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## ESRS G2: Definition of Corruption/Bribery and anti-competitive behaviour events and omission of sensitive or risky information

### Objective

- 1 The objective of this paper is for EFRAG SR TEG to recommend the appropriate requirements with respect to:
  - (a) corruption/bribery and anti-competitive behaviour events in the context about legal risk concerns and alignment to the requirements of GRI;
  - (b) possibility to omit information that may be prejudicial to the undertaking.

### A - CORRUPTION/BRIBERY AND ANTI-COMPETITIVE BEHAVIOUR EVENTS

#### Background

- 2 In ESRS G2 *Business conduct*, DR G2-6 requires disclosures about legal proceedings related to bribery and/or corruption while DR G2-7 requires similar disclosures about anti-competitive behaviour the undertaking may have engaged in.
- 3 The full GRI requirements relating to corruption are provided in Appendix 1. Of particular interest in this discussion is the definition of *confirmed incident of corruption* which is defined as “an incident of corruption that has been found to be substantiated”. A note clarifies that this does not include “incidents of corruption still under investigation in the reporting period”.
- 4 The PTF-ESRS followed the same approach with the [working paper](#) on ESRS G3 Business conduct published in March 2022. However, when finalizing the ED of ESRS G2, it was decided to narrow down the definition of events.
- 5 In fact, as explained paragraph 40 of the basis for conclusions of ESRS G2, “[T]he ESRS requirement is more narrowly defined than the relevant GRI standard that refers to “incidents” which are defined as “incident of corruption that has been found to be substantiated”. This Disclosure Requirement originated a discussion with different initial opinions. Some were concerned about the legal risk this may raise for preparers. On the other hand, some interpreted this as being confirmed only upon resolution of a court case compared to others considering an internal investigation determining a *prima facie* case to be answered as sufficient to trigger disclosure. Therefore, the definition was updated for this [Draft] Standard to refer to “legal proceedings”. GRI 205-3 requires the same information for confirmed incidents of corruption and then additionally asks for information about public legal cases during the period.”
- 6 ESRS G2-6 states that “The undertaking shall provide information on legal proceedings related to corruption or bribery during the reporting period”. The full DR for G2-6 and G2-7 as well as the original requirements in the working paper have been set out in Appendix 1.

### **Feedback received**

- 7 During the SR TEG survey as well as the use test some concerns were raised with respect to whether there would be legal risk to undertakings when disclosing the results from internal investigations.
- 8 However, GRI recommended closer alignment with the structure and wording of GRI 205-3.

### **GRI analysis**

- 9 In The staff of GRI provided the EFRAG Secretariat with analysis about the obligations of undertakings about disclosures on internal investigations of corruption/bribery events.
- 10 In short, they conclude that there is no general legal duty to self-disclose or report known or suspected corrupt activity, including to law enforcement bodies, but it is an increasing expectation of civil society, investors and other stakeholders per Transparency International. In some cases, in the UK, US and Australia self-disclosure can result in more lenient treatment when legal authorities consider whether to bring charges, and in the consequences if charges are brought. Also in some territories, there may be a legal duty to disclose corrupt activities to auditors, shareholders or regulators, e.g., in the UK.
- 11 However, in the EU, only three countries (France, Germany and Italy) currently impose legal obligations on larger enterprises relating to the prevention and detection of corruption.
- 12 The paper also points out that any legal risk can be limited by including only general information without specific details of the parties involved. They also provide examples of disclosures by the following EU companies in an Annex to the paper:
  - (a) EMD Group;
  - (b) H&M Group;
  - (c) NLB;
  - (d) PZY;
  - (e) Shell;
  - (f) Siemens;
  - (g) Stora Enso;
  - (h) STRABAG SE;
  - (i) Telefónica; and
  - (j) Volvo.
- 13 The staff of GRI also emphasises the best practice guidance from Transparency International which states that companies should disclose high-level results from incident investigations and resulting disciplinary actions. Transparency International also argues that where the breaches were promptly and thoroughly investigated and resulted in appropriate disciplinary and remedial action will reflect that the problem is localised and not systemic.

### **EFRAG Secretariat analysis**

- 14 The EFRAG Secretariat notes that the GRI standard is explicit that '[T]he reasons 'confidentiality constraints' and 'information unavailable / incomplete' should only be used in exceptional cases.'

