

Strengthening Government Capacity to Assess and Account for Corporate Anti-Corruption Compliance Measures and Programmes



Anti-Corruption
Compliance

Assessment
Strategies

Governmental
Incentives

Consultation Paper prepared to facilitate conversations amongst stakeholders regarding how governments might best incorporate assessments of compliance programmes' effectiveness when awarding incentives.

Executive Summary

Meeting Purpose: A discussion amongst public and private sectors stakeholders on how to ensure that governments properly assess the effectiveness of company's anti-corruption compliance efforts when granting incentives.

Meeting Objectives: Obtain input from stakeholders on the following questions (and more).

- Why has it become increasingly important for both companies and governments to assess the effectiveness of corporate anti-corruption compliance programmes?
- How might one empirically assess whether the intended outcomes of corporate anti-corruption initiatives have been measured rather than processes?

Government capacity:

- What role should governments play in assessing the effectiveness of corporate anti-corruption compliance programmes?
- What challenges might governments face when evaluating the effectiveness of these programmes?
- What capacities and resources might governments need to properly assess their effectiveness?
- What methodologies, evidence, regulatory, and general tools should governments employ or have available to determine whether a corporate compliance programme is in fact effective? What impact should evidence of (i) compliance failures, (ii) recidivist conduct, and (iii) general compliance deficiencies have in an assessment?
- Should assessments be conducted directly by government employees, or should they outsource these tasks to third parties from the private sector?

Private sector perspectives:

- What are companies doing to assess whether their anti-corruption compliance programmes are effective, and what kind of goals and targets are they setting themselves?
- What are the challenges faced by companies in assessing the effectiveness of their programmes?
- In the view of companies, how could governments strengthen their own capacity to assess compliance programmes in a way that is reasonable and supports businesses?
- How can public-private initiatives help to develop methodologies and tools to assess anti-corruption compliance initiatives?
- What peer learning mechanisms could be set up to support companies that want to strengthen the effectiveness of their anti-corruption compliance programmes?

OECD standards: The OECD has long encouraged governments to develop strong anti-corruption laws and norms.¹ The Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Recommendation), revised and expanded in 2021,² encourages companies to develop internal controls, ethics, and compliance programmes, taking into account the Good Practice Guidance on Internal Controls, Ethics, and Compliance. In addition, the OECD Anti-Bribery Recommendation recognises the various ways in which governments can promote business integrity and compliance by using incentives in law enforcement or in connection with decisions to grant public advantages, including public procurement, export credits, and official development assistance. Crucially, if such incentives are provided, the OECD Anti-Bribery Recommendation encourages countries to ensure that the authorities deciding whether to grant the incentives provide sufficient guidance and training to officials to ensure that the companies benefitting from incentives have genuine and effective internal controls, ethics and compliance programmes or measures in place.

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Consultation Paper

The OECD has historically worked on matters related to promoting strong anti-corruption norms and standards within both the public and private sectors. This initiative is yet another step in that effort. Specifically, this project focuses on methods and mechanisms for strengthening governments' capacities to assess and account for corporate anti-corruption compliance measures and programmes. To date, there is no (i) single international standard for compliance programmes or (ii) consensus on what constitutes an effective compliance programme. Moreover, the government agencies might lack the necessary expertise, tools, and data to properly assess the effectiveness of businesses' compliance efforts. As a result, it is unclear whether the incentives employed by countries to promote the adoption of effective corporate compliance programmes are in fact meeting their goals. It is therefore essential to understand how governments can make accurate assessments of the effectiveness of anti-corruption compliance efforts to better incentivise corporate compliance programmes and ensure that the incentives are given to deserving companies.

During this project, stakeholders will be asked to consider: (i) what countries are already doing to assess compliance programmes, particularly efforts that might be well-suited for other countries to implement; (ii) the nature and scope of possible assessments; (iii) how governments can benefit from private sector experience in assessing corporate anti-corruption compliance efforts; (iv) what, if any, challenges should be considered by countries in developing mechanisms involving the assessment of anti-corruption compliance; (v) how countries considering creating incentive mechanisms for companies should engage in assessments of the effectiveness of their anti-corruption compliance programmes.

This Consultation Paper will focus on the following. First, it will take up the question of whether there is a need for assessment of corporate anti-corruption compliance measures. Second, it will identify potential issues and existing challenges that governments and companies might confront when attempting to better assess the effectiveness of anti-corruption compliance programmes. Third, it will briefly identify how governments and companies are already utilising assessment strategies with regards to anti-corruption compliance programmes.

I. The Need for Assessment

The call for better assessment of compliance effectiveness has grown over the past ten years. Members of the international community, private sector, public sector, academics, and practitioners all recognise that companies have employed anti-corruption compliance programmes of varying degrees of sophistication for quite some time. As such, it is now imperative that governments ensure that these programmes are in fact effective, particularly as governments are awarding incentives for compliance programmes.

In particular, the OECD has emphasised the importance of corporate compliance programmes in helping to combat corruption. The 2021 OECD Anti-Bribery Recommendation encourages law enforcement and other government agencies to consider developing incentives for businesses to develop anti-corruption compliance and enhance government capacity to assess corporate compliance efforts. In 2023, the OECD organised an expert meeting and a public-private dialogue, in conjunction with UNODC and UN Global Compact, to obtain insights from stakeholders on what incentives governments employ for corporate anti-corruption compliance.

In line with the 2021 OECD Anti-Bribery Recommendation, the OECD has worked with UNODC and UN Global Compact to update the UNODC's 2013 [Resource Guide on State Measures for Strengthening Business Integrity](#) ("Resource Guide"). The Resource Guide provides governments with a framework for identifying and implementing an appropriate mix of sanctions and incentives for encouraging business

integrity.³ In addition, the Resource Guide highlights the importance of ensuring that governments can accurately assess corporate anti-corruption compliance programmes when granting incentives to ensure that these reward deserving companies. In continuation of this effort, the OECD is working with public and private sector experts, as well as academics, to further foster efforts to promote corporate compliance with a focus on assessment capacity. This is particularly important because, as detailed in the next Part, several governments have already begun developing incentives or other measures to promote more effective compliance programmes.

