

RESPONSES TO THE CONSULTATION PAPER ON THE REVIEW OF THE OECD ANTI-BRIBERY INSTRUMENTS

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Corruption and Corporate Liability in Germany

*Reform Measures**

Commentary on Section II.2. of the OECD Working Group on Bribery in International Business Transactions' Consultation Paper (Liability of Legal Persons for Bribing a Foreign Public Official)

Abstract

Corporate liability has to be designed such that opportunities for window-dressing are eliminated and that prosecution is disburdened. Besides, it must be formed in such a fashion that management has a true incentive for disclosing acts of wrongdoing on part of their agents. This paper focuses on corporate liability in Germany pursuant to the Regulatory Offences Act, highlights its weaknesses for anticorruption and proposes pertinent reform measures. It (a) provides additional insights into corporate liability and (b) addresses steps to be taken for making corporate liability a more potent anticorruption tool. By this, the study may provide guidance for reform for countries that are parties to the OECD Anti-Bribery Convention.

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1. Introduction

Imposing corporate liability is vital for preventing corruption. Without it, a corporation would be entitled to the benefits accruing to it through illegal activities performed in its interest, but would not at the same time be exposed to the disadvantages that may occur in the course of non-observance of rules and regulations.¹ Corporate liability seeks to balance this. Foremost, it aims at holding an entire corporation to account in case of corruptive misconduct by employees, designees or other contractual partners, and not only the natural persons who engage in such wrongdoing. Toleration or promotion of corruption, but also negligence or obfuscation thereof, is sanctioned collectively. By this, a corporation's stakeholders shall be urged in their own (financial) interest to implement and cultivate an all-encompassing corporate culture of respect and adherence to the rule of law (compliance).

Corporations as legal bodies cannot themselves commit illegalities, but only the natural persons they employ. Much debate has therefore surrounded the justification of corporate liability, with much emphasis put on corporate criminal liability. Critics of corporate criminal liability argue that, as legal entities, corporations lack *mens rea* and, thus, the blameworthiness necessary for criminal liability. Proponents counter that corporations are more than legal constructs, but have a "mind" of their own that is expressed by the interaction of its agents. Put differently, a corporation is considered to be animated by the people working for it; and therefore the mind of its employees is the mind of the corporation.

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¹ EOWiG, Begründung (explanation), Bundestags-Drucksache V/1269 (Lower House of the German Parliament), p. 59.

The imposition of criminal liability, however, is only one means of regulating corporations. Ultimately, it is up to jurists and politicians to decide if it is reconcilable with and desirable for their legal system. Taking this pragmatic stance is not to say that the discussion about the criminal responsibility of legal persons is not an important one. It indeed is. This paper, however, is more concerned with the question of how corporate liability, whether criminal or other, should be designed to be an effective anticorruption tool, and in which direction the OECD's Working Group on Bribery in International Business Transactions should push national reform. This is done against the background of corporate liability in Germany, backed by some examples relating to the corruption case involving German behemoth Siemens.

On October 4, 2007, the District Court in Munich ordered Siemens to pay EUR 201 million. In its decision, the court acted on the assumption that former executive employee Reinhard Siekaczek from 2001 to 2004 paid bribes to public officials in Russia, Nigeria and Libya in 77 cases for the purpose of securing contracts for Siemens. In the assessment of the fine, the court on the one hand factored in the unlawful economic advantage of at least EUR 200 million that Siemens was approximately able to gain from Mr. Siekaczek's illicit acts. On the other hand, the District Court imposed an administrative fine of EUR 1 million on Siemens.

After the explosive discoveries of corrupt practices within Siemens and the relatively mild fine imposed on the conglomerate, the voices of those in Germany and in other parts of the world demanding higher and more forceful consequences – not only for those directly involved, but also for the companies in which corruption could thrive and prosper – again grew louder. However, those who advocate rigorous sanctions for corporations easily overlook the other side of the coin.

Fighting corruption does not only mean to take a zero tolerance stance to it, and to hold those directly or indirectly involved responsible with little mercy. It also means to enable a reliable way back into legality for the ones who wish to clear the air. Yet, those looking for an exit frequently cannot find any. Not least, because engaging in corruption often means being at the mercy of “business partners” – evidence of which is provided by the following case.

