World Economic Forum – Global Agenda Council on Anticorruption
Working Group on Voluntary Self-Disclosure

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Part 1 – Recommendation to B20/G20

In connection with the G20 Australian presidency, observations and related recommendations were drafted by a B20 Anticorruption Working Group focused on the voluntary self-disclosure by companies of potential or actual violations of corruption regulations in particular jurisdictions. These recommendations form the basis of the practical guidance developed by this Working Group presented herein.

Key highlights of the Australian B20 Working Group observations and recommendations include:

Harmonize regulation and incentivize responsible business

Corporate responsibility plays a major role in tackling the supply side of corruption. The majority of companies genuinely strive to comply with the law and responsible practices. The business community welcomes the opportunity to cooperate with regulators to design effective incentives that align mutual interests.

Self-reporting of corruption has the potential to make a significant impact. Ideally, businesses and public offices should be prepared to report violations to the authorities and work together proactively on resolution. Businesses should be encouraged to do so—for example, by a reliable process that consistently rewards self-reporting, including reduced penalties and streamlined resolution. This will inspire a more productive partnership between governments and business.

To further this anti-corruption partnership, we recommend that the G20 Governments take the following actions:

- Agree to harmonize laws related to anti-corruption that incentivize companies to build robust compliance programs and self-report compliance breaches.
- Form a working group of business and enforcement agencies to map jurisdictional differences, propose regulatory change that recognizes anti-corruption programs and self-reporting, and monitor progress.

Implement leniency mechanisms to incentivize companies to self-disclose

Implementing formal leniency mechanisms in more countries would help multi-nationals and SMEs alike. In the interconnected global marketplace, both types of companies are likely to be dealing with cross-border transactions (either directly or as supply chain partners), and a corruption problem in one country may trace to others where they are doing business. Ethical companies and their stakeholders are looking for governments to reward effective compliance programs and use them to root out problems and ultimately to stop misconduct.

Leniency mechanisms can incentivize companies to improve their compliance systems and culture. If the leniency mechanisms are consistently available to companies that choose self-disclosure, companies will be more motivated to determine what is going on internally,

take appropriate remedial action, and make a disclosure before the problem becomes any larger. In addition to the existing business case, leniency programs also give compliance officers more reason to go to management and request the resources for a robust internal program in reporting, examinations, and remediation. They may also encourage well-meaning employees to come forward with issues because these employees know that the company can change its behavior and be protected from certain adverse consequences. Finally, leniency should also protect whistle-blowers.

Company compliance is being more broadly encouraged from an institutional perspective as well. As an example, under European antitrust law and other jurisdictions, a company can file a summary application for leniency if it is not sure whether it has discovered a case of wrongdoing but wants to continue investigating. Later, the company can either complete the application or withdraw it; this protects the company's rank as a candidate for leniency. A similar approach should also be considered for corruption cases.

- Define self-disclosure (of bribe payments or other economic crimes as well?), evidence its increasing use, and put forward the business case from the government and private sector perspective.

- Describe the incentive issues and complexities surrounding multiple jurisdictions and differing laws and legal practices for handling self-disclosures.

Proposals of the Australian B20 working group:

- Encourage states to promote self-disclosure by engaging local businesses, and establishing a legal framework that is predictable, rewards disclosure, provides some structure for addressing overlapping jurisdictions by regulatory authorities nationally and internationally, etc.

- Call on the appropriate prosecutorial bodies among the G20 and Anticorruption alliance to establish voluntary practices for managing disclosure of misconduct constituting violations in multiple jurisdictions.

Part 2 – Guidance to Companies

When a company detects a potential violation of anti-corruption or other criminal laws, officials are often confronted with the decision whether to disclose the matter to public authorities. When there is no legal obligation to self-disclose, the company must carefully weigh the risks and opportunities of each disclosure. Each jurisdiction presents unique compliance challenges; therefore, each potential violation must be considered individually.

The following questions and answers address the most common topics a company should consider.

1. Why should companies worry about (foreign) bribery?

- **Bribery is a crime.** Foreign bribery is regulated by many international and local standards, including the U.S. Foreign Corrupt Practices Act (FCPA), UK Bribery Act, OECD Anti-Bribery Convention, and the United Nations Convention against Corruption.

