Technical Guide to UNCAC (2009), pages 116 and 117 (Training for investigators, prosecutors and judges)
- iv) Re training of the judiciary:
  - Limassol Conclusions on Combating Corruption within the Judiciary: *‘8.i The Colloquium recommends the adoption of guidelines on judicial ethics as a means of underpinning the integrity of the judiciary and promoting better public awareness of the requisite ethical standards. Such guidelines should be formulated by judicial officers and kept under constant review by them. Judicial officers should take responsibility for ensuring compliance with those guidelines.’*
  - ‘9. In considering action within the courts, the Colloquium expresses the view that – vii. judicial training programmes should be available and should include training on ethical and corruption issues’*

Annex A: *‘Recommendations of the Colloquium for judicial education on issues relating to corruption and judicial integrity.’*

## BM 11.20 Assessment and monitoring

### ‘A body designated for such purpose’:

The functions in Benchmark 11.20 could be carried out by the public official’s employer or by the body responsible for regulating the public official’s conduct (see Benchmark 11.2). In the case of the judiciary, for example, the appropriate body may be the independent body responsible for judicial oversight (see Benchmark 4.3(4) and Guidance BM 4.3(4)). The adequacy and accuracy of the disclosures could be checked (as provided for in Benchmark 11.20(3)) by inter alia the following steps:

- a) checking disclosures against the public register for asset ownership (Benchmark 8) to determine whether the public official has disclosed all interests registered under her or his name or those of her or his spouse or children. (For such a check to be possible, the asset ownership register would need to be searchable by name of an individual. See Guidance BM 8.5.)
- b) checking disclosures against any information obtained through international co-operation (Benchmark 25)
- c) monitoring, or being alert to suspicious indicators in, the lifestyles of the public officials. (See Reference (iv) below.)
- d) reviewing and following up on any reports received from members of the public or fellow public officials in relation to the matters being monitored.

### **BM 11.20(4) ‘A body designated for such purpose should ... ensure that such disclosures and declarations and any consequent action required are published to the public ...’:**

Where public officials are in positions of trust regarding public funds, the balance of public interest should lie in favour of their providing transparency regarding their assets etc., rather than in protecting their privacy. There is significant value in public disclosure in that it would provide an additional check on the accuracy of the disclosures and help ensure that suitable action is taken in respect of them. It would also help build public confidence in the public sector.

#### References for all of BM 11.20

- i) Re disclosures by members of the judiciary:
  - UNODC Technical Guide to UNCAC (2009), page 51:
 

*‘The code should at the least impose an obligation on all judges publicly to declare their assets and liabilities and those of their family members. It should also reflect the guidance provided in article 8 relating to the disclosure of more general conflicts of interests. Such declarations should*

*be regularly updated. They should be inspected after appointment and monitored from time to time by an independent official as part of the work of a judicial oversight body or the body or bodies established under article 6.'*

ii) Re disclosures by politically exposed persons:

- UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019):

*'RECOMMENDATION 1: Asset declarations systems for Politically Exposed Persons (PEPs) should be established, including regular reporting, as well as sanctions for non-compliance, and public disclosure of those declarations should be encouraged, with due regard for national legislation.*

*RECOMMENDATION 6: Not-for-profit organizations established or controlled by individuals holding high political office, their families and associates should provide full transparency on their revenues and expenditures, in line with national legislation.'*

iii) Re disclosures by members of parliament:

- The Commonwealth Parliamentary Association: Recommended Benchmarks for Democratic Legislatures:

*'11.1.3 Legislatures shall require legislators to periodically, fully and publicly disclose their financial and other relevant interests.'*

iv) Re monitoring of suspicious indicators and lifestyles:

- UNODC Technical Guide to UNCAC (2009), pages 15 and 25–27:

*'Management should also introduce specific support and oversight procedures for public officials in positions that are especially vulnerable to corruption, including regular appraisals, confidential reporting, registration and declaration of interests, assets, hospitality and gifts, as well as efficient procedures to regularly monitor the accuracy of the declarations...*

*It may also be advisable to explore ways to monitor lifestyles of certain key officials. This would admittedly be a rather delicate matter and would need to be approached with due regard to, and in compliance with, applicable laws for the protection of privacy. Such monitoring may include looking for tell-tale signs in living accommodations, use of vehicles or standards of vacations which may not be consistent with known salary levels. Individuals' bank accounts may also need to be monitored, provided that such monitoring is approved by employees in their contracts.'* (page 15)

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## BM 11.21 Disciplinary procedures and sanctions for public officials:

### BM 11.21(1) Misconduct by public officials:

#### References

- i) UNCAC Article 8, paragraph 6, provides that States shall consider taking disciplinary or other measures against public officials who violate the codes or standards established in accordance with Article 8. The Benchmark goes wider than this in that it provides that disciplinary measures should be taken. The rationale for this is that sufficient sanction is needed to encourage compliance with the code of conduct.
- ii) UNODC Technical Guide to UNCAC (2009), pages 27 (Section V) and 89 (Sections II.6 and II.7)

### BM 11.21(2) Unexplained wealth of public officials:

Referral to the law enforcement authorities may result in an investigation in relation to the offence of illicit enrichment (see Benchmark 1.1(9)) or an application for an unexplained wealth order (Benchmark 3.16(3)).

### BM 11.21(3) Unsupported debts and other liabilities of public officials:

- A) **‘unsupported debts and/or other liabilities’**: These are debts or other liabilities which a public official’s income or assets are insufficient to support or discharge, and where the public official is unable to explain how such liabilities will be supported or discharged.
- B) **‘significant corruption’** should be established by way of a value threshold.

### BM 11.21(4) Public officials accused or suspected of a corruption offence:

#### References

- i) UNCAC Article 30, paragraph 6 provides that States may consider establishing procedures for removing, suspending or reassigning public officials accused of an UNCAC offence. The Benchmark differs from this in that it provides that the public official accused should be suspended etc. This is so as to protect the public interest. However, the Benchmark adds the proviso that, before any such suspension etc., there should be reasonable grounds to suspect that a corruption offence may have been committed. The principle of presumption of innocence is preserved to the extent that the public official may be reinstated where there is insufficient evidence against the official or she or he is found to be not guilty of the allegation.

- ii) UNODC Technical Guide to UNCAC (2009), page 89:  
*‘States Parties have the obligation to consider whether to establish procedures which provide for the removal, suspension or reassignment of public officials accused of a corruption offence. Such measures may relate to the launch of an investigation and extend throughout its duration. They may serve to prevent the accused from obstructing the investigation by influencing or intimidating witnesses, as well as tampering with or destroying evidence. In addition, those measures may be appropriate to thwart misconceived “esprit de corps” which can be an obstacle for investigations. The measures contemplated in this article should not lend themselves to politically motivated reprisals and should not prejudice the principle of presumption of innocence of the public official in question.’*

### **BM 11.21(5) Employment sanctions for public officials convicted of a corruption offence**

These sanctions are also provided for as criminal sanctions in Benchmark 1.5(2)(a).

#### References

- i) UNCAC Article 8, paragraph 6
- ii) UNODC Technical Guide to UNCAC (2009), pages 27 and 89–90.
- iii) Re disciplining of members of parliament:
- The Commonwealth Parliamentary Association: Recommended Benchmarks for Democratic Legislatures:  
*‘11.1.4 There shall be mechanisms to prevent, detect, and bring to justice legislators and staff engaged in corrupt practices.’*

### **BM 11.22 Transparency:**

- A) This Benchmark provision provides that the relevant prescribed bodies should proactively provide information to the public, in addition to responding to requests for information. This will facilitate the public’s understanding of the employment and conduct of public officials and enable the public to hold public officials to account. It will also help to build public confidence in the public sector and to create a culture in the public sector where the provision of information to the public is part of its regular function.
- B) **‘Save to the extent contrary to the public interest’:** This would include, for example, not disclosing confidential details of ongoing corruption investigations until the investigations are complete. In the Benchmarks Definitions, ‘public interest’ is defined as *‘the interests of the public at large as objectively and independently determined’*. The public interest exception would not allow the withholding of information simply

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because it may be embarrassing to an individual or organisation (e.g. if it shows a failure to manage a process appropriately or effectively).

- C) **‘promptly’**: Information should be published as soon as possible after it becomes available so that, as far as possible, the public has current information enabling it to monitor the relevant matters as they proceed. In this way, any ongoing corruption or risk of corrupt activity in such matters may be able to be prevented, or at least identified early.

## References

- i) UNCAC: The following provisions provide that *‘Each State Party shall, in accordance with the fundamental principles of its legal system:’*
- UNCAC Article 5, paragraph 1:  
*‘... develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of ... transparency and accountability.’*
  - UNCAC Article 10:  
*‘... take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia: (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public; (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and (c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.’*
  - UNCAC Article 13, paragraph 1(b):  
*‘... take appropriate measures, ... , to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as: (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes; (b) Ensuring that the public has effective access to information.’*
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 58–65
- iii) UNODC Technical Guide to UNCAC (2009), pages 42–46

# Guidance to Benchmark 12

## Issuing permits

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### BM 12 Purpose of Benchmark:

- A) The types of permit intended to be covered by this Benchmark include permits issued by public officials in relation to matters such as (i) planning permission, (ii) compliance with fire, safety, building and environmental regulations, (iii) work permits, (iv) passports and visas, and (v) customs clearance. These normally tend to be routine permits, where public officials may be issuing numerous permits each day, and where the terms of the permits are likely to be the same or materially similar.
- B) The routine type of permit covered by this Benchmark should be distinguished from the granting by public sector organisations of concessions for matters such as:
- a) the extraction of oil, gas or minerals
  - b) the operation of telephone or internet networks
  - c) the provision of services to the public, such as railways, airports, ports, roads, power, water, gas, schools, hospitals.
- These concessions are likely to require significant and lengthy negotiations between the government and concession operators, and the concession conditions may vary significantly between different concession agreements. These concessions are dealt with separately under Benchmark 16 (Concession management).
- C) The corruption risk in relation to the issuing of permits by public officials is mainly the risk of public officials demanding bribes from applicants in order to issue, or speed up the issuing of, or improve the conditions of, the relevant permits. In some cases, the applicant may not be entitled to such permit, but may obtain it as a result of paying a bribe. In other cases, the applicant may be entitled to receive such permit, but be unable to obtain it without paying a bribe. These latter unlawful payments made to receive permits are sometimes called 'facilitation payments'.
- D) Although these bribes paid to obtain permits can be quite small, they are cumulatively damaging, as they distort the process for obtaining permits. Applicants who should receive a permit may not receive it or may have to pay more for it than is legally due, and those who should not receive a permit may receive one. Conditions which are necessary for health,

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safety or environmental reasons may be removed due to a bribe. This can have major adverse implications for efficiency, fairness, health, safety and the environment. It also results in loss of public trust in the government. Furthermore, these bribes often have to be paid by the poorest people in society. It is therefore important that this type of corruption is prevented. This Benchmark recommends measures to prevent such corruption.

### References

- i) UNCAC Article 12(d): *‘Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities’*

## BM 12.2 Scope of application:

- A) The regulations relating to permit issuing should apply to all permits issued by public officials. Examples of such permits are given in Guidance BM 12, paragraph (A) above.
- B) Benchmark 16 (Concession Management) deals separately with the granting of concessions. (See Guidance BM 12, paragraph (B) above.)

## BM 12.3 Permit issuing personnel:

Permit issuing personnel include those public officials who are responsible for issuing permits, making decisions in relation to permits and receiving payments for permits, and all other personnel involved in the permit issuing process.

## BM 12.4 Assessment of the purpose of the permit:

- A) As the permit issuing process is a significant corruption risk (as a public official wields power over an applicant) and a significant cause of public disillusionment with the government in many States, it is important that permits are required only in cases where they fulfil a valid purpose. Consequently, an assessment of the purpose of the permit is important from an anti-corruption perspective, as well as for purposes of efficiency. This Benchmark paragraph suggests criteria for such an assessment.
- B) As the public officials working for the public sector organisation issuing the permits may have a vested interest in the current permit issuing process (e.g. if they are supplementing their income through corrupt payments in connection with the permit issuing process), it is preferable for an independent person to undertake this assessment.

**BM 12.4(1) ‘What is the purpose of the permit?’:**

For example, the purpose of a planning permit may be to ensure that buildings are not constructed in prohibited areas or green spaces.

**BM 12.4(2) ‘Is the purpose necessary for good governance or the public interest?’:**

For example, if the current regulations require a permit to sell goods, but there is no good reason to restrict anyone from selling goods provided that they comply with the law in relation to those sales, then there is no necessity to require a permit in advance. The focus could instead be on ensuring compliance with relevant laws (e.g. through tax audits or safety inspections). Requiring a person to obtain a permit to sell goods is an obvious corruption risk as a person is more likely to pay a bribe for a permit if they cannot earn a living without doing so.

**BM 12.4(3) ‘Does the permit usefully fulfil that purpose?’:**

For example, a permit may not usefully fulfil the intended purpose if there are no realistic means to check compliance with the permit.

**BM 12.4(4) ‘If the permit is not necessary, or does not usefully fulfil its purpose ...’:**

If a permit serves no useful purpose but could serve a useful purpose if changed or upgraded, then the necessary change or upgrade should be applied. If it would serve no useful purpose, even if changed or upgraded, it should be abandoned, as it is therefore merely providing a bureaucratic burden with a consequent corruption risk (i.e. a person may need to pay a bribe to obtain a pointless permit).

**BM 12.5 Assessment of the permit issuing process:**

An assessment of the permit issuing process (i.e. the steps by which a permit is issued) is important from both an efficiency and anti-corruption perspective. If there are a large number of steps in the process, or the process is very slow and inefficient, people may be tempted to demand or offer bribes to speed up the process. This paragraph suggests criteria for such an assessment.

**BM 12.5(1) ‘What are the steps in the process?’:**

Identify each step in the process (for example: (i) member of public locates guidance and forms on internet; (ii) member of public completes forms and files online or at government office; (iii) public official approves application and issues permit; (iv) member of public collects permit and pays fee; (v) correctness of permit issuing is audited on sample basis; (vi) compliance by member of public with permit is audited on sample basis).

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### **BM 12.5(2) ‘Is each step necessary for good governance or the public interest?’:**

For example, the applicant may be required to file proof of marital status which is entirely irrelevant to the application and therefore unnecessary.

### **BM 12.5(3) ‘Does each step usefully fulfil its purpose?’:**

For example, if the nationality of the applicant is a critical factor, does the document filed by the applicant adequately prove nationality, and therefore fulfil its purpose?

### **BM 12.5(4) ‘Could each step be carried out more efficiently?’:**

For example, it may be more efficient, both in time and cost, to have online filing of a permit application than to require people to file documents in person in a government office.

### **BM 12.5(5) ‘If a step is not necessary, does not usefully fulfil its purpose, and/or could be carried out more efficiently ...?’:**

If a step in the process is unnecessary for good governance or the public interest, or does not fulfil its purpose, and it cannot be upgraded or changed so as to become necessary or fulfil its purpose, then it should be abandoned, as it is therefore merely providing a bureaucratic burden with a consequent corruption risk (i.e. a person may need to pay a bribe to bypass this pointless step).

#### References

- i) UNCAC Article 10(b): *‘Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities’*

## **BM 12.7 Repeat of assessments:**

It is suggested that the assessments are repeated at least once every three years, so as to reflect changing circumstances and technology. If the assessment is not actively repeated, parts of the permit issuing process may have become pointless during that time and may continue to be undertaken as an unnecessary routine.

## **BM 12.8 Controls over the permit issuing process:**

### **BM 12.8(1) Publication of permit issuing process:**

The purpose of this detailed disclosure and clarity is that a public official is less likely to be able to demand a bribe from an applicant if the permit issuing process is clear and objective, and if the applicant understands the process and her/his rights.

**BM 12.8(1)(f) Fee categories:**

For example, there may be two legitimate fees for issuing a permit: a lower fee for the normal issuing time (e.g. 7 days), and a higher legitimate fee for expediting the issue of the permit (e.g. next day). This legitimate expediting fee should be distinguished from an illegal fee demanded by a public official to 'speed up' the process.

**BM 12.8(1)(g) Commitment:**

The commitment of the organisation to the public to deal with their applications honestly, impartially, transparently and accountably could be published, for example as a 'Code of Conduct', 'Citizens' Charter' or 'Public Commitment'.

**BM 12.8(2) Personnel:**

**Conflict of interest:** For example, a public official affected personally by a planning application should not be permitted to be involved in any decision regarding that application. A government minister with a personal interest in a business should not be permitted to interfere with the independence of the permit process affecting that business.

**BM 12.8(3) Minimisation of human discretion, interface and intervention:**

- A) Bribery is easier if there is discretion. The official can require a bribe in order to exercise discretion in a particular way (e.g. whether or not a driving examiner passes a person taking a driving test). Discretion should be limited as much as possible in the application process, in order to limit the bribery opportunities.
- B) Example of objective factors: If an applicant is entitled to a permit if she/he is over 18 and a citizen of the state, proof of age and nationality from a passport or equivalent record should be sufficient. No discretion is required.
- C) Bribes can be easily requested by a public official only where there is human interface. It is much more difficult for the official to demand a bribe if the official does not meet the applicant. Human interface can be avoided by means of submitting the application documents online or by post, and by the processing of the application in the organisation's office without any need of a public official to meet the applicant in person.
- D) Example of automation: If a vehicle needs an annual road permit, and the constituent conditions for the permit are the vehicle's annual roadworthiness test and the vehicle's insurance, these can be automatically verified online by a computer, provided that facilities are in place for the roadworthiness test and insurance certificate to be filed online in a central register by the vehicle tester and insurance company.

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### **BM 12.8(5) Application tracking:**

- A) If the application and issuing process is done automatically by computer, the system should be capable of logging the date and time of application, of payment, of any intermediate steps in the process, and of issue or rejection.
- B) If the application and issuing process is done in person, the public officials handling the process should enter into a permanent record the date and time of application, of payment, of any intermediate steps in the process, and of issue or rejection.

### **BM 12.8(6) Decision timing:**

Delay is a key bribery risk. An official could delay issuing a permit until given a bribe. It is important that permit issuing times are clearly specified, and that public officials are compelled to act within these time limits. The time limits should be as fast as possible, so that there is no incentive for applicants to pay bribes to speed the process up. If the process allows for an expedited issuing process for an additional fee, then this faster time and extra fee should be clearly stated and should be part of the formal issuing and payment process.

### **BM 12.8(8) Automation or separation of payment process:**

Example of separation of process: The public official issuing the permit gives a payment slip with reference number to the applicant, and the applicant then takes the payment slip to a separate payment desk at which a payment clerk accepts only the correct payment, enters the reference number and payment into a computerised system, and issues a formal receipt.

### **BM 12.8(9) Availability of permit application documents:**

Making the application documents easily and freely available makes it more difficult for a public official to charge an illicit fee to give the documents to the applicant.

## **BM 12.9 Decisions impacting on other members of public:**

An example of a decision impacting on other members of public is a planning permission or environmental permit which impacts on neighbours or the community.

### **BM 12.9(1) ‘... the members of the public affected by the application should be notified ...’:**

Notification should include:

- a) that they can review the application documents and the conditions governing the issuing of the permit on the organisation’s website or at the organisation’s office

- b) that they can submit comments on or objections to the application to the organisation, and that these comments and objections will be taken into account in making the decision
- c) how they may submit comments or objections, and the deadline for submission.

**BM 12.9.(2) ‘The method by which the organisation notifies the public under (1) above should be reasonable in the circumstances’:**

- A) Where only a few members of the public are involved, then the organisation should notify them in person, by post or by email. For example, where a small extension to a dwelling house is being planned and only the direct neighbours would be affected, then only the direct neighbours need to be notified.
- B) Where a large number of members of the public are involved and the personal notification under subparagraph (A) above would be unreasonable, then the organisation should:
  - i) publish the information on its website
  - ii) issue a press release to relevant newspapers or journals
  - iii) notify community organisations which it is aware have interests in this issue.

An example may be where an application is made for the construction of an industrial plant or large shopping centre which will have significant impact on a large community.

**BM 12.9(5) ‘The decision on the permit should be made by more than one person of appropriate seniority’:**

In cases with significant public impact (e.g. the construction of an industrial plant or large shopping centre), the decision may be made by a committee of several members.

## **BM 12.11 Auditing of permit issuing process:**

- A) The sample audits could include:
  - a) checking the application paperwork and outcome of specific applications on a sample basis in order to ascertain whether permits are being properly issued or rejected according to the details provided in the applications
  - b) checking decisions which are made later than the specified time limit and ascertaining the reasons for the delay

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- c) collating statistics, in relation to each of the permit issuing public officials, as to:
    - i) the number of permits issued
    - ii) the number of permits rejected
    - iii) the time taken from date of lodging of application to date of issuance or rejection,and identifying whether there are any unusual patterns in these statistics
  - d) reconciling the payments received with permits issued.
- B) In cases of high corruption risk or high value transactions, the organisation could install video and audio recording facilities which record the public officials responsible for issuing permits and receiving payments in their interface with the applicants. The auditor could then watch the recordings of the issuing and payment process on a sample basis.
- C) The sample basis selected could depend on risk and resources but could be, for example, 1 in 100 applications and payments.

# Guidance to Benchmark 13

## Procurement

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### BM 13 Purpose of Benchmark:

A) The UNODC Guidebook on Anti-Corruption in Public Procurement (2013) states:

*‘Despite its enormous negative impact and the various efforts undertaken to curb corruption in the field of government contracts, public contracts have remained highly prone to corruption during the last decade; this is true both of developing and developed countries. Even in an environment where the public and private sectors are aware of the enhanced enforcement of anticorruption laws, corruption opportunities and challenges continue to arise through private sector contact with government officials.*

*It is thus vital that anti-corruption initiatives and procurement reform work more closely together. It seems that adopting anti-corruption laws and model procurement codes will only partially solve the problem. More focus should be placed on supporting the rules by norms such as accountability and integrity – in other words, the ideals of anti-corruption must be brought into the fabric of the procurement community.*

.....

*An appropriate system of public procurement, as required under article 9 (1) of UNCAC, is considered to be a core component of any government programme. In particular, the volume of public funds spent on public procurement and the multiple negative effects of corruption in public procurement are reasons why, besides UNODC, several other international organizations promote the implementation of appropriate systems of public procurement. In this regard, the UNCITRAL Model Law, the World Trade Organization (WTO) Government Procurement Agreement (GPA) and the European Union (EU) Public Procurement Directives (EU Directives) are most important from a legislative perspective, as they are the models most often examined when drafting procurement legislation. A comparison of these international texts shows that while the comprehensiveness of the rules framing an efficient procurement system varies significantly, the same principles underpin the rules set out in all the texts. All the texts are designed to promote procurement systems based on the cornerstone principles of*

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*transparency, competition and objectivity, as required under article 9 (1) of UNCAC.*

(page 1, fourth and fifth paragraphs and page 3, fourth paragraph)

- B) In accordance with the above, Benchmark 13 provides measures to help prevent and detect corruption in public sector procurement. The Benchmark uses as its sources primarily the UNCITRAL Model Law, the WTO GPA and the EU Public Procurement Directives, as referred to in the UNODC passage above. The Benchmark measures are designed to prevent corruption at each stage of the procurement process by ensuring inter alia that:
- only necessary procurement is carried out
  - the subject matter of the procurement is designed to suit the needs of the procuring entity and does not favour any particular supplier
  - qualification and evaluation criteria are impartial
  - procurement methods are chosen on legitimate grounds and so as to maximise competition and transparency
  - the procurement process is based on comprehensive solicitation documents and is conducted in a fair, transparent and impartial manner
  - at every stage, maximum possible transparency is provided to the public
  - there is adequate accountability by way of reviews, challenges and monitoring of the procurement process, with appropriate sanctions, and referral to the law enforcement authorities where there are reasonable grounds to suspect corruption.

### BM 13.1 Regulations:

#### References

- i) UNCAC Article 9, paragraph 1 requires States to establish *‘appropriate systems of procurement based on transparency, competition and objective criteria in decision-making that are effective, inter alia, in preventing corruption’.*

### BM 13.3 Scope of application:

- A) The following terms are defined in the Benchmark Definitions as follows:
- a) **‘Procurement’:** *‘the process by which a supplier is selected and contracted by a procuring entity to provide works, products, services, loans, assets, or the operation of a concession’.*

- b) **‘Supplier’**: *‘includes any agent, concession operator, consultant, contractor, distributor, lender, lessor, representative, seller, supplier, or other person offering or providing works, products, services or assets’.*
- c) The procurement regulations may specify a comprehensive procedure(s), requiring compliance with all the requirements of Benchmark 13, for procurements above a prescribed value threshold(s), and a simpler procedure(s) for contracts below a prescribed value threshold(s) (such as those, for example, below the threshold for an open competitive process – see Benchmark 13.16(2)). Such value thresholds should be set at a level which maximises the number of procurements for which the comprehensive procurement procedures should apply but should not be so low as to capture very low value procurements, thereby imposing an unreasonable bureaucratic burden.

### BM 13.4 Overriding principle:

#### References

- i) UNCAC Article 9, paragraph 1
- ii) WTO Revised Agreement on Government Procurement (2012), Article IV (General principles)
- iii) UNCITRAL Model Law on Procurement (2011), Preamble
- iv) EU Directive 2014/24/EU, Article 18(1) (Principles of procurement)

### BM 13.7 Communications and dealings between the procuring entity and suppliers:

**BM 13.7(1) ‘Communications and dealings ... should be only as necessary for the legitimate purposes of the procurement and should be conducted by the procuring entity so as to ensure: equal and fair treatment of all suppliers ...; confidentiality; and security’:**

- A) **‘only as necessary for the legitimate purposes of the procurement’**: To limit opportunities for corrupt interaction between procurement personnel and suppliers, communications and dealings should be kept to what is strictly necessary for the legitimate purposes of the procurement.
- B) **‘equal and fair treatment of all suppliers’**: No communication or dealing should be made so as to give an undue advantage to any supplier. For example, a procurement official should not give notice to a supplier of the design of the subject matter of the procurement in advance of such information being provided equally and at the same time to all suppliers.

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- C) **‘confidentiality’**: Save as required by law or by the procurement regulations, the procuring entity should keep confidential all information provided to it by suppliers. In particular, it should not share such information with any supplier so as to give that supplier a competitive advantage.
- D) **‘security’**: The procuring entity should ensure that documentation is kept secure and cannot be tampered with or accessed illicitly. For example:
  - a) Solicitation documents should not be able to be accessed by suppliers or other unauthorised persons prior to the specified time in the procurement process.
  - b) Submissions which have been received by the procuring entity should be stored securely and should not be opened or examined until the time specified for opening of submissions. Once opened, they should be kept securely pending and during their evaluation.
  - c) Where possible (such as in e-procurement), infringements of these requirements should be made detectable.

**BM 13.7(2) ‘All material communications and dealings should be in writing or, if initially oral, should as soon as possible be confirmed in writing, should state all material content, dates and times, and should be signed by the person(s) issuing, or preparing the record of, the communication...’:**

- A) This Benchmark provision seeks to ensure certainty and transparency by requiring written records as to the content of communications and dealings. This certainty will reduce the risk of corruption in the procurement process and in the performance of the procurement contract and will also be of use in any subsequent challenge (Benchmark 13.29), audit (Benchmark 13.31(3)), litigation or prosecution.
- B) Where communications or dealings are initially oral, these should be confirmed in writing to a sufficient degree to record all material information. Such oral communications may include, for example, conversations, meetings, negotiations and requests for and provision of information.

## References

- i) UNCITRAL Model Law on Procurement (2011), Article 7 (Communications in procurement) and Article 24 (Confidentiality)
- ii) EU Directive 2014/24/EU
  - Recital (58): *‘While essential elements of a procurement procedure such as the procurement documents, requests for participation, confirmation of interest and tenders should always be made in writing, oral communication with economic operators should otherwise*

*continue to be possible, provided that its content is documented to a sufficient degree. This is necessary to ensure an adequate level of transparency that allows for a verification of whether the principle of equal treatment has been adhered to. In particular, it is essential that oral communications with tenderers which could have an impact on the content and assessment of the tenders be documented to a sufficient extent and by appropriate means, such as written or audio records or summaries of the main elements of the communication.'*

- Article 21 (Confidentiality) and Article 22 (Rules applicable to communication)

### BM 13.8 Procurement records:

- A) This Benchmark provision seeks to ensure that proper records in permanent form are kept and retained so as to provide certainty and transparency as to the procurement process. This will reduce the risk of corruption in the procurement process and in the performance of the procurement contract and will also be of use in any subsequent challenge (Benchmark 13.29), audit (Benchmark 13.31(3)), litigation or prosecution concerning the procurement process or contract.
- B) **'Such records should be retained for the period prescribed in the regulations':** The prescribed period in the regulations for retention of records should take account of relevant limitation periods so that such records are, as far as possible, available for any future challenge, audit, litigation or prosecution. In cases where there is a risk of corruption and where there is no limitation period for corruption offences (as is recommended in Benchmark 1.2(5)), the period prescribed for retention should be indefinite for contracts over a prescribed contract value threshold, and as long as practicable for other contracts. The right to erasure under data protection laws should not allow for destruction of documents that may be needed for corruption investigations. For this purpose, the period of three years provided for in the WTO Revised Agreement on Government Procurement (2012) and the EU Directives is too short. (See References (iii) and (v) below.)

#### References

- i) UNCAC Article 9, paragraph 3 (Preserving the integrity of documents related to public expenditure)
- ii) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), page 33 (Section C, Integrity of records)

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- iii) WTO Revised Agreement on Government Procurement (2012) Article XVI, paragraph 3 (Maintenance of documentation, Reports and Electronic Traceability):

*‘Each procuring entity shall, for a period of at least three years from the date it awards a contract, maintain: (a) the documentation and reports of tendering procedures and contract awards relating to covered procurement, including the reports required under Article XIII; and (b) data that ensure the appropriate traceability of the conduct of covered procurement by electronic means.’*

- iv) UNCITRAL Model Law on Procurement (2011), Article 25, paragraph 5: *‘The procurement entity shall record, file and preserve all documents relating to the procurement proceedings, according to procurement regulations or other provisions of law of this State.’*

- v) EU Directive 2014/24/EU:

– Recital (126): *‘The traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including efficiently fighting corruption and fraud...’*

– Article 84(2): *‘Contracting authorities shall document the progress of all procurement procedures, whether or not those are conducted by electronic means. To that end, they shall ensure that they keep sufficient documentation to justify decisions taken in all stages of the procurement procedure, such as documentation on communications with economic operators and internal deliberations, preparation of the procurement documents, dialogue or negotiation if any, selection and award of the contract. The documentation shall be kept for a period of at least three years from the date of award of the contract.’*

## BM 13.9 Management of the procurement:

### BM 13.9(2) Decisions:

- A) **‘Decision’** is defined in the Benchmarks Definitions as including *‘any approval, assessment, certification, confirmation, decision, determination, judgment, recommendation, refusal or rejection’*. This could include, for example, a decision to undertake a procurement, to choose a particular procurement method, or to award a contract to the selected supplier.
- B) The provisions of BM 10.14 (referred to in Benchmark 13.9) are designed to ensure that decisions are made by persons of a number, skill and seniority appropriate to the size and corruption risk of the transaction, and who are without conflict of interest.