In 2004, Siemens prematurely terminated a contract with a Saudi distributor. The Saudi retaliated and demanded a multimillion “payment of compensation”. Former chief financial officer Heinz-Joachim Neubürger testified to German prosecutors that the Saudi, in fact, extorted Siemens. If Siemens would not pay, the Saudi is said to have threatened to accord the American Securities and Exchange Commission (SEC) and other countries' watchdogs documents revealing illegal payments made by Siemens executives and employees in the late 1990s concerning Saudi Telecom contracts. Neubürger testified that, thereupon, Siemens paid EUR 50 million to the Saudi.²

Whether or not Neubürger's version of the story is true does not matter that much. In light of the extent of corrupt practices within Siemens it is escapist to assume that top management at least did not take notice of them. That senior executives at Siemens did not react forcefully to rumours or even to evidence of corruption clearly has to be criticised. Yet, the Siemens case points to one particular fact. Ending corruption means exposure to both the public and prosecution. Significant risks in terms of loss of reputation and of liability emerge. What remains is often the sobering discovery – or at least the individual perception – that carrying on with corruption is the sole viable option.

² See Berliner Zeitung (15 December 2006: “Diesem Spuk ein Ende machen”), <http://www.berlinonline.de/berliner-zeitung/archiv/.bin/dump.fcgi/2006/1215/wirtschaft/0005/index.html>, and Netzzeitung.de (31 January 2006: “Siemens hatte Geheimcode für Schmiergeld“), <http://www.netzzeitung.de/wirtschaft/unternehmen/516089.html>, download on 20 November, 2007.

To break that vicious circle, laws have to be formulated and enforced such that they do both deter people from corruption and offering reliable ways back into legality.³ Along this line of thinking, also corporate liability has to be designed such that it severely punishes those companies whose management does not stop corruption, but at the same time concedes leniency to those companies whose management aims at ending it. Otherwise, corporate liability may in the end run the risk of producing long-term, structural relationships of corruption.

However, corporate liability in Germany, as well as in many other countries that are party to the OECD Anti-Bribery Convention, offers no true incentives for management to voluntarily disclose corruptive practices within their business, because they have to fear both large fines and a significant damage to their reputation – the latter often being linked to the former. This is unfortunate. Spontaneous disclosure ultimately is the strongest signal of a zero tolerance stance towards corruption, or at least of effective regret and the pursuit of implementing good governance in the future.

This paper provides some clues on how corporate liability can be designed such that (a) deterrence is high, (b) window-dressing is replaced by real corporate due diligence and (c) corporations (or their management) have an incentive to report acts of wrongdoing. The paper does so against the background of corporate liability in Germany.

2. Corporate Liability in Germany and Problems for Anticorruption

German legislators have thus far shied corporate criminal liability because a corporation is considered not to have the *mens rea* necessary to inflict criminal liability. Nevertheless, German law has established a legal norm that makes it possible to hold business to account. Legal entities in Germany are sanctioned administratively according to § 30 in conjunction with § 9, and according to § 130 in connection with § 30 of the so-called Administrative Offences Act (Gesetz über Ordnungswidrigkeiten; abbr.: OwiG).

Liability under §§ 9, 30 OwiG and Problems for Anticorruption

Under § 30 OwiG, corporate liability is activated by the time a representative of a corporation, that is a person authorized to represent the corporation or a person in an executive position, commits a criminal or administrative offence by which either the duties pertaining to the corporation were violated or by whose means the corporation was benefited or should have been benefited.⁴ ⁵Additionally, corporate liability under § 30 OwiG is activated if a representative connives criminal or administrative offences, or knows of them but does not (try to) prevent them. Then, the corporation is indirectly responsible for the acts of the employee that commits the criminal or administrative offence.

The limitation that § 30 OwiG-liability brings about runs counter to potent anticorruption. Even though in principle all offences can be attributed to a legal body, corporate liability is not triggered by unlawful actions of people who are formally not seen as representatives of the corporation (unless offences were

³ See for instance Lambsdorff, J. Graf and Nell, M. (2007): *Fighting Corruption with Asymmetric Penalties and Leniency*, CeGE Working Paper No. 59, University of Göttingen; and Nell, M. (2007): *Strategic Aspects of Voluntary Disclosure Programs for Corruption Offences – Towards a Design of Good Practice*, Economics Paper V-53-07, University of Passau.