- **Enforcement action is increasing.** Many countries are increasing their legislative and enforcement activities to criminalize corruption and bribery in all its forms. This includes not only direct corruption, but also indirect corruption—for example, using agents to engage in corrupt activities—in both the public and the private sector. In addition, more and more criminal law provisions require enterprises to install effective preventive systems that aim to avoid any occurrence of bribery. Inside and outside the OECD area, an increasing number of states are increasing their enforcement resources and efforts to detect, identify, and punish bribery, exposing enterprises to extensive liability under a variety of anti-bribery laws.[1]

- **The risks are serious.** Companies that engage in corrupt activities not only increase the risk for the company: they also raise the risk for management and employees. These risks may range from fines and penalties to debarment, damage to reputation, and even personal liability, including incarceration and fines. Investigations have also found that companies engaging in bribery could face increased risk of embezzlement because of the inaccuracies in the books and records intended to hide bribe payments.

2. Is my company at risk?

Bribery risks depend to a large extent on where a company does business, the nature of its business, and whether it interacts with public entities.

[1] See, for example, ICC Guidelines on Agents, Intermediaries and other Third Parties, www.iccwbo.org.

- **High-risk countries/ regions.** In some countries and regions, corruption is more prevalent than in others,[2] which increases the risk that companies will be solicited to pay bribes. For current statistics on industrial corruption worldwide, see the OECD Foreign Bribery Report.

- **High-risk industries.** Certain industries appear to have been known to be more prone to corruption than others – in fact this may be more of a perception than reality, however, is an important point of reference.

Each company should perform a thorough risk assessment that considers all of the factors relevant to its unique business circumstances so that it can evaluate its specific compliance risks and implement adequate mitigation measures.

3. What can I do to prevent employees paying bribes?

It is important to maintain a robust compliance program focusing on cooperation. To deal with compliance incidents that have been discovered, every company should adopt a protocol for deciding whether to self-disclose. This should include (1) a *policy* for deciding whether to disclose a matter to the competent authority and (2) a *process* with clear accountability for decisions at each process point.

Some laws and standards recognize companies' efforts to implement robust compliance systems. On the other hand, failing to implement adequate mechanisms may be an aggravating factor in determining a company's liability. Compliance systems generally include these features:

- Prohibit misconduct, including fraud, corruption, collusion, obstruction of investigations, coercion, insider trading, and tax evasion.
- Create and maintain a trust-based culture that encourages ethical conduct.
- Assign responsibility for implementing an integrity compliance program, mandate compliance by all staff, and institute a compliance function to effectively implement the program.
- Establish a protocol for evaluating whether to self-disclose, including an understanding of the appropriate level of company management and board involvement.
- Provide adequate training.
- Detect incidents and potential infringements, and institute a reporting mechanism for all personnel to report their concerns.
- Investigate and respond to actual violations, including appropriate disciplinary action.
- Carry out regular risk assessments to inform the program.
- Protect whistle-blowers against retaliation.

[2] http://www.transparency.org/research/cpi/overview.

Self-disclosure, when appropriate, and cooperation with the authorities can be viewed favorably by an authority when it has discretion over how to resolve a compliance incident. However, the judgment on whether to disclose a matter to the authorities can be very complex, especially when multiple jurisdictions or several public authorities are involved. Before facing such circumstances, it is best if a company has already established a detailed protocol for evaluating whether to self-disclose, including an understanding of what level of company management or board involvement is appropriate.

4. Do I have a duty to report bribe demands to national authorities?

When there is a clear obligation to report a bribe demand, the demand must be reported. However, anti-corruption laws such as the U.S. FCPA and the UK Bribery Act generally do not impose obligations on companies to report bribe demands by public officials. The laws of some jurisdictions may criminalize failures to report crimes, but those laws tend to be general. Often, they lack specificity or do not apply to financial crimes such as bribery; moreover, they are enforced sparingly or, if enforced, have nominal repercussions.

