



HUMBOLDT-VIADRINA
School of Governance



Motivating Business to Counter Corruption

A Practitioner Handbook on
Anti-Corruption Incentives and Sanctions

About the HUMBOLDT-VIADRINA School of Governance

The HUMBOLDT-VIADRINA School of Governance in Berlin was founded in 2009 by the Humboldt University of Berlin and the European University Viadrina in Frankfurt (Oder) to bring together the public and business sectors, civil society, academia, and the media. Its aim is to find practical solutions for social challenges and to contribute to sustainable democratic politics by building political consensus through multi-stakeholder cooperation. The School has a special character: it seeks to be an academically respected institution, as well as an active civil society organization that encourages public debates and long-term policy projects.

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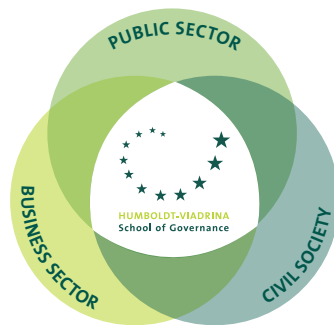
The authors are further very grateful to Esther Pieterse for contributing to this Handbook.

Every effort has been made to verify the accuracy of the information contained in this document. All information was believed to be correct as of October 2013. Nevertheless HUMBOLDT-VIADRINA School of Governance cannot accept responsibility for the consequences of its use for other purposes or in other contexts.

Foreword

Corruption is considered one of the most pressing concerns of our time. It fuels poverty and political instability, undermines sustainable economic growth and distorts fair competition. Now that the importance of business in the global fight against corruption is widely accepted, recent years have seen increasing debate about how different actors in society can help motivate companies to engage in it.

Our approach at the HUMBOLDT-VIADRINA School of Governance is based on the vision that the public sector, business sector and civil society need to collaborate in order to solve global and local problems. We aim to find practical solutions for social challenges and to contribute to sustainable democratic policies by building consensus through multi-stakeholder cooperation. We seek to be an academically respected institution, as well as an active civil society organization that encourages public debate and long-term policy projects. The implementation of ideas is as important as the thinking behind them.



Our approach as a ‘think-and-do tank’ is the spirit driving this Practitioner Handbook. We believe that collaboration is needed between anti-corruption practitioners in the public and business sectors, as well as civil society, to motivate sustainable action against corruption in business. This Handbook was developed as part of the wider HUMBOLDT-VIADRINA initiative, *Best Practice on Anti-corruption Incentives and Sanctions for Business*.

The Handbook is intended for anti-corruption practitioners, change agents as well as policymakers. By examining how anti-corruption measures can be applied, our aim is to enable all stakeholders to achieve a sustainable impact on business behavior. In today’s fast-changing economic environment, we also aim to stimulate ongoing dialog among stakeholders about how best this can be achieved.

We hope this Practitioner Handbook will be useful to all those wanting to act against corruption in business. Our thanks to Siemens for supporting this initiative as part of the **Siemens Integrity Initiative**.

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Why should you read this Handbook?

Do you feel that an approach of using only penalties is sufficient to deter companies from engaging in corruption?

Are you using rewards to motivate companies, especially in zones of weak governance?

Do you know of all the penalties (i.e. sanctions) and rewards (i.e. incentives) to strengthen the business case for companies to counter corruption?

Do you know when to target an entire company or its individual representatives?

Are you aware of good practices when applying and implementing penalties and rewards?

If you answered any of these questions with 'No', this Handbook is for you – whether you are an anti-corruption practitioner, change agent or a policymaker from the public sector, business sector or civil society, and whatever region you are from.

If you want business to engage in the fight against corruption but don't know what you can do, or if you seek new ideas, this Practitioner Handbook helps you to establish, apply or benchmark effective anti-corruption sanctions and incentives for business¹.

¹ The term 'business' comprises the entire company as well as individual representatives.

PUBLIC SECTOR

If you are from the public sector the Handbook will assist you in:

- using a complementary approach of sanctions and incentives to motivate business effectively;
- applying not only legal but also commercial sanctions and incentives to companies and their representatives;
- communicating about applied sanctions and incentives to further increase their impact.

BUSINESS SECTOR

If you are from the business sector the Handbook will assist you in:

- going beyond the typical sanctions-only approach in motivating your business partners to adhere to your anti-corruption standards (e.g. Code of Conduct);
- establishing commercial incentives by giving you practical examples and implementation guidance;
- understanding practical considerations when monitoring your business partners' adherence to your anti-corruption standards.

CIVIL SOCIETY

If you are from civil society the Handbook will assist you in:

- applying reputational sanctions and incentives to companies;
- advocating for the combined approach of sanctions and incentives by the public sector as well as the business sector;
- understanding the role you can play in the practical application of incentives and sanctions, such as monitoring and establishing anti-corruption coalitions.

By providing a common language and methodology, the Handbook aims to foster collaboration and a coordinated approach between the public and business sectors and civil society. It recognizes collaboration both within and across stakeholder groups as an effective way to motivate business.

About this Handbook

This Practitioner Handbook focuses on an important approach to increase the engagement of business in the fight against corruption – that is, the use of sanctions and incentives. This approach is often referred to as ‘sticks and carrots’.

Why target business? The role of the business sector in fighting corruption is undisputed, generating calls from stakeholders such as national governments, intergovernmental institutions and civil society organizations for greater accountability, transparency and integrity.

Increasing amounts are being written about measures companies can take internally to counter corruption, such as establishing an anti-corruption ethics & compliance program. But the underlying motives are less elaborated. Are companies doing this only because they are required to by law? Are they doing this because it is the right thing to do? Or does it actually make good business sense?

In order to strengthen the motivation of companies to engage in the fight against corruption, there is a need not only to underline the moral case for companies to act as good corporate citizens. It is equally important to strengthen the business case for companies to counter corruption. This can be done when companies’ external stakeholders apply a combined approach of sanctions and incentives.

Methodology

The Handbook is based on comprehensive desk research as well as interviews with anti-corruption policymakers and practitioners across sectors and regions worldwide. It draws on a global expert survey² of actors in all three stakeholder groups and the analysis of case studies.

Target audience

The Handbook is targeted at anti-corruption practitioners, change agents and policymakers from the three major societal groups – public sector, business sector and civil society. It is designed for a global audience, but recognizes different regional contexts, such as zones of weak governance.

Throughout the Handbook, this target audience is referred to as ‘stakeholders’.

² HUMBOLDT-VIADRINA School of Governance (2012): *Motivating Business to Counter Corruption - A Global Survey on Anti-corruption Incentives and Sanctions*.

Structure

Following a provocative question on the business case to counter corruption, this Handbook is structured in four major parts:

Part I

Part I demonstrates that all stakeholders, whether they are from the public sector, business sector or civil society can play an important role in motivating business to counter corruption.

At the end of Part I, stakeholders will have a good overview of how the public sector, business sector and civil society hold the power to motivate companies by strengthening the business case to counter corruption.

Part II

Part II provides a simple model of factors that influence business decisions and advocates for a combined approach of sanctions and incentives to influence these decisions.

At the end of Part II, stakeholders will have a good understanding of why a complementary approach of sanctions and incentives is the most promising way to motivate business to counter corruption.

Part III

Part III profiles legal, commercial and reputational sanctions and incentives and outlines practical considerations of their application.

At the end of Part III, stakeholders will have a good understanding of the sanctions and incentives available, how they can be categorized and in which scenarios they should be applied to a company or its representatives.

Part IV

Part IV describes six overarching principles that are key to the successful implementation of sanctions and incentives.³

At the end of Part IV, stakeholders will have a good understanding of what should be taken into account to apply sanctions and incentives effectively to motivate business to counter corruption.

The Handbook closes with a set of key recommendations for stakeholders.

³ This Handbook is not a blueprint for how to apply sanctions and incentives in every unique environment. It will not give roadmaps or step-by-step strategies on how to implement sanctions and incentives, as this differs in different institutional and societal contexts. Rather, it outlines important questions to ask, lists sanctions and incentives, and provides key implementation principles. In this sense, the Handbook is adaptable and its content universally applicable – but in a different way for each situation.

Practical examples

The Handbook reaches beyond theory. It features case studies and policy extracts that demonstrate the application of anti-corruption sanctions and incentives to business.

In addition, guest contributors have shared their ideas and experiences in using sanctions and incentives to change business behavior.

Organization and Author	Title	Page
Egyptian Junior Business Association Qusay Salama <i>Board Member</i>	Advancing Anti-Corruption in Challenging Business Environments – SMEs, collective action, and the provision of incentives in Egypt	24
Eni SpA Massimo Mantovani <i>General Counsel of Eni SpA and co-lead sherpa of the B20 Task Force on Improving Transparency and Anticorruption for the 2013 G20 in Russia</i>	Encouraging Self-Reporting	46
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Society of Corporate Compliance and Ethics Joseph E. Murphy <i>Director of Public Policy</i>	Incentives for Good Anti-Corruption Behavior: What about Whistleblowers?	86
The Convention on Business Integrity Olusoji Apampa <i>Executive Director</i>	Evaluating Corporate Compliance – An effective integrity assessment as a basis for setting incentives for companies in Nigeria (and beyond)	116

Expert consultation

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Is there really a business case to counter corruption?

Increasingly often, the demand for companies to act as good corporate citizens is supplemented by the invocation of a so-called 'business case to counter corruption'. This alludes to the fact that doing the right thing with regards to ethics & compliance is not only right from a moral standpoint, but also makes good business sense.

If there really was a business case for companies to counter corruption (i.e. not acting corruptly was more profitable than acting corruptly), why are we still seeing many cases of companies and their representatives engaging in corrupt acts?

The moral case to counter corruption

Over the last two decades, understanding of the negative effects of corruption has significantly increased. Thus, few people would disagree that corruption is morally wrong. Despite the few instances where individuals or contexts warrant a moral justification of corrupt practices, overall it is safe to argue that there are stronger moral arguments to refrain from corruption than to engage in it. It can thus be assumed that there is a moral case against corruption to be made everywhere.

But it has also been shown that although most managers disapprove of corrupt practices, the perception often prevails that acting against corruption will either result in a short-term loss of opportunity or that corruption is seen as a necessity of doing business. The existence of a moral case against corruption therefore does not necessarily mean that individuals will not act corruptly. For example, the sales officer of a company may personally feel that corruption is wrong, but he is also pressured by his superior to meet ambitious business targets – no matter what. In such a case, an individual may act against his personal belief system and subsequently rationalize his behavior.

Despite a moral rejection, individuals may engage in corruption when it is seen as beneficial.⁴

While further strengthening the moral case is undoubtedly important, it may not be enough. The moral case needs to be complemented with a strong business case. If countering corruption is linked to tangible business advantages, it is much more likely that business will actually do so. Fighting corruption then increasingly becomes a business decision, supporting the moral desire to do the right thing.

⁴ In cases of extortion individuals may also engage in corruption without it being beneficial.

Is there really a business case for everyone?

When referring to the business case to counter corruption, strong and impressive figures are often cited to underscore the negative impact of corruption on companies:⁵

- Corruption adds up to 10 percent to the total cost of doing business globally;
- Corruption adds up to 25 percent to the cost of procurement contracts in developing countries;
- Moving business from a country with a low level of corruption to a country with medium or high levels of corruption is found to be equivalent to a 20 percent tax on foreign business.

These numbers underline the importance of eradicating corruption. However, they can also be misleading. For one, in their generality they tend to ignore the individual perspective of companies and their representatives in a specific situation or context.

But such generic figures also hide the fact that while corruption adds to the costs of business transactions, there is much that can be gained – at least in the short-term. For example, a company representative may accept a cost increase on a business transaction if – through corrupt behavior – the contract is won in the first place. There may not even be a cost increase for the company when such costs are anticipated and directly calculated into the business transaction. Arguments that seek to support the business case often refer to unfavorable dependencies for companies – especially when they (have to) engage with corrupt low-level public officials. For example, companies may be forced to pay bribes to obtain operating licenses or other public services. Refusing to do so may result in negative effects for the company, such as time delays. Companies may therefore be tempted to pay such bribes, especially as these payments are typically small in nominal value, in order to avoid these negative effects which may be even more costly than the actual payment. Why should the public official not ask for money again next time? It worked once, it will probably work again. In fact, the public official has a motivation to make the overall process even more cumbersome for the company in order to request more money or other kinds of advantages.

Business managers understand these arguments to counter corruption⁶ – but frequently they may still not be strong enough to actually persuade them not to engage in it. When faced with winning an important contract, obtaining permission to open a new store or renewing an operating license, the transaction-related costs of corruption may still be small compared to what can be gained from engaging in corrupt acts.

⁵ Source: International Chamber of Commerce, Transparency International, United Nations Global Compact, World Economic Forum (2008): *Clean Business is Good Business*.

⁶ Additional arguments comprise e.g. supporting a culture of transparency, accountability and integrity, improving employee morale, reducing process inefficiencies, attracting and retaining highly motivated employees, improving public trust in business and improving brand reputation.

Motivating Business to Counter Corruption

Is there really a business case to counter corruption?

Strengthening the business case through sanctions and incentives

Admittedly, the argument for establishing a business case to counter corruption solely on such a transaction-related basis is a bit theoretical. Corruption is illegal. In the past decade, an international legal framework has been established to underscore this. This framework includes the United Nations Convention against Corruption (UNCAC), which requires countries inter alia to criminalize major manifestations of corruption, such as bribery and embezzlement, as well as acts carried out in support of corruption. Thus companies that engage in corrupt practices face negative consequences in the form of penalties, such as a legal fine.

But even with an international legal framework prohibiting corruption, it once again needs to be asked: If there really was a business case for companies to counter corruption (i.e. not acting corruptly was more profitable than acting corruptly), why are we still seeing so many cases of companies and their representatives engaging in corrupt acts?

There are three practical arguments that may answer the question on the persistence of corruption:

- Companies do not face negative consequences for being corrupt either because sanctions are **not applied in practice**, e.g. a sanction in the form of a legal fine, or they do not exist at all.
- Companies may face negative consequences for being corrupt, but even when caught, the consequences are **not dissuasive enough**, so being corrupt is still profitable, despite sanctions.
- Companies may face negative dissuasive consequences for being corrupt and may also perceive the risk of getting caught as high, but they do not see any other way of surviving in a competitive environment. There is **no real business alternative to corruption** (in the short term).

Under conditions of perfect enforcement, dissuasive sanctions can increase the costs of corruption so substantially that they are enough to influence the business case, so corruption becomes too much of a risk and is therefore unprofitable. However, perfect enforcement conditions rarely exist and sanctions are very often neither applied nor dissuasive enough. In order to strengthen the business case for countering corruption, stakeholders need not only to strengthen their monitoring and enforcement capacities, but also to widen the application of sanctions to make them more dissuasive (e.g. combining legal with commercial and reputational sanctions).

But would that mean that in areas with weak (perceived) monitoring and enforcement, despite the existence of dissuasive sanctions 'on paper', there is no business case for countering corruption? No. Further to the objective of making these sanctions more effective by enhancing their actual application, the business case can further be supported by applying incentives for good performance. Such an incentive approach strengthens the business case by making anti-corruption commitment more profitable. Countering corruption is then not only seen as a way to avoid negative consequences, but as a way for companies to set themselves apart from their peers (and gain competitive advantage). This offers an alternative approach for companies that currently feel refraining from corruption translates directly into a loss for the business.

The question of whether there is a business case for countering corruption cannot be answered with a clear 'yes' or 'no'.

Despite a strong moral case and sound business arguments to counter corruption, corruption in the business sector still persists, to one degree or another, almost everywhere.

Thus, a persuasive business case for companies can only be established through sanctions and incentives. In the presence of dissuasive sanctions and a high risk of detection, a business case exists for companies to counter corruption. However, even for companies operating in environments with no dissuasive sanctions and/or low risks of getting caught, a business case can be established. Incentives can be an alternative by providing tangible business advantages to companies that refrain from corruption.

Stakeholders from the public sector, the business sector itself and civil society can set powerful anti-corruption sanctions and incentives for companies and their representatives. Increasingly fighting corruption then becomes a day-to-day business decision, supporting the moral desire to do the right thing.

Part I:

The power to motivate

All stakeholders hold significant potential to influence business

At the end of Part I, stakeholders will have a good overview of how the public sector, business sector and civil society hold the power to motivate companies by strengthening the business case to counter corruption.

I.1 Stakeholders from the PUBLIC SECTOR **p. 18**

Stakeholders from the public sector are the key driver to motivate business to counter corruption – either through applying sanctions and incentives themselves or through facilitating the application of measures by the business sector and civil society.

I.2 Stakeholders from the BUSINESS SECTOR **p. 20**

Stakeholders from the business sector have enormous potential in shaping a corruption-free business environment by applying sanctions to those who fall below and incentives to those who live up to or even exceed anti-corruption standards.

I.3 Stakeholders from CIVIL SOCIETY **p. 22**

Besides applying reputational measures, civil society can do much to motivate in business to counter corruption. Civil society organizations can for example advocate for and monitor the application of legal and commercial sanctions and incentives by the public and business sectors.

Motivating Business to Counter Corruption

Part I: The power to motivate

Companies and their representatives act and interact in complex societal and economic settings with a variety of stakeholders. This means that all these stakeholders have the potential to influence business behavior regarding refraining from corruption.

One way of influencing business is through the application of sanctions and incentives. For example:

- **PUBLIC SECTOR:** A governmental institution can impose a criminal fine on a company caught bribing a public official.
- **BUSINESS SECTOR:** A large company can establish a preferred supplier relationship with selected suppliers due to their exceptional anti-corruption ethics & compliance programs.
- **CIVIL SOCIETY:** Civil society organizations can generate publicity about certain cases of corruption and thus impact the reputation of corrupt companies.

Figure 1 shows that stakeholders from the public sector, business sector⁷ and civil society can apply sanctions and incentives to motivate business to counter corruption:



Figure 1: Stakeholders can apply a variety of sanctions and incentives to business

⁷ Figure 1 shows that business can apply, as well as be subject to, anti-corruption sanctions and incentives. A company may receive a sanction from a public sector stakeholder for a corrupt act (e.g. exclusion from public contracts), while at the same time itself apply incentives to support its own business standards.

Of course, the selection of sanctions and incentives depends not only on the stakeholder itself but also on the local context.

In a country with very strong and effective law enforcement, the public sector will obviously be better equipped to influence business than in a country where the government's authority and effectiveness are limited. Likewise, a civil society organization will be better equipped to speak out publicly against corruption in a context where civil and political rights such as freedom of information, speech and assembly are respected. And a multinational company with strong ties around the world will probably hold greater leverage over its business partners than a small company with fewer relationships.

But while strong law enforcement, sufficient respect for human rights or relative economic power are factors that can significantly facilitate the application of sanctions and incentives, this does not mean that nothing can be done in their absence.

There is much that can be done. All stakeholders – whether from the public sector, the business sector itself or civil society – have the potential to apply powerful measures to strengthen the business case and motivate business to counter corruption!

I.1 Stakeholders from the Public Sector

Examples:

- > **Judiciary**
(including courts, public prosecutor)
- > **Legislative**
(e.g. parliaments)
- > **Executive**
(Government)
- > **Public procurement agencies**
- > **Export credit agencies**
- > **International Organizations**
(e.g. multilateral development banks)

As legislators or law enforcement officials, public sector stakeholders can strengthen the business case to counter corruption by applying legal measures. Fines or imprisonment can send strong signals when implemented in a transparent and accountable way.

But the public sector not only acts as legislator and law enforcer. It is also a major contractor of public goods and services and as such can apply commercial and reputational measures. A public procurement agency could, for example, publicly debar a supplier for violating its anti-corruption standards. The OECD Recommendations for Further Combating Bribery of Foreign Public Officials of 2009 recognize this by stating that “laws and regulations should permit authorities to suspend [business] ... from competition for public contracts or other public advantages, including public procurement contracts”.

Even in circumstances in which the application of sanctions and incentives is restricted (e.g. capacities of public institutions are limited), there is a lot stakeholders from the public sector can do to improve overall context and facilitate the application of sanctions and incentives by others. For example:

- Provide a stable set of regulations and institutions governing business operations;
- Promote the advancement of laws through voluntary standards;
- Strengthen opportunities for civil society to participate in public tenders⁸ (e.g. monitoring);
- Promote and support collective action initiatives;
- Increase transparency through access to information and freedom of expression.

⁸ *Civil society-led procurement monitoring in the Philippines or the ‘Social Witnesses’ in Mexico. For more examples and guidance, see e.g. Transparencia Mexicana (2012): The New Role of Citizens in Public Procurement or Transparency International USA (2012): Procurement Monitoring Guide – A Tool for Civil Society.*

In zones of both weak and strong governance, stakeholders from the public sector have enormous potential to motivate business to counter corruption – either through applying sanctions and incentives themselves or through facilitating the application of measures by the business sector and civil society.

“Each State Party shall take measures [...] to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.”

(Article 12(1) of the United Nations Convention against Corruption)

“Key priorities for G20 governments should be to streamline their public procurement processes, to address the demand-side of bribery, and to encourage and further incentivize business action against corruption.”

(B20 Task Force Recommendation for Los Cabos / Mexico, June 2012)

1.2 Stakeholders from the Business Sector

Examples:

- > **Multinational enterprises** (MNEs) as well as **small and medium-sized enterprises** (SMEs)
- > **State-owned enterprises** as well as **privately or publically owned enterprises**
- > **For-profit companies** as well as **not-for-profit companies**
- > **Business representatives** (executives as well as employees)

As customer, supplier, investor, insurer, financier or other business partner, business sector stakeholders are arguably closest to other companies and can thus strengthen the business case to counter corruption by applying mostly commercial measures. Termination of contracts with corrupt business partners or preferential treatment of suppliers with a strong value statement can be strong measures to motivate business partners.

Likewise, if not necessarily to the same extent, companies can as contractually engaged with their business partners make use of legal measures such as contractual penalties or claim compensation for damages.

Even in circumstances in which the application of sanctions and incentives is restricted (e.g. capacities and outreach of company are limited, instable policy environment), there is a lot stakeholders from the business sector can do to improve overall context and facilitate the application of sanctions and incentives by others. For example:

- Engage in collective action initiatives with industry peers;
- Support business associations in capacity building;
- Lobby for effective policies and anti-corruption regulations with local and national governments;
- Work towards the inclusion of civil society organizations in public procurement as monitors (e.g. Integrity Pacts).

On a global scale, large multinational enterprises probably have the biggest potential for influence. But small and medium-sized enterprises (SMEs) can also play a crucial role in shaping the way business is done, as they usually make up the biggest chunk of the business sector. By monitoring and streamlining their operations, refusing to bribe, raising awareness and increasing transparency they have significant power to stimulate change – especially when done collectively.

In zones of both weak and strong governance, stakeholders from the business sector are a key driver in shaping a corruption-free business environment by applying sanctions to those who fall below anti-corruption standards and incentives to those who live up to or even exceed them.

“Companies are subject to extortion and some play a role in paying bribes. Accordingly, the private sector is also part of the problem and can also be part of the solution (for example, by sharing responsibility for finding ways to effectively fight corruption).”

(ICC, TI, WEF and UNGC⁹)

“Access to finance is one of the most severe problems that SMEs face, particularly in the developing world. If financial institutions linked anti-corruption compliance to certain incentives in terms of financing, it would create an excellent business case. One possible support initiative would be to offer better loan conditions for companies that apply certain ethical standards.”

(UNIDO and UNODC¹⁰)

⁹ Source: International Chamber of Commerce, Transparency International, World Economic Forum and the UN Global Compact (2012): *Clean Business is Good Business – The Business Case against Corruption*.

¹⁰ Source: United Nations Industrial Development Organization, United Nations Office on Drugs and Crime (2007): *Corruption prevention to foster small and medium-sized enterprise development*.

1.3 Stakeholders from Civil Society

Examples:

- > **Non-governmental organizations** (NGOs)
- > **Business associations**
- > **Labor unions**
- > **Media outlets**
- > **Foundations**
- > **Academic institutions**
- > **Social movements**
(and other unorganized social networks)
- > **Individual activists**
- > **Religious institutions**

Advocates, opinion leaders, journalists, and other civil society stakeholders can have significant influence on public opinion and can thus strengthen the business case to counter corruption by applying mostly reputational measures. Making corruption cases public or assessing reporting of companies in a ranking can be very powerful measures to motivate business.

Other civil society stakeholders with closer business ties such as business associations can further facilitate (and to a limited extent apply) commercial measures (e.g. facilitate collective action initiatives in the dissemination of good practice and homogenization of anti-corruption standards and requirements).

Even in circumstances in which the application of sanctions and incentives is restricted (e.g. capacities and outreach of civil society organization are limited, repressive policy environment), there is a lot stakeholders from civil society can do to improve overall context and facilitate the application of sanctions and incentives by others. For example:

- Raise awareness about corruption through education and awareness campaigns;
- Provide capacity building (e.g. guidance and training on anti-corruption ethics & compliance programs);
- Advocate for the further application of sanctions and incentives by public and business sector stakeholders;
- Support the monitoring efforts of sanction or incentive processes of other stakeholders (e.g. act as independent monitors in public procurement processes that include incentives for good performance);
- Join collective action initiatives to promote the application of sanctions and incentives.

In zones of both weak and strong governance, stakeholders from civil society are of particular importance in motivating business to counter corruption. Not only can sanctions and incentives targeting the reputation of companies be very effective, but stakeholders can also do much to advocate for and monitor the application of legal and commercial sanctions and incentives by the public and business sectors.

“Like any other aspect of human resources, there have to be incentives for carrying out the code of conduct, and sanctions for ignoring it.”

(Cobus de Swart – Managing Director, Transparency International ¹¹)

“Where companies and governments act dishonestly, Global Witness exposes and shames them. We gather concrete evidence of corporate and official corruption and use this to expose how deals are done, where the money is going and who is benefitting [...] We then campaign to change the system.”

(Global Witness¹²)

¹¹ Source: http://www.huffingtonpost.com/cobus-de-swardt/walmart-bribery-mexico_b_1455596.html.

¹² Source: Global Witness (2013): Annual Review 2012 – Exposing hidden interests.

Advancing Anti-Corruption in Challenging Business Environments – SMEs, collective action, and the provision of incentives in Egypt

Qusay Salama

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Small and medium-sized enterprises (SMEs) are a strong and crucial component of the Egyptian economy. They stimulate entrepreneurship, generate employment, and have an important role to play in the country's socioeconomic development. Estimates of the extent and proportion of SMEs in Egypt are as high as 97 percent (of all enterprises)¹³. They are further said to employ about 75 percent of the private sector's labor force¹⁴. As a large proportion of SMEs operate in the informal economy however, precise information is notoriously difficult to come by. The importance of SMEs, globally and in Egypt, is nonetheless undisputed. SMEs have proven highly resilient to the recent international financial crises, their share of a country's gross domestic product increases with economic development, and they have significant potential to contribute to an inclusive development of the private sector.

While SMEs are of crucial economic importance in Egypt, their governance, transparency, and anti-corruption standards are chronically underdeveloped. Informality, instability, unpredictable regulatory requirements, and a lack of access to finance are significant obstacles – and often result in SMEs lacking the awareness, capacity, or resources to establish effective governance and compliance systems. At the same time, SMEs are particularly vulnerable to extortion requests and other forms of corruption, which further increases instability and would suggest that they have an interest in improved governance.

But while multinationals and stock listed companies often have an interest in developing governance and compliance programs, to many SMEs they seem irrelevant, or worse, hampering and harmful. The belief is widespread that a strong compliance program and a zero-tolerance policy against corruption (especially when considering extortion), will put SMEs at a competitive disadvantage and will mean they would be losing business, or that their business would halt entirely. At the same time corruption in Egypt may seem so widespread and chances of getting caught so slim that SMEs will be further discouraged from investing in anti-corruption measures.

If a significant number of SMEs is to engage in the fight against corruption it needs to make business sense to them. They need to see that it is not only ethically right, but that it will also put them at a competitive advantage; that it will increase reliability, decrease costs in the long term, and facilitate access to new markets and business opportunities. This is especially the case in challenging business environments such as Egypt, where it can be difficult for governmental agencies to enforce anti-corruption standards throughout their jurisdictions. It is thus important to motivate SMEs to proactively work towards reducing corruption.

But making anti-corruption a viable business option cannot be done by SMEs alone. We at the Egyptian Junior Business Association believe that it is part of the

¹³ Source: *Egypt National Human Development Report of UNDP (2005): The contributions of SMEs to Egypt's economy.*

¹⁴ Source: *Quarterly Newsletter Vol. IX, Issue No. 4 of the Egyptian Ministry of Planning & International Cooperation – Centre for Project Evaluation and Macroeconomic Analysis (October 2011): Achieving an Inclusive Growth Pattern for Egypt.* (<http://www.pema.gov.eg>)

governmental institutions', larger companies', and financial institutions' social responsibility to have policies and procedures in place that encourage SMEs to implement compliance programs.

While we recognize that companies have a responsibility to act as good corporate citizens, we also understand the practical challenges of doing business in Egypt. Corruption is illegal but law enforcement, and thus the risk of getting caught, is low. Likewise, companies that seek to do business without corruption face disadvantages in the form of short-term losses or significant delays.

To contribute to address this challenge EJB's Anti-Corruption Task Force has started an initiative with a two-pronged approach:

1. Establishing an anti-corruption and transparency standard (Integrity Pledge) that is specifically tailored to the needs and challenges of SMEs working in Egypt. This is accompanied by guidance material, training and capacity building.
2. Identifying and establishing symbolic and material incentives for SMEs that commit to and implement this Integrity Pledge.

Because ultimately it is not only about WHAT SMEs should do to tackle corruption within their operations, but about providing them with a WHY: a reason why they should put valuable and scarce resources behind a commitment to fight corruption. Especially when they are operating in environments where violations of anti-corruption standards are seldom sanctioned. Providing external (material and symbolic) incentives to SMEs that demonstrably adhere to anti-corruption standards can thus be a significant factor in encouraging more SMEs to counter corruption.

Examples for such incentives are manifold. A straightforward one would be the facilitated access to business opportunities. Where large companies extend their responsibility to their supply chains by granting easier access to SMEs that have strong anti-corruption measures in place, they would create a significant motivation for SMEs to improve their anti-corruption performance. They would also be acting in their own interest by doing business only with lower risk suppliers. Another example of specific importance in Egypt is access to finance. Securing much needed funding is often difficult for SMEs as they are often treated as high risk, low return clients. Surveys suggest that only 5 percent of SMEs receive capital through banks.¹⁵ Facilitating access to finance for SMEs that reduce their risk by adhering to anti-corruption standards would thus presumably constitute a significant motivation to implement measures to counter corruption.

Building the capacity of SMEs, providing them with incentives for tackling corruption, and acting collectively are a powerful combination to bringing significant change on the corruption front.

¹⁵ Source: General Authority for Investment (2011): *The Role of SMEs in Mediterranean Economies: The Egyptian Experience*, http://www.iemed.org/observatori-en/arees-danalisi/arxiu_adjunts/anuari/med.2011/elsaady_en.pdf

Part II:

Using sticks and carrots

Sanctions and incentives to influence business

At the end of Part II, stakeholders will have a good understanding of why a complementary approach of sanctions and incentives is the most promising way to motivate business to counter corruption.