⁴ *Karlsruher Kommentar (2000): Ordnungswidrigkeitengesetz*, 2nd Edition, Verlag C.H. Beck, Munich, p. 476.

⁵ Representatives according to § 30 OwiG are, for instance, executive directors, members of the (supervisory) board, managing partners or shareholder; see Pelz, C. (2007): *Strafrechtliche und zivilrechtliche Aufsichtspflicht*, in: Hauschka, C. E. (Ed.): *Corporate Compliance*, Verlag C.H. Beck, Munich, p. 99.

mandated or connived by such representatives). § 9 (2) OwiG counteracts that problem to some extent. § 9 (2) in conjunction with § 30 OwiG can trigger corporate liability also if agents lower in the corporate hierarchy – for instance, branch or department managers, and in principle also external designees such as auditors or tax accountants – commit a criminal or administrative offence.

Nevertheless, the activation of liability remains insufficient. This is because, on the one hand, § 9 (2) Nr. 2 requires the explicit assignment of natural persons by the representatives of the corporation. A silent or implicit appointment does not suffice to trigger corporate liability in case of wrongdoing by the designees. This, however, is often the case when it comes to corruption. On the other hand, § 9 (2) Nr. 2 OwiG does not cover middlemen or intermediaries.⁶ Indeed, § 9 (2) Nr. 2 OwiG as a matter of principle includes also third parties. But to trigger corporate liability, it is necessary that these parties perform tasks that are incumbent upon the representatives of the corporation. This is not applicable in the case of middlemen or intermediaries. Consequently, German legislation in its present form may stimulate the use of middlemen or intermediaries to avoid corporate liability.⁷

Another deficiency is that §§9, 30 OwiG-liability requires the identification of an offender. According to German adjudication the offender does not have to be identified personally. However, it is a prerequisite that prosecution can prove that some representative, person in an executive position or acting for such person committed a criminal or administrative offence.⁸ Clearly, corporate liability should not be tied to the personal identification of a natural person since “complex corporate decision-making does not necessarily lend itself to the identification of specific individuals involved in corporate wrongdoing.”⁹ Rather, corporate liability should be activated once some, if applicable, unidentified agent commits a bribery offence.

Liability under §§ 30, 130 OwiG and Problems for Anticorruption

In essence, § 130 OwiG causes administrative liability of a proprietor of a corporation (that is, a person who is responsible for attending duties of supervision) by the time he negligently or wilfully omits those duties of supervision that are deemed necessary to avoid offences within the corporation, and if these offences could have been prevented or significantly impeded by observing his duties of supervision.¹⁰ Then, the proprietor can be administratively sanctioned (fined) to the amount of EUR 1 million if he fails to exercise due diligence negligently or willfully, that is culpably. In light of this, it is of relevance that § 130 OwiG allows to hold a corporation to account by means of conjunction with § 30 OwiG. That is, the violation of duties of supervision on part of a particular organ or of several organs of a corporation can activate the liability also of the legal person.

Involvement in terms of § 14 OwiG is not needed to activate personal liability. That is, the proprietor does not have to carry out a criminal or administrative offence himself, or command, connive or know

⁶ Bachmann, G. and Prüfer, G. (2005): *Korruptionsprävention und Corporate Governance*, in *Zeitschrift für Rechtspolitik (ZRP)*, 2005, pp. 109-113.

⁷ Lambsdorff, J. Graf and Nell, M. (2005): *Korruption in Deutschland – Reformmaßnahmen*, in *Wirtschaftsdienst: Zeitschrift für Wirtschaftspolitik*, Vol. 85 (12), 2005, p. 789.

⁸ *Idem*, p. 789.

⁹ OECD Working Group on Bribery in International Business Transactions (2008): *Consultation Paper – Review of the OECD Instruments on Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption*, p. 12.

