Public consultation on liability of legal persons: Secretariat summary of responses

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Organisation for Economic Co-operation and Development
Anti-Corruption Division, Directorate for Financial and Enterprise Affairs
Paris, France

Context

This document presents a summary by the OECD Secretariat of the compilation of responses received to the public consultation conducted by the Working Group on Bribery (WGB) from August to November 2016. These comments will be made available at the OECD Roundtable on Corporate Liability for Foreign Bribery on 9 December 2016. They will also be used by the OECD Working Group on Bribery as inputs to its process of continually improving its monitoring of Parties' foreign bribery laws. Information about the public consultation can be found online at www.oecd.org/corruption/public-consultation-foreign-bribery-liability-legal-persons.htm.

This summary by the OECD Secretariat does not necessarily reflect the views of the OECD Working Group on Bribery or of the individual Parties to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. It also does not prejudge in any way findings that might be made on liability of legal persons in future monitoring reports by the Working Group on Bribery.

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1. Introduction

1. The Working Group on Bribery (WGB) is the OECD body charged with monitoring Parties' observance of their commitments under the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (henceforth, the Convention). In support of this mandate, the WGB launched an online consultation on liability of legal persons in August 2016. Article 2 of the Convention obligates each Party to "take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official." Article 3 requires that Parties apply "effective, proportionate and dissuasive" penalties for foreign bribery by legal persons.

2. The online consultation is one of several WGB activities that celebrate International Anti-Corruption Day (9 December 2016). Other activities include the launch of a publication mapping legal person liability systems across time and across the 41 Parties to the Convention (see the Stocktaking report). The mapping points to partial convergence among Parties of law and practice in this area, but also shows that the growing similarities are accompanied by ongoing, entrenched diversity. A Roundtable hosted by the WGB on December 9 provides further inputs from experts on liability of legal persons.

3. These inputs will feed into the WGB's fourth phase of monitoring of the Convention, which will begin in 2017 and which will features a special focus on liability of legal persons. In particular, the fourth phase will extend and deepen earlier WGB monitoring of how Parties to the Convention live up to their commitments under Articles 2 and 3 of the Convention.

4. The invitation to contribute to the online consultation was open to all. Guidelines and proposed issues for the online consultation were posted on the WGB webpage as was a draft consultation version of the WGB's stocktaking paper on liability of legal persons. A compilation of these contributions is available on the WGB's webpage.

5. A total of 29 contributions were received from individuals and institutions based in 11 countries (Australia, Brazil, France, Germany, Italy, Luxembourg, Mexico, Norway, Turkey, United Kingdom, United States). The complete list of contributors can be found in the Box.

6. This document summarises these contributions – which totalled some 200 single spaced pages -- and backs up the summary with quotations from the submissions[1]. It is organised as follows:

- Section 1 presents general observations about the submissions.
- Section 2 discusses selected issues from the list of proposed issues. Although, to varying degrees, all of the consultation issues proposed by the WGB were addressed, the summary focuses on those that appear to be the most relevant for the current dialogue within the WGB.
- Section 3 describes issues raised in the contribution that were not raised in the list of proposed issues. These are: individuals and organisations in the LP liability system; the human and managerial dimensions of these systems; multi-jurisdictional cases and double jeopardy; systemic considerations; and the influence of LP systems on actual management practice.

[1] The quotations are direct quotes from the submissions. In some cases, the formatting has been changed to conform to OECD publishing rules and to save space.

Box: Contributors to the WGB's Consultation on Liability of Legal Persons	
Jennifer Arlen, Professor of Law, New York University, United States	Michel Levien González, DeForest Abogados, Mexico
Association of Corporate Counsel	European Bank for Reconstruction and Development
BHP Billiton	Michael Kubiciel, Professor of Law, University of Cologne, Germany
Business and Industry Advisory Committee (BIAC)	Sharon Oded, Professor, Erasmus University Rotterdam, the Netherlands
Business Law Section of the Law Council of Australia	Martin Polaine and Arvinder Sambei, Amicus Legal Consultants, United Kingdom
José Antonio Caballero Juárez, Centro de Investigación y Docencia Económicas, Mexico	Nicola Selvaggi, Law Faculty, Mediterranean University of Reggio Calabria, Italy
Corruption Watch, United Kingdom	Siemens Aktiengesellschaft, Germany
Frederick Davis. Adjunct Professor, Columbia Law School, United States	Society of Corporate Compliance and Ethics
Kevin E. Davis, Professor of Law, New York University School of Law, United States	Tina Søreide, Professor of Law and Economics, Norwegian School of Economics
Federation of German Industries (BDI)	Nicolas Tollet. Hubbard & Reed LLP, France
Brandon L. Garrett, Professor of Law, University of Virginia, United States	Transparency International, Germany
Global Infrastructure Anti-corruption Centre (GIACC), United Kingdom	Transparency International, United Kingdom
Gönenç Gürkaynak, ELIG, Attorneys-at-Law, İstanbul, Turkey	U4, Norway
Jorge Hage, Head of the Office of the Comptroller General, Brazil	UN Office on Drugs and Crime
Stijn Lamberigts, Law Faculty, University of Luxembourg	