Moreover, the OECD's work is consistent with calls for better compliance from a range of academics. Some key insights and observations from leading academics are noted below.

Academic Insights

- *Placing “an overwhelming and steadily increasing importance on internal compliance structures as a liability determinant” could result in “opportunistic behaviour” by firms, as they [are] left to “fill in legal gaps during the implementation and enforcement phases of governance.”⁴*
- Professor Kimberly D. Krawiec
- *Explaining the need for proposals for evidence-based reforms to the current evaluation of corporate compliance programmes and advocating for “a scientific approach towards regulating compliance through testing, in which compliance data must be made public, and empirically validated.”⁵*
- Professors Brandon Garrett and Gregory Mitchell
- *Highlighting the need for the adoption of frameworks for evaluating corporate compliance programmes based on data and empirical analysis from compliance initiatives—including whistle-blower hotlines and training initiatives.⁶*
- Professor Eugene Soltes
- *Proposing that companies should better assess compliance by employing “(1) internal reporting hotlines; (2) decision advisory hotlines; (3) well-designed surveys given months after training to assess employees’ reactions to scenarios implicating choices between compliance and profits; (4) exit interviews; [and] (5) [the] adoption of an analytic detection system that incorporates data from internal hotlines.”*
- Professor Jennifer Arlen
- *Scholars and practitioners collaborated in the volume, MEASURING COMPLIANCE, in an effort to determine how to best measure the effectiveness of compliance interventions for companies.*
- Professors Melissa Rorie & Benjamin van Rooij (eds.)

These academic perspectives help explain why assessments of corporate anti-corruption compliance efforts are needed and are consistent with the OECD's current project targeted at strengthening anti-corruption compliance assessments.

Importantly, the work of the OECD and academics is also consistent with concerns expressed by compliance practitioners and other industry professionals.

Industry Insights

- *Hui Chen, a compliance expert who formerly served as compliance counsel for the United States Department of Justice, together with Prof. Soltes, explained that modern-day corporate compliance efforts need to go well-beyond a “box-checking exercise.”⁷ Instead, they urge the adoption of compliance initiatives that are carefully linked to specific compliance objectives, including detecting and preventing misconduct.⁸*
- *A 2018 study based on data collected from U.S.-based employeesⁱ determined that organisations with ethics and compliance programmes targeted to meeting regulatory and legal minimum requirements were helpful to firms. Importantly, the same study determined that “high-quality ethics and compliance programmes”⁹ were much more likely to result in favourable outcomes for firms.¹⁰ The organisation conducting the study defined a “high-quality programme” as one that included items such as, (i) strong incentives for leaders within the organisation to act with integrity, (ii) the promotion of a company culture where employees are comfortable raising concerns, (iii) clear accountability and discipline for both leaders and employees when they fail to adhere to company values and standards, (iv) clear guidance and training for employees on how to approach challenges related to key risk areas for the organisation, and (v) identifying potential compliance issues through a robust risk assessment.”¹¹*
- *In 2023, a longitudinal, global benchmark study across forty-two countries outlined a number of factors that were relevant to identifying when companies should be concerned about the status of their compliance programmes. In particular, important measures for determining the state of a compliance programme include: (i) “[p]ressure in the workplace to compromise ethical standards,” (ii) [o]bservations of misconduct by employees as they go about their day-to-day work,” (iii) [t]he reporting of misconduct when observed,” (iv) “[a]ny retaliation perceived by employees after they report misconduct; and (v) [s]trength of workplace culture from an ethics and compliance perspective.”¹²*

The upshot is that both private and public stakeholders increasingly recognise the need for better assessment of how compliance programmes are assessed.

Questions for Discussion:

- Why has it become increasingly important for both companies and governments to assess the effectiveness of corporate anti-corruption compliance programmes?
- Can governments and companies genuinely measure what makes a compliance programme effective in terms of outcomes rather than effort?

ⁱ Based on data collected from over 5,000 employees in the United States.

II. Identifying Potential Issues and Existing Challenges in Assessing Anti-Corruption Compliance Effectiveness

The effort to increase both the sophistication and standardisation of assessments of the effectiveness of anti-corruption compliance programmes has a range of challenges to confront. This Part will discuss some of the potential issues and challenges with this project. In particular, it will focus on: (i) what evidence and tools governments and companies will need to conduct assessments, (ii) what resources and capacities might aid or hinder the ability to conduct assessments, and (iii) what competing methodologies might confront governments in attempting to identify the best methods of assessment.

a. Evidence and Tools.

An important question for stakeholders is what evidence and tools, which may include both qualitative and quantitative empirical measurements, should companies and governments consider when assessing compliance efforts.

As a first-order step, stakeholders might need to consider the following challenges that were outlined by Professors Melissa Rorie and Benjamin van Rooij. In 2021, they addressed four core challenges in measuring corporate compliance effectiveness and discussed how to choose the appropriate research method for the specific question being asked by those charged with compliance responsibilities.¹³

- First, they noted the “conceptual ambiguity” that often occurs with compliance efforts. In particular, they “note that the term ‘corporate compliance’ means different things to different people—whether you’re a regulator or a regulated entity, an investor, or on the Board of Directors dictates your definition of compliance, as well as the behaviors that fall under compliant versus noncompliant labels.”¹⁴
- Second, they point out criminology research that suggests that the actual amount of crime that occurs is unknown, which means that “[i]n any compliance measurement or assessment, there is no objectively valid estimate of how much compliance and non-compliance there is.” As a result, they conclude that “, any assessment or measurement approach must account for its inherent limits in assessing the true nature of the non-compliance problem it studies.”¹⁵
- Third, they note that correlation is not causation, and that those engaged in assessments must be careful not to conflate correlation to mean that an intervention, or lack thereof, did or did not result in a particular outcome.¹⁶
- Fourth, and finally, the use of secondary data—by which they mean attempts to assess compliance by using existing data collection—might not be a good or strong comparator for a particular organisation’s compliance programme. In part, this is related to their concerns that compliance might not be defined in the same way and that a programme’s priorities might differ. In short, their work suggests that assessments of compliance must be done in a careful and contemplative manner.¹⁷

With these challenges in mind, there are some key considerations that companies and government might want to account for when assessing the effectiveness of companies’ compliance programmes.