¹⁰ *Karlsruher Kommentar (2000): Ordnungswidrigkeitengesetz*, 2nd Edition, Verlag C.H. Beck, München, p. 1599.

about the offence in order to be liable pursuant to § 130 OwiG. It suffices that the proprietor knows that the commission of a particular offence could have been prevented or significantly impeded through certain measures of due diligence.^{11 12}

§ 130 OwiG sees to it that management takes measures that are able to prevent or stop misconduct by all employees, designees and other contractual partners. Should the situation arise that management fails to do so negligently or willfully, it violates its duties of supervision (administrative offence) and the corporation is liable following § 30 OwiG. Consequently, management is not enabled to bypass its own and the corporation's liability by delegating authority and tasks to lower-ranked agents without such delegation being tied to commensurate measures of supervision and due diligence.^{11 12}

At the outset, one may conclude that liability pursuant to §§ 30, 130 OwiG is suitable for preventing corruption. If those responsible for exercising due diligence fail to do so wilfully or negligently, or delegate authority and tasks of supervision without this being tied to commensurate measures of supervision and due diligence, the corporation is held to account. This motivates management to attend to its duties of supervision. In practice, though, duty-based liability under §§ 30, 130 OwiG suffers from several significant deficiencies that run counter to forceful anticorruption.

First, the duties of supervision extend only to the prevention of violations of internal duties. Accordingly, management solely has to supervise those persons who are entrusted with company-related affairs. Sub-contractors do not have to be supervised, because they are not entrusted with internal matters, but act in their own business interest.¹³ This, however, means that bribery can also be "sub-contracted", with no implications following from §§ 30, 130 OwiG for the main contractor. Only if prosecution can prove that a person covered by §§ 9, 30 OwiG participated in or connived a particular corruption scheme, corporate liability also of the main contractor would take effect.

Second, in an affiliated group, top management's duties of supervision extend only to the combination itself, but not to the supervision of its legally independent subsidiaries.¹⁴ While this creates leeway for corruptive schemes already in the home country of the combine and its national subsidiaries, it particularly does so for schemes involving foreign subsidiaries. The adverse effect becomes especially pressing if corporate liability does not exist or is not enforced in the country where the foreign subsidiary is incorporated. This issue is also highlighted generally by the OECD Working Group.¹⁵

However, even if management does not try to circumvent §§ 30, 130 OwiG-liability through elaborate schemes involving sub-contractors and/or foreign subsidiaries, there are still substantial drawbacks

¹¹ Bundeskartellamt Bonn, Beschluss vom 17.12.2003 (decision made on December 12, 2003), Aktenzeichen (file reference) B9 – 9/03.

¹² Even though the law leaves open which concrete duties of supervision are necessary to comply with § 130 OwiG, case law has given some clues. In particular, duties of supervision relate to corporate organisation, employee-selection, -instruction, -monitoring and -sanctioning. For an overview on German adjudication see Pelz, C. (2007): *Strafrechtliche und zivilrechtliche Aufsichtspflicht*, in: Hauschka, C. E. (Ed.): *Corporate Compliance*, Verlag C.H. Beck, Munich, pp. 100-105.

¹³ Pelz, C. (2007): *Strafrechtliche und zivilrechtliche Aufsichtspflicht*, in: Hauschka, C. E. (Ed.): *Corporate Compliance*, Verlag C.H. Beck, München, S. 101.

¹⁴ *Idem*, p. 101.

¹⁵ OECD Working Group on Bribery in International Business Transactions (2008): *Consultation Paper – Review of the OECD Instruments on Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption*, p. 12.

attached to duty-based liability. It is often difficult for prosecutors to pierce organisational structures and processes of delegation to demonstrate an actual violation of the duties of supervision pursuant to § 130 OwiG. Intention or negligence on part of management is challenging to prove. Especially, if prosecutors and judges lack the competences necessary for demonstrating that the procedures and the measures of supervision taken or omitted, the motives thereof as well as their non-effectiveness are in a causal relation with corrupt practices.