2. General observations

7. A number of overarching themes are in evidence in the submissions. These are: 1) there is general agreement on the need for systems of liability of legal persons; 2) these systems show simultaneous (partial) convergence, combined with continued entrenched variation; 3) these systems appear to be influencing managerial practice in firms. These themes are discussed in turn below.

2.a. General agreement on the broad principles, less agreement on specifics

8. The submissions showed no evidence of resistance to – and indeed often showed active support for -- the general idea of developing and refining systems of legal person liability with a view toward improving compliance with law and law enforcement.

9. This is true of submissions from the business community as well as from NGOs and law practitioners. Examples of the business community's support include:

- ***BIAC***. "Companies should … be urged to carry out effective compliance work in order to prevent white-collar crimes, shed light on internally detected misconduct, and disclose it to the authorities. In return, the compliance measures should be taken into consideration when setting the amount of the financial penalty in the event of a violation of the law, even to the extent of waiving a sanction on the company."

- ***BHP Billiton***. "We want to take this opportunity to express our support for some of the key themes and principles arising from the consultation, including reforms that support: … Well-defined conditions which must be met before a company is liable for alleged corrupt conduct of its employees and third parties and clear compliance programme guidance that: provides clarity to global companies as to applicable standards; facilitates the development of global best practice; and provides a common benchmark against which enforcement agencies can assess corporate conduct."

10. Several of the submissions also stressed the importance of transparency, predictability and non-discrimination in the substance and procedures of these systems. See, for example, BHP Billiton's reference above to "well-defined conditions " as well as its support for "consistent and effective enforcement of anti-corruption laws that level the playing field for ethical companies".

11. This agreement on broad principles, however, is not matched in the submissions by agreement on the details of how legal person liability systems should be designed. For example, there were major divergences of view even on basic design elements like burden of proof for the adequacy of preventive measures (should it be on the prosecutor or the company), standard of liability (how should it be formulated?), and whether and how sanctions should be linked to preventive measures (for example, what sorts of mitigation should be available?).

12. This wide divergence of views in the consultation findings echoes the divergence of law and practice across jurisdictions that were documented in the WGB stocktaking paper that maps legal person liability systems. Legal person liability is dynamic area of law that is accompanied by entrenched variations across jurisdictions.

2.b. Country experiences with LP liability -- Convergence and entrenched variability

13. Quite a few of the submissions focus on a single country, often addressing the consultation questions with reference to that country's experience in developing and refining its legal person liability system.

14. These country-specific contributions provide rich and varied accounts of recent and active development of legal person liability. In some cases the countries in question are starting pretty much from scratch, while in others they are formalising and refining a long legal tradition.

15. The country-specific contributions include: Jorge Hage on the Brazilian experience; UN Office on Drugs and Crime on Colombia; the Federation of German Industries on Germany; Jose Caballero Juarez on Mexico; Nicola Selvagii on the Italian experience; and Transparency International, UK on the United Kingdom.

16. These contributions attest to the active process of law-making that is occurring in this field as well as to the fact that countries are experiencing a need to continually refine legal person liability systems in order to improve their 'fit' with the broader legal system and to enhance their effectiveness as law enforcement tools. Countries are gradually learning how to build and implement systems of liability of legal persons. These themes are also supported by the mappings of legal person liability that are presented in the WGB's stocktaking paper and the WGB plays in active role in the learning and adaptation process.

2.c. New legal person liability systems are already influencing management practice

17. Several of the contributions either imply or state explicitly that incentivising compliance systems and other preventive measures through legal person liability is already having an impact on corporate management and compliance processes. Express statements include:

- ***Kubiciel – German companies have sharpened their compliance systems***. Corporate liability, especially liability under the FCPA, had a major impact on sharpening compliance management systems in big and medium-sized German enterprises. Already in 2011, 59% of all German enterprises had implemented compliance programmes; some of them have even set international standards. In summer 2013, 74% of all enterprises had implemented compliance programmes. It is likely, that the percentage has even increased during the last three years. ... However, several scandals in enterprises, which already had implemented a compliance management system, show that the sheer act of implementation does not prevent corruption: Compliance programmes must be adaptive and come at the core of the corporate culture. In my view, a modern code on corporate criminal liability, providing for prosecution agreements, can be an effective tool to change the corporate culture for the better.