**BM 13.9(5) ‘they are alert to any suspicions of corruption ...’:**

Managers should be constantly alert to any indications of corruption in the procurement process, including for example:

- a) attempts by, or pressure from, any public official to influence the process
- b) evidence of a close connection between a procurement manager and a participating supplier
- c) attempts to specify qualification or evaluation criteria that favour one or more suppliers
- d) conduct of negotiations or dialogue in a manner that favours a particular supplier
- e) evidence in a supplier’s submission that it has been provided with extra information to give it an advantage in the procurement
- f) evidence in suppliers’ submissions that there has been collusion between the suppliers.

**BM 13.10 Procurement needs assessment:**

- A) There is a risk that decisions to procure works, products or services are made for corrupt reasons, with the result that such works, products or services may be unnecessary, wrongly designed, under- or over-specified, or delivered too late to satisfy an identified need. Such corrupt decisions may be made where, for example, the official making the procurement decision is in collusion with, or has a share in, a supplier, and is fabricating or misrepresenting a procurement need in order to enable a corrupt contract to be awarded to the supplier. In such a case, the procurement is serving as a vehicle for corruption rather than answering a legitimate need of the procuring entity.
- B) To combat this risk, Benchmark 13.10 provides for a needs assessment to be carried out.

**References**

- i) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), page 14, third paragraph

**BM 13.10(1) ‘is for a legitimate purpose which is in accordance with the procuring entity’s objectives’:**

For example, if the objective of the organisation is to provide low cost housing to the public, then incurring expenditure for the construction of low cost public housing would be a legitimate purpose in accordance with the organisation’s

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objectives. Building luxury accommodation for senior personnel or other public officials would not be.

### **BM 13.10(2) ‘is necessary for the procuring entity to be able to achieve that purpose’:**

For example, where the organisation’s particular procurement purpose is to provide low cost housing, then landscaping works should be procured only to the extent necessary to enable the housing to be built. Any landscaping works over and above this would not be necessary and procurement of such excessive landscaping works may be a corrupt mechanism to provide additional unjustified work to the contractor.

### **BM 13.10(3) ‘is permitted by the procuring entity’s budgetary requirements’:**

Benchmark 15.5(4) provides that: *‘The budget should identify the categories of revenue, debt and expenditure, and the major items of expenditure, for each sub-national government, government department and public sector organisation.’* Thus, the budget should specifically anticipate major items of expenditure and the general categories of minor items of expenditure by each public sector organisation, with permitted amounts, and should go through the proper budgetary approval process (Benchmark 15.5(6)). Expenditure should not be incurred by the organisation unless it is permitted by the budget. This is an added expenditure control which helps avoid illicit improper expenditure.

### **BM 13.10(4) ‘will provide value for money for the procuring entity’:**

For example, where an organisation is seeking to provide low cost housing for a large number of displaced persons, procuring high specification housing resulting in much higher cost for fewer houses would not be value for money.

### **BM 13.10(5) ‘in the case of procurements with an estimated value over a prescribed threshold, is shown to be justified by a written and objective needs assessment, technical assessment, and value for money assessment provided by a suitably skilled and independent third party’:**

These assessments should as far as possible be carried out by persons who are independent of the organisation’s management and who have a reputation for integrity. However, external consultants will also be vulnerable to corruption. They should therefore be contracted on the basis of the public procurement regulations and assessed to ensure that they are independent and free of any conflicts of interest. This applies to any external consultant engaged in relation to any aspect of the procurement process (for example, to prepare the design of the procurement subject matter).

**BM 13.10(6) ‘is approved in accordance with the decision-making procedures in Benchmark 10.14 (Public sector organisations)’:**

The provisions of BM 10.14 are designed to ensure that decisions are made by procurement officials of a number, skill and seniority appropriate to the size and corruption risk of the transaction, and who are without conflict of interest.

**BM 13.11 Procurement subject matter and its design:**

- A) The design and description of the procurement subject matter may be used corruptly. For example:
  - a) The design may deliberately provide for products that are under- or over-specified so as to enable greater profit to be made by the supplier. Under-specification may necessitate variations during the contract to provide for more suitable work or products, thereby enabling the supplier to make increased profit if the contract variation rates are high. Over-specification may enable a supplier to secure a higher contract price or higher rates with an increased profit margin.
  - b) The description or design may be deliberately unclear or inadequate, thus introducing uncertainty into the contract. This may then enable the supplier and project engineer to collude so as to take advantage of the ambiguities in the contract to enable the supplier to increase its profit.
  - c) The description or design may deliberately specify a particular brand or producer or otherwise be specified in such a way so as to favour a particular supplier and to restrict competition.
- B) To combat these risk, Benchmark 13.11 provides that the design and description of the procurement subject matter should be:
  - a) based on the needs of the procuring entity; namely, it should be appropriate for and proportionate to those needs
  - b) in terms that are clear, comprehensive, objective, functional and generic.
  - c) **‘objective, functional and generic’** means that there should be no specification of a particular brand, patent, design, type, specific origin or producer unless there is no other adequate way of describing the particular requirement and provided that words such as ‘or equivalent’ are included.

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### References

- i) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), page 18, paragraph (f):
 

*‘Technical specifications should be designed so as to avoid bias, especially so as not to favour any particular bidders or particular products or services. They must be pre-disclosed, relevant and appropriate with regard to the subject matter of the procurement, objective and be based on the actual needs of the government. Good practice suggests that procuring entities should call for a particular good or service – a brand name – only where no other sufficiently precise description can be used. The call for a particular good can also be followed by the wording “or equivalent” with a description of the key characteristics being sought. Good practice requires, where appropriate, that technical specifications be set out in terms of performance and functional requirements rather than design or descriptive standards. External consultants for drafting technical specifications must be independent.’*
- ii) WTO Revised Agreement on Government Procurement (2012), Article X (Technical specifications and tender documentation)
- iii) UNCITRAL Model Law on Procurement (2011), Article 10 (Rules concerning description of the subject matter of the procurement and the terms and conditions of the procurement contract or framework agreement)
- iv) EU Directive 2014/24/EU:
  - Recital (74)
  - Article 18(1): *‘... The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.’*

## BM 13.12 Estimate of the contract value:

This estimate should take into account all costs over the full duration of the contract. The estimate should be prepared at the outset of the procurement and before any submissions from suppliers have been received. In procurement methods where dialogue is first required before finalising the technical specification, the estimate should be prepared when the procuring entity has sufficient information.

**BM 13.12(1) ‘The estimate should be used ... to determine where the procurement lies in relation to prescribed contract value thresholds. The procuring entity should not divide the procurement or use a valuation method for estimating the contract value so as to change where the procurement lies in relation to such value thresholds, unless justified by objective reasons’:**

- A) **‘prescribed contract value thresholds’:** These thresholds may include, for example:
  - a) the threshold below which an open competitive process need not be used (Benchmark 13.16(2))
  - b) the threshold above which any decision to use single-source procurement, restricted transparency or expedited procurement should be determined by an independent body (Benchmark 13.16(9))
  - c) the thresholds used to determine the number, skill and seniority of procurement officials required to evaluate submissions (Benchmark 13.22), to approve acceptance of a successful submission (Benchmark 13.26(3)) or to cancel a procurement process (Benchmark 13.28)
  - d) the threshold above which the procurement report should be disclosed to parliament and the public (Benchmark 13.30), audits should be carried out (Benchmark 13.31(3)) and full transparency should be provided to the public (Benchmarks 13.34(2) to (4)).
- B) **‘should not divide the procurement ... so as to change where the procurement lies in relation to such value thresholds ...’:** There is a risk that a corrupt procurement official, who is in collusion with a supplier, could divide the procurement into a number of smaller procurements so as to take their value below the threshold that requires an open competitive process, and then ensure that they are awarded to the supplier.

**BM 13.12(2) ‘The estimate should be used ... as a comparison for assessing whether offered prices appear to be unreasonably high or low. The procuring entity should not estimate a false or inappropriate contract value so as to provide a false or inappropriate basis of comparison for the offer evaluation’:**

- A) **‘prices appear to be unreasonably high or low’:** It is essential that the procuring entity has an estimated contract value according to which it can assess whether submitted prices appear to be unreasonably high or low. This may help it to identify corruption in the bidding process:
  - a) Prices which are unreasonably high (i.e. significantly higher than the estimated value, with no reasonable justification) may be evidence of collusion where all bidders have colluded to put in high prices so as to increase the price of the winning bid, or of a bidder deliberately trying to ensure it will not be successful (which may also be part of

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a cartel arrangement where bidders have agreed to take it in turns to win contracts).

- b) Prices which are unreasonably low (i.e. significantly lower than the estimated value, with no reasonable justification) may indicate that a contractor is intending to ‘bid low, claim high’, i.e. to win the contract on the basis of a very low bid, and then make up its losses and obtain bigger profits by way of illicit claims during contract performance.
- B) **‘... should not estimate a false or inappropriate contract value ...’:**  
There is a risk that a corrupt procurement official, who is in collusion with suppliers in a cartel, could estimate a very high contract value, allowing the winning supplier under the cartel arrangement to put a bid in at above market price without arousing suspicion within the procuring entity (as the bid will be no higher than the inflated estimate).

## References for all of BM 13.12

- i) UNCAC Article 9, paragraph 1 allows for procurement systems to take account of appropriate value thresholds.
- ii) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), page 15 (Budgeting):

*‘After the needs assessment, comes the estimation of costs for the goods, services or works to be purchased. Costs can be estimated on the basis of past procurements or can be based on sound forecasting methods. Cost estimates must be realistic and should already take into account possible variations of the contract over time...’*

*Good practice would suggest conducting in-depth market research to estimate the likely costs of the procurement. Bid prices that are considerably higher than market prices may be an indicator of collusion between bidders, also known as price fixing. Concluding a contract with a company that offered a considerably higher-than-market price could also indicate collusion between this winning company and the responsible procurement officer.’*

- iii) WTO Revised Agreement on Government Procurement (2012), Article II, paragraphs 6–8
- iv) UNCITRAL Model Law on Procurement (2011), Article 12 (Rules concerning estimation of the value of procurement):

*‘1. A procuring entity shall neither divide its procurement nor use a particular valuation method for estimating the value of procurement so as to limit competition among suppliers or contractors or otherwise avoid its obligations under this Law.’*

*2. In estimating the value of procurement, the procuring entity shall include the estimated maximum total value of the procurement contract or of all procurement contracts envisaged under a framework agreement over its entire duration, taking into account all forms of remuneration.'*

- v) EU Directive 2014/24/EU:
  - Recitals (19) and (20)
  - Article 5 (Method for calculating the estimated value of procurement), paragraph 1: *'The calculation of the estimated value of a procurement shall be based on the total amount payable, net of VAT, as estimated by the contracting authority, including any form of option and any renewals of the contracts as explicitly set out in the procurement documents.'*

### BM 13.13 Economic offsets:

- A) 'Economic offsets' refers to those additional works, products or services which a procuring entity may require a supplier to provide but which are not related to the main subject matter of the procurement. For example, a defence contractor supplying jet fighters may also be required to provide unrelated products, or to invest in an unrelated local commercial venture. There may be little commercial sense to an offset. For example, the defence contractor supplying jet fighters may not be best placed to provide the unrelated products or to invest in an unrelated local venture.
- B) Such offset agreements are a high corruption risk, often involving collusion between public officials and the supplier. For example:
  - a) They may involve complex pricing arrangements and may not be open to scrutiny (for example, if the offset is part of a high security defence contract) and could thus be deliberately set up as a vehicle to conceal substantial bribes paid to public officials of the State receiving the economic offset.
  - b) The supplier may add a hidden cost for the offset to its price for the original product being procured, thus increasing the price of the original product.
  - c) The economic offset may be worth significantly less than the value attributed to it in the transaction, or the offset may in the event not be provided by the supplier at all, both of which will result in the procuring entity receiving significantly less value overall than was envisaged by the arrangement.

In such cases, the real beneficiaries of the offset arrangement are likely to be the public official(s) who receive the bribe(s) and the supplier who wins the contract, possibly at a considerably higher profit, due to the corrupt nature of the transaction.

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- C) There is thus frequently no public benefit for such offset arrangements, and a high risk of significant detriment due to corruption. To avoid such risk, both the original product (e.g. the jet fighters in paragraph (A) above) and the products envisaged by the offset, if they are genuinely needed, should be procured by way of separate and transparent procurement processes using suppliers most suited to the product required.

### References

- i) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019), Recommendation 11:  
*‘Economic offset offers in the context of defence procurement decisions should be prohibited and transparency should be ensured as regards intermediaries, the services provided, and the fees received, in line with national legislation.’* (This reference recommends prohibition of economic offsets only in relation to defence procurement. However, the Benchmark recommends that economic offsets should be prohibited in relation to all public sector procurement.)
- ii) WTO Revised Agreement on Government Procurement (2012): Article IV, paragraph 6 prohibits offsets. However, Article V, paragraph 3(b)(1) allows offsets for Developing Countries *‘provided that any requirement for, or consideration of, the imposition of the offset is clearly stated in the notice of intended procurement’*. However, for the reasons given in (A)–(C) above, offsets are a considerable corruption risk and thus Benchmark 13.13 provides that the product being ‘offset’ should be dealt with by separate and transparent procurement processes.

## BM 13.14 Illicit contractors:

This provision is to protect against attempts to insert a corrupt organisation into the procurement process or procurement contract as a vehicle to extract funds corruptly from the contract. This could be done, for example, by requiring a supplier who has been properly selected under a procurement process to take on an organisation as a joint venture partner under the contract. This partner would be inactive but would be entitled to receive a percentage of the contract payments. It may be owned covertly by a senior public official who may then ensure that the contract payments are inflated so as to maximise her/his corrupt share. There should be safeguards to ensure that this sort of arrangement cannot be used.

## BM 13.15 No negotiations or dialogue:

- A) Benchmark 13.15 prohibits negotiation or dialogue between the procuring entity and suppliers, at any time during the procurement

process, except as permitted by Benchmark 13.16(4). This is so as to prevent opportunity for a corrupt supplier to influence any aspect of the procurement process.

B) **‘negotiations or dialogue’:**

- a) The term ‘negotiations or dialogue’ covers situations where, in order to address the procuring entity’s needs, the procuring entity and supplier may discuss components of the design or specification or the suppliers’ submissions. Due to the increased interface between procurement officials and participating suppliers, such situations provide significant opportunity for corruption whereby participating suppliers may bribe or collude with procurement officials so as to improperly influence the procurement process. Consequently, Benchmark 13.15 prohibits any negotiation and dialogue save as permitted and controlled in accordance with Benchmark 13.16(4).
- b) The term ‘negotiations or dialogue’ does not include normal communications and dealings between procurement officials and suppliers for purposes of the normal conduct of the procurement process. Consequently, such communications and dealings are not prohibited by Benchmark 13.15. They are, however, subject to Benchmark 13.7(1), which provides that any communications and dealings should be *‘only as necessary for the legitimate purposes of the procurement and should be conducted by the procuring entity so as to ensure: equal and fair treatment of all suppliers...’* This type of permitted communication will include, for example, the procuring entity sending the solicitation documents to all bidding suppliers, or clarifying to all bidding suppliers at the same time prior to bid submission, that there was a minor error in the technical specification, and correcting the error.

References

- i) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), page 21 (final paragraph):
 

*‘In general, it is strictly forbidden to negotiate the contract after bid submission. Exceptions to this rule apply only in those cases where the chosen procurement procedure allows for a dialogue between the procuring entity and the bidder (e.g., a negotiated procedure).’*
- ii) UNCITRAL Model Law on Procurement (2011):
  - Article 16, paragraph 4: *‘No negotiations shall take place between the procuring entity and a supplier or contractor with respect to qualification information or submissions, nor shall any change in price be made pursuant to a clarification that is sought under this article.’*

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- Article 44 (in relation to open tendering): *‘No negotiations shall take place between the procuring entity and a supplier or contractor with respect to a tender presented by the supplier or contractor.’*

### BM 13.16 Procurement methods:

**‘... All methods should maximise competition and transparency as far as possible. All the provisions of Benchmark 13 should apply to all procurement methods specified below except to the extent expressly specified below or to the extent that a provision cannot apply due to the nature of the procurement method...’:**

- A) Benchmark 13 specifies a number of processes and controls, which are designed to work together to ensure an effective and honest procurement system.
- B) Benchmark 13.16 specifies the permitted procurement methods, and the circumstances in which the processes and controls in Benchmark 13 can be modified.
- C) It is important to ensure that the necessary control mechanisms specified in Benchmark 13 are not circumvented by the corrupt selection or implementation of a particular procurement method. Therefore, the introduction to Benchmark 13.16 provides that all the provisions of Benchmark 13 should apply to all specified procurement methods except to the extent expressly specified in that method or to the extent that a provision cannot apply due to the nature of the procurement method. These methods and exceptions are explained in further detail in Guidance BM 13.16(1)–(9) below.

#### References

- i) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), pages 5–6
- ii) WTO Revised Agreement on Government Procurement (2012), Article IV, paragraph 4 (Conduct of procurement)
- iii) UNCITRAL Model Law on Procurement (2011), Articles 27–63
- iv) EU Directive 2014/24/EU, Articles 26–39

#### **BM 13.16(1) Open competitive process:**

- A) The open competitive process is the default process. It should be used in all cases unless a procurement specifically falls within one of the other categories listed in Benchmarks 13.16(2) to (5).
- B) This process is ‘open’ in that it widely publicises the invitation to participate and allows all interested suppliers to submit an offer. It is

‘competitive’ in that selection is based on the best comparative option. The UNODC Guidebook on Anti-Corruption in Public Procurement (2013), page 5 states that the open procedure:

*‘... allows maximum transparency and competition, for it generally requires a public notice advertising the contract opportunity, exhaustive technical specifications and contractual terms, a public opening of tenders and the absence of the possibility to negotiate the contract. In general, a procuring entity must use this procurement method unless the use of alternative methods is justified.’*

#### References

- i) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), page 5 (Open procedure)
- ii) UNCITRAL Model Law on Procurement (2011), Article 28 (General rules applicable to the selection of a procurement method):
  1. *Except as otherwise provided for in articles 29 to 31 of this Law, a procuring entity shall conduct procurement by means of open tendering.*
  2. *A procuring entity may use a method of procurement other than open tendering only in accordance with articles 29 to 31 of this Law, shall select the other method of procurement to accommodate the circumstances of the procurement concerned and shall seek to maximize competition to the extent practicable.*
  3. *If the procuring entity uses a method of procurement other than open tendering, it shall include in the record required under article 25 of this Law a statement of the reasons and circumstances upon which it relied to justify the use of that method.’*

#### **BM 13.16(2) Low value competitive process:**

- A) It would not be cost-effective to require a full open, competitive process to be carried out in relation to low value contracts, so Benchmark 13.6(2) allows restricted competition for such contracts.
- B) The threshold for an open competitive process should be set at a point where, below such threshold, the time and cost required to examine and evaluate the number of offers which would result from open competition would be disproportionate to the value of the subject matter of the procurement. However, even below this threshold, the procuring entity should nevertheless ensure a sufficient degree of competition in order to minimise opportunity for corruption. The Benchmark recommends that at least three suppliers should compete for a low value contract.
- C) In addition to permitting restricted competition for these low value contracts, Benchmark 13.6(2) also allows for a less onerous procurement

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process that is more proportionate to the contract value. However, the simpler process should still comply with the overriding requirements in Benchmark 13.4 that the procurement should be impartial and fair, maximise competition and transparency, provide certainty and value for money, meet the needs of the procuring entity, be accountable, and, as far as proportionate to the value of the contract, be in accordance with the procurement regulations.

### **BM 13.16(3) Restricted competitive process:**

- A) In a restricted competitive process, only a restricted number of suppliers will be invited to submit an offer.
- B) The prescribed criteria to permit use of restricted competition may, for example, include the following:
  - a) that, for the particular types of works, products or services being procured, there is an administratively unmanageable number of potential suppliers, many of whom may not have the ability to undertake the contract, thereby creating a genuine need for a pre-qualification exercise involving all potential suppliers, followed by a restricted tendering exercise for pre-qualified suppliers
  - b) that the subject matter of the procurement, by reason of its highly complex or specialised nature, is available only from a limited number of suppliers
  - c) that, where it is determined under Benchmark 13.16(4) that negotiations or dialogue are necessary, the number of participating suppliers may be restricted in order to make the negotiations or dialogue manageable. (The negotiations or dialogue should then be managed in accordance with the safeguards required under Benchmark 13.16(4).)
- C) In order to maximise competition, suppliers who may be selected to participate in a restricted competitive process should be required to pre-qualify in a pre-qualification process open to all suppliers. The pre-qualification process will enable the procuring entity to eliminate potential suppliers who do not satisfy the qualification criteria. However, the procuring entity should ensure that the pre-qualification process is controlled so that suppliers are not corruptly omitted from or included on the pre-qualified list.

### References

- i) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), page 5 and page 17 (top paragraph).

***Restricted procedure:** A restricted procedure is different from an open procedure in the sense that only pre-selected qualified companies are allowed to submit a bid. There are slight variations in restricted procedures under different frameworks. They may involve a restriction of the bidding to those companies which pre-qualified following a public advertisement and on the basis of disclosed minimum and/or selection criteria, as is done under the EU Directives. A restricted procedure may also mean that a public advertisement of a contract opportunity is not required, as interpreted in the UNCITRAL Model Law. This may happen, for instance, if the subject matter of the procurement is available only from a limited number of suppliers.’ (Page 5)*

- ii) WTO Revised Agreement on Government Procurement (2012), Article XIII (Limited tendering)
- iii) UNCITRAL Model Law on Procurement (2011), Article 29 (Conditions for the use of methods of procurement under chapter IV of this Law (Restricted tendering, requests for quotations and requests for proposals without negotiation))

**BM 13.16(4) Negotiations or dialogue:**

- A) Benchmark 13.15 prohibits negotiation or dialogue between the procuring entity and suppliers at any time during the procurement process, except as permitted by this Benchmark 13.16(4). This is so as to prevent any opportunity for a corrupt supplier to influence any aspect of the procurement process (e.g. negotiations or dialogue may be used to provide additional information to a favoured supplier, or to allow the design of the procurement to be changed during the negotiations so as to favour a particular supplier). (See Guidance BM 13.15 for further discussion of the prohibition of negotiations and dialogue.)
- B) However, negotiations or dialogue during the procurement process may be needed due to the nature or complexity of the type of the works, products or services being procured. In such cases, the procuring entity may need to discuss with suppliers the different technical options available and their suitability for the procuring entity’s needs. For example, the procuring entity may have a complex ground drainage issue and may ask three suppliers to provide a fully costed design and construction proposal. Each proposal may vary widely in cost, method and benefits and the procuring entity may need to discuss and negotiate these solutions with the suppliers.
- C) In order to prevent corrupt use of negotiations or dialogue, negotiations or dialogue should be permitted only to the extent necessary according to criteria prescribed by the regulations and should be subject to safeguards, as provided for in Benchmark 13.16(4).

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- D) **‘according to prescribed criteria’:** The prescribed criteria which should be met in order to permit use of negotiations or dialogue should apply to all methods of procurement. So, for example, where a single-source procurement method is considered necessary, negotiations should be used only if permitted according to the prescribed criteria.
- E) **‘... safeguards should be implemented to ensure that the negotiations or dialogue are not used to favour a supplier or to the detriment of the procuring entity’:**

Safeguards against abuse should include inter alia the following:

- a) the procuring entity should disclose, in the solicitation documents, the minimum number of suppliers that will be invited to participate and the minimum requirements to be met by all suppliers, which should not be changed in the negotiations or dialogue
- b) the minimum number of suppliers that participate should be sufficient to ensure genuine competition
- c) all negotiations and dialogue should be carried out on behalf of the procuring entity by officials of appropriate number, skill and seniority
- d) all negotiations and dialogue should be recorded in writing so as to record all material content
- e) during the negotiations or dialogue, the procuring entity should not modify: (i) the subject matter of the procurement or the description thereof; (ii) the qualification or evaluation criteria; or (iii) any terms or conditions of the procurement contract that are not subject to the negotiations or dialogue as specified in the original solicitation documents
- f) the procuring entity should use the estimated contract price (see Benchmark 13.12(2)) as a guideline in deciding whether the proposals of the suppliers are acceptable and should not accept any proposal that materially deviates from this estimate without proper justification
- g) equal treatment, opportunity and information should be provided to all suppliers participating in the negotiations or dialogue.

## References

- i) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), pages 5 and 17:

***‘Negotiated procedure:** A negotiated procedure is often used for cases in which it is not feasible (or not possible) to formulate exhaustive technical specifications and contractual terms. It is thus necessary to enter into a dialogue with the offerors to conclude the contract. A negotiated procedure is also often used for cases of failed tendering*

*procedures (e.g., no tenders or only non-responsive tenders were delivered). Another frequent reason for a negotiated procedure is circumstances of urgency or a catastrophic event.’ (Page 5)*

ii) WTO Revised Agreement on Government Procurement (2012), Article XII (Negotiation)

iii) UNCITRAL Model Law on Procurement (2011):

- Article 30 (Conditions for the use of methods of procurement under chapter V of this Law) (Two-stage tendering, requests for proposals with dialogue, requests for proposals with consecutive negotiations, competitive negotiations)

iv) EU Directive 2014/24/EU:

- Recitals (42)–(44) (Negotiated methods)
- Recital (45) (Safeguards for negotiated methods):

*‘The competitive procedure with negotiation should be accompanied by adequate safeguards ensuring observance of the principles of equal treatment and transparency. In particular, contracting authorities should indicate beforehand the minimum requirements which characterise the nature of the procurement and which should not be changed in the negotiations. Award criteria and their weighting should remain stable throughout the entire procedure and should not be subject to negotiations, in order to guarantee equal treatment of all economic operators. Negotiations should aim at improving the tenders so as to allow contracting authorities to buy works, supplies and services perfectly adapted to their specific needs. Negotiations may concern all characteristics of the purchased works, supplies and services including, for instance, quality, quantities, commercial clauses as well as social, environmental and innovative aspects, in so far as they do not constitute minimum requirements.*

*It should be clarified that the minimum requirements to be set by the contracting authority are those conditions and characteristics (particularly physical, functional and legal) that any tender should meet or possess in order to allow the contracting authority to award the contract in accordance with the chosen award criteria. In order to ensure transparency and traceability of the process, all stages should be duly documented. Furthermore, all tenders throughout the procedure should be submitted in writing.’*

#### **BM 13.16(5) Single-source procurement:**

- A) Single-source procurement is where a single supplier is selected, without competition, to provide works, products, services, loans, assets, or operation of a concession.

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- B) Single-source procurement constitutes a significant corruption risk as:
  - a) it may be chosen as the procurement method without justification and only so as to provide the opportunity to corruptly award the contract to a supplier in return for a bribe or to a supplier owned by a public official
  - b) even if its choice as procurement method is justified by the circumstances (e.g. in a genuine emergency), the supplier may still be corruptly selected due to the lack of competition
  - c) in both the above cases, the corruptly selected supplier may be awarded the contract at an inflated price and on other terms which are unduly beneficial to the supplier, and the emergency may also be wrongly used as an excuse to dispense with other normal procurement regulations such as those relating to transparency and accountability.
- C) To combat this corruption risk, single-source procurement should be permitted only on the grounds stated in Benchmark 13.16(5) and only (for those procurements above a prescribed value threshold) where and to the extent that its use has been approved by an independent body (as provided for Benchmark 13.16(9)).
- D) In determining, under Benchmark 13.16(9), whether and to what extent single-source procurement should be approved, the independent body should apply the following factors:
  - a) The overriding objective should be to maximise competition as far as possible and to allow single-source procurement only where it is essential.
  - b) The independent body should ensure that the grounds in Benchmark 13.16(5) have been satisfied and that the information on which a decision regarding single-source procurement may be based has not been manipulated.
  - c) The independent body should permit single-source procurement only where and to the extent strictly necessary in the specific circumstances.
  - d) If it determines that single-source procurement is necessary, the independent body should also ensure (in accordance with Benchmark 13.16) that all the provisions of Benchmark 13 are applied to the procurement process except to the extent that any provision cannot apply due to the use of single-source procurement. (See paragraph (F) below for an example.)
- E) Where single-source procurement is permitted, the independent body should monitor the consequent procurement process generally and

also to ensure that there is no corruption as a result of the single-source procurement (regarding which see further comments in Guidance BM 13.16(9)).

- F) As an example of paragraph (D)(d) above, an emergency may genuinely necessitate single-source procurement, meaning that a competitive tender should not be used. However, this would not justify dispensing with the other applicable provisions of Benchmark 13 such as, for example, the provisions that:
- a) there should be an estimated contract value against which the supplier's price should be estimated (Benchmark 13.12(2)): Due to the emergency, there may not be time to estimate a contract value at the outset of the procurement. However, when placing the contract, the procuring entity should retain the right to assess the price at a later date and to renegotiate the price if it is shown to be unreasonably high and that the supplier was unreasonably taking advantage of and profiteering from the emergency. Otherwise, emergencies would provide carte blanche for single-source suppliers to put any price forward, however high, and would thus provide ample opportunity for collusion with corrupt procurement or government officials
  - b) there should be a comprehensive written contract (Benchmark 13.27): Due to the emergency, there may not be time to prepare a formal written contract at the outset of the procurement. However, a comprehensive written contract should be prepared and signed as soon as possible.
  - c) a procurement report should be provided (Benchmark 13.30),
  - d) the procurement should be subject to monitoring, audit, review and sanctions (Benchmark 13.31), and
  - e) full transparency to the public should be provided (Benchmark 13.34).