Most anti-corruption laws focus on the "supply side" and are drafted to punish the bribe payers, with little or no concern for the foreign officials who often instigate or receive the bribes. For example, the legislative history of the FCPA suggests that the United States did not want to implicate or prosecute foreign officials out of concern over "embarrass[ing] friendly governments."[3]

5. Do I have a duty to disclose actual or potential violations of anti-corruption laws?

Most anti-corruption laws do not impose a duty to disclose actual or potential violations. If a duty of disclosure is mandated, that duty most often arises out of securities regulations or other laws on companies that trade stock or debt on public exchanges. Other laws include mandatory reporting requirements, but those requirements are limited in scope and apply only to anti-corruption violations that are "material" to the integrity of a regulated company's financial statements or system of internal controls—for example, bribe attempts and failures to keep accurate books and records. It is always important to check the specific requirements.

6. Do authorities expect companies to make a disclosure?

[3] See, for example, Klaw; "A New Strategy for Preventing Bribery and Extortion in International Business Transactions"; 49 Har. J. on Legis., 6, 25; 2012.

Many regulators actively encourage companies to self-disclose all violations of anti-corruption laws. Regulators routinely declare that they give "credit" (leniency) to companies who both volunteer information about anti-corruption violations and then follow up such disclosures with cooperation in resulting investigations. Indeed, the UK Serious Fraud Office, Brazilian Public Prosecutor's Office, U.S. Department of Justice (DOJ), the U.S. Securities and Exchange Commission (SEC), and other regulatory agencies have provided written guidance in which the principles of voluntary disclosure followed by cooperation are reflected as key factors (among others) to be taken into consideration by these agencies when deciding whether to indict companies or to assess penalties. Some anti-corruption legislation codifies penalty reduction regimes for voluntary disclosures, including the U.S. Sentencing Guidelines, which may reduce the overall fines based on cooperation and acceptance of responsibility.

However, voluntary disclosures may not produce the benefits that regulators claim. Indeed, many commentators have stated that the benefits of voluntary disclosure are uncertain and unpredictable.

Companies and regulators can benefit from a more concrete, predictable framework for the investigation and disposition of self-disclosed violations. Such a framework may do more to persuade companies to disclose by offering a clear path to conclude what is inevitably a difficult matter—rather than a path to more uncertainty.

In today's environment, the decision to self-disclose anti-corruption violations to the government and cooperate with resulting investigations must be made on a case-by-case basis after careful investigation of the facts and legal analysis. The decision cannot and should not be pre-disposed for or against disclosure. Because of the consequences associated with disclosure, the question of whether to disclose anti-corruption law violations must be undertaken by the Board of Directors or other appropriate level of management following consultation with its advisors.

7. What are the potential benefits and risks my firm can expect from self-disclosure of a violation of anti-corruption laws?

When a business discovers misconduct of any kind, it must always consider whether disclosure is mandated by its own ethical policies, duties to its shareholders, local law, etc. Because corruption cases can carry enormous financial penalties, the possibility of a less severe punishment is a strong incentive for companies to self-disclose.

Some B20 countries already implement such policies to a certain extent. In these jurisdictions, disclosure may help a corporation avoid prosecution and minimize potential penalties or sanctions. For example, in the United States, voluntary disclosure can help a firm avoid prosecution altogether through a *non-prosecution agreement* or a *deferred prosecution agreement*, in which the government files criminal charges against the enterprise but agrees to suspend those charges and later drop them if it is satisfied with the company's cooperation. For less egregious violations, disclosure may help a business avoid substantial penalties and be

subject only to a cease-and-desist order, which requires the business simply to refrain from violating the FCPA in the future.[4]

As another example, under Brazil's recent Anti-Bribery Law, the highest authority of each public agency or entity may enter into leniency agreements with legal entities responsible for potential violations of the law if the agreement results in identifying others involved in the violation and in swiftly procuring information and documents. Execution of a leniency agreement can reduce the applicable fine by up to two-thirds, can exempt the entity from publication of the conviction, and can exempt it from being prohibited from receiving government incentives for one to five years.[5]

Companies considering whether to self-report to the authorities will want to know about the benefits and risks, as well as the immunity or mitigation they may receive.[6] The company's questions may include:

- Can there still be a legal verdict either in a criminal or an administrative court?
- Do the leniency rules set out what advantage we will receive?
- How certain can we be that the decision of the authority to which the self-report is made will be upheld by a court if judicial approval is needed?
- Will this leniency policy apply in other jurisdictions if the inquiry spreads to other countries?[7]
- Will officials of the company still be prosecuted?