- ***Nicola Selvaggi on heightened attention to compliance in Italian companies***. As far as Italian experience is concerned, we have observed a growing attention of companies to the matter of compliance and organization in order to prevent the commission of crime… At the beginning (2001), the most corporations were not really aware of risk of crime and of necessity of prevention. In the last years we had instead an improvement of adoption of compliance programs by companies, especially by the biggest ones.

3. Comments on selected issues raised in the consultation document.

3.a. What is an effective system of liability of legal persons?

18. Quite a few contributors dealt with the definition of "effective" LP liability systems:

- ***BIAC: Effective prevention is the best outcome for society.*** It should be clarified what is meant by *effective:* good at getting convictions, i.e. establishing liability, or good at preventing the commission of the offence in the first place? Getting a conviction is not going to undo the harm done by the initial offence, whereas prevention through implementation of compliance systems etc. is a far better outcome for society. So the question falls into two parts: how can we prevent bribery, and what are the specific features of legal person liability (as distinct from individual liability) that need to be addressed in order to achieve those outcomes?

19. Many of the submissions advanced variations on the theme of optimal deterrence, including considerations of balancing the costs and benefits of any specific system. Indeed, the cost of prevention, policing and prosecuting and sanctioning firms guilty of offences was a major theme in quite a few of the contributions. This means, among other things, assigning roles to different actors – public law enforcement authorities, business managers, legal services providers and other private actors such as whistle-blowers – that take advantage of their relative strengths in providing information and services needed for effective deterrence. Businesses know a lot about what is going on in their business, which makes them a good (low cost) source of information on illegal activity within the firm (e.g. self-reporting crimes, assuming the burden of proof for effective compliance systems). Examples of such submissions include:

- ***Jennifer Arlen: An effective system is one that optimally deters crime and that taps into firms' distinctive advantages in policing some types of crime.*** … policy-makers can best serve the public by focusing on deterrence. …. Corporations can not only deter crime, but, as previously explained, they generally are the most cost-effective providers of many vital forms of prevention and policing. This implies that, in the case of corporate crime, the state has an extra instrument available to it when (as is usually the case) it cannot rely entirely on maximal individual sanctions (with minimal enforcement). In the corporate context, the state can, and generally should, deter crime by inducing firms to reduce the expected benefit of wrongdoing and also to intervene to increase the probability wrongdoing is detected and wrongdoers are sanctioned (corporate policing)… To achieve these goals, the state usually must impose liability on firms that is structured to ensure firms do not obtain an expected benefit from misconduct. It also must ensure that liability is structured to induce firms to undertake optimal policing measures (monitoring, self-reporting and cooperation).

- ***Sharon Oded: Minimize the net social costs of crime***. … in order to be socially desirable, an enforcement policy against foreign corruption cannot afford to focus only on the most *effective* ways of deterring and preventing foreign corruption. Instead, while seeking to maximise the use of highly effective policy measures, a socially desirable policy would also aim to utilise the available resources "smartly", that is, to use less costly mechanisms to reach high enforcement productivity. A socially desirable objective of LP liability can therefore be determined as *minimising the sum of (1) the social harm generated by foreign corruption and (2) the cost of its prevention, including the cost of enforcement.*

3.b. Successor liability

20. Successor liability in the context of foreign bribery refers to whether and under what conditions LP liability for the offence is affected by changes in company identity and ownership. Without successor liability, a firm could artificially escape sanctions through changes in corporate identity. In some legal systems, however, successor liability is viewed as being problematic in a criminal law context in the sense that it may conflict with the fundamental notion that no one can be punished for the acts of another.

21. Ten of the submissions deal with successor liability and all stress its importance. The submissions show the diversity of law and practice in this area -- in some cases, there is an absence of law[2], in other cases there is a need for further refinement and, in at least one, the national law on successor liability was judged to be adequate. A few submissions also note that successor liability provides incentives for effective M&A due diligence.

22. Excerpts from the submissions on successor liability include the following:

- ***Brandon Garrett: no reason to excuse successors***. "Nor is there any reason to excuse successors from the criminal actions of the entity they acquired. A sale or merger should not wipe the criminal slate clean. Otherwise, companies would play a shell game, engaging in mergers or sales simply to avoid consequences of their crimes. Companies should be expected to do due diligence regarding criminal exposure before making a purchase, and that potential liability and need to do due diligence will further encourage compliance to detect and prevent bribery.

- ***Transparency International – Germany: don't overlook successor liability***. Many if not most laws on liability of legal persons seem to overlook this important issue. Legal persons could easily merge, demerge, or transform. Their legal personality as such would disappear. One can expect that in many jurisdictions this would throw prosecutors and courts off course in view of legal gaps in the criminal code. High-profile cases are proof of the practical relevance of this issue."