#### References

- i) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), pages 5–6 (Single-source procurement):
 

*‘It has often been the case that direct, single-source has been abused to facilitate corruption. Those concerned about corruption have stressed that single-source procurement done in the name of extreme urgency should occur only when, for good cause, there is too little time to use the regular procedures and where the urgent event was truly unforeseeable by the procuring entity and not attributable to that entity. A procuring entity must therefore plan ahead and cannot claim that a requirement*

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*was unforeseeable simply because the procuring entity failed, for example, to gain the external and internal approvals in due time, or that the minimum deadlines for bid submission cannot be met. In the context of direct contracting, it is therefore essential that procurement legislation specifies in detail the grounds under which single-source procurement may be used. These grounds must then be strictly interpreted, and the reasons for use documented in the procurement file.’ (Page 5, beginning at last sentence of page)*

- ii) UNCITRAL Model Law on Procurement (2011), Article 30, paragraph 5 (Single source procurement)

**BM 13.16(6) Restricted transparency:**

- A) **‘Disclosure requirements’** means those requirements which require disclosure of information to any person (for example, to suppliers, auditors, parliament and the public).
- B) Restricted transparency may be required due to national security concerns (e.g. in some cases of defence procurement where it has been properly determined that the technical specification of military equipment should be kept secret).
- C) However, national security concerns can be corruptly used as an excuse to provide no transparency at all, or significantly less transparency than is justified, in order to enable the procurement to be conducted corruptly. With little or no information being provided to the public or to bodies responsible for scrutiny, there will be no or limited accountability of the procurement process.
- D) To combat this risk, restricted transparency should be permitted only on the basis of prescribed reasons of national security (as provided for in Benchmark 13.16(6)) and only (for those procurements above a prescribed value threshold) where and to the extent that such restriction has been approved by an independent body (as provided for Benchmark 13.16(9)). Transparency should be restricted only to the extent strictly necessary to maintain the specific required secrecy.
- E) In determining, under Benchmark 13.16(9), whether and to what extent restricted transparency should be approved, the independent body should apply the following factors:
  - a) The overriding objective should be to maximise transparency as far as possible and to comply with all the disclosure requirements of Benchmark 13.
  - b) The independent body should ensure that the grounds in Benchmark 13.16(6) have been satisfied and that the information on which a

decision regarding restricted transparency may be based has not been manipulated.

- c) The independent body should permit restricted transparency only where and to the extent strictly necessary in the specific circumstances. The question to be determined is what particular information should be safeguarded and from whom, and what information may still be provided and to whom.
- d) Thus, in the example in (B) above, there would be no justification to dispense with all disclosure requirements required by Benchmark 13. All such disclosure requirements should be complied with other than disclosure regarding the specific technical specifications. In relation to the technical specifications, it would need to be decided precisely which specifications should remain undisclosed and from whom. Otherwise, all disclosures should be made to all relevant persons as required by Benchmark 13.
- e) If it determines that a particular degree of restricted transparency is necessary, the independent body should also ensure (in accordance with Benchmark 13.16) that all the provisions of Benchmark 13 are applied to the procurement process except to the extent that any provision cannot apply due to the permitted restricted transparency.
- F) Where any degree of restricted transparency is permitted, the independent body should monitor the consequent procurement process generally and also to ensure that there is no corruption as a result of the restricted transparency (regarding which see further comments in Guidance BM 13.16(9)).

**BM 13.16(7) Expedited procurement:**

- A) Expedited procurement may be necessary due to national emergency (such as a terrorist incident, flood or pandemic). Depending on the emergency, the procurement timetable may need to be curtailed in some way by, for example, shortening time periods or omitting certain steps in the procurement. In addition, the need to expedite the process under Benchmark 13.16(7) may work in conjunction with the need to use single-source procurement under Benchmark 13.16(5).
- B) However, emergencies can be used corruptly as an excuse to expedite procurement so as to provide opportunities for corruption. For example, a corrupt public official may give advance notice to a corrupt supplier of a proposed emergency purchase, in order to give it time to prepare its offer, and then give other suppliers much shorter notice to prepare their offers. The corrupt supplier may then be the only supplier which is able to submit an offer in the specified time.

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- C) To combat this risk, expedited procurement should be permitted only where and only to the extent essential for prescribed reasons of national security or emergency; where such emergency was not foreseeable by the procuring entity and not due to delay on its part; and only (for those procurements above a prescribed value threshold) where and to the extent that such expedited procurement has been approved by an independent body (as provided for Benchmark 13.16(9)).
- D) In determining, under Benchmark 13.16(9) whether and to what extent expedited procurement should be approved, the independent body should apply the following factors:
  - a) The overriding objective should be to maximise the opportunity to conduct a full competitive procurement process that meets all the requirements of Benchmark 13, including the normal timetable.
  - b) The independent body should ensure that the grounds in Benchmark 13.16(7) have been satisfied and that the information on which a decision regarding expedited procurement may be based has not been manipulated.
  - c) The independent body should permit expedited procurement only where and to the extent strictly necessary in the specific circumstances. Thus, for example, where an emergency does not allow for an open competitive process using the normal timetable, this does not necessarily justify single-source procurement. The timetable may be shortened but there is still the need to maximise competition. Depending on the circumstances, the urgency may allow for expedited reduced competition (e.g. three suppliers to provide a price within a curtailed period).
  - d) If it determines that a particular degree of expedited procurement is necessary, the independent body should also ensure (in accordance with Benchmark 13.16) that all the provisions of Benchmark 13 are applied to the procurement process except to the extent that any provision cannot apply due to the permitted expedited procurement.
- E) Where any degree of expedited procurement is permitted, the independent body should monitor the consequent procurement process generally and also to ensure that there is no corruption as a result of the expedited procurement (regarding which see further comments in Guidance BM 13.16(9)).

### **BM 13.16(8) Mixed contracts:**

Benchmark 13.16(8) is designed to ensure that a procurement process cannot be abused by unjustifiably applying single-source, expedited or restricted

transparency measures to the whole procurement rather than to the particular part of the procurement which justifies such measures. For example, it would be unjustifiable to use single-source procurement for the entire procurement of hospital equipment just because some of that equipment needed to be acquired from a single source. The equipment which genuinely needed to be procured from a single source should be so procured, but the remainder should be procured by a competitive process.

**BM 13.16(9) Decision to use single-source procurement, or to restrict transparency, or to expedite procurement:**

- A) As discussed in Guidance BM 13.16(5)–13.16(7) above, procurement processes which are single-source or which have restricted transparency or use expedited processes, and which are without adequate safeguards, provide significant opportunity for corruption. Thus, public officials:
  - a) may falsely claim that there are grounds of national security or emergency, so that they may then take advantage of the single-source, non-transparent, or expedited process for corrupt ends, or
  - b) may use genuine situations of national security or emergency as an opportunity to take advantage of such processes for corrupt ends.
- B) Benchmark 13.16(9) guards against this corruption risk by providing that, for procurements above a prescribed value threshold, the decision to use such methods, and the extent to which they should be used, should be determined by an independent body, and that the subsequent procurement process should be monitored by the independent body and be subject to appropriate safeguards.
- C) The factors which the independent body should consider and the matters which it should ensure are discussed under the relevant methods in Guidance BM 13.16(5)–(7) above.
- D) **‘Where the estimated contract value is above a prescribed threshold’:** The requirement for determination and monitoring by an independent body should apply only to procurements over a prescribed contract value threshold. This value threshold should be set at a level which maximises the number of procurements to which the procedures under Benchmark 13.16(9) should apply, but should not be so low as to capture very low value procurements, thereby imposing an unreasonable bureaucratic burden.
- E) In cases of urgency, the independent determination may be expedited to take account of the urgency. However, urgency should not be used as a justification to dispense with the independent determination and monitoring processes altogether.

## BM 13.17 Criteria in the procurement process:

**BM 13.17(1) ‘General principles: ... The procuring entity should ... use all reasonable endeavours to verify the accuracy of the information and evidence provided by the supplier.’:**

- A) The procuring entity should use all reasonable endeavours to verify whether information and evidence provided by each supplier under Benchmark 13.17(2) and its sub-suppliers under Benchmark 13.17(4) is correct.
- B) For example, in relation to the qualification criteria in Benchmark 13.17(2), verification would include checking, in relation to each supplier and its major sub-suppliers:
  - a) their performance records to verify their competence (Benchmark 13.17(2)(a))
  - b) their accounts and the court insolvency register to verify their financial standing (Benchmark 13.17(2)(a))
  - c) the ownership register (showing legal and beneficial ownership) (Benchmark 8) to check whether any person who could influence the outcome of the procurement is a legal or beneficial owner of the supplier or of any of its major sub-suppliers (Benchmark 13.17(2)(b) and (4))
  - d) the debarment register, if any, maintained by the courts or other relevant public sector body to verify whether they have been debarred (Benchmark 13.17(2)(c))
  - e) the register of convictions, if any, maintained by the courts or other relevant public sector body (Benchmark 4. 8(11)(a)) to verify whether they or their senior managers have unspent convictions for corruption offences (Benchmark 13.17(2)(e)).

### References

- i) UNCAC:
  - Article 9, paragraph 1(b) requires the establishment in advance of conditions for participation in a procurement, including selection and award criteria and tendering rules, and their publication
  - Article 9, paragraph 1(c) requires the use of objective and predetermined criteria for public procurement decisions.
- ii) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), pages 10 and 17–18 (paragraphs (d) and e)
- iii) UNCITRAL Model Law on Procurement (2011), Articles 8, 9, 11, 12, 21
- iv) EU Directive 2014/24/EU, Section 3, Articles 56–69 (Choice of participants and award of contracts)

**BM 13.17(2) Criteria for pre-qualification and qualification:**

- A) The objective should be that all suppliers for all public sector procurements should be required to meet the qualification criteria in order to ensure their suitability.
- B) Exceptions to this objective should be permitted only in cases of extreme urgency. However, even in such cases:
  - a) The procuring entity should ensure as far as possible that the selected supplier satisfies the qualification criteria.
  - b) If there is no time to check the qualification criteria or where they have been checked and it is found that the only available supplier does not satisfy them, then this should be recorded in writing. If the contract goes ahead, an audit should be carried out as soon as possible to assess whether any corruption might have been involved. For example:
    - In a pandemic, there is a shortage of face masks and only one supplier is put forward as having sufficient immediately available supply. Due to the urgency (the masks are needed for hospitals the next day), there is no time to verify whether the supplier is indeed the only supplier, whether it satisfies the qualification criteria, and whether the price is reasonable. Subsequently, an audit is carried out and it is found that the adviser to the health minister who put forward the supplier had an undisclosed conflict of interest in that he was part owner of the supplier and he deliberately falsely stated that the supplier was the only supplier with sufficient supply. It is also found that the masks were provided at a price significantly above market price. In view of the fraud, the contract should be voided, and steps should also be taken to prosecute for corruption. Any payment for masks supplied (assuming they are of satisfactory quality) should at most be at cost so as to ensure the corrupt supplier does not benefit from its corruption.
- C) If a supplier is treated as pre-qualified or qualified, but it is later discovered that the supplier had provided false information and had not in fact satisfied the pre-qualification/qualification criteria, then the supplier should be excluded from the procurement process. If, at the time of discovery, the contract has already been awarded to the supplier, then the contract should be set aside on the grounds of fraud. The supplier should not be permitted to benefit from its corrupt actions. Steps should also be taken to prosecute for corruption.

**BM 13.17(2)(b) 'it has no connection with any person that could constitute a conflict of interest in relation to the procurement (in relation to which the supplier should also provide details of its legal and beneficial ownership, and**

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### **authorisations to enable the procuring entity to verify such ownership with relevant company registries or agents):**

- A) There could be a conflict of interest where a supplier (or one of its relevant sub-suppliers, if any – see Benchmark 13.17(4)) has some connection with a person who could influence the outcome of the procurement, the terms of the awarded contract, or performance of the contract.
- B) For example, this could be where a supplier or relevant sub-supplier is wholly or partly owned by:
  - a) a public official or a spouse, relative or close associate of a public official, who is in a position to improperly influence the procurement process or the management of the contract
  - b) a person who has made significant donations to the ruling government political party and so may be granted public sector contracts in return, possibly at inflated prices.
- C) The following should be checked by the procuring entity so as to help identify any such conflicts of interest:
  - a) Legal and beneficial ownership of the supplier (and any relevant sub-suppliers – see Benchmark 13.17(4)): This check may show that a supplier or relevant sub-supplier is owned by a person who is in a position to improperly influence the procurement or the contract. This check will be facilitated where a register of ownership is available, as required under Benchmark 8.3 (Transparency of asset ownership). Where there is no such register, the authorisations specified in Benchmark 13.17(2)(b) may help the procurement manager to obtain access to the relevant ownership details at the relevant companies' registry.
  - b) Donations provided to political parties or candidates by the supplier (and any relevant sub-suppliers – see Benchmark 13.17(4)): This check may show whether the supplier or a relevant sub-supplier has made donations to a party or individual who is in a position to improperly influence the procurement or contract. This check will be facilitated where a register of donations is available as required under Benchmark 9.7(6) (Political lobbying, financing, spending and elections).
  - c) The conflict of interest disclosures held by the procuring entity in relation to its personnel (Benchmark 11.13): The disclosures made under Benchmark 11.13 by the procurement officials involved in or with any authority or influence over the particular procurement should be checked to see whether they show any connection with any participating supplier or relevant sub-supplier in the procurement.

**BM 13.17(2)(e) ‘... If the supplier has unspent convictions but can demonstrate that it has taken adequate measures, as prescribed in the procurement regulations, to prevent such further offences being committed ...’:**

- A) Adequate measures should be prescribed in the regulations. They may include, for example, implementation of a third party certified anti-corruption management system in accordance with Benchmark 10 (for public sector organisations) or the Annex to the Guidance (for private sector organisations)).
- B) Where, during the qualification process, the measures implemented by a supplier are considered to be insufficient, the supplier should receive a statement of the reasons for that decision.
- C) The ability, under Benchmark 13.17(2)(e), for the procuring entity to treat a conviction as nullified should not apply if the supplier has been mandatorily debarred (see Benchmark 13.17(2)(c)).

**References for all of BM 13.17(2)**

- i) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), pages 17–18 (Contractor qualification)
- ii) UNCITRAL Model Law on Procurement (2011) Article 9 (Qualifications of suppliers and contractors)
- iii) WTO Revised Agreement on Government Procurement (2012), Article VIII (Conditions for participation)
- iv) UNODC Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019):
  - *RECOMMENDATION 4: ‘... disclosure should be required of the beneficial ownership of the supplier companies providing services or goods [to state-owned or controlled enterprises]’.*
- v) EU Directive 2014/24/EU, Recital (100) and Section 3, Articles 56-69 (Choice of Participants and award of contracts)
  - *Recital (100): ‘Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union’s financial interests, terrorist offences, money laundering or terrorist financing...’*

**BM 13.17(3) Criteria for mandatory exclusion:**

**References**

- i) UNCITRAL Model Law on Procurement (2011):
  - Article 9, paragraph 8 (Disqualification of a supplier):

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*'8. (a) The procuring entity shall disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was false or constituted a misrepresentation*

*(b) A procuring entity may disqualify a supplier or contractor if it finds at any time that the information submitted concerning the qualifications of the supplier or contractor was materially inaccurate or materially incomplete*

*(c) Other than in a case to which subparagraph (a) of this paragraph applies, a procuring entity may not disqualify a supplier or contractor on the ground that information submitted concerning the qualifications of the supplier or contractor was inaccurate or incomplete in a non-material respect. The supplier or contractor may, however, be disqualified if it fails to remedy such deficiencies promptly upon request by the procuring entity...'*

– Article 21, paragraph 1 (Exclusion of a supplier):

*'1. A procuring entity shall exclude a supplier or contractor from the procurement proceedings if:*

*(a) The supplier or contractor offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, so as to influence an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings; or*

*(b) The supplier or contractor has an unfair competitive advantage or a conflict of interest, in violation of provisions of law of this State.'*

**BM 13.17(5) Criteria for evaluating offers:**

References

- i) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), page 19 (Award criteria):

*'To stem corruption and ensure appropriate competition, the award of a public contract should be made only on the basis of pre-disclosed criteria. This may either be the lowest price or a combination of the price with other criteria, such as the most advantageous or best value tender. Award criteria should be drafted in an objective way to ensure fair, impartial and non-discriminatory application. The weighting between criteria, and the manner of application for the criteria, must be set out in the tender documents, and non-price related criteria, such as time for delivery and extension of the minimum warranty period,*

*should be quantifiable, so that they can be assessed objectively and transparently...?*

- ii) UNCITRAL Model Law on Procurement (2011):
  - Article 11 (Rules concerning evaluation criteria and procedures)
  - Article 43 (Examination and evaluation of tenders): ‘... (b) *The successful tender shall be: (i) Where price is the only award criterion, the tender with the lowest tender price; or (ii) Where there are price and other award criteria, the most advantageous tender ascertained on the basis of the criteria and procedures for evaluating tenders specified in the solicitation documents in accordance with article 11 of this Law.*’
- iii) EU Directive 2014/24/EU, Article 67 (Contract award criteria)

## BM 13.18 Notices of intended procurement:

- A) From an anti-corruption perspective, procurement notices should serve two purposes:
  - a) They should enable equal participation by the number of suppliers required by the relevant procurement method, and thus should provide equal knowledge at the same time to all such suppliers and give them a reasonable time to respond.
  - b) They should alert the public to intended procurements, providing sufficient detail so that the public can understand the nature of the procurement.

Thus, such notices help to maximise competition and transparency.

- B) Subject to (d) below, such notices should be published in relation to all procurements. Such notices may vary depending on the type of procurement method and procurement subject matter:
  - a) **In open and restricted competitive processes**, the notice should be published so that it reaches the required number of suppliers so as to maximise competition, as well as being published to the public.
  - b) **In single-source procurement**, even though there is to be no call to suppliers for participation, a notice should nevertheless be published to the public giving all specified information.
  - c) **In cases of urgency**, a notice should still be published to the public giving all specified information. Whether a notice is published to suppliers will depend on the procurement method chosen: for example, a notice may be combined with or replaced by an invitation to submit an offer, or there may be no such notice to suppliers if, due to the urgency, the procurement is to be single-source.

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- d) **In cases of national security**, where restricted transparency may be required (to the extent determined in Benchmark 13.16(9)), whether a notice is published to the public and what it may contain will depend on the degree of transparency permitted. Restrictions may also apply in relation to notices published to suppliers.

## References

- i) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), page 20:

*‘(a) **Public notice:** For the reasons described above, transparency and competition are of the essence in public procurement. As a general rule, a procuring entity should therefore publish a public notice of its intent to procure goods or services, so that potential bidders can become aware of any contract opportunity with the government. Advertising a notice of intended procurement is one of the cornerstone elements of an appropriate procurement system. A public procurement notice must include certain minimum information so that potential bidders can assess whether a particular procurement is of competitive interest to them. The notice should include, at the least, a short description of the subject matter of the procurement, the deadline for bid submissions, where the tender documents may be obtained, and the contact point for enquires. All prospective bidders must receive the same information to ensure a level competitive field. Good practice includes advertising contract opportunities as broadly as possible – including internationally – so that a broader group of suppliers may compete for the contract. Procurement methods without notice should be the absolute exception.’*

- ii) WTO Revised Agreement on Government Procurement (2012), Article VII (Notices):

*‘1. For each covered procurement, a procuring entity shall publish a notice of intended procurement in the appropriate paper or electronic medium listed in Appendix III, except in the circumstances described in Article XIII. Such medium shall be widely disseminated, and such notices shall remain readily accessible to the public, at least until expiration of the time-period indicated in the notice...’*

- iii) EU Directive 2014/24/EU, Article 48:

*‘1. Contracting authorities may make known their intentions of planned procurements through the publication of a prior information notice. Those notices shall contain the information set out in Annex V part B section I...’*

## BM 13.19 Solicitation documents:

- A) From an anti-corruption perspective, solicitation documents should serve three purposes:
  - a) to provide sufficient information for suppliers to submit responsive and timely submissions
  - b) to indicate minimum requirements which characterise the nature of the procurement and which should not be changed at any stage of the procurement, including in any (permitted) negotiations
  - c) to inform the public as to the detail of the product being procured.
- B) **‘should contain all information necessary...’**: The information to be provided in the solicitation documents should include inter alia technical specifications, qualification criteria, evaluation criteria, criteria for mandatory exclusion, procurement method and rules, procurement procedure and timetable, manner in which the procurement contract will be entered into, terms and conditions of contract, and means of communicating with the procuring entity.
- C) **‘should be published to the public ...’**: The solicitation documents should be published in full to the public (including in cases of urgency), subject to any transparency restrictions determined under Benchmark 13.16(9).

### References

- i) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), page 16 (Tender documents):

*‘(a) **Tender documents:** ... The tender documents are the key component of any tender procedure. The procuring entity shall set out in the tender documents all requirements that submissions must meet in order to be considered responsive and the manner in which those requirements are to be assessed. The tender documents will include, in particular, the timeframes for bidding, the stages in the process, criteria regarding eligibility of companies, technical specifications, selection and award criteria, criteria for the rejection of bids or the disqualification of a bidder, legal terms and conditions, as well as means of communications between the procuring entity and bidders. All these criteria and conditions must be objectively defined, available to all potential suppliers in understandable terms and applied equally.*

*Procurement laws, in order to ensure that the competitive process is fully fair and transparent, typically specify in detail the minimum content which tenders must include. Good practice suggests not only setting out the minimum content of tender documents, but also*

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*any information, useful to those offering tenders, which promotes transparency, competition and integrity.’*

- ii) WTO Revised Agreement on Government Procurement (2012), Article X (Technical specifications and tender documents), paragraphs 7 and 10
- iii) UNCITRAL Model Law on Procurement (2011), Article 15 (Clarifications and modifications of solicitation documents) and Articles 38–39 (Provision and contents of solicitation documents in open tendering)

### BM 13.21 Opening of submissions:

There is a risk that, following opening of submissions, a submission may be illicitly altered so as to ensure that it will be the winning submission. This can be avoided if sufficient information contained in the submission is, at the time of opening, recorded in writing, distributed to suppliers and published to the public (subject to any transparency restrictions as determined under Benchmark 13.16(9)). Such information should include the prices or rates offered, and all other elements of the submission which are relevant to the award criteria.

#### References

- i) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), pages 20–21:

#### **‘(c) Public bid opening**

*To ensure transparency, bids should be opened immediately after the deadline for submitting bids in a public bid opening session. All tenderers should be permitted to be present at the bid opening session. Absent extraordinary circumstances, bids which were submitted after the deadline normally need not be evaluated. In a traditional open tender, the procuring entity should be required to announce the names of all bidders and the prices offered. Good practice requires that, for open tenders at least, not only the price but all the other elements of a bid which are necessary for applying the award criteria should be announced. To ensure transparency and accountability, public procurement minutes should be drafted and made available to all tenderers and other interested persons not present at the bid opening...*

#### **(d) Evaluation of tenderers and tenders**

*... Procuring entities should have the right to ask bidders for clarification of their tender as long as this was done in a non-discriminatory and transparent fashion. Changes to the bid after the deadline for submitting the bid should, in general, be prohibited. Procurement regimes sometimes provide for the opportunity to correct unintentional errors of form or errors*

*which do not involve any substantial change of the bid. A correction of errors should be allowed only in exceptional cases given that allowing for corrections may risk granting a particular bidder an illegitimate advantage. This could occur, for instance, in the case of a company that submitted a bid which failed to comply with certain mandatory requirements according to the tender documents, and which intends to bribe the responsible public official to remedy this error after the bid was submitted.'*

- ii) WTO Revised Agreement on Government Procurement (2012), Article XV (Treatment of tenders and awarding of contracts)

*'1. A procuring entity shall receive, open and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process, and the confidentiality of tenders. ...*

*4. To be considered for an award, a tender shall be submitted in writing and shall, at the time of opening, comply with the essential requirements set out in the notices and tender documentation and be from a supplier that satisfies the conditions for participation.'*

- iii) UNCITRAL Model Law on Procurement (2011), Article 16 (Clarification of qualification information and of submissions):

*'1. At any stage of the procurement proceedings, the procuring entity may ask a supplier or contractor for clarification of its qualification information or of its submission, in order to assist in the ascertainment of qualifications or the examination and evaluation of submissions.*

*2. The procuring entity shall correct purely arithmetical errors that are discovered during the examination of submissions. The procuring entity shall give prompt notice of any such correction to the supplier or contractor that presented the submission concerned.*

*3. No substantive change to qualification information or to a submission, including changes aimed at making an unqualified supplier or contractor qualified or an unresponsive submission responsive, shall be sought, offered or permitted.*

*4. No negotiations shall take place between the procuring entity and a supplier or contractor with respect to qualification information or submissions, nor shall any change in price be made pursuant to a clarification that is sought under this article.'*

- iv) UNCITRAL Model Law on Procurement (2011), Article 42 (Opening of tenders)

- v) EU Directive 2014/24/EU, Article 56(3) (Incomplete or erroneous submissions)

## BM 13.22 Evaluation of submissions:

- A) In order to reduce the risk of corruption, two or more procurement officials should be responsible for evaluating submissions. The number, skill and seniority of procurement officials should be determined according to value thresholds in the procurement regulations. For large-value contracts, the submission should be evaluated or approved by a committee comprising several appropriately qualified persons.
- B) **‘The evaluators should be alert to any indication in the submissions of possible corruption in the procurement process.’:** Such indications may include inter alia where:
- a) a supplier appears to have taken deliberate steps to have its submission disqualified (for example, by deliberately failing to submit a responsive bid) while giving the appearance of participating impartially
  - b) the prices or rates offered by one or more suppliers appear to be unreasonably high or low in whole or in part so that the rates of only one or two suppliers fall within an acceptable range of the estimated contract price (see Benchmark 13.12(2))
  - c) the prices or rates of one or more suppliers are consistently within a fixed percentage of one or more other suppliers
  - d) the prices or rates of one or more suppliers are materially inconsistent with prices or rates they have submitted previously (in relation to other procurements)
  - e) comparison of submissions in this procurement process with previous processes shows that the same or similar groups of suppliers took part and appear to have each been in turn successful, or that the same suppliers appear to always deliberately disqualify themselves or submit unreasonably low or high rates or prices
  - f) a submission appears to contain information that was not made available as part of the procurement process, thus indicating that the supplier may have received preferential treatment from a procurement official.
- C) **‘The evaluators should issue a written evaluation report ...’:** The evaluation report should inter alia specify the selected supplier and all elements of the winning submission which were relevant to the evaluation criteria and should also list each rejected supplier and the reasons for rejection.

## References

- i) UNCITRAL Model Law on Procurement (2011), Article 43 (Examination and evaluation of tenders):
  - ‘3. (a) The procuring entity shall evaluate the tenders that have not been rejected in order to ascertain the successful tender, as defined in subparagraph (b) of this paragraph, in accordance with the criteria and procedures set out in the solicitation documents. No criterion or procedure shall be used that has not been set out in the solicitation documents;’*

### BM 13.23 Rejection of submissions:

**BM 13.23(3) ‘the submission is not responsive’:** i.e., it does not comply with the requirements in the solicitation documents or is incorrect in a material respect.

## References for all of BM 13.23

- i) WTO Revised Agreement on Government Procurement (2012), Article XV, paragraph 6
- ii) UNCITRAL Model Law on Procurement (2011):
  - Article 20 (Rejection of abnormally low submissions)
  - Article 21 (Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest)
  - Article 43(2) (Grounds for rejecting a tender)
- iii) EU Directive 2014/24/EU:
  - Article 26(4)(b)
  - Recital 103 and Article 69 (Abnormally low tenders)

### BM 13.24 Notice of outcome of the evaluation:

This notice should be provided to suppliers and to the public subject to any transparency restrictions as determined under Benchmark 13.16(9).

**BM 13.24(2) ‘Such notice should ... provide sufficient information for suppliers to assess whether the procuring entity’s decision was reasonably based’:** Such information should include the elements of the winning submission which determined its success, and should state the submissions which were rejected and why. The notice should also offer the possibility of further information, either in writing or orally, pursuant to suppliers’ request.

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## References

- i) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), page 22:

***‘(e) Publication of intended contract award and awarded contract***

*After bid evaluation and ranking of bids, bidders should be promptly notified about the procuring entity’s intention to award the contract to the successful bidder. This award decision should, for reasons of transparency, contain sufficient information, besides the name of the successful tenderer, the contract price and a summary of other characteristics and relative advantages of the successful tenderer, to allow all bidders and stakeholders to assess whether the procuring entity’s decision is reasonably based. The award notice should include the standstill period (i.e., the period during which the procuring entity is not allowed to conclude the contract), if such a period is specified in the relevant procurement legislation. Good practice suggests that the opportunity of a debriefing, either in writing or orally, should be offered to suppliers on request.’*

- ii) WTO Revised Agreement on Government Procurement (2012), Article XVI, paragraph 1:

*‘A procuring entity shall promptly inform participating suppliers of the entity’s contract award decisions and, on the request of a supplier, shall do so in writing. Subject to paragraphs 2 and 3 of Article XVII, a procuring entity shall, on request, provide an unsuccessful supplier with an explanation of the reasons why the entity did not select its tender and the relative advantages of the successful supplier’s tender.’*

- iii) UNCITRAL Model Law on Procurement (2011), Article 22.2:

*‘The procuring entity shall promptly notify each supplier or contractor that presented submissions of its decision to accept the successful submission at the end of the standstill period. The notice shall contain, at a minimum, the following information: (a) The name and address of the supplier or contractor presenting the successful submission; (b) The contract price or, where the successful submission was ascertained on the basis of price and other criteria, the contract price and a summary of other characteristics and relative advantages of the successful submission; and (c) The duration of the standstill period as set out in the solicitation documents and in accordance with the requirements of the procurement regulations. The standstill period shall run from the date of the dispatch of the notice under this paragraph to all suppliers or contractors that presented submissions.’*

- iv) EU Directive 2014/24/EU Recital 82 (Notification of decisions and reasons)

## BM 13.25 Standstill period:

**‘reasonable prescribed standstill period’:** This should allow a sufficient reasonable time for unsuccessful suppliers to bring a challenge.

### References

- i) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), page 22
- ii) UNCITRAL Model Law on Procurement (2011), Article 22

## BM 13.26 Acceptance of the successful submission:

**BM 13.26(3) ‘The successful submission should be accepted only after ... approval of the intended acceptance has been provided in writing and signed by two or more procurement officials ... who are different from and senior to those persons who evaluated the submissions’:**

- A) There is a risk of collusion between one or more of the suppliers and the procurement evaluators whereby a successful supplier may be corruptly selected.
- B) To combat this risk, Benchmark 13.26(3) provides that approval of the intended acceptance should be obtained from persons who are different from and senior to the evaluators.
- C) These senior officials should be alert to the risk of corruption in the evaluation and should ensure that they are provided with sufficient, clear and coherent information with regard to the procurement and in response to any enquiries that they make.

### References for all of BM 13.26

- i) UNCITRAL Model Law on Procurement (2011), Article 22, paragraph 4: *‘Upon expiry of the standstill period or, where there is none, promptly after the successful submission was ascertained, the procuring entity shall dispatch the notice of acceptance of the successful submission to the supplier or contractor that presented that submission, unless the [name of court or courts] or the [name of the relevant organ designated by the enacting State] orders otherwise.’*
- ii) EU Directive 2014/24/EU Recital 82 (Notification of decisions and reasons)

## BM 13.27 Making of the contract:

For purposes of certainty as to the terms that have been agreed, a comprehensive written contract should be signed setting out all terms and conditions, and

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attaching, as part of the contract, all specifications and technical information. A signed contract copy should be provided to and retained by each of the procuring entity and the supplier. This will help prevent any subsequent problem, whether during the performance of the contract or in any later court proceedings, in establishing what the terms of the agreed contract were. Lack of signed contracts, or lack of supporting specifications, creates uncertainty which can create opportunities for corruption. For example, a supplier may take advantage of inadequate contract specifications to supply products of a lower quantity or specification than originally envisaged by the procurement documentation, but still receive the payment envisaged.