II.1 Define anti-corruption standards **p. 28**

Stakeholders must define an anti-corruption standard which companies and their representatives are required to adhere to. This standard must clearly state a zero-tolerance for corruption and require companies to establish an anti-corruption ethics & compliance program.

II.2 The first reaction: Punish business **p. 32**

The application of relevant and appropriate sanctions is very important in influencing the decisions of company representatives. However, an approach that uses only sanctions is insufficient to motivate business to counter corruption.

II.3 A better reaction: Combine punishments and rewards **p. 38**

The complementary strengths of sanctions, mitigation incentives and genuine incentives mean that a combined approach is the most promising way of motivating business to counter corruption.

II.1 Define anti-corruption standards

The first step in motivating business to counter corruption is to state clearly what is expected from companies and their representatives. An anti-corruption standard, to which companies and their representatives must adhere, serves as an objective baseline against which business performance can be evaluated.

An anti-corruption standard can be established as a law (by the public sector), a Code of Conduct for business partners (by the business sector), a good-practice recommendation (e.g. by civil society) or in other formats.

In general, an anti-corruption standard must embrace two fundamental principles:

Principle 1: Define corruption as an offense

With the groundbreaking OECD Anti-Bribery Convention¹⁶ of 1997, corruption crossed the line from being widely tolerated (with bribes tax-deductible) to being unacceptable. It is now seen worldwide as an offense codified in national laws and international conventions such as the United Nations Convention against Corruption (2005).

An anti-corruption standard must therefore clearly state a zero-tolerance of corruption. It must ensure that corruption is broadly defined, covering a variety of forms, e.g. active and passive, direct and indirect, private-to-public, private-to-private and so on. This should also include the prohibition of payments to public officials in order to obtain goods and services to which the company is legally entitled (so-called facilitation payments).

Principle 2: Require an anti-corruption ethics & compliance program

The zero-tolerance of corruption must be backed by an anti-corruption ethics & compliance program to reduce risks in an effective, efficient and sustainable way¹⁷. Although such a program can never fully eliminate all corruption risks, without one, it may simply be a question of luck whether a company falls prey to these risks. The Resource Guide to the U.S. Foreign Corrupt Practices Act states, for example, that if designed carefully, implemented earnestly and enforced fairly, a company's anti-corruption ethics & compliance program will generally enable the prevention of corruption, the detection of cases that occur and a prompt and appropriate response.

¹⁶ Official title: *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.

¹⁷ *To be effective, such a program should be interconnected with the company's overall ethics & compliance program.*

Such programs typically comprise a variety of elements, such as commitment and support from senior management, training and communication, internal controls and record keeping, reporting mechanisms, and monitoring and review. An anti-corruption ethics & compliance program must apply mandatorily to all of a company's representatives. Some of these measures should also be applied to business partners.

To a large extent there is consensus on the key elements and requirements that comprise such a program. Existing standards therefore follow in principle the same spirit, irrespective of differences in wording or structure. The practical challenge is that there is no one-size-fits-all solution for implementing these elements and requirements within companies. Implementing and continuously maintaining and enhancing an effective program are highly dependent on a company's particular characteristics, such as its structure, culture or risk profile. For example, the requirements for an anti-corruption ethics & compliance program call for training measures. But how this training is delivered, what the content is and how often representatives have to take the training should be left up to the company. Therefore, an anti-corruption standard needs to be flexible enough to leave companies room to implement it in a way appropriate to their sector, size and operating environment. Yet standards must also be concrete enough that companies understand the basic ground rules.

Stakeholders should support the homogenization and advancement of anti-corruption standards and avoid imposing multiple or even contradicting requirements on business.

If stakeholders do not have a standard yet, there is no need to start from scratch. For example, a multinational company that plans to define the desired behavior from its business partners in the form of a Code of Conduct can turn to already existing resources. While such resources should not be used in a simple copy-and-paste approach, they can serve as a source of initial inspiration. Stakeholders should use recognized resources in order to support the homogenization and advancement of anti-corruption standards and to avoid imposing multiple or even contradicting requirements on business.

Motivating Business to Counter Corruption

Part II: Using sticks and carrots

Resources exist across all stakeholder groups, including:

- International Chamber of Commerce (ICC), *Rules on Combating Corruption*, 2011;
- Organisation for Economic Co-operation and Development (OECD), *Good Practice Guidance on Internal Controls, Ethics, and Compliance*, 2010 (integral to the Recommendations of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, 2009);
- Transparency International (TI), *Business Principles for Countering Bribery*, 2009;
- United Nations Global Compact (UNGC), *Principle 10*, 2004;
- World Economic Forum, Partnering Against Corruption Initiative (PACI), *Principles for Countering Bribery*, 2004;
- World Bank, *Integrity and Compliance Guidelines*, 2011.

Stakeholders should consult with other practitioners or policymakers when establishing anti-corruption standards.

Once an anti-corruption standard has been established, stakeholders can give additional guidance¹⁸ regarding specific areas, for example outlining the expected behavior of public disclosure on the status of a company's anti-corruption program, or asset disclosure by senior management.

Finally, stakeholders need to decide whether to make adherence to their anti-corruption standards mandatory or voluntary¹⁹.

- **Mandatory anti-corruption standards:** This mainly includes standards to which adherence is binding as they are either based on jurisdictional authority or an integral part of a contractual relationship between stakeholder and business. Relationships between public sector stakeholders and companies are mostly based on mandatory standards. For example, a governmental institution codifies the desired behavior of companies into an anti-corruption law. But the relationships between companies may also be based on mandatory standards. For example, if a business makes adherence to its anti-corruption standard a contractual requirement with its suppliers.
- **Voluntary anti-corruption standards:** This mainly includes standards that qualify as recommendations or aspirations, unilaterally proclaimed by a stakeholder with no contractual or jurisdictional authority over business regarding that standard. Voluntary standards are often set by stakeholders from civil society, for example in the form of good practice business principles. But stakeholders from the business sector or public sector can also use voluntary standards to further develop the quality and scope of anti-corruption standards, e.g. as recommendations that their business partners should follow (but do not have an obligation to do so).

¹⁸ See for example, the U.S. Attorneys' Manual, the Resource Guide to the U.S. Foreign Corrupt Practices Act by the U.S. Department of Justice and the Securities and Exchange Commission (2012) or the Guidance for UK Bribery Act from the UK Ministry of Justice.

¹⁹ Typically, only laws – as standards which apply to all citizens of a country – are considered mandatory. However, this public-policy motivated understanding of the term 'mandatory' does not account for the nature of business relationships. A company would typically consider its Code of Conduct for suppliers or anti-corruption contract clauses as mandatory for its suppliers as well.

Defining whether an anti-corruption standard *must* be followed (mandatorily) or can be followed (voluntarily) is important in the context of this Handbook for two reasons:

Firstly, it gives stakeholders the opportunity to distinguish between minimum required behavior and more advanced behavior. For example, a government may adopt a law that prohibits the bribing of a national public official. This minimum standard is binding for everyone in the country. However, the same government may seek to advance practices further. In this case, a voluntary standard can be established.

Secondly, whether a standard is mandatory or voluntary is also important for deciding whether to apply sanctions, incentives or both (as shown in the next two sections).

Stakeholders must define anti-corruption standards to which companies and their representatives are required to adhere.

These standards must clearly state a zero-tolerance of corruption and require companies to establish an anti-corruption ethics & compliance program.

The standards should draw on already recognized resources in order to support the homogenization and advancement of anti-corruption standards and to avoid imposing multiple or even contradicting requirements on business.

Finally, stakeholders need to decide whether a standard must be followed (mandatory standard) or can be followed (voluntary standard).

II.2 The first reaction: Punish business

After establishing an anti-corruption standard, stakeholders need to think about how to motivate companies and their representatives to adhere to it. This typically triggers an initial reaction: Relevant penalties need to be put in place to punish wrongdoers and deter potential followers. But is this reaction the best approach?

Doing business consists of countless decisions over buying, selling, hiring, processing and so on – either taken by a single entrepreneur or by individuals organized under a legal entity (referred to as a company). Motivating business therefore means motivating individuals ('company representatives') who carry out these decisions on a day-to-day basis. It is therefore important to target individual representatives (if possible) to motivate them to refrain from corruption. Executives play an important role here, as this group defines the operating environment in which employees execute their work-related activities. This includes the establishment and on-going maintenance of an effective anti-corruption ethics & compliance program. The executives' state of mind is the state of mind of the company.

In order to change the behavior of a company's representatives – independent of their role and level of influence within the company – it is important to understand how these representatives make decisions when facing a corruption-related issue – and how such decisions can be influenced.²⁰ For instance, if a supplier approaches a company representative and offers a bribe payment in return for a sales contract, the representative faces the decision of whether to commit or refrain from passive corruption. Or a company representative may be aware that a crucial license can be obtained far more quickly by making a facilitation payment to a public customs official. Here the choice is between committing or refraining from active corruption.

In order to change the behavior of a company's representatives it is important to understand how these representatives make decisions when facing a corruption-related issue – and how such decisions can be influenced.

Considerations that influence corruption-related decisions

To select appropriate measures to influence a company's representatives, it is essential to understand the considerations that lead them to take a particular decision. Only if these are understood stakeholders can seek to influence them. When punishment is the first reaction, such an approach is looking to outweigh the potential gains from corruption by increasing the various costs usually associated with corrupt decisions.

²⁰ This section partly draws on Esther Pieterse, Sven Biermann (2013): *Employees facing corruption: Aligning anti-corruption measures to the influencing factors of decision-making*, HUMBOLDT-VIADRINA School of Governance.

Corruption can take place in very different scenarios, for example, as a sophisticated and elaborate scheme, or because it is the normal thing to do. In either case, individuals – consciously or unconsciously – weigh the odds and compare costs with gains, drawing on their experience and perception. An individual is expected to opt for a corrupt act if the potential gains are seen to outweigh the costs.

Financial costs are most commonly considered, but social and psychological costs also need to be assessed:²¹



Figure 2: Costs for violating an anti-corruption standard

The potential **gains** of engaging in a corrupt act include all material and non-material gains that a company representative anticipates. Material gains relate to any type of direct or indirect advantage that a company representative receives as a result of the decision. This can comprise, for example, a bribe payment, increased salary due to business benefits obtained through a corrupt deal, or a company bonus. Non-material gains can include an increase of perceived power, improved relationships with business partners or the realization of other personal preferences.

On the other side stand the expected **financial costs**, which include all direct and indirect damages the representative expects to suffer if the corrupt act is detected. Common examples include fines paid out of the individual's pocket, imprisonment and loss of employment, as well as punishments that may impact the company overall (debarment from lucrative markets or reputational damages). Financial costs become an influencing factor in the representative's decision-making process if there is a risk of getting caught (likelihood of application). This risk is, among other factors, influenced by the representative's awareness of existing policies, procedures and controls within the company (which may lead to detection), and the effectiveness of public prosecution.

²¹ The following concept of financial, social and psychological costs of corruption-related decision draws on Philip M. Nichols (2012): *The psychic costs of violating corruption laws*, *Vanderbilt Journal of Transnational Law*, Vol. 45.

But why are there representatives and entire companies that refrain from corruption, even when operating in areas with few potential punishments? Obviously, financial costs are not the only factor that company representatives weigh against the (potential) gains of corruption. Two additional cost factors should be taken into account when seeking to understand how company representatives make decisions.

Social costs: Individuals do not live and work on a deserted island, but are influenced by their current social environment – at work (by colleagues, business partners, competitors or regulators), at home (by family and friends), and in the public sphere (by the media or activists). These groups can influence a representative's decision either to refrain from or commit a corrupt act. For instance, colleagues can influence a representative toward refraining from corruption because it is regarded as a dishonorable practice that puts the company at risk. If a company representative still engages in a corrupt act and is caught, he or she may not only face financial costs, but also social costs, usually in the form of damaged reputation and shame. As with financial costs, the risk of getting caught and punished is also important with social costs (likelihood of application). However, it is noteworthy that this risk differs from the risk of being caught by internal control measures or by external authorities (typically used to apply financial costs). Colleagues, family members and friends may know more than the company's internal auditors or external investigators know. In such cases, the representative has to bear social costs (even in the absence of financial costs), which need to be considered when applying measures to influence a decision.

Psychological costs: A company representative will not only compare the expected gains with financial and social costs, but will also take into consideration how he or she feels personally when engaging in a corrupt act. A person's attitude when considering such a decision reflects their personal values and awareness:

- Personal values are a result of past experiences and influences (e.g. parental condemnation of corruption, social values conveyed in school), and are highly dependent on the representative's social context.
- Awareness of negative consequences relates to the company representative's understanding of the harm that corruption causes to third parties, such as the organization, the economy and society. Despite the fact that corruption is illegal almost everywhere in the world, the lack of awareness can be explained by the perceived absence of a direct victim in most cases of corruption, which is why corruption is often called a 'victimless crime'.

Psychological costs and social costs are therefore closely interrelated. If, for example, the social costs of corruption are very high as there is strong objection by the representative's family, this pressure would eventually influence their personal stance on corruption, and therefore its psychological costs. In cases where a company representative's personal attitude regards corruption in principle as something negative, but he or she still engages in a corrupt act (due to the high expected gains such an act would bring), the representative has to bear self-imposed psychological costs. The violation of one's own internal rules may evoke personal feelings of guilt. While empirical evaluations of such costs are difficult, these types of costs are recognized as having a powerful impact on the decision-making process when it comes to corruption.

Consideration of the financial, social and psychological costs of corruption offers valuable information to help identify anti-corruption measures that can increase these costs, and therefore decrease the likelihood of decisions towards corruption.

All three determining cost factors play a crucial role in seeking to outweigh the potential gains of corruption. Measures should be applied to increase not only the financial costs, but also the social ones in order to make a potential engagement in corruption less favorable.

In many companies, an ethical culture based on inherent understanding of corporate responsibility drives day-to-day activities as well as long-term strategic business decisions. However, even such representatives may face dilemmas between adhering to anti-corruption standards and addressing pressing challenges, such as meeting the next quarterly targets or simply paying the bills at the end of the month. Such pressing challenges may outweigh considerations of personal attitude and social cost. Thus, even in environments with a strong ethical culture, financial costs need to be targeted with appropriate measures.

One way of countering corruption is to make it more costly. The importance of financial, social and psychological costs means that all three have to be sufficiently high if companies (and their representatives) are to be motivated to adhere to anti-corruption standards. This can be achieved through sanctions for violating anti-corruption standards.

Punish business for violating anti-corruption standards

Corruption is illegal – therefore, committing or attempting to commit a corrupt act should be punished. Punishing corrupt acts demonstrates that stakeholders do not tolerate failure. It also deters other potential wrongdoers and restores or establishes a feeling of justice among those adhering to the standard.

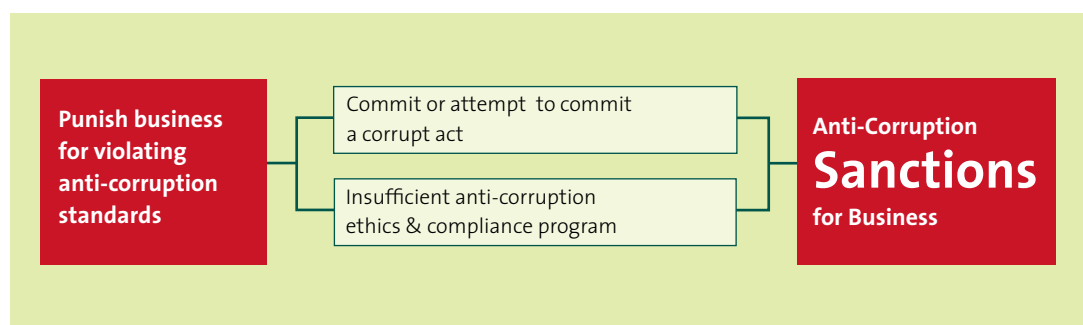


Figure 3: Punish business for violating anti-corruption standards

The application of relevant and proportionate sanctions is very important in influencing the decisions of company representatives, as sanctions can directly affect financial and social costs. They can also have a (more indirect) impact on psychological costs.

Increasingly, it is not only corrupt acts themselves that result in punishment, but also failure to establish an effective anti-corruption ethics & compliance program. For example, an intergovernmental organization may not admit a company for public tendering if the company cannot prove that it has implemented such a program. Or a civil society organization publicly shames a company for refusal to adopt preventive anti-corruption measures to international standards.

However, an approach that relies solely on sanctions is not sufficient, due to a variety of potential limitations, including:

- The ability of sanctions to deter potential violators depends significantly on the risks of being caught. If company representatives perceive such risks as low, no financial or social costs are anticipated. Engaging in corruption may be seen as profitable and as the rational decision. In such environments, sanctions may exist on paper but are insufficient to deter wrongdoers.
- Corruption involves complex and secret transactions. In order to apply sanctions, stakeholders need to invest significant efforts to identify companies which fail to meet their anti-corruption standards. Stakeholders such as public prosecution offices may rely on cooperation with companies to uncover such incidents. Companies that face a 'sanctions-only' approach may be inclined to refuse such cooperation. This is especially true if sanctions are used excessively ('the stronger the better'). For fear that cooperation would result in disproportionate punishment, companies may opt to cover up problems instead of proactively engaging with a stakeholder.
- Sanctions as punishment of a corrupt act may be insufficient to motivate business to implement preventive measures or to take other proactive anti-corruption approaches.
- Sanctions can lead companies to adhere to an anti-corruption standard, but they seldom provide motivation to go further.

Sanctions alone are not enough – especially in zones of weak governance. Stakeholders should therefore apply a complementary approach that not only raises the financial, social and psychological costs of corruption but also increases the benefits of refraining from it.

II.3 A better reaction: Combine punishments and rewards

As argued, the common initial reaction of only punishing wrongdoers for violations of anti-corruption standards may not be the best one. This is especially true when punishment is focused only on increasing the financial costs – common as this approach may be. While stakeholders do need to define how to respond to a violation of anti-corruption standards, it is also important to define a response if a business meets or even exceeds them.

Thus, stakeholders should:

- PUNISH business for violating anti-corruption standards (**sanctions**), and
- REWARD business for meeting or exceeding anti-corruption standards (**incentives**).

A combined approach of punishments (sanctions) and rewards (incentives), often referred to as ‘sticks and carrots’, can be far more effective than simply using sanctions alone.

Reward business for meeting or exceeding anti-corruption standards

Company representatives can be motivated to counter corruption by raising the benefits of meeting or exceeding anti-corruption standards.

Incentives that reward the meeting or exceeding of anti-corruption standards help encourage business by showing that taking the right approach will be acknowledged and valued. For example, incentives can be introduced by granting preferred commercial conditions or public praise to companies exceeding an anti-corruption standard.

The term ‘incentive’

In this Handbook, incentives refer only to positive rewards. While the term ‘incentive’ is sometimes used not only to describe a motivation to obtain a reward, but also a motivation to avoid a penalty, using the term in both ways makes it hard to differentiate clearly between a reward and a penalty. ‘Incentive’ therefore refers solely to a reward for meeting or exceeding anti-corruption standards.

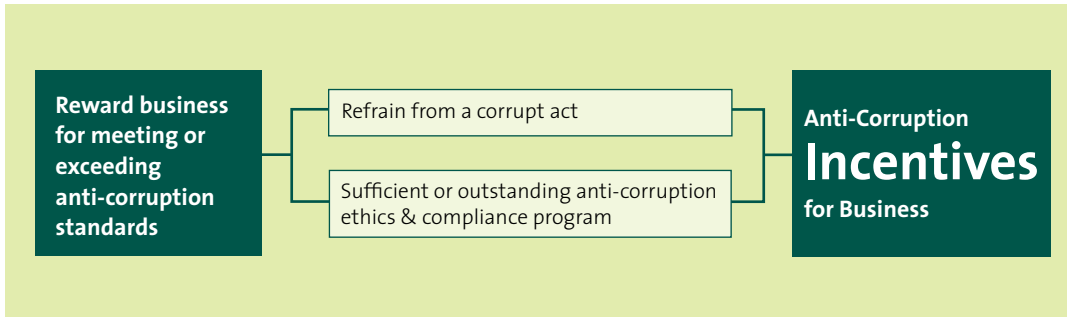


Figure 4: Reward business for meeting or exceeding anti-corruption standards

As with the sanctions approach, it is important to increase not only the financial benefits, but also the social and psychological benefits when applying incentives.

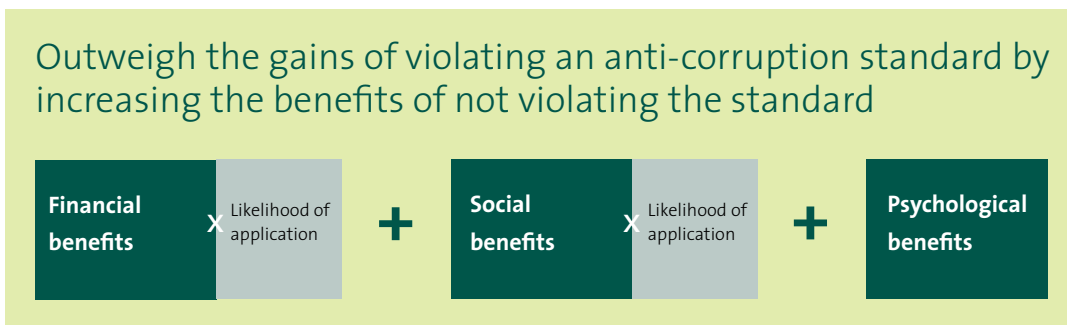


Figure 5: Benefits of not violating an anti-corruption standard

While sanctions seek to make the violation of anti-corruption standards unprofitable by increasing the costs, incentives seek to make adherence to anti-corruption standards more profitable by introducing benefits, so that the benefits of adherence outweigh the gains from violating the standards.

The application of persuasive incentives is very important when influencing the decisions of company representatives, as incentives can directly affect financial and social benefits. They can also have a (more indirect) impact on psychological benefits.

Financial benefits include all financial rewards a company's representative expects to obtain for not violating anti-corruption standards. Most financial benefits from external stakeholders affect the overall company, e.g. preferred supplier status. Providing financial benefits to individual representatives is usually done by the company, and not external stakeholders. However, external stakeholders can encourage such internal incentives by rewarding companies that apply them²².

Social benefits typically arise from recognition and praise from colleagues, friends, peers or public organizations. Unlike most financial benefits, external stakeholders can usually apply social benefits directly to company representatives. For example, a civil society organization can praise a Chief Executive Officer for his or her dedication and leadership in the fight against corruption. Social benefits can also be applied to the overall company, in a sense that an improved reputation constitutes such a benefit.

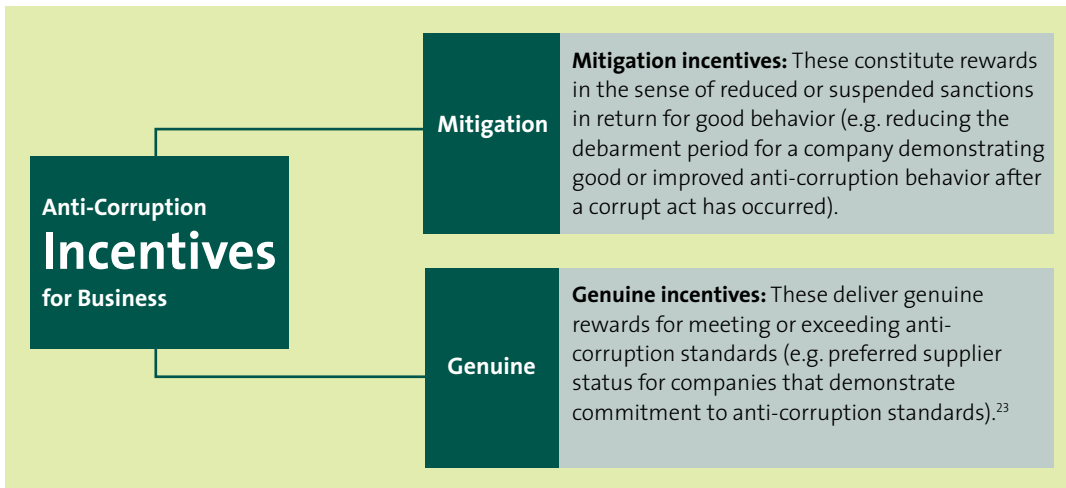
As with financial and social costs, financial and social benefits are only relevant if the company representative perceives a chance of actually receiving these benefits (likelihood of application).

Psychological benefits occur where a person continuously lives up to his or her own standards of ethical behavior (e.g. a positive self-image due to not caving in to a demand for facilitation payments at customs).

Incentives are more than just a shorter stick!

²² *Incentives as part of a company's anti-corruption ethics & compliance program have been included in several anti-corruption standards. For example, the U.S. Sentencing Guidelines include the provision of incentives as a criterion for an effective compliance and ethics program that can establish eligibility for mitigated punishment in sentencing (United States Sentencing Commission (2008): U.S. Federal Sentencing Guidelines Manual & Supplement, Chapter 8 – Sentencing of organizations, §8B 2.1, Effective Compliance and Ethics Program (6)).*

There are two types of incentives stakeholders can use to complement sanctions:



Mitigation incentives

Ultimately the goal of sanctions is not to punish, but to change business behavior. While the primary objective of sanctions is to increase the costs of violating a standard, measures should be offered to reduce the sanction under certain conditions. There are strong practical arguments for such an approach. For example, a company that invests significant efforts in its anti-corruption ethics & compliance program should receive rewards even if a corrupt act has occurred (e.g. in form of a reduced sanction), if it can show that this violation was not based on a systematic failure, but was carried out by a rogue employee (see example below). Otherwise, companies may not have the motivation to establish such a program in the first place. A company that had failed to establish measures to prevent a violation should be given ways to rehabilitate itself if improved behavior can be clearly demonstrated.

Changes in business behavior can be promoted by offering a mitigation of sanctions (i.e. reducing the initial financial and social costs) for certain types of actions from companies. Mitigation of sanctions is a very common approach among the public sector when it comes to sanctions based on administrative, civil or criminal law.²⁴ Part III.1 of this Handbook shows how mitigation incentives can also be applied by stakeholders from the business sector and civil society.

Ultimately the goal of sanctions is not to punish, but to change business behavior.

²³ Genuine incentives are sometimes also referred to as 'positive incentives'.

²⁴ For example, in the UK Bribery Act (Section 7), the 'adequate procedures' provision recognizes the existence of effective anti-corruption systems. The culpability points score system in the U.S. Federal Sentencing Guidelines (USSG §8C2.5) also recognizes the existence of an effective compliance and ethics program (outlined in USSG §8B2.1), as long as a company does not delay unreasonably in reporting the offense to appropriate governmental authorities. The guidelines also consider involvement in or tolerance of criminal activity, prior history, obstruction of justice, self-reporting, cooperation and acceptance of responsibility.

Stakeholders should consider applying mitigation incentives for four types of actions:

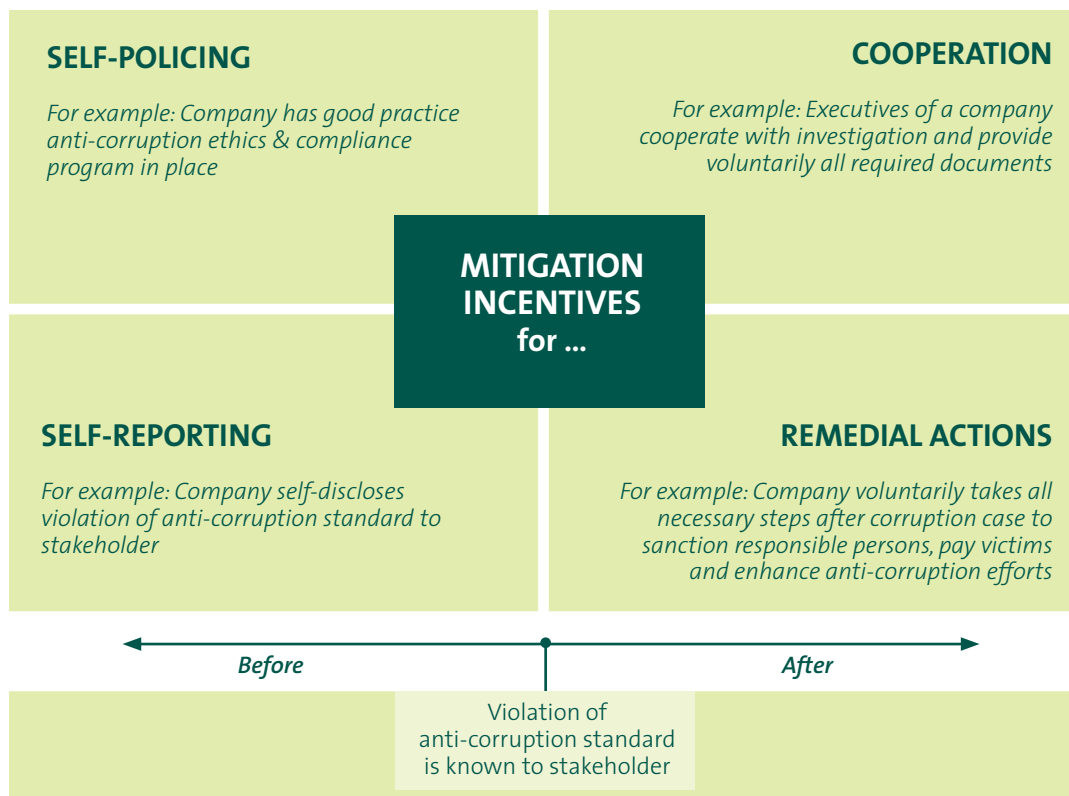


Figure 6: Four types of actions for mitigation incentives

CASE 1 World Bank offers mitigation incentives to companies

The World Bank offers mitigation incentives for sanctions in its voluntary disclosure program and in its sanctioning procedures for companies. In both, the World Bank is clear that it is rewarding a company's cooperation and remedial actions.

The voluntary disclosure program offers incentives to companies and its representatives involved in the procurement and selection process for contracts related to projects financed or supported by the World Bank. For example, if a company voluntarily discloses information about sanctionable misconduct, and agrees to adopt a robust corporate governance compliance program monitored for three years by a compliance monitor, the World Bank refrains from publicly debarring that business and keeps its identity confidential. In addition to the mitigation incentives offered in the program, the World Bank states several mitigating circumstances for the baseline sanction (three-year debarment)²⁵ such as voluntary corrective measures taken by a company and whether it cooperates with investigations.