Accordingly, it was not liability pursuant to § 130 in conjunction with § 30 OwiG, that is, a culpable violation of the duties of supervision on behalf of the Siemens management, that led to the administrative fine on October 4, 2007. Rather, it was § 30 OwiG alone. The reason is that Mr. Siekaczek, the man who bribed foreign officials in Nigeria, Russia and Libya, was an executive employee of Siemens. The elements of the regulatory offence pursuant to § 30 OwiG were met because a manager committed a criminal offence. Corporate liability, however, was not activated because Siemens' management negligently or wilfully failed to attend to its duties of supervision. This, German prosecutors were not able to prove, even though in some cases it may have been conjecturable.

This points up that, in Germany, a corporation may be able to hide behind a veil of collective organised irresponsibility. By means of window-dressing, management can formally comply with § 130 OwiG – for instance by proving in court that employees were continuously instructed and trained about the legal prescriptions they have to adhere to, or by showing that the internal audit department frequently exercised control. Then, the duties of supervision pursuant to § 130 OwiG may not be seen having been violated, and the legal entity cannot be held liable pursuant to § 30 OwiG since management did not commit the administrative offence. Instructing personnel about compliance, however, does not automatically lead to actual compliance. Siemens' management repeatedly proclaimed that corrupt practices would not be tolerated and be punished with utmost severity. Reality looked quite different, though. Similarly, high monitoring and control density does not bring about the detection of offences if one (consciously) looks for the wrong needles in the wrong haystacks.

§§ 30, 130 OwiG-liability brings about one other significant negative effect. Even though case law has provided some clues about what are considered reasonable duties of supervision, substantial legal uncertainty prevails. Management cannot anticipate which measures prosecutors and judges will deem reasonable. Besides, some of the measures taken may be non-verifiable in courts, because, for instance, no documentation exists or supervision was to a large extent exercised informally. In case of doubt, management has to fear that the absence or non-verifiability of particular measures of supervision will be misinterpreted by prosecutors or judges as wilful or negligent omission.

The risk of seeing their corporation held to account wrongfully – and fearing the ensuing negative effect on corporate reputation – leads to a reduction of the incentive to report offences of employees, designees or other contractual partners; even in case management adhered to its duties of supervision to the best of its knowledge, or at least honestly believed to do so. This ultimately undermines the deterrent effect of criminal and civil law, because those involved in corruption have less reason to worry about criminal charges or civil actions.

Skimming of Revenues under § 17 (4) OwiG and Problems for Anticorruption

As stated in the introduction, the District Court in Munich ordered Siemens to pay EUR 201 million. The fine can be divided into two parts: 1 million plus 200 million. The basis of the former was § 30 (2) OwiG, for the latter it was § 17 (4) OwiG. In essence, § 17 (4) OwiG states that the fine (imposed on a legal entity) shall exceed the economic advantage gained from the criminal or administrative offence.

This applied in the Siemens case. § 30 (2) OwiG provides for a maximum fine of EUR 1 million. This amount did not suffice to exceed the economic advantage that Siemens was able to make from bribery. Hence, the court levied an “additional” fine of EUR 200 million. This fine primarily served the purpose of skimming the “profits” Siemens made. Strictly speaking, it is revenues-skimming since adjudication in Germany has abandoned applying the so-called net principle in favour of the gross principle. The gross principle means that, under § 17 (4) OwiG, total revenues without the deduction of costs are skimmed.¹⁶

If profits (net principle) were skimmed instead of revenues (gross principle), no deterrence would be achieved at all. From this perspective, changing to the gross principle is an improvement. Nevertheless, the gross principle just reduces, but does not eliminate the problem of non-deterrence. Deterrence may be achieved for companies that incur high costs. That is, if a substantial loss occurs in the event of skimming. Deterrence, however, is not achieved if companies’ (project- or product-) cost-structure is low. Then, no significant difference exists between the gross and the net principle, and the preventive effect that skimming intends to bring about fulminates.