### References

- i) EU Directive 2014/24/EU Recital 126:

*‘The traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including efficiently fighting corruption and fraud. Contracting authorities should therefore keep copies of concluded high-value contracts, in order to be able to provide access to those documents to interested parties in accordance with applicable rules on access to documents.’*

## BM 13.28 Cancellation of the procurement process:

**BM 13.28(1) ‘A procurement process may be cancelled by the procuring entity only on objective, reasonable and prescribed grounds.’:**

Without proper safeguards, there is a risk that a procurement could be corruptly cancelled because the preferred supplier (e.g. one who had offered a bribe to procurement officials) has not been selected. The procurement would then be re-run so that the preferred supplier could win. To avoid this, the procurement regulations should specify the grounds on which a procurement may be cancelled.

**BM 13.28(2) ‘The procuring entity should be entitled to cancel the procurement process inter alia where the procuring entity has sufficient plausible evidence to conclude that there has been corruption ...’:**

Cancellation of a procurement process may result in major delay and disruption to the supply of the relevant works, products or services and potentially significant loss suffered by the procuring entity. The procuring entity should seek to recover any loss suffered from the corrupt participating supplier(s) and others implicated in the corruption (see Benchmark 1.6).

## BM 13.29 Challenge to the procurement process, contract award, or cancellation of procurement:

- A) **‘There should be a ... fair ... process ...’:** In order to provide for a fair process, the procurement regulations should inter alia specify a reasonable period within which challenges to the procurement process may be brought, starting from the time when the suppliers or the public (depending on who is bringing the challenge) were aware, or could have been aware, of the grounds for challenge.
- B) Subject to considerations of public interest (e.g. legitimate commercial confidentiality), or to any transparency restrictions as determined under Benchmark 13.16(9), all procurement records and access to procurement personnel should be made available to all parties for the purposes of the review process.

### References

- i) UNCAC Article 9, paragraph 1(d): *‘Such [procurement] systems shall address ... (d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed.’*
- ii) UNODC Guidebook on Anti-Corruption in Public Procurement (2013):
  - Page 11 (Effective systems of domestic review)
  - Page 23 (penultimate and final paragraphs):
 

*‘An effective review mechanism has several purposes. Most importantly, it is an incentive to respect an established procurement system because non-compliance will be enforced. Bidders have the right to turn to a review body, which will then verify whether a decision by the procuring entity was made in conformity with applicable rules.*

*An effective remedy system requires that an application for review be heard by an independent body...’*
  - Page 24 (first and second paragraphs):
 

*‘It is good practice for a reviewing body to include, or be composed of, outside experts independent from the government, such as experts from statutory professional representations such as a chamber of commerce or a non-governmental organization. It is also good practice to have the manner of the appointment of members of a review body and the duration of their term specified in the law or in other regulations. For instance, personal independence should be guaranteed by the fact that any arbiter is appointed for life, is not subject to transfer, and cannot be relocated involuntarily. Whether the review body is an impartial*

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*administrative authority or a judicial authority, and whether it specializes in public procurement law cases, will depend in part on the legal system in the country concerned. The decisive factor is that the independent body be afforded the highest possible degree of autonomy and independence of action from the executive and legislative branches.*

- *Effectiveness in the area of remedies will also require that any supplier which has, or has had, an interest in a particular procurement will be granted sufficient time to prepare and submit a challenge. Procurement legislation usually sets out a minimum period of time to file a complaint, starting from the time when the basis for the challenge becomes known or reasonably should have become known to the supplier. It is good practice to ensure that an aggrieved bidder is able to appeal any important decision or action taken by a procuring entity.'*
- iii) WTO Revised Agreement on Government Procurement (2012), Article XVIII (Domestic review procedures)
- iv) UNCITRAL Model Law on Procurement (2011), Articles 64–69 (Challenge proceedings)
- v) EU Directive 2014/24/EU, Recital 82 (Notification of decisions and reasons)

### BM 13.30 Procurement report:

- A) From an anti-corruption perspective, the value of such a report is that it provides a clear and comprehensive record of the procurement process. It should be provided to the procuring entity, the procurement regulatory authority, and (where over the prescribed value threshold) to parliament and the public (subject to any transparency restrictions as determined under Benchmark 13.16(9)). In preparing the report, it should be ensured that all relevant documents are identified and located. This is important to help detect any corruption and also to ensure that the documents are available for any subsequent challenge, audit, litigation or prosecution.
- B) The level of detail to be contained in the reports can vary according to contract value thresholds, with higher value contracts requiring more detail. This report is unlikely to be necessary for low value contracts (see Benchmark 13.16(2)).
- C) For procurements over a prescribed value threshold, such report should include inter alia:
  - a) identification of the procurement regulations governing the procurement process

- b) the name and address of the procuring entity (and its powers authorising the procurement)
  - c) a description of the subject matter of the contract and the technical specifications
  - d) a summary of the needs assessment, technical assessment and value for money assessment
  - e) the chosen method of procurement and the reasons for this choice
  - f) the estimated contract price, including an explanation of how this estimated value was calculated
  - g) a timetable showing the dates on which all material documents were issued or received, and all material decisions were made
  - h) all procurement criteria relied on
  - i) the name of the successful supplier, the price (or rates) of the successful submission, and other factors relevant to its success
  - j) the legal and beneficial ownership of the successful supplier
  - k) a list of the submissions rejected, and the reasons for this
  - l) whether the procurement was cancelled, and the reasons for this
  - m) details of any challenges to the procurement process and the outcome of these challenges, including any sanctions imposed or remedies awarded
  - n) evidence of conflicts of interests or possible corruption offences and subsequent measures taken, including any referrals to the law enforcement authorities, and subsequent prosecutions.
- D) The report in (C) should attach or link to inter alia:
- a) the applicable procurement regulations
  - b) the needs assessment, technical assessment and value for money assessment
  - c) the procuring entity's reasons for choice of procurement method
  - d) any reports issued by the independent body under Benchmark 13.16(9)
  - e) disclosures by the successful supplier as to its legal and beneficial ownership
  - f) the notice of intended procurement
  - g) the solicitation documents
  - h) all suppliers' submissions
  - i) the evaluation report

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- j) notice of outcome of the evaluation
- k) notice of acceptance of the successful submission
- l) the signed contract.

### References

- i) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), page 21 (final paragraph):
  - ‘... All decisions should be documented, including the compilation of an evaluation report containing the result of the evaluation of the tenderer and the tenders.’
- ii) UNCITRAL Model Law on Procurement (2011), Article 25 (Documentary record of procurement proceedings)
- iii) EU Directive 2014/24/EU:
  - Recital 126: *‘The traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including efficiently fighting corruption and fraud ... Furthermore, the essential elements and decisions of individual procurement procedures should be documented in a procurement report. To avoid administrative burdens wherever possible, it should be permitted for the procurement report to refer to information already contained in the relevant contract award notice. The electronic systems for publication of those notices, managed by the Commission, should also be improved with a view to facilitating the entry of data while making it easier to extract global reports and exchange data between systems.’*
  - Article 84 (Individual reports on procedures for the award of contracts)

## BM 13.31 Monitoring and review of the procurement process:

### BM 13.31(3) Audit of the procurement process:

- A) Audits should be conducted in accordance with Benchmark 19. For purposes of the audit, the auditing body should be entitled to receive disclosure of all procurement records and interview all procurement personnel and suppliers.
- B) It would not be practicable for audits to be carried out for all procurements. Thus, the procurement regulations should require audits only for those procurements in excess of prescribed contract value thresholds (see Benchmark 13.12(1)) and otherwise on a random sample basis. This value threshold should be set at a level which maximises the

number of procurements for which audits should be carried out but should not be so low as to capture very low value procurements, thereby imposing an unreasonable bureaucratic burden.

- C) In the case of each auditable procurement, the auditor should assess whether the procurement has been carried out in accordance with the procurement regulations (which should include the provisions of Benchmark 13) and should be alert to any indications of corruption.
- D) In those cases where the open competitive process (Benchmark 13.16(1)) was not used and in addition to assessing as required in paragraph (C) above, the auditor should also check for the following:
  - a) For low value competitive procurements (Benchmark 13.16(2)):
    - i) Were the procurements genuinely low value, or have procurements been artificially divided into smaller procurements so as to take them below the threshold for an open competitive process?
    - ii) Are a disproportionate number of low value procurements being awarded to one or the same few suppliers?
    - iii) Are a large number of low value procurements being made which are unnecessary?
  - b) For restricted competitive procurements (Benchmark 13.16(3)):
    - i) Was there a genuine need for restricted competition?
    - ii) Was a sufficient number of suppliers invited to participate so as to provide adequate competition?
    - iii) Was there a pre-qualification process which was open to a wide number of suppliers?
    - iv) Had all the suppliers who were invited to participate pre-qualified?
    - v) Is there any evidence that the suppliers invited had been chosen for corrupt reasons? For example, is there any evidence that a public official was connected with one or more of them?
  - c) For procurement involving negotiations or dialogue (Benchmark 13.16(4)):
    - i) Was there a genuine need for negotiations or dialogue?
    - ii) (The same questions as for (b)(ii)–(v) above)
    - iii) Were the negotiations and dialogue conducted by public officials of appropriate skill, number and seniority?
    - iv) Were all negotiations properly recorded?

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- v) Were the negotiations conducted impartially? For example, was all information provided on an equal basis and were negotiations conducted equally with all suppliers? Or is there evidence of preferential treatment being provided to one or more suppliers?
- d) For single-source procurements (Benchmark 13.16(5)):
  - i) Was there a genuine need for single sourcing?
  - ii) Is there any evidence that the selected supplier had been chosen for corrupt reasons? For example, is there any evidence that a public official was connected with the supplier?
  - iii) Was the decision to use single-source procurement determined by an independent body, as required under Benchmark 13.16(9), and did the independent body monitor the subsequent procurement and provide a report as required under Benchmark 13.16(9)? Did the report indicate any suspicious circumstances?
- e) Where restricted transparency or expedited procurement were used (Benchmark 13.16(6) and (7)):
  - i) Was there a genuine need for restricted transparency or expedition?
  - ii) Is there any evidence that the selected supplier had been chosen for corrupt reasons? For example, is there any evidence that a public official was connected with the supplier?
  - iii) Was the decision to use restricted transparency or expedited procurement determined by an independent body, as required under Benchmark 13.16(9), and did the independent body monitor the subsequent procurement and provide a report as required under Benchmark 13.16(9)? Did the report indicate any suspicious circumstances?

## References for all of BM 13.31

- i) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), page 8:

***‘Transparency***

*Transparency is a key feature of a sound procurement system and generally involves: ... (c) the provision of a system for monitoring and enforcing applicable rules. Given that procuring entities frequently have a high degree of discretion in the procurement process, it is also transparency which allows this exercise of discretion to be monitored.*

*Procurement systems depend on transparency to allow stakeholders (policymakers, officials, competitors and members of the public) to monitor*

*the procurement process. That monitoring is a crucial tool to ensure that the government agents in the procurement process – the procuring officials and the vendors themselves – pursue the government’s ends and not their own.’*

- ii) EU Directive 2014/24/EU: Article 83, paragraphs 2 and 3:

*‘Member States shall ensure that the application of public procurement rules is monitored. Where monitoring authorities or structures identify by their own initiative or upon the receipt of information specific violations or systemic problems, they shall be empowered to indicate those problems to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national parliaments or committees thereof.*

*The results of the monitoring activities pursuant to paragraph 2 shall be made available to the public through appropriate means of information. These results shall also be made available to the Commission. For instance, they may be integrated in the monitoring reports referred to in the second subparagraph of this paragraph.’*

### BM 13.34 Transparency to the public:

- A) This Benchmark provides that the procurement regulatory authority and each procuring entity should proactively provide information in relation to public sector procurement to the public, in addition to responding to requests for information. This will facilitate the public’s understanding of public sector procurement and help the public to monitor procurements and to hold the authority and procuring entities to account. It will also help to build public confidence in the public sector and to create a culture in the public sector where the provision of information to the public is part of its regular function.
- B) **‘Save to the extent contrary to the public interest’:** This would include, for example, not disclosing confidential details of ongoing corruption investigations until the investigations are complete. In the Benchmarks Definitions, ‘public interest’ is defined as *‘the interests of the public at large as objectively and independently determined’*. The public interest exception would not allow the withholding of information simply because it may be embarrassing to an individual or organisation (e.g. if it shows a failure to manage a procurement process appropriately and effectively).
- C) **‘promptly’:** As far as possible, the public should be given contemporaneous information by the organisation so that the public can monitor each procurement as it proceeds. In this way, any ongoing corruption or risk of corrupt activity in the procurement may be able to be prevented, or at least identified early.

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**BM 13.34(1) ‘Information to be provided by the procurement regulatory authority’:****BM 13.34(2) ‘Information to be provided by the procuring entity’:**

As they are public sector organisations, the procurement regulatory authority and each procuring entity should comply with Benchmark 10 (Public sector organisations) and thus should each have a freely accessible public website on which they publish information to the public (see Benchmark 10.22). In addition to the information to be published under Benchmark 10.22, the authority and each procuring entity should also publish, on the freely accessible website, the information specified in Benchmark 13.34.

**BM 13.34(2)(a) (ii) This Benchmark provision provides for disclosure in relation to ‘all procurements by the procuring entity above a prescribed value threshold’:**

- A) This value threshold should be set at a level which maximises the number of procurements for which information is made available to the public, but should not be so low as to capture very low value procurements, thereby imposing an unreasonable bureaucratic burden. The disclosure requirements for procurements above the value threshold are as stated in Benchmark 13.34(2) to (4).
- B) While the Benchmark specifies disclosure of information only in relation to procurement over the prescribed value threshold, the procuring entity may also choose, as a matter of good practice and maximum transparency, to disclose information in relation to procurements under this threshold. The level of detail is likely to be far less than in relation to procurements over the value threshold. These smaller procurement details could be aggregated, and disclosure could, for example, include the following information disclosed annually in relation to these smaller value procurements:
  - a) the cumulative value of contracts awarded by the organisation, by category of procurement method
  - b) the names of the suppliers awarded these contracts together with the total contract value awarded to each supplier.

**BM 13.34(3)(l) ‘the identities and legal and beneficial ownership of the winning supplier and of any of its sub-suppliers whose contracts are above a prescribed value threshold (Benchmark 13.17(2)(b) and 13.17(4))’**

- A) **Where the supplier or sub-supplier is an individual:** The individual’s name, nationality, State of residence and address should be disclosed. As these are individuals, disclosure of legal and beneficial ownership will not be relevant.

- B) **Where the supplier or sub-supplier is an organisation:** The following should be disclosed:
- a) the organisation's name, identity number, date of incorporation, place of incorporation and address
  - b) details of each legal and beneficial owner of the organisation, as required in Benchmark 8.4(2)(b) (Transparency of asset ownership).

#### References

- i) UNCAC Article 9, paragraph 1(a) requires that procurement systems be based inter alia on transparency and should provide for the public distribution of information relating to procurement procedures and contracts.
- ii) UNODC Guidebook on Anti-Corruption in Public Procurement (2013), page 8 (Transparency), page 10 (Public distribution of information), page 26 (Civil society procurement monitoring) and page 39 (Section B)
- iii) UNCITRAL Model Law on Procurement (2011), Article 5 (Publication of legal texts), Article 8(5) (Making available reasons for limiting number of suppliers), Article 18(9) (Making available names of pre-qualified suppliers), Article 19(2) (Publication of notice of cancellation of procurement), Article 23 (Public notice of the award of a procurement contract or framework agreement), Article 25(2)–(4) (Making available documentary record of procurement proceedings), and Article 26 (Publication to the public of the code of conduct for procurement officials)

# Guidance to Benchmark 14

## Contract management

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### BM 14 Purpose of Benchmark:

- A) There is a significant risk of corruption in relation to contract management. For example,
  - a) The organisation's contract manager, in return for a bribe, may, under an existing contract with a supplier:
    - i) award additional work which is not necessary or is at a price which is above market price
    - ii) approve defective or incomplete work by a supplier
    - iii) approve delivery from a supplier of products which are not in accordance with the specification
    - iv) ignore failures by a supplier to comply with building, safety or environmental regulations
    - v) approve payment to a supplier to a higher level than is due.
  - b) A supplier may deliberately provide defective work or under-supply products so as to increase its profit.
- B) This type of corruption can have major adverse implications for public sector works. For example:
  - a) Buildings may be built which are not in accordance with building regulations, and may in consequence collapse, causing death or injury.
  - b) Roads may not be built in accordance with the design requirements, and in consequence may crack or subside.
  - c) Unnecessary products may be purchased.
  - d) The public sector may pay more money for products than is warranted by their quality and quantity.

This Benchmark recommends measures to prevent such corruption.

- C) The intention of the Benchmarks is that a public sector organisation should implement a series of controls in relation to its contracts in order to help ensure that the relevant procurement is necessary and that the contract procurement, management and payment processes are adequately controlled so as to minimise the risk of corruption. For example, in relation to any contract that the organisation enters into for the supply of works, products or services to the organisation:

- a) Initially, the organisation should budget for its likely expenditure in relation to the overall supply of works, products or services to the organisation during the budget period (Benchmark 15.5(4) (Financial management)). The budget may specifically identify major items, and list minor items by category.
- b) In the event that any specific supply of works, products or service is required, then the organisation should approve the likely specific expenditure prior to entering into any commitment in relation to such expenditure (Benchmark 15.10) (Financial management).
- c) A supplier to supply the works, products or service should be selected and contracted by the organisation in accordance with Benchmark 13 (Procurement).
- d) Once contracts have been entered into, they should be managed by the organisation in accordance with Benchmark 14 (Contract management), Benchmark 16 (Concession management) or Benchmark 17 (Asset management) (as appropriate to the type of contract).
- e) Payments due to or from the organisation in relation to these contracts should be managed in accordance with Benchmark 15 (Financial management).

#### References

- i) ISO 37001 Guidance A.12 provides some summary principles on contract management

### BM 14.2 Scope of application:

- A) The contract management regulations should apply to all contracts between public sector organisations and business associates. This would include:
  - a) contracts with suppliers for the supply of works, products, services, loans, assets, or operation of concessions
  - b) contracts with other business associates such as:
    - joint venture partners
    - customers (such as where the public sector organisation is a utility)
    - clients (such as where the public sector organisation is a state-owned contractor).
- B) These regulations may specify a comprehensive procedure for contracts above a prescribed value threshold(s), and a simpler procedure for

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contracts below that threshold(s). Such value thresholds should be set at a level which maximises the number of contracts for which the comprehensive procedure should apply but should not be so low as to capture very low value contracts, thereby imposing an unreasonable bureaucratic burden.

- C) The contract management regulations may have specific exceptions which allow an expedited or simplified procedure to be used in prescribed emergency circumstances, for example in cases of serious risk to essential national security, public health or public safety. It is important that these exceptions are controlled so as to prevent abuse for corrupt purposes. An example of abuse is utilising an exception purportedly on the grounds of national security, public health or public safety but where no such grounds genuinely exist.
- D) An example of proper use of an exception would be where a public sector health organisation has a contract with a company under which the company supplies blood to the organisation. A terrorist incident occurs with major casualties requiring more blood than the organisation has in stock or than the supplier is contracted to supply. The emergency is so critical that the contract modification regulations (Benchmark 14.7) requiring a written justification and approval of the modification and any additional cost are temporarily suspended, and the organisation places an emergency request with the supplier for the additional blood supplies. In this case, the exception to the modification requirements may be justified. However, even in such a case, care should be taken to agree, as far as possible in the time given, an acceptable price and other terms for the modification, and all details of the modification should subsequently be confirmed in writing, together with written justification for using the exception. In cases where an exception is used, the process should be audited to ensure that the exception and the price and other terms were justified and acceptable in the circumstances and that the exception was not abused for corrupt purposes.

### BM 14.3 Contract management personnel:

Contract management personnel include project managers, contract managers, site managers, factory managers, personnel responsible for approving the quality or quantity of work or services supplied, contract administrative personnel, and all other personnel involved in the contract management function on behalf of the public sector organisation.

## BM 14.4 Decisions:

- A) **‘Decision’** is defined in the Benchmarks Definitions as including *‘any approval, assessment, certification, confirmation, decision, determination, judgment, recommendation, refusal or rejection’*. This could include, for example, approval of a modification to the contract; certification of the actual quantities and quality of the supplier’s works, products, or services; and recommendation of payment to the supplier.
- B) The provisions of BM 10.14 (referred to in Benchmark 14.4) are designed to ensure that decisions are made by persons of a number, skill and seniority appropriate to the size and corruption risk of the transaction, and who are without conflict of interest.

## BM 14.5 Anti-corruption commitments:

- A) **‘business associate’** is defined in the Benchmark Definitions as *‘a person with which an organisation had, has, or intends to have a business relationship, including clients, consortium partners, customers, joint venture partners, purchasers and suppliers (as defined in the Benchmark Definitions) but excluding personnel of the organisation’*.
- B) **‘supplier’** is defined in the Benchmark Definitions as including *‘any agent, concession operator, consultant, contractor, distributor, lender, lessor, representative, seller, supplier, or other person offering or providing works, products, services or assets’*.
- C) The anti-corruption commitments provided for in Benchmark 14.5 should be included at the time of signing of the contract with a business associate. (For example, Benchmark 13.19(2) provides that anti-corruption commitments by the procuring entity and the supplier should be included in the contract terms and conditions as part of the procurement process under Benchmark 13.)
- D) Benchmark 14.5 provides an additional safeguard by requiring contract managers to verify, as part of the contract management process, that these contractual anti-corruption commitments have been given.

## BM 14.6 Management of the contract:

In order to ensure that the contract obligations are being properly and honestly complied with, the performance of the contract should be effectively managed on an ongoing basis by managers of an appropriate number, skill and seniority. Good contract management helps avoid costly failures and corrupt conduct which can cost the organisation far more than the cost of providing good management. The

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number, skill and seniority level should be determined according to contract value and degree of corruption risk.

### **BM 14.6(1) ‘the contract is at arm’s length and on market terms and conditions’:**

- A) In order to help ensure that contracts are at arm’s length and on market terms and conditions:
  - a) **Contracts for the supply of works, products, services, loans, assets, or operation of a concession** should have been procured under Benchmark 13. If this procurement process is properly carried out, this should ensure that the contract is at arm’s length and on market terms and conditions.
  - b) **For other types of contracts**, such as contracts with:
    - joint venture partners
    - customers (such as where the public sector organisation is a utility)
    - clients (such as where the public sector organisation is a state-owned contractor),
 the managers responsible for placing the contracts should have ensured that the contract was at arm’s length and on market terms and conditions.
- B) A contract would not be at arm’s length or on market terms and conditions if, for example:
  - a) the contracting supplier or other business associate is wholly or partly owned by a public official who is in a position to influence the terms of the contract or payments or approvals under the contract
  - b) the contracting supplier or other business associate is owned by a major donor to the ruling party and the contract corruptly gives the business associate preferential rates.
- C) Benchmark 14.6 provides an additional safeguard by requiring contract managers to verify, as part of the contract management process, that contracts are at arm’s length and on market terms and conditions.

### **BM 14.6(2) ‘... the contract was awarded pursuant to a procurement process carried out in accordance with Benchmark 13 (Procurement)’:**

- A) The procurement process under Benchmark 13 is designed to ensure as far as reasonable that contracts are awarded to an organisation or individual after a properly managed competitive procurement process which is designed to minimise the risk of corruption.

- B) Despite the requirements of Benchmark 13 (Procurement), there remains a risk that contracts may be corruptly awarded without a proper procurement process. For example, a contract may be awarded without a competitive process to a supplier which is secretly owned by a procurement manager, or who has bribed a procurement manager.
- C) Consequently, Benchmark 14.6 provides an additional safeguard by requiring contract managers to verify, as part of the contract management process, that contracts of the types specified in Benchmark 14.6(2) have been procured in accordance with Benchmark 13.

### **BM 14.7 Modifications to or under a contract:**

- A) Modifications to or under an awarded contract are modifications which take place after the contract has been entered into between the organisation and the supplier. A modification is also often called a 'variation'.
- B) There are two types of modification:
  - a) A modification to the contract, whereby the contract terms are changed by agreement between the contract parties.
  - b) A modification under the contract, whereby the contract contains a procedure under which modifications to the contract obligations can be made (e.g. an increase in the contractual quantity of works, products or services to be supplied).
- C) Modifications may include:
  - a) changes to the contract price
  - b) additions to, or deductions from, the contractual quantity of works, products or services to be supplied
  - c) changes to the contractual type, or quality of works, products or services to be supplied
  - d) changes to the contract programme
  - e) changes to the contract terms.
- D) There is a significant risk that a supplier may bribe a contract manager to allow improper modifications to the contract which will result in significant profit for the supplier. It is therefore important that modifications to the contract are properly regulated and managed.

#### **References**

- i) EU Directive 2014/24/EU, Article 72

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### **BM 14.7(1)(a) ‘not necessary to achieve the organisation’s objectives under the contract’:**

For example: If the organisation’s objective under the contract is to provide a hospital, then any change to the contract should be necessary for the effective construction of the hospital. The change should not, for example, be a contract modification which increases the contractor’s scope of work to include building an adjacent shopping mall. The shopping mall should be awarded under a separate procurement process pursuant to Benchmark 13 (Procurement).

### **BM 14.7(1)(b) ‘materially changes the nature of the contract’:**

For example:

- a) If the contract was awarded on a fixed price basis, it should not be changed to a re-measurement contract.
- b) If the organisation requires a contractor to construct a building, the contract should not be modified so that the contractor is also required to build the access road to the building. Road construction is different in nature to building construction. The road construction should be awarded under a separate competitive procurement process pursuant to Benchmark 13 (Procurement).

### **BM 14.7(1)(c) ‘permitted percentage increase’:**

- A) The permitted percentage price increase should be set at a level which allows reasonable flexibility to the organisation to require a reasonable level of unforeseen additional work to be carried out under the contract, but not at such a high level that it could facilitate abuse. Where there is no limit on the price increase for contract modifications, or where the limit is set too high, this may allow abuse of the procurement process or profiteering by the supplier carrying out the work. For example:
  - a) A supplier may bid at a very low price to win work during a competitive procurement knowing that, in return for a bribe to the organisation’s contract managers, it will later receive an instruction from the organisation for significant and highly profitable additional work to be carried out as a modification to the contract.
  - b) A supplier may price for additional works required under a legitimate contract modification at far higher than market cost, as the supplier will not, in the absence of a limit on the price increase, be incentivised to offer a competitive price.
- B) The permitted price increase, if expressed as a percentage, may be set at a higher percentage level for smaller contracts than larger contracts.

- C) Where several contemporaneous and/or successive modifications are made, the percentage price increase should be assessed on the basis of the total cumulative value of such modifications.
- D) A specified price or quantity increase (rather than percentage increase) may be permitted in the contract. For example, a contract may contain a clause:
  - a) allowing prices to increase annually in line with inflation
  - b) allowing the organisation to exercise an option to buy an increased number of products (in which case, the permitted increase in quantity and price in relation to these products, as well as the terms on which the option is exercisable, should be clearly stated in the contract).

**BM 14.7(1)(d) ‘expands the scope of the contract, and it would be more beneficial for the organisation to procure such expanded scope under a separate competitive procurement process in accordance with Benchmark 13 (Procurement)’:**

- A) The expanded scope of the contract may, for example, provide for:
  - a) additional works, products, services or assets
  - b) increasing the amount of, or adding additional, loans
  - c) increasing the size of, or adding additional, concessions.
- B) In some circumstances, even if the cost of the expanded scope is below the specified threshold for allowing a modification, it may be more beneficial for the organisation to procure the expanded scope under a separate competitive procurement process, as this may enable a different supplier to be selected who is more skilled at providing the expanded scope than the existing supplier and/or whose price may be materially lower than that offered by the existing supplier.

**BM 14.7(1)(e) ‘is detrimental to the organisation’s interests’:**

For example, a modification which lowers safety, quality or environmental standards is likely to be detrimental to the organisation’s interests.

**BM 14.7(2)(a) ‘properly justified in writing, with all necessary supporting evidence’:**

Justification would include providing sufficiently detailed reasons for the modification, with reference to relevant contract clauses, price comparisons, calculations and quality assessments, and providing all evidence necessary to support such reasons. Details should be sufficient for the organisation’s

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management and auditor to be able to evaluate sufficiently the justification for the modification.

### **BM 14.7(2)(b) ‘approved in accordance with the decision-making procedures’:**

To limit the risk of corrupt contract modifications being made, the organisation should ensure that its decision-making procedures for contract modifications are robust and appropriate to the value of the modification. For example, the organisation may require that any contract modification which has a price impact of more than a specified value should be approved by a contract management committee of suitable number, skill and seniority.

### **BM 14.7(2)(c) ‘effected in writing’:**

Once the modification has been appropriately approved by the organisation, the modification should be recorded in writing. Oral modifications should not be permitted. The modification should state all material information (e.g. the modified price, work, quality and completion date), and should be signed by an authorised signatory of each contracting party.

## **BM 14.8 Recommendation for payment:**

- A) In order to reduce the risk of corruption, a person should not approve both: (i) works, products or services provided by a supplier, and (ii) payment to that supplier. Accordingly, there should be a separation of functions whereby the contract manager approves the works, products or services provided by the supplier and the finance function approves payment.
- B) However, finance managers who are responsible for approving payments will not normally have the necessary skill or involvement with a contract to be able to assess whether the contract has been properly performed and whether the payment is actually due. Therefore, there needs to be a process whereby an appropriately skilled manager(s) who has suitable knowledge of the contract and its performance makes a recommendation for the payment prior to payment being made.
- C) The manager who approves work done may also recommend payment. Alternatively, the two functions may be divided as an additional anti-corruption control.
- D) The manager approving work and/or recommending payment should always be different from the manager approving payment.

**BM 14.8(1)(a): ‘in accordance with the decision-making procedures in Benchmark 10.14 (Public sector organisations)’:**

A recommendation for payment is an important management action. It is effectively a management decision stating that payment is due and requesting the finance department to make the payment. Therefore, the organisation should ensure that this recommendation is issued in accordance with its decision-making process under BM 10.14 (i.e. that the managers recommending payment should have no conflict of interest and be of appropriate number, skill and seniority, taking into account the size and corruption risk of the payment).

**BM 14.8(1)(b) ‘the relevant managers have taken reasonable steps to verify that, and reasonably believe that ...’:**

**A) ‘(i) the contract obligations in respect of which the payment is to be made have been complied with in accordance with the contract’:**

In checking whether such contract obligations have been complied with, the manager should, prior to recommending payment, consider and record the following on the payment recommendation:

- a) (Unless it is an advance payment) whether the payee’s works, products or services (or part thereof where payment is periodic) have been provided:
  - i) in compliance with applicable laws
  - ii) in accordance with the contractual requirements.