25 Source: Sanctioning Guidelines of the World Bank Group. (<http://go.worldbank.org/G9UW6YoDCo>)

- **Self-policing:** Companies demonstrate that they have established measures which seek to prevent violations. No company is immune to corruption – but the measures that companies take to reduce this risk differ significantly in practice. Companies that can demonstrate sincere commitment to their anti-corruption ethics & compliance program should be treated differently from those where such preventive measures exist only on paper or are completely absent. Stakeholders benefit from giving mitigation incentives for self-policing as this motivates companies to establish and enhance their anti-corruption ethics & compliance program in the first place.
- **Self-reporting:** Companies (or their representatives) report violations of anti- corruption standards, for example through a voluntary disclosure or leniency program. Stakeholders benefit from giving mitigation incentives for self-reporting as this helps them to detect violations that would otherwise have remained undiscovered. It also prevents companies' violations from being driven underground (by making it worthwhile for companies to break the 'pact of silence' that often surrounds corruption).²⁶
- **Cooperation:** Companies (or their representatives) actively support stakeholders in the processing of the violation, for example, by providing information needed for an investigation. Stakeholders benefit from giving mitigation incentives to companies for cooperation as this helps to reduce investigation and process costs on the stakeholder side.
- **Remedial actions:** Companies take measures to respond to the causes and consequences of a violation, for example, dismissal of corrupt representatives, restoration of damages or losses caused by the offense, a voluntary offer to have the proceeds of the offense confiscated, engagement in an anti- corruption initiative, or acceptance of an external compliance monitor. Stakeholders benefit from giving mitigation incentives for remedial actions, e.g. if a company provides information voluntarily, the stakeholder is spared long and costly administrative processes. Remedial actions may also reduce or eliminate the reasons for sanctioning a company in the first place. If corruption causes damages and a company voluntarily compensates the victim for those damages, the reason for sanctioning (damages to victim) is reduced.

²⁶ Self-reporting programs not only support the exposure of violations, but also have a potential destabilizing effect on corrupt networks.

Motivating Business to Counter Corruption

Part II: Using sticks and carrots

CASE 2 Company not sanctioned in corruption case due to sufficient self-policing

After pleading guilty to conspiring to evade internal accounting controls, Garth Peterson, former Managing Director for real estate in China at Morgan Stanley, was sentenced to a prison term of nine months. He further agreed to pay about US \$250,000 in disgorgement and forfeit Shanghai real estate worth US \$3.4 million to settle civil U.S. Foreign Corrupt Practices Act-charges filed by the U.S. Securities and Exchange Commission. In contrast, the authorities declined to charge Morgan Stanley as a company. They argued that the company's compliance program met all best practice standards regarding the prevention and detection of bribery and thus "provided reasonable assurances that its employees were not bribing government officials". They thus concluded that Peterson acted as a rogue employee, despite having been trained on the compliance program and informed about his duties.²⁷

As the ultimate goal of sanctions should not be to punish but to change behavior, stakeholders should consider offering mitigation incentives to reduce sanctions. Mitigation incentives should be given for self-policing, self-reporting, cooperation and remedial actions. However, they should be implemented with care in order not to reduce the initial deterrent effect of sanctions.

²⁷ Adopted from U.S. Department of Justice Press Release No. 12-534 (2012): Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA.

Considerations for mitigation incentives

Mitigation incentives are tied to sanctions. If sanctions are not applied in practice, no mitigation incentives to motivate business can be applied either. They therefore have no practical relevance in this case.

If sanctions are not applied in practice, mitigation incentives to motivate business cannot be applied either.

Mitigation incentives might undermine the initial deterrent effect of a sanction if not applied with care. For example, reduction of a sanction for establishing an anti-corruption ethics & compliance program after a violation must not undermine a company's motivation to establish such a system in the first place. Therefore mitigation of a sanction should in general be tied to voluntary actions by a company or its representatives.

If a stakeholder relies mainly on self-reporting to uncover violations of anti-corruption standards, this may have a negative impact on the deterrent effect of sanctions. If companies know that without their self-reporting, the risk of detection from stakeholders is limited, the perceived (financial and social) costs to companies are low.

It is also important to be aware that despite a combination of sanctions and mitigation incentives, companies may still not self-report or cooperate with stakeholders. This is mainly the case where fear of additional punishment by other stakeholders is a factor (see for example contribution by Massimo Mantovani on page 46). For example, a company may be reluctant to disclose illicit practices voluntarily to one stakeholder if there is a fear that other stakeholders might become aware of these practices as well and apply a sanctions-only approach.

While these considerations need to be addressed when establishing mitigation incentives, this type of incentive is paramount for motivating business to counter corruption.

Encouraging Self-Reporting

Massimo Mantovani

General Counsel of Eni SpA and co-lead sherpa of the B2o Task Force on Improving Transparency and Anticorruption for the 2013 G2o in Russia

“Governments and business should identify good practices that would encourage (with incentives) self-reporting by companies and active cooperation with enforcement authorities, and where appropriate, should carry out pilot projects ...”²⁸

This statement, part of the recommendation of the ‘B2o Task Force on Improving Transparency and Anti-corruption’ at the 2012 G2o in Los Cabos, Mexico, shows the importance of using incentives to motivate companies to engage in the fight against corruption.

Corruption can occur even in companies with a good anti-corruption ethics & compliance program (e.g. through rogue employees). In such cases companies should actively engage with the authorities to clear up the case and self-report. Companies doing so should be offered considerable reductions of sanctions. However, they need to be secure in their expectations of what information they should provide to the authorities and, most importantly, what happens afterwards in terms of their treatment (e.g. possible sanctions, further inquiries).

When implemented transparently and thoroughly, this approach holds the potential to make voluntary cooperative behavior the best choice for companies. It means trying to resolve the issue internally may not be the best option any more (e.g. due to threat of later punishment).

Companies as well as the authorities can benefit from self-reporting of corruption incidents. The benefits for companies include:

- Internal controls: Sending a clear message to company employees, setting the ‘tone from the top’ that corruption will not be tolerated.
- Reduced sanctions: Increasing the chances that the authorities will allow the company to lead the investigation (often in consultation with the government authority), resulting in less disruption to the company’s business.

Authorities expect law-abiding behavior and welcome preventive measures to counter corruption risks, but they also need to show that they punish those who do not adhere to anti-corruption laws. Benefits for the authorities of self-reporting by companies include:

- Identifying and remediating unlawful conduct that the government may not otherwise discover.
- Saving government resources by relying on companies to bear the cost of the investigations.

However, companies must do their homework in terms of corruption prevention in order to gain advantages

²⁸ Source: B2o Task Force on Improving Transparency and Anticorruption (June 2012): B2o Task Force Recommendations: Concrete Actions for Los Cabos, (<http://b2o.org>).

from self-reporting. Mitigation strategies should be adopted by companies where possible in respect of monitoring corruption risk internally and self-reporting to the authorities. In particular, several factors may mitigate the risk of being involved in corruption and in such cases may limit exposure to liability:

- Having suitably robust compliance policies and procedures in place (including tools for monitoring corruption risk and self-reporting).
- Ensuring these policies and procedures are communicated to all employees.
- Ensuring that compliance regimes are consistent at both a local and group level.

Under the current international framework, there are obstacles for companies which seek to self-report the corrupt behavior of employees. For example:

- Concerns over whether self-reports might be used in other jurisdictions leading to cross-border concurrent liabilities – in effect, paying twice for the same offence. There is no helpful international framework that guarantees international cooperation or mitigates the potential for duplicative fines.
- Penalties can be large and the sanctions oppressive, e.g. imposing monitoring regimes in U.S. FCPA settlements that allow the company minor input and are notoriously expensive to implement.
- Whistleblower legislation may limit the opportunity for a company to self-report:
 - In the U.S., under the Dodd-Frank Act, whistleblowers can receive between 10-30 percent of any penalty paid by the company exceeding US \$1 million, for reporting a suspected offence to the Securities and Exchange Commission. However, there is no requirement that a whistleblower first report the conduct internally, therefore, companies will not always be given a chance to remedy the conduct and self-report any violations.

- Whistleblowing is also encouraged in the UK by the Serious Fraud Office through a confidential reporting mechanism (although there are no equivalent financial incentives).

In order to bring companies and the authorities together and make the model of self-reporting attractive for both sides, public sector stakeholders should consider the following options for increasing motivation for self-reporting:

- Offering discounts and/or leniency for self-reporting and cooperation, such as those available in the anti-trust regime (i.e. competition laws). In multi-jurisdiction cases, due weight should be given to the principle of *ne bis in idem* (which restricts the possibility of a defendant being prosecuted repeatedly on the basis of the same offence). At the very least, authorities should not punish companies twice for the same conduct.
- Offering Deferred Prosecution Agreements.
- Removing the potential for onerous sanctions such as monitors or debarment (preliminary injunction pending the final investigation).
- Establishing a presumption that companies that self-report will be allowed to undertake their own internal investigation before the government authority begins to conduct its own investigation.

Companies do take an active role in the fight against corruption if incentivized, but they can do more. In particular, stakeholders can widen the number of corporations that do so. Reliable national and international procedures for corporate self-reporting can be a powerful tool. Stakeholders should not miss the opportunity to increase the cooperation between companies' internal legal compliance teams and external prosecutors, as the fight against corruption is a common fight.

Genuine incentives

Mitigation incentives can address the limitations of a sanctions-only approach in terms of the lack of motivation for business to show positive behavior before or after a violation of a standard is known to relevant stakeholders. However, they do not have the potential to motivate business to adhere to a standard where sanctions fail to do so, or to motivate business to exceed an anti-corruption standard. A second type of rewards, referred to as 'genuine incentives', should therefore be offered by stakeholders to further strengthen business' motivation to counter corruption.

A second type of rewards, referred to as 'genuine incentives', should therefore be offered by stakeholders to further strengthen business' motivation to counter corruption.

Genuine incentives can motivate business to adhere to a standard where sanctions fail to do so

In less developed environments, e.g. under weak law enforcement or where there is a high acceptance or tolerance of corruption, it is almost impossible for stakeholders to increase financial and social costs significantly to outweigh the gains of corruption. In such situations, stakeholders may choose a complementary approach by introducing financial and social benefits for adhering to anti-corruption standards. A company representative may opt to forego short-term gains from a corrupt act for more long-term rewards that can be obtained for not violating a standard.

It needs to be recognized that such genuine incentives may typically not outweigh the (mainly financial) gains of violating anti-corruption standards. However, when combining material financial benefits (e.g. preferred supplier status from a major customer) with considerable social benefits (e.g. public endorsement), such genuine incentives show that fighting corruption makes business sense and ultimately leaves companies better off in the long term than peers which are not engaging in this fight. The existence of such genuine incentives also strengthens the individual's perception of doing 'the right thing' (bringing psychological benefits).

Genuine incentives offer an alternative way!

Genuine incentives can motivate business to exceed a standard

In contexts where law enforcement is relatively strong and laws, treaties or other regulations are generally widely accepted, adherence to standards may be successfully achieved through sanctions and mitigation incentives only. But standards need to be kept up-to-date in order to reduce the risk of corruption in a changing business sector. Stakeholders may offer genuine incentives to achieve this.²⁹

If rewards are given to move beyond the current status quo, top-performing companies may be motivated to do so.³⁰ Over time, these companies are raising the bar of what is expected from business. For example, while most companies' internal control systems still rely on a manual, sample-based approach for detecting irregularities, advanced companies use information technology to automate detection across full datasets, reducing the risk that irregularities remain undetected due to sample-based controls. Stakeholders may decide that they prefer to do business with companies applying such a process rather than with those still relying on a more random, higher-risk approach.

Offering genuine incentives can also help stakeholders overcome the risk of non-detection. For example, while large companies' Codes of Conduct for business partners typically includes the possibility of business partner monitoring (e.g. through on-site visits), the high number of partners makes this challenging in practice. Therefore a risk-based approach is usually adopted which calls for due diligence reviews for the largest and most critical suppliers, but relies on the cooperative behavior of the majority of other suppliers (most of them SMEs). By providing genuine incentives, companies can motivate business partners to demonstrate their efforts proactively. The burden of proof is thus shared.

Genuine incentives for complying with the law?

Genuine incentives for 'simply' meeting a standard are not advisable if the standard is the law, even in challenging environments. States and societies function because of an agreed set of rules that organize the behavior of individuals and institutions. Obeying these rules is mandatory for everyone. Rewarding actors for adhering to such laws could therefore be seen as undermining the state's moral and actual authority and assertiveness. If governments want to provide genuine incentives, they should be given for voluntary standards and actions, extraordinary performance of compliance leaders and for process-based compliance.³¹

²⁹ This approach is especially relevant for voluntary anti-corruption standards.

³⁰ In general, incentives should be given for an outstanding comprehensive anti-corruption ethics & compliance program. Occasionally, individual aspects of a program can also be rewarded, such as outstanding training. This may also include rewarding individual whistleblowers (for more information refer to expert experience by Joe Murphy on incentives for whistleblowers, pp. 88).

³¹ In contrast to outcome-based compliance which refers to the actual result of the processes (e.g. company is not corrupt), process-based compliance refers to what the company is actually doing to achieve the desired result. This can be a very innovative training approach for company representatives or new management practices to significantly decrease the use of facilitation payments in zones of weak governance, or an exceptional overall anti-corruption ethics & compliance program.

Motivating Business to Counter Corruption

Part II: Using sticks and carrots

Despite the strong reasons for the use of genuine incentives alongside sanctions, stakeholders need to be aware of several factors when applying them:

- Companies may reap the rewards of genuine incentives without really adhering to standards ('free-riding') or by pretending to adhere to standards ('window dressing') through 'creative' disclosure;
- Genuine incentives can create expectations or dependencies;
- They may also signal that a stakeholder mistrusts business to do 'the right thing', resulting in a lower intrinsic motivation;
- Genuine incentives may trigger desired behavior, but the long-term effect needs to be considered. Such incentives carry the risk that the behavior only changes as long as these incentives are provided, and that afterwards, behavior reverts to 'business as usual'.

While these considerations need to be addressed when establishing genuine incentives, this type of incentive does hold substantial potential to motivate business to counter corruption and further develop anti-corruption standards.

In addition to sanctions and mitigation incentives, stakeholders should consider offering genuine incentives to business. If the commitment to counter corruption is linked to tangible business advantages, the likelihood is much greater that companies will actually make that commitment. Fighting corruption then becomes a business decision, supporting the moral desire to do the right thing. In the same way that companies provide incentives to their employees to obtain desired behavior, stakeholders should offer genuine incentives to business.

Stakeholders should seek to outweigh the gains of violating anti-corruption standards with sanctions and incentives:

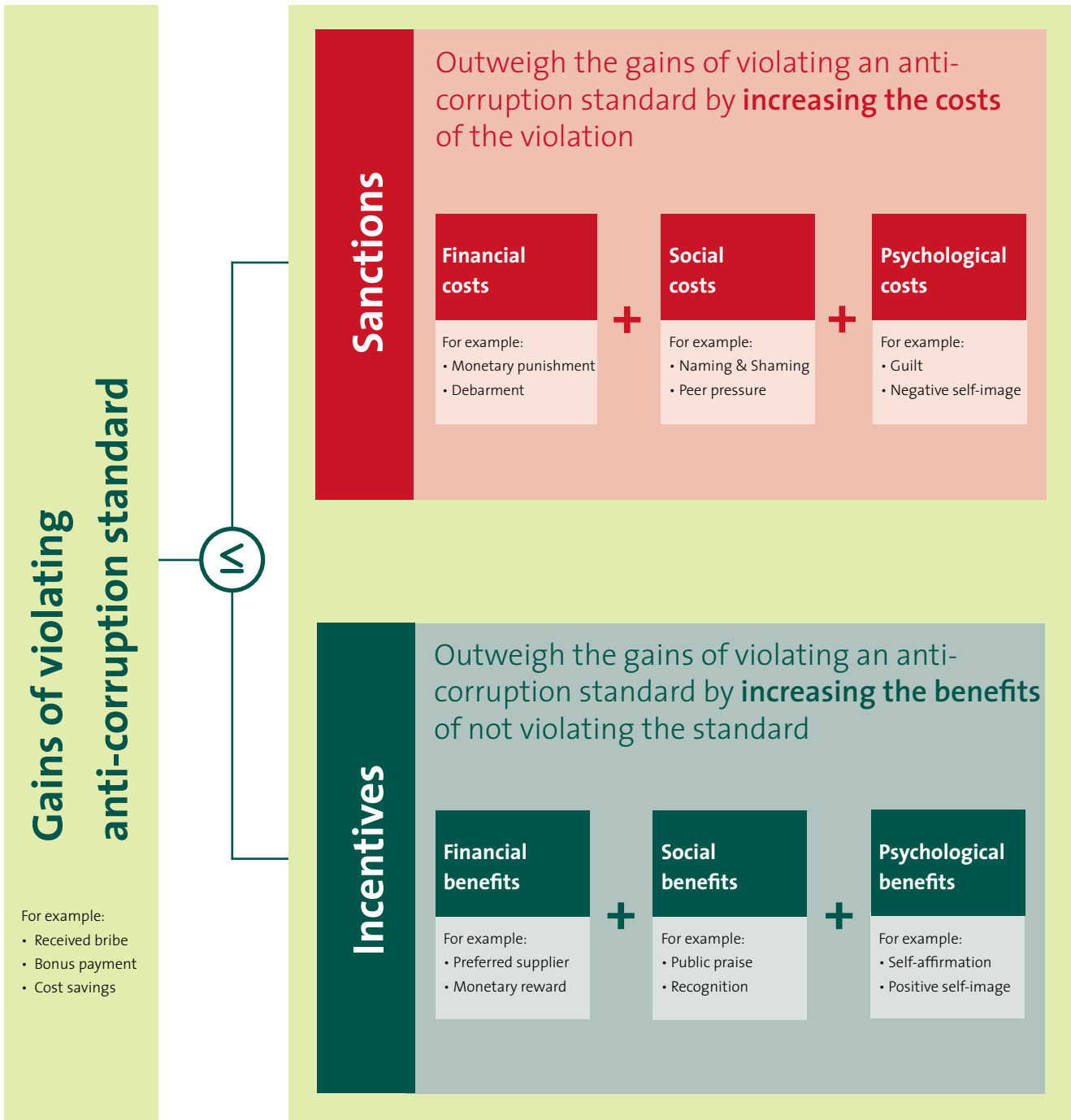


Figure 7: Outweigh the gains from corruption with sanctions and incentives

Part III:

Measures to influence business

Sanctions and incentives for companies and their representatives

At the end of Part III, stakeholders will have a good understanding of the sanctions and incentives available, how they can be categorized and in which scenarios they should be applied to a company or its representatives.

III.1 Categorizing sanctions and incentives

p. 54

There are many ways to punish or reward companies and their representatives. When assessing the best course of action in a particular set of circumstances, stakeholders can choose from three key categories of anti-corruption sanctions and incentives: legal, commercial and reputational.

III.2 Targeting companies and their representatives

p. 88

Stakeholders also need to consider whether to target an entire company, its representatives or both.

III.1 Categorizing sanctions and incentives

There are many existing and potential sanctions and incentives. Stakeholders need to examine the range of sanctions, mitigation incentives and genuine incentives they can use to motivate business.

There are three key categories of anti-corruption sanctions and incentives:

- Legal sanctions and incentives represent a range of financial and non-financial measures implemented mainly by means of law-based regulations.
- Commercial sanctions and incentives represent a range of measures mainly implemented in business relationships.
- Reputational sanctions and incentives represent a range of measures mainly implemented by publicizing companies' anti-corruption performance.

A HUMBOLDT-VIADRINA survey on anti-corruption sanctions and incentives for business indicates that all three categories are of near-equal importance in motivating business to counter corruption.³²

By profiling sanctions and incentives in all three categories, as well as their potential impacts and limitations, the Handbook will help stakeholders to navigate the numerous options available:

- > For **PUBLIC SECTOR** stakeholders, legal and commercial sanctions and incentives are the most common options.
- > For **BUSINESS SECTOR** stakeholders, commercial measures are the most common options.
- > For **CIVIL SOCIETY** stakeholders, reputational sanctions and incentives are the most common options.

When evaluating the best course of action, stakeholders should always check available options from all three categories of sanctions and incentives. For example, stakeholders from the public and business sectors should consider making the application of sanctions public, as this may not only raise financial costs, but also social costs and (potentially) even psychological costs. Likewise, civil society should have a sound understanding of legal and commercial sanctions and incentives, in order to include them in its advocacy strategies or monitor their application.

³² Source: HUMBOLDT-VIADRINA School of Governance (2012): *Motivating Business to Counter Corruption - A Global Survey on Anti-corruption Incentives and Sanctions*.

Anti-corruption sanctions and incentives can be grouped into 3 categories:

	Legal	Commercial	Reputational
Sanctions	<ul style="list-style-type: none"> • Fine • Imposition of damages • Confiscation of proceeds of corruption • Imprisonment (only representatives) 	<ul style="list-style-type: none"> • Termination of relationship • Exclusion from opportunities • Assignment of unfavorable conditions 	<ul style="list-style-type: none"> • Punishment through case-specific publication • Punishment through comparative performance
Incentives	<ul style="list-style-type: none"> • Legal mitigation incentive: Reduced sanction 	<ul style="list-style-type: none"> • Access to opportunities • Assignment of preferential conditions • Commercial mitigation incentive: Reduced sanction 	<ul style="list-style-type: none"> • Reward through case-specific publication • Reward through comparative performance • Reputational mitigation incentive: Reduced sanction

Figure 8: Three categories of anti-corruption sanctions and incentives for business

III.1.1 Legal sanctions and incentives

Legal sanctions represent a range of financial and non-financial measures implemented mainly by means of law-based regulations. Typically these include fines, *imposition of damages*, *confiscation of the proceeds of corruption* and *imprisonment* of a company's representatives. As well as imposing straightforward punishment on a company, stakeholders can apply legal mitigation incentives by offering a reduction of a sanction under certain conditions. There are no genuine legal incentives.

Governments are the key stakeholder in applying legal sanctions and mitigation incentives to companies. But other stakeholders, such as business partners, can also use legal measures. For instance, a customer can impose a contractual penalty on a supplier due to an infringement of an anti-corruption contract clause. Likewise, the same customer can choose to claim compensatory damages.

In contrast to commercial or reputational measures, stakeholders applying legal sanctions typically require governmental institutions to enforce prevailing criminal, civil and administrative laws and regulations. Even a contractual penalty must be negotiated at a public court in case of disagreement. Therefore, legal sanctions and mitigation incentives can be harder to apply in environments with insufficient laws and regulations or weak law enforcement.

Impacts of legal sanctions and incentives on the business case to counter corruption include:

Legal sanctions	Legal genuine incentives
<p>Financial costs</p> <ul style="list-style-type: none"> Increased costs of doing business through <i>fin</i>es, <i>imposition of damages</i>, <i>confiscation of proceeds of corruption</i> Loss of income (in case of <i>imprisonment</i>) Reduced brand reputation and possible lower asset valuation Other associated costs, e.g. costs of legal defense <hr/> <p>Social costs:</p> <ul style="list-style-type: none"> Damaged reputation of representatives and shame at work, at home or in public (if legal sanction is made public) <hr/> <p>Psychological costs:</p> <ul style="list-style-type: none"> Personal guilt (especially in case of imprisonment) 	<p>Currently, no legal genuine incentives exist to provide benefits for good behavior.³⁴</p>

Table 1: Possible impacts of legal sanctions and incentives

Legal mitigation incentives (reduction of legal sanctions) should be applied in complement to legal sanctions, to provide further motivations to business to act against corruption.

The impact of all legal sanctions can be further increased by proportionately applying additional commercial and reputational measures (e.g. publicizing the application of a sanction). For example, the U.S. Department of Justice publishes on its website all instances of the application of sanctions against business (e.g. *fin*es and *imprisonment* of company representatives).

The following pages briefly profile different legal sanctions and incentives. They also give practical considerations which may hamper their application in practice. Key considerations on how to ensure the impact of these measures are given in Part IV.

³³ In general, no genuine incentives should be given if the mandatory standard is a law. However, it might be possible to apply commercial or reputational genuine incentives for voluntary standards (compare also box on page 46).

LEGAL SANCTION **Fine**

The most common legal sanction applied to companies is a fine.³⁴

A *fine* is a pecuniary penalty which can typically be applied for most breaches of anti-corruption standards by companies and their representatives. This can be for a corrupt act itself but also for other breaches of anti-corruption standards (e.g. failure to establish an effective anti-corruption ethics & compliance program). In this sense, *fin*es are further-reaching than other legal sanctions such as *imposition of damages* or confiscation of proceeds. *Fines* can be codified in laws and regulations, but also as contractual penalties.

STAKEHOLDER This sanction can usually be applied by public and business sector stakeholders, e.g. as a result of a criminal conviction or as a contractual penalty. It can also be applied if other legal sanctions cannot be used, e.g. when a public prosecution office imposes a fine in lieu of *imposition of damages* or *confiscation of the proceeds of corruption*.

TARGET Fines can be applied to a company, as well as to its representatives.

IMPACT This sanction raises the financial costs of violating an anti-corruption standard. It can also impact social costs, if the *fine* is made public.³⁵

CASE 3 Tokyo-based company fined for bribery of Vietnamese officials

*In January 2009, a Tokyo court fined Pacific Consultants International US \$780,000 for paying more than US \$800,000 in bribes to a Vietnamese official. The bribe appeared to be aimed at securing consulting contracts in 2001-03 on the East-West Highway construction project in Vietnam's Ho Chi Minh City. The city's biggest infrastructure project required more than US \$400 million in Japanese loans. In 2010 Vietnamese officials sentenced the alleged recipient to life in prison for receiving more than US \$260,000 from executives of Pacific Consultants International. Four of the company's executives were also convicted.*³⁶

A *fine* can also be reduced by a stakeholder if a company (or its representatives) meets certain conditions (see page 62 for details on legal mitigation incentives).

³⁴ This sanction is also known as a monetary penalty or monetary fine, a financial penalty or punitive fine, or a civil, administrative or criminal fine (depending on the legal instruments and procedures used).

³⁵ It is usually perceived that fines resulting from criminal procedures have a greater deterrent effect than fines resulting from civil procedures for instance as the criminal conviction represents a condemnation by society. It also gives individuals a criminal record, which can greatly narrow future opportunities available to them.

³⁶ Source: OECD (2011): Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Japan.

LEGAL SANCTION Imposition of damages

Fines as sanctions are often imposed against companies that violate anti-corruption standards, but less common is the requirement that they compensate victims for related damages.³⁷

As a sanction, *imposition of damages* requires the clear occurrence of damages³⁸ and the notion of a 'victim' of a company's violation of anti-corruption standards. In this sense, it differs from sanctions such as *finés* or *confiscation of the proceeds of corruption*. Three types of damages due to corrupt acts can be distinguished: i) material damages (an actual reduction in a stakeholder's economic position); ii) lost profits (e.g. a competitor's claim against profits which could reasonably have been expected had the corruption not occurred); and iii) other tangible and intangible losses (e.g. reputational damage).

For *imposition of damages* to be enforced, proof is usually required that the company committed, authorized or failed to prevent the act of corruption, causing a stakeholder to suffer damages as a result. The right to claim damages is most often codified in law, but it could be also part of a contract.

STAKEHOLDER *Imposition of damages* can usually be applied by public and business sector stakeholders, e.g. public sector may channel all or part of the confiscated proceeds of corruption (or fines) back to those who have suffered as a result of the corruption (see example below).

TARGET *Imposition of damages* can be enforced against a company, as well as against its representatives.

IMPACT This sanction raises the financial costs of violating the anti-corruption standard. It can also impact social costs, if *imposition of damages* is made public.

CASE 4 Agreement facilitates restitution to victims

In 2012, the UK Serious Fraud Office (SFO), the Government of Tanzania, BAE Systems and the Department for International Development (DFID) signed a Memorandum of Understanding enabling the payment of £29.5 million plus accrued interest to be paid by BAE Systems for educational projects in Tanzania. This outcome among others follows a settlement by BAE as part of a global agreement it reached in December 2010 with the Serious Fraud Office and the U.S. Department of Justice concerning defence contracts in a number of countries. The former SFO Director Richard Alderman said, "I am delighted that the Judge stressed the seriousness of BAE's actions and that he recognised that the true victims were the people of Tanzania."³⁹

In some cases the imposed damages can be reduced by the stakeholder (e.g. waiving parts of the damages) if a company (or its representatives) meets certain conditions (see page 62 for details on legal mitigation incentives).

³⁷ This sanction is also known as restitution or reparation payments.

³⁸ For classification of damages into individual, collective and social, see, for example, Juanita Olaya et al (2010): *Repairing social damage out of corruption cases: opportunities and challenges as illustrated in the Alcatel Case in Costa Rica*.

³⁹ Adopted from UK Serious Fraud Office Press Releases (2010): *BAE fined in Tanzania defence contract case*; and (2012): *BAE Systems will pay towards educating children in Tanzania after signing an agreement brokered by the Serious Fraud Office*.

LEGAL SANCTION **Confiscation of proceeds of corruption**

By confiscating the proceeds of corruption⁴⁰, stakeholders can deprive a company or a representative of the gains of corrupt behavior, removing any resultant assets (and possibly returning them to their legitimate owner).

Confiscation is based on the understanding that the company is not the legitimate owner of the proceeds of corruption. Unlike *finer* or *imposition of damages*, *confiscation of proceeds* usually requires proof that a company gained an advantage – such as financial assets – through corruption-related behavior (e.g. paying a bribe to receive a contract).

Proceeds can include any economic advantages such as turnover or profits from corruptly gained contracts, the whole contract value, and any savings by means of reduced expenditures derived from the offense. Losses or expenses avoided through bribery can also be subject to confiscation.

On its own, this sanction is not a ‘true’ punishment as it simply seeks to set a company back to its previous position. It is therefore also referred to as ‘remedy which prevents unjust enrichment’, as it deprives companies and their representatives of their ill-gotten gains. Hence, it should be accompanied by other sanctions such as fines.

STAKEHOLDER *Confiscation of proceeds of corruption* can only be enforced by public sector stakeholders. For example, a court may order to confiscate the whole value of a contract gained by corrupt means.

TARGET Proceeds of corruption can be confiscated from a company, as well as its representatives.

IMPACT This sanction raises the financial costs of violating the anti-corruption standard. It can also impact social costs, if *confiscation of proceeds of corruption* is made public.

CASE 5 Consultant agrees to forfeit illegal profits from corrupt deal in Nigeria

*Jeffrey Tesler, a former consultant to Kellogg, Brown & Root and its joint venture partners, pleaded guilty to violating and conspiring to violate the U.S. Foreign Corrupt Practices Act for his participation in a decade-long scheme to bribe Nigerian government officials to obtain engineering, procurement and construction contracts. These contracts, to build liquefied natural gas facilities on Bonny Island, Nigeria, were valued at more than US \$6 billion. As part of his plea agreement, Tesler agreed to forfeit US \$150 million.*⁴¹

In some cases (e.g. if cooperation is essential to identify proceeds) the amount to be confiscated can also be reduced by the stakeholder if a company (or its representatives) meets certain conditions (see page 62 for details on legal mitigation incentives).

⁴⁰ This sanction is also known as *disgorgement*, *seizure* or *criminal and civil forfeiture* (depending on the procedures and remedies).

⁴¹ Source: Adopted from U.S. Department of Justice Press Release 11-1313 (11 March 2011): UK Solicitor Pleads Guilty for Role in Bribing Nigerian Government Officials as Part of KBR Joint Venture Scheme.