- ***Amicus Legal Consultants: diversity of approaches and lack of agreement/understanding on how to design successor liability***. We have consistently found that States struggle and practitioners agonise as to how best to ensure that appropriate proceeding are able to be instituted against a legal person's successor entity where, for instance, the legal person in question has been subject to reorganisation or even merger. Approaches differ as between jurisdictions and there is a clear need for technical assistance in this regard to Ministries of Justice or their equivalent. There is wide recognition that restructuring, acquisition or merger should not defeat the liability that would ordinarily be borne; at the same time, there is confusion as to whether legal development within a State should focus on the preventive (for instance, suspending the ability to dissolve, or merge in the event of anticipated or initiated criminal proceedings) or the reactive (i.e. successor liability in a true sense).

- ***European Bank for Reconstruction and Development: successor liability strengthens M&A due diligence***. In addition to concerns over evasion of sanctions, … successor liability creates incentives for companies to strengthen their anti-corruption compliance programmes in the context of mergers and acquisitions. If buyers were liable for the anti-corruption risks

[2] Again, these perspectives echo those found in the stocktaking document on successor liability.

of the companies they purchased, buyers would be wary of purchasing a company with a weak anti-corruption compliance programme. On the other side of the transaction, companies hoping to be purchased would have an incentive to improve their anti-corruption compliance programmes in order not to deter potential buyers.

- ***Michael Kubiciel: use EU competition law as a model***. Providing for a liability of successors of a legal entity is important for ensuring that legal persons can be held liable. … A good approach to hamper the described avoidance strategies is providing for sanctions that do not address a concrete legal person, but the economic enterprise as such (the European competition law includes such an instrument). By means of that, all individual legal persons of an enterprise can be held liable, including the parent company.

- ***Business Law Section of the Law Council of Australia: current arrangements in Australia are adequate***. We do "not consider the issue of successor liability is a significant matter in the Australian context. In Australia, change-of-control transactions typically involve the acquired corporation remaining a distinct legal entity rather than becoming merged into an acquiring entity. To the extent an entity is dissolved (winding up on the grounds of insolvency), if subsequent legal liability were to be established there are processes to revive the legal entity.

3.c. Settlements, compliance systems, self-reporting and sanctions

23. A number of the submissions state explicitly or imply (by discussing them in an integrated way) that settlements, compliance systems, self-reporting and sanctions on legal persons are closely linked issues. For example:

- ***Association of Corporate Counsel: settlements, incentives for compliance systems and self-reporting are all intertwined***. ACC views the issue of settlements as very much entwined with incentivizing compliance systems and the issue of self-reporting by corporations (see Issue #11c of the consultation document). One of the greatest benefits of an effective corporate compliance system – both for corporations and for governments – is the corporation's ability to uncover and investigate instances of potential wrongdoing by its employees. Once discovered, the corporation is faced with the decision of whether or not to report the suspected wrongdoing to the government and cooperate with any investigation. Allowing the corporation to negotiate a more favourable resolution with the government is further incentive to report the violation and cooperate with the government investigation, and also adds to the value the corporation receives from its compliance system.

3.c.1. Agreement on the general idea of incentives, but not on the details

24. In this area also, the submissions point to broad agreement on the usefulness of providing legal incentives for company compliance efforts (incentives for self-reporting and cooperation with investigations and resolutions are less frequently mentioned). However, there is widespread disagreement on how exactly these should be implemented.

25. Some submissions called for only partial avoidance of liability for having adopted preventive measures, including effective compliance systems (as well as for self-reporting and cooperation). A few note that settlement arrangements and available sanctions need to provide incentives for a complex array of behaviours, and therefore require carefully calibrated sanctions for each of the various types of behaviour. Others seemed to call for a complete exemption for having an effective compliance system alone.

26. Examples of these various positions include:

- ***Jennifer Arlen: Sanctions systems need to recognise that compliance systems are an important tool for deterrence, but not the only tool.*** Firms that adopt and implement effective compliance programs should avoid the full threat of criminal liability. … Compliance programs are not the only—or even necessarily the most effective—way to deter crime. They are simply an important tool. In order to effectively deter corporate crime, we need firms to take three additional steps. We need them to reform compensation/ promotion/ retention policies to ensure that they encourage productivity without also encouraging misconduct. We need them to self-report all detected misconduct. We also need them to fully cooperate by investigating the wrong and turning over all materials to the government. Regimes that insulate firms from liability if they have an effective compliance program do not provide corporations with needed incentives to self-report, fully cooperate, or to take other actions to deter crime (such as compensation and promotion policy reform).