Defining Compliance. Profs. Rorie and van Rooij note that one should be very careful in defining what one means by corporate compliance, because stakeholders from numerous industries and legal and regulatory areas may use the phrase to encompass different types of initiatives. This project, however, is narrowed by its focus on anti-corruption compliance programmes, which will help lend precision to conversations on the topic. Yet, anti-corruption compliance efforts arise, at least in part, in response to a range of diverse anti-corruption laws across the globe. These laws, which often have similarities, are not identical. As stakeholders work on this project, the definitions of what one considers part of the anti-corruption compliance effort will need to be clearly set out.

Data Identification & Collection. Governments and companies will need to identify what data they already have in their possession. This data may be a range of both quantitative and qualitative information. Once the current set of data points is identified, governments and companies can begin to take three important steps. First, they can find ways to analyse the existing data across a variety of methods. The goal would be to harness what they already know and try to determine what can already be learned about companies' compliance programmes. Second, they can consider what additional information could or should be collected. Again, they will likely need to gather a range of quantitative and qualitative information, and in some instances a mixed method approach might be helpful. For example, a firm might get quantitative data through a relative short survey and then follow-up with participants via qualitative interviews targeted at gathering a more fulsome picture of the potential success or challenges within the compliance programme. Third, companies and governments can begin to pinpoint the type of information that might be difficult to analyse, obtain, or share with different decision-makers—which aligns with Profs. Rorie and van Rooij's second concern. There are, however, costs related to the gathering, management, and maintenance of such data, which should be taken into account by governments and companies. These costs considerations may vary depending on whether the data is managed internally or outsourced to private third parties.

Defining Effectiveness. One of the most important considerations in this project will be to identify what stakeholders mean by the term “effective”. As part of this project, a consultation of fourteen companiesⁱⁱ has also been carried out by the OECD in cooperation with Basel Institute on Governance, with the view to elicit their views and expertise on what constitutes best practice in terms of measuring the effectiveness of anti-compliance measures. A number of themes were uncovered. One of the key drivers of how the interviewed companies defined and assessed effectiveness was related to the activities of regulators and enforcement authorities. Companies stated that they are influenced by the formal regulatory and legal requirements adopted by governments and assessed effective compliance by their ability to adhere to those requirements. Relatedly, some interviewed framed effectiveness as having no or very few serious incidents of misconduct that would require external disclosure to government authorities. Additionally, the use of risk assessments to help direct companies' compliance programmes was noted by several interviewed companies. The process of creating a risk assessment and then evaluating the company's responses to that risk are believed to have provided important information about the state of a company's compliance programme.

Industry Standards and Best Practices. Many of the documents on compliance published by governments, companies, and non-governmental stakeholders reference industry standards or best practices. Importantly, adherence to an industry standard or best practice does not necessarily mean that the compliance initiative is in fact effective. First, the best practice may not have ever been subjected to rigorous empirical testing (e.g., proving causality between the compliance intervention and the compliance outcome). Second, the best practice may work for some companies within certain industries, but it may not be effective in other settings. Stakeholders should resist the temptation to equate meeting best practices with actually implementing an effective anti-corruption compliance programme.

Transparency & Confidentiality. Governments necessarily rely on information provided to them by companies when making assessments of anti-corruption compliance programmes. Many of the disclosures companies make today when attempting to obtain a governmental incentive happen outside of the view of the public. For example, Professor Veronica Root Martinez has noted the efforts U.S. prosecutors have undertaken to ensure information that companies provided to them will remain private.¹⁸ Some reasons a company might want to keep their compliance programme information confidential include: (i) a belief that the compliance programme details are trade secrets that provide a competitive advantage over competitors, (ii) a concern that heightened transparency regarding compliance efforts might result in civil litigation (e.g., shareholder lawsuits), and (iii) a fear that disclosure of detailed information might be looked upon with

ⁱⁱ The 14 companies chosen for this consultation were mostly larger organisations (500+ employees), although Small- and Medium-Sized Enterprises were also represented. They were headquartered in North America, Europe, Africa, Latin America and Asia.

hindsight bias in the event that a compliance failure occurs, leading some to believe the failures could have been prevented. However, a lack of transparency about compliance efforts might put various stakeholders—including governments—at a disadvantage when attempting to develop tools for assessing compliance programmes. When stakeholders come together and share information it provides companies, governments, and other stakeholders with an opportunity to refine their ability to properly assess compliance initiatives and address anti-corruption concerns at a societal level.

Data Analytics. Companies are using data analytics within and throughout their organisations in a myriad of ways. Scholars like Prof. Arlen have called for companies to use tools from data analytics and artificial intelligence to help identify “red flags’ or anomalies in data that may be predictive of suspicious conduct.”¹⁹ Stakeholders should consider the ways in which data analytics could assist companies in their efforts to assess compliance programme effectiveness. Importantly, governments are also using data analytics in their regulatory and enforcement efforts. As the use of these tools continues to grow in both the private and public sectors, stakeholders should consider how they might be deployed to help governments to assess whether a company’s compliance programme is one that should allow it to receive a governmental incentive should a compliance failure occur.

Fear of Failure. Profs. Mitchell and Garrett hypothesise that while companies have “hope” that current compliance programmes will produce effective results they also “fear” that testing those programmes will show that current programmes are not mitigating compliance risk. The authors believe this leads to “rational ignorance” about the true effectiveness of compliance programmes.²⁰ This sort of concern is important for stakeholders to keep in mind when pursuing an effort to incentivise companies to conduct robust assessments of their anti-corruption programmes. Importantly, governments must acknowledge that if a company finds that an element of a compliance programme does not in fact meet the programme’s objectives it is not necessarily indicative of a programme’s failure. Instead, if a company is willing to find instances of failure within its programme, it might actually suggest that those overseeing the programme are committed to ensuring that the compliance interventions they employ will be ones proven to be successful. If a programme never implements an initiative that fails it may simply be the case that (i) the programme is not testing itself sufficiently or (ii) the programme is not experimenting enough.