LEGAL SANCTION **Imprisonment**

Due to its severity, *imprisonment*⁴² of company representatives is generally perceived as a highly effective sanction. Participants of the HUMBOLDT-VIADRINA global anti-corruption survey on sanctions and incentives confirmed this.

For imprisonment to be applied, it must be proven by a governmental body, beyond reasonable doubt, that the company representative willfully refrained from adhering to anti-corruption standards codified in criminal laws, e.g. a public prosecution office imposes a prison sentence on a company's representative for bribing foreign officials to win contracts. It must be based on a conviction, and is therefore always the result of infringement of criminal anti-corruption laws.

STAKEHOLDER *Imprisonment* as a custodial sentence can only be imposed by public sector stakeholders.

TARGET *Imprisonment* applies only to company representatives.

IMPACT Unlike *fines*, *imposition of damages*, and *confiscation of proceeds of corruption* imprisonment seeks to not only raise financial but also social costs. Whereas *fines*, etc. can be hidden (if not made public by the stakeholder), this is hardly possible for imprisonment. The social stigma of imprisonment can be seen as an especially effective deterrence factor. *Imprisonment* must therefore be applied with great care. It may also have a stronger impact on a representative's psychological costs, as such a conviction cannot be as easily rationalized as a pure financial penalty (often seen as a 'cost of doing business').

CASE 6 Indonesian businesswoman sentenced to prison for kickbacks

*In 2012, the Jakarta Anti-Corruption Court in Indonesia sentenced a businesswoman to two and a half years in prison for providing two billion Rupiah (US \$224,000) in bribes to two officials at the Ministry of Transmigration. The money was given in return for appointing her company, Alam Jaya Papua, to projects in four Papuan districts. Two ministry officials had sought a 10 percent kickback from the 73 billion Rupiah (US \$8.2 million) in total committed to the projects.*⁴³

A prison term can also be reduced by the stakeholder if a company representative meets certain conditions (see page 62 for details on legal mitigation incentives).

⁴² This sanction is also known as incarceration or deprivation of liberty.

⁴³ Source: Jakarta Post (31 January 2012): Dharnawati Jailed for 2.5 Years Over Bribes.

LEGAL MITIGATION INCENTIVE **Reduced sanction**

Legal mitigation incentives refer to the reduction of a legal sanction threatened or already imposed for self-policing, self-reporting, cooperation and remedial actions.

Typically *fin*es and *imprisonment* are subject to such reductions. In some cases, stakeholders could also decide to reduce their claim for damages.

STAKEHOLDER Legal mitigation incentives are typically applied by public sector stakeholders. For example, a court can reduce a threatened *fine* if a company cooperates with the investigation and takes other voluntary measures.⁴⁴ They can also be used by business sector stakeholders (e.g. a reducing a contractual penalty).

TARGET They can be applied to a company, as well as to its representatives.

IMPACT Reducing a legal sanction decreases the financial costs and to a lesser degree social costs if the reduction is made public.

CASE 7 Johnson & Johnson fine reduced for cooperation with authorities

*Johnson & Johnson agreed to pay a US \$21 million criminal penalty as part of a deferred prosecution agreement with the U.S. Department of Justice, to resolve improper payments by the company's subsidiaries to government officials in Greece, Poland and Romania. These violated the U.S. Foreign Corrupt Practices Act. The agreement recognized Johnson & Johnson's timely voluntary disclosure and thorough self-investigation of the underlying conduct; its extraordinary cooperation with American officials and foreign enforcement authorities, including significant assistance in an industry-wide investigation; and its extensive remedial efforts and compliance improvements. In addition, the company received a 25 percent reduction in its criminal fine as a result of its cooperation in ongoing investigations of other companies and individuals, its pre-existing compliance and ethics program, extensive remediation and improvement of its compliance systems and internal controls.*⁴⁵

⁴⁴ See for example *Alcatel-Lucent S.A. vs. DOJ* (U.S. Department of Justice, Press Release 10-1481; 27 December 2010).

⁴⁵ Source: Adopted from Press Release 11-446 of the U.S. Department of Justice (8 April 2011): *Johnson & Johnson Agrees to Pay \$21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations*.

LEGAL SANCTIONS AND INCENTIVES Further practical considerations

Besides the typical practical challenges of applying effective sanctions and incentives, such as the enforcement of laws (see IV.1 for more details), specific issues may arise when seeking to apply legal sanctions and incentives:

- **High burden of proof:** The burden of proof can be very high, especially for legal sanctions based on criminal law.
- **Connection between corruption and damages or gains:** When imposing damages or confiscating the proceeds of corruption, the stakeholder usually needs to prove a connection between the cause (corruption) and the consequences (damages or gains). It can be difficult to evaluate, for example, whether a company or its representatives would have received certain gains without corruption.
- **The quantification of damages or gains cannot always be determined:** Complex and elusive consequences of corruption make it difficult to specify what the damages are and how high they are.
- **Difficulty getting hold of the proceeds of corruption:** The proceeds of corruption (including transformed or converted proceeds, derived income and gains) may be hidden, spent or in the possession of a bona fide third party⁴⁶, and may therefore not be recoverable.
- **Lack of collaboration between jurisdictions:** In the global context, the application of legal sanctions and incentives may also be subject to incompatibility between legal procedures in different countries, a lack of mutual legal assistance (e.g. over extradition) or jurisdictional overlap exposing multinational companies to sanctions in different jurisdictions for the same conduct.

Although legal sanctions and incentives are generally perceived to have vast potential to motivate business to counter corruption, among others these practical considerations need to be taken into account.

⁴⁶ For methods to quantify the proceeds of corruption, see OECD, The World Bank (2012): *Identification and Quantification of the Proceeds of Bribery*.

III.1.2 Commercial sanctions and incentives

Commercial sanctions and incentives represent a range of measures mainly implemented in business relationships. Commercial considerations are core elements in a company’s decision-making process, influencing day-to-day decisions as well as long-term strategic direction. They refer to the creation of economic value and to the execution of business operations, e.g. buying, selling, hiring and investing.

Commercial sanctions are among the most effective ways to motivate business to counter corruption – as shown by HUMBOLDT VIADRINA’s global survey on anti-corruption sanctions and incentives for business. Two of the three highest-ranked sanctions were commercial. Commercial sanctions for companies can comprise the *termination of relationship, exclusion from opportunities* (i.e. debarment) or the *assignment of unfavorable conditions*.

The survey also indicated that commercial incentives are of value when given to business for adhering to anti-corruption standards, with 92 percent of respondents agreeing that preferential treatment should be given to companies that adhere to anti-corruption standards. Such treatment can include *access to opportunities, the assignment of preferential conditions* or the reduction of a threatened or imposed sanction.

Possible impacts of commercial sanctions and incentives on the business case to counter corruption include:

Commercial sanctions	Commercial genuine incentives
<p>Financial costs</p> <ul style="list-style-type: none"> • Loss of revenue opportunities and market share • Increased cost of capital (e.g. higher interest rates) • Loss of subsidies or other funds • Higher operational costs (e.g. through imposition of external monitor) • Loss of contacts (indirect financial cost) • Difficulty in re-entering market (indirect financial cost) 	<p>Financial benefits:</p> <ul style="list-style-type: none"> • Revenue opportunities • Increased market share • Decreased cost of capital (e.g. lower interest rates) • Access to subsidies or other funds • New contacts (indirect financial benefit) • Tax credits • Access to markets (indirect financial benefit)
<p>Social costs:</p> <ul style="list-style-type: none"> • Damaged reputation of representatives and shame, primarily at work (if commercial sanction is made public) 	<p>Social benefits:</p> <ul style="list-style-type: none"> • Positive reputation of representatives and praise, primarily at work (if commercial incentive is made public)
<p>Psychological costs:</p> <ul style="list-style-type: none"> • Personal guilt 	<p>Psychological benefits:</p> <ul style="list-style-type: none"> • Positive self-image

Table 2: Possible impacts of commercial sanctions and incentives

Commercial mitigation incentives (reduction of commercial sanctions) should be applied in complement to commercial sanctions, to provide further motivations to business to act against corruption.

The impact of all commercial sanctions and incentives can be further increased by proportionately applying additional legal and reputational measures.

The importance of business activities

If a stakeholder considers applying commercial sanctions and incentives, there are a variety of possibilities, depending on which business activities the stakeholder is primarily engaging with a company in. Targeting a company's sales activities may be the most obvious, but stakeholders can also consider other entry points, such as access to finance.

Table 3 gives an example of how the commercial sanction *exclusion from opportunities* can be applied by different stakeholders in relation to the most common business activities.

Business activities	Sanction: <i>Exclusion from opportunities</i>
Procurement & Sourcing	Intergovernmental organization debars a company from being eligible to bid for public tender
Investment	Financial investor excludes a company from its investment portfolio
Financing	Banking institute excludes a company from receiving loans or other financial services
Collaborations / Operations	Business partner excludes a company from Research & Development collaboration opportunities
Employment	Governmental institution excludes a current company employee from future employment opportunities
Insurance	Insurance company excludes an executive from obtaining Directors and Officers liability insurance for corruption related risks
Fiscal	Governmental institution excludes a company from applying for subsidies

Table 3: *Exclusion from opportunities can be applied to various business activities*

The following pages briefly profile different commercial sanctions and incentives. They also give practical considerations which may hamper their application in practice. Key considerations on how to ensure the impact of these measures are given in Part IV.

COMMERCIAL SANCTION Termination of relationship

Termination of relationship is the most drastic commercial sanction, as it ends an existing relationship with a company. However, it might not always be expedient or possible for the stakeholder and should therefore be used only as a last resort.

The relationship is usually in the form of a contract (e.g. supply contract) or license agreement (e.g. export and import licenses granted by the public sector), but also includes any other form of cooperation.

STAKEHOLDER All stakeholders can terminate existing relationships with a company, although this sanction can usually be applied by public and business sector stakeholders, as they are often contractually engaged with companies. However, civil society stakeholders can also terminate strategic relationships with companies, e.g. a collaboration agreement.

TARGET *Termination of relationship* can only be applied to a company.

IMPACT This sanction primarily raises the financial costs. It can also impact social costs, if the sanction is made public.

CASE 8 Taipei City Government annuls contract gained by bribery

In Taiwan in 2005, the Taipei City Sports Department called for tenders to operate the Taipei Arena for nine years. The Eastern Multimedia Group (EMG) won the contract. In 2007, the Taipei City Government announced that it would annul the contract with EMG after its chairman Gary Wang was indicted for allegedly bribing city government officials to win the bid. Taipei's then mayor Hau Lung-bin stated that "The group won the bidding illegally and the city government has to annul the contract. We will protect the rights of consumers and companies."⁴⁷

The related commercial genuine incentive is *access to opportunities*. There is no directly related commercial mitigation incentive.

⁴⁷ Source: Taipei Times (2007): Taipei City Government annuls EMG arena deal.

COMMERCIAL SANCTION Exclusion from opportunities

*Exclusion from opportunities*⁴⁸ is probably the best-known commercial sanction. It is widely used by intergovernmental organizations such as the World Bank, but also by national authorities (in public procurement).

This sanction can be applied to all companies a stakeholder is currently engaged with (i.e. exclusion after relationship has been terminated). It can also be applied to companies which want to engage with the stakeholder in the future (e.g. through biddings for business opportunities). *Exclusion from opportunities* does not necessarily require an existing (contractual) relationship as it most typically covers exclusion from future contracts or services. Stakeholders can also choose to exclude a company temporarily if immediate action is necessary to protect their interests⁴⁹ (often referred to as suspension).

STAKEHOLDER All stakeholders can exclude a company from opportunities, although this sanction can mainly be applied by public and business sector stakeholders, as they are usually contractually engaged with companies. However, civil society stakeholders can also exclude a company, e.g. from strategic collaboration opportunities.

TARGET *Exclusion of opportunities* is most commonly applied to companies, although it can also be applied to their representatives (e.g. exclusion of a company's representatives from future employment in public institutions⁵⁰).

IMPACT This sanction primarily raises the financial costs. It can also impact social costs if the sanction is made public.

CASE 9 Huawei Algeria and ZTE Algeria excluded from public contracting

*Corruption related to the construction of a highway in Algeria led to the exclusion of ZTE Algérie and Huawei Algérie from bidding for Algerian state contracts for two years in 2012. In addition, three Chinese nationals were sentenced in absentia to 10 years in prison and fined around US \$65,000. Two Algerians, one a former senior official with the state-owned Algérie Télécom, the other a businessman, were also found guilty of money laundering and mismanagement, receiving sentences of 18 years and a fine of around US \$110,000, plus confiscation of any goods or wealth acquired during the period in question, including the businessman's property in Luxembourg.*⁵¹

The related commercial genuine incentive is *access to opportunities*. Stakeholders can consider offering a reduction of the sanction (e.g. reduced exclusion period or full reversal of the exclusion) if certain conditions are met (see page 71 for details on commercial mitigation incentives).

⁴⁸ This sanction is also known as *debarment* or *blacklisting*. Exclusion is often not referred to as punishment but considered as a measure to protect the interests and assets of the stakeholder. See, for example, *Federal Acquisition Regulation of the United States, Subpart 9.4 — Debarment, Suspension, and Ineligibility*.

⁴⁹ See, for example, Article 2, *Temporary Suspension Prior To Sanctions Proceedings*, of the *World Bank's Sanctions Procedures (January 2011)*.

⁵⁰ For example, as stated in Article 30 paragraph 7 of the *United Nations Convention against Corruption*.

⁵¹ Source: Adapted from *Trace-blog (June 2012): Criminal convictions for corruption and influence peddling in telecommunications contracts in Algeria*.

COMMERCIAL SANCTION Assignment of unfavorable conditions

Termination of relationship or exclusion from opportunities may seem too harsh as a punishment for minor violations of anti-corruption standards. *Assignment of unfavorable conditions* can therefore be an appropriate alternative commercial sanction. Here, stakeholders are able to punish a company in a phased approach (depending on the nature of the violation), but not to the extent of canceling the entire relationship or depriving the company of revenue opportunities.

Stakeholders may, for example impose a higher risk premium for insurance or financing contracts, require higher reporting or due diligence standards or reduce their guaranteed annual volume of business.

Occasionally, stakeholders from the public sector also assign external monitors to supervise implementation or enhancement of internal anti-corruption ethics & compliance programs.⁵²

STAKEHOLDER All stakeholders can assign unfavorable conditions to a company, although this sanction can mainly be applied by public and business sector stakeholders, as they are usually contractually engaged with companies.

TARGET *Assignment of unfavorable conditions* is most commonly applied to companies.

IMPACT This sanction primarily raises the financial costs. It can also impact social costs, if the sanction is made public.

CASE 10 Company ordered to retain a compliance monitor

*Total S.A., a French oil and gas company agreed in May 2013 with the U.S. Department of Justice to pay a US \$245,2 million monetary penalty to resolve charges related to violations of the U.S. Foreign Corrupt Practices Act in connection with illegal payments made through third parties to a government official in Iran to obtain valuable oil and gas concessions. In addition to the monetary penalty, Total also agreed to cooperate with the department and foreign law enforcement (French enforcement authorities) to retain an independent corporate compliance monitor for a period of three years and to continue to implement an enhanced compliance program and internal controls designed to prevent and detect FCPA violations.*⁵³

The most directly related commercial genuine incentive is *assignment of preferential conditions*. Stakeholders can consider offering a reduction of the sanction (e.g. reduced reporting requirements due to demonstrated progress in a company's anti-corruption ethics & compliance program) if certain conditions are met (see page 71 for details on commercial mitigation incentives).

⁵² See, for example, Article 9.03 (b) of the World Bank's Sanctioning Procedures (January 2011). The official commentaries on Article 3 ('Sanction') of the OECD Anti-Bribery Convention also include 'placing under judicial supervision' and 'a judicial winding-up order'.

⁵³ Adopted from Press Release No. 13-613 of the U.S. Department of Justice (May 2013): French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme, (<http://www.justice.gov>).

COMMERCIAL GENUINE INCENTIVE Access to opportunities

*Access to opportunities*⁵⁴ is a genuine incentive which can be very attractive to target companies, as it not only opens an immediate window of opportunity, but may also bring subsequent benefits. For example, taking part in a tender not only means potential for immediate revenue creation (if the company wins), but also new contacts, knowledge and potential market entry. As it does not require an existing contract, stakeholders can apply this incentive to all current and future business partners (e.g. preferred supplier status).

STAKEHOLDER All stakeholders can grant *access to opportunities* to a company, although this genuine incentive can mainly be applied by business stakeholders, as they are contractually engaged with companies.⁵⁵ It is less often used by public sector stakeholders.

TARGET *Access to opportunities* can be applied to companies, although it can also be used occasionally for their representatives (e.g. access to public office only for individuals with a clean corruption track record).

IMPACT This sanction primarily raises the financial benefits. It can also impact social benefits if the incentive is made public.

CASE 11 OECD recommends granting public advantages

The 2009 Recommendation of the OECD Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions stated: 'Member countries should encourage... their government agencies to consider, where international business transactions are concerned, and as appropriate, internal controls, ethics and compliance programmes or measures in their decisions to grant public advantages, including public subsidies, licences, public procurement contracts, and contracts funded by official development assistance, and officially supported export credits'. (Article X.C.(vi))

The most directly related commercial sanction is *exclusion from opportunities*.

⁵⁴ This incentive is also known as whitelisting.

⁵⁵ Stakeholders from the public sector should also consider applying this incentive, as long as the respective anti-corruption standard is not a law, as rewarding law-compliant behavior may not be adequate.

COMMERCIAL GENUINE INCENTIVE Assignment of preferential conditions

Assignment of preferential conditions offers a flexible way to reward companies for meeting or exceeding anti-corruption standards. In cases where stakeholders may not want to or are unable to give *access to opportunities* only to companies which adhere to their anti-corruption standards, this incentive offers the opportunity to reward a company that meets those standards without excluding non-compliant ones.

By assigning preferential conditions to companies which meet or exceed anti-corruption standards (e.g. favorable loan conditions), this incentive allows stakeholders to make non-adherence to anti-corruption standards more expensive for other companies. It can also be applied during the negotiation of new contracts or licenses, as well as the renegotiation of existing ones – e.g. pegging the reporting levels required from a company to its anti-corruption performance.

STAKEHOLDER All stakeholders can assign preferential conditions to a company, although this genuine incentive can mainly be used by business stakeholders, as they are often contractually engaged with a company.⁵⁶ For example, financial service providers could offer lower risk premiums for insurance or financing contracts, or lower reporting or due diligence requirements, while other companies could offer a higher guaranteed annual volume of business. It is currently less often used by public sector stakeholders (e.g. in the form of tax credits).

TARGET *Assignment of preferential conditions* is most commonly applied to companies.

IMPACT This sanction primarily raises the financial benefits. It can also impact social benefits, if the incentive is made public.

CASE 12 Commercial incentives for SMEs

An example of genuine commercial incentives for (and mostly from) SMEs is that of 'B Corporation' certification in the United States. The non-profit organization B Lab certifies companies with regard to their social and environmental performance (including anti-corruption). Companies that pass the certification process qualify for material incentives given by B Corporations and other external stakeholders. The City of Philadelphia, for example, offers a tax credits program valued at US \$100,000 and the Yale School of Management has extended its loan forgiveness program to alumni that go on to work for B Corps. Other incentives include discounts for the design of communications platforms and improved web presence, for legal and printing services, as well as credit card transactions.⁵⁷

The most directly related commercial sanction is *assignment of unfavorable conditions*.

⁵⁶ Stakeholders from the public sector should also consider applying this incentive, as long as the respective anti-corruption standard is not a law, as rewarding law-compliant behavior may not be adequate.

⁵⁷ See <http://www.bcorporation.net> for more details.

COMMERCIAL GENUINE INCENTIVES List of examples

Genuine incentives for companies can include:

- **Preferred supplier status**, enjoying advantages over peers with otherwise equal commercial conditions; including for example higher sales quotas, a shortened timeframe between quotation and procurement, reduced due diligence requirements from business partners in a tender;
- **Assistance for capacity building**, supporting companies in conducting training and capacity building in all areas of operations (not limited to ethics & compliance);
- **Opportunity to participate in strategic buyer/supplier planning meetings;**
- **Opportunity to participate in collective action initiatives;**
- **Favorable payment terms**, e.g. payments are released faster;
- **Reduced procurement costs for the supplier**, e.g. the company is able to buy products or services at a reduced price.

>>> *APPENDIX I provides a more detailed list of possible commercial incentives.*

COMMERCIAL MITIGATION INCENTIVE Reduction of sanction

Commercial mitigation incentives refer to the reduction of a commercial sanction threatened or already imposed for self-policing, self-reporting, cooperation and remedial actions.

Exclusion from opportunities and *assignment of unfavorable conditions* are typical commercial sanctions which can be reduced. A terminated relationship can also be re-established or partly renegotiated if a company can prove significantly increased anti-corruption performance (i.e. *access to opportunities*). Thus, commercial mitigation incentives can, for example, comprise mitigation of threatened unfavorable conditions, a decrease in an exclusion period or the suspension of a sanction altogether.

STAKEHOLDER Commercial mitigation incentives can typically be applied by public and business sector stakeholders. For example, a public procurement agency can reduce the debarment of a company due to supervised enhancement of its anti-corruption ethics & compliance program. Or a company can reduce due diligence requirements in response to voluntary corrective measures taken by a business partner.

TARGET They can be applied mainly to companies.

IMPACT Reducing a commercial sanction decreases the financial costs and to a lesser degree social costs if the reduction is made public.

CASE 13 Lahmeyer International removed from World Bank debarment list

In 2006 the World Bank Group declared Lahmeyer International GmbH ineligible for World Bank-financed contracts for a period of seven years, due to corrupt activities in connection with the Lesotho Highlands Water Project. The period of ineligibility was subject to an optional reduction by four years if the World Bank determined that Lahmeyer had met specific compliance conditions and fully cooperated in disclosing past sanctionable misconduct. The World Bank also placed the company on its Listing of Ineligible Individuals and Firms, which is publicly accessible on its website.

In August 2011 the World Bank released Lahmeyer from debarment following its assessment that the company had satisfactorily adopted and implemented a compliance management system. This was accompanied by removal from the publicly accessible debarment list and a press release acknowledging the company's improvements.⁵⁸

⁵⁸ Sources: World Bank Press Release No. 129/2007/INT and World Bank Press Release (15 August 2012): Lahmeyer International GmbH Released From Debarment.

COMMERCIAL SANCTIONS AND INCENTIVES Further practical considerations

Besides the typical practical challenges of applying effective sanctions and incentives, such as the enforcement of laws (see IV.1. for more details), specific issues may arise when seeking to apply commercial sanctions and incentives:

- **Lack of alternatives:** *Exclusion from opportunities or termination of relationship* can be difficult or expensive if there are no alternative business partners to work with (i.e. there is a strong dependency on the business partner).
For example, if a company seeks to debar a key supplier, but only a few potential suppliers remain on the market, the cost of future contracts may increase due to reduced negotiation leverage, or as the remaining suppliers may have not enough capacity to satisfy future orders. In such cases, long-term strategies are needed to reduce existing dependencies and linkages.
- **Disproportionate damages to others:** *Exclusion from opportunities* may disproportionately damage other stakeholder groups (e.g. shareholders, employees).
- **Regulatory constraints on the public sector:** Certain laws may limit or prohibit the application of commercial incentives, e.g. distortion of competition.
- **Significant monitoring resources necessary:** Monitoring a company's exclusion, including that of its subsidiaries and related parties, may require significant expense on the part of stakeholders. For example, companies may inappropriately mitigate the effect of exclusion by creating new business entities, installing shell companies or using sub-contractors.

Although commercial sanctions and incentives are generally perceived to have vast potential to motivate business to counter corruption as they target their core modus operandi, among others these practical considerations need to be taken into account.

III.1.3 Reputational sanctions and incentives

Reputational sanctions and incentives represent a range of measures mainly implemented by publicizing the anti-corruption performance of business. While legal and commercial sanctions and incentives mostly influence financial costs and benefits in company representatives' decision-making, they seldom target social costs and benefits directly.

However, increasingly companies and their representatives are reacting sensitively to reputational considerations. This means that reputational sanctions and incentives can have a significant effect on companies – especially those in competitive markets, which rely on a positive public image to retain or increase market share and attract employees, customers and investors.

Reputation matters to companies and especially their representatives for two main reasons:

- Reputational measures, especially sanctions, can have a significant influence on the social (and psychological) costs of corruption. However, reputational measures can only have an impact if they not only influence the targeted individual or company, but also the opinion of key stakeholders or the general public. Communication and publicity are therefore important success factors of reputational measures.⁵⁹ As reputational measures focus heavily on publicity and awareness, they are probably the most suitable to influence a society's attitude toward corruption – which in turn influences the attitude of individuals.
- Reputational sanctions and incentives can also cause direct or indirect financial costs (or benefits). While these are difficult to quantify, as the effects on the bottom-line tend to be indirect and heavily dependent on the reactions of third parties, reputational sanctions and incentives can trigger a range of significant follow-up effects. For example, customer boycotts have significantly influenced business behavior in the fields of human rights and environmental protection. It has also been shown that reputation can impact the ability to attract qualified (and ethically-oriented) employees and investors.

Reputational sanctions and incentives are typically applied by civil society organizations through campaigns or public reporting on the anti-corruption related performance of business. However, public and to a lesser degree business sector stakeholders can also apply reputational measures – typically by making the application of their sanctions and incentives public.

⁵⁹ *The internet and in particular social media have given new momentum to reputational sanctions and incentives, widening their scope and enabling high-speed information distribution. Where traditional forms of communication are restricted by factors such as geography, the internet means external scrutiny can potentially be globalized.*

Possible impacts of reputational sanctions and incentives on the business case to counter corruption include:

Reputational sanctions	Reputational genuine incentives
<p>Financial costs (indirect):</p> <ul style="list-style-type: none"> • Difficulty in attracting ethically oriented customers, investors, employees, suppliers, etc. • Loss of customers, investors, suppliers, etc. • Increased public relations and marketing expenses to counter bad reputation due to violation of standard 	<p>Financial benefits (indirect):</p> <ul style="list-style-type: none"> • Attracting ethically oriented customers, investors, employees, suppliers, etc. • Positive reputation can be used for public relations and marketing purposes
<p>Social costs:</p> <ul style="list-style-type: none"> • Exclusion/ostracism within the community, neighborhood, etc. • Social rejection from colleagues, friends and family • (Public) association with behavior that damages society 	<p>Social benefits:</p> <ul style="list-style-type: none"> • Respect and status within the community, neighborhood, etc. • Praise from colleagues, friends and family • (Public) association with honorable behavior that benefits society
<p>Psychological costs:</p> <ul style="list-style-type: none"> • Personal guilt 	<p>Psychological benefits:</p> <ul style="list-style-type: none"> • Positive self-image

Table 4: Possible impacts of reputational sanctions and incentives

Reputational mitigation incentives (reducing reputational sanctions) should be applied in complement to reputational sanctions to provide further motivation to business. However, unlike financial costs, social costs cannot easily be revoked.

The impact of all reputational sanctions and incentives can be further increased by proportionately applying additional legal and commercial measures.

The following pages briefly profile different reputational sanctions and incentives⁶⁰. They also give practical considerations which may hamper their application in practice. Key considerations on how to ensure impact of these measures are given in Part IV.

⁶⁰ It must be recognized that while there are strong arguments for using reputational sanctions and incentives to motivate business to counter corruption, there are limited examples for practical application in the field of anti-corruption. The following pages thus at times use real-world examples from other disciplines, such as human rights and environmental protection.

REPUTATIONAL SANCTION **Punishment through case-specific publication**

Punishment through case-specific publication is probably the most common reputational measure. It refers to the punishment of a company or its representative by publicizing their violation of an anti-corruption standard. This includes not only corrupt acts, but also insufficient anti-corruption ethics & compliance programs of companies.

It is usually applied by media outlets and civil society organizations which report on recent cases of corruption and their impact. The Business & Human Rights Resource Center, for example, reports on the human rights performance (including corruption) of over 5,000 companies⁶¹. Other known organizations reporting on companies' corruption-related performance include Global Witness and Transparency International.

STAKEHOLDER Stakeholders from civil society can directly apply this sanction by naming a poor-performing company in a campaign or media article. Public or business sector stakeholders can choose to announce publicly the application of a commercial or legal sanction. A public procurement body could, for example, publish the debarment lists, or a company could announce the exclusion of a major supplier due to corruption.⁶²

TARGET Stakeholders can apply this sanction to a company. It may also be applied to representatives although this should be done with care.

IMPACT This sanction can increase the social costs and can also have an indirect financial effect (e.g. if reputational sanction triggers commercial measures).

CASE 14 **British banks complicit in Nigerian corruption**

*The report International Thief Thief, published in 2010 by human-rights NGO Global Witness, revealed the involvement of British banks in Nigerian corruption. The report accuses Barclays, NatWest, RBS, HSBC and UBS of accepting millions of pounds in deposits from corrupt Nigerian politicians, which helped 'fuel corruption and entrench poverty' in Nigeria. After analyzing court documents in London that revealed the extent of the banks' involvement, Global Witness concluded that their commitment to tackling financial crime was questionable. The report's findings were discussed and circulated by several media outlets, including the BBC, Al Jazeera and the Wall Street Journal.*⁶³

The directly related reputational genuine incentive is *reward through case-specific publication*. Stakeholders should also consider applying the related reputational mitigation incentive if certain conditions are met (for details on reputational mitigation incentives, see page 84).

⁶¹ See <http://www.business-humanrights.org>.

⁶² For example, this is already done by the multilateral development banks (e.g. <http://www.worldbank.org/debarr>) and by U.S. authorities (<http://www.epa.gov>).

⁶³ Source: Global Witness (2010): *International Thief Thief*.

REPUTATIONAL SANCTION Punishment through comparative performance

Punishment through comparative performance refers to the public reporting of comparisons between the (poor) anti-corruption performances of several companies (e.g. the Defence Companies Anti-Corruption Index 2012⁶⁴).

Two different approaches can be distinguished. Stakeholders can either:

- List and rank *only* companies that violate an anti-corruption standard so appearance on the list constitutes a punishment;⁶⁵ or
- Rank *all* companies (of a certain sector, region etc.) according to their performance, in which case appearance can either constitute a punishment or a reward (depending on the position).

Both approaches can motivate companies to perform better in future rankings (i.e. peer pressure).

STAKEHOLDER *Punishment through comparative performance* can typically be applied by stakeholders from civil society, for example, by publishing a list of companies that lack publicly accessible reporting on anti-corruption principles (see example below). But also business and public sector stakeholders can in some cases apply this sanction, e.g. in the form of a public corporate governance index.

TARGET Stakeholders can commonly apply this sanction to companies only.

IMPACT This sanction can increase the social costs and can also have an indirect financial effect (e.g. if reputational sanction triggers commercial measures).

CASE 15 Ranking of oil and gas companies

In 2011 the Revenue Watch Institute and Transparency International published Promoting Revenue Transparency, a report evaluating 44 global oil and gas companies by their reporting on anti-corruption programs, organizational disclosure and country-level disclosure. As well as raising awareness of the issue, the report also serves as 'the basis for recommendations aimed at companies [...] legislators, regulators and investors' and 'as a tool for advocacy by international and local civil society organizations'.