If not, the manager should state the reasons for non-compliance, and whether this non-compliance needs to be, or has been, appropriately taken account of in the payment calculation. Where payment is periodic (e.g. monthly according to value completed), the certification should confirm that the work relevant to the payment has been satisfactorily completed.

- b) (Unless it is an advance payment) whether the contract programme is being or has been achieved by the payee. If not, state the reasons for non-compliance, and whether this non-compliance needs to be, or has been, appropriately taken account of in the payment calculation.
- c) Whether all other contractual obligations of the business associate relevant to that payment have been complied with.

**B) ‘(ii) the payment is for the correct amount due under the contract’:**

The manager should verify that:

- a) the due date for payment has arrived
- b) the amount to be paid has been properly calculated in accordance with the contract.

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C) **‘(iii) the proposed payee is the correct person to be paid under the contract’:**

Payment should normally be made to the supplier named in the contract. The organisation should not accept an unverified request to pay a third party instead of the named supplier. There may be some cases where paying another party is legitimate but this should still be properly verified (e.g. in cases where the supplier has assigned the payment to a bank and the organisation has received the appropriate confirmation of assignment documents).

**BM 14.8(3) ‘If there are any suspicions of corruption in relation to the payment, payment should not be recommended unless and until such suspicions have been satisfactorily resolved.’:**

The manager recommending payment needs to be alert to suspicions of corruption. In recommending payment, the manager should be reasonably satisfied that there are no such suspicions. The manager should therefore consider the following factors:

- a) whether there are any indications that any improper benefit or advantage has been requested by, given to, or received from any individual or organisation in connection with the contract
- b) whether there are any indications that any person may have improperly influenced a decision in relation to the contract, whether as a result of a conflict of interest or otherwise
- c) whether the amount of the payment is reasonable and proportionate to the value of the work. When recommending payment for works, products or services, experienced managers with awareness of market prices should be able to assess the reasonableness and proportionality of a relevant payment when compared to the works, products or services supplied or which could have been supplied in the relevant period. Identifying that a specific payment is unreasonable or disproportionate could, for example, indicate possible corruption in the contract rates or in the claim for quantity of work carried out.

## BM 14.9 Payment:

The payment function (namely, approval and implementation of the payment) should be separated from the contract management function (namely, approval of the works, products or services and the recommendation for payment). It would increase the corruption risk if the contract manager who approves the supplier’s work could also approve and implement payment to the supplier. Therefore:

- a) Benchmarks 14.6 and 14.8 provide that the contract manager should be responsible for approving works, products or services and for recommending payment
- b) Benchmark 14.9 provides that the finance function should make the payment. In doing so, the finance function is required to carry out the additional checks provided for in BM 15.11 and 15.12.

## BM 14.10 Termination of, or voiding, a contract:

### References

- i) EU Directive 2014/24/EU, Article 73

### **BM 14.10(1) ‘the business associate should have been excluded from the procurement process under Benchmark 13.17(3) (Procurement)’:**

- A) The grounds for exclusion from the procurement process under Benchmark 13.17(3) are mandatory. They relate to matters which involve or may give rise to corruption in the procurement process. Consequently, where grounds for exclusion of a supplier are only discovered after a contract has been awarded and possibly performed in part or in full, the contract should nevertheless be terminated or declared void. For example:
  - a) Under Benchmark 13.17(2)(c), one of the qualification criteria to participate in a procurement is that a supplier should not have been debarred from participating in public sector procurement. Consequently, if a supplier falsely declares in its qualification document that it has not been debarred, and the organisation admits it to the procurement process and awards it the contract, the organisation should be entitled to terminate or set aside the contract if it subsequently discovers that the supplier had lied in its qualification document. This would be a mandatory ground for exclusion under Benchmark 13.17(3).
  - b) The organisation should be entitled to terminate or set aside a contract if it subsequently discovers that the winning supplier or one of its major sub-suppliers had bribed a procurement manager to win the contract, or had entered into a secret cartel with the other bidding suppliers to pre-select the winning supplier. This would be a mandatory ground for exclusion under Benchmark 13.17(3).
- B) Termination of a contract during its execution may result in major delay and disruption to the supply of the relevant works, products or services pending re-award of the contract, and potentially significant loss suffered by the organisation. The organisation should seek to recover

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any loss suffered from the terminated supplier. In some cases loss may be irrecoverable, for example if the supplier is unable to pay the damages awarded. However, the contract should nevertheless be terminated. If this was not done, it would enable a supplier to retain a contract even though it was ineligible to win the contract on one or more of the grounds in Benchmark 13.17(3). To help avoid such a situation, it is imperative that the organisation takes reasonable steps to verify the accuracy of qualification documents and ensures that the bidding suppliers and their major sub-suppliers are made fully aware of the risks of termination of a contract in these circumstances.

### **BM 14.10(2) ‘there has been corruption by, on behalf of, or for the benefit of, the business associate in connection with the contract’:**

- A) Benchmark 14.10(1) relates to corruption occurring during procurement and provides that, if this corruption is only discovered during the contract, the organisation should nevertheless be entitled to terminate the contract. (See discussion under Guidance BM 14.10(1) above.)
- B) Benchmark 14.10(2) relates to corruption occurring after award of the contract, for example where a supplier offers a bribe to the organisation’s contract manager in order to get an improper contract modification approved. In this case, the organisation should also be entitled to terminate the contract.

## **BM 14.11 Termination and re-award of contract:**

### References

- i) EU Directive 2014/24/EU, Recital 110

## **BM 14.12 Contract communications:**

### References

- i) UNCITRAL Model Law on Procurement (2011), Article 7: This article relates to communications in procurement. Similar principles apply to communications in contract management.

## **BM 14.16 Transparency to the public:**

- A) This Benchmark provides that each public sector organisation should proactively provide information in relation to its contracts (which are above the prescribed value threshold) to the public, in addition to responding to requests for information. This will facilitate the public’s

understanding of public sector contracting and help the public to monitor the contracts and hold the organisation to account. It will also help to build public confidence in the public sector and to create a culture in the public sector where the provision of information to the public is part of its regular function.

- B) As it is a public sector organisation, the organisation should comply with Benchmark 10 (Public sector organisations) and thus should have a freely accessible public website on which it publishes information to the public (see Benchmark 10.22). In addition to the information to be published under Benchmark 10.22, the organisation should also publish, on the freely accessible public website, the information specified in this Benchmark 14.16.
- C) **‘Save to the extent contrary to the public interest’**: This would include, for example, not disclosing confidential details of ongoing corruption investigations until the investigations are complete. As per the Benchmarks Definitions, ‘public interest’ is defined as *‘the interests of the public at large as objectively and independently determined’*. The public interest exception would not allow the withholding of information simply because it may be embarrassing to an individual or organisation (e.g. if it shows a failure to manage a contract appropriately or effectively).
- D) **‘promptly’**: As far as possible, the public should be given contemporaneous information by the organisation so that the public can monitor each contract as it proceeds. In this way, any ongoing corruption or risk of corrupt activity in the organisation’s contract management or in contract performance may be able to be prevented, or at least identified early.

**BM 14.16(1)(a) (ii) The Benchmark provides for disclosure in relation to ‘all of the organisation’s contracts above a prescribed value threshold’.**

- A) This value threshold should be set as low as is reasonable, so as to maximise the number of contracts for which information is made available to the public, but should not be so low as to capture very low value contracts, thereby imposing an unreasonable bureaucratic burden. The disclosure requirements for contracts above the value threshold are as stated in BM 14.16.
- B) While the Benchmark specifies disclosure of information only in relation to contracts over the prescribed value threshold, the organisation may also choose, as a matter of good practice and maximum transparency, to disclose information in relation to contracts under this threshold. The level of detail is likely to be far less than in relation to contracts over the value threshold. These smaller contract details could be aggregated, and disclosure could, for example, include the following information disclosed annually in relation to these smaller value contracts:

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- a) the cumulative value of contracts awarded by the organisation, by category of type of contract
- b) the cumulative value of payments made by the organisation, by category of type of contract
- c) the names of the suppliers awarded these contracts, together with cumulative payments received by each supplier.

**BM 14.16(2)(b) ‘the identities and legal and beneficial ownership of all contract parties and of any of its sub-suppliers whose contracts are above a prescribed value threshold (Benchmarks 13.17(2)(b) and 13.17(4))’**

- A) **Where the contract party or sub-supplier is an individual:** The individual’s name, nationality, State of residence and address should be disclosed. As these are individuals, disclosure of legal and beneficial ownership will not be relevant.
- B) **Where the contract party or sub-supplier is an organisation:** The following should be disclosed:
  - a) the organisation’s name, identity number, date of incorporation, place of incorporation and address
  - b) details of each legal and beneficial owner of the organisation, as required in Benchmark 8.4 (Transparency of asset ownership).

**BM 14.16(2)(c) ‘information in relation to any procurement process for the contract’:**

This information should already have been disclosed as part of the procurement process in accordance with the transparency requirements of Benchmark 13.34. This information should continue to be available on the organisation’s public website throughout the operation of the contract, and after completion of the contract.

**BM 14.16(2)(e) ‘ongoing information, on at least an annual basis, as to the contract, contract progress, payments made and received by the organisation, and material contract modifications and their time and cost implications’:**

This information should include:

- a) a summary of information on the contract, including the purpose, description and location of the contract performance
- b) information as to the progress of the contract (i.e. the contractual programme, any changes to the programme, reasons for the changes, the modified programme(s), whether the programme is being met, and if not, the reasons for this)

- c) payments made by the organisation in respect of the contract, and reasons as to any difference between anticipated payments to be made and actual payments
- d) payments received by the organisation in respect of the contract, and reasons as to any difference between anticipated receipts and actual receipts
- e) any claims agreed, including in relation to additional costs or delay
- f) any modifications to or under the contract, including in relation to price, payment terms, specification, quantities, quality, programme, or to other contract terms and conditions, and the reasons for and consequences of such modifications.

**BM 14.16(2)(f) ‘a summary of the contract outcomes ...’:**

This information should include:

- a) information as to the outcome of the contract (i.e. was the contract fully and successfully completed as originally intended, and if not, the reasons for and consequences of any change or outcome)
- b) the final total amount paid by the organisation in respect of the contract, and reasons as to any difference between the total anticipated amount to be paid and the actual total amount paid
- c) the final total amount received by the organisation in respect of the contract, and reasons as to any difference between the total anticipated amount to be received and actual total amount received
- d) the date of completion, whether completion was delayed beyond the contract completion date, and if so, the reasons for such delay
- e) any claims agreed, including in relation to additional costs or delay
- f) any modifications to or under the contract, including in relation to price, payment terms, specification, quantities, quality, programme, or to other contract terms and conditions, and the reasons for and consequences of such modifications
- g) any defects or other deficiencies in performance
- h) whether there are or have been any major disputes in relation to the contract, and if so, how these have been or are being addressed, and the outcome of any such disputes.

**References**

- i) Construction Sector Transparency Initiative
- ii) Open Government Partnership

# Guidance to Benchmark 15

## Financial management

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### BM 15 Purpose of Benchmark:

- A) There is a significant risk of corruption in relation to financial management. For example,
- a) in preparing the national budget, officials may include projects that benefit their own interests, not those of the public
  - b) tax officials may embezzle tax revenue
  - c) public officials may misappropriate non-tax revenue
  - d) finance managers of public sector organisations may make corrupt payments:
    - i) in return for a bribe, to suppliers of more than is due
    - ii) to suppliers secretly owned, wholly or partly, by the managers
    - iii) to non-existent employees (and instead receive the payment into their own account).
- B) This Benchmark recommends measures to prevent such corruption. It covers measures relating to the management of national finances and the management of the finances of public sector organisations.

### BM 15.1 Regulations:

#### References

- i) UNCAC Article 9, paragraph 2:
 

*‘Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia:*

  - a) Procedures for the adoption of the national budget*
  - b) Timely reporting on revenue and expenditure*
  - c) A system of accounting and auditing standards and related oversight*
  - d) Effective and efficient systems of risk management and internal control; and*
  - e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.’*

- ii) ISO 37001 Guidance A.11 provides some summary principles on financial management for organisations.
- iii) UNODC Guidebook on Anti-Corruption in Public Procurement, Section B, pages 30–33

## BM 15.2 Scope of application:

- A) The financial management regulations should apply to all public sector financial management.
- B) The financial management regulations may have specific exceptions which allow an expedited or simplified procedure in specified emergency circumstances, for example in cases of serious risk to essential national security, public health or public safety. It is important that these exceptions are controlled so as to prevent abuse for corrupt purposes.
- C) An example of abuse is using an exception purportedly on the grounds of national security, public health or public safety but where no such ground genuinely exists.
- D) However, even in genuine cases of emergency, it is unlikely that expediting or suspending the normal required financial procedures would be justified. For example, while a contract may need to be placed immediately in the case of a genuine emergency (see Guidance BM 17.2, paragraph (D)), in most cases, payment for the works, products or services contracted under the emergency contract would not need to be made immediately. There would therefore normally be time to apply the normal payment regulations to a contract placed in an emergency. In cases where an exception is used, the process should be audited to ensure that the exception and its terms were justified and acceptable in the circumstances.

## BM 15.3 Financial management personnel:

Financial management personnel include accountants, finance administration personnel and all other personnel involved in the financial management function on behalf of the public sector organisation.

## BM 15.4 Decisions:

- A) **‘Decision’** is defined in the Benchmarks Definitions as including *‘any approval, assessment, certification, confirmation, decision, determination, judgment, recommendation, refusal or rejection’*. This could include, for example, decisions regarding the national budget, tax revenue, bank

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loans, payments to suppliers and payments of salary and expenses to employees.

- B) The provisions of BM 10.14 (referred to in Benchmark 15.4) are designed to ensure that decisions are made by persons of a number, skill and seniority appropriate to the size and corruption risk of the transaction, and who are without conflict of interest.

### BM 15.5 Adoption of the national budget:

#### References

- i) PEFA (October 2019): Framework for Assessing Public Financial Management: Pillar One (Budget Reliability)
- ii) Commonwealth Parliamentary Association 2018: 'Recommended Benchmarks for Democratic Legislatures': Sections 7.2.1 to 7.2.6

### BM 15.6 Tax collection and management:

#### References

- i) PEFA (October 2019): Framework for Assessing Public Financial Management: Pillar One (Budget Reliability): PI-3 and PI-19

### BM 15.7 Non-tax revenue collection and management:

Non-tax revenue could include, for example:

- a) royalties or concession fees paid by private sector operators to the State (the relevant public sector organisation) in relation to oil, gas or mineral extraction or for operation of mobile phone networks and toll roads
- b) revenue where the State itself owns and operates facilities, for example toll roads or car parks.

#### References

- i) PEFA (October 2019): Framework for Assessing Public Financial Management: Pillar One (Budget Reliability): PI-3 and PI-19

### BM 15.9 Debt management:

Corruption in relation to a loan to a public sector organisation could occur, for example, where the public official who is arranging the loan:

- a) ensures, in return for a bribe from the lending institution, that the loan is unnecessarily large and at above market interest rates, and that additional

corrupt payments are made to the lending institution disguised as loan fees

- b) misappropriates part of the loan for his or her personal use. This may involve collusion with personnel from the lending institution.

**BM 15.9(2)(a) ‘is for a legitimate purpose which is in accordance with the organisation’s objectives’:**

For example, if the objective of the organisation is to provide health services to the public, then obtaining a loan to help build a hospital would be a legitimate purpose in accordance with the organisation’s objectives. A loan to help the organisation’s chief executive build her/his private house would not be.

**BM 15.9(2)(b) ‘is necessary for the organisation to be able to achieve that purpose’:**

For example, if the organisation has sufficient available funds to build the hospital without taking on a loan from a private sector organisation, then the loan is unlikely to be necessary.

**BM 15.9(2)(c) ‘is permitted by the organisation’s budgetary requirements’:**

Benchmark 15.5(4) provides that: *‘The budget should identify the categories of revenue, debt and expenditure, and the major items of expenditure, for each sub-national government, government department and public sector organisation.’* Thus, the budget should specifically anticipate loans required by each public sector organisation, with permitted amounts, and should go through the proper budgetary approval process (Benchmark 15.5(6)). Debt should not be incurred by the organisation unless it is permitted by the budget. This is an added debt control measure which helps avoid improper debt.

**BM 15.9(2)(d) ‘will provide value for money for the organisation’:**

For example, if the organisation can more cheaply obtain a loan from the national treasury, or another public sector organisation, obtaining a loan from a wholly or partly private sector lender at commercial interest rates is unlikely to provide value for money to the organisation.

**BM 15.9(2)(e) ‘is at arm’s length and on market terms and conditions’:**

In order to help ensure that the loan is at arm’s length and on market terms and conditions, the organisation should, for loans which are above a prescribed value threshold, take the following verification steps prior to entering into any loan obligation:

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- a) obtain confirmation from an independent and appropriately skilled person that the terms and conditions of the loan, such as interest rate, term, currency, commission, fees and repayment conditions, are appropriate for the organisation and are in accordance with market norms
- b) verify that no intermediary or third party is obtaining a fee or commission in respect of the loan unless:
  - i) the intermediary or third party is providing genuine, necessary and legitimate services in relation to the loan
  - ii) the intermediary or third party is not directly or indirectly connected to a public official
  - iii) the commission or fee is reasonable and proportionate to the actual legitimate services carried out by the intermediary or third party in relation to the loan.

### **BM 15.9(2)(f) ‘is from a legitimate lender who is verified and contracted under a competitive process in accordance with Benchmark 13 (Procurement)’:**

It is likely that the risk of corruption will be reduced, and better value for money achieved, if loans are procured through a competitive process involving several potential lenders rather than through direct negotiation with one lender. The provision of a loan is no different to the placing of a purchase contract for products – it should be procured as a financial service, in accordance with Benchmark 13 (Procurement).

### **BM 15.9(2)(g) ‘is approved in accordance with the decision-making procedures in Benchmark 10.14 (Public sector organisations)’:**

The provisions of BM 10.14 are designed to ensure that decisions are made by persons of a number, skill and seniority appropriate to the size and corruption risk of the transaction, and who are without conflict of interest.

#### References

- i) PEFA (October 2019): Framework for Assessing Public Financial Management: Pillar One (Budget Reliability): PI-1, PI-11, PI-13

## **BM 15.10 Expenditure:**

The provisions of Benchmark 15.10 envisage approval of expenditure prior to entering into any commitment in relation to that expenditure. Therefore, an organisation should not commence a procurement process under Benchmark 13 to procure a supplier unless and until it has first approved the likely expenditure

in respect of the contract that would be awarded under the procurement. There are a number of tests which the likely expenditure should satisfy prior to such expenditure being approved. These tests are listed in Benchmark 15.10 and are designed to ensure that the expenditure is appropriate, and to minimise the risk that the expenditure is corrupt.

**BM 15.10(1)(a) ‘is for a legitimate purpose which is in accordance with the organisation’s objectives’:**

For example, if the objective of the organisation is to provide health services to the public, then incurring expenditure for the construction of the hospital would be a legitimate purpose in accordance with the organisation’s objectives. Expenditure to build the organisation’s chief executive’s private house would not be.

**BM 15.10(1)(b) ‘is necessary for the organisation to be able to achieve that purpose’:**

For example, paying the membership of its senior management to a golf club is not necessary to achieve the purpose of building the hospital.

**BM 15.10(1)(c) ‘is permitted by the organisation’s budgetary requirements’:**

Benchmark 15.5(4) provides that: *‘The budget should identify the categories of revenue, debt and expenditure, and the major items of expenditure, for each sub-national government, government department and public sector organisation.’* Thus, the budget should specifically anticipate major items of expenditure and the general categories of minor items of expenditure by each public sector organisation, with permitted amounts, and should go through the proper budgetary approval process (Benchmark 15.5(6)). Expenditure should not be incurred by the organisation unless it is permitted by the budget. This is an added expenditure control which helps avoid improper expenditure.

**BM 15.10(1)(d) ‘will provide value for money for the organisation’:**

For example, if the organisation requires cars for its staff, these cars should provide value for money. A standard car is adequate. Luxury cars should not be provided, however senior the staff may be. The additional cost of the luxury car would not provide value for money to the organisation and would be a misuse of public money. (See also Benchmark 11.6 and Guidance BM 11.6, paragraph (E).)

**BM 15.10(1)(e) ‘will be under a contract which is at arm’s length and on market terms and conditions’:**

- A) The organisation should not approve any expenditure unless it will be incurred under a contract which is at arm’s length and on market terms and conditions.

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- B) See the following regarding ensuring contracts are at arm's length and on market terms and conditions:
- a) Guidance BM 14.6(1) regarding contracts generally
  - b) Guidance BM 15.9(2)(e) regarding loans
  - c) Guidance BM 16.5(1)(e) regarding concession contracts
  - d) Guidance BM 17.5(5) regarding purchases of assets
  - e) Guidance BM 17.7(3) regarding sales of assets.

**BM 15.10(1)(f) 'will ... be under a contract awarded pursuant to a procurement process carried out in accordance with Benchmark 13 (Procurement)':**

It is likely that the risk of corruption will be reduced, and better value for money achieved, if contracts are procured through a competitive process involving several potential suppliers rather than through direct negotiation with one supplier. Therefore, all expenditure in relation to the supply to the organisation of works, products, services, loans, assets, or operation of a concession should be incurred only under contracts awarded in accordance with Benchmark 13 (Procurement).

**BM 15.10(1)(g) 'is approved in accordance with the decision-making procedures in Benchmark 10.14 (Public sector organisations)':**

The provisions of BM 10.14 are designed to ensure that decisions are made by persons of a number, skill and seniority appropriate to the size and corruption risk of the transaction, and who are without conflict of interest.

**BM 15.10(1)(h) 'in the case of projects requiring expenditure over a prescribed value threshold, is shown to be justified by a written and objective needs assessment, technical assessment, and value for money assessment provided by a suitably skilled and independent third party':**

There is a risk that projects may be initiated by managers of an organisation for corrupt reasons. For example:

- a) in order to get work for a supplier in which she/he has an interest, a manager of the organisation may corruptly recommend to the Board that the organisation should enter into a major contract and may advise that the technical requirements necessitate a single-source procurement from the particular supplier who is corruptly linked to the manager
- b) alternatively, a group of suppliers operating a cartel may bribe the manager to recommend an unnecessary or over-designed project.

Consequently, to limit the corruption risk, all planned projects which would require expenditure over a prescribed value threshold should be shown to be justified by a written and objective needs assessment, technical assessment, and value for money

assessment. These assessments should as far as possible be carried out by persons who are independent of the organisation's management, and who have a reputation for integrity.

#### References

- i) PEFA (October 2019): Framework for Assessing Public Financial Management: Pillar One (Budget Reliability): PI-1, PI-11

## BM 15.11 Approving payments:

A significant amount of corruption in the public sector relies on the corrupt person obtaining corrupt payment from a public sector organisation. Therefore, the payment approval process is effectively the final opportunity to stop corrupt payments leaving the organisation. Payment approval should therefore be effectively controlled. Approval will normally be the responsibility of the finance function. No payment should be made by the organisation except in accordance with the process specified in Benchmark 15.11.

### **BM 15.11(1) 'in accordance with the decision-making procedures in Benchmark 10.14 (Public sector organisations)':**

The provisions of BM 10.14 are designed to ensure that decisions are made by persons of a number, skill and seniority appropriate to the size and corruption risk of the transaction, and who are without conflict of interest. Consequently, payment approvals should be given by a finance manager(s) who have had no involvement with the procurement or contract management process. Regarding appropriate number, skill and seniority, a larger and higher risk payment would normally require two or more approvers. In the case of very large or high-risk payments, the approval of the Board may be required.

### **BM 15.11(2)(a) Approving payments to business associates:**

The managers of the finance department who are responsible for approving payments do not normally have the necessary skill or involvement with a contract to be able to assess whether the contract has been properly performed and whether the payment is actually due. Consequently, the approval process should entail, at minimum, the manager(s) verifying, as far as reasonable, from the documents provided and, if necessary, by checking with the appropriate other managers:

- a) that there is a formal contract in respect of which the payment is to be made, that the proposed payee is the correct person to be paid under the contract, and that the payment is in accordance with the contract
- b) that a payment recommendation has been properly completed and signed in accordance with the procedures for payment recommendations

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in Benchmark 14.8 (Contract management) and provides adequate justification for the proposed payment.

### **BM 15.11(2)(b) Approving payments to personnel:**

- A) There is a risk that payments to personnel may be used as a means to embezzle funds from the organisation. For example:
  - a) payments may be made to persons named as employees in personnel records but who in fact are no longer, or have never been, employees
  - b) employees may be overpaid because their names are deliberately duplicated in the personnel records
  - c) employees may be overpaid because their supervisor or the relevant human resources officer (in collusion with the employee) has authorised a payment for the employee that is not due.
- B) To guard against these risks, Benchmark 11.9 provides that accurate personnel records should be kept by an organisation (and Guidance BM 11.9 provides further guidance on this requirement) and Benchmark 15.11(2)(b) provides for the matters that managers should verify before approving payments to personnel.

### **BM 15.11(2)(c): Suspicion of corruption:**

- A) The manager(s) approving payments should be alert to the risk of corruption. For example, the manager who recommended a particular payment may have colluded with the payee (i.e. the business associate or employee due to be paid) to agree that the manager would provide false information in the recommendation and would recommend payment that was not contractually due.
- B) Consequently, the managers approving the payments should not take the payment recommendations at face value, but should scrutinise the recommendations and supporting documentation, and make reasonable further enquiries if they are concerned as to the truth and accuracy of the matters stated or if they identify any other matters which suggest that the recommended payments are suspicious.

## **BM 15.12 Implementing payments:**

Payment implementation is the mechanical act of processing the payment. This is done after the payment approval process has been completed. Payment will be processed by a manager who has the necessary authority to make the payment through the organisation's online banking system, or to send the payment processing documents to the bank. The processes of recommending payment and approving payment have already taken place, as per Benchmarks 14.8 and 15.11. Therefore, the obligation of the manager actually implementing the payment is to

ensure that no payment leaves the organisation unless the correct approvals have been issued, that payment is made to the correct person in the correct amount and at the correct time, and that the payment is made in an appropriate manner and is appropriately recorded, as specified in Benchmark 15.12.

#### References

- i) PEFA (October 2019): Framework for Assessing Public Financial Management: Pillar One (Budget Reliability): PI-23

### BM 15.13 Revenue:

If the measures in Benchmark 15.13 are not properly implemented, the organisation may suffer losses due to bribery, fraud or embezzlement. For example:

- a) a person may buy an asset from the organisation, fail to pay the organisation for it, and then bribe the relevant manager of the organisation to falsely record, in the organisation's accounts, that payment has been received
- b) the buyer could make payment, which is recorded as received, but is then misappropriated by a financial manager.

#### **BM 15.13(2) 'paid into the organisation's legitimate bank accounts':**

This measure is to help prevent misappropriation of the organisation's funds.

Under proper procedures, payment should be made into the organisation's legitimate bank accounts, and money should leave such accounts only if all relevant payment approvals outlined in Benchmark 15.11 have been received.

If a payment is made into a third party account, this itself may be a misappropriation, or even if not (e.g. it may have been paid into that account in error), it may enable a corrupt person to withdraw the payment outside the scope of the organisation's controls.

#### **BM 15.13(3) 'from legitimate persons and for legitimate purposes':**

The organisation should only accept payment into its accounts if the money is from legitimate persons who legitimately owe money to the organisation. This will help to ensure that the organisation's bank accounts are not being used, for example, to harbour proceeds of crime.

#### **BM 15.13(4) 'appropriately recorded in the organisation's accounts'**

The organisation should accurately record the receipt in its accounts. There is then an auditable record of the receipt, which will make stealing this money more difficult to conceal.

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**BM 15.14 Reporting on revenue, debt and expenditure:**

## References

- i) PEFA (October 2019): Framework for Assessing Public Financial Management: Pillar One (Budget Reliability): PI-6, PI-28, PI-29

**BM 15.15 Accounting and auditing systems and related oversight:**

## References

- i) PEFA (October 2019): Framework for Assessing Public Financial Management: Pillar One (Budget Reliability): PI-20, PI-30, PI-31
- ii) Commonwealth Parliamentary Association 2018: 'Recommended Benchmarks for Democratic Legislatures': Sections 7.2.7 to 7.2.9.

**BM 15.16 Communications:**

## References

- i) UNCITRAL Model Law on Procurement (2011), Article 7: This article relates to communications in procurement. Similar principles apply to communications in financial management.

**BM 15.19 Transparency to the public:**

- A) This Benchmark provides that each public sector organisation should proactively provide information in relation to its financial management to the public, in addition to responding to requests for information. This will facilitate the public's understanding of public sector financial management and help the public to monitor each organisation's financial management and hold the organisation to account. It will also help to build public confidence in the public sector and to create a culture in the public sector where the provision of information to the public is part of its regular function.
- B) As it is a public sector organisation, the organisation should comply with Benchmark 10 and thus should have a freely accessible public website on which it publishes information to the public (see Benchmark 10.22). In addition to the information to be published under Benchmark 10.22, the organisation should also publish, on the freely accessible public website, the information specified in this Benchmark 15.19.
- C) **'Save to the extent contrary to the public interest'**: This would include, for example, not disclosing confidential details of ongoing

corruption investigations until the investigations are complete. As per the Benchmarks Definitions, 'public interest' is defined as '*the interests of the public at large as objectively and independently determined*'. The public interest exception would not allow the withholding of information simply because it may be embarrassing to an individual or organisation (e.g. if it shows a failure to manage the organisation's finances appropriately or effectively).

- D) '**promptly**': As far as possible, the public should be given contemporaneous information by the organisation so that the public can monitor financial management as it proceeds. In this way, any ongoing corruption or risk of corrupt activity in public sector financial management may be able to be prevented, or at least identified early.

#### References

- i) PEFA (October 2019): Framework for Assessing Public Financial Management: Pillar One (Budget Reliability): PI-9 and PI-19

# Guidance to Benchmark 16

## Concession management

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### BM 16 Purpose of Benchmark:

There is a significant risk of corruption in relation to the award or management of a concession. For example:

- a) a public official may award a concession to a concession operator in which the public official secretly has a personal interest
- b) a public official, in return for a secret share of the concession output, may award a concession to a concession operator at an undervalue, or impose unduly lenient environmental and safety conditions, or may undervalue the royalty payments to be made by the concession operator to the public sector organisation
- c) the concession operator may fraudulently conceal the true output figures so as to lower the royalty payment due to the government or may conceal safety or environmental breaches. This may be done in collusion with the public sector manager responsible for managing the concession.