- ***Jennifer Arlen (continued): carefully calibrate the incentives faced by firms to get the right incentive mix.*** To induce corporate policing, the government should employ a duty-based regime under which firms are obligated to undertake optimal monitoring, self-reporting and cooperation and are subject to a special sanction for violating any one (and each) of these duties. Firms that satisfy all policing duties should escape criminal sanction. Nevertheless, they generally should face 'residual' civil liability designed to ensure that they adopt optimal prevention measures unless market forces ensure that the firm internalised the social cost of employees' wrongs.

- ***Association of Corporate Counsel: give firms 'some measure of leniency'.*** ACC strongly feels that all jurisdictions should have a mechanism within their anti-bribery regimes that gives corporations with effective compliance systems some measure of leniency with respect to foreign bribery offenses. Such incentives act as a sort of government endorsement of the value of corporate compliance systems. Multi-national enterprises find such endorsements particularly useful when attempting to implement compliance systems in their international subsidiaries. It is easier to marginalize compliance when the government where the subsidiary operates has not made ethics and compliance in corporations a priority. Formal compliance incentives are a helpful tool for the lawyers and compliance officers who must convince executives to make the necessary investments in corporate compliance systems.

- ***Federation of German Industries (BDI): exempt firms from liability if they take adequate preventive measures.*** The BDI is in favour of a regulation that exempts a corporation from sanctions if it provides evidence that it has taken appropriate and adequate measures, in terms of organisation and manpower, to provide a general safeguard against such misconduct. This would also be a way of rewarding good corporate compliance systems. Adequate compliance systems that are already in place as well as forward-looking investments in compliance, such as the establishment or tightening of compliance measures, should result in exempting corporations from liability. Individual cases of misconduct or failure to supervise can never be fully precluded. If the corporation has selected a decision maker with due care and has an adequate compliance system in place which is generally suited to preventing such misconduct, then the corporation should not be made liable for this misconduct.

27. Another dimension of complexity for settlements and sanctions stems from the diversity of the business community and the diversity of the motives and context of corporate crime. In order to

deal with this, one of the submissions states that authorities need to have a complex tool kit that includes both rewards and escalating punishments:

- ***U4: Build a support-and-sanctions pyramid***. The support and sanctions pyramid offers the regulating body with a wide variety of instruments from punishment to persuasion depending on the offence and offender. .. . At the very top of the pyramid, it should be possible for repeat offenders to be debarred from conducting their business and thereby in effect liquidated… The ultimate purpose of sanctions should not just be to punish but to achieve normative change within an organisation to avoid/prevent future offences. The underlying principle of a cost-effective regulatory system is to reward reform and punish refusal to reform.

3.c.3. Need for guidance and clarity

28. A number of the submissions stressed the need to provide guidance and definitions of relevant rules and concepts in order to clarify, to the maximum extent possible, the rules for settlements, preventive measures including compliance systems, self-reporting and cooperation:

- ***Gönenç Gürkaynak: reward companies that have made 'best efforts', but clearly define 'best effort'***. …what would constitute "best efforts" should be clearly defined and the efforts of the management of the legal person should be in line with these standards. In such a system, sovereign law makers would decide what higher or lower standards they would impose as the "best efforts" standards, provided that the legal person liability is "effective, proportionate and dissuasive". Disadvantages on the other hand, would be holding a person liable for an act which the person did not intend or did not commit.

- ***Global Infrastructure Anti-Corruption Centre: on the risks of settlements without conviction and the need for guidance***. There is a risk that settlements without conviction may mean that a guilty legal person can avoid the penalties and stigma which normally go alongside a conviction, and can claim to the public that it never committed any wrongdoing. There is also a risk that prosecutors can effectively force a legal person to pay a large fine without conviction and proof of liability, when the alternative to the legal person can be years of uncertainty and legal and other costs which defending a court case can result in. However, the possibility of a settlement without a conviction remains a necessary part of the enforcement armoury. … There should be appropriate guidance on when a settlement is acceptable, the type of sanction which is as a result appropriate, and appropriate judicial oversight over the settlement.

- ***Law Council of Australia – need for a clear framework for sanctions and self-reporting***. The sanctions for legal persons that are the least effective are where there is no clear framework to encourage self-reporting as the logical response when bribery is discovered within an organisation. In this environment, having regard to the significant sanctions that may be involved, regulatory investigations become more difficult and outcomes more arbitrary.

3.e. Burden of proof regarding preventive measures, including compliance systems

29. Twelve contributors addressed the question of whether the company or the prosecution should bear the burden of proof concerning the adequacy (or inadequacy) of the firm's preventive measures. Their positions on this matter were quite variable, as can be seen in the following:

- ***Gönenç Gürkaynak: save enforcement authorities' scarce resources***. In systems where a defense is provided to the legal persons by way of meeting the standard of precluding liability, the burden to prove that the legal person did indeed met the standard should be on the legal persons. This way, rather than the legal enforcement authorities spending their scarce resources on finding out whether the legal person has a defense, the legal person would be preoccupied with preparing its own defense.