The best-performing companies for reporting on anti-corruption programs were BG, BHP, BP and Statoil. The worst-performing were, among others, Gazprom, GEPetrol, Sonatrach and SOCAR.⁶⁶

The most directly related reputational incentive is *reward through comparative performance*. Although the reputational sanction of appearing on a ranking cannot easily be withdrawn or reduced (i.e. reputational mitigation incentives; for details see page 84), changes in performance over time can be highlighted to motivate companies to improve their practices.

⁶⁴ See <http://companies.defenceindex.org> for more information.

⁶⁵ As an extension of this type of reputational punishment, other fields of activism have used 'award' ceremonies as occasions to shame the poorest performers in a field. For example: The Public Eye Awards by the Berne Declaration and Greenpeace (<http://www.publiceye.ch>).

⁶⁶ Source: Revenue Watch Institute, Transparency International (2011): *Promoting Revenue Transparency – 2011 Report on oil and gas companies*.

Delivering Change – Lessons from Greenpeace’s environmental campaigning

Daniel Mittler

Political Director, Greenpeace International

Corruption is one reason why the public good is being damaged and our future as humanity is at stake. Greenpeace’s vision of a sustainable society demands that power be exercised fairly and that those in power be held accountable for their actions. Corruption undermines this vision, by privileging those with power and money over others, allowing them to profit at the expense not only of the rest of us – but of the planet itself. Greenpeace is therefore honored to share some insights from our campaigning history with anti-corruption practitioners. We hope that doing so will help our collective work for a more accountable and just world.

There is no question that sheer luck often makes the difference between a good – but unsuccessful – campaign plan and a winning one. The victories Greenpeace has achieved also vary a lot (you can get an overview here: <http://www.greenpeace.org/international/en/about/victories>).

There is no ‘off the shelf’ plan one can adopt, but here are five lessons from our experience that I would like to emphasize:

1. A picture is worth more than a 1000 words

It is a cliché, but it is true: unless there is a picture, getting attention is very hard. Abu Ghraib, for example, only became a real scandal once pictures were available.⁶⁷ A picture is not everything, but without good visual material achieving impact is difficult. What pictures travel can often depend on the news day, but images that explain the demand of the campaign simply are an

essential tool. Pictures of pipes blowing out dirt or of heavy air pollution simply work better than only analyses showing that there is a problem. The combination of ‘killer facts’ with visuals illustrating them is to be strived for.

2. You need to identify the point ‘where it hurts’

With the rise of the Internet there has been a lot of debate about the tools of campaigning, sometimes at the expense of considering the bread and butter issues of strategy. But a campaign which is not based on an accurate analysis of the strength and weaknesses of the company or government it aims to influence will never be successful. Planning a campaign to Green Apple⁶⁸ or a campaign to stop the commercialization of genetically engineered rice in China⁶⁹ could not be more different in many ways. But they are the same in the sense that you need to analyze your ‘target’ as accurately and effectively as you can. We sometimes spend years doing research before we find a ‘lever’ that we think can deliver real change. If you have not identified such a lever, it is probably better not to start your campaign, as you will only look weak. What effective levers are depends on what you are trying to shift. In the case of Apple, for example, we realized that we needed to appeal to the Apple fan base to affect change at Apple. When we were running a campaign on toxic ship paints, on the other hand, our target audience was often a very small number of technical magazines covering ship matters. It was (negative) coverage in those magazines that toxic paint producers were worried about because they directly influenced market decisions.

⁶⁷ See <http://www.scvhistory.com/scvhistory/signal/iraq/abughraib-timeline.htm>.

⁶⁸ See <http://www.greenpeace.org/international/en/news/features/greening-of-apple-310507>.

⁶⁹ See <http://www.greenpeace.org/eastasia/specials/gpmo1>.

3. Always provide a solution

Some people believe Greenpeace to be against everything, but nothing could be further from the truth. We always do provide an alternative. We show in our Energy Revolution scenario⁷⁰, for example, that you can provide energy for all, cut emissions and do without coal and nuclear; we do not JUST oppose coal and nuclear power plants. That is why often our confrontations end in cooperation over time. A campaign on climate-killing refrigerants being used at the Sydney Olympics, for example, over time morphs into a common agenda with the likes of Coca-Cola to eliminate climate-damaging f-gases from refrigerants altogether.⁷¹ A (successful) campaign asking Nestlé to cut its ties with Golden Agri Resources because of their destructive palm oil practices results in us – three years later – welcoming GAR's commitment to 'no deforestation footprint' for palm oil.⁷²

4. Integrity makes you strong

Greenpeace is fiercely independent and takes no money from corporations or governments. When I talk of 'cooperation' with business in the previous paragraph, this working together never entails Greenpeace getting any money. In our experience, it is this integrity that makes us strong. If we say something is good for people or the planet, the question of corruption simply does not arise. Nobody can even dream of claiming that we only say this in order to receive corporate donations. Doing without corporate funding – and by doing so increasing your integrity – is thus certainly an approach we can recommend to other players. This seems to be particularly pertinent in the anti-corruption field.

Part of integrity is of course also accuracy. Greenpeace has its own Science Unit and issue experts across the organization, because we know we are only as strong as our claims are accurate.

5. Being unpredictable makes you stronger: No permanent enemies, no permanent friends

Strategy is key; it is probably the most important of all criteria for success (see 2). However, many wrongly equate strategy with a need to define 'one definitive way of doing something'. But not only does one size not fit all, predictability is simply not an asset in campaigning. If you do the same thing again and again, that predictability will become your weakness (even if your execution of the campaign is excellent). The 'other' side will be prepared for your next move, or failing that, will be able – soon after you start your campaign – to decipher an effective counter strategy based on previous experiences. How to counter 'standard' campaigns is already being taught in MBA classes after all. It is therefore essential that you stay unpredictable in your choice of both targets and tools. The reason why Greenpeace is often effective is that we do both: We take bold action forcing destructive companies⁷³ to change course and do first hand research on the ground⁷⁴ uncovering scandals and proposing solutions. But we are also present where important decisions are being taken by powerful institutions⁷⁵ and governments, often unnoticed and far from media attention – but with profound impacts. We have 'No permanent friends and no permanent enemies'. We praise those against whom we have previously campaigned if they do the right thing. But we also always reserve the right to confront a corporation on an issue even if we work in cooperation with it on another.

Greenpeace does from time to time directly attack corruption and corrupt practices. In doing so, we learn a lot from the anti-corruption community. I hope that these lines may help the anti-corruption community in a small way to develop effective campaign strategies to further our common cause of holding those in power accountable.

⁷⁰ See <http://www.energyblueprint.info>.

⁷¹ See <http://www.greenpeace.org/international/en/press/releases/Greenpeaces-20-year-campaign-catalyzes-groundbreaking-climate-commitment-on-refrigeration-by-400-companies>.

⁷² See <http://www.greenpeace.org/seasia/Press-Centre/Press-Releases/progress-towards-a-no-deforestation-footprint>.

⁷³ See <http://www.greenpeace.org/international/en/publications/Campaign-reports/Forests-Reports/Junking-the-Jungle>.

⁷⁴ See <http://www.greenpeace.org/africa/en/Press-Centre-Hub/Press-releases/Greenpeace-DRCs-moratorium-on-industrial-logging-being-bypassed>.

⁷⁵ See <http://www.greenpeace.org/international/en/news/Blogs/makingwaves/we-are-people-already-sold-say-voices-from-af/blog/37212>.

REPUTATIONAL GENUINE INCENTIVE Reward through case-specific publication

Just as stakeholders can publicly report on a company's violation of an anti-corruption standard, they can also report on its exemplary behavior. This may also motivate other companies to follow its example.

STAKEHOLDER *Reward through case-specific publication* can be applied by stakeholders from all sectors, although as with reputational sanctions, the manner of application is likely to differ. Stakeholders from civil society can directly apply this incentive by naming a well-performing company in a campaign or media article⁷⁶. Public or business sector stakeholders may choose to announce publicly the application of a commercial or legal incentive.

TARGET Stakeholders can apply this sanction to a company, or to representatives (e.g. Chief Executive Officer).

IMPACT This incentive can increase the social benefits and can also have an indirect financial effect (e.g. if reputational incentive triggers commercial measures).

CASE 16 Public praise of companies' conduct in sourcing conflict minerals

In 2012 the U.S. Chamber of Commerce began lobbying against Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which deals with the sourcing of conflict minerals from Eastern Congo. Consequently several civil society organizations called on electronics companies to clarify their position relating to the legislation and asked them to oppose the Chamber of Commerce stance. But they also publicly praised those companies that had already come out in favor of the legislation and in opposition to the Chamber of Commerce. "Human rights advocates applaud Microsoft, GE and Motorola Solutions for taking a stand on this life-or-death issue," said a representative of The Enough Project. The Executive Director of Jewish World Watch further argued that consumers would be willing to reward those companies that "are doing their utmost" to bring conflict-free products to the market.⁷⁷

The most directly related reputational sanction is *punishment through case-specific publication*.

⁷⁶ This can also apply for rewarding individual whistleblowers. For more information see contribution by Joe Murphy on pp. 88.

⁷⁷ Sources: Joint press release by The Conflict Free Campus Initiative, Congo Action Now, Earthworks, The Enough Project, Global Witness, Jewish World Watch and STAND (27 June 2012): *Electronics Companies Must Break from US Chamber on Conflict Minerals*.

REPUTATIONAL GENUINE INCENTIVE Reward through comparative performance

Reward through comparative performance refers to the public comparison of companies' positive anti-corruption performance.

As with the corresponding reputational sanction, two different approaches can be distinguished. Stakeholders can either:

- List and rank *only* companies that meet or exceed an anti-corruption standard so appearance on the list constitutes a reward;⁷⁸ or
- Rank *all* companies (of a certain sector, region etc.) according to their performance, in which case appearance can either constitute a punishment or a reward (depending on the position).

Both approaches can motivate companies to perform better in future rankings (i.e. peer pressure).

STAKEHOLDER This incentive can typically be applied by stakeholders from civil society, for example by publishing a list of companies with respect to their reporting on their anti-corruption performance (see example below). But also business and public sector stakeholders can in some cases apply this incentive, e.g. in form of a public corporate governance or corporate social responsibility index.

TARGET Stakeholders can apply this incentive to a company, or to representatives (e.g. Chief Executive Officer).

IMPACT This incentive can increase the social benefits and can also have an indirect financial effect (e.g. if reputational incentive triggers commercial measures).

CASE 17 Assessing the world's largest companies

Transparency International rated the 105 largest publicly-listed multinational companies (as determined by Forbes) in terms of their reporting standards. The companies were evaluated based on their reporting on anti-corruption programs, their organizational transparency and their country-by-country reporting. This amounts to a reputational punishment for the ones that fare badly, but is also a reputational reward for the ones that do well. Statoil, the Norwegian oil and gas company, performed highest overall, as well as in the individual categories (sometimes sharing the top spot with others). Following the release of the ranking, the company was lauded by several international press outlets for its strong performance.⁷⁹ For further details see practitioner experience by Karen Egger on the next page.

The most directly related reputational sanction is *punishment through comparative performance*.

⁷⁸ For example: Ethisphere: World's Most Ethical Companies, (<http://www.ethisphere.com>).

⁷⁹ Source: Transparency International (2012): *Transparency in Corporate Reporting*.

Combating Corruption through Publicity and Peer Pressure – Opportunities of a ‘Corporate Corruption Ranking’

Karen Egger

Private Sector Team Head, Transparency International

Among the factors likely to motivate individuals, institutions or countries to counter corruption are reputational risk and peer pressure. One possible way to combine the two is through public ratings or rankings that evaluate and score the corruption-related performance of countries, businesses or other entities. The increased or worsened reputation associated with a good or bad ranking can have a strong effect on the behavior of the ranked entity. Another important aspect is the peer pressure involved – setting oneself apart from one’s peers, being seen as a leader and not falling behind one’s competitors.

When it comes to raising awareness about corruption, Transparency International’s Corruption Perception Index (CPI) is probably one of the most published and referenced rankings of global corruption. As such, a CPI ranking often serves as a benchmark for policymakers, activists and investors alike. The CPI results also trigger governments to pay more attention to corruption risks and take action to address them. However, given that the CPI uses a multitude of perception-based surveys and aggregates them in a single score for a given country, its usefulness to guide specific anti-corruption policies and activities is limited. To address these challenges of perception-based aggregate indices, such as the CPI, when it comes to examining the corruption risks of individual businesses, Transparency International examines transparency in corporate reporting to measure companies’ anti-corruption behavior, rather than using data on perceived levels of corruption in these businesses. In addition, the results go beyond a single score for each business, but provide a more granular assessment of several aspects of corporate transparency.

Transparency International believes that reporting demonstrates a company’s commitment to countering

corruption and makes companies more easily accountable for their shortcomings. In our report, *Transparency in Corporate Reporting: Assessing the World’s Largest Companies*, we measured corporate transparency across three dimensions that bear directly on a company’s anti-corruption commitment and performance:

- Whether its disclosure of its anti-corruption programs meets voluntary best-practice standards. These standards are based on Transparency International’s Business Principles for Countering Bribery
- Whether disclosure of underlying company holdings is complete and comprehensive
- Whether or not it reports key financial details, such as taxes paid and profits earned in each country in which it operates.

These dimensions are fundamental to transparency. Reporting on anti-corruption programs is a basic preventative measure and enables companies to show their stakeholders that they are committed to countering corruption. Transparent organizational structures are necessary to ensure that contracts and financial flows are easily traceable. Country-by-country disclosure allows local citizens and civil society organizations to monitor companies’ business relations, transfers and value-sharing practices, as well as money transfers to governments in the form of taxation and licensing.

The report contains a list of companies, starting with the company with the highest overall score. What we found was that companies scored fair to well in reporting on their anti-corruption programs, indicating that this information is considered relevant and fairly common among the world’s largest multinationals. Companies were more likely than in the past to disclose information on their anti-corruption

training programs and whistleblowing policies. They were also more likely than before to extend their policies to include business partners. Unfortunately, however, the prohibition of facilitation payments has not been taken up by enough of the companies surveyed.

Companies achieved the best results in the study with respect to their reporting on underlying holdings. However, there remains significant room for improvement as only a few companies actually disclose exhaustive lists of their holdings.

Scores were weakest in the area of country-by-country reporting, with the surveyed companies achieving an average of only four percent and nearly half the companies scoring zero.

Mining and other resource companies were among the top-performing companies in each dimension and overall. These companies have traditionally been identified as exposed to a high risk of corruption and have been the subject of scrutiny for many years. Many initiatives are in place to promote cleaner business practices and greater transparency with respect to the extractives industry. Transparency International's 2009 and 2011 reports Promoting Revenue Transparency, as well as this report, are part of these broader efforts to shine a spotlight on the extractive industries – and many of the companies have demonstrated a positive response in several areas. In part as a result of Transparency International's work in this area, the industry has created the Extractive Industries Transparency Initiative (EITI), a coalition of countries that sets standards of reporting for companies engaged in extractives. These factors probably account for the relatively high scores in anti-corruption programs. However, as a high-risk industry, the publication of anti-corruption programs is not enough. More needs to be done to ensure robust implementation of the highest possible standards, including country-by-country reporting and, eventually, reporting on a project-by-project basis.

Since publication of the report in July 2012, Transparency International has had the opportunity to engage one-to-one with many of the surveyed companies, most often at the initiative of companies themselves. Those at the top as well as at the bottom of the list have reached out to meet with us as a direct result of our publication of the report.

These engagements have been instructive and constructive. Some companies indicated to us that they were not previously aware of the standards for robust anti-corruption behavior. Publication of the report therefore was instrumental in raising their awareness.

Several companies told us that they have set themselves an objective to improve their score. The report has had an impact on company behavior and policies, resulting directly in the publication of more relevant information. They have entered into dialogue with Transparency International to better understand the methodology and their individual results in order to improve their position on the list. They want to work with Transparency International as they make progress towards becoming more transparent.

Transparency International staff have been invited to participate in internal company meetings to convey the report's messages and respond to questions regarding their individual performance. Companies are especially keen to understand and compare their results against those of their industry competitors.

The report has also generated interest and activity in the media and among investors. This interest is manifested in press coverage, interview requests and invitations to Transparency International to present the report findings. Finally, the report has enabled civil society organizations to engage with companies who are based or operating in their jurisdictions. Civil society organizations from a company's home country have been able to use the report to initiate or strengthen relationships with companies. Those based in the host countries where the companies operate can use the information to put pressure not only on the companies, but on local governments and regulators to effect change.

Warren Buffet said, "It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you'll do things differently." A company's reputation is built on many factors, including its commitment to anti-corruption. This explains the high level of interest that Transparency in Corporate Reporting, and in particular the list, has generated in the senior management suites of the companies surveyed.

REPUTATIONAL MITIGATION INCENTIVE Reduction of sanction

Reputational mitigation incentives refer to the reduction of a reputational sanction.

Even though a negative reputation cannot be as easily improved as the effects of legal and commercial sanctions, stakeholders should always consider this mitigation incentive if a company shows improved performance. A civil society organization can, for example, start a campaign urging a company to commit to stricter standards of transparency. Once it does, the campaign may not only be stopped but the civil society organization may publicly praise a company for its decisive anti-corruption action.

STAKEHOLDER This incentive is an option for civil society stakeholders, who are the primary users of reputational sanctions. But it can also be applied by public sector stakeholders, who can refrain from publishing a corruption case in recognition of a company's satisfactory participation in a leniency program⁸⁰, or report on a company's achievements (e.g. as agreed in settlement).

TARGET As reputational sanctions are mostly applied to companies, so are mitigation incentives.

IMPACT Reducing a reputational sanction may decrease the social costs and can also have an indirect financial effect (e.g. if reputational incentive triggers application of commercial measures).

CASE 18 Adidas shamed and subsequently praised by Greenpeace

Greenpeace has used the combination of initial shaming and subsequent collaboration and public praise to great effect in its environmental campaigning (see practitioner experience, Daniel Mittler, page 78). The approach can also be beneficial for targeted companies. If they react early and adequately, they will be seen as trailblazers and change agents in the increasingly important domains of supply chain responsibility and environmental protection.

Among other sports and textile manufacturers, Adidas was targeted as part of Greenpeace's 2011 Detox campaign, calling for a phasing-out of all hazardous chemicals from the supply chains of big textile brands. Adidas not only complied to the demands but also committed to the establishment of a forum for bringing together the industry in an attempt to tackle the challenge sector-wide. Adidas was lauded by the NGO, which states on its website: "Crucially, Adidas has also agreed to further promote the principle of the 'right to know', ensuring full transparency [...] With these commitments, Nike, Adidas and Puma have broken away from the other big-name clothing brands listed in our Dirty Laundry 2 report".

⁸⁰ See, for example, the voluntary disclosure program of the World Bank, which offers to refrain from publicly debarring companies for past misconduct that was disclosed, and keeps their identities confidential.

REPUTATIONAL SANCTIONS AND INCENTIVES Further practical considerations

Besides the typical practical challenges to applying effective sanctions and incentives, such as the absence of political and civil rights (see IV.1. for more details), specific issues may arise when seeking to apply reputational sanctions and incentives:

- **Evidence must be flawless:** If reputational sanctions are applied without clear evidence, stakeholders risk not only damaging their own reputation but also incurring potential legal consequences (e.g. injurious falsehood, defamation). There are additional legal factors to consider when targeting individuals (e.g. invasion of privacy).
- **Stakeholder is perceived as biased:** It is often not possible to apply reputational sanctions to all companies that violate a standard, so stakeholders will have to limit themselves to a selection of the most prominent or exemplary companies. However, applying reputational sanctions to a selected few may lead to accusations of bias if credible arguments for the selection are lacking.
- **Information overload:** The effect of reputational sanctions and incentives may be limited where these measures compete for attention with too many others ('inflation of public awards').
- **Resource demands on civil society:** *Punishment and reward through comparative performance* require the gathering of sufficient and consistent data for comparability, which may prove difficult for resource-constrained civil society organizations.
- **Lack of acceptance and depth of perception-based indicators:** Perception-based data seldom allows for policy recommendations or details of why one business fared worse than another. So while it may produce straightforward rankings, it may be less useful in telling companies how to improve their anti-corruption performance.

Although reputational sanctions and incentives are generally perceived to have vast potential to motivate business to counter corruption, among others these practical considerations need to be taken into account.

Incentives for Good Anti-Corruption Behavior: What about Whistleblowers?

Joseph E. Murphy

Director of Public Policy, Society of Corporate Compliance and Ethics

Should governments offer companies' employees incentives to report infringements of anti-corruption standards?⁸¹
Should companies offer cash rewards for internal whistleblowers?

The idea behind rewarding whistleblowers is that companies need to have employees report internally when they see something wrong. The company, in turn, should have an effective compliance and ethics program with the independence and competence to investigate such allegations diligently. However many people who witness misconduct do not report it, whether from fear of retaliation, indifference, or the belief that nothing will be done. Yet those who do raise issues may benefit their employers enormously by interdicting potentially disastrous misconduct. Therefore, in order to motivate employees to report issues, should companies offer them rewards? A reward system could follow the model of the highly successful (for the government) U.S. False Claims Act, which offers whistleblowers a large percentage of any damages the government recovers as a result of a whistleblower's reporting fraud in government contracting.

But there is a concern that companies rewarding whistleblowers may not necessarily have a positive effect: first we are not talking about rewarding people for good ideas, or for suggesting improvements in the compliance program, or positively considering in an employee's annual evaluation the fact that the employee raised a compliance issue; rather, the concern is about turning in fellow workers for money. Will this harm employee morale? Will employees work secretly and be looking over their shoulders to see if internal bounty-hunters are watching them? Will high rewards drive employees to "frame" fellow employees to earn the cash? Is there also the risk that converting a matter

of right and wrong into merely a financial proposition might actually cause employees to be less inclined to report issues?

Companies should certainly be active in encouraging employees to raise issues and proactive in preventing and punishing retaliation. The company should make it clear to employees that it appreciates their courage in raising issues. But offering cash rewards is significantly different. Moreover, it is unrealistic for the company to compete with the government in offering cash rewards.

When it comes to rewards by government, however, the calculus is different. The rewards under the U.S. False Claims Act have brought numerous procurement fraud schemes to light saving a significant amount of tax-payers' money. Similarly, the Dodd Frank Act's whistleblower program has resulted in many tips about securities fraud and foreign corrupt practices to government officials. These government programs likely caused changes in the way businesses operate.

If governments offer incentives for company employees to report misconduct externally they need to check whether reward programs are reasonable. For example if poorly designed they could undermine company ethics and compliance programs. Large external rewards may encourage employees to bypass their company processes. Likewise, a thoughtless reward offering could motivate unreasonable reports with significant administrative costs. There is also the difficult question whether to reward an employee who participated in the wrongdoing. Reports may also be motivated by malice without regards to the actual facts. Employees might even be tempted to wait until a nascent violation gets worse, to increase the chances of a

⁸¹ This article is based on Joseph E. Murphy, *Using Incentives in Your Compliance and Ethics Program*, Society of Corporate Compliance and Ethics, November 2011 (<http://www.corporatecompliance.org/Resources/View/smid/940/ArticleID/724.aspx>).

fine or restitution and therefore a larger reward. Poorly designed rewards programs might undermine leniency programs. It may be difficult for companies to conduct internal investigations before self-reporting to the authorities, when rewards are promised to employees who front-run the investigation and report the conduct to the government before the company does.

In the U.S. these concerns were widely discussed as part of the Securities and Exchange Commission's rulemaking for the Dodd Frank Act's whistleblower provisions. The SEC added provisions to its rules to address the difficult issues, including providing incentives to employees first to use internal reporting systems and limiting the opportunities for front-running. The SEC would not, however, require that employees first report internally. Given the risk of retaliation against employees, it was thought better to put the burden on companies to enhance their internal programs so that employees would continue to use them first. The general experience of those dealing with whistleblowers has been that they will first raise issues internally, notwithstanding potential rewards for going outside.

In practice, if a system for rewarding reports of violations to the government is correctly designed it seems to work, at least based on the experience with the U.S. False Claims Act. As for rewards by companies, that seems to be an open question with very serious doubts about its impact and efficacy. Yet it does seem to be the case that even those who ultimately report violations to the government first try to report them internally. Unfortunately, such internal reporting may be met by resistance and difficulty for the employees making the report. The best way for companies to avoid having employees report to the government may be to treat those employees fairly and responsibly, and investigate matters thoroughly.

Governments and companies need to take care in addressing whistleblowing issues. Good practices include:

Companies

- having strong policies and procedures against retaliation (e.g. record of fierce discipline for retaliation);
- publicizing internally the results of investigations and

discipline (while protecting the privacy of individuals) to demonstrate that calls are taken seriously and appropriate action is taken;

- rewarding those employees who use reporting systems to report defects in the compliance system. Those reporting actual violations are thanked and recognized, but not necessarily paid;
- giving compliance and ethics programs sufficient empowerment and independence to be effective in conducting investigations and protecting whistleblowers (incl. a sufficiently independent and empowered chief ethics and compliance officer at the executive level);

Governments

- motivating companies to enable employees to make protected and anonymous internal whistleblowing disclosures (including guarantees that good faith calls lead to investigations);
- treating companies that self-report with strong incentives such as elimination or reduction of penalties;
- not requiring but strongly encouraging employees to first use company reporting systems when companies have effective internal compliance and ethics programs;
- not misapplying privacy laws that undercut good faith internal whistleblower programs; and
- using care in other areas of regulation (e.g., employment law, privacy, etc.) to promote and not undercut effective compliance and ethics programs that include reporting systems.

Companies, employees and government should join together in the fight against corruption. Effective reporting systems are one important tool in this effort, but such systems need to be intelligently designed. It should also be realized that people will show a commitment to doing the right thing even without cash as a reward. Treat them fairly, listen to them, and protect them and they can show extraordinary courage and conviction. Companies implementing effective compliance and ethics programs that facilitate such employees' reporting and then voluntarily reporting their own violations are acting in the public interest and should be encouraged by the government.

III.2 Targeting companies and their representatives

Stakeholders need to consider whether to apply sanctions and incentives to entire companies, individual representatives of these companies or both.

A company cannot act on its own. The decision to violate or meet and exceed anti-corruption standards is taken by a single representative or by a group. These decisions are based on considerations of financial, social and psychological costs that are expected when a standard is violated. The same holds true for the benefits associated with incentives. It is therefore important to target individual representatives (if possible) to motivate them to refrain from corruption.

However, simply targeting representatives may not always be enough. In cases where a culture of corruption is endemic within a company, or where difficulties exist in identifying culpable representatives, stakeholders should consider targeting the entire company, instead of or in addition to its representatives.

The apple-barrel analogy

When considering whether to target individual representatives or an entire company, it can be helpful to refer to the analogy of **'apples' (company representatives)** in a **'barrel' (the overall company)**:

- *If a good barrel contains good apples*, a culture of integrity, accountability and transparency prevails, supported by an effective anti-corruption ethics & compliance program. In this situation, stakeholders should apply genuine incentives;
- *If a good barrel contains some bad apples*, selected company representatives (bad apples) need to be punished (in extreme cases removed from the barrel). The company itself should not be punished as a good barrel means among other things that an effective anti-corruption ethics & compliance program is in place. Thus, the company should qualify for mitigation incentives;
- *If a bad barrel contains mostly good apples*, sanctions should be target at representatives which are responsible for the bad barrel. When punishing the company is necessary, care should be used so as not to punish the *good apples*;
- *If a bad barrel contains bad apples*, both the entire company and its representatives need to be sanctioned.

This simple analogy highlights a major point. The term 'company representatives' needs to be divided into executives and employees, to acknowledge the special responsibilities of a company's executives in establishing and maintaining a *good barrel*.

Figure 9 shows that stakeholders can apply sanctions and incentives on a company and its representatives whereas the latter should be differentiated between those who are responsible for the barrel (i.e. executives) and those who are not (i.e. employees).

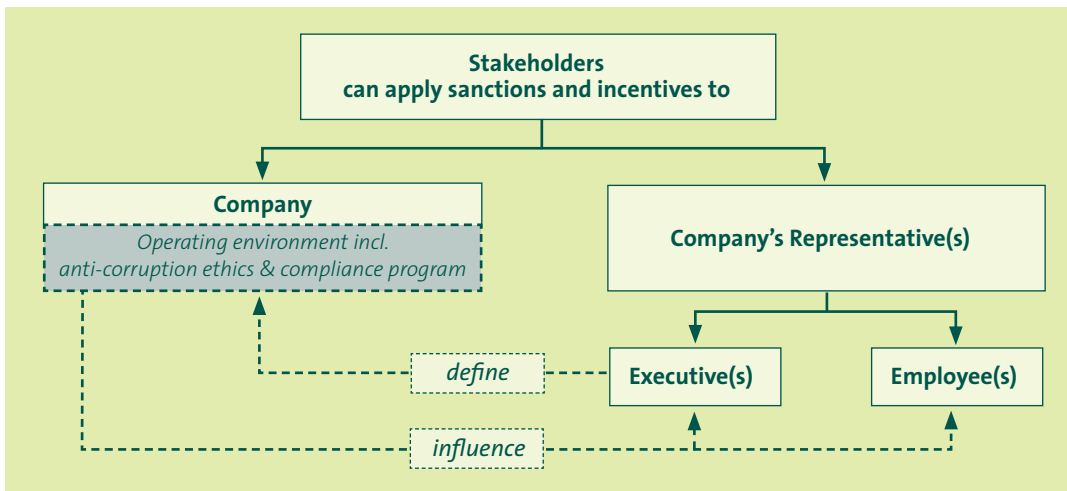


Figure 9: Apply sanctions and incentives to a company and/or its representative(s)

Executives are persons with high levels of authority and directing power (e.g. senior as well as middle managers, board of directors) who are among others responsible for an effective anti-corruption ethics & compliance program.

Employees are subordinates of executives, who may have varying degrees of fiduciary, managerial and administrative responsibility.

A key difference between executives and employees is that executives define the operating environment in which employees carry out their work-related activities. The executives' state of mind is the state of mind of the company which puts them into a special position for stakeholders aiming to motivate business to counter corruption.

The executive's state of mind is the state of mind of the company which puts them into a special position for stakeholders aiming to motivate business to counter corruption.

III.2.1 Targeting company representatives

Stakeholders need to make sure that sanctions reach culpable individual representatives, and that representatives likewise benefit from meeting or exceeding standards (i.e. incentives). Thus, the key message for targeting company representatives is very simple: executives and employees can both engage in corrupt actions, hence sanctions and incentives should be applied to encourage both not to do so.

Executives have additional responsibilities which need to be recognized. They are increasingly obliged by regulatory demands and voluntary good practice standards to establish an operating environment which detects, prevents and responds appropriately to corruption risks (i.e. an effective anti-corruption ethics & compliance program). Failure to do so puts not only the overall company at risk, but also puts individual executives at risk of legal liability for employees' actions, even if they have not been directly involved personally (i.e. willful blindness, failure to supervise). For example, the U.S. Securities and Exchange Commission uses the concept of 'control person liability', which holds people in authority accountable for the acts of persons under their control.