### BM 16.1 Regulations:

#### References

- i) EU Directive 2104/23/EU on the Award of Concession Contracts

### BM 16.2 Scope of application:

These concessions are likely to be of high value and to require lengthy negotiations between the public sector organisation awarding the concession and the concession operator, and the concession conditions may vary significantly between different concession agreements. These concessions dealt with under this Benchmark 16 should be distinguished from the issuing of more routine permits by public sector organisations, such as for: (i) planning permission, (ii) compliance with fire, safety, building or environmental regulations, (iii) work permits, (iv) passports and visas, (v) customs clearance. These are separately dealt with under Benchmark 12 (Issuing permits).

### BM 16.3 Concession management personnel:

Concession management personnel include those managers responsible, on behalf of the public sector organisation, for negotiating, valuing, awarding and overseeing the concession; quality, safety and environmental managers and inspectors; personnel responsible for monitoring or approving the quality, quantity or value of the outputs of the concession, and all other personnel involved in the concession management function.

### BM 16.4 Decisions:

- A) **‘Decision’** is defined in the Benchmarks Definitions as including *‘any approval, assessment, certification, confirmation, decision, determination, judgment, recommendation, refusal or rejection’*. This could include, for example, a decision to seek a concession operator to operate a mine, approval of the solicitation documents to be used in the relevant procurement process, approval of the selected concession operator, approval of the level of royalty payment, and certification of the actual quantities produced by the mine.
- B) The provisions of BM 10.14 are designed to ensure that decisions are made by persons of a number, skill and seniority appropriate to the size and corruption risk of the transaction, and who are without conflict of interest.

### BM 16.5 Managing the award of concessions:

**BM 16.5(1)(a) ‘is for a legitimate purpose which is in accordance with the organisation’s objectives’:**

For example:

- a) If the organisation awards a concession to undertake logging in a forest where logging is illegal, then this concession would not be for a legitimate purpose.
- b) If one of the objectives of the Ministry of Mines is to maximise revenue from mining, then the award of a mining concession would be in accordance with the organisation’s objectives.

**BM 16.5(1)(b) ‘is permitted by the organisation’s budgetary requirements’:**

Benchmark 15.5(4) provides that: *‘The budget should identify the categories of revenue, debt and expenditure, and the major items of expenditure, for each*

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*sub-national government, government department and public sector organisation.* Thus, the budget should specifically anticipate the award of a concession contract, allow for the anticipated revenue and expenditure in connection with such award, and go through the proper budgetary approval process (Benchmark 15.5(6)). A concession should not be awarded unless it is permitted by the budget. This is an added control, which helps avoid improper awards.

### **BM 16.5(1)(c) ‘will provide value for money for the organisation’:**

For example, if the State could achieve significantly greater revenue from a mine if it mined it itself rather than by awarding a mining concession to a private sector operator, then the award would not provide value for money.

### **BM 16.5(1)(d) ‘is to a legitimate concession operator...’:**

For example, a concession may be corruptly awarded to a shell company owned by government officials who may then subcontract the concession to a genuine operator and improperly take a large share of the royalties from the concession. The shell company would not be a legitimate operator with the necessary resources and skills, and so should not be awarded the concession.

### **BM 16.5(1)(e) ‘is at arm’s length and on market terms and conditions’:**

In order to help ensure that the concession is awarded at arm’s length and on market terms and conditions, the organisation should take the following verification steps prior to entering into any concession agreement:

- a) obtain confirmation from an independent and appropriately skilled person that the proposed terms and conditions of the concession, such as amount of any advance payment, fee or royalties, output, duration, safety, environmental, quality and human rights requirements, and other contractual terms and conditions, are appropriate for the organisation and the organisation’s State, and are in accordance with market norms.
- b) verify that no intermediary or third party is obtaining a fee or commission in respect of the award of the concession unless:
  - i) the intermediary or third party is:
    - providing genuine, necessary and legitimate services in relation to the concession
    - not directly or indirectly connected to a public official
  - ii) the fee or commission is reasonable and proportionate to the actual legitimate services carried out by the intermediary or third party in relation to the concession.

**BM 16.5(1)(f) ‘is by way of contract awarded pursuant to a procurement process carried out in accordance with Benchmark 13 (Procurement)’:**

It is likely that the risk of corruption will be reduced, and better value for money achieved, if concession operators are procured through a competitive process involving several potential concession operators rather than through direct negotiation with one concession operator. Therefore, a concession should only be awarded pursuant to a procurement process in accordance with Benchmark 13 (Procurement).

**BM 16.5(1)(g) ‘is approved in accordance with the decision-making procedures in Benchmark 10.14 (Public sector organisations)’:**

The provisions of BM 10.14 are designed to ensure that decisions are made by persons of a number, skill and seniority appropriate to the size and corruption risk of the transaction, and who are without conflict of interest.

**BM 16.5(1)(h) ‘requires the concession operator to publish to the public (i) details of all revenue received in relation to the concession, and (ii) all payments made by the operator in connection with the concession to the government, to any public sector organisation or public official, or to any organisation or individual connected with a public official’:**

- A) Concession contracts are reputed to be a significant corruption risk. See examples in BM 16 above.
- B) It is accordingly good practice for the concession operator to be required to publish to the public (i) details of all revenues received in relation to the concession, and (ii) all amounts paid by the operator in connection with the concession to the government, to any public sector organisation or public official, or to any organisation or individual connected with a public official.
- C) The public sector organisation receiving any such payments would be required to:
  - a) account for these receipts and publish its accounts under Benchmark 15.15
  - b) have these receipts audited under Benchmark 16.9
  - c) publish these receipts to the public under Benchmark 16.11.
- D) The disclosures to the public in (B) and (C) above are required to be made, under Benchmark 16.11, together with the full concession contract. This should enable the public to compare the declared payments by the concession operator, the declared receipts by the public sector organisation, and the payments due to be made under the concession contract.

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### **BM 16.5(2) ‘Public official(s) should have no direct or indirect personal interest in the concession and should not receive directly or indirectly any income in relation to the concession.’:**

This restriction is designed to avoid any conflict of interest, which could arise if a public official has an interest in a concession or a concession operator. The restriction in Benchmark 16.5(2) should not prohibit a public official from indirectly holding a minority shareholding in the concession operator by reason of the public official having an investment in a publicly available investment fund which invests in numerous organisations including the concession operator (e.g. if the concession operator is listed on a stock exchange, and the investment fund invests in numerous listed companies).

### **BM 16.5(3) ‘A legal entity should not be interposed between the organisation awarding the concession and the actual concession operator unless such entity is necessary to ensure the successful and legitimate financing or operation of the concession.’:**

- A) A corrupt public official may use this as a mechanism to divert concession revenue. For example, corrupt public officials may arrange for the public sector organisation to award a concession to a separate legal entity wholly or partly owned by them, which then sub-awards the concession to the organisation which will actually operate the concession. This interposed company will have no skill or resources to operate the concession and its only purpose will be to take a share of the royalties received from the concession operator before passing the balance to the public sector organisation. In other words, this interposed company would simply be a device designed to corruptly extract revenue from the concession. This structure is prohibited by Benchmark 16.5(3), as the interposed entity is not ‘necessary to ensure the successful and legitimate financing or operation of the concession.’
- B) It may be legitimate to interpose an entity where, for example, this entity is 50 per cent owned by the State and 50 per cent owned by a legitimate investment fund, and where the State and the investment fund are each putting in 50 per cent of the capital investment and taking 50 per cent of the risk.
- C) If a legal entity is legitimately interposed between the organisation and the concession operator, then the requirements in this Benchmark which apply in relation to the concession operator should apply in relation to both the concession operator and the interposed entity. The interposition should not allow for the diminishing of any of the requirements of Benchmark 16 in relation to either the interposed entity or the actual concession operator.

## BM 16.11 Transparency to the public:

- A) This Benchmark provides that each public sector organisation should proactively provide information in relation to its concession contracts to the public, in addition to responding to requests for information. This will facilitate the public's understanding of public sector concessions and help the public to monitor each organisation's concessions (above a prescribed value threshold) and to hold the organisation to account. It will also help to build public confidence in the public sector and to create a culture in the public sector where the provision of information to the public is part of its regular function.
- B) As it is a public sector organisation, the organisation should comply with Benchmark 10 and thus should have a freely accessible public website on which it publishes information to the public (see Benchmark 10.22). In addition to the information to be published under Benchmark 10.22, the organisation should also publish, on the freely accessible public website, the information specified in this Benchmark 16.11.
- C) **'Save to the extent contrary to the public interest'**: This would include, for example, not disclosing confidential details of ongoing corruption investigations until the investigations are complete. As per the Benchmarks Definitions, 'public interest' is defined as *'the interests of the public at large as objectively and independently determined'*. The public interest exception would not allow the withholding of information simply because it may be embarrassing to an individual or organisation (e.g. if it shows a failure to manage a concession contract appropriately or effectively).
- D) **'promptly'**: As far as possible, the public should be given contemporaneous information by the organisation so that the public can monitor concession management as it proceeds. In this way, any ongoing corruption or risk of corrupt activity in the organisation's concession management may be able to be prevented, or at least identified early.

### **BM 16.11(1)(a) (ii) The Benchmark provides for disclosure in relation to 'the organisation's concession contracts above a prescribed value threshold':**

- A) This value threshold should be set as low as is reasonable, so as to maximise the number of contracts for which information is made available to the public, but should not be so low as to capture very low value contracts, thereby imposing an unreasonable bureaucratic burden. The disclosure requirements for contracts above the value threshold are as stated in BM 16.11.
- B) While the Benchmark specifies disclosure of information only in relation to contracts over the prescribed value threshold, the organisation may also choose, as a matter of good practice and maximum transparency, to

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disclose information in relation to contracts under this threshold. The level of detail is likely to be far less than in relation to contracts over the value threshold. These smaller contract details could be aggregated and disclosure by the organisation could, for example, include the following information disclosed annually in relation to these smaller value contracts:

- a) the cumulative value of contracts awarded by the organisation, by category of type of contract
- b) the cumulative value of payments made and revenue received by the organisation, by category of type of contract
- c) the names of the concession operators awarded these contracts.

**BM 16.11(2)(b) ‘identities and legal and beneficial ownership of all parties to the concession contract and of their sub-suppliers whose contracts are above a prescribed value threshold (Benchmarks 13.17(2)(b) and 13.17(4))’:**

- A) **Where a party is an individual:** the individual’s name, nationality, State of residence and address should be disclosed. As these are individuals, disclosure of legal and beneficial ownership will not be relevant.
- B) **Where a party is an organisation:** The following should be disclosed:
  - a) the organisation’s name, identity number, date of incorporation, place of incorporation and address
  - b) details of each legal and beneficial owner of the organisation, as required in Benchmark 8.4 (Transparency of asset ownership).

**BM 16.11(2)(c) ‘information in relation to the procurement process for the concession contract’:**

This information should already have been disclosed as part of the procurement process in accordance with the transparency requirements of Benchmark 13.34. It includes details of the procurement process, the solicitation documents, the outcome of the evaluation, the procurement report, the procurement audit report, the independent monitor’s report, and other details as specified in Benchmark 13.34. This information should continue to be available on the organisation’s public website throughout the operation of the concession contract, and after completion of the contract.

**BM 16.11(2)(e) ‘ongoing information, on at least an annual basis, as to the concession contract, contract progress, expenditure by the organisation in relation to the concession, revenue received by the organisation in relation to the concession, and material contract modifications and their time and cost implications’:**

This information should include:

- a) a summary of information regarding the concession contract, including location, description and purpose

- b) information as to the performance and progress of the concession contract including:
  - i) output, production, users, or equivalent data depending on the nature of the concession
  - ii) the contractual programme, any changes to that programme, reasons for the changes, the modified programme(s), whether the programme is being met, and if not, the reasons for this
- c) expenditure by the organisation in relation to the concession, including, for example, fees, costs, or provision of facilities or infrastructure for the concession. Explanation and reasons should be given as to any differences between the anticipated expenditure under the concession contract and the actual expenditure
- d) revenue received by the organisation and by any interposed entities in relation to the concession, including, for example, tolls, royalties, fees, commissions, dividends or other revenue. Explanation and reasons should be given as to any differences between anticipated revenue under the concession contract and the actual revenue
- e) any claims agreed, including in relation to additional costs or delay
- f) any modifications to or under the concession contract, including in relation to pricing, payment terms, specification, quantities, quality, programme, or to other contract terms and conditions, and the reasons for and consequences of such modifications.

**BM 16.11(2)(f) 'a summary of the outcomes of the concession contract':**

This information should include:

- a) cumulative output, production, users, or equivalent data depending on the nature of the concession, whether this was more or less than anticipated under the concession contract, and if so, the reasons for such difference
- b) the total expenditure by the organisation in relation to the concession. Explanation and reasons should be given as to any differences between the anticipated total expenditure under the concession contract and the actual total expenditure
- c) the total revenue received by the organisation and by any interposed entities in relation to the concession. Explanation and reasons should be given as to any differences between anticipated total revenue under the concession contract and the actual total revenue
- d) the date of completion, whether completion was different from the original concession completion date, and if so, the reasons for such difference
- e) any claims agreed, including in relation to additional costs or delay

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- f) any modifications to or under the concession contract, including in relation to pricing, payment terms, specification, quantities, quality, programme, or to other contract terms and conditions, and the reasons for and consequences of such modifications
- g) any defects or deficiencies in performance
- h) whether there are or have been any major disputes in relation to the concession, and if so, how these are being addressed, and the outcome of any such disputes.

### **BM 16.11(3) ‘Information to be provided by the concession operator’:**

The concession operator should promptly publish the following information:

- a) All revenue received by the concession operator in relation to the concession. Depending on the nature of the concession, this would include any revenue received by the concession operator from:
  - i) sales of the product of the concession (such as oil, gas, minerals), or revenue from the use of the concession (such as toll road fees from users)
  - ii) any royalties or payments received from a sub-licence or sale of the concession operator’s rights
  - iii) the government or public sector body in relation to the concession (such as subsidies).
- b) All payments made by the concession operator in relation to the concession to each of: the government, any public sector organisation or public official, or any organisation or individual connected with a public official. This would include:
  - i) fees paid to obtain the concession
  - ii) any share of concession revenue, royalties, fees, commissions or dividends, paid during the operation of the concession
  - iii) fees or commissions paid to an intermediary in relation to the award, operation or transfer of the concession.
- c) Where an entity has been interposed between the organisation and the concession operator, the equivalent information in (a) and (b) above should also be provided:
  - i) by the interposed entity
  - ii) by the concession operator in relation to the interposed entity.

### References

- i) Publish What You Pay
- ii) Extractive Industries Transparency Initiative

# Guidance to Benchmark 17

## Asset management

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### BM 17 Purpose of Benchmark:

There is a significant risk of corruption in relation to the purchase, management and sale of public sector assets. For example:

- a) A public official overseeing the sale of the whole or part of the business of, or a building owned by, a state-owned enterprise could ensure, in return for a bribe, that the sale is made to a specific buyer at an undervalue.
- b) A public official could ensure that the organisation purchases an asset from the public official at an overvalue or sells an asset to the public official at an undervalue.
- c) A public official, in return for a bribe, could ensure that the organisation places a contract for the maintenance, repair or insurance of an asset with the company paying the bribe.

### BM 17.1 Regulations:

#### References

- i) PI-12: PEFA Framework for Assessing Public Financial Management 2016

### BM 17.2 Scope of application:

- A) The asset management regulations should apply to the purchase, management and sale of all public sector assets.
- B) The asset management regulations may specify comprehensive purchase, management and sale procedures for assets above a prescribed value threshold(s), and simpler procedures for assets below a prescribed value threshold(s). Such value thresholds should be set at a level which maximises the number of assets for which the comprehensive procedures should apply but should not be so low as to capture very low value assets, thereby imposing an unreasonable bureaucratic burden.
- C) The asset management regulations may have specific exceptions which allow an expedited or simplified procedure in specified emergency circumstances, for example in cases of serious risk to essential national

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security, public health or public safety. It is important that these exceptions are controlled so as to prevent abuse for corrupt purposes. An example of abuse is using an exception purportedly on the grounds of national security, public health or public safety but where no such ground genuinely exists.

- D) An example of proper use of the exception would be where there is an emergency caused by a flood when a river breaks its banks after heavy rainfall. The water is rising rapidly. There is an imminent risk to property and possibly lives. Pumps are urgently needed. There is no time to use a competitive tender process. Instead, the organisation uses single-source procurement to purchase the pumps from the nearest pump supplier who has sufficient stock. In this case, use of single-source procurement may be justified. However, even in such a case, this should not mean that the organisation is committed to pay whatever the pump supplier demands. The organisation, prior to payment to the supplier, should take reasonable steps to ensure that the pump supplier was not unreasonably taking advantage of and profiteering from the emergency (i.e. the sale should be at an objectively reasonable price). In cases where an exception is used, the process should be audited to ensure that the exception and its terms were justified and acceptable in the circumstances.

### BM 17.3 Asset management personnel:

Asset management personnel include building managers, plant managers, maintenance technicians, accountants, asset administrative personnel and all other personnel involved in the asset management function on behalf of the public sector organisation.

### BM 17.4 Decisions:

- A) '**Decision**' is defined in the Benchmarks Definitions as including '*any approval, assessment, certification, confirmation, decision, determination, judgment, recommendation, refusal or rejection*'. This could include, for example, approval of the purchase or sale of an asset, or of the terms and conditions of the purchase or sale agreement, or of the manner in which the asset may be used, maintained, repaired and insured, and recommendation of payment to the seller of the asset.
- B) The provisions of BM 10.14 are designed to ensure that decisions are made by persons of a number, skill and seniority appropriate to the size and corruption risk of the transaction, and who are without conflict of interest.

## BM 17.5 Purchase of an asset:

In order to reduce the risk of assets being purchased for corrupt reasons, there are a number of tests, as listed in Benchmark 17.5, which the proposed purchase of an asset should satisfy prior to the purchase of the asset being approved and implemented.

### **BM 17.5(1) ‘is for a legitimate purpose which is in accordance with the organisation’s objectives’:**

For example, if the objective of the organisation is to provide health services to the public, then purchasing assets for use in the organisation’s hospitals, such as scanning machines, etc., would be a legitimate purpose in accordance with the organisation’s objectives. Purchasing a recreational yacht for senior personnel of the organisation would not be.

### **BM 17.5(2) ‘is necessary for the organisation to be able to achieve that purpose’:**

For example, if the organisation only has a need, for the foreseeable future, of one scanning machine for its hospital, it is not necessary to purchase five machines, and leave four in long-term storage. Over-supply is often due to collusion between a procurement manager and the relevant supplier.

### **BM 17.5(3) ‘is permitted by the organisation’s budgetary requirements’:**

Benchmark 15.5(4) provides that: *‘The budget should identify the categories of revenue, debt and expenditure, and the major items of expenditure, for each sub-national government, government department and public sector organisation.’* Thus, the budget should specifically anticipate the assets which the organisation plans to purchase during that budget period, with consequent permitted amounts, and should go through the proper budgetary approval process (Benchmark 15.5(6)). An asset should not be purchased by the organisation unless it is permitted by the budget. This is an added control, which helps avoid improper purchases.

### **BM 17.5(4) ‘will provide value for money for the organisation’:**

For example, if an objective value for money analysis shows that it is cheaper to hire an item of equipment for the required period and then off-hire it, rather than purchase and sell the equipment, the organisation should not purchase such equipment, as this would not provide value for money.

### **BM 17.5(5) ‘is at arm’s length and on market terms and conditions’:**

- A) The organisation should not approve any purchase of an asset unless it is purchased on an arm’s length basis and on market terms and conditions. For example, a contract to purchase an asset from a manager of the

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organisation on conditions unduly favourable to the manager would not be at arm's length or on market terms and conditions.

- B) To help ensure that any expenditure is at arm's length and on market terms and conditions, all purchases should be made through the organisation's procurement process (Benchmark 13). This is in any event a Benchmark requirement (see BM 17.5(6)) below.
- C) In addition, the organisation should take the following verification steps prior to entering into any purchase obligation in relation to an asset over a prescribed value threshold:
  - a) obtain at least one independent valuation of the market value of the asset (and more than one valuation in the case of an asset over a prescribed higher value threshold)
  - b) ensure that if the seller of the asset is connected with any public official, the public official has no role in agreeing or influencing the purchase price on behalf of the organisation, and is not receiving any improper benefit from the purchase
  - c) ensure that any fee or commission paid to an intermediary in relation to the purchase:
    - i) is a genuine arm's length and market value fee or commission customarily paid in such circumstances
    - ii) is not paid directly or indirectly to any public official.

### **BM 17.5(6) 'is by way of contract awarded pursuant to a procurement process in accordance with Benchmark 13 (Procurement)'**

It is likely that the risk of corruption will be reduced, and better value for money achieved, if assets are procured through a competitive process involving several potential sellers rather than through direct negotiation with one seller. Therefore, all assets should be purchased only in accordance with Benchmark 13 (Procurement).

### **BM 17.5(7) 'in the case of the purchase of an asset requiring expenditure over a prescribed value threshold, the purchase has been justified by a written and objective needs assessment, technical assessment, and value for money assessment provided by a suitably skilled and independent third party'**

For example, a manager of the organisation may corruptly recommend to the Board that the organisation purchases a building. The seller of the building may be secretly connected with the manager. The manager may exaggerate the benefits of buying the building. Consequently, in order to limit the corruption risk, all planned purchases of assets which would require expenditure over a prescribed value threshold should be shown to be justified by a written and objective needs assessment, technical assessment, and value for money assessment. The technical

assessment should assess whether the asset being purchased meets the organisation's technical requirements. The value for money assessment should assess the cost of the asset against its benefits and whether, overall, the asset is worth buying, and is likely to include an independent valuation. These assessments should as far as possible be carried out by persons who are independent of the organisation's management and who have a reputation for integrity.

**BM 17.5(8) 'is approved in accordance with the decision-making procedures in Benchmark 10.14 (Public sector organisations)':**

The provisions of BM 10.14 are designed to ensure that decisions are made by persons of a number, skill and seniority appropriate to the size and corruption risk of the transaction, and who are without conflict of interest.

## **BM 17.7 Sale of an asset:**

In order to reduce the risk of public sector assets being sold for corrupt reasons, there are a number of tests, as listed in Benchmark 17.7, which the proposed sale of an asset should satisfy prior to the sale of the asset being approved and implemented.

**BM 17.7(1) 'has a legitimate reason':**

For example, it would be legitimate to sell an asset if the asset is no longer needed by the organisation and is unlikely to be needed in the future. It would not be legitimate to sell an asset simply because a public official or donor to the ruling political party wants to buy it.

**BM 17.7(2) 'will provide value for money for the organisation':**

For example, if the total cost to the organisation of owning, maintaining and insuring an item of equipment is higher than the total cost of hiring equivalent equipment whenever needed, it would provide value for money to sell the asset.

**BM 17.7(3) 'is at arm's length and on market terms and conditions':**

So as to ensure that the contract of sale is at arm's length and on market terms and conditions, the organisation should take equivalent steps in relation to the sale as it takes in relation to a purchase under Guidance BM 17.5(5) above.

**BM 17.7(4) 'is by way of a contract awarded, as far as appropriate, in accordance with Benchmark 13 (Procurement)':**

It is likely that the risk of corruption will be reduced, and better value for money achieved, if buyers of assets are procured through a competitive process involving

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several potential buyers rather than through direct negotiation with one buyer. Therefore, all assets should only be sold in accordance with the applicable principles of Benchmark 13 (Procurement). For example, the organisation should publish a specification which lists the nature of the asset being sold, and should publicly call for interested buyers to submit an offer to buy within a specified period and on specified terms and conditions. The offering buyers will then be evaluated, and the buyer with the best evaluated offer would be selected to buy the asset. Alternatively, the asset could be sold through a public auction, where sufficient notice to the public is given of the auction taking place so as to maximise transparency and competition.

### **BM 17.7(5) ‘is approved in accordance with the decision-making procedures in Benchmark 10.14 (Public sector organisations)’:**

The provisions of BM 10.14 are designed to ensure that decisions are made by persons of a number, skill and seniority appropriate to the size and corruption risk of the transaction, and who are without conflict of interest.

## **BM 17.9 Register of assets:**

- A) Assets owned by public sector organisations are effectively assets indirectly owned by the public. Therefore, the public should have a right to know what assets are owned by public sector organisations, and how these assets are being purchased, managed and sold. Publication of these details reduces the risk of corruption in relation to the sale, purchase and management of assets.
- B) The value threshold for the register of assets should be set at a level which includes all significant assets by value and in respect of which it is reasonable, from an administrative perspective, to publish the specified information. The value should be as low as is reasonable, so as to maximise the amount of information available to the public, but should not be so low as to capture very low value assets, thereby imposing an unreasonable bureaucratic burden.
- C) The register of assets should show the following information in relation to all public sector assets over the specified value threshold:
  - a) the identity of the asset
  - b) date of purchase
  - c) purchase price
  - d) name of seller
  - e) any commissions or fees paid to third parties in relation to the purchase

- f) date of sale
- g) sale price
- h) name of purchaser
- i) any commissions or fees paid to third parties in relation to the sale.

### BM 17.13 Transparency to the public:

- A) This Benchmark provides that each public sector organisation should proactively provide information in relation to the sale, purchase and management of its assets to the public, in addition to responding to requests for information. This will facilitate the public's understanding of public sector asset management and help the public to monitor the sale, purchase and management of the organisation's assets and hold the organisation to account. It will also help to build public confidence in the public sector and create a culture in the public sector where the provision of information to the public is part of its regular function.
- B) As it is a public sector organisation, the organisation should comply with Benchmark 10 and thus should have a freely accessible public website on which it publishes information to the public (see Benchmark 10.22). In addition to the information to be published under Benchmark 10.22, the organisation should also publish, on the freely accessible public website, the information specified in this Benchmark 17.13.
- C) **'Save to the extent contrary to the public interest'**: This would include, for example, not disclosing confidential details of ongoing corruption investigations until the investigations are complete. As per the Benchmarks Definitions, 'public interest' is defined as *'the interests of the public at large as objectively and independently determined'*. The public interest exception would not allow the withholding of information simply because it may be embarrassing to an individual or organisation (e.g. if it shows a failure to manage a process appropriately or effectively).
- D) **'promptly'**: As far as possible, the public should be given contemporaneous information by the organisation so that the public can monitor the asset management as it proceeds. In this way, any ongoing corruption or risk of corrupt activity in the organisation's purchase, sale or management of assets may be able to be prevented, or at least identified early.

#### **BM 17.13(1)(a)(ii) The Benchmark provides for disclosure in relation to 'the organisation's contracts for the purchase, management and sale of assets above a prescribed value threshold':**

- A) This value threshold should be set so that disclosure is required of:

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- a) all significant asset purchases and sales, and
- b) the purchase and sale of large numbers of low value assets whose cumulative value is above the threshold.

The value threshold should be as low as is reasonable so as to maximise the number of assets in respect of which information is made available to the public, but should not be so low as to capture very low value assets, thereby imposing an unreasonable bureaucratic burden.

- B) The disclosure requirements for contracts for the purchase, management and sale of assets above the value threshold are as stated in Benchmark 17.13. Note that the value threshold for disclosure in Benchmark 17.13(1) may be higher than the value threshold for registration of an asset on the asset register (Benchmark 17.9). The asset registration requirements in Benchmark 17.9 are likely to be a simpler administrative task than the disclosure requirements in Benchmark 17.13.

### **BM 17.13(2)(b) ‘identities and legal and beneficial ownership of all parties to the contract (Benchmark 13.17(2)(b))’:**

- A) **Where a party is an individual:** the individual’s name, nationality, State of residence and address should be disclosed. As these are individuals, disclosure of legal and beneficial ownership will not be relevant.
- B) **Where a party is an organisation:** The following should be disclosed:
  - a) the organisation’s name, identity number, date of incorporation, place of incorporation and address
  - b) details of each legal and beneficial owner of the organisation, as required in Benchmark 8.4 (Transparency of asset ownership).

### **BM 17.13(2)(c) ‘information in relation to the procurement process relating to the contract’:**

This information should already have been disclosed as part of the procurement process in accordance with the transparency requirements of Benchmark 13.34. This information should continue to be available on the organisation’s public website throughout the ownership by the organisation of the asset and after sale of the asset.

### **BM 17.13(2)(e) ‘a statement of the legitimate purpose for the purchase or sale of the asset (Benchmark 17.5(1) and 17.7(1))’:**

This statement should be a brief statement of the legitimate purpose; for example, that the purpose of selling equipment was that it was no longer needed by the organisation, or that the purpose of purchasing a building was as an office for the organisation’s personnel.

**BM 17.13(2)(g) ‘a summary of the outcomes of the contract ...’:**

This is likely to include the following information:

- a) information as to the outcome of the contract (i.e. was the contract for sale or purchase of the asset fully and successfully completed as originally intended, and if not, the reasons for and consequences of any change or outcome)
- b) the final total amount paid by the organisation in respect of the contract, whether this was different from the anticipated amount to be paid under the contract, and if so, the reasons for such difference
- c) the final total amount received by the organisation in respect of the contract, whether this was different from the anticipated amount to be received under the contract, and if so, the reasons for such difference
- d) the date of completion of the sale or purchase, whether completion was delayed beyond the contract completion date, and if so, the reasons for such delay
- e) any modifications to or under the contract, including in relation to price, payment terms, specification, quantities, or to other contract terms and conditions, and the reasons for and consequences of such modifications
- f) any claims agreed, including in relation to additional costs or delay
- g) any defects in the assets purchased or sold
- h) whether there are or have been any major disputes in relation to the sale or purchase contract and, if so, how these have been or are being addressed, and the outcome of any such disputes.

# Guidance to Benchmark 18

## Independent monitoring

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### BM 18 Purpose of Benchmark:

- A) Independent monitoring is the process by which a person who is independent of all the participants in a contract, and who has suitable skills and experience, monitors a contract throughout its life cycle in order to detect and deter corruption. Where the monitor identifies reasonable grounds to suspect corruption, the monitor should have a duty to report such suspicions to the law enforcement authorities. The presence of a monitor will also provide a significant deterrent against corruption if the contract participants are aware that the project is being effectively monitored and that any suspected corruption will be investigated and reported to the law enforcement authorities. As such, monitoring can be a powerful anti-corruption tool.
- B) Monitoring of contracts for corruption under this Benchmark 18 differs from auditing of contracts for corruption under Benchmark 19 in that a monitor is appointed for the duration of a contract in order to observe activities on an ongoing basis, from procurement through to completion of the contract and final payment. This can deter corrupt practices from taking place due to the observation of the process and can identify a corrupt practice as it occurs, or shortly afterwards, thus enabling prompt preventive or remedial action to be taken. In contrast, an auditor's appointment is limited to the specific audit, and the audit is normally undertaken upon completion of an activity (e.g. a financial audit at year end, or a technical audit upon completion of installation of equipment). As a result, it is more difficult for an audit to identify or prevent a corrupt act than if the issue was contemporaneously identified by a monitor. The roles of monitor and auditor are complementary. If the monitor suspects some corrupt conduct, the monitor could, for example, call in a specialist financial or technical auditor to audit specific aspects.
- C) The types of corruption which a monitor may prevent or identify can take place throughout the contract cycle and could, for example, include:
- a) **In the procurement process:**
    - i) corrupt selection of single-source procurement as the procurement method so as to enable the contract to be awarded to a favoured supplier

- ii) restricting transparency of the procurement so as to conceal from the public the corrupt selection of a supplier and over-pricing of the contract
  - iii) use of qualifying or evaluation criteria that deliberately favour a particular supplier
  - iv) allowing negotiations when these are not appropriate and when they are being used to favour a particular supplier
  - v) communicating information to a supplier to give it an advantage in the procurement process
  - vi) collusion by suppliers to rig the bidding process
  - vii) see also the factors listed in Guidance BM 13.31(3), paragraph (D). These relate equally to monitoring as to auditing of a procurement process.
- b) **During contract performance:**
- i) bribes paid by a supplier to a contract manager to agree an improper contract modification
  - ii) bribes paid by a contractor to conceal defective work or obtain additional payment
  - iii) bribes demanded by a public official from a supplier in order to issue certificates or payment approvals which are properly due
  - iv) false claims made by a supplier.