Questions for Discussion:

- How could effectiveness be defined, measured and tested, and in what ways could the results be used?
- What challenges might governments face when evaluating the effectiveness?
- How might stakeholders address challenges that arise when assessing the effectiveness of companies’ anti-corruption compliance programmes?
What methodologies, evidence, regulatory, metrics and tools should governments employ or have available to determine whether a programme is in fact effective?
- What are possible strategies for assessing whether the intended outcomes of programmes have been reached, thereby going beyond just the measurement of activities and outputs?

b. Resources and Capacity.

Another concern that is important for stakeholders to consider is how a company or government's resources and capacities might aid or hinder the ability to conduct assessments of anti-corruption compliance programmes. This Part will highlight some considerations for those attempting to implement assessment mechanisms.

Boards of Directors. Stakeholders have long identified the importance of a company's board of directors in ensuring compliance programmes are engaged in effective and meaningful efforts.

- Professors John Armour, Brandon Garrett, Jeffrey Gordon, and Geeyoung Min have argued that boards of public companies should create compliance committees to ensure the board is sufficiently tied into the work of the compliance function.²¹
- Several companies consulted by the OECD via its collaboration with the Basel Institute on Governance discussed ways in which their Board of Directors engaged in compliance initiatives. Boards often receive specific reporting on compliance matters, sometimes have an ethics and compliance committee, and there are often specific reporting lines from those working in compliance to the Board.
- Those who work in compliance often tout the importance of the "tone at the top," believing that those at the top of the company must embrace compliance activities for them to be seen as important for employees of the firm. That said, the focus on boards of directors has not necessarily focused upon the importance of companies to engage in robust assessment of their compliance programmes.

Stakeholders interested in ensuring more robust assessments of compliance will likely need to consider what role, if any, boards of directors should have in these conversations. In thinking about the role of boards of directors, stakeholders should consider and anticipate questions board members might pose when confronted with the possibility that (i) the company plans to assess the effectiveness of its anti-corruption compliance programme or (ii) that the government will withhold incentives if a company is unable to demonstrate that its anti-corruption compliance programme was in fact effective. Stakeholders should keep in mind that changes to a company's anti-corruption compliance programme may also prompt changes to other components of a company's general compliance efforts, which will very likely be a potential concern for board members.

Resource and Capacity Constraints within Companies. Stakeholders will need to carefully consider what resource constraints might prevent a company from engaging in certain assessments of the compliance programme. For example, small, medium, and large enterprises may have different capacities to engage in assessment efforts. A small or medium sized enterprise may not have a large staff devoted to compliance activity, which may make it difficult for the organisation to complete tasks like large-scale, qualitative interviews with staff. Many governments already take into account the size of a firm when making determinations about compliance effectiveness, and nuances of this nature should not be lost in the effort to find ways to assess compliance programmes. Additionally, compliance departments within firms may have relatively static budgets. Requiring compliance departments to engage in assessments of their anti-corruption programmes may require additional resource allocations to be directed toward compliance departments. For this to occur, stakeholders will need to persuade companies that the investment in the compliance department will be of benefit. Obtaining greater resource investments may require educating firm leaders about how those investments might help the firm. It is possible, however, that a company may engage in a cost-benefit analysis regarding additional compliance programme investments and determine that the effort is not in fact beneficial. The upshot is that to obtain the resources and capacity to engage in assessments of anti-corruption compliance programmes, companies will need to believe that the investments are in fact justified from both a financial and governance rationale.

Resource and Capacity Constraints within Governments. There are a range of challenges that governments may face as they attempt to determine whether a company's anti-corruption compliance programme is effective. First, governments may need to have individuals who are knowledgeable about

compliance and are capable of assessing a compliance programme. For example, the U.S. Department of Justice has employed individuals with private-sector compliance experience to help advise prosecutors overseeing foreign bribery and fraud matters.²² Not all government officials will have spent time working in companies or in the compliance area, which may make it more challenging for some government officials to evaluate whether a compliance programme is in fact effective. If the compliance assessment is designated to a particular person within an agency, however, there could be concerns that others charged with enforcement duties by the government may not develop the expertise needed to engage in their own assessments of a company's compliance programmes. Second, governments' capacity is often affected by their own resource constraints. Adding assessments of anti-corruption compliance programmes to an official's responsibilities might slow down investigations, which has the potential of tying up important governmental resources. Third, members of companies often have an informational advantage over those in government because as insiders they are more familiar with their compliance programmes than outsiders. Governments will need to carefully evaluate whether (i) resistance to conducting certain assessments from a company is valid or an attempt to avoid responsibility and whether (ii) information provided by a company is accurate and transparent regarding the firm's anti-corruption compliance programme.

The Role of Regulators. Much of the focus on governments' anti-corruption enforcement efforts prioritises the work of the prosecutorial function. The reality, however, is that regulators are invaluable in their ability to create ex ante requirements for companies to follow. As information regarding assessment of anti-corruption compliance programmes is pursued by governments, one method for ensuring standardisation of information could come from the adoption of regulatory interventions. Regulators could require companies to gather and/or disclose certain information related to their compliance programmes. To the extent this information is gathered and disclosed, it would allow a range of stakeholders to better assess the effectiveness of compliance programme initiatives. Finally, regulatory guidance might aid stakeholders in determining what does and should count as an effective compliance programme. Prof. Arlen has argued in favour of delegating the role of imposing structural reforms (including assessing corporate compliance programmes) to regulatory agencies. She cites the fact that regulatory agencies typically have industry-specific expertise, ability to gather information and collect public comments, and ability to conduct more widespread, industry-specific assessments of compliance.²³

Role for Third Parties. Oversight of certain activities by companies that are important to governments is sometimes outsourced to third parties. Given the expertise required to assess whether a company has or has not adopted an effective anti-corruption compliance programme, stakeholders will need to consider whether a third party with compliance expertise might be better equipped to levy such an assessment. There are, however, downsides to such an approach, including costs, reliability, potential for capture, and possible conflicts of interest. Moreover, questions might exist as to how a government would determine whether a third party was itself effective at conducting compliance assessments.