CASE 19 Executives fined for failure to supervise employees

The provision of control person liability was applied in the court case between the U.S. Securities and Exchange Commission (SEC) and Nature's Sunshine Products, its President and CEO Douglas Faggioli and former CFO Craig D. Huff. A Brazilian subsidiary of the U.S.-based company Nature's Sunshine Products made undocumented cash payments through a customs broker to low-level customs officials in an emerging market, in order to bypass a new regulatory requirement that was increasing the company's cost of doing business. Without admitting liability, Nature Sunshine, as parent company of the Brazilian subsidiary, consented to the entry of a permanent civil injunction and agreed to pay a civil penalty of US \$600,000. Faggioli and Huff were not personally involved, nor had they knowledge of the improper cash payments in Brazil. Yet the SEC alleged they had violated the books and records requirements, as well as the internal control provisions, of the Foreign Corrupt Practices Act in their capacities as control persons under Section 20(a) of the Securities Exchange Act. The SEC based its control person claims on the theory that Faggioli and Huff failed to supervise the employees with responsibility for maintaining accurate books and records and the company's internal controls. Without admitting liability, both Faggioli and Huff consented to the entry of civil injunctions and each agreed to pay a penalty of US \$25,000.⁸²

⁸² Sources: Adapted from Ethisphere: Control person liability – A new weapon in the FCPA enforcement arsenal (see <http://ethisphere.com>) and Press Release No. 21162 of the U.S. Securities and Exchange Commission (31 July 2009): SEC charges nature's sunshine products, Inc. with making illegal foreign payments.

However, targeting company representatives effectively with sanctions and incentives may in practice hold a variety of challenges which can include:

- **Sanctions and incentives for representatives are not available:** Stakeholders which for example primarily apply commercial measures face the challenge that the majority of available commercial sanctions and incentives are typically applied to a company, not directly to its representatives.
- **Difficulties in identifying culpable representative(s):** *Exactly which apples are rotten?* Identifying the individual representatives behind a corrupt act can be challenging, as it is not always possible to pinpoint personal guilt to a single individual or group of representatives. This problem may be compounded in the case of decentralized multinational companies.
- **Shared culpability:** *How many apples are rotten in the barrel?* An individual representative may share responsibility for corrupt acts with predecessors or with current colleagues. For example, failure to introduce an anti-corruption ethics & compliance program by past executives could be insufficiently addressed by making the current executive the scapegoat. Individual culpability can be very difficult to pinpoint where multiple decision makers are involved.
- **Possible legal risks of reputational sanctions:** *How to target the rotten apples?* Targeting individual representatives with reputational sanctions may have a great influence on the individual. This is especially true for executives. But this may hold legal as well as ethical risks that need to be considered (e.g. violation of personality rights).
- **Financial costs of sanctions are passed onto third parties:** Sanctions which seek to increase the financial costs for representatives (typically legal fines) may have a limited deterrent effect if they are covered by third parties (e.g. reimbursement by the company or insurance).

Targeting executives with sanctions and incentives is crucial when seeking to motivate business to counter corruption.

These practical challenges may make it difficult for some stakeholders to target individual representatives directly, even when this is considered the best course of action. In such cases, stakeholders can turn to applying sanctions and incentives to the entire company, but in a way so as to ensure that these sanctions and incentives eventually also reach its representatives:

- **Apply effective sanctions and incentives to a company** (e.g. significant commercial measures will most likely be passed on to representatives in the form of reduced bonuses or shareholder pressure);
- **Consider use of reputational measures for companies**, as its representatives are associated with them;
- **Apply sanctions and incentives to companies based on the anti-corruption performance of their representatives** (see example below);
- Approve companies for **mitigation incentives only if a company can show adequate responses towards involved representatives** (e.g. dismissal of corrupt representatives).

CASE 20 Law on sanctioning companies conditional to its representatives

By allowing only companies whose executives have a clean corruption record to take part in public tenders, the UK's Public Contract Regulation 2006 recognizes the importance of executives in setting the operational environment.

Article 23, Criteria for the rejection of economic operators, requires that a "contracting authority shall treat as ineligible and shall not select an economic operator in accordance with these Regulations if the contracting authority has actual knowledge that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of corruption, bribery or fraud".

III.2.2 Targeting the company

Targeting the overall company becomes necessary when the application of sanctions and incentives to representatives is not possible or not feasible. But stakeholders should also consider holding an entire company accountable for infringements of standards by its representatives.⁸³

CASE 21 OECD Recommendation on responsibility of companies for executives

The OECD Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions issued a Recommendation advocating a three- fold approach. A company is responsible for acts of natural persons representatives with the highest level of managerial authority within the company if the person with highest level of authority i) “offers, promises or gives a bribe”, ii) “directs or authorises a lower level person to offer, promise or give a bribe”, and iii) “fails to prevent a lower person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics and compliance programmes and measures”. (Annex I: - B) Article 2)

Whenever possible, stakeholders should make sure that their sanctions and incentives are applied directly to the relevant representatives, affecting their financial, social and psychological costs and benefits. This can be done primarily by legal and to limited extent reputational measures.

But in situations where targeting representatives directly is either not possible, or not feasible, targeting the overall company has to be considered.

⁸³ This is often referred to by the legal doctrine of *respondeat superior* (corporate liability), which states that an employer can be held vicariously liable for the actions of employees acting within the scope of their employment. For instance, the strict liability of a company for failure to prevent bribery by its representatives is articulated in the UK Bribery Act 2010. The German Act on Regulatory Offences also recognizes the violation of obligatory supervision in operations and enterprises (Ordnungswidrigkeitengesetz - OWiG).

Besides addressing practical challenges of targeting individual representatives, there are further reasons to apply sanctions and incentives to an entire company which can include:

- **Systemic corruption:** In cases where corruption appears systemic within a company, targeting representatives only may not be sufficient.
- **Sanctioning individual representatives may not protect the stakeholder from risks of corruption that emanate from the company:** Stakeholders may choose to sanction a company not only to punish but also to protect their own interests, e.g. misappropriation of funds due to corruption. Applying sanctions to individual representatives will not achieve this if the company cannot show that it has a sufficient anti-corruption ethics & compliance program in place to prevent future incidents. In such cases, the entire company should be sanctioned (e.g. *exclusion from opportunities*).
- **Peer pressure:** Measures such as exclusion from tenders impact all representatives, not only those who are corrupt. This increases awareness of corruption and risk sensitivity, leading to peer pressure, and stimulating attitudes (and social as well as psychological costs) towards a rejection of corruption. The same holds true for the application of incentives. When building on peer pressure the risk has to be taken into consideration that innocent representatives are harmed.
- **Increased basis for claiming damages:** If corruption involved damages to a third party (e.g. a company lost a public tender due to bribes by a competitor), that party can try to recover damages from the perpetrator. Stakeholders should hold a company liable at least to some degree for the infringement of anti-corruption laws by its representatives, e.g. due to the absence of an effective anti-corruption ethics & compliance program. These damages should be claimed not only from representatives but also from the company. In most cases, company representatives may not be able to pay the incurred damages.
- **Proceeds of corruption are often at least partly owned by a company:** Illicit gains from corruption by company representatives must be recovered and returned. If a company gained from the corrupt practices of its representatives, the company should consequently be subject to confiscation of those illegal proceeds.

CASE 22 Siemens sanctioned for failure of its board

In 2008 Siemens AG was sentenced by the Office of the Prosecutor General in Munich (Germany) to pay €395,000,000 for the failure of its board to fulfill its supervisory duties. A deficient compliance system was unable to prevent the creation of slush funds to channel illicit payments to foreign public officials. The sanction included a monetary penalty of €250,000 and a disgorgement of profits of €394,750,000.⁸⁴

When targeting the entire company, stakeholders must ensure that these measures have an impact on business – otherwise they will not stimulate a change in behavior. The focus should be on strengthening the business case to counter corruption. If incentives and sanctions applied to a company are not adequately passed on to relevant representatives through internal policies (e.g. loss of bonuses, penalties), especially sanctions may be subject to the risk of internalization as ‘mere costs of doing business’. They may also be passed on to third parties such as shareholders, creditors or customers. In such cases, sanctions applied solely to a company have only limited effect on the financial cost considerations of individual representatives, and may therefore fail to motivate business to counter corruption.

>>> APPENDIX II outlines typical scenarios for targeting individual representatives (executives and employees) as well as an entire company, according to their involvement in corrupt acts and the existence of an effective anti-corruption ethics & compliance program.

⁸⁴ Source: <http://www.siemens.com>.

Part IV:

Six principles for changing business behavior

Key considerations when applying sanctions and incentives

At the end of Part IV, stakeholders will have a good understanding of what should be taken into account to apply sanctions and incentives effectively to motivate business to counter corruption.

IV.1 Impact p. 98
Be relevant and proportionate!

IV.2 Communication p. 108
If nobody knows, nobody cares!

IV.3 Monitoring p. 110
Trust is good, monitoring is necessary!

ESTABLISHING

EVALUATING

IV.6 Evaluation p. 128
Are the measures working?

ENHANCING

IV.4 Multiplication p. 118
Seek allies!

IV.5 Responsibility p. 122
Create a snowball effect!

IV.1 Impact: Be relevant and proportionate!

Is a specific sanction strong enough to deter violations of anti-corruption standards? Is an incentive sufficiently beneficial to outweigh the potential gains of corruption, or to motivate establishment of an effective anti-corruption ethics & compliance program? Are these measures really strengthening the business case for targeted companies and their representatives to counter corruption?

A company's decisions are the decisions of its representatives and are therefore driven by considerations regarding the financial, social and psychological costs and benefits of acting corruptly or preventing corruption. In order to have an impact on business, sanctions and incentives must address this.⁸⁵

Applying relevant and proportionate sanctions and incentives to business is essential to strengthen the business case to counter corruption. To achieve this, stakeholders should ensure that the perceived dimension of their measures, as well as the likelihood of their application, actually impact the behavior of companies and their representatives.

Dimension and likelihood of application of sanctions and incentives

There is no standard solution for assessing the impact of an anti-corruption sanction or incentive on the business case to counter corruption. A common approach to assess whether sanctions and incentives have the potential to impact the business case is to examine the interaction between the **dimension** of these measures and the **likelihood of their application** in a particular context.

For example, if a government announces that bribery of foreign public officials will be punished by a substantial *fine*, but it is perceived that this sanction will never be enforced, the measure will not deter company representatives from bribing. Likewise, if the size of a *fine* falls short of international standards, it may not significantly reduce the probability that company representatives will engage in corrupt acts – even if they are almost certain to get caught and fined.

⁸⁵ Supplementary to applying sanctions and incentives, stakeholders should focus on reducing opportunities for business to engage in corrupt acts (e.g. improvement of procurement procedures).

Perception drives behavior

Note that the *perception* of the dimension and likelihood of application is at least as important as the reality. For example, if law enforcement agencies do not communicate their activities properly, company representatives may perceive that there is no risk of actually getting caught. Additionally, individuals tend to evaluate low probabilities much higher than they really are.

The dimension and likelihood of application depend on six elements – relevance, scope, credibility, commitment, capacity and environmental factors. With the help of these six factors, stakeholders can assess a measure’s potential to motivate business to counter corruption by strengthening the business case in their unique context.

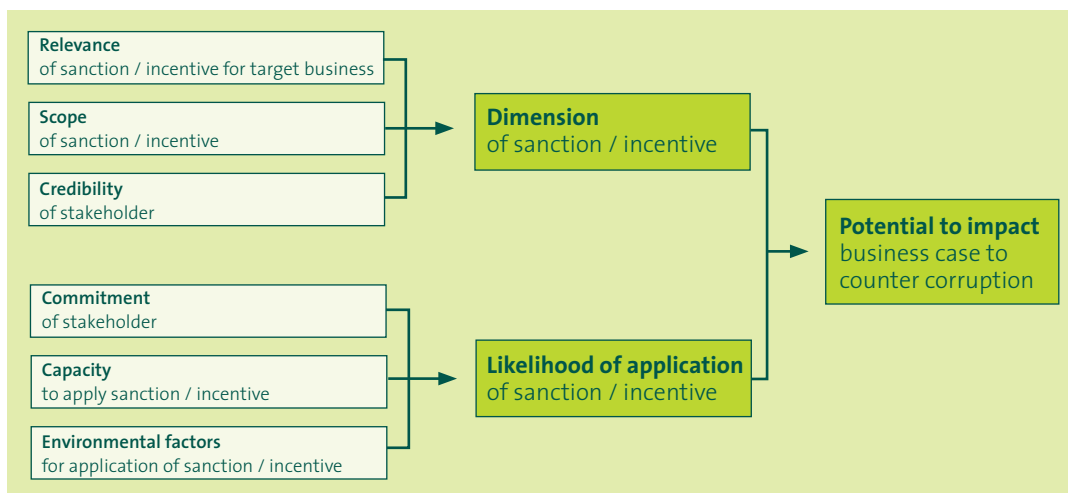


Figure 10: Factors to assess the impact on the business case to counter corruption

Whereas stakeholders usually have the power to determine and influence the first five elements, they cannot significantly influence environmental factors in the short term. These should therefore be treated as accepted constraints. For example, weak law enforcement often needs to be treated as given in the short and medium term. However, all stakeholders have the potential to advocate for improvements of those environmental factors in order to further facilitate the application of sanctions and incentives.

Factors affecting ‘Dimension’

Relevance of sanction / incentive for target business

Stakeholders must ensure that their anti-corruption sanctions and incentives matter! Different companies (or industry sectors) have different pressure points. For example, companies with high exposure to the public may generally be more susceptible to reputational sanctions and incentives.

While legal sanctions and incentives can be seen as typically independent of the underlying business model, commercial and reputational ones are not. Stakeholders need to understand the business models of targeted companies in order to assess the potential for impacting the business case for countering corruption. The business model gives good indications of the susceptibility of companies and their representatives to certain measures. For example:

- **Strong focus on one or a group of customers:** Large international construction companies may react strongly to debarment by an intergovernmental organization (commercial sanction: *exclusion from opportunities*).
- **Reputation as an important selling point for companies:** Consumer-focused suppliers or companies in a highly competitive market may react strongly to reputational incentives.
- **Reputation as an important selling point for representatives:** Credibility is vital for some professions. Shaming an accountant or lawyer through publicity in a corruption case may have more impact than doing so for a construction worker (reputational sanction: *punishment through case-specific publication*).
- **Strong dependence on certain distribution channels:** Export-oriented trading companies may react strongly to relevant commercial sanctions, such as the revocation of export licenses or unfavorable conditions for specialist insurance.
- **Tangible, short-term benefits:** Immediate commercial incentives, such as preferred payment of invoices, may be more valuable to SMEs than reputational incentives with more intangible, longer-term benefits.

Ideally, stakeholders should focus on companies with homogeneous business models as this allows to establish the measures accordingly (i.e. establish effective measures for different business models may be very costly for the stakeholder). This could, for example, be done through industry sector approaches. However, in practice stakeholders may have to target a wide range of different business models. For example, a national anti-corruption law is applicable to all companies within a country. In this case, either sanctions and incentives which are relatively independent of the business model need to be applied (i.e. legal measures), or a variety of different sanctions and incentives should be used.

Scope of sanction / incentive

A sanction or incentive must have significant scope in order to be able to influence a company and its representatives. A minor fine for bribing a foreign public official in a large public infrastructure project may not be sufficient, as the gains from corruption might be larger than the financial costs imposed by the sanction.⁸⁶ But more is not always better. As well as being effective, both sanctions and incentives must be proportionate, and not overshoot their aim. Disproportionate sanctions may cause unintended side effects, which need to be taken into account, while disproportionate incentives may rebound on the stakeholder by requiring significant resources and still bearing the risk of 'free-riders'.

To assess the scope of a measure, stakeholders should put themselves 'in the shoes' of the target business. Are the envisioned financial, social and psychological costs (and benefits) persuasive enough to obtain the desired behavior?

- **Rewards should be proportionate:** A minor commercial incentive given by a customer to its supplier (e.g. lower due diligence requirements) might not be sufficient to motivate the supplier to establish an effective anti-corruption ethics & compliance program.
- **Punishments should relate to conduct:** A *fine* equivalent to a bribe paid may not be sufficient to deter wrongdoing if the profits resulting from the corrupt actions exceed the bribe paid.
- **Understand the scope of sanctions and incentives with respect to time:** A one-off *fine* can be seen as a 'cost of doing business', impacting only a single financial reporting period, whereas the establishment of an effective anti-corruption ethics & compliance program will result in ongoing expenses.
- **Consider possible unintended effects:** If the establishment of an effective anti-corruption ethics & compliance program is offered as a mitigating factor, the scale of mitigation should not be so enticing as to encourage companies to refrain from establishing systems in the first place (before any incident of corruption).

Stakeholders should apply sanctions and incentives that are relevant to the business model of the targeted companies and their representatives.

⁸⁶ For example, in Mongolia, intermediation in bribery is punishable by incarceration for 1-3 months. According to an OECD and Asian Development Bank (2009): *The Criminalization of Bribery in Asia and the Pacific*, pp.43, page 351, the scale of this sanction does not reflect the importance of intermediaries in international business transactions, and cannot be considered effective, proportionate or dissuasive. In contrast, the sanction for domestic bribery in OECD countries is 3-5 years.

Motivating Business to Counter Corruption

Part IV: Six principles for changing business behavior

Stakeholders should therefore ensure sufficient flexibility with respect to the scope of their sanctions and incentives (e.g. sanctions and incentives catalog). The scope should take aggravating and mitigating factors⁸⁷ into account, which can be summarized as: nature of the conduct, grade of self-policing, self-reporting, cooperation and remedial action.

CASE 23 Factors which affect the length of debarment period

The UK Anti-Corruption Forum (an alliance of UK business associations, professional institutions, civil society organizations and companies) lists 10 factors to take into account when determining the length of a debarment period⁸⁸:

1. *the severity of the offence;*
 2. *the magnitude of the loss caused by the company's actions;*
 3. *whether it is a first offence or a repeat offence;*
 4. *the seniority of the relevant individuals responsible for the offence;*
 5. *whether the board of the company had authorized or acquiesced in the offence;*
 6. *the steps taken by the company to prevent the offence occurring;*
 7. *whether the company itself reported the offence to the authorities;*
 8. *the extent to which the company co-operated with the authorities after the offence was discovered;*
 9. *whether the individuals responsible for the offence have been dismissed or appropriately disciplined by the company;*
 10. *the impact on the company and its non-offending employees of a debarment.*
-

Stakeholders should ensure that their measures have sufficient scope to strengthen the business case for countering corruption of target companies and their representatives effectively. Aggravating and mitigating factors, as well as possible evasion scenarios, need to be taken into account.

⁸⁷ See, for example, the *Principles of Federal Prosecution of Business Organizations of the United States Attorneys (USAM 9-28.400-28.1100)*, the factors highlighted in the *Seaboard Report of the Securities and Exchange Commission of the U.S. or the Aggravating and Mitigating Factors stated by the World Bank Sanctioning Guidelines*.

⁸⁸ Source: UK Anti-Corruption Forum Discussion Paper (2007): *Fair and Efficient Debarment Procedures* (<http://www.anticorruptionforum.org.uk>).

Pay attention to possible evasion scenarios

Stakeholders must be aware that some companies will try to ‘work around’ even well-intended and well-established measures, especially sanctions. When establishing sanctions and assessing their impact, it is necessary to consider ways in which companies and their representatives might be able to evade, circumvent, or reduce that impact, and to make provisions to counter those ways. Evasion tactics for sanctions may include:

- Creating new legal entities to circumvent exclusion from business opportunities imposed on the original entity (e.g. renaming a company can be very easy in certain environments and make the enforcement of exclusion decisions very costly);
- Delegating contracts to subsidiaries, agents or other directly or indirectly controlled or affiliated entities;⁸⁹
- Taking on roles as a subcontractor;
- Appearing as a ‘silent owner’ of another business tendering for contracts;
- Exploiting the tax deductibility of sanctions;⁹⁰
- Outsourcing high-risk operations to agents and other third parties (e.g. acquisition of contract through bribes paid by a micro-company owned by a foreign joint-venture partner);
- Claiming reimbursement for monetary sanctions through insurance (e.g. fines or compensatory damages paid by a ‘Directors and Officers liability insurance’).

Stakeholders can also prevent companies from circumventing sanctions by reasonably extending the responsibility of the target company to its business partners (for details see IV.5).

CASE 24 World Bank debars successor company

In 2009, the World Bank announced the eight-year debarment of the China Road and Bridge Corporation (CRBC) for its role in cartel bidding on road-building contracts in the Philippines. The corporation is therefore ineligible to be awarded World Bank-financed contracts. After five years, the sanction can be reduced or even terminated if the company puts a compliance program in place. In July 2011 the World Bank also announced the debarment of China Communications Construction Company and all its subsidiaries, for fraudulent practices in the same Philippines road-building program. The company was found to be a designated successor organization of the previously debarred CRBC. The World Bank’s sanctions procedures state that “[a]ny sanction imposed shall apply to the sanctioned party’s successor...” (Section 9.05).⁹¹

⁸⁹ Exclusion of a company should therefore be extended to both indirectly and directly controlled entities. This is reflected in sanction decisions of the World Bank, which include, in the case of Oxford University Press East Africa, that “[t]he period of ineligibility of Oxford University Press East Africa Limited extends to any legal entity that it directly or indirectly controls” (<http://www.world-bank.org/debarr>).

⁹⁰ See international agreements such as Article 12(4) of the United Nations Convention against Corruption, and The Recommendations of the Council on Tax Measures for further Combating Bribery of Foreign Public Officials in International Business Transactions (2009).

⁹¹ Sources: Adopted from Press Releases of the World Bank (14 January 2009): World Bank Debars Seven Firms and One Individual for Collusive Practices under Philippines Roads Project (No. 2009/200/INT) and World Bank (29 July 2011): World Bank Applies 2009 Debarment to China Communications Construction Company Limited for Fraud in Philippines Roads Project (No. 2012/044/INT).

Credibility of stakeholder

A stakeholder's own credibility is very likely to affect the direct and indirect impact of a sanction or an incentive. Credibility is especially important when it comes to:

- **The application of reputational measures:** As reputational sanctions and incentives are based primarily on disseminating information and raising awareness, they will have the desired effect only if the stakeholder is regarded as a credible source of information. For example, naming and shaming by a well-known and trustworthy civil society organization is likely to be considered credible by the public. If an identical campaign was started by a previously unknown organization, the public reaction is likely to be more cautious.
- **The willingness of other stakeholders to adopt measures:** If a stakeholder decides to publish applied sanctions and incentives, other stakeholders may only be willing to apply sanctions and incentives themselves if the stakeholder is known for consistent and accountable procedures (for more information see IV.4).

However, a lack of (initial) credibility does not necessarily mean that an incentive or sanction is doomed to fail. To a certain extent, insufficient credibility can be offset. For example, stakeholders can compensate for limited recognition or scope by seeking allies and joining forces with bigger, better-known organizations, and by making their decisions and procedures transparent. This will over time increase a stakeholder's credibility and therefore also the scope of the applied sanctions and incentives to further strengthen the business case to counter corruption.

Stakeholders should recognize that their own credibility may affect the direct and indirect impact of a sanction or an incentive.

Factors affecting ‘Likelihood of application’

Commitment of stakeholder

Business will only take announced anti-corruption sanctions or incentives seriously if the stakeholder demonstrates willingness to apply them. Companies will evaluate this by the commitment communicated. It is therefore paramount that stakeholders openly express to business their commitment to their anti-corruption standards and the application of sanctions and incentives, for example through:

- A public statement on anti-corruption standards (e.g. press release, declaration);
- Demonstration of own anti-corruption ethics & compliance efforts;
- Participation in voluntary initiatives (e.g. UN Global Compact);
- Publicly visible track-record of applied anti-corruption sanctions and incentives (see IV.2 for more information).

The last point is a key element. Business will look behind a well-established public relations campaign to assess whether a stakeholder translates words into actions. A visible track record, however, shows that a stakeholder is not only committed to applying sanctions and incentives, but has the capacity to do so.

Stakeholders should (continuously) demonstrate and communicate their commitment to their anti-corruption standards, as well as to the application of their sanctions and incentives.

Capacity to apply sanction / incentive

Despite a stakeholder's public commitment to an anti-corruption standard and the associated sanctions and incentives, business still may believe that it cannot actually apply these measures due to a (perceived) lack of capacity.

As with the question of commitment, business can only go by what is communicated. Stakeholders should therefore assign sufficient capacity to the application of sanctions and incentives, and publicly demonstrate that capacity.

Strategies to increase the effectiveness of available capacity

Stakeholders that are unable to assign sufficient resources may turn to other strategies such as:

- **Offer mitigation incentives:** This may be a key approach for overcoming a lack of capacity. Corruption involves complex and secret transactions, and stakeholders may have to invest significant efforts to identify companies that fail to meet anti-corruption standards. Companies should therefore be motivated to self-report corruption incidents and to cooperate.
- **Offer genuine incentives:** Genuine incentives can be used to significantly reduce the burden of proof on the stakeholder's side, as companies will come forward with information on their anti-corruption performance in order to claim such incentives.

Additionally, stakeholders may want to consider forming coalitions with other stakeholders or focusing on specific business groups, e.g. from a particular industry. For example, the United States carries out industry sweeps (see example below) which can create synergy and have multiplier effects across or beyond a sector.

CASE 25 Industry sweeps in the U.S.

Industry-specific investigations are increasingly carried out in the U.S. In 2010, in the first sweep of a particular industrial sector, the authorities reached settlements with companies in the oil services industry that allegedly 'violated the Foreign Corrupt Practices Act (FCPA) by paying millions of dollars in bribes to foreign officials in order to receive preferential treatment and improper benefits during the customs process'. Cheryl J. Scarborough, then Chief of the U.S. Securities and Exchange Commission (SEC) FCPA Unit, stated that the "FCPA Unit will continue to focus on industry-wide sweeps, and no industry is immune from investigation."*

**Companies included Panalpina, Pride International, Tidewater, Transocean, GlobalSantaFe, Noble and Shell.*

Stakeholders should demonstrate their capacity to apply sanctions and incentives. To further strengthen capacities, they should consider mitigation incentives and genuine incentives.

Environmental factors for application of sanction / incentive

While companies operate across borders, the capacity and resources of stakeholders to apply sanctions and incentives may not travel so easily. This is especially so in the global environment, where, for example, the application of legal sanctions may be subject to difficulties such as lack of mutual legal assistance between countries.⁹²

Even with a persuasive commitment, the right people and sufficient resources to apply sanctions and incentives in practice, stakeholders may still face challenges in doing so due to environmental constraints which are beyond their immediate and direct control.

Challenges with respect to the environment can be diverse. For example, stakeholders from the business sector may face the problem that the monopolistic structure of the supplier market does not permit debarment of a corrupt supplier. Or, restrictive access to information laws or limited freedoms of speech may not only impact the likelihood of detecting a violation, but also the application of reputational sanctions and incentives. A high public tolerance of corruption may have the same effect.

Therefore it is important that stakeholders pay attention to environmental factors which affect the application of anti-corruption measures, and then seek to select approaches and measures suitable for their unique context. An environmental analysis with regards to a country or society's political, economic, social, technological and legal factors⁹³ is therefore useful.

Once stakeholders have analyzed their context, they should select approaches and measures suitable for the current situation. For example, a civil society organization operating in an environment overloaded with public rewards for ethical behavior may refrain from providing reputational incentives in the form of yet another public appraisal.

Although environmental factors are beyond a (single) stakeholder's control in the short term, stakeholders should seek to influence them in the medium to long term, especially acting together with other stakeholders, e.g. through education, policy change and advocacy for stronger anti-corruption standards or freedom of information laws.

Stakeholders should pay sufficient attention to environmental factors which affect the application of their anti-corruption sanctions and incentives. This allows them to select suitable combinations of measures for their particular context.

>>> APPENDIX III provides a non-exhaustive list of environmental factors which may impact the application of sanctions and incentives.

⁹² There may be incompatibility between legal procedures in different countries, for example, with respect to dual criminality requirements, statutes of limitations, bribery offenses or defenses such as facilitation payments. Or there may be jurisdictional overlap, making multinational companies subject to sanctions in different jurisdictions for the same conduct, due to the extraterritorial application of laws, though liability for subsidiaries.

⁹³ This is sometimes known as PESTL analysis, i.e. of Political, Economic, Social, Technological and Legal factors.

IV.2 Communication: If nobody knows, nobody cares!

Communication is one of the most essential, but often neglected, aspects of successfully curbing corruption.⁹⁴

Through effective communication, stakeholders can create awareness of and support for anti-corruption standards and related sanctions and incentives. Without adequate communication, companies may not know what stakeholders expect from them and that they are serious about their commitment. Given the importance of communication, stakeholders often need to do more to communicate their anti-corruption measures. For example, a survey from 2012 revealed that 72 percent of UK middle managers have never heard of the UK Bribery Act⁹⁵.

A **two-fold approach** should be considered to increase awareness among companies, as well as other stakeholders and the general public, which in turn creates peer pressure and may trigger the application of additional measures:

1. Communicate anti-corruption standards, sanctions and incentives

Effective communication requires that stakeholders clearly state upfront what their anti-corruption standards are, and what will happen if business violates, meets or even exceeds those standards.

Stakeholders should not only communicate *what* is expected from business, but also *why* it is expected. Communicating the underlying purpose of anti-corruption standards raises awareness about the distorting effects of corruption and the obligation of companies as responsible citizens to refrain from it. Stakeholders should also highlight the negative consequences of corruption. The fact that it is often referred to as a 'victimless crime' may make it easier for individual representatives to rationalize or tolerate corrupt behavior, lowering their psychological costs when engaging in a corrupt act. Pointing out the harm corruption causes can help these representatives to move beyond solely complying with anti-corruption standards (e.g. "the law forces us to do so") towards a personal attitude that rejects corruption.

By clearly communicating commitment to anti-corruption standards, and the capacity to enforce these with sanctions and incentives, stakeholders can also inspire others to apply similar standards, and attract potential partners to exchange good practice experiences.

⁹⁴ According to a report, many anti-corruption agencies fail to acknowledge the critical challenge of effective communication (Source: The International Bank for Reconstruction and Development, World Bank, United Nations Office on Drugs and Crime (2010): *Building Public Support for Anti-Corruption Efforts*). According to the report, this failure is "one of the reasons why we are losing the fight against corruption".

⁹⁵ Sources: Survey by IBA, OECD, UNODC (2010): *Risks and threats of corruption and the legal profession*, (<http://www.anticorruptionstrategy.org>); and news by Ernst & Young (2012): *72 percent of middle managers still unaware of Bribery Act*, reveals Ernst & Young survey, (<http://www.ey.com>).

2. Communicate the application of sanctions and incentives

Stakeholders should publicly communicate the application of sanctions and incentives to increase the immediate impact of their measures and express their commitment and capacity. Communicating the application of sanctions and incentives is a reputational punishment or reward in itself which cannot only translate into social costs or benefits, but can also cause direct or indirect financial costs (or benefits).