- ***Professor Nicola Selvagii; the burden of proof should be (and is already in Italy) on the prosecutor.*** As far as the burden of proof on effectiveness of compliance systems is concerned, we consider that the lack of organization should be an element of the offence and not only a defence. This leads as a consequence to consider that the organizational shortcomings should be proved by the prosecutor. At this proposal we should consider that, as far as Italian discipline on LP liability is concerned, the Supreme Court already clarified that this approach is the one to be preferred

- ***Siemens Aktiengesellschaft: the burden of proof should lie with the company***. "The burden of proof in relation to circumstances with a mitigating effect on sanctions should lie with the company. As a general rule, of course, all facts that are material to the decision regarding the type and extent of the legal consequences must be investigated by the authorities. However the responsible officers within the company are themselves in the best position to provide information as to what preventive organizational and personnel measures have been taken, and this is to be recommended in view of their greater proximity to the proof.

- ***Society of Corporate Compliance and Ethics: it makes sense to place the burden of proof on the company.*** Companies should bear the burden of proof relating to compliance and ethics programs. A compliance and ethics program is inherently internal; a company knows best what it has done. For many reasons, it makes sense for the company to be the one showing the steps it has taken in its compliance program and what indications it has that the program is effective.

3.g. Finding the right balance between sanctions on companies and on individuals

30. The Convention and the 2009 Recommendation contain obligations and guidance on the relation between legal and natural persons in the enforcement of foreign bribery laws (e.g. on standards of liability and on procedural links). This complex legal issue raises a host of other (related) issues as well, including perceptions of justice, effective deterrence and protecting the rights of both individuals and firms that are the target of investigations and the mix of available sanctions that are needed in order to genuinely deter crime.

31. Many of the submissions deal with these issues and the varying perspectives offered in the submissions reinforce the findings of the WGB's stocktaking paper that Parties' legal systems adopt variable approaches to these issues. For example:

- ***Jennifer Arlen: corporate sanctions alone are not enough.*** "In order to deter crime by publicly held (and other large) firms, lawmakers and enforcement officials must ensure that the individuals responsible for the crime are personally sanctioned for the wrongs they commit. Corporate sanctions alone are not sufficient…"

- ***Kevin Davis***: "Almost all of these laws [referring to a range of laws in such areas as criminal and environmental law] are enforced though a combination of individual and corporate liability. The central policy question facing enforcement authorities is how to structure

individual and corporate liability and corporate civil and criminal sanctions to optimally deter such crimes… ."

- ***Corruption Watch: the deterrent effect is undermined if there are no sanctions on individuals***. "In the UK, the first DPA resulted in no individual action and there were serious concerns that prosecutors had not undertaken an independent enough investigation to ascertain individual culpability. The deterrent effect of anti-corruption law is undermined if individuals, particularly at a senior level, are not held to account for wrongdoing by a company."

4. Other issues raised by contributors

32. The contributions also address a number of themes that were not explicitly covered in the list of proposed issues for the online consultation.

4.a. Managing the human and managerial dimension of LP liability systems

33. Legal person liability creates a behavioural system in which the actions of a wide variety of actors are coordinated for the purpose of enhancing the effectiveness of law enforcement against foreign bribery and other economic crimes. All systems of law are human systems. This fact introduces flexibility, but also inertia, since time is required for the human actors in the system to reset their ways of thinking, acquire technical training and develop supporting institutions (e.g. modalities for international cooperation and specialised legal service providers).

34. This point was in evidence in various ways in the contributions:

- ***Amicus Legal Consultants on educational and training needs of investigators and prosecutors***. "Given the increasingly transnational nature of corruption and related crimes, it is more important than ever for practitioners to have a familiarity with the different approaches of states to legal person liability. The educational and training need in that regard remains great and is particularly marked, in our experience, among investigators and prosecutors. A lack of such understanding is still an obstacle for those making requests to other jurisdictions, whether for evidence via mutual legal assistance (MLA) or information and intelligence via administrative (informal) assistance."

- ***Michael Kubiciel on staffing levels and expertise in enforcement bodies***. "Sufficiently staffed and specialized law enforcement bodies and (criminal) courts which are trained to conduct investigations against large, often multinational enterprises…. A positive attitude within the law enforcement bodies towards laws allowing for sanctioning legal persons. This isn't trivial, as many German prosecution offices simply do not apply the existing law, due to a diffuse opposition against the law and/or a lacking tradition of investigating against legal persons."