Questions for Discussion:

- What resources and capacities are required, in particular in terms of data analytics and technology, to measure the effectiveness of compliance efforts at both the corporation and governmental levels?
- What role should regulators play in setting requirements for (i) data collection about compliance and (ii) disclosure of the data collected?
- Should assessments be conducted directly by government employees, or should they outsource these tasks to private third parties?
- When assessments are made outside the law enforcement process, how much weight, if any, should be given to them once an issue has arisen?

- In the view of companies, how could governments strengthen their own capacity to assess compliance programmes in a way that is reasonable and supports businesses?

c. Policy Methodology.

As stakeholders work to create mechanisms for strengthening the assessment of anti-corruption compliance programmes, they will need to make a range of methodological decisions. The below are a few of the considerations that might be worthy of attention as this project unfolds.

Incentivising Assessment. Governments that prioritise the creation and implementation of effective anti-corruption compliance programmes will need (i) to consider what mechanisms will best incentivise companies to engage in self-assessment and (ii) identify methods for the government to analyse the effectiveness of companies' compliance programmes prior to awarding incentives. Traditional law and economics models suggest that to incentivise companies to engage in self-policing, governments must provide some sort of leniency or mitigation credit, as opposed to adopting a regime of strict liability when compliance failures occur.²⁴ Currently, some law enforcement authorities (e.g., the United States Department of Justice) have stated that they take the effectiveness of an anti-corruption compliance programme into account when making determinations regarding potential sanctions and penalties. It is, however, often less clear how governments are measuring effectiveness of a compliance programme beyond ensuring that a programme meets industry standards.²⁵ If governments want to employ incentives aimed at encouraging compliance, they may need to be more transparent about (i) how they will implement their own assessments of companies' compliance programme effectiveness, (ii) the information governments will require to conduct such assessments, and (iii) what compliance programme metrics would justify a finding that a company has in fact implemented an effective anti-corruption compliance programme. The forthcoming Resource Guide on State Measures for Strengthening Business Integrity, produced jointly by the OECD, UNODC and UN Global Compact, seeks to provide more information on the various incentives' mechanisms available to States.

Standardised Assessments. One of the current challenges in assessing an anti-corruption compliance programme's effectiveness is that there is a lack of standardisation regarding what is and is not an effective compliance programme. As members from the public and private sectors provide input and information over the course of this project, some compliance programme elements capable of standardisation may be identified. The reality, however, is that each company is unique. Differences in size, industry, location of business operation, and a whole host of other considerations often necessitate firms to tailor their compliance programmes to their particular set of risks. Governments engaged in the assessment of a company's compliance programme will need to balance the benefits of standardisation with the potential need to tailor a programme to business risks and industry- and companies' size-specificities.

Contextualising Compliance Failures. One issue that governments must confront when assessing compliance, including when awarding incentives, is how to treat a company with (i) a compliance failure, (ii) a history of recidivism (which requires defining corporate recidivism), and (iii) deficiencies within the anti-corruption compliance programme. A company may have an effective compliance programme and still have a compliance failure. And some compliance failures may come to light as a result of a company's decision to engage in robust assessments of their compliance programme. Additionally, corporate recidivism can present a number of challenges in gauging the effectiveness of a compliance programme, as large, complex organisations may have multiple compliance failures that occur in divergent legal or regulatory areas or within different business units. Finally, there could be a wide range of compliance deficiencies within an otherwise excellent anti-corruption compliance programme. This project is not meant to advocate for governments to adopt a strict liability regime for companies found to have engaged in anti-corruption violations. Instead, governments may need to conduct independent analyses of the above concerns when

engaging in assessments of companies' compliance programmes as well as when structuring the nature and manner in which incentives are given for compliance.

Private-Public initiatives, Collective Actions and Peer-learning Mechanisms. For many issues of public concern, there is often an interplay between governments and regulated entities, sometimes known as public-private initiatives,²⁶ as well as collective actions undertaken by interested stakeholders. Public-private partnership can be extremely beneficial, as the government benefits from getting more information about the entities they regulate, while the regulated entity has an opportunity to educate the government about the challenges it faces in running its organisation. In the anti-corruption space, collective actions have proven to be helpful as public and private stakeholders have attempted to identify and implement effective interventions to combat corruption. As the conversation about assessment of anti-corruption compliance evolves, it may be beneficial to identify ways in which private and public stakeholders might collaborate in an effort to ensure that both sets of actors are engaged in a productive assessment process. On a different scale, cooperation between peer companies can offer opportunities to share good practice and find solutions to common challenges. A further topic for discussion could therefore be how peer-learning mechanisms could be put in place to support companies wishing to improve the effectiveness of their anti-corruption compliance programmes.

Questions for Discussion:

- How can we bridge the information gap between governments and the private sector to help companies effectively assess their anti-corruption compliance programmes and incentivise them to improve these programmes over time?
- What mechanisms should governments employ to best incentivise companies to engage in self-assessment?
- What impact should evidence of (i) compliance failures, (ii) recidivist conduct, and (iii) general compliance deficiencies have in an assessment?
- How can we facilitate the sharing of lessons learned from companies about their compliance successes and challenges without jeopardising their legitimate business interests or confidentiality considerations?
- In the view of companies, how could governments strengthen their own capacity to assess compliance programmes in a way that is reasonable and supports businesses?
- How can public-private initiatives help to develop methodologies and tools to assess anti-corruption compliance initiatives?
- What peer learning mechanism could be set up to support companies that want to strengthen the effectiveness of their anti-corruption compliance programmes?
- Considering that the approaches and tools used by different authorities vary, what more could be done to promote the harmonisation of assessments at the national and/or international level?