For example, debarring a company is likely to be an even stronger punishment if such a decision is made public. It can lead, for example, to other stakeholders refusing to do business with this particular company (emphasizing how direct social costs can lead to financial costs). Specific communication may be more effective; for example publishing names has a greater impact than simply quoting numbers⁹⁶.

Communication of the application of sanctions and incentives can include:

- Examples of specific scenarios which trigger their application;
- Aggravating and mitigating factors affecting the scope and extent of sanctions (e.g. self-policing, self-reporting, cooperation and remedial actions);
- Process of applying sanctions and incentives (e.g. timeframe, steps);
- Detailed case studies of applied sanctions and incentives;
- Reasons for applying them in a specific case;
- Allies who apply similar sanctions and incentives;
- Cases of subsequent application by other stakeholders, triggered by the initial application.

CASE 26 World Bank communicates standards and their application

The World Bank makes its anti-corruption standards and associated sanctions and incentives publicly available online, where it publishes its sanctioning guidelines, voluntary disclosure policy, administrative sanctions and incentives processes, organizational charts and background information. The organization also publishes it in its Listing of Ineligible Firms & Individuals, and announces it in a press release which names the excluded business and gives reasons for the decision. Since May 2012, this includes information on the background of each case and details of the process leading to the sanctioning decision.⁹⁷

All stakeholders – whether from the public sector, business sector or civil society – should not only communicate with targeted companies, but also with those companies' relevant stakeholders, such as shareholders, customers, investors, civil society organizations and the media.

Stakeholders should communicate their anti-corruption standards, related sanctions and incentives, and cases of application.

⁹⁶ In certain circumstances, it may be appropriate not to communicate the application of sanctions and incentives, e.g. if a public announcement of a sanction would result in a disproportionate punishment for the company, if non-publicity of sanctioning can work as an incentive in a voluntary disclosure program, or where data privacy laws protect certain information (including names of involved entities). In the latter case, stakeholders should consider communicating the application of sanctions and incentives without giving names.

⁹⁷ See 'Sanctions and Compliance' - website of the World Bank: <http://go.worldbank.org/G9UW6YoDCo>.

IV.3 **Monitoring:** **Trust is good, monitoring is necessary!**

Companies which adhere to anti-corruption measures have a clear expectation that those which do not will be sanctioned. The same applies for incentives such as granting preferential conditions to suppliers. Stakeholders that provide sanctions and incentives want to do so on solid and justified grounds.

Monitoring business' anti-corruption performance is a basic prerequisite for knowing whether it conforms to anti-corruption standards and therefore whether stakeholders should impose sanctions or grant incentives. Even well-designed and communicated anti-corruption standards can fail to have an impact on companies and their representatives if it is perceived that a stakeholder will conduct little or no monitoring.

A good monitoring strategy⁹⁸ is paramount for the consistent application of sanctions and incentives. If their application is not based on objective criteria, but on (perceived) arbitrary or even biased assumptions, this will result in a loss of credibility or even rejection of a stakeholder.

⁹⁸ Stakeholders need to achieve an objective and transparent monitoring approach while simultaneously leaving business under some uncertainty on specific operational aspects, such as timing of ad-hoc investigations.

Monitoring of the anti-corruption performance of business is a two-fold approach:

1. Collect information about the performance of companies regarding the anti-corruption standard;
2. Evaluate the collected information with respect to the standard, in order to decide whether to apply sanctions and incentives.

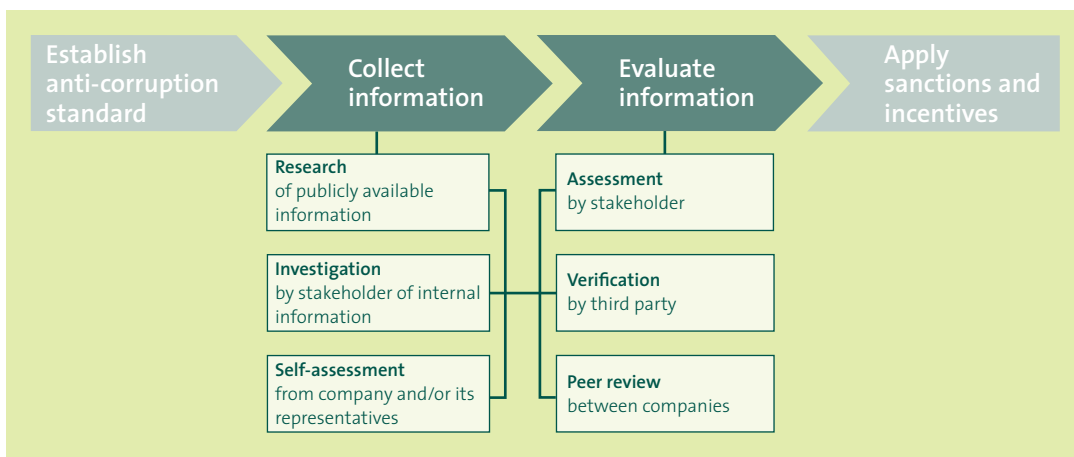


Figure 11: Monitoring consists of the collection and evaluation of information

1. Collect information from companies and their representatives

Monitoring adherence to a standard starts with gathering information from companies regarding their performance.

There are three practical approaches for stakeholders seeking to collect relevant information to assess whether a company has violated, met or exceeded their anti-corruption standard:

- **Research:** Conducting research relies primarily on publicly available data. It can range from desk research (e.g. internet searches on past misconduct, press releases, financial reports, corporate social responsibility reports⁹⁹) to consulting with the target company's business partners and other stakeholders.
- **Investigation:** Conducting an investigation refers to an in-depth collection of non-public data. This approach is subject to the authority of the stakeholder to conduct such an investigation. For example, a risk-sensitive customer may conduct interviews and even review the books and records of a company's key supplier, based on contractual audit rights. Or public sector stakeholders (especially public prosecution offices) may conduct both announced and ad-hoc inquiries and gather information through investigations (e.g. through information obtained from or provided by tax authorities).
- **Self-assessment** from companies: Collecting information through a self-assessment refers to the provision of information from the company itself to the stakeholder. This can be done either through standardized self-assessment questionnaires or through interviews with the company's management. Obviously, this approach is subject to the risk of companies not providing sufficient information or being biased (e.g. risks of 'window-dressing') – especially when incentives are granted.

Relying on one way of collecting information may not be enough to provide sufficient information for the subsequent evaluation. Choosing the most appropriate option depends on various factors, such as a stakeholder's level of risk tolerance, and the costs and resources. For example, companies regarded as low-risk may be required to submit only a self-assessment, whereas companies that are crucial for a stakeholder's own activities or reputation need much more detailed information.

⁹⁹ Information on a company's anti-corruption performance can be part of financial or non-financial reports, such as corporate social responsibility reports. The UN Global Compact or the Global Reporting Initiative provide frameworks for reporting environmental, social and governance performance, including information on a company's commitment to its anti-corruption ethics & compliance program and its implementation and monitoring.

2. Evaluate information of companies and their representatives

After the necessary information has been collected, it needs to be evaluated in order to assess whether a company has violated, met to or even exceeded an anti-corruption standard, and therefore whether sanctions or incentives need to be applied.¹⁰⁰

All stakeholders from the public sector, business sector or civil society require a solid basis for applying sanctions and incentives to companies and their representatives. For example, a multinational company may not grant preferential treatment as a commercial incentive to its suppliers if there is a risk that the suppliers are exaggerating their anti-corruption efforts.

Evaluating a company's performance regarding an anti-corruption standard is easier said than done. It is especially difficult to judge whether the established anti-corruption ethics & compliance program is consistent with the rules and the spirit of the standard – independent of how the data has been collected. In order to truly assess a company's performance, the stakeholder requires a **'look behind the scenes'**.

Not being corrupt is usually a somewhat straightforward requirement, but there is no one-size-fits-all list of requirements for an effective anti-corruption ethics & compliance program. Establishing such a program is highly dependent on the various characteristics of the company, such as its structure, culture and risk profile. Conducting objective monitoring against a static requirement list (the checklist approach) is therefore neither feasible nor desirable when applying sanctions, and especially not for incentives. In recent years, a variety of companies that were compliant with a set of requirements (e.g. those of the U.S. Sarbanes-Oxley Act) have also experienced significant corruption. Therefore monitoring needs not only to show that effective anti-corruption measures exist ('compliance-based approach'), but also to assess whether these elements are effective in preventing corruption ('values-based approach'). Does a company understand anti-corruption standards as an integral part of its overall culture, or does it simply state on paper its commitment to them?

Evaluating a company's performance regarding an anti-corruption standard is easier said than done.

¹⁰⁰ Different sanctions and incentives may require different levels of detail and types of information and assessments. For example, an anti-corruption certification by an external auditor may be the prerequisite for a multinational company to grant preferred supplier status.

Taking these challenges into account, there are three major ways of evaluating the collected data:¹⁰¹

- **Assessment:** The most obvious way to assess the collected data is for the stakeholders to do this themselves.
- **Verification:** Another way of assessing the anti-corruption performance of a company is by requesting verification from a third party. This would mean that an (accredited) third party (e.g. certification company, auditor) assesses the information and vouches for its accuracy.¹⁰²
For example, a public sector stakeholder may appoint an external monitor to review the enhancements of a company's anti-corruption ethics & compliance program as part of granting a mitigation incentive. Or a business customer can ask its major suppliers for certification of their anti-corruption ethics & compliance program from an independent, external party. Obtaining anti-corruption verification can provide a solid basis for imposing sanctions and incentives. However, in such cases stakeholders also need to understand the methodology applied by the third party in order to evaluate the credibility of the verification process.
- **Peer review:** Peer review comprises an approach where companies are assessed by fellow companies. Companies – especially from the same industry or with a similar business model – are typically best placed to assess whether the business under review has actually implemented an anti-corruption standard or whether it merely has a 'paper-based program'. Such an approach also provides learning experiences from peer and knowledge exchanges. Of course, it also holds risks. A company may feel reluctant to give a negative assessment of a peer if it knows it will be subject to the same scrutiny in the future. Likewise, competitors may not be willing to engage in peer review processes. Including a neutral third party, such as a civil society organization, in this process may help to reduce this risk.

In practice, a combination of the various forms of evaluation may be used. Often, additional checks and evaluations are added to further increase the reliability of the overall assessments. These can include, for example, feedback from the general public or the establishment of a multi-stakeholder committee for the final judgment¹⁰³ (see for example, expert experience by Olusoji Apampa, page 116).

¹⁰¹ For the purpose of clarity, there is a firm distinction between collecting and evaluating information. In practice, however, there may be overlaps between these two activities.

¹⁰² Despite the fact that there is currently no independent, globally accepted anti-corruption assurance standard, demand for external verification is increasing. For example, in guidance to the 2010 Bribery Act, the UK Ministry of Justice encourages commercial organizations to consider external verification.

¹⁰³ See, for example, the approach of the Confédération Générale des Entreprises du Maroc (CGEM), which uses such a multi-stakeholder committee for final judgment on the eligibility of a company for its label (see example page 121).

But even with a well-designed approach involving various forms of data collection and verification, there remains one major practical challenge: an anti-corruption standard may apply to thousands of companies. For example, a large multinational company may have thousands of suppliers in a country, which makes monitoring very time- and resource-consuming.

Two factors need to be considered to deal with resource constraints for monitoring:

- **Not every company needs to be monitored in the same way:** Some of the targeted companies may have a much lower expected risk of corruption than others. A large multinational company does not need to apply the same monitoring approach for small suppliers as it does for its crucial large suppliers.
- **Genuine incentives could be used to facilitate monitoring:** By providing incentives to companies that meet or exceed the stakeholder's anti-corruption standard, stakeholders give those companies motivation to demonstrate their efforts proactively to the stakeholder. Companies will come forward to present their status – probably in a more timely way and with higher quality than without such incentives. The burden of monitoring (i.e. collection of information) is thus shared.

Stakeholders need to monitor the anti-corruption performance of companies and their representatives in order to apply sanctions and incentives objectively.

Evaluating Corporate Compliance – An effective integrity assessment as a basis for setting incentives for companies in Nigeria (and beyond)

Olusoji Apampa

Executive Director, The Convention on Business Integrity (CBI) in Nigeria

It is often difficult to say whether or not a company's anti-corruption standards are 'working'. Are employees following the corporate guidelines in their day-to-day interactions? Are internal controls applied effectively throughout the organization? And do employees act according to the company's values even in the absence of concrete rules and procedures?

It is difficult to assess whether a company provides a compliance program 'on paper' only or whether it is actively working towards a culture of transparency, accountability and integrity in all its business operations. However, such an assessment is crucial to understand whether the company's policies and procedures are actually followed in the day-to-day operations of its employees and senior management. But it is also crucial for external actors who want to promote business integrity, especially when it comes to setting incentives. It is paramount to know whether or not a business actually adheres to its own proclaimed standards when granting incentives. Otherwise stakeholders would not be promoting integrity but 'window-dressing'.

But who should conduct such an assessment? How do you guarantee objectivity and comprehensiveness? And how can you make sure that the verdict is accepted and trusted by the public and business partners alike? In a country like Nigeria, whose relative absence of effective governance makes an official (public) monitoring or certification process challenging. On the other hand Nigeria, like many other African countries, has

a long tradition of saving and borrowing networks (revolving credit schemes called *ajo*, *esusu*, etc.), that are based on a system of peer review. These networks, operating through a mutual accountability system, constitute an auspicious starting point for putting together an anti-corruption monitoring mechanism that is sufficiently independent and trustworthy to provide a reliable source of evaluating a business's anti-corruption performance.

Providing an impartial, credible, and trusted assessment can be done through a comprehensive multi-stakeholder approach, a way also chosen by The Convention on Business Integrity (CBI) in Nigeria. In the face of a 'perceived all-encompassing culture of corruption' in Nigeria, CBI was founded in 1997 to 'empower people, their transactions, systems and institutions against corruption and corrupt practices in and with Nigeria'. One method to advance this objective is CBI's Integrity Rating process, whose principal aim is to explore the underlying values guiding an organization's business conduct and how these values are translated into visible actions. The typical approach is to check whether a compliance program comprises all the relevant elements, such as policies, training and internal controls. This can be done by a formal assessment using checklists. It is necessary to conduct this sort of technical assessment to ensure a comprehensive and sustainable process, but it falls short of capturing the 'true' level of integrity of a company. Learning from the African concept of *esusu*, one way to complement the more technical assessment is by

including the company's reputation and stakeholder perceptions of its business conduct.

Based on this idea, CBI has developed an innovative methodology. To guarantee both the impartial assessment of a business's compliance system as well as the trustworthy evaluation of its actual value system and behavior, a multi-dimensional assessment methodology was devised, involving different stakeholders as well as different information sources. The first main source of information comes from a compliance-driven self-assessment (indicators, program components, etc.) by the company. An external independent consultant, based on a structured questionnaire, conducts a similar assessment on stakeholders. It includes checklist questions as well as open questions directed at randomly selected internal and external stakeholders of the business (e.g. employees, customers, suppliers, investors/creditors, public service providers), whose identity will remain undisclosed to the company under review. The third main source of information comes from a reputational assessment. This assessment is conducted by the CBI Reference Group, a multi-stakeholder group consisting of representatives from civil society, the business sector and the public sector, both CBI members and non-members. This assessment is based exclusively on the Group's perception of whether the business has demonstrated commitment to the principles and standards of CBI. As CBI is a shared credibility system, members need to be extra careful about their decisions, as there is a direct positive or negative impact on their reputation as a result of choices made.

The three information sources are then considered to arrive at the company's level of integrity. The results of the integrity assessment are made publicly available, followed by a public ceremony to award the best-performing companies with the CBI Kite-Mark.

It is important to state that this annual assessment process is now mandatory for all signatories of CBI, but this rating is neither a financial audit nor a legally-binding assurance or certification of compliance. A high level of integrity can have material as well as immaterial benefits for the signatories. They may be able to attract socially responsible business partners and increase their reputation. Likewise CBI membership may lead to the protection of shareholder assets, as well as a heightened employee awareness of corporate policy. CBI will continue to explore tangible and intangible values for its assessed members.

By combining a thorough assessment of a business's stated values and an equally thorough analysis of its 'true' level of integrity, and by merging globally accepted standards with local traditions, CBI not only aims to position its signatories as reliable, innovative and thus preferred business partners, but to also to move society towards zero-tolerance of corruption.

IV.4 Multiplication: Seek allies!

One sanction or incentive alone, or often one stakeholder alone, may not have a sufficient impact on a company and its representatives. In these cases it is necessary that stakeholders apply a combination of measures, and/or ally with other stakeholders to increase the impact on business.

Figure 12 shows two possible scenarios for how stakeholders can increase the impact of sanctions and incentives through multiplication:

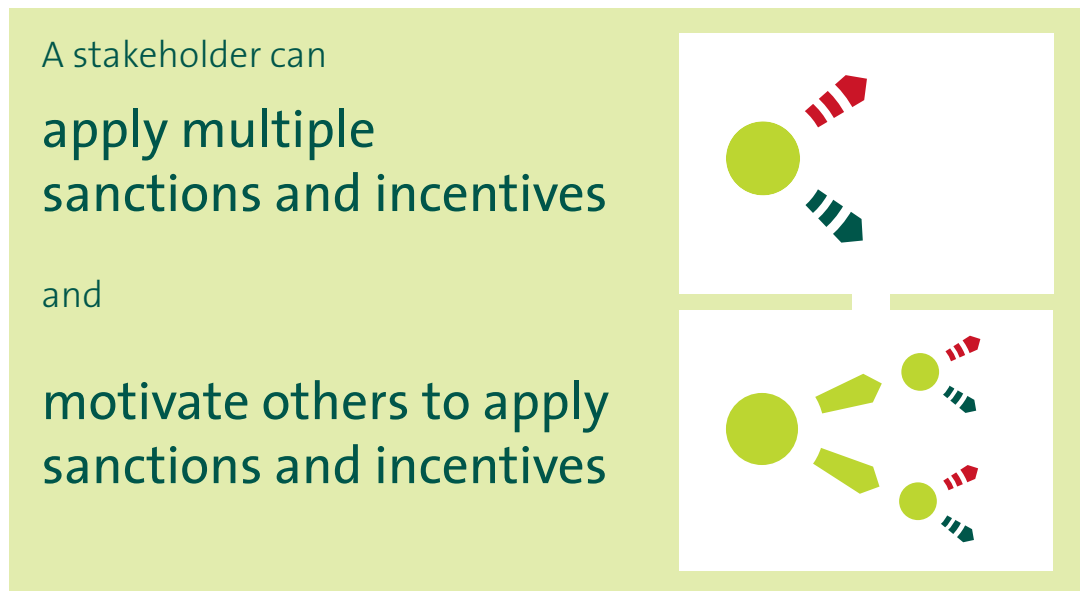


Figure 12: Apply multiple sanctions and incentives, and motivate others to do so as well

Multiple applications of sanctions and incentives can significantly strengthen the business case to counter corruption.

1. Apply multiple sanctions and incentives

Stakeholders should consider combining different types of sanctions and incentives to target different business motivations. For example:

- **Combining legal and commercial sanctions** increases financial costs (e.g. a *fine* following a criminal conviction, plus future temporary exclusion from contracting).
- **Combining legal mitigation incentives with reputational incentives** lowers social costs (e.g. reducing a prison term and make the reduction public).
- **Combining commercial and reputational sanctions** adding social costs to the original financial costs (e.g. exclusion from tendering for contracts is publicized).

When applying multiple measures, stakeholders should keep in mind the need to be relevant and proportionate (section IV.1).

CASE 27 U.S. Department of Justice imposes and publicizes legal sanctions

*The U.S. Department of Justice publishes its verdicts about legal sanctions for corruption on its website. It includes not only a press release but also statements of offense, indictments, possible plea agreement documents and its judgments. This adds a reputational punishment to the imposed legal sanctions, by making a wide range of information about a case publicly accessible – including reasons for sanctioning.*¹⁰⁴

2. Motivate others to apply sanctions and incentives

Stakeholders who do not have enough impact acting alone (even when multiple sanctions or incentives are applied) should look to cooperate with other stakeholders to increase their overall impact. For example, it may be worthwhile for a company to adhere to anti-corruption standards if other stakeholders have the same standards and apply equally punitive or preferential commercial conditions. Such collective action can also limit a company's substitution possibilities, e.g. by preventing it from easily transferring its business to other customers. For example, if all major companies within a particular industry assign unfavorable due diligence requirements to suppliers without a strong commitment to counter corruption, such suppliers cannot simply switch to other business customers.

Stakeholders can either consider establishing formal alliances with others, or simply encouraging others to further increase the impact of the sanction or incentive.

¹⁰⁴ See <http://www.justice.gov>.

Motivating Business to Counter Corruption

Part IV: Six principles for changing business behavior

Multiple applications of similar sanctions and incentives can include, for example:

- If one stakeholder decides to stop doing business with a corrupt company, other stakeholders can do likewise (see example above ‘Alliance over debarment by multilateral development banks’);
- Several stakeholders from the financial sector can reward a company – showing a reduced corruption risk – by offering reduced service fees or even interest rates;
- A business customer stops buying from a supplier after a public prosecutor imposed fine;
- A published legal sanction is picked up by a civil society organization and publicized through an awareness-raising campaign;
- Comparative analysis by a civil society organization is featured on various news channels.

CASE 28 Alliance over debarment by multilateral development banks

In the Agreement on Mutual Enforcement of Debarment Decisions (2010), the world’s multilateral development banks agreed that each will enforce debarment decisions made by another. So exclusion by one bank automatically triggers exclusion by the others. For example, the Asian Development Bank automatically debarred Alstom Hydro France between 2012 and 2015 after infringement of the World Bank’s Procurement Guidelines.¹⁰⁵*

**African Development Bank Group, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank Group, World Bank Group.*

¹⁰⁵ A list of the cross-debarred entities can be accessed through the Asian Development Bank website (<http://www.adb.org/site/integrity/sanctions>).

CASE 29 Debarment of contractors by India's Ministry of Defence

The Indian Ministry of Defence banned six companies from doing business with the state-owned Ordnance Factory Board and the Ministry of Defence for 10 years (2012-22). The debarment was recommended by the Central Bureau of Investigation and imposed by the ministry after it had issued a notice to the companies to demonstrate why actions against them should not be taken. All six companies are connected with the bribery scandal that led to the arrest in 2009 of Sudipto Ghosh, the former director-general of the Ordnance Factory. Days after the announcement, the director-general of the Israeli Defence Ministry instructed its Export Licensing Division that Israeli contractors must have an anti-corruption compliance program which specifically prohibits the bribing of foreign government officials in order to be eligible for export licenses.¹⁰⁶*

**Singapore Technologies Kinetics, Israel Military Industries, Rheinmetall Air Defence, Russia's Corporation Defence and two Indian companies, TS Kisan & Co and RK Machine Tools.*

CASE 30 Incentives for certified companies in Morocco

Since 2006 the Confédération Général des Entreprises de Maroc (CGEM) has awarded a CSR label (Label CGEM pour la Responsabilité Sociale de l'Entreprise – RSE) to companies that comply with nine key CSR and sustainability principles, including prevention of corruption, respect for the rules of fair competition, and reinforcing transparency in corporate governance.

Companies committing to these principles and passing an audit process receive the label, and subsequently qualify for a variety of material benefits from different organizations, e.g. customs and import administration, National Social Security, Groupe Banques Populaires and others. Benefits include preferential rates and charges, simplification of procedures, and faster processing.¹⁰⁷

Individual stakeholders should consider applying multiple sanctions and incentives to companies and/or their representatives in order to target different motivations. Most typically, this will combine legal or commercial measures with reputational ones. Strategic alliances such as collective action initiatives with other stakeholders can be used to further increase the impact of measures and reduce evasion effects.

¹⁰⁶ Sources: Press Release by Press Information Bureau, Government of India (5 March 2012): MoD Debars Six Firms from Business Dealings for Ten Years (ID:80699) and United Press International (20 March 2012): Israeli defense sector told to 'clean up'.

¹⁰⁷ For more information, please see <http://www.cgem.ma>.

IV.5 Responsibility: Create a snowball effect!

Companies often act through a network of subsidiaries, agents, intermediaries, joint ventures and suppliers, and have investments in other companies. This gives stakeholders a major opportunity to enhance the impact and outreach of their standards by motivating target companies to require similar anti-corruption standards in their related entities, and holding them accountable for their behavior. There are strong arguments for doing so, as this helps to:

- prevent companies from turning a blind eye (intended or unintended) to corruption in entities they control, e.g. profit directly or indirectly from corruption in foreign subsidiaries;
- prevent evasion of responsibility through delegation or restructuring, e.g. hiring external agents to perform tasks prone to corruption.

Obviously, a company is not responsible for the activities of all of its business partners – in general the higher the level of influence on its partners (e.g. effective control and determining influence), the greater its responsibility for the behavior of that party.

Extending this responsibility is already common practice among a variety of stakeholders. For example, the World Bank also excludes successor companies of previously excluded predecessors (see example on page 103).

There are **four major groups of business partners**¹⁰⁸ to which stakeholders can extend a target company's responsibility for countering corruption:

1. **Business partners over which a company exercises strong or effective control** (e.g. subsidiaries¹⁰⁹);
2. **Business partners acting on behalf of a company** (e.g. agents);
3. **Business partners over which a company exercises weak or no control** by owning shares (e.g. minority investments);
4. **Other business partners** (e.g. suppliers).

¹⁰⁸ These clusters are primarily adapted from the legal context, as the issue is most discussed when it comes to the application of laws and regulations. However, all stakeholders are invited to adopt these clusters in order to further facilitate extension of responsibility of companies for their business partners.

¹⁰⁹ Please note that a subsidiary is part of the company and usually not a considered to be a business partner. However, for the ease of reading, this relationship is referred to as a business partner throughout this Handbook.

In practice, business relationships are complex, often meaning that a company's relationship with one business partner can touch on several of the above groups. For example, a company can hold a minority investment in a key supplier.

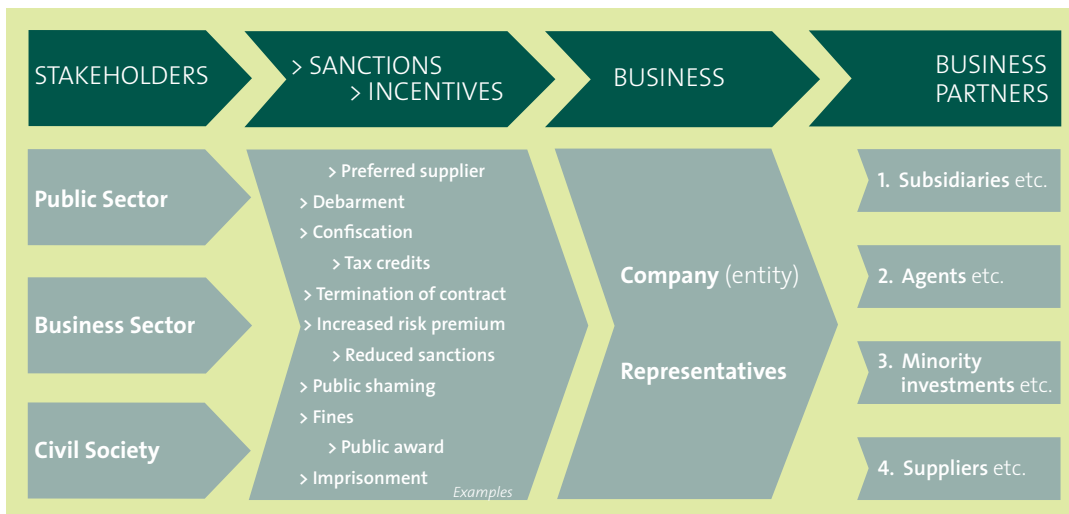


Figure 13: Extension of responsibility to business partners

Stakeholders should extend the responsibility of companies to their business partners such as subsidiaries, agents and intermediaries, but also to a certain extent to their minority investments and suppliers.

1. Business partners over which a company exercises strong or effective control (subsidiaries etc.)

Stakeholders should apply sanctions and incentives to motivate the target company to demand similar anti-corruption standards from business partners over which it has strong or effective control (especially subsidiaries or joint ventures).¹¹⁰

The term 'control' can be subject to different interpretations. As a general rule, if a business holds at least 50 percent of the shares of another company, the latter can be considered a controlled entity.¹¹¹ Control or the power to control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, and common use of employees. For example, under the UK Bribery Act 2010, an investor exercising strong control may be construed as associate and can therefore be held liable, if bribery occurs, for failure to establish an effective anti-corruption ethics & compliance program in the invested company. Or, a civil society organization can increase its impact in motivating business to counter corruption by holding parent companies responsible for the anti-corruption performance of entities they control (e.g. reputational shaming).

CASE 31 Recovery of share dividends by the UK Serious Fraud Office

In early 2012, Mabey Engineering (Holdings) agreed to pay back £130,000 in recognition of sums it received through share dividends derived from contracts won through unlawful conduct by its subsidiary, Mabey & Johnson. The subsidiary had pleaded guilty to charges of corruption and breaches of UN sanctions and was convicted in September 2009. Richard Alderman, the then-Director of the Serious Fraud Office (SFO), said: "There are two key messages I would like to highlight. First, shareholders who receive the proceeds of crime can expect civil action against them to recover the money. The SFO will pursue this approach vigorously... The second, broader point is that shareholders and investors in companies are obliged to satisfy themselves with the business practices of the companies they invest in... It is particularly so for institutional investors who have the knowledge and expertise to do it. The SFO intends to use the civil recovery process to pursue investors who have benefitted from illegal activity. Where the issues arise, we will be much less sympathetic to institutional investors whose due diligence has clearly been lax in this respect."¹¹² Before, in 2009, Mabey & Johnson was ordered among other operational and financial penalties, the company was ordered to pay Ghana £659,000, Jamaica £139,000 and Iraq £618,000 to compensate for damages.¹¹³

¹¹⁰ This is also referred to 'corporate groups' as for example in the MDB Harmonized principles on treatment of corporate groups which was adopted by the multilateral development banks in September 2012.

¹¹¹ However, there are cases in which stakeholders may decide that a company has effective control over a related entity for which it holds less than 50 percent of shares, if the rest of the shares are widely dispersed.

¹¹² Source: Press release by the UK Serious Fraud Office (13 January 2012): Shareholder agrees civil recovery by SFO in Mabey & Johnson.

¹¹³ Source: Press release of UK Serious Fraud Office (25 September 2009): Mabey & Johnson Ltd sentencing.

2. Business partners acting on behalf of a company (agents etc.)

Stakeholders should apply sanctions and incentives to motivate target companies to require similar anti-corruption standards from business partners which perform a service for them or act on their behalf (especially agents and intermediaries¹¹⁴).

A business partner is acting on behalf of a target company if it represents that company. Business partners which act on behalf of a company usually perform key business functions for that company (such as business development). It is therefore essential to motivate companies to require similar anti-corruption standards from their business partners to prevent companies from deliberately outsourcing core business operations which are prone to corruption

CASE 32 Extension of responsibility according to the UK Bribery Act

Article 7 states that 'A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending... to obtain or retain business for C, or... to obtain or retain an advantage in the conduct of business for C.' Article 8 clarifies that 'a person ("A") is associated with C if (disregarding any bribe under consideration) A is a person who performs services for or on behalf of C.'