If governments that already offer some leniency for companies that self-disclose would publicize the benefits of such programs—such as avoiding interim measures or receiving lighter or no penalties—companies would be more willing to take advantage of self-disclosure procedures.[8]

8. Will the information I disclose become public?

Attorney-client privilege protects certain communications between a client and his or her attorney and keeps those communications confidential: the concept is unique to common-law countries such as the United States, UK, and Singapore. Similar concepts exist in civil-law jurisdictions such as the EU, but there is a greater risk that communication with in-house

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4 O'Melveny & Myers LLP FCPA Handbook, 6th Edition, p. 93, 2009.

5 http://fcpamericas.com/english/brazil/brazils-anti-bribery-act-leniency-agreement-saving-mechanism-dead-arrival/#sthash.knuNaqxe.dpuf

6 B20 Task Force on Improving Transparency and Anti-Corruption, Development of a Preliminary Study on Possible Regulatory Developments to Enhance the Private Sector Role in the Fight against Corruption in a Global Business Context, Richard Alderman, section 6.2, 2014.

7 B20 Task Force on Improving Transparency and Anti-Corruption, Development of a Preliminary Study on Possible Regulatory Developments to Enhance the Private Sector Role in the Fight against Corruption in a Global Business Context, Richard Alderman, section 6.8, 2014.

8 http://blogs.wsj.com/riskandcompliance/2014/11/04/heres-what-would-get-more-companies-to-self-disclose-bribery/

attorneys is not privileged. The ability to keep investigatory information confidential would encourage companies to make disclosures to governments.

Still, there is a high risk that the disclosed information will become public. Under the current system, virtually every company that makes a disclosure does so with the knowledge that its internal compliance failures can become public knowledge.

Companies will likely want to keep their information confidential and use the attorney-client privilege to do so, but this may not be possible. In the United States, for example, in the absence of a formal confidentiality agreement, attorney-client privilege is waived once information is turned over to a third party (in this case the government investigatory authority). The ability to secure a confidentiality agreement in a corruption case is either limited or non-existent.

Although counsel conducting an investigation will go to great lengths to maintain confidentiality protections, circumstances beyond the corporation's control will often result in an inescapable waiver of such protections. Documents may be inadvertently released or courts may come to conflicting privilege and waiver decisions. If the company must account as part of a regulatory filing, the details may be closely monitored by anti-corruption practitioners and by the media.

The issue of confidentiality also arises in considering whether the investigatory authority will pass the evidence to other governments. Following a self-report, companies may face criminal or administrative action in other countries. In practice, companies have little influence over the decision of one government to give details to another.[9]

Finally, a firm may be forced to reveal investigatory details to prove the independence and reasonableness of an internal inquiry in order to fend off a subsequent civil legal action.[10]

In some jurisdictions, including the EU, a firm must also take into account data privacy implications. A voluntary disclosure of personal data (such as employee data) may be subject to additional legal requirements—for example, the involvement of workers councils.

Companies should therefore assume that any communication they transmit, and any document they draft, may eventually be revealed to third parties, including governments.

9. When do we self-disclose?

Determining when to disclose is a difficult decision that can have significant legal, business, and reputational consequences.[11] During an internal inquiry, companies may need to

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[9] B20 Task Force on Improving Transparency and Anti-Corruption, *Development of a Preliminary Study on Possible Regulatory Developments to Enhance the Private Sector Role in the Fight against Corruption in a Global Business Context*, Richard Alderman, section 5.13, 2014.

[10] O'Melveny & Myers LLP FCPA Handbook, 6th Edition, p. 91, 2009.

[11] David M. Stuart & David A. Wilson; Disclosure Obligations Under the Federal Securities Laws in Government

weigh wanting to know all the facts against making a timely admission. Some enforcement authorities expect a prompt admission of potential violations as soon as the company is aware of a problem. This has increasingly resulted in preliminary disclosures of potential violations. Some view this as the safest way to guarantee that a company obtains the full benefit of the admission.[12]

To determine the proper timing of a disclosure, the company needs to balance the need to gather relevant information against the desire to gain from the disclosure. Furthermore, the requirements of securities markets or other legislation may mandate disclosure.[13] Where disclosure may be required by law, care must be taken to assess when disclosure should be made.