- 15 The EFRAG Secretariat notes that European companies disclose this information already and proposes to align the disclosures in ESRS G2 with those of GRI. This would be in the interest of transparency.

**B-POSSIBILITY TO OMIT INFORMATION THAT MAY BE PREJUDICIAL TO THE UNDERTAKING**

- 16 One of the recurring comments in the consultation, not only for this two DRs but in general, is the request to introduce an option to omit information when it is commercially or legally prejudicial.
- 17 EFRAG Secretariat notes that GRI 1: Foundation 2021, Requirement 6 allows omission for the following:
- (a) Not applicable,
  - (b) Legal prohibitions,
  - (c) Confidentiality constraints,
  - (d) Information unavailable / incomplete.
- 18 The EFRAG Secretariat notes that this aspect is specifically covered by the CSRD: in ESRS 2<sup>1</sup> paragraph 5(c) it is stated that if a Member State allows for an exemption as per CSRD due to the information being prejudicial, the use of the option should be disclosed.
- 19 The EFRAG Secretariat considers that it would be contrary to the CSRD to broaden the scope of such exemption in level 2 regulation (ESRS), when level 1 regulation (CSRD) already covers this aspect.

**Questions for EFRAG SR TEG**

- 20 Does EFRAG SR TEG have further comments on this paper?
- 21 Does EFRAG SR TEG agree to align the proposals in G2 with that of GRI or would you prefer to maintain the wording in the exposure draft? Please explain.
- 22 Does EFRAG SR TEG agree that there should not be an option to omit prejudicial information in ESRS?

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<sup>1</sup> General, strategy, governance and materiality assessment

## Appendix 1: The relevant provisions

### Introduction

- 23 The appendix details more detailed requirements of both GRI as well as the ESRS Exposure Drafts and the March working paper.

### GRI provisions

- 24 The GRI provisions on corruption:

#### Disclosure 205-3 Confirmed incidents of corruption and actions taken

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**REQUIREMENTS**

The reporting organization shall report the following information:

- a. Total number and nature of confirmed incidents of corruption.
- b. Total number of confirmed incidents in which employees were dismissed or disciplined for corruption.
- c. Total number of confirmed incidents when contracts with business partners were terminated or not renewed due to violations related to corruption.
- d. Public legal cases regarding corruption brought against the organization or its employees during the reporting period and the outcomes of such cases.

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**GUIDANCE****Guidance for Disclosure 205-3**

For stakeholders, there is an interest in both the occurrence of incidents and an organization's response to the incidents. Public legal cases regarding corruption can include current public investigations, prosecutions, or closed cases.

**Guidance for Disclosure 205-3-c**

In the context of this GRI Standard, the term 'business partners' includes, among others, suppliers, agents, lobbyists and other intermediaries, joint venture and consortia partners, governments, customers, and clients.

- 25 The provisions of GRI on anti-competitive behaviour:

#### Disclosure 206-1 Legal actions for anti-competitive behavior, anti-trust, and monopoly practices

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**REQUIREMENTS**

The reporting organization shall report the following information:

- a. Number of legal actions pending or completed during the reporting period regarding anti-competitive behavior and violations of anti-trust and monopoly legislation in which the organization has been identified as a participant.
- b. Main outcomes of completed legal actions, including any decisions or judgements.

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**GUIDANCE****Background**

This disclosure pertains to legal actions initiated under national or international laws designed primarily for the purpose of regulating anti-competitive behavior, anti-trust, or monopoly practices.

Anti-competitive behavior, anti-trust, and monopoly practices can affect consumer choice, pricing, and other factors that are essential to efficient markets. Legislation introduced in many countries seeks to control or prevent monopolies, with the underlying assumption that competition between enterprises also promotes economic efficiency and sustainable growth.

Legal action indicates a situation in which the market actions or status of an organization have reached a sufficient scale to merit concern by a third party. Legal decisions arising from these situations can carry the risk of significant disruption of market activities for the organization as well as punitive measures.