- ***Kevin Davis on the emergence of specialised legal service providers***. "In the U.S. system, the investigative costs associated with LP liability are probably mitigated by the fact that internal investigations can be outsourced to service providers staffed by people with sophisticated understanding of the relevant languages and business practices. Those service providers operate in a competitive market, which tends to induce them to minimize prices, but they also have reputational incentives to provide high-quality services. In the absence of this kind of market for investigative services, LP liability is likely to entail higher investigative costs and should therefore, at the margins, be less attractive. Although many

providers of investigative services operate in multiple countries, it is far from clear that firms answerable to enforcement agencies outside the U.S. will benefit from the same level of expertise and mix of competitive and reputational incentives."

- ***Tina Soreide on the need to carefully consider the organizational design of the entire law enforcement system***. "Among the most common hindrances for efficient law enforcement we find...*organization of enforcement* (prosecutor's lack of autonomy, confusing allocation of responsibilities across institutions, statute of limitations), and an astonishing *lack of resources* even in otherwise wealthy countries. Of course, the many legitimate and less legitimate obstacles contribute to explain the low number of law enforcement reactions against bribery."

4.b. Multijurisdictional cases and double jeopardy

35. Five submissions mention the emerging importance of multijurisdictional cases and the growing possibility that companies will be subject to double jeopardy as more countries adopt LP liability systems and start actively prosecuting foreign bribery.

36. A particular concern is how the LP liability systems will function once they start interacting across jurisdictions. For example, how will self-reporting incentives offered in one jurisdiction work if companies face different incentives (or no incentives) for self-reporting in other jurisdictions? How do rules for sharing information and allocating cases across jurisdictions influence this interaction? How will the different settlement systems interact (e.g. will companies get "credit" for sanctions imposed in one jurisdiction in other jurisdictions)?

37. Excerpts on this issue are as follows:

- ***BIAC***. "Furthermore, the concept of *ne bis in idem* is not accepted/applied globally which leads to the risk of double jeopardy for companies although they are cooperating with law enforcement or even have voluntarily self-disclosed misconduct to authorities. This problem is so far not solved and puts compliance efforts by companies at risk."

- ***Frederick Davis***. "There is increasing discussion about "international double jeopardy" (ne bis in idem) in light of the fact that companies and individuals are now more likely to face prosecutions in different countries for the same alleged wrongdoing. In a broad, non-technical sense, the issue boils down to "what weight should one country give to an outcome of a prosecution in another?"

- ***Brandon Garrett***."… as more countries adopt corporate criminal liability for bribery and other crimes, it will be important to develop coordination rules, including double jeopardy norms, so that corporations do not face multiple overlapping punishments for the same conduct."

- ***Siemens Aktiengesellschaft***. "Settlements between companies and individual criminal prosecution authorities regarding the punishment of white-collar crime are of significant importance both for companies and for criminal prosecution authorities. This applies above all to globally active companies. Complex cases, sometimes involving cross-border transactions, entail lengthy investigations due to the need for collaboration with authorities in different countries and the language barrier. These can have a detrimental effect on the company's reputation and prevent a "new start". They also tie up the human resources of both the company and the criminal prosecution authorities. It is therefore in the interest of

both the company and the criminal prosecution authority to bring investigation proceedings to a close as soon as possible. If a settlement is reached in such cases between the company and the criminal prosecution authority, steps must be taken in the interest of legal certainty to ensure that the cause of action of the case in hand cannot be cited in any further investigation proceedings ('ne bis in idem')."

4.c. Systemic considerations in the design of legal persons liability

38. Several of the submissions noted that legal person liability systems do not exist in isolation and cannot be evaluated in isolation. For example:

- ***Kevin Davis: effectiveness depends on overall context and the impact of a given feature cannot be judged in isolation.*** "The features of an LP liability regime also depend on legal and non-legal features of the overall context in which the regime is implemented, including alternative forms of liability for individuals or organizations and characteristics of the organizations to which LP liability applies. …. The impact of each feature of an LP liability regime on the benefits and costs mentioned above is likely to depend in part on interactions with other features of the LP liability regime. This makes it impossible to assess the impact of any given feature in isolation and raises the possibility that distinct LP liability regimes that combine different packages of features will be functionally equivalent."

39. Relevant contextual factors cited include underlying criminal procedure rules and institutions, and the broader governance system for controlling corporate conduct:

- ***Brandon Garrett: effective legal person liability is linked to underlying criminal procedure rules and institutions.*** "I do think that there are some answers to that question [about what makes for effective systems of liability of legal persons] that are relevant in a range of legal systems, but the underlying criminal procedure rules and institutions matter a great deal. The standard for entity criminal liability standing alone cannot serve its purposes without accompanying procedure and institutions that can make entity criminal liability practical and useful as an addition to the other mechanisms available in a criminal justice system.