The following key points should be considered:

- **Act with caution** when a company is notified by a government regulator of its anti-corruption investigation. The fact of the government's investigation may impose a duty on exchange-regulated companies to disclose to the public that an investigation is ongoing.
- **Consider not waiting to finish the investigation before involving the authority**, to prevent the risk that the prosecutor would ask the company to do something more or differently. By waiting until completing the investigation, the company risks that the authority may demand additional internal inquiry and remediation.
- **Provide accurate, complete disclosures.** An inaccurate or incomplete disclosure may be viewed by regulatory authorities as poorly as a failure to disclose in the first instance. Thus, if disclosure is required or seems advisable, it should be considered in light of the results of an investigation that has uncovered reasonable grounds to believe that a violation has occurred. Failing to undertake a reasonable investigation is virtually never a justification for failing to disclose otherwise reportable events.
- There may be **other circumstances** when the company is not under a legal requirement to divulge a compliance concern. In such cases, premature disclosure may lead to unnecessary costs and negative publicity for alleged acts that may not ultimately be sanctionable.[14]

10. What risks must be managed in the disclosure process?

The company must make a plan, keeping in mind that the outcomes of the investigation will be submitted to the authority. Therefore, the company can anticipate what the government might want to know and present a work plan designed to provide credible answers through a

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Investigations; 64 BUS. LAW. 973, 997–98; 2009.

[12] O'Melveny & Myers LLP FCPA Handbook, 6th Edition, p. 97, 2009.

[13] B20 Task Force on Improving Transparency and Anti-Corruption, Development of a Preliminary Study on Possible Regulatory Developments to Enhance the Private Sector Role in the Fight against Corruption in a Global Business Context, Richard Alderman, Section 7.11, 2014.

[14] See http://www.corporatecomplianceinsights.com/arbitration-corruption-and-voluntary-self-disclosures-what-are-the-options/ .

thorough, targeted, and efficient investigation. The government might distrust an initial presentation that seeks to characterize potential wrongful conduct as marginal, anomalous, and isolated. The company must, therefore, anticipate what is often the government's first question: "How do you know this is all there is?" The answer must be that the company has looked elsewhere, but this does not necessarily mean that a long investigative process looked into every aspect of the business in detail. The company should develop a plan that accounts for risk to similar business units or lines of business, similar geographies, high levels of government interaction, etc.

In substance, the company is conducting an investigation that will be made available to the public prosecutor. Compared to the prolonged, costly public investigation, the company's investigation has an incomparable advantage: the company knows better than the public authority its organization, processes, people, and its areas and activities at risk. The company investigation may be able to limit some of the disruption to day-by-day activity. This advantage, associated with a thorough and vibrant investigation plan, can result in concentrating the investigative process within a reasonable time.

Do we need to disclose this in our filings to regulatory authorities?

Disclosure requirements vary from jurisdiction to jurisdiction; therefore, the company must approach each case one at a time. The company must conduct a preliminary analysis on the basis of the jurisdictions involved. Some practitioners draw the line at the receipt of a subpoena, others at disclosure, and others only when it is clear that the government is likely to take some enforcement action. Even then, disclosures tend to be very general—for example, that the company has made a disclosure concerning questionable business payments and is cooperating with the government. In many cases, they do not disclose the country or even line of business. However, any disclosure may well invite a civil class action complaint, even though the overall success of such actions has been low.

Will there be any personal risk to individuals?

There are always risks to individuals. A corporation acts only through individuals; a corporation cannot violate criminal law unless at least one associated person (employee, agent, etc.) violates the law. From the government's viewpoint, a critical aspect of a corporation's cooperation is its willingness to assign responsibility and take appropriate action; furthermore, there is also an increasing trend to prosecute individuals. From the employees' viewpoint, this may be seen as sacrificing the employee and thus must be managed carefully under the company's compliance investigations and disciplinary policy. In addition to its enforcement authority, the company must be ready to properly discipline individuals whose responsibilities have been identified.

In assessing whether to self-report, the company must consider the probability that individuals will be involved because this implies further costs and duration. Individuals might be more willing to go to trial than settle the allegations, which might raise the risk of imprisonment.

Does the benefit of disclosure apply to all aspects of the case?