#### References

- i) PI-11.4: PEFA Framework for Assessing Public Financial Management 2016

## BM 18.2 Requirement for monitoring:

- A) The independent monitor should monitor all contracts between public sector organisations and business associates over a prescribed value threshold. This would include:
  - a) contracts with suppliers for the supply of works, products, services, loans, assets, and operation of concessions
  - b) contracts with other business associates such as:
    - joint venture partners
    - customers (such as where the public sector organisation is a utility)
    - clients (such as where the public sector organisation is a state-owned contractor).

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- B) The regulations should determine the threshold over which contracts would require monitoring. This threshold should be set as low as is reasonable, so as to maximise the number of contracts which are monitored, but should not be so low as to capture very low value contracts, thereby imposing an unreasonable bureaucratic burden. The intention should be that any project in respect of which significant public funds could be lost due to corruption is monitored. In this case, the cost of monitoring would be highly likely to be offset by the savings resulting from reduced corruption.

### BM 18.4 Selection, appointment, qualification and termination:

- A) The selection of the monitor (the process of choosing the monitor) is a separate issue from the appointment (the process of contracting and paying the monitor).
- B) Benchmark 18.4 specifies that the selection should always be by an independent body.
- C) While the Benchmark allows the monitor to be appointed either by an independent body or by the organisation, greater independence would be assured if the monitor was appointed by an independent body. If the monitor is appointed by the body whose projects are being monitored, this creates the risk of improper influence on the monitor, and the monitor may be inclined not to report corruption as she or he would fear that reporting corruption would prevent a future appointment (this risk is reduced if the selection is always by an independent body).
- D) The independent body which selects, and may appoint, the monitor should be a reputable independent institution, such as a professional institution or an independent body set up for this purpose.
- E) The monitor could be one individual or, for very large projects, could be a team of monitors.
- F) The monitor should be suitably skilled so as to be able to monitor the project in question. Therefore, for example, a road building project should be monitored by a person who has experience in road construction. If the monitor has no experience of the type of work in question, it will be easier for corrupt persons to deceive the monitor.
- G) It is an obvious risk that if the independent monitor uncovers corruption, she or he could be bribed or threatened by the defaulting party not to reveal the corruption. This risk can be minimised, but not entirely avoided.
  - a) The bribery risk to the monitor can be minimised by ensuring that the monitor is a person of known integrity, and is a member of a

professional institution or business association which maintains the highest ethical standards, and which has strict disciplinary procedures.

- b) The risk of personal danger to the monitor can be minimised by rapid and routine disclosure by the monitor of her/his findings to all related parties. Threats are normally designed to prevent information from being published. Once the information has been published, the threats become less effective.

## BM 18.5 Scope of monitoring:

Corruption can take place at any stage of the contract cycle. If one process (e.g. procurement) is well controlled, and other aspects (e.g. contract management) are less well controlled, then the risk is that corruption will be displaced from the procurement stage to the contract management stage. It is therefore essential that all stages of the contract are effectively monitored.

### **BM 18.5(3) ‘there is no conflict of interest in respect of the business associate with whom the contract is to be made’:**

- A) In relation to each contract, the independent monitor should assess whether there is any conflict of interest; namely, whether there is any connection between: (i) the business associate with whom the contract may be made (or its major sub-suppliers, if any, under the proposed contract) and (ii) any person who could influence the outcome of the procurement, the terms of the awarded contract, and/or the performance of the contract.
- B) For example, this could be where the business associate or one of its major sub-suppliers under the proposed contract is wholly or partly owned by:
  - a) a public official or a spouse, relative or close associate of a public official, who is in a position to improperly influence the procurement process or the approval of contract claims or payments
  - b) a person who has made significant donations to the ruling political party and so may be granted public sector contracts in return, possibly at inflated prices.
- C) Where contracts are for the supply of works, products, services, loans, assets, or the operation of a concession, this conflict of interest check is required to be made as part of the qualification process under Benchmark 13.17 (Procurement). So the monitor could assess for conflict of interest as part of the overall monitoring of the procurement process for these contracts (as required under Benchmark 18.5(4)).

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- D) For other contracts which are not for the supply of works, products, services, loans, assets, or the operation of a concession (for example, joint venture contracts), the monitor should check for such conflict of interest, including by checking the following:
- a) Legal and beneficial ownership of the business associate (and its major sub-suppliers, if any, under the proposed contract): This check may show that the business associate or major sub-supplier is owned by a person who is in a position to improperly influence the contract. This check will be facilitated where a register of ownership is available, as required under Benchmark 8.3 (Transparency of asset ownership). Where there is no such register, the independent monitor should make relevant enquiries at the companies' registry, with any necessary authorisations to be provided by the business associate or major sub-supplier.
  - b) The donations made by the business associate (and its major sub-suppliers, if any, under the proposed contract) to political parties or candidates: This check may show whether the business associate or any major sub-supplier has made donations to a party or individual who is in a position to improperly influence the contract. This check will be facilitated where a register of donations is available as required under Benchmark 9.7(6) (Political lobbying, financing, spending and elections).
  - c) The conflict of interest disclosures held by the organisation in relation to its personnel (Benchmark 11.13 (Public officials)): The disclosures made under Benchmark 11.13 by the public officials involved in or with any authority or influence over the particular contract should be checked to see whether they show any connection with the business associate or with any of its major sub-suppliers, if any, under the proposed contract.

### **BM 18.5(5) –(6) Monitoring contract management and contract performance**

- A) In monitoring for indications of corruption, the independent monitor should assess whether:
  - a) contract management by the public sector organisation has been conducted in accordance with Benchmarks 14, 16 or 17 (as appropriate to the type of contract) and without corruption
  - b) contract performance has been carried out in accordance with the contract obligations and without corruption.
- B) Some examples of corruption in contract management and/or contract performance are as follows:

- a) public officials may demand bribes in order to provide routine permits or approval of contract works or payments
- b) suppliers may bribe public officials or private sector consultants to provide permits or approvals that are not due or to ignore shortcomings in the works, products or services. Such bribes may be substantial and may have serious consequences with regard to health and safety (e.g. where fire safety approval is provided for a building covered in highly inflammable cladding)
- c) a contractor may try to defraud the public sector organisation by:
  - concealing defects
  - submitting fraudulent claims
- d) a supplier may bribe or collude with the contract manager of the public sector organisation so as to facilitate approval and payment in relation to:
  - defective works, products or services
  - improper modifications to or under the contract
  - fraudulent claims.
- e) a concession operator may collude with a senior public official to modify the terms of the concession so that the concession operator is able to retain more revenue in exchange for sharing the additional profit with the public official.

### BM 18.6 Timing of monitoring:

- A) On a major contract, the monitor may assess all significant activities throughout the contract, as listed in Benchmark 18.5. On smaller contracts, the monitor may select, by sample, the activities to monitor. The monitor should not reveal the selected sample in advance, so that the contract parties do not know which of the activities will be part of the sample.
- B) Projects which are both high value and have a high corruption risk should preferably have a full-time monitor(s). Other projects may have a part-time monitor. One monitor could monitor several smaller projects.

### BM 18.7 Access:

The organisation's contracts with business associates should require the business associate, and its major sub-suppliers, to give the independent monitor unhindered access as specified in Benchmark 18.7, insofar as these relate to the relevant contract.

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### **BM 18.8 Resources:**

The monitor will require adequate resources to be able to carry out the monitoring role effectively. For example, the monitor may need to be given access to a desk and computer for her/his use and be provided with transportation to and from the relevant premises and sites.

### **BM 18.9 Investigating and reporting corruption:**

The investigative role of the independent monitor is not the same as that of the law enforcement authorities. If the monitor identifies, or receives a report of, suspicious or potentially corrupt conduct, the monitor should undertake sufficient preliminary enquiries so as to identify whether or not there are reasonable grounds to suspect possible corrupt activity. If there are such grounds, then the monitor should not investigate any further, but should report her/his findings to the law enforcement authorities for detailed investigation. She/he should also send such report to the audit committee of the organisation, and to the appointing body (if different to the organisation). The circumstances identified by the monitor, and the actions taken, should be included in the monitoring report referred to in Benchmark 18.10.

### **BM 18.10 Record-keeping and reports:**

In the case of a major project of long duration, the independent monitor's reports should be issued upon completion of significant activities (e.g. completion of project design, completion of selection of the relevant supplier under the procurement process) and then, for example, quarterly as the contract performance progresses until completion and settlement of all claims and disputes. In the case of a contract of lower value and short duration, a report should be issued only at contract completion.

# Guidance to Benchmark 19

## Independent auditing

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### BM 19 Purpose of Benchmark:

- A) Independent auditing is the process by which an independent person, who has suitable skills and experience, audits an organisation or a contract. The purpose of the audit depends on the type of audit:
  - a) A financial audit assesses whether the finances of an organisation or contract are being properly managed.
  - b) A performance audit assesses whether:
    - i) an organisation is complying with its procedures (e.g. procurement and contract management) and is achieving efficiency, effectiveness and value for money
    - ii) a contract is being properly performed and managed.
  - c) A technical audit assesses whether a contract, process, system or product has been implemented in accordance with the intended design or specification and is effective in meeting the intended purpose.
- B) The purpose of the audits specified in this Benchmark is to detect corruption. Separate audit processes do not need to be established for this purpose. Instead, the detection of corruption can be carried out as part of the general financial, performance and technical audits. The auditor should be trained and instructed on how to identify potentially corrupt aspects. For example:
  - a) A financial auditor, in auditing the organisation's financial transactions, should be alert to the possibility that a suspicious payment identified during the audit may have a corrupt purpose.
  - b) A performance auditor, in auditing the organisation's procurement function, should be alert to the possibility that a breach of the procurement regulations (e.g. placing a contract without a competitive process due to an alleged emergency, when no such emergency genuinely existed) may have a corrupt cause or purpose.
  - c) A technical auditor, in auditing the technical suitability of a contract, should be alert to the possibility that unsuitable equipment may have been specified and procured for corrupt reasons.

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- C) Where the auditor has reasonable grounds to suspect corruption, the auditor should have a duty to report such suspicions to the law enforcement authorities. The prospect of an audit will also provide a significant deterrent against corruption if those whose actions will be audited are aware that the auditing process will be effective and that any suspected corruption will be properly investigated and reported to the law enforcement authorities. As such, auditing can be a powerful anti-corruption tool.
- D) Auditing of contracts for corruption under this Benchmark 19 differs from monitoring of contracts for corruption under Benchmark 18 in that an auditor's appointment is limited to the specific audit, and the audit is normally undertaken upon completion of an activity (e.g. a financial audit at year end, or a technical audit upon completion of installation of equipment). As a result, it is more difficult for an audit to identify or prevent a corrupt act than if the issue was contemporaneously identified by a monitor. In contrast, a monitor is appointed for the duration of a contract in order to observe activities on an ongoing basis from procurement through to completion of the contract and final payment. This can, therefore, deter corrupt practices due to the observation of the process, and can identify a corrupt practice as it occurs or shortly afterwards, thus enabling prompt preventive or remedial action to be taken. The roles of monitor and auditor are complementary. If the monitor suspects some corrupt conduct, the monitor could call in, for example, a specialist financial or technical auditor to audit specific aspects.
- E) The types of corruption which an auditor may identify may be the same as those which could be identified by the monitor referred to in Guidance BM 18, paragraph (C). Other examples may include the following:
- a) a financial audit may discover that money has been paid to a supplier who was not approved under the organisation's procurement process or to a person who was not the proper payee under the contract, or that an incorrect sum of money was paid out
  - b) a technical audit may discover that the quality of the product was not in accordance with the contract requirements or that the contract design was unsuited to the intended purpose.

These issues may or may not have had a corrupt purpose, but the auditor should investigate the matters further to identify whether corruption was involved.

## References

- i) UNCAC Article 9, paragraph 2(c): ‘A system of accounting and auditing standards and related oversight’
- ii) UNODC Guidebook on Anti-Corruption in Public Procurement and the Management of Public Finances, pages 31 and 32
- iii) Sections 7.2.7 to 7.2.9, ‘Recommended Benchmarks for Democratic Legislatures,’ Commonwealth Parliamentary Association 2018
- iv) Jakarta Statement on Principles for Anti-Corruption Agencies (2012), Paragraph 1: Internal Accountability, External Accountability, Public Reporting
- v) PI-8, PI-19.3, PI-26, PI-30: PEFA Framework for Assessing Public Financial Management 2016

### BM 19.3 Requirement for auditing:

**BM 19.3(2) ‘... and which are above a reasonable prescribed minimum value threshold, and otherwise on a sample basis’:**

The regulations should determine the threshold over which contracts would require auditing. This threshold should be set as low as is reasonable, so as to maximise the number of contracts which are audited, but should not be so low as to capture very low value contracts, thereby imposing an unreasonable bureaucratic burden. The intention should be that any project in respect of which significant public funds could be lost due to corruption is audited. In this case, the cost of auditing would be highly likely to be offset by the savings resulting from reduced corruption.

### BM 19.5 Selection, appointment and qualification:

- A) The same principles on selection, appointment and qualification apply to auditors as to monitors, as explained in Guidance BM 18.4.
- B) In cases where the State has a specific public sector audit body (such as a National Audit Office, or Auditor-General), then this body may select, provide or appoint the auditor.
- C) An auditor who is in place for a long period may be more vulnerable to bribery, may develop too close a relationship with the organisation’s personnel to be entirely objective, or may continually fail to identify an issue. Rotating auditors after a specified period (e.g. three years) can help avoid this issue.
- D) It is an obvious risk that if the auditor uncovers corruption, she or he could be bribed or threatened by the defaulting party not to reveal the corruption. This risk can be minimised, but not entirely avoided, on

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the same basis as in relation to monitors stated in Guidance BM 18.4, paragraph (G).

### BM 19.6 Scope of auditing:

Benchmark 19.6 does not aim to specify what the full scope of audits of organisations and contracts should be. Its purpose is to state what audit checks should be carried out in order to deter and detect corruption. In all types of audit referred to in Benchmark 19.6, the auditor should be alert for any indications of corruption in the matters being audited.

#### BM 19.6(2)(b) ‘Performance audits: These audits should assess whether ...’:

- A) **‘(iii) there was any conflict of interest in respect of the business associate with whom the contract was made’:**

See Guidance BM 18.5(3) for checks the auditor should make in relation to conflict of interest.

- B) **‘(iv) where the contract was for the supply of works, products, services, loans, assets, or the operation of a concession, the procurement of the contract was carried out in accordance with Benchmark 13’:**

See Guidance BM 13.31.(3) for matters which the auditor should consider when auditing the procurement process.

### BM 19.10 Resources:

The auditor will require adequate resources to be able to carry out the auditing role effectively. For example, the auditor may need to be given access to a desk and computer for her/his use and be provided with transportation to and from the relevant premises and sites.

### BM 19.11 Audit committee:

The audit committee should have a sufficient number of members of appropriate experience and seniority to allow it to carry out its oversight obligations effectively. At least three members is suggested so as to reduce the risk that members on the committee are exposed to bribes and threats.

### BM 19.12 Investigating and reporting corruption:

If the auditor identifies, or receives a report of, suspicious or potentially corrupt conduct, the auditor should undertake sufficient preliminary enquiries so as to

identify whether or not there are reasonable grounds to suspect possible corrupt activity. If there are such grounds, then the auditor should not investigate any further, but should report her/his findings in accordance with Benchmark 19.12. The circumstances identified by the auditor, and the actions taken, should be included in the audit report referred to in Benchmark 19.13.

### **BM 19.13 Record-keeping and reports:**

**BM 19.13(2)** The audit reports should, inter alia, and as far as relevant to the scope of the audit, record:

- a) when, where and by whom the audit was carried out
- b) the scope of the audit (i.e. the specific matters audited, procedures and documents reviewed, personnel interviewed, sites visited, equipment inspected etc.)
- c) any issues identified, adverse findings, breaches of procedures, or weaknesses in controls
- d) recommendations for improvement by the organisation in its procedures or actions
- e) whether the organisation is properly and effectively carrying out its responsibilities
- f) any complaints or reports of corruption made by or against or involving the organisation, its business associates, its personnel or its contracts
- g) any incidents of suspected corruption which are being, or have been, investigated
- h) how such complaints, reports and incidents have been dealt with
- i) any disciplinary measures or sanctions against personnel or business associates
- j) any referrals to the law enforcement authorities, and the outcome of such referrals.

Where a matter is the subject of an ongoing investigation, then confidential details which may prejudice the investigation may be omitted from the report.

# Guidance to Benchmark 20

## Anti-corruption training

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### BM 20 Purpose of Benchmark:

- A) It is important from an anti-corruption perspective that:
- a) public officials, and
  - b) the relevant personnel of all private sector organisations which execute major public sector contracts,
- are adequately trained so that they are made aware of: how corruption occurs; how it can be prevented; how it can be reported; the damage which can be caused by corruption to them, the organisation and the public; and the criminal liability and penalties that may result from involvement in corruption. Personnel who are well trained and aware of corruption risks can materially help to prevent, identify and deal with corruption.
- B) As anti-corruption training can significantly help to reduce corruption, it is incumbent on all public sector organisations and other relevant bodies to ensure that appropriate anti-corruption training is provided in accordance with their responsibilities (as provided for in Benchmark 20.2).
- C) This Benchmark specifies the key components of an anti-corruption training programme.
- D) In all cases, the training should be designed so as to be relevant and appropriate to the identity of the trainees and to the level and nature of corruption risk that they are likely to face. For example, training provided to members of the judiciary will be different in approach and content to that provided to an organisation's procurement managers.
- E) Anti-corruption training required in Benchmark 10 (Public sector organisations) and Benchmark 11 (Public officials) should be provided in accordance with this Benchmark.

#### References

- i) UNCAC Article 7, paragraph 1(d) provides for training of public officials to enable the proper and honourable performance of their functions and enhance their awareness of the risks of corruption.
- ii) UNODC Technical Guide to UNCAC (2009), pages 16 and 17 (Training public officials in ethics)

- iii) UNODC Technical Guide to UNCAC (2009), pages 116 and 117 (Training for investigators, prosecutors and judges)
- iv) ISO 37001 section 7.3 and Guidance A.9
- v) Limassol Conclusions on Combating Corruption within the Judiciary, paragraphs 8.i and 9.

## BM 20.2 Responsibility for providing training:

**BM 20.2(2) ‘In relation to public officials who are not employed by a public sector organisation, the relevant body responsible for their regulation should be responsible for providing them with training.’:**

Examples of such public officials may include government ministers, elected members of parliament and members of the judiciary. Depending on the State, these public officials may or may not be employed by a public sector organisation. If they are not employed by a public sector organisation, then the bodies responsible for their regulation should arrange for them to receive the appropriate anti-corruption training. For example, in relation to regulation and training of the judiciary, see Benchmark 4.3(4) and 4.6(3) and Guidance BM 4.3(4) and BM 4.6(3).

## BM 20.5 Identifying the level of training:

- A) **Simple level:** Trainees who do not have any control or decision-making function in relation to matters above a low value threshold are less likely to get involved in any significant corrupt conduct in relation to the organisation’s activities. It may, therefore, be proportionate and reasonable to declare these trainees to be a low corruption risk, and consequently to give them the simple level of anti-corruption training.
- B) **Comprehensive level:** Trainees who have control or a decision-making function in relation to matters above a low value threshold are at risk of involvement in significant corrupt conduct in relation to the organisation’s activities. For example, they may demand or be offered bribes in order to make a decision in favour of another party. It is, therefore, likely to be proportionate and reasonable to declare these trainees to be more than a low corruption risk, and consequently to give them the comprehensive level of anti-corruption training. The type of training they receive, and the content of the training, should be appropriate to their roles and the corruption risks they face.

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**BM 20.6 Simple anti-corruption training:**

The simple level of anti-corruption training can be given to trainees by a pamphlet or by an online module which covers the topics in Benchmark 20.6.

**BM 20.7 Comprehensive anti-corruption training:**

- A) The comprehensive level of anti-corruption training can be provided partially by a pamphlet or by an online module which wholly or partially covers the topics in Benchmark 20.7, but in all cases should be supplemented by an in-person workshop at which the trainees:
  - a) are provided with:
    - i) either the full information specified in Benchmark 20.7, or
    - ii) a summary of such information to the extent that it has already been provided and read by the trainees in pamphlet or online format
  - b) can ask questions, and receive appropriate answers, in relation to the information specified in Benchmark 20.7, or any other relevant issues or concerns which the trainees wish to discuss.
- B) The anti-corruption training workshop may be provided as a stand-alone session or could be integrated into training sessions covering other topics, provided that the anti-corruption element is sufficiently covered as a separate topic.

**BM 20.8 Trainer skills:**

- A) The person who writes and provides the training could be an employee of the organisation or could be a person external to the organisation.
- B) An external person could, for example, be a training organisation, a university or academy, a civil service college, or a suitably skilled person.

**BM 20.9 Training records:**

- A) In the case of in-person training workshops, the record could be prepared upon completion of the workshop by the workshop leader or organiser.
- B) In the case of online training, the record could be compiled automatically (e.g. the computer system could log the identity of the participants and the date and time they undertook the training).

## BM 20.11 Training for personnel of private sector organisations:

- A) Benchmark 10.13 provides that any private sector entity which enters into a contract over a reasonable prescribed value with the organisation should implement, and provide sufficient proof in the form of a reputable third party certification that it has implemented, an effective anti-corruption management system which at minimum is in accordance with the Annex to the Guidance (Private sector organisations). Paragraph AN 8 of the Annex to the Guidance requires that anti-corruption training should be provided to the personnel of the private sector organisation. Therefore, the public sector organisation could obtain assurance that the training has been provided by obtaining proof of third party certification of the private sector organisation's anti-corruption management system.
- B) Alternatively, the public sector organisation may prefer to provide its own anti-corruption training programme to the relevant personnel of the private sector organisation. In this manner, the public sector organisation can control the quality and content of the training and can be assured that its own personnel and relevant private sector personnel are receiving the same level of training.

# Guidance to Benchmark 21

## Reporting corruption

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### BM 21 Purpose of Benchmark:

- A) Corruption is normally concealed by the participants and it is therefore difficult for the affected organisation or the law enforcement authorities to uncover and deal with it. Reports from persons who witness suspicious conduct are therefore important in the fight against corruption.
- B) All individuals (including public officials, personnel of private sector organisations and members of the public) should be encouraged and enabled to report the matters listed in BM 21.1. As people may be frightened to report corruption, due to fear of reprisal or the consequences of being wrong, safe and effective reporting systems should be made available and publicised, and persons who report corruption in good faith or on reasonable grounds should have legal protection from retaliation, legal action or other penalty.
- C) As the reporting of corruption can significantly help to reduce corruption, it is incumbent on all public sector organisations and other relevant bodies to ensure that appropriate effective reporting systems are provided in accordance with their responsibilities (as provided for in Benchmark 21.2) and that there should be appropriate duties to report corruption in relation to public sector activities.
- D) This Benchmark specifies the key components of a reporting system.
- E) The word 'reporting' is used in this Benchmark. In many publications, reporting is referred to as 'whistle-blowing'.

#### References

- i) UNCAC:
  - Article 8, paragraph 4: *'Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.'*
  - Article 13, paragraph 2: *'Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including*

*anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.'*

- Article 37
- Article 38
- Article 39
- ii) UNODC Legislative Guide to UNCAC (2006), paragraphs 64–65
- iii) UNODC Technical Guide to UNCAC (2009), page 24
- iv) UNODC Resource Guide on Good Practices in the Protection of Reporting Persons
- v) UNODC State of Implementation of UNCAC (2017), pages 152–157
- vi) ICC Guidelines on Whistleblowing, 2008
- vii) Council of Europe Recommendation on the Protection of Whistle-blowers (2014)<sup>10</sup>
- viii) ISO 37001 section 8.9

## BM 21.2 Responsibility for providing reporting systems:

**Private sector organisations:** Private sector organisations are not required to comply with Benchmark 21. However, any private sector organisation which is required to implement an anti-corruption management system under Benchmark 10.13 is required to implement a reporting system under the Annex to the Guidance (paragraph AN 19).

**BM 21.2(1)/(2) Corruption prevention authority and law enforcement authorities:** A system for reporting any corruption by any person should be operated by both the corruption prevention authority and law enforcement authorities (in those States where the latter authority is separate from the former authority). It is likely to be beneficial to have more than one authority operating such a system in order to cater for situations where corruption may be suspected in one or other of these authorities. If persons were restricted to reporting to only one authority, this would increase the risk that any such report would be suppressed if it related to corruption with which that authority was connected.

### References

- i) UNCAC: UNCAC Article 13, paragraph 2 requires that the public should have access to '*relevant anti-corruption bodies*' for the reporting of corruption, and Article 39, paragraph 2 requires that the State Party should consider encouraging reporting of corruption to the '*national investigating and prosecuting authorities*'.

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- ii) UNODC Legislative Guide to UNCAC (2006), paragraph 64 (Reporting)
- iii) UNODC Technical Guide to UNCAC (2009), page 24 (Reporting)

## BM 21.4 Features of the reporting system:

### BM 21.4(1) The reporting system ‘... should enable reports to be made in a safe and confidential or, if desired, anonymous manner.’:

The system for receiving a report could involve any or all of the following methods provided that they are made sufficiently secure and confidential:

- a) post for the receipt of written reports
- b) secure box into which written reports can be deposited
- c) email
- d) telephone
- e) online reporting facility.

### BM 21.4(3) ‘Reports should be received, investigated and managed securely and confidentially, by or on behalf of the organisation which receives the report, by a person who is sufficiently independent of the persons or activities which are the subject of the report.’:

- A) The organisation should ensure that the methods used for the receipt, investigation and management of reports are secure and confidential.
- B) In order that reports are, and are seen to be, dealt with independently, the receipt, investigation and management of reports should be handled:
  - a) by a person or function within the organisation who is sufficiently independent of the matters in question to be able to deal with the matters independently and to be seen to deal with the matters independently (e.g. the organisation’s compliance or internal audit manager or function), or
  - b) by a suitably skilled third party appointed for this purpose.
- C) The receipt, investigation and management of reports are distinct functions, which can be handled by the same persons, or different persons:
  - a) The receiver of the report logs the receipt and passes it on to the manager of the report.
  - b) The manager of the report decides whether or not the report should be investigated, how and by whom it should be investigated, and what follow-up action should be taken consequent on the investigation. The ultimate decision on what action should be taken may be taken

at a higher level (e.g. by the Chief Executive, or Board, or Audit Committee).

- c) The investigator of the report undertakes the actual investigation.

#### **BM 21.4(4) Investigation:**

- A) The person investigating should be given appropriate authority, resources and access by the organisation's top management to enable the investigation to be carried out effectively. The investigation should promptly establish the facts and collect all necessary evidence by, for example:
  - a) making necessary enquiries
  - b) collecting together all relevant documents and other evidence
  - c) obtaining witness evidence
  - d) where possible and reasonable, requesting investigation reports and witness statements to be made in writing and signed by the individuals making them.
- B) The results of the investigation should as soon as possible be reported to the organisation's top management or to the compliance manager as appropriate.

#### **BM 21.5 Publicising the reporting system:**

- A) The organisation's personnel should be informed of the reporting system by any or all of the following mechanisms:
  - a) by including information on the reporting system in the organisation's code of conduct or anti-corruption policy, a copy of which should be given to all personnel electronically or in hard copy
  - b) by email to all personnel from an appropriate manager of the organisation
  - c) through the anti-corruption training provided to personnel
  - d) by publishing relevant information:
    - i) on the organisation's website
    - ii) at the office of the organisation where the personnel work (e.g. on a poster on the wall).
- B) Personnel of the organisation's business associates should be informed of the organisation's reporting system by:
  - a) publishing relevant information on the organisation's website

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- b) requiring, in the contract between the organisation and the business associate, that the business associate informs its relevant personnel of the reporting system.
- C) Members of the public should be informed of the organisation's reporting system by publishing relevant information:
  - a) on the organisation's website
  - b) at any office of the organisation at which members of the public receive public services (e.g. in a brochure, or on a poster on the wall).

**BM 21.5(1)(b) 'encourage all persons to report where they believe in good faith or on reasonable grounds that any matter referred to in Benchmark 21.1(1) to (4) has occurred, even in circumstances where there is no legal duty to report'**

For meaning of 'in good faith or on reasonable grounds,' see Guidance BM 21.6(5).

**BM 21.5(1)(c) 'inform persons about how to seek advice from an appropriate person ...':**

Appropriate persons who could give advice to other persons on what to do if faced with a concern or situation which could involve corruption could include:

- a) the organisation's compliance manager
- b) the professional institution or business association of which the person is a member
- c) a relevant regulatory authority
- d) a government agency or charity established for such a purpose.

## BM 21.6 Obligations, rights and protections for those reporting corruption:

### **BM 21.6(1) Specific legal duty to report:**

For example, money laundering laws may impose duties on a person to report a suspicion of money laundering.

### **BM 21.6(2) Public officials' duty to report:**

The salaries of public officials are paid by the public. As public officials, they also have a duty to act in the public interest and may be in a position to identify corruption in the public sector. It should therefore be incumbent on public officials to make a report where they believe in good faith or on reasonable grounds that any of the matters in Benchmark 21.1 have occurred in connection with a public official or public sector organisation or its activities. (See also Benchmark 11.17 (Public officials), which provides for this reporting obligation by public officials.)

**BM 21.6(3) Private sector duty to report:**

- A) If an individual in the private sector is involved with an activity which is wholly or partly funded by public funds, then that individual's salary may be being wholly or partly paid by the public, and/or that individual is in a position to identify corruption in relation to public funds. It should therefore be incumbent on such individual to make a report where she or he believes in good faith or on reasonable grounds that there is suspected or actual corruption in relation to such publicly funded activity.
- B) The Benchmarks do not suggest a general duty on the public to report corruption. Duties are limited to the circumstances stated in Benchmarks 21.6(1) to (3). However, the public should be generally encouraged to report any matter referred to in Benchmark 21.1(1) to (4), provided that such reports are made in good faith or on reasonable grounds (see Benchmark 21.5(1)(b)).