- ***U4: embed corporate liability regime in the wider governance system***. "As noted above, corporate liability can create negative externalities and fail to address the root cause of non-compliance, which lies in corporate culture. However, to ensure that a corporate liability regime is included in a wider governance system that promotes normative change, there is a need to adopt an effective regulation that economises on resources and provides regulators with more options to respond to various motivations for non-compliance. Such options should start with less severe measures, escalating towards punishment for more egregious conduct and non-responsiveness."

4.d. Respecting fundamental legal values – transparency, due process, etc.

40. A few of the submissions focused on the issue of defining and protecting legal persons' rights when they face investigation and possible prosecution. This also relates to broader questions of the public's perception of legitimacy of the system. Examples include:

- ***Stijn Lamberrigt***s: ***diverse approaches to whether privilege against self-incrimination and/or the right to remain silent apply to legal persons***. "Despite the lack of debate, the applicability of fair trial rights, such as the right to silence, to legal persons is not self-evident considering the differences between legal persons and individuals. Nevertheless,

several states have extended the application of fair trial rights to legal persons without a fundamental debate. …. Unlike certain other fair trial rights, such as the right to access to a court, which can be applied to legal persons *mutatis mutandis*, [such applicability] seems less obvious for the right to silence and the privilege against self-incrimination, because this right was originally designed to protect *human beings* against physical coercion…. The question whether a legal person can rely on the privilege against self-incrimination and the right to silence has been answered differently throughout Europe, as well as abroad."

- ***Tina Soreide – don't give the impression that firms can pay their way out of enforcement problems***. Governments' law enforcement shortcomings makes it necessary to "incentivize" companies to collaborate with law enforcers and bring forward evidence of their own crime, and this is why duty-based sanctions (compliance-based defence) has become more common,... However, across the globe there seems to be serious challenges associated with these arrangements, including a lack of guidelines, deviation from guidelines, low predictability in penalties, and too few details shared with the public – which may well cause suspicions of firms paying their way out of the law enforcement problem.

- ***UNODC: need to protect the process rights of legal persons***. "Coherence between substantive and procedural rules is required. When introducing new forms of liability of legal persons, it is also necessary to create procedural rules that protect the due process rights of legal persons and provide them with conditions equal to those enjoyed by natural persons under the same liability system (criminal or non-criminal)."

4.e. Rules versus discretion in legal person liability systems

41. Several of the submissions discuss the challenge of designing enough flexibility into rules for liability of legal persons. This issue is closely linked to the commonly encountered policy design problem of "rules versus discretion".

42. Flexibility allows enforcement authorities to adapt enforcement actions to circumstances (e.g. by allowing significant discretion to prosecutors). However, it might also entail serious disadvantages, notably it might engender problems of transparency; predictability and non-discrimination (see also the previous section on 'Respecting fundamental legal values').

43. On the other hand, reliance on strict, detailed rules might give rise to other problems. (for example, greater difficulty in effectively tailoring prosecuting strategies and sanctions to case-specific circumstances). One submissions notes that and making it easier for firms to game a system (e.g by facilitating "check the box" compliance strategies by firms that position them well with respect to the rules, but fail to create a genuine culture of compliance).

44. Examples of these varying concerns can be found in the following excerpts:

- ***Jennifer Arlen: Ex ante standards versus discretion and protecting the rule of law***. Governments can best hope to deter corporate crime by adopting *ex ante* standards (through statutes or regulations) imposing duties on corporations to (1) adopt an effective compliance program, (2) self-report detected wrongdoing, and (3) fully cooperate. These rules or standards need to clearly state the consequences firms face if they breach these duties, and, in turn, the benefits firms obtain if they adhere to these duties…. In the US prosecutors also have enormous discretion over the monetary sanctions and mandates imposed. Indeed, it appears that prosecutors imposing sanctions through DPAs and NPAs can impose any sanction a firm will agree with without being subject to judicial review (unless the mandate

is unconstitutional). This degree of discretion is not consistent with a commitment to the Rule of Law.

- ***Society of Corporate Compliance and Ethics on the need to avoid inflexible, "pass-fail" systems.*** Expressly including compliance and ethics programs as a defense certainly gets the attention of companies. However, it remains the case that the arrangement has to be one that truly promotes effective programs and is not easily gamed. … there should be a dynamic and flexible standard and system that provides an incentive for companies to keep improving their programs on an ongoing basis. …. while programs should have to meet certain core, minimum standards to be considered by government, they must also remain dynamic and designed to fit the specific risks of each company … This approach to program standards has been called "structured flexibility." Thus in each case government would determine whether a compliance program first met the minimum standards, but then also determine whether it merited credit given the nature of the risks and other circumstances in the specific case.

- ***Tina Soreide: balancing flexibility and legitimacy***. A main challenge – within and among governments - is to reach consensus around the balance between flexibility in law enforcement solutions (incentivizing collaboration) with conditions intended to secure legitimacy (fair treatment, transparency).