A corporation that makes a voluntary disclosure is expected to be fully transparent as to all misconduct. If the government learns that the corporation disclosed one type of misconduct but failed to disclose other conduct of which it was aware, the government may well deny it credit for cooperation. On the other hand, a corporation that fully cooperates may realize and should expect a number of benefits—the ability to shape the scope of the investigation, to conduct the investigation in the most efficient and least disruptive way possible, to obtain reduced penalties, and possibly to avoid post-settlement monitoring. The involvement of prosecutors and regulators, for instance stock regulators may well determine a situation whereby the benefits of disclosure are differently applied to various aspects of the case. Therefore, the company must assess which agencies need to be involved in order to identify the overall benefits or to balance the advantages and disadvantages of a voluntary disclosure.

11. **My case affects several jurisdictions. How do I deal with this situation?**

Complicated issues arise in cross-border situations, including privacy laws, labor laws, cultural issues, and language issues. Additionally, the issue of *ne bis in idem* (double jeopardy) unfortunately does not have a clear solution, and most jurisdictions do not apply it, including the United States.

If a company decides to voluntarily disclose in a jurisdiction where it has the opportunity, it must look at all the other jurisdictions that might be involved as a consequence of that disclosure and develop a comprehensive strategy so that a disclosure made in one jurisdiction does not negatively affect the company in another jurisdiction. The company must assess the issues in the different jurisdictions—such as the level of sanctions, disgorgement of profit, debarment, and even the risk of preliminary injunctions being imposed during the investigation (a peculiarity of the Italian jurisdiction).

Like a major project in itself, disclosure may require a company to devote internal resources to coordinate multiple departments in multiple countries. Few jurisdictions have developed a process of voluntary disclosure and internal investigation as, for instance, the United States. One way of managing the process is to engage with DOJ first and seek their assistance in persuading the foreign jurisdiction to allow an internal investigation to proceed and even to accept its findings. In most cases, the U.S. authorities will want to know if the company has disclosed to the relevant foreign authorities. If not, there is significant risk that they might reach out directly if they believe that the company is not disclosing evidence and findings on a timely basis or is encountering difficulties due to local data protection or blocking statutes. In some cases, the company may even invite DOJ to make a cooperative legal assistance request to overcome such obstacles.

It is most often in the company's interest to encourage cooperation among the jurisdictions. In the best of circumstances, the jurisdictions will allow the jurisdiction with the greatest probability of reaching conclusion (for example, the corporation's home country) to take the lead and will agree to receive the same reports at the same time. In other cases, the jurisdictions may allocate responsibility for different parts of the investigation, based on their institutional priorities or access to evidence. The company should also consider that regulators

from different countries and international organizations (such as the World Bank) have entered into various arrangements that facilitate the sharing of information.

When the issue of multiple jurisdictions' involvement arises, the company will also face other practical problems, such as coordinating local and foreign counsel or dealing with non-uniform data protection laws, which may require different approaches for the conduct of investigations in different countries.

A problem might occur if one jurisdiction will not cooperate or will even forbid the company from conducting its own internal investigation. In such cases, the company must comply with applicable law, at least within that jurisdiction, but it may find that other jurisdictions will move forward in areas within their competence. Alternatively, those jurisdictions may stand down but demand that the company "toll" the statute of limitations while the first jurisdiction conducts its investigation.

The aim of reaching global settlements with the enforcement authorities involved

The aim of reaching a "global settlement," "global enforcement," or "coordinated settlement" with other enforcement authorities that have authority over the company's behavior would be strong objective, even though this may create problems on the basis of the peculiarity of each legal system. For example, prosecutors in many jurisdictions are not allowed to provide benefits to companies in consideration of their cooperation and voluntary disclosure.

It is therefore important for the corporation to check if the jurisdiction where it intends to disclose values voluntary disclosure, coordinated investigation, or coordinated resolution. The company may also properly analyze this approach in terms of costs and balance the burdens of a voluntary disclosure, the advantages of timely disclosing, and the disadvantages of failing to disclose.

A company conducting internal investigations, making self-disclosure, and cooperating with the authorities in order to mitigate the risk of being subject to multiple sanctions in each involved jurisdiction should have contact with the various authorities to contribute to the extent possible to coordinate investigations and decisions and to avoid sanctions multiplication.

From a practical point of view, the involvement of multiple jurisdictions requires the company to undertake a major effort in economic and organizational sources, including strong coordination by the internal sources dealing with the matter.