## ESRS G2 provisions

26 The requirements on corruption/bribery:

### ***Disclosure Requirement G2-6 – Corruption or bribery events***

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36. **The undertaking shall provide information on legal proceedings related to corruption or bribery during the reporting period.**
37. The principle to be followed under this disclosure requirement is to provide transparency on legal proceedings relating to corruption or bribery incidents during the reporting period and the related outcomes.
38. The disclosure required by paragraph 36 shall include information about the following:
  - (a) the main outcomes of legal proceedings related to corruption or bribery against the undertaking or its employees, concluded during the reporting period, including sanctions and fines. This shall include the number of convictions and the amount of fines for violation of anti-corruption and anti-bribery laws<sup>4</sup>;
  - (b) details of ongoing legal proceedings against the undertaking and its employees related to corruption or bribery;
  - (c) the number of investigations into and decisions in which employees were dismissed or disciplined for corruption or bribery-related incidents; and
  - (d) the number of investigations into and decisions relating to contracts with business partners that were terminated or not renewed due to violations related to corruption or bribery.
39. The undertaking shall disclose where it has insufficiencies in actions taken to address breaches in procedures and standards of anti-corruption and anti-bribery<sup>5</sup>.

27 The requirements on anti-competitive behaviour:

### ***Disclosure Requirement G2-7 – Anti-competitive behaviour events***

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40. **The undertaking shall provide information on any publicly announced investigation into or litigation concerning possible anti-competitive behaviour it is facing during the reporting period.**
41. The principle to be followed under this disclosure requirement is to provide transparency on publicly announced investigations into or litigation concerning possible anti-competitive behaviour of the undertaking that are ongoing during the reporting period.
42. The disclosure required by paragraph 40 shall include the following information:
  - (a) investigations into and decisions relating to violations of anti-trust and monopoly legislation where the undertaking (or its subsidiaries) was named as a participant by a competent authority;
  - (b) number of new, continuing, or finalised legal action (separately) during the reporting period regarding anti-competitive behaviour;
  - (c) main outcome of legal proceedings against the undertaking concluded during the reporting period, including sanctions, fines and damages orders.

**Proposals per the March working paper**

- 28 The requirements on corruption in the then G3 working paper as published in March 2022.

*Disclosure requirement 8 – Corruption incidents*

- 41 **The undertaking shall provide information on any confirmed corruption incidents that came to its attention during the reporting period.**
- 42 *The principle to be followed under this disclosure requirement is to provide transparency on any externally reported or internally identified corruption incidents during the reporting period and the related outcomes.*
- 43 The disclosure required by paragraph 41 shall include information about the following:
- (a) sanctions brought against the undertaking or its employees during the reporting period regarding corruption;
  - (b) the number of reported allegations of corruption received through whistleblowing channels;
  - (c) the number of investigations launched internally and the number of confirmed incidents of corruption;
  - (d) the number of confirmed incidents in which employees were dismissed or disciplined for corruption-related incidents;
  - (e) the number of confirmed incidents when contracts with business partners that were terminated or not renewed due to violations related to corruption;
  - (f) legal cases regarding corruption brought against the organization or its employees during the reporting period and the outcomes of such cases.
- 44 When (one of more items of) this information is presented in the financial statements, the undertaking shall refer to the relevant section of the financial statements.

<b>Corruption incident</b>	Incident of corruption that has been found to be substantiated by internal investigation but does not include those that are still under investigation at the end of the reporting period.
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- 29 The requirements on anti-competitive behaviour in the working paper:

*Disclosure requirement 9 – Anti-competitive behaviour incidents*

- 45 **The undertaking shall provide information on any confirmed incidents of anti-competitive behaviour it is facing during the reporting period.**
- 46 *The principle to be followed under this disclosure requirement is to provide transparency on the number, nature and outcome of any incidents with respect to anti-competitive behaviour of the undertaking during the reporting period.*
- 47 The disclosure required by paragraph 45 shall include the following information:
- (a) violations of anti-trust and monopoly legislation where the undertaking or its subsidiaries was named as a participant by a legal authority;
  - (b) number of new, continuing, or finalised legal action (separately) during the reporting period regarding anti-competitive behaviour;
  - (c) main outcome of legal proceedings against the undertaking concluded during the reporting period, including sanctions and fines.
- 48 When (one of more items of) this information is presented in the financial statements, the undertaking shall make reference to the relevant section of the financial statements.