¹¹⁴ See, for example, Annex 1 (C) of the OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, on the responsibility of business for bribery through intermediaries (2009).

3. Business partners over which a company exercises weak or no control (minority investments etc.)

Stakeholders should consider applying sanctions and incentives to motivate target companies to require similar anti-corruption standards from business partners in which the company owns shares without exercising effective control (especially minor investments).

Ownership creates responsibility – even if a company doesn't exercise control over its related party. This responsibility does not necessarily have to be legal; it can mainly be moral.

Otherwise a company may profit from those shares without being responsible for how these profits are created. A stakeholder could therefore demand due diligence processes with respect to a company's minor investments, and sanction if it failed to carry out such processes.

4. Other business partners (suppliers etc.)

Stakeholders should consider applying sanctions and incentives to motivate a target company to require similar anti-corruption standards from other business partners (especially suppliers). Even though there is usually no legal responsibility in these cases, it is now widely accepted that companies have a moral responsibility for their supply chains.¹¹⁵ They should no longer be allowed to ignore the origins of their wealth-creating inputs.¹¹⁶ In turn, stakeholders should also consider rewarding a company for supporting its suppliers in countering corruption.

¹¹⁵ A supplier is usually not subject to another's control except as specified in a mutually binding agreement for a specific job.

¹¹⁶ For example, the U.S. Dodd Frank Act on conflict minerals, Section 1502.

CASE 33 Reputational shaming due to supply chain misconduct

A *New York Times* article from January 2012 detailed harsh working conditions and improper practices in Chinese factories assembling products for Apple. Allegations included underage workers, excessive overtime, hazardous waste and falsified documents, and resulted in a severe reputational backlash for Apple. A 2011 audit by Apple had revealed 36 'core violations' in the company's supply chain: 18 cases of payment of excessive recruitment fees, 10 cases of underage workers, four cases of falsified records, two of worker endangerment, one of coaching workers on how to answer auditor's questions, and one of bribery (a facility manager had offered cash to Apple's third-party auditors, asking them to reduce the number of audit findings).

In protest, activists collected over 250,000 signatures and delivered them to Apple stores around the world. Several news outlets worldwide picked up the story in the days that followed the *New York Times* article. The initial article was skeptical as to whether the scandal would have a significant effect on consumers' purchasing decisions, but the severe reputational attack on a company that cultivates a brand targeting a conscious and forward-thinking consumer base led to immediate reactions from the company. One outcome was that Apple increased its own audits and, in a move unprecedented in the electronics industry, asked the Fair Labor Association, an independent NGO, to audit its supply chain. An extensive report containing the Association's findings was released in March 2012.¹¹⁷

¹¹⁷ Sources: Apple (2011): *Apple Supplier Responsibility: 2011 Progress Report and Fair Labor Association* (2012): *Foxconn Investigation Report and Huffington Post* (2012): *Apple Store Protests*; and *The New York Times* (2012): *In China, Human Costs Are Built Into an iPad*.

IV.6 Evaluation: Are the measures working?

Stakeholders should evaluate whether their applied anti-corruption sanctions and incentives are successful in relation to the overarching goal of motivating business to counter corruption.¹¹⁸

The key measure of success for a sanction or an incentive is whether it has a significant impact on business behavior. Evaluation is of particular importance to enable learning from past experiences, so stakeholders can enhance the chosen sanctions and incentives, as well as justify the effort of their application. Evaluations can be carried out in various ways, ranging from a rough judgment based on perceptions to a detailed analysis (including feedback from other stakeholders).

Successful evaluation requires a **two-pronged approach and should be carried out on a regular basis**: Firstly, evaluation must assess how effectively and efficiently the applied sanctions and incentives were implemented. Secondly, it must examine to what extent they contributed to the overarching goal of motivating business to counter corruption.

1. Effectiveness and efficiency: How well was the sanction or incentive established and applied?

By evaluating *effectiveness*, stakeholders assess how well the sanctions and incentives were established and actually applied. Indicators for effectiveness include:

- Number of companies reached with sanctions and incentives (e.g. with respect to reported cases of corruption);
- Cases in which companies and representatives were able to evade or significantly reduce the intended impact of applied measures;
- Establishment of a credible and effective monitoring process;
- Awareness raised on anti-corruption standards and the application of measures.

The application of sanctions and incentives requires resources. By evaluating *efficiency*, stakeholders assess whether sanctions and incentives were applied in a resource-responsible way. Indicators for efficiency include:

- Levels of resources which went into the application of sanctions and incentives (e.g. number of employees who contributed to a particular policy, costs for a communication campaign);
- Financial costs for external monitoring support;
- Whether the results are proportionate to the resources invested (e.g. costs incurred to find substitution of excluded supplier).

¹¹⁷ This Handbook outlines only key aspects of evaluation. For further information on how to evaluate the success of implemented policies, see for example IFC, GTZ, DFID (2008): *The Monitoring and Evaluation Handbook – For Business Environment Reform*.

Benchmarking with other stakeholders may help to assess the level of effectiveness and efficiency (e.g. average time required to establish and communicate a new Code of Conduct for suppliers).

The effectiveness and efficiency of anti-corruption sanctions and incentives can be assessed with reasonable accuracy. However, it is much more difficult to assess whether the applied sanctions and incentives actually contributed to the overall goal of motivating business to counter corruption.

2. Impact: Did sanctions and incentives contribute to the overall goal?

While a reduction of corruption is desirable regardless of the cause, proper evaluation of a sanction or an incentive requires demonstration that it actually led to reduced corruption. Corruption risks are notoriously difficult to measure – as are actual levels of corruption, or reductions in either. It is even harder to attribute any reductions to the existence of anti-corruption standards and the application of sanctions or incentives by a particular stakeholder.

However, even though it might sometimes be very difficult to quantify, it is very important that stakeholders seek to assess the impact of their sanctions and incentives on business. This helps to justify the costs of the applied sanctions and incentives, enables consideration of possible alternative strategies and indicates improvement opportunities.

Indicators which appropriately describe the impact of the measures can be subject to disagreement. Therefore, stakeholders should understand (and communicate to business) these indicators as reasonably sufficient proxies rather than proofs.¹¹⁹ Indicators for impact may include:

- Number of reported incidents of corruption in the target companies;
- Levels of reporting by target companies on corruption-related issues;
- Contribution of applied sanctions and incentives to strengthening the business case of target companies and representatives to counter corruption;
- Perceived level of corruption;
- Number of whistleblower reports;
- Number of corruption-related complaints;
- Reported success stories (e.g. averting of facilitation payment requests);
- Average costs of doing business with a target company;
- Response by target companies to incidents of corruption (e.g. self-reporting);
- Relationships between business and stakeholders (e.g. increased transparency in decision-making).

Some indicators may paint a misleading picture, e.g. an increase in complaints may well be attributable to a greater awareness of the issue, not an increase in corruption. A regular and mutual trusting dialogue with target companies, as well as inviting feedback from other relevant stakeholders, is therefore essential.

¹¹⁸ Defining such indicators prior to application and evaluating them afterwards (i.e. with respect to a baseline) helps in assessing whether there is a reduction of corruption and (to a lesser degree) the extent to which any reduction can be attributed to the applied sanction or incentive.

There is much that should be done

All stakeholders – whether from the public sector, the business sector itself or civil society – have the potential to apply powerful measures to motivate business to counter corruption!

- > **Complement the moral case with a strong business case.**
If countering corruption is linked to tangible business advantages (i.e. avoiding penalties and obtaining rewards), it is much more likely that companies will actually do so. Fighting corruption then becomes a business decision, supporting the moral desire to do the right thing.
- > **Strengthen the business case by using sticks and carrots.**
A combined approach of punishments (sanctions) and rewards (incentives), often referred to as 'sticks and carrots', can be far more effective than simply using sanctions alone.
- > **Use sticks: Punish with dissuasive sanctions.**
One way of countering corruption is to make it more expensive. The importance of financial, social and psychological costs means that all three have to be sufficiently high if companies (and their representatives) are to be motivated to counter corruption. This can be achieved by applying effective, proportionate and dissuasive sanctions.
- > **Give two types of carrot: Reward with persuasive mitigation incentives and genuine incentives.**
Sanctions should always be applied in combination with mitigation incentives. Companies should receive mitigation incentives for self-policing, self-reporting, cooperation, and remedial actions.
Incentives should also be given for good behavior in the first place – and not only if a violation has actually occurred. Just as companies provide incentives to employees in their own organizations to obtain desired behavior, stakeholders should offer effective, proportionate and persuasive genuine incentives to business.
- > **Consider all available options out of legal, commercial, and reputational sanctions and incentives.**
There are many ways to punish or reward business. Stakeholders should become familiar with the broad range of legal, commercial and reputational measures and apply the most promising and appropriate.

- > **Target individual representatives and the company.**
A company cannot act on its own. The decision to engage in corruption is taken by a single representative or by a group. Targeting these representatives is crucial but sometimes not sufficient or feasible. Therefore stakeholders may need to apply sanctions and incentives to the entire company as well as its executives.

- > **Communicate.**
If nobody knows, nobody cares! The business case for countering corruption relies on the communication of clear and strong messages. Stakeholders should communicate their anti-corruption standards, related sanctions and incentives, and cases of their application.

- > **Conduct transparent and credible monitoring.**
Stakeholders that provide sanctions and incentives want to do so on solid and justified grounds. A transparent and credible monitoring is paramount and may require the involvement of different parties, incl. civil society.

- > **Multiply the impact of sanctions and incentives.**
A single incentive or sanction may not have a sufficient effect on business. Individual stakeholders should consider applying multiple sanctions and incentives in order to target different business motivations. Most typically, this will combine legal or commercial measures with reputational ones to increase both financial and social costs and benefits.

- > **Create a snowball effect.**
Stakeholders should increase the impact of sanctions and incentives by holding the target business responsible for the actions of business partners, be they entities under effective control, entities acting on behalf of the company, investments or other business partners (such as suppliers).

- > **Work collectively on sanctions and incentives.**
Public sector, business sector and civil society stakeholders need to work together in setting anti-corruption standards and applying sanctions and incentives. To successfully fight a problem as complex and urgent as corruption requires a concerted and decisive effort by actors across society.

“Civil Society pressure, sometimes coupled with an effective media campaign, can encourage authorities – even those with little political will – to sanction corrupt actors, whether in the government or the private sector.”

(Transparency International USA (2012): Procurement Monitoring Guide: A tool for Civil Society.)

“Incentives and sanctions should be combined in order that business start to be accountable and use transparent procedures.”¹²⁰

“An important factor to motivate businesses to counter corruption is to set incentives for compliant organizations, raising their chances to make Value Added Businesses (profitability of clean business).”

“Legal sanctions are most effective – however, key is the actual implementation / enforcement of the legal mechanism. In too many countries, good legal instruments exist, but they are poorly enforced.”

“Put simply, the prospects of significant prison sentences for individuals should make clear to every corporate executive, every board member, and every sales agent that we will seek to hold you personally accountable for FCPA violations.”

(Lanny Breuer, Head of DOJ Criminal Division, February 2010)¹²¹

“The cost of corruption must be very high to serve as a deterrent to corruption. This would require a combination of sanctions, including prosecution and imprisonment and incentives, including public ranking of best performers.”

“Finally, seeking positive incentives, we will also recognise and promote best practice in this area by businesses and institutions, encouraging a ‘race to the top’ among peers.” (Transparency International, Strategy 2015)

¹²⁰ If not marked differently, citations on this page are gathered from opinions of the Expert Survey on sanctions and incentives.

¹²¹ Source: <http://www.fcprofessor.com/step-up-to-the-podium-friday>.

Appendix

Appendix I

Commercial genuine incentives

The following table lists commercial genuine incentives which can be given to business mainly in business-to-business relationships. Some of these incentives may also be provided in public sector-to-business relationships:

Incentive	Description / Example
Preferred supplier status¹²¹	A company establishes a list of preferred business partners that enjoy advantages over other partners with equal commercial status. Preferential treatment can refer to: <ul style="list-style-type: none"> • higher sales quotas with business partners; • shortened timeframe between quotation and procurement; • supply contract without having to go through a formal tender (taking procurement approval thresholds into consideration); • right to first quote on a tender; • reduced due diligence requirements; • improved contractual terms (e.g. lower liability), etc.
Public recognition**	A company introduces a 'business partners of the year' award or publicly recognizes relevant business partners through other means, e.g. mention on its website, promotional activities.
Assistance for capacity building	A company supports its business partners in conducting training and capacity building (e.g. through access to their own programs). Such capacity building can be applied to all areas of operations and is not limited to ethics & compliance. A company provides its business partners with services from its own internal departments (e.g. information technology, legal, human resources, accounting & controlling) for free or at a reduced cost.
Participation in strategic supplier planning meetings	A company grants its business partners access to strategic supplier planning meetings.
Sharing cost for sustainability improvements	A company establishes a joint sustainability improvement program with its business partners.
Reference to business partners**	A company recommends its business partners, either directly to other large companies or through notices in dedicated business partner networks.
Favourable payment terms	A company pays the selected business partners' invoice faster than others. Other allowances or payment discounts can also be offered.
Reduced procurement costs for partners	A company sells its own products or services at a reduced price or offers reduced service fees to its business partners, for example in telecommunication leasing, legal and consulting (e.g. assistance with accounting for taxation purposes), information technology, retail, real estate and utility.
Extending benefits to representatives of preferred partners	A company allows that benefits granted to a business partner may also be used by the partner's representatives (e.g. personal discount on company products, educational courses).

¹²² Preferred Supplier Status does not typically indicate exclusive or priority rights to business partners (e.g. a company will do business only with such partners). Rather, these business partners will enjoy additional benefits or advantages. For example, a tender process will be open for all business partners, but preferred partners may not be subjected to time-consuming checks or an evaluation process.

Reduced number of audits	A company reduces the number of required anti-corruption on-site audits for its business partners.
Reduced reporting requirements	A company reduces the frequency of checks on, or requirements of, anti-corruption related indicators for its business partners.
Improved reaction time for service/ product delivery	A company anticipates the challenges (e.g. delays in service/product delivery) that a business partner is facing when conducting its operations without the utilization of facilitation payments. Contractual fines for delayed provision of the contracted services / products may be waived.
Reduced service charges*	A creditor reduces or abstains from account-related service charges, such as late fees, annual fees, charges for outstanding payments.
Improved banking conditions*	A creditor provides its business partners with preferred conditions for day-to-day transactions, such as unlimited check writing, no minimum balance, fee-free use of cash machines, etc.
Easier access to loans*	A creditor reduces the required checks for business partners applying for loans.
Preferential repayment conditions for loans*	A creditor reduces interest rates or processing fees for loans, increases flexibility of repayment, or reduces commissions and fees for document review.
Reduced fees for investment rating*	A capital market service provider reduces fees for investment ratings and analytics.
Promotion at capital market*	A capital market service provider (e.g. Stock Exchange) can list the business partners on a Good Governance Index.

Table 5: List of commercial genuine incentives

* These are commercial genuine incentives which can particularly be applied by stakeholders from the financial services industry (such as commercial banks, investors or insurance companies).

** These are reputational incentives which can be given to business partners.

Appendix II

Typical scenarios for targeting a company and its representatives

There are several scenarios stakeholders might encounter when considering whether to target a company, its representatives or both. When targeting representatives, there is also the question of whether to target the executives of a company or its individual employees. These decisions depend primarily on who was involved in an act of corruption and whether an effective anti-corruption ethics & compliance program was in place.

		EXECUTIVE ...	
		... was involved in the corrupt act	... was NOT involved in the corrupt act
Corrupt act occurred...	... despite effective anti-corruption ethics & compliance program being in place	SCENARIO 1 <ul style="list-style-type: none"> Sanctions for corrupt act = Yes Sanctions for lack of anti-corruption ethics & compliance program = No Mitigation incentives = Possible Genuine incentives = No 	SCENARIO 3 <ul style="list-style-type: none"> Sanctions for corrupt act = No Sanctions for lack of anti-corruption ethics & compliance program = No Mitigation incentives = No Genuine incentives = Possible
	... and effective anti-corruption ethics & compliance program missing	SCENARIO 2 <ul style="list-style-type: none"> Sanctions for corrupt act = Yes Sanctions for lack of anti-corruption ethics & compliance program = Yes Mitigation incentives = Possible Genuine incentives = No 	SCENARIO 4 <ul style="list-style-type: none"> Sanctions for corrupt act = No Sanctions for lack of anti-corruption ethics & compliance program = Yes Mitigation incentives = Possible Genuine incentives = No
Corrupt act did NOT occur...	... and effective anti-corruption ethics & compliance program is in place	/	SCENARIO 5 <ul style="list-style-type: none"> Sanctions for corrupt act = No Sanctions for lack of anti-corruption ethics & compliance program = No Mitigation incentives = No Genuine incentives = Yes
	... and effective anti-corruption ethics & compliance program missing	/	SCENARIO 6 <ul style="list-style-type: none"> Sanctions for corrupt act = No Sanctions for lack of anti-corruption ethics & compliance program = Possible Mitigation incentives = Possible Genuine incentives = No

The non-exhaustive table lists typical scenarios with regard to whom a stakeholder should hold responsible for violating an anti-corruption standard. This overview table (and the following scenarios) provides a generic indication of applicable incentives and sanctions for company representatives and company. The information may vary according to individual circumstances and must be referred to with the explanatory notes provided on the subsequent pages.

EMPLOYEE ...		COMPANY
... was involved in the corrupt act	... was NOT involved in the corrupt act	
<p>SCENARIO 7</p> <ul style="list-style-type: none"> Sanctions for corrupt act = Yes Sanctions for lack of anti-corruption ethics & compliance program = No Mitigation incentives = Possible Genuine incentives = No 	<p>SCENARIO 8</p> <ul style="list-style-type: none"> Sanctions for corrupt act = No Sanctions for lack of anti-corruption ethics & compliance program = No Mitigation incentives = No Genuine incentives = Possible 	<p>SCENARIO 9</p> <ul style="list-style-type: none"> Sanctions for corrupt act = Possible Sanctions for lack of anti-corruption ethics & compliance program = No Mitigation incentives = Possible Genuine incentives = Possible <hr/> <p>SCENARIO 10</p> <ul style="list-style-type: none"> Sanctions for corrupt act = Possible Sanctions for lack of anti-corruption ethics & compliance program = Yes Mitigation incentives = Possible Genuine incentives = No
\	\	<p>SCENARIO 11</p> <ul style="list-style-type: none"> Sanctions for corrupt act = No Sanctions for lack of anti-corruption ethics & compliance program = No Mitigation incentives = No Genuine incentives = Yes
\	\	<p>SCENARIO 12</p> <ul style="list-style-type: none"> Sanctions for corrupt act = No Sanctions for lack of anti-corruption ethics & compliance program = Possible Mitigation incentives = Possible Genuine incentives = No

Table 6: Overview of when to apply sanctions and incentives to business

Targeting executives

SCENARIO 1

A company executive was involved in a corrupt act, even though an otherwise effective anti-corruption ethics & compliance program existed (for which the executive was – at least partly – responsible).

Sanctions for corrupt act: Yes

- An executive who engages in a corrupt act needs to be penalized with sanctions.

Sanctions for lack of anti-corruption ethics & compliance program: No

- An anti-corruption ethics & compliance program exists, which is – despite the corrupt act – considered adequate by international good-practice standards.

Mitigation incentives: Possible

- Stakeholders should consider offering incentives to corrupt executives by mitigating the initial sanction, for example, in cases where the executive came forward through self-reporting or cooperated with the relevant authorities. However, no mitigating incentives should be given to the executive for having an appropriate anti-corruption ethics & compliance program in place, as this system was actively circumvented.

Genuine incentives: No

- Executive was involved in a corrupt act.

>>> *See scenario 9. for sanctions and incentives for companies in this case.*

SCENARIO 2

A company executive was involved in a corrupt act while an effective anti-corruption ethics & compliance program was missing.

Sanctions for corrupt act: Yes

- An executive who engages in a corrupt act needs to be penalized with sanctions.

Sanctions for lack of anti-corruption ethics & compliance program: Yes

- The executive should also be punished for failure to establish an effective anti-corruption ethics & compliance program.

Mitigation incentives: Possible

- Stakeholders should consider offering incentives to corrupt executives by mitigating the initial sanction, for example, in cases where the executive came forward through self-reporting, cooperated with the relevant authorities and/or remedial actions such as establishing an anti-corruption ethics & compliance program after the corrupt act occurred.

Genuine incentives: No

- Executive was involved in a corrupt act and effective anti-corruption ethics & compliance program was missing.

>>> *See scenario 10. for sanctions and incentives for companies in this case.*

Targeting executives

SCENARIO 3

A corrupt act occurred (committed by an employee) even though an effective anti-corruption ethics & compliance program was in place. The executive to be targeted was not involved in the act of corruption (neither directly as a participant, nor indirectly as a confidant).

Sanctions for corrupt act: No

- No sanction should be applied for the corrupt act, as the executive was not involved in it.
- If the executive knew about the case but intentionally failed to report it (connivance), he is considered involved and may be sanctioned. For example, in the UK, reporting is mandatory for money laundering, but discretionary for corruption. Many jurisdictions legally require the reporting of criminal behavior.

Sanctions for lack of anti-corruption ethics & compliance program: No

- An anti-corruption ethics & compliance program exists, which is – despite the corrupt act – considered adequate by international good-practice standards.

Mitigation incentives: No

- As the executive is not sanctioned, there is no mitigation incentive.

Genuine incentives: Possible

- Executive may show outstanding behavior and may therefore be subsequently praised.

>>> *See scenario 9. for sanctions and incentives for companies in this case.*

SCENARIO 4

A corrupt act occurred (committed by an employee) while an effective anti-corruption ethics & compliance program was missing. The executive to be targeted was not involved in the act of corruption (either directly as a participant, or indirectly as a confidant) but failed to establish an effective anti-corruption ethics & compliance program.

Sanctions for corrupt act: No

- No sanction should be applied for the corrupt act, as the executive was not involved in it.
- If the executive knew about the case but intentionally failed to report it (connivance), he is considered involved and may be sanctioned.

Sanctions for lack of anti-corruption ethics & compliance program: Yes

- As it is the executives' responsibility to implement an effective anti-corruption ethics & compliance program, stakeholders should apply sanctions against executives for failing to do so (i.e. failure in supervisory duty).

Mitigation incentives: Possible

- Stakeholders should consider offering incentives to executives by mitigating the initial sanction, for example, in cases where the executive cooperated with the relevant authorities and/or remedial actions such as establishing an anti-corruption ethics & compliance program after the corrupt act occurred.

Genuine incentives: No

- As an effective anti-corruption ethics and compliance program was not in place, no genuine incentives should be given to the executive.

>>> *See scenario 10. for sanctions and incentives for companies in this case.*

Targeting executives

SCENARIO 5

Corrupt act did not occur and an effective anti-corruption ethics & compliance program is in place, for which the executive was – at least partly – responsible.

Sanctions for corrupt act: No

- No corrupt act occurred.

Sanctions for lack of anti-corruption ethics & compliance program: No

- Effective anti-corruption ethics & compliance program exists.

Mitigation incentives: No

- As there is no sanction, there is no mitigation incentive.

Genuine incentives: Yes

- Stakeholders should consider giving incentives to executives who were responsible for establishing good operating environments (i.e. above average).

>>> *See scenario 11. for sanctions and incentives for companies in this case.*

SCENARIO 6

Corrupt act did not occur, but there is no effective anti-corruption ethics & compliance program.

Sanctions for corrupt act: No

- No corrupt act occurred.

Sanctions for lack of anti-corruption ethics & compliance program: Possible

- Executives who are responsible for establishing an anti-corruption ethics & compliance program may be sanctioned for failing to do so.

Mitigation incentives: Possible

- If stakeholders apply sanctions for lack of an effective anti-corruption ethics & compliance program, they should also consider mitigation incentives for remedial actions.

Genuine incentives: No

- Executive failed to establish an effective anti-corruption ethics & compliance program.

>>> *See scenario 12. for sanctions and incentives for companies in this case.*

Targeting employees

SCENARIO 7

An employee was involved in an act of corruption.

Sanctions for corrupt act: Yes

- An employee who engages in corrupt acts must be punished.

Sanctions for lack of anti-corruption ethics & compliance program: No

- In this case the existence or non-existence of an anti-corruption ethics & compliance program is irrelevant, as employees are not responsible for the operating environment of a company.

Mitigation incentives: Possible

- Stakeholders should consider offering mitigation incentives by reducing the initial sanction if the employee comes forward, e.g. through self-reporting, or cooperates with the relevant authorities.

Genuine incentives: No

- Employee was involved in a corrupt act.

>>> *If an anti-corruption ethics & compliance program is missing, see scenario 3. on sanctions and incentives for executives and scenario 9. on sanctions and incentives for companies.*

>>> *If an anti-corruption ethics & compliance program is in place, see scenario 4. on sanctions and incentives for executives and scenario 10. on sanctions and incentives for companies.*

SCENARIO 8

A corrupt act occurred (committed by executive). The employee was not involved in the act of corruption.

Sanctions for corrupt act: No

- An employee was not engaged in corrupt act.

Sanctions for lack of anti-corruption ethics & compliance program: No

- In this case the existence or non-existence of an anti-corruption ethics & compliance program is irrelevant, as employees are not responsible for the operating environment of a company.

Mitigation incentives: No

- As there is no sanction, there is no mitigation incentive.

Genuine incentives: Possible

- Whistleblowing by employees may be rewarded (see also Joe Murphy on incentives for whistleblowers, p. xy)¹²³

>>> *If an anti-corruption ethics & compliance program is missing, see scenario 3. on sanctions and incentives for executives and scenario 9. on sanctions and incentives for companies.*

>>> *If an anti-corruption ethics & compliance program is in place, see scenario 4. on sanctions and incentives for executives and scenario 10. on sanctions and incentives for companies.*

¹²³ For example: whistleblowing is codified in the Dodd-Frank Act of the US: Section 922 awards whistleblowers who provide information which leads to a sanction of over US \$1 million (10-30 percent of the sanction).

Targeting the company

SCENARIO 9

A corrupt act occurred even though an effective anti-corruption ethics & compliance program was in place (case of rogue representative).

Sanctions for corrupt act: Possible

- Companies can be sanctioned for infringement of anti-corruption standards by their representatives under certain conditions (e.g. in case of difficulties in identifying culpable representatives; for more information see section III.2.).

Sanctions for lack of anti-corruption ethics & compliance program: No

- Effective anti-corruption ethics & compliance program exists.

Mitigation incentives: Possible

- An existing anti-corruption ethics & compliance program should be recognized as a mitigating factor when sanctioning corrupt acts.

Genuine incentives: Possible

- Despite the occurrence of a corrupt act, there was no systematic failure on the part of the company (i.e. existence of an anti-corruption ethics & compliance program). Genuine incentives may be given to the company.

>>> *See scenario 1. for sanctions and incentives if executive was involved in the corruption case.*

>>> *See scenario 7. for sanctions and incentives if employee was involved in the corruption case.*

SCENARIO 10

Corrupt act occurred and an effective anti-corruption ethics & compliance program was missing.

Sanctions for corrupt act: Possible

- Stakeholders may sanction the entire company depending on context (see section III.2.).

Sanctions for lack of anti-corruption ethics & compliance program: Yes

- Companies should be sanctioned for lack of an effective anti-corruption ethics & compliance program.

Mitigation incentives: Possible

- Stakeholders can consider offering mitigation incentives for self-reporting, cooperation and remedial actions.

Genuine incentives: No

- Due to corrupt act and as anti-corruption ethics & compliance program was missing, no genuine incentives should be granted.

>>> See scenario 2. for sanctions and incentives if executive was involved in the corruption case.

>>> *See scenario 7. for sanctions and incentives if employee was involved in the corruption case.*

Targeting the company

SCENARIO 11

Corrupt act did not occur and effective anti-corruption ethics & compliance program is in place.

Sanctions for corrupt act: No

- No corrupt act occurred.

Sanctions for lack of anti-corruption ethics & compliance program: No

- Effective anti-corruption ethics & compliance program exists.

Mitigation incentives: No

- As there is no sanction, there is no mitigation incentive.

Genuine incentives: Yes

- Stakeholders should apply incentives to companies that have established an effective anti-corruption ethics & compliance program, show a good track record etc.

>>> *See scenario 5. for incentives for executives in this case.*

SCENARIO 12

Corrupt act did not occur but an effective anti-corruption ethics & compliance program is missing.

Sanctions for corrupt act: No

- No corrupt act occurred.

Sanctions for lack of anti-corruption ethics & compliance program: Possible

- Companies may be sanctioned for lack of an effective anti-corruption ethics & compliance program.

Mitigation incentives: Possible

- If stakeholders apply sanctions for lack of an effective anti-corruption ethics & compliance program, they should also consider mitigation incentives for remedial actions.

Genuine incentives: No

- Companies that do not have an effective anti-corruption ethics & compliance program should not receive genuine incentives.

>>> See scenario 6. for sanctions for executives in this case.

Appendix III

External factors which may impact application of sanctions and incentives

Stakeholders should pay attention to environmental factors which affect the application of anti-corruption measures, and then seek to select approaches and measures suitable for their unique context. An environmental analysis with regards to a country or society's political, economic, social, technological and legal factors¹²⁴ is therefore useful.

The following list helps to assess which external factors are important for the application of sanctions and incentives:

Political

- Political will and commitment to fight corruption
- Effective free speech and freedom of information laws
- Effective judiciary (including protection of experts and victims)
- Whistleblower protection and social acceptance of whistleblowing
- Impunity
- Implementation of international conventions, etc.

Economic

- Centralization of economy (e.g. monopolistic market)
- Ownership of main economic players (e.g. public sector)
- Shadow economy (e.g. percentage of companies active in non-registered activities)
- Administrative processes, etc.

Social

- Perceived media independence
- Societal attitudes (e.g. general condemnation of corruption)
- Levels of trust between different parts of society, etc.

Technological¹²⁵

- Citizens and stakeholders using internet / mobile communication media
- Availability of information, etc.

Legal

- Mutual (legal) assistance between stakeholders (e.g. extradition, asset recovery, information exchange, joint investigations)
- Effective applicable codes for civil, administrative and criminal procedures
- Statute of limitations, etc.

¹²⁴ This is sometimes known as PESTL analysis, i.e. of Political, Economic, Social, Technological and Legal factors.

¹²⁵ The internet and social media provide access to new information sources, enable faster distribution and lower the threshold for direct and active citizen participation. After success in crime-fighting, disaster relief, election monitoring and political protest (e.g. Ushahidi, Crowdfunder), the use of new technologies to monitor and advocate for social causes has now been extended to the fight against corruption (e.g. I paid a bribe, Bribespot, Egunjedotinfo).

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Motivating Business to Counter Corruption

Notes

Motivating Business to Counter Corruption

Notes