III. Currently Implemented Assessment Methodologies

Given the recognition that the assessment of compliance programmes is an important and valuable goal for a range of stakeholders, it is perhaps unsurprising that governments, companies, and other non-governmental actors have already signalled that they are interested in and engaged in attempts to better assess anti-corruption compliance programmes. This Part will outline some of the initiatives being undertaken in this area. We welcome additional input and information about ways in which governments and companies are engaged in these activities.

a. Governments' Assessments of Compliance Effectiveness

As anti-corruption enforcement efforts have grown more sophisticated worldwide, some governments have determined that it is important to assess whether a compliance programme is effective, as opposed to a programme on paper only.

For example, the United States has enacted what is known as the Organizational Sentencing Guidelines. These guidelines expressly attempt to (i) incentivise “organizations to self-police their behaviour” and (ii) provide “guidance on effective compliance and ethics programs.”²⁷ Some argue that the Organizational Sentencing Guidelines have achieved “widespread acceptance” and provided “criteria for developing and maintaining effective compliance and ethics programs to prevent, detect, and report criminal conduct.”²⁸ Significantly, if a company can demonstrate that it has in fact implemented an effective ethics and compliance programme, it qualifies “as a mitigating factor for a fine reduction.”²⁹ The Organizational Sentencing Guidelines are technically applicable only when a company has been found guilty of a criminal violation, but they are used in an advisory manner for many civil enforcement proceedings within the United States. Additionally, when concluding non-trial resolutions prosecutors will also assess whether a company has an effective compliance programme, awarding incentives for those that do.³⁰ Those incentives often involve a decreased fine, but sometimes the incentive is related to the resolution of the offense. For instance, one company was required to enter a guilty plea, as opposed to a negotiated civil settlement agreement, because it had a “compliance program [that] was inadequate not only at the time of the offense, but also at the time of the resolution.”³¹ Finally, as noted above, the U.S. Department of Justice has at times employed an individual with significant private-sector compliance experience to assist prosecutors in evaluating companies' compliance programmes. One outgrowth of this practice was the publication of a document entitled “Evaluation of Corporate Compliance Programs,” which provides guidance on what a “well-designed compliance program” should include.³²

France is also engaged in robust anti-corruption enforcement efforts, most notably since the adoption of the Sapin 2 Act, which created the French Anti-Corruption Authority (*Agence Française Anticorruption*) (“AFA”).³³ The Sapin 2 Act “strengthened the preventive aspect of France’s anti-corruption system, in particular by establishing the AFA and creating an obligation for large companies to set up compliance programmes, with sanctions imposed for non-compliance.”³⁴ The AFA has focused on whether compliance programmes are effective. Specifically, the AFA guidelines note that the “adequacy and effectiveness of the anti-corruption programme’s measures and procedures [should be] regularly evaluated by monitoring by the third line of defence or internal audit.”³⁵ In doing so, the guidelines highlight the importance of “risk mapping,” which “consists of regularly updated documentation intended to make the organisation aware of its corruption risks.”³⁶ Such an audit should include: “[r]eview of the scope of the [risk] map, the methodology used and the deployment of the associated action plans”; “[a]nalysis of the deficiencies found and incidents (with a view to updating the map)”; “analysis of governance and proper allocation of resources”; “[a]nalysis of the systematic nature of the programme”; “[a]nalysis of the illustrations provided in the code of conduct with regard to the risks identified by the risk map: “[a]nalysis of the targeting and content of training with regard to the risks identified by the risk map”; “[a]nalysis of incidents reported by whistleblowers or found by accounting audits, and the consequences for updating the map”; and “[a]nalysis of the adequacy of third-party due diligence with regard to the risks identified by the map.”³⁷ The guidelines recommend that these

audits be “formalised, documented and retained” and that “a substantiated and documented audit report set[s] out the corrective measures and recommendations and [be] submitted to senior management.”³⁸ Finally, AFA sometimes conducts “*ad hoc* compliance audits,; which allows the AFA to verify the existence, quality and effectiveness of mandatory anti-corruption compliance measures, detect misconduct and “uncover suspicious acts that could justify a report to the judicial authorities.”³⁹

The OECD is in the process of surveying members of the Working Group on Bribery to determine to what extent governments are assessing companies’ anti-corruption compliance programmes as part of the governments’ determinations to award incentives. The results of this research thus far suggest that many countries have a strong expectation that companies should adopt anti-corruption compliance programmes, with a particular focus on programmes targeted at preventing instances of misconduct and detecting when wrongdoing occurs. There is much greater variability on whether governments are assessing whether the compliance is effective when awarding incentives. That said, one surveyed country has noted that its assessment of the effectiveness of a company’s compliance programme is considered when determining (i) the sanction for an offense, (ii) to allow penalty mitigation, (iii) suspension or debarment, and (iv) access to public procurement processes.

It is important to keep in mind that those overseeing anti-corruption enforcement within governments can vary. Some countries have various agencies with oversight over different portions of their anti-corruption regimes—in the United States, for instance, both the Department of Justice and Securities and Exchange Commission have jurisdiction over certain aspects of anti-corruption efforts. Other countries have dedicated agencies like the AFA in France. Many countries employ the use of third parties, like monitors, to assist in overseeing compliance assessments and reforms after wrongdoing has occurred. The OECD is continuing to survey countries on this issue, but there appear to be several Working Group Members whose enforcement of anti-corruption efforts is funnelled through national prosecutorial agencies or via police or investigative services.

Companies’ insights on how governments can effectively support their anti-corruption compliance efforts

As was noted above, a consultation of fourteen companiesⁱⁱⁱ has been carried out by the OECD in cooperation with Basel Institute on Governance. One area of insight provided by interviewed companies focuses on what governments can do to support companies as well as learn from them, with a view to reducing corruption within their jurisdictions. The below are some of the concerns expressed by companies that participated in the consultation.

- Interviewed companies explained that governments could incentivise effective compliance by rewarding firms with effective anti-corruption compliance programmes in bidding and procurement and other government contracting engagements.
- Interviewed companies expressed frustration to very high compliance standards whilst it remains unclear whether governments are holding their own employees to similar standards.
- Interviewed companies articulated a need for clear and standardised guidance how to assess effectiveness of anticorruption compliance across jurisdictions, noting that it is difficult to operate as a multinational organisation, or within international supply chains, when some jurisdictions provide little to no guidance while others are making expecting very specific outcomes.
- Interviewed companies noted the importance of the underlying expertise, background, and qualifications of government employees who may be involved in assessing a company’s anti-corruption compliance programme.