**BM 21.6(4) Anonymous reporting:**

- A) Whether anonymous reporting should be permitted is a controversial subject.
  - a) The argument in favour is that people may be too frightened to report corruption if they have to disclose their identity. Therefore, allowing anonymous reporting helps uncover corrupt acts which would otherwise go unreported.
  - b) The argument against is that malicious and time-wasting reports may be made anonymously, with no comeback against the reporting person if the report is malicious.
- B) However, the balance of public interest in uncovering corruption lies in favour of allowing anonymous reporting of corruption, as provided for in Benchmark 21.6(4). Notably, UNCAC Article 13.2 requires States' anti-corruption bodies to allow anonymous reporting.
- C) The reporting system should ensure that anonymous reporting is facilitated. Much modern communication leaves an identity trail, and therefore the system should be set up in such a way that reports can genuinely be made anonymously; e.g. by providing a postal address to which anonymous letters can be sent, or a telephone reporting system which does not record the number of the caller.
- D) The system should provide advice to potential anonymous reporting persons as to how they can report anonymously.

**References**

- i) UNCAC Article 13, paragraph 2
- ii) UNODC State of Implementation of UNCAC (2017), pages 152–157

## Guidance

**BM 21.6(5) Good faith or on reasonable grounds:**

- A) The Benchmark specifies that measures should be enacted to protect a person, whether in the public or private sectors, who makes a report in good faith or on reasonable grounds. 'In good faith' means a sincere belief or motive without any malice.
- B) The Benchmark standard for protecting a reporting person is a less strict standard than that applied, for example, by UNCAC Article 33 which refers to protection for a person who 'reports in good faith and on reasonable grounds'. The UNCAC provision would possibly deny protection to a person who genuinely believed that there had been corruption (and so was reporting in good faith), but where objectively that person's belief was unreasonable. The UNCAC provision would also possibly deny protection to a person who reported actual corruption, but whose motive was to obtain revenge against a person (i.e. the person may not be reporting in good faith, as there may be some malice in the report). By using the word 'or', the Benchmark is suggesting a wider protection.
- C) However, the Benchmark wording still provides that the report should be made either in good faith or reasonable grounds, and so deters frivolous reporting, or reporting in bad faith with no reasonable grounds. As the Benchmark wording is less onerous than UNCAC 33, it should help encourage reporting.
- D) The law should permit legitimate action to be taken by organisations or the authorities against persons who report corruption in bad faith and with no reasonable grounds to report (i.e. a malicious report, without reasonable justification, designed to harm another person). This action could include:
  - a) legal action taken for defamation or perjury
  - b) contractual action, such as dismissal from employment
  - c) professional institution action, such as termination of membership or accreditation.

**BM 21.6(5)(c) 'The reporting person should be protected against civil or criminal court action ...':****BM 21.6(5)(d) 'The reporting person should be protected against retaliation, ... etc.':**

- A) The law should expressly provide for protective measures for all reporting persons (i.e. persons making reports of suspected corruption in good faith or on reasonable grounds – as defined in Benchmark 21.6(5)).

- B) Such protection should apply inter alia:
- a) **whether the reporting person is in the public or private sector and whatever their role or office**
  - b) **against civil or criminal court action:** For example, a person accused of corruption could bring an action against the reporting person for defamation or false accusation, or could threaten such action so as to stop the person reporting (particularly if the accused person is in a powerful position in government or the judiciary). Without protection from such threats or action, the reporting person is likely to be discouraged from reporting. It is important, therefore, that the law provides that no civil or criminal action may be taken against someone who reports suspected corruption in good faith or on reasonable grounds
  - c) **against retaliation, discriminatory treatment or disciplinary sanctions:** Such retaliation, treatment or sanctions would normally occur in the reporting person's workplace, particularly where the report is made by a more junior person against a more senior person in the organisation or against persons in a position to influence the way the reporting person is treated at work. Such accused persons may retaliate by ensuring that the reporting person is demoted or not promoted, intimidated, bullied or harassed (either at work or outside work). Without protection from such threats and action, the reporting person is likely to be discouraged from reporting. It is important, therefore, that the law provides protection for reporting persons against retaliation, discriminatory treatment, disciplinary sanctions, or other unjustified treatment
  - d) **against confidentiality clauses:** Employment contracts normally have confidentiality clauses, and professional institutions may include confidentiality clauses in their terms of membership. The law should not permit such clauses to prevent persons from reporting corruption in good faith or on reasonable grounds.
- C) **Protections for the accused:** There is an important balance between protecting reporting persons (as per (A) and (B) above) and protecting the rights and reputation of the accused persons. The rights of the accused persons are protected by the following mechanisms:
- a) Benchmark 21.6(5)(b) provides that identities, information, records and documents delivered or referred to by the reporting person should be kept confidential except in so far as necessary to further an investigation or prosecution. This helps protect the identity of the accused person in case the allegations turn out to be unfounded, or not provable.

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- b) Legal action can be taken against the reporting person if the reporting person's acts were both not in good faith and without reasonable grounds.
- c) Even if the reporting person's report contains reasonable suspicions, these suspicions still have to be proved before the relevant court or tribunal.

### References

- i) UNCAC Article 33
- ii) UNODC State of Implementation of UNCAC (2017), pages 152–157
- iii) UNODC Resource Guide on Good Practices in the Protection of Reporting Persons, pages 24–26

# Guidance to Benchmark 22

## Standards and certification

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### BM 22 Purpose of Benchmark:

- A) A standard is an agreed specification or requirement for a management process or for a technical product.
- B) Standards provide clarity and assurance to government, national and international business and the public as they ensure, as far as possible, that organisations which are compliant with the standards are using recognised good practice management processes or product specifications which are equivalent to those used by other compliant organisations.
- C) Many States have national standards bodies which develop and publish national standards, and which participate in the development and publication of international standards.
- D) The International Organization for Standardization (ISO) is the international umbrella body of all national standards bodies operating within its framework. ISO develops and publishes international standards in collaboration with its national member bodies.
- E) The purpose of these standards may include ensuring better compliance by organisations and individuals with laws, regulations and recognised good practice related to matters such as bribery prevention, quality management, safety management and environmental management. They therefore assist in:
  - a) safeguarding the integrity of organisations, personnel, professions and professionals
  - b) ensuring correct, ethical, accountable and proper performance of the activities of organisations, personnel, professions and professionals
  - c) ensuring the safety and quality of business activities and products
  - d) promoting the use of good practices
  - e) providing consistency in performance
  - f) levelling the playing field by requiring competing organisations to work to the same standards
  - g) helping organisations choose business associates who also work to these standards.

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- F) ISO has published various important management standards which help organisations comply with their legal and contractual obligations, such as ISO 37001 (anti-bribery management), ISO 9001 (quality management), ISO 14001 (environmental management) and ISO 45001 (safety management).
- G) Independent certification of an organisation's compliance with these standards can help provide assurance that the organisation is properly complying, and not merely giving the appearance of complying. Many reputable international certification bodies provide independent certification to these standards. This gives significant credibility to the organisation's effective implementation of the standard's requirements.
- H) There are two aspects to compliance with standards from an anti-corruption perspective:
  - a) Compliance with specific anti-corruption standards (such as ISO 37001 – see (J) below) helps ensure that the organisation has implemented effective anti-corruption controls in relation to its activities.
  - b) Compliance with other management standards, such as safety, quality and environmental standards, helps ensure that the organisation does not, for corrupt reasons, bypass safety, quality and environmental regulations and contractual requirements.

Therefore, compliance with applicable standards by organisations can be an effective anti-corruption measure.

- I) As the publication of, and compliance with, these standards can significantly help to reduce corruption, it is in the interests of the public for governments to permit, promote and support the development and implementation of, and certification to, national and international standards which are designed to ensure better compliance by organisations and individuals with laws, regulations and recognised good practice. This Benchmark therefore specifies the actions that governments can take in this regard.
- J) **ISO 37001** is an anti-bribery management system standard for organisations published by ISO in 2016. It was developed by a project committee comprising 37 participating countries and 22 observing countries. It specifies the anti-bribery policies and procedures which an organisation should implement to help it prevent and deal with bribery by, on behalf of or against the organisation. It is designed to be used by small, medium and large organisations in the public and private sectors. Compliance by an organisation with ISO 37001 helps ensure that the organisation and its personnel do not pay or receive bribes in connection with its business. The compliance of an organisation with the

requirements of ISO 37001 can be certified by a third party. ISO 37001 is specifically an anti-bribery standard but can be expanded to cover other corrupt practices.

#### References

- i) UNCAC Article 12, paragraph 2(b): *‘Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State’*
- ii) ISO 37001 anti-bribery management systems standard

#### **BM 22.1(6) ‘... a pre-condition to the award of public sector contracts over a reasonable prescribed value threshold to any suppliers.’:**

- A) In awarding contracts to private sector organisations, public sector bodies are spending public funds. Therefore, reasonable steps should be taken by public sector bodies to ensure that these funds are properly spent and that the private sector organisations providing the works, products or services are complying with the law and contractual requirements. Proven compliance by a private sector organisation with an international standard can help provide this assurance.
- B) It is therefore reasonable and sensible for a public sector organisation to require that private sector organisations, when bidding for public sector work over a reasonable specified value threshold, should:
  - a) comply with appropriate standards
  - b) prove their compliance through a reputable independent certification process.
- C) In particular:
  - a) Benchmark 10.13 provides that a public sector organisation should require that any private sector organisation which enters into any contract over a reasonable specified value with the public sector organisation should provide sufficient proof, in the form of a reputable third party certification, that it has implemented an effective anti-corruption management system.
  - b) Benchmark 13.17(2)(d) provides that, in order to pre-qualify or qualify to participate in a public sector procurement process, a supplier should provide evidence, in the form of a reputable third party certification, that it has implemented an effective anti-corruption management system.

# Guidance to Benchmark 23

## Professional institutions and business associations

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### BM 23 Purpose of Benchmark:

- A) A **professional institution** is a non-profit organisation which seeks to further a particular profession, the adoption and promotion of professionalism, and the relevant public interest. Some professional institutions, such as RICS, are responsible for setting and regulating professional standards. The types of profession which it would be important to be covered by this Benchmark would include, for example, lawyers, accountants, engineers, architects, surveyors, valuers, land/property and asset managers, scientists and healthcare practitioners.
- B) A **business association** is a non-profit organisation which seeks to further the interests of businesses working in a specific region or sector, and the relevant public interest. The types of business sectors which it would be important to be covered by this Benchmark would include, for example, legal, accounting, engineering, architecture, surveying, building, valuing, property and asset management, science and health care.
- C) Professional institutions and business associations can play an important leadership role in raising awareness of corruption, providing anti-corruption training, preventing and dealing with corruption, and in helping ensure that their members work with integrity and to minimum standards in their professional and business activities. Such bodies can also deter corruption through regulatory enforcement activities which could include monitoring of the member's business or professional activities, restrictions on the member's ability to undertake a business or profession, suspension or dismissal from membership, and fines.
- D) This Benchmark provides recommendations for such activities by professional institutions and business associations.

### BM 23.4 Professional institution and business association activities:

BM 23.4(4) 'to publish on the professional institution's and business association's website the names and details of any offence and sanction imposed by the professional institution or business association on their members':

This publication alerts members of the public to the fact that a business or professional whom they may have been intending to contract or employ has been sanctioned.

**BM 23.4(7) ‘to require (where the professional institution or business association has the power to make such requirement) or encourage the inclusion of anti-corruption training as an essential part of: ...’**

This anti-corruption training could be provided through an online module or in-person workshop. See also Benchmark 20 (Anti-corruption training).

# Guidance to Benchmark 24

## Participation of society

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### BM 24 Purpose of Benchmark:

- A) Public officials are the servants of the people, not the masters of the people. However, some public officials exercise their powers not in the interests of the people who appoint and pay them, but in their own personal interests.
- B) It is therefore important that the public is informed about, and is freely able to participate in, report on, comment on, and lawfully protest against, the actions of government, public officials and public sector organisations. In order to do so, the rights and obligations specified in Benchmark 24 should be guaranteed by law, and the government should promote and take adequate steps to ensure these rights and comply with its obligations.
- C) If these rights and obligations are respected, then corruption will become more difficult. The public will be aware of the risks of corruption and of how public sector money is being spent and will be able to call the relevant public officials to account through the media, public protest, and reporting.

### BM 24.1

#### References

- i) UNCAC Article 13: *'Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption.'*
- ii) UNODC Legislative Guide to UNCAC (2012), paragraphs 61–65
- iii) Commonwealth Latimer House Principles, Principle (X)

**BM 24.2**

## References

- i) UNCAC Article 13(d): *‘Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:*
  - *For respect of the rights or reputations of others*
  - *For the protection of national security or “ordre public” or of public health or morals.’*
- ii) Universal Declaration of Human Rights, Article 19
- iii) Commonwealth Latimer House Principles, Principle (III)(b) and (IX)(b)

**BM 24.3**

## References

- i) UNCAC Article 13 (see BM 24.1 above)
- ii) UN International Covenant on Civil and Political Rights, Article 21

**BM 24.5**

## References

- i) UN Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels (2012), paragraph 3
- ii) UK Equality Act 2010, Part 2, Chapter 1, Protected Characteristics

# Guidance to Benchmark 25

## International co-operation

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### BM 25 Purpose of Benchmark:

- A) Corruption does not respect national boundaries. A corrupt act may involve individuals or organisations from more than one State, and/or may involve acts committed in more than one State. Corruptly obtained assets may be moved from one State to another.
- B) It is therefore important that States co-operate with each other, both formally and informally, so as to ensure the prevention of corruption, the investigation and prosecution of corruption, and the recovery and return of corruptly obtained assets.
- C) This Benchmark summarises the key components of international co-operation contained in UNCAC. The relevant UNCAC provisions listed below should be referred to for the full content of the relevant UNCAC provision.
- D) In addition to the UNCAC provisions, the Benchmark provides for the following:
  - a) informal co-operation (Benchmark 25.1(3))
  - b) asset verification (Benchmark 25.1(10))
  - c) beneficial ownership (Benchmark 25.1(11))
  - d) co-operation on laws, regulations and standards (Benchmark 25.1(14))
  - e) spirit of co-operation (Benchmark 25.3)
  - f) transparency to the public (Benchmark 25.4).

### BM 25.1

#### References

- i) UNCAC Article 43
- ii) UNODC: Technical Guide to The United Nations Convention Against Corruption, page 5
- iii) Commonwealth Schemes for International Cooperation in Criminal Matters (2017)
- iv) FATF Recommendations, Section G

**BM 25.1(1)**

## References

- i) UNCAC Article 44
- ii) FATF Recommendations, paragraph 39

**BM 25.1(2)**

## References

- i) UNCAC Article 45

**BM 25.1(3)**

## References

- i) UNODC Lima Statement on Corruption involving Vast Quantities of Assets (5 December 2018): 4th page, penultimate paragraph
- ii) Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019): Recommendations 36 and 37

**BM 25.1(4)**

## References

- i) UNCAC Article 46
- ii) FATF Recommendations, paragraphs 37 and 38

**BM 25.1(5)**

## References

- i) UNCAC Article 47

**BM 25.1(6)**

## References

- i) UNCAC Article 48

**BM 25.1(7)**

## References

- i) UNCAC Article 49

## Guidance

### BM 25.1(8)

#### References

- i) UNCAC Article 50

### BM 25.1(9)

#### References

- i) UNCAC Articles 51–59
- ii) UNCAC Article 46, paragraphs 3(c), (g), (j) and (k)
- iii) UNODC/IMF/Commonwealth, Common Law Legal Systems Model Legislative Provisions (2016), Part V, Section 41 (Restraint Orders and International Requests)

### BM 25.1(10)

#### References

- i) Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019), Recommendation 2

### BM 25.1(11)

#### References

- i) Oslo Statement on Corruption involving Vast Quantities of Assets (14 June 2019): Recommendation 45

### BM 25.1(12)

#### References

- i) UNCAC Article 61.2

### BM 25.1(13)

#### References

- i) UNCAC Article 43.1 (second sentence)

### BM 25.2

#### References

- i) UNCAC Article 46, paragraph 13, subject to paragraph 7

**BM 25.4****References**

- i) UNCAC Article 5, paragraph 1
- ii) UNCAC Article 6, paragraph 1(b)
- iii) UNCAC Article 10
- iv) UNCAC Article 13, paragraph 1(b)
- v) See other resources listed in Guidance BM 10.22

# Annex to Guidance

## Private sector organisations

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**(This is the anti-corruption management system which must, at minimum, be implemented by a private sector organisation under Benchmark 10.13 and Guidance BM 10.13.)**

AN 1 **Anti-corruption policy:** The organisation<sup>1</sup> shall adopt an anti-corruption policy. The policy shall be a commitment by the organisation that it:

- 1) prohibits corruption by, on behalf of or against the organisation
- 2) requires compliance by its personnel<sup>2</sup> and business associates<sup>3</sup> with all applicable anti-corruption laws
- 3) will implement effective procedures:
  - a) to prevent corruption by, on behalf of or against the organisation
  - b) to detect, report and deal with any corruption which occurs.

AN 2 **Anti-corruption procedures:** The organisation shall implement<sup>4</sup> anti-corruption procedures in order to give effect to the anti-corruption policy referred to in AN 1. The procedures shall:

- 1) comprise the procedures specified in AN 3 to 21
- 2) be implemented in a manner which is reasonable and proportionate having regard to the size, structure, activities and location of the organisation, and the nature and extent of corruption risks which the organisation faces.

AN 3 **Top management<sup>5</sup> responsibility for the policy and procedures:** The organisation's top management shall:

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- 1 **'organisation'** refers to the relevant private sector organisation which is implementing the anti-corruption management system in accordance with the Annex to the Guidance.
  - 2 **'personnel'** means the organisation's directors, officers, employees, workers and volunteers (whether full time or part time, permanent or temporary).
  - 3 **'business associate'** means a person with which the organisation had, has or intends to have a business relationship, including agent, client, consortium partner, consultant, contractor, customer, distributor, joint venture partner, lender, lessor, purchaser, representative, seller, supplier, or other person providing works, products, services or assets (but excluding personnel of the organisation).
  - 4 **'implement'** means design, develop, introduce, operate, maintain, monitor and continually improve.
  - 5 **'top management'** means the body or person(s) who controls the organisation at the highest level (for example, the board of directors, supervisory council, chief executive, or other top leadership individual or body).

- 1) have overall responsibility for the effective implementation by the organisation of, and compliance by the organisation with, the anti-corruption policy and procedures
- 2) ensure that the organisation's managers assume responsibility for overseeing day-to-day compliance by personnel within their department, function or project with the anti-corruption policy and procedures
- 3) provide the necessary leadership and example so that personnel believe in the necessity for, and importance of, compliance with the anti-corruption policy and procedures.

**AN 4 Communicating the policy and procedures:**

- 1) The anti-corruption policy shall be communicated by the organisation:
  - a) to all personnel upon initial adoption of the policy by the organisation, and upon any amendment to the policy
  - b) to all new personnel as soon as practicable after they have joined the organisation
  - c) to all business associates which pose more than a low risk of corruption to the organisation prior to or immediately upon entering into a contract with the business associate.
- 2) The anti-corruption policy shall be published and maintained on the organisation's website.
- 3) All personnel shall be required to confirm in writing or electronically that they have read and understood the anti-corruption policy and will comply with it.
- 4) The organisation's top management shall issue a written or electronic statement to all personnel upon initial adoption by the organisation of the policy, and annually thereafter, confirming top management's commitment to the anti-corruption policy and procedures, and requiring full compliance by all personnel with the policy and procedures.
- 5) The parts of the anti-corruption procedures relevant<sup>6</sup> to personnel shall be appropriately communicated to them.

**AN 5 Compliance manager:**

- 1) A senior manager of the organisation shall be designated as compliance manager, and shall be made responsible for:

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<sup>6</sup> For example, the parts of the anti-corruption procedures relevant to the finance function shall be communicated to finance personnel.

- a) overseeing the implementation by the organisation of, and compliance with, the anti-corruption policy and procedures
  - b) providing advice and guidance to personnel on the anti-corruption policy and procedures and issues relating to corruption.
- 2) The compliance manager shall:
- a) be provided with sufficient resources and authority so as to be able to undertake the role effectively
  - b) have direct and prompt access to top management in the event that any issue or concern in relation to the anti-corruption policy and procedures needs to be raised.
- 3) This compliance responsibility can be on either a full-time or part-time basis, depending on the size of the organisation and the nature and extent of corruption risk which the organisation faces. If on a part-time basis, the compliance manager can combine the compliance function with other responsibilities.

AN 6 **Resources:** The organisation shall provide the resources needed to implement the anti-corruption policy and procedures.<sup>7</sup>

AN 7 **Employment procedures:**

- 1) In relation to all personnel, the organisation shall implement procedures such that:
  - a) conditions of employment require personnel to comply with the anti-corruption policy and procedures
  - b) disciplinary procedures entitle the organisation to take appropriate disciplinary action against any personnel who breach the anti-corruption policy or procedures.
- 2) In relation to all personnel positions which are exposed to more than a low corruption risk, the organisation shall implement procedures such that:
  - a) personnel are vetted before they are employed, transferred or promoted to such positions to ascertain as far as is reasonable that it is appropriate to employ or redeploy them, and that it is reasonable to believe that they will comply with the organisation's anti-corruption policy and procedures
  - b) personnel declare any conflict of interest, which shall be recorded on a register of conflict of interests maintained by the organisation
  - c) personnel do not take any part in decisions in relation to which they have or may have a conflict of interest

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<sup>7</sup> These resources may include, for example, office space, personnel and equipment.

- d) personnel have the necessary competence to undertake the responsibilities entrusted to them, based on their experience and / or training
- e) performance bonuses, performance targets and other incentivising elements of remuneration are reviewed periodically to verify that there are reasonable safeguards to prevent them from encouraging corruption.

AN 8 **Training:** The organisation shall provide appropriate anti-corruption training on a regular basis to all personnel in positions which pose a more than low corruption risk to the organisation to make them aware of:

- 1) the organisation's anti-corruption policy, and the organisation's procedures relevant to their position
- 2) the risk and damage to them and the organisation which can result from corruption
- 3) the types of corruption they could encounter in their position
- 4) the circumstances in which corruption can occur in relation to their duties, and how to recognise these circumstances
- 5) how they shall respond if faced with a potentially corrupt situation
- 6) how and to whom they shall report corruption.

AN 9 **Gifts, hospitality, entertainment, donations and similar benefits:** The organisation shall adopt a policy which prohibits the offer, giving or receipt of gifts, hospitality, entertainment, donations or similar benefits where the offer, giving or receipt is, or could reasonably be perceived to be, for the purpose of corruption. The organisation shall implement procedures which minimise the risk of breach of this policy.

AN 10 **Facilitation payments:**<sup>8</sup> The organisation shall adopt a policy which prohibits the making or receiving of facilitation payments (except, in the case of making payments, where the safety and liberty of personnel is perceived to be at risk). The organisation shall implement procedures which minimise the risk of breach of this policy.

AN 11 **Risk assessment and due diligence:**

- 1) **Risk assessment:** The organisation shall on a regular basis assess the risk of corruption in relation to its existing and proposed transactions,

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<sup>8</sup> 'Facilitation payment' is the term sometimes given to an illegal or unofficial payment which is solicited, accepted or demanded by a public official in return for services that the payer is legally entitled to receive without having to make such payment.

projects, activities or business associates, and assess whether its policies and procedures are adequate to reduce those risks to an acceptable level.

- 2) **Due diligence:** In the event that the organisation's risk assessment identifies a more than low corruption risk in relation to any specific transaction, project, activity or business associate, the organisation shall undertake further appropriate enquiries (due diligence) in order to learn more about it and the possible specific corruption risks it may pose. The organisation will then, based on this additional information, assess whether its policies and procedures are adequate to reduce those specific risks to an acceptable level.

#### AN 12 **Managing inadequacy of anti-corruption policies and procedures:**

- 1) Where the risk assessment under AN 11 establishes that the organisation's existing policies and procedures are not adequate to reduce the corruption risks in relation to any transaction, project, activity or business associate to an acceptable level, the organisation shall implement additional or enhanced controls or take other appropriate steps (such as changing the nature of the transaction, project, activity or business associate relationship) to enable the organisation to reduce the corruption risks to an acceptable level.
- 2) Where additional or enhanced controls or other appropriate steps would not be sufficient to reduce the corruption risks in relation to any transaction, project, activity or business associate to an acceptable level, or the organisation cannot or does not wish to implement additional or enhanced controls or take other appropriate steps, the organisation shall:
  - a) in the case of an existing transaction, project, activity or business associate relationship, take appropriate steps to terminate, discontinue, suspend or withdraw from it as soon as practicable
  - b) in the case of a proposed new transaction, project, activity or relationship, postpone or decline to continue with it.

#### AN 13 **Implementation of anti-corruption measures by controlled organisations and by business associates:**

- 1) The organisation shall implement procedures which require that all other organisations over which it has control<sup>9</sup> implement anti-corruption procedures which are reasonable and proportionate having regard to the size, structure, activities and location of the controlled organisation, and the nature and extent of corruption risks which the controlled organisation faces.

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<sup>9</sup> An organisation might have **control**, for example, over a subsidiary, joint venture or consortium, either through exercising management control or through having a majority ownership interest.

- 2) In relation to business associates over which the organisation has no control, and in relation to which the organisation's risk assessment has identified a more than low corruption risk, and where anti-corruption controls implemented by the business associate would help mitigate the corruption risk, the organisation shall implement procedures as follows:
  - a) the organisation shall determine whether the business associate has in place anti-corruption controls which appropriately manage the relevant corruption risk
  - b) where a business associate does not have in place anti-corruption controls which appropriately manage the relevant corruption risk, the organisation shall, where practicable, require the business associate to implement such controls in relation to the relevant transaction, project or activity
  - c) where it is not practicable to require the business associate to implement such controls, or it is not possible to determine whether it has them in place, this shall be a factor taken into account in evaluating the corruption risk of the relationship with this business associate and the way in which the organisation manages such risks.

AN 14 **Decision-making process:** The organisation shall establish a procedure which ensures that the decision-making process, and the number, skill and seniority of the decision maker(s), is appropriate for the value of the transaction and the perceived risk of corruption.<sup>10</sup>

AN 15 **Anti-corruption commitments:**

- 1) For business associates which pose more than a low corruption risk, the organisation shall implement procedures which require that, as far as practicable:
  - a) business associates commit to preventing corruption by, on behalf of, or for the benefit of the business associate in connection with the relevant transaction, contract, activity or relationship
  - b) the organisation is able to terminate the relationship with the business associate in the event of corruption by, on behalf of, or for the benefit of the business associate in connection with the relevant transaction, contract, activity or relationship.
- 2) Where it is not practicable to meet the requirements of (1)(a) or (b) above, this shall be a factor taken into account in evaluating the corruption risk of the relationship with this business associate and the way in which the organisation manages such risk.

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<sup>10</sup> For example, higher value or higher corruption risk transactions are likely to require a larger number of approvers of appropriately senior status.

AN 16 **Financial controls:** The organisation shall implement financial controls which minimise the risk of corruption by, on behalf of or against the organisation. These controls shall be designed to ensure as far as practicable that:

- 1) payments made by or on behalf of the organisation are as contractually required, in the correct amount and on time, and only to legitimate recipients for legitimate reasons
- 2) payments made to the organisation are as contractually required, in the correct amount and on time, by legitimate payers for legitimate reasons, and paid into the organisation's legitimate bank accounts
- 3) all payments made by, on behalf of or to the organisation are appropriately recorded in the organisation's accounts.

AN 17 **Non-financial controls:**<sup>11</sup> The organisation shall implement non-financial controls which minimise the risk of corruption by, on behalf of or against the organisation. These controls shall be designed to ensure as far as practicable that:

- 1) contracts are entered into by the organisation only with legitimate business associates for necessary and legitimate works, products or services
- 2) the price agreed to be paid by the organisation to a business associate is reasonable and proportionate to the value of the works, products or services to be provided by the business associate
- 3) the works, products or services provided by or to the organisation are provided in accordance with the contractual requirements.

AN 18 **Reviewing and improving the policy and procedures:**

- 1) The compliance manager shall:
  - a) assess on a continual basis whether the anti-corruption policy and procedures:
    - i) are adequate to manage effectively the corruption risks faced by the organisation
    - ii) are being effectively implemented
    - iii) require any improvement
  - b) report at least annually to top management on the adequacy and implementation of the anti-corruption policy and procedures.
- 2) Top management shall review at least annually (taking account of the compliance manager report under 1) above, and any reports under AN

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<sup>11</sup> These controls shall encompass non-financial functions, such as sales, procurement, commercial, legal, operations, project management.

19) whether the anti-corruption policy and procedures are adequate and are being effectively implemented, and whether any improvements are required.

- 3) The organisation shall implement as soon as practicable any necessary improvements to the anti-corruption policy and procedures.

AN 19 **Reporting:** The organisation shall implement procedures which:

- 1) encourage its personnel to report to the organisation where they believe, in good faith or on reasonable grounds, that there has been corruption or a breach of the anti-corruption policy or procedures in relation to the organisation's activities
- 2) require its personnel to report to the organisation or to the appropriate public sector authority where they believe, in good faith or on reasonable grounds, that there has been corruption in relation to any of the organisation's activities with which they have an involvement and which is wholly or partly funded by public funds
- 3) enable reports to the organisation to be made in a safe and confidential or, if desired, anonymous manner
- 4) ensure that personnel are not penalised (e.g. by demotion, disciplinary action, transfer or dismissal) for:
  - a) refusing to participate in, or for turning down, any activity in respect of which they have in good faith or on reasonable grounds judged there to be an unacceptable risk of corruption
  - b) reporting in good faith or on reasonable grounds any actual or suspected corruption, or breach of the anti-corruption policy or procedures.

AN 20 **Investigating and dealing with corruption:** The organisation shall implement procedures which require:

- 1) appropriate investigation by the organisation of any corruption, or any breach of the anti-corruption policy or procedures, which is reported, detected or reasonably suspected in relation to the organisation's activities
- 2) appropriate action by the organisation in the event that the investigation reveals corruption, or breach of the anti-corruption policy or procedures
- 3) where there are reasonable grounds to suspect corruption, that such matter is reported by the organisation to the law enforcement authorities.

AN 21 **Records:** The organisation shall maintain reasonably detailed records of its anti-corruption policy and procedures and any compliance issues which arise.



The Commonwealth

The Commonwealth Anti-Corruption Benchmarks are recommended as good practice anti-corruption measures. They are intended primarily to help governments and public sector organisations assess their anti-corruption laws, regulations, policies and procedures against international good practice, and consider implementing appropriate improvements. The Benchmark measures are designed to be achievable, practical and auditable. There are 25 Benchmarks, each of which comprises a Principle supported by a corresponding Benchmark.

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