ⁱⁱⁱ The 14 companies chosen for this consultation were mostly larger organisations (500+ employees), although Small- and Medium-Sized Enterprises were also represented. They were headquartered in North America, Europe, Africa, Latin America and Asia.

- Interviewed companies noted that governments need to consider the differences in capacity between large companies and small and medium enterprises (SMEs) and provide relevant guidance to both sets of organisations.

These insights are important for governments to consider going forward—particularly governments that (i) are not currently awarding incentives for an effective anti-corruption compliance programme or (ii) are awarding incentives for anti-corruption compliance programmes without assessing the effectiveness of those programmes.

Relatedly, governments are also engaged in a range of activities related to the effort of encouraging companies to assess the effectiveness of their compliance programmes. Assessments of this nature are imperative for ensuring that companies have appropriate incentives for implementing effective compliance programmes, and a key incentive for companies to engage in compliance activity, as reflected in companies' own consultation responses, often arises out of, or from, guidance or requirements from governments. Prof. Martinez argues that enforcement authorities should (i) utilise the information they have about compliance programmes and structures in a manner that would allow private sector actors to have a better understanding of what compliance initiatives do and do not work⁴⁰ and (ii) be more deliberative about the sanctions levied, particularly when a company has a history of compliance failures.⁴¹

Finally, this project is focused on anti-corruption compliance programmes, but there are many governments and companies that frame effective compliance programmes more broadly than the anti-corruption area. Indeed, for many companies, their anti-corruption compliance programmes are folded into a broader compliance programme. Governments attempting to assess the effectiveness of anti-corruption compliance programmes may be confronted by situations where it may be challenging for a firm to disaggregate the parts of their programme focused on anti-corruption compliance versus its compliance programme more generally. Governments could use good practices related to the assessment of compliance programmes in other areas, such as money laundering or competition, to develop or reinforce their methodologies to assess the effectiveness of anti-corruption compliance efforts.

Questions for Discussion:

- What role should governments play in assessing the effectiveness of corporate anti-corruption compliance programmes?
- What capacities and resources might governments need to properly assess the effectiveness of a company's compliance programme?
- What methodologies, evidence, regulatory, and general tools should governments employ or have available to determine whether a corporate anti-corruption compliance programme is in fact effective?
- To what extent governments can use the assessment methodologies developed in other areas to develop methodologies and tools to assess the effectiveness of anti-corruption compliance programmes?
- What, if any, avenues might there be for capacity building or technical assistance across governments or across agencies to help develop methodologies and tools to assess what sorts of compliance initiatives have empirically proven to be effective?

b. Companies' Assessment of Compliance

Companies from a range of industries are adopting mechanisms to allow them to measure the effectiveness of their compliance programmes. Some of the information is publicly available, but much of it is not. As companies discover methods of assessment that are capable to operationalize, as well as particular strategies that have proven effective, providing this information to public and private stakeholders will prove invaluable for helping industries strengthen their compliance programmes.

A few anonymised examples of companies whose decisions to measure and assess aspects of their compliance programmes are public are highlighted below.

Insights from Compliance Programmes^{iv}

- *One company indicates that it assesses its compliance programme effectiveness by ensuring repeated dialogue between company employees and members and members of the legal team, including through formal training, ad hoc counselling on particular issues, as well as periodic assessments.*
- *One company indicated that it employs risk-based compliance programme monitoring and testing and regularly scheduled risk reviews.*
- *One company utilizes questionnaires to assist it in engaging in self-assessment efforts targeted at measuring the effectiveness of its compliance programme. These assessments aid the company in identifying areas in need of improvement, reinforcement, or additional monitoring.*

The companies that provided information to the OECD in cooperation with the Basel Institute on Governance provided a range of valuable and important perspectives regarding the ways in which they employ assessments. A few are recounted below.

- Interviewed companies noted that it can be useful to harness the results of investigations to inform how a compliance programme should be adjusted in the future.
- The importance of exchanging and benchmarking information with other companies was also highlighted by the interviewed companies, in particular at industry-level. These interactions and opportunities for peer learning allow companies to gain valuable insights from other companies about the types of compliance interventions that are or are not effective.
- Several interviewed companies attempted to ascertain whether employees understood their compliance obligations via surveys, interviews, or questionnaires. These sorts of interventions were typically meant to supplement and reinforce information that employees were already trained upon and should presumably be familiar with.

A more fulsome accounting of the results of this consultation with interviewed companies will feed into the broader multi-stakeholder project.

Questions for Discussion:

- What are companies doing to assess whether their anti-corruption compliance programmes are effective, and what kind of goals and targets are they setting themselves?

^{iv} These insights were pulled from publicly available compliance documents for large, multinational organisations.

- What are the challenges faced by companies in assessing the effectiveness of their programmes?
- What can be learnt from the models used by large companies to assess compliance programmes of suppliers, in particular SMEs, in due diligence processes?
- See also questions for discussions p.14

* * * *

Governments and companies, as well as non-governmental stakeholders, have demonstrated an interest in and put efforts toward ensuring the effective assessment of anti-corruption compliance programmes. But as is reflective in the above discussion, the implementation of these assessments lacks standardization and methodological guidance and, in many ways, consensus. This OECD project will investigate whether there are some generalizable principles and considerations regarding the assessment of anti-corruption compliance programmes that governments can use when awarding incentives, in particular in view of experiences and challenges faced by companies. Additionally, this effort will assist companies in strengthening their anti-corruption compliance programmes assessment efforts.

Conclusion

Anti-corruption compliance efforts have grown tremendously over the past thirty years. As anti-corruption norms have proliferated across the globe, a range of anti-corruption laws and standards have been enacted by various governments. Part of those efforts have resulted in what is today's robust anti-corruption compliance community. This project is a needed next step to ensure that the compliance programmes adopted by companies today ensure that corruption does not occur tomorrow. Governments can assist this progression by being more deliberative and purposeful in their assessment of companies' anti-corruption compliance programmes.

For this project to succeed, however, we need input from a range of private and public stakeholders. We need to properly take stock of what is already being done by both governments and companies. Additionally, we need to better understand what more can be done by a range of stakeholders to ensure that incentives are awarded by governments after they have assessed the effectiveness of companies' compliance programmes.

Sources and Background Materials

¹ See e.g., Kevin E. Davis, *Between Impunity and Imperialism: The Regulation of Transnational Bribery* (2019 (discussing the “OECD Paradigm”)); Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611-1682 (2017) (discussing the OECD’s role in spurring anti-corruption efforts worldwide).

² OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (last updated Nov. 25, 2021), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378>.

³ United Nations Office on Drugs and Crime, A RESOURCE GUIDE ON STATE MEASURES FOR STRENGTHENING CORPORATE INTEGRITY (2013), https://www.unodc.org/documents/corruption/Publications/2013/Resource_Guide_on_State_Measures_for_Strngthening_Corporate_Integrity.pdfhttps://www.unodc.org/documents/corruption/Publications/2013/Resource_Guide_on_State_Measures_for_Strngthening_Corporate_Integrity.pdf.

⁴ Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003).

⁵ Brandon Garrett and Gregory Mitchell, *Testing Compliance*, 83 L. & CONTEMP. PROBS. 47 (2020)

⁶ Eugene F. Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, N.Y. J. OF L. & BUS., Summer 2018, at 965

⁷ Hui Chen and Eugene F. Soltes, *Why Compliance Programs Fail: And How to Fix Them*, HARV. BUS. REV., Mar.–Apr. 2018, at 116.

⁸ *Id.*

⁹ Ethics & Compliance initiative, *Principles and Practices of High-Quality Ethics & Compliance Programs*, (2016), <https://www.ethics.org/wp-content/uploads/2016-ECI-WP-Principles-Practices-High-Quality-E-C-Programs.pdf>.

¹⁰ Ethics & Compliance Initiative, *Measuring the Impact of Ethics & Compliance Programs* (2018), https://acua.org/ACUA/media/files_members/rise/webinars/Measuring-the-Impact-of-Ethics-and-Compliance-Programs-June-2018.pdf.

¹¹ *Id.*

¹² Ethics and Compliance Initiative, *Global Business Ethics Survey* (2023), <https://www.ethics.org/gbes-2023/>.

¹³ Melissa Rorie and Benjamin van Rooij, *Measuring Compliance, Overcoming Four Challenges and Matching Method to Purpose*, THE FINREG BLOG (Sept. 28, 2021), <https://sites.duke.edu/thefinregblog/2021/09/28/measuring-compliance-overcoming-four-challenges-and-matching-method-to-purpose>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Veronica Root Martinez, *The Government’s Prioritization of Information over Sanction: Implications for Compliance*, 83 L. & CONTEMP. PROBS. 85 (2020).

¹⁹ Jennifer Arlen, *The Compliance Function*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey N. Gordon and Wolf-Georg Ringe, eds., Oxford University Press 2d ed., forthcoming), https://its.law.nyu.edu/faculty/profiles/representativeFiles/Arlen.Compliance%20Function.2023.07_593BD13D-CAD5-802A-B77962197EE16B4E.pdf.

²⁰ Gregory Mitchell & Brandon Garrett, *Overcoming Hope and Fear in Compliance*, STARLING COMPENDIUM (May 2022).

²¹ John Armour, Brandon Garrett, Jeffrey Gordon, and Geeyoung Min, *Board Compliance*, 104 MINN. L. REV. 1191 (2020)

²² See e.g., Anne R. Harris, *Evaluating Ethics, Compliance Programs*, 100 NAT’L DEFENSE 748 (Mar. 2016); Hui Chen, *New DOJ Fraud Section Data Expert Will Reshape Compliance*, LAW360 (Oct. 7, 2022), <https://www.law360.com/articles/1537908/new-doj-fraud-section-data-expert-will-reshape-compliance>.

²³ Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, in PROSECUTORS IN THE BOARDROOM (Anthony S. Barkow & Rachel E. Barkow, eds. 2011).

²⁴ Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997).

²⁵ Martinez, *supra* note 18.

²⁶ See Orly Lobel, *New Governance as Regulatory Governance* in THE OXFORD HANDBOOK OF GOVERNANCE (2012).

²⁷ United States Sentencing Commission, THE ORGANIZATIONAL SENTENCING GUIDELINES (Aug. 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220829_Organizational-Guidelines.pdf.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See .e.g., Assistant Attorney General Kenneth A. Polite, Jr., *Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy* (Jan. 17, 2023), <https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law>.

³¹ *Id.*

³² U.S. Department of Justice, Criminal Division, Evaluation of Corporate compliance Programs (March 2023), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

³³ France's Anti-Corruption Strategy in Its Cooperation Action (2021-2030), https://www.diplomatie.gouv.fr/IMG/pdf/strategie_anticorruption_de_la_fce_ds_son_aciton_de_coop_en_cle81dc7d.pdf

³⁴ OECD, *Implementing the OECD Anti-Bribery Convention* (2021), <https://www.oecd.org/france/france-oecdanti-briberyconvention.htm>.

³⁵ THE FRENCH ANTI-CORRUPTION AGENCY GUIDELINES, AGENCE FRANÇAISE ANTICORRUPTION 40 (Dec. 4, 2020), <https://www.agence-francaise-anticorruption.gouv.fr/files/files/French%20AC%20Agency%20Guidelines%20.pdf>.

³⁶ *Id.* at 7.

³⁷ *Id.* at 40.

³⁸ *Id.*

³⁹ *Id.* at *supra* note 34.

⁴⁰ Veronica Root Martinez, *The Government's Prioritization of Information over Sanction: Implications for Compliance*, 83 L. & CONTEMP. PROBS. 85 (2020).

⁴¹ Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003 (2017).