Oddly, hypothetical revenues are not part of economic advantages according to adjudication relating to § 17 (4) OwiG.¹⁷ Thus, skimming captures only those companies whose agents were able to bribe successfully. Those companies whose agents paid bribes, but nevertheless could not secure an economic advantage for their company, cannot be fined in excess of the maximum of EUR 1 million provided for in § 30 (2) OwiG. But is their illicit strategy less worthy of being sanctioned just because they were unsuccessful with it? Following the same logic, companies cannot be fined beyond EUR 1 million for “feeding” or “baiting”. There are no revenues to be skimmed if a company seeks to “cultivate good business relationships” by means of giving benefits, but no precise return service has materialized. Revenues-skimming clearly stands contrary to German penal law, where the granting of a benefit (Vorteilsgewährung; § 333 of the German Penal Code; StGB) is criminalized.¹⁸

Moreover, skimming can be disproportional. Imagine the following case. A municipal authority invites tenders for a road construction contract. The representative of one of the bidding companies pays a small bribe, say EUR 1,000, to the person in charge of soliciting the bids so that he ignores the late submitting of the company’s offer. In the process of an otherwise correct award procedure, the company’s tender is accepted and generates profits in the amount of EUR 5 million (revenues of EUR 10 million minus costs of EUR 5 million). The elements of both §§ 30 and 17 (4) OwiG are fulfilled. The skimming of revenues, resulting in a loss of EUR 5 million for the building firm, would be disproportional considering the EUR 1,000 bribe the representative paid.

3. Reform Measures

Three lines of attack seem to be most pressing for reform in Germany. First, un-limiting strict liability. This involves, on the one hand, activating liability at the time *any* agent of a legal person indulged in corruption. On the other hand, the prerequisite of identification should be waived. Furthermore, the condition that bribery must or should have benefited the corporation should be eliminated. Second, German legislation should abandon duty-based liability, that is triggering § 30 OwiG-liability in case of

¹⁶ G. Greeve (2007): *Korruptionsbekämpfung*, in: Hauschka, C. E. (Ed.): *Corporate Compliance*, Verlag C.H. Beck, Munich, p. 488.

¹⁷ Bohnert, J. (2007): *Ordnungswidrigkeitengesetz*, 2nd Edition, Verlag C.H. Beck, Munich, p. 96.

¹⁸ § 333 (1) StGB: Whoever offers, promises or grants a benefit to a public official (...) for the discharge of a duty shall be punished with imprisonment for not more than three years or a fine.

violation of § 130 OwiG, in favour of strict liability, that is triggering § 30 OwiG-liability by the time some agent commits a bribery offence. Such strict liability scheme ought to be tied to a pre-detection voluntary disclosure program. Third, the level of the fine should no longer be based on the gross principle, but rather on the proven bribe payments.

Un-limiting Strict Liability

In cases of corruption, corporate liability pursuant to §§ 9, 30 OwiG is too narrow. Consequently, reform should entail abandoning the limits put on the basis of corporate liability. In particular, German legislation should provide for strict liability being activated by the time some (unidentified) agent commits a criminal or administrative offence in the course of his contractual relationship with the company. In other words, corporations should always be held liable if an agent commits a bribery offence. As a result, the possibility of avoiding corporate liability by choosing a particular organisational form or structure, or by resorting to middlemen, would be eliminated.

This is in line with the OECD Working Group's assessment that "limiting the liability of a legal person for bribing a foreign public official to cases where the bribe was perpetrated by a senior person might not cover certain situations, in particular offences committed by legal persons with decentralised decision-making processes. For instance, it might not cover the case where someone other than a senior person who has been delegated the authority to act on behalf of the legal person in international business transactions bribes a foreign public official. A system of administrative or criminal liability for legal persons that addresses this kind of situation reflects emerging international trends."¹⁹

Moreover, German legislation should eliminate the condition that bribery must or should have benefited the corporation in order to activate liability. This is again congruent with the OECD Working Group's appraisal: "The third cross-cutting issue arises where (...) laws restrict the liability of legal persons for the (...) bribery offence to cases where the bribe benefits the legal person that gave the bribe. Such a law would not cover cases where a legal person bribes on behalf of a related legal person, including a subsidiary, holding company, or member of the same industrial structure (business conglomerate)."²⁰

Abandoning Duty-Based Liability

The system of duty-based liability under § 130 OwiG (triggering corporate liability in conjunction with § 30 OwiG) should be abandoned altogether in cases of corruption, and be replaced by the aforementioned "pure" system of strict liability. In its current design, § 130 OwiG, first, creates too large an opportunity for window-dressing. Second, it produces significant legal uncertainty that inhibits reporting on corruptive acts, thereby undermining penal and civil law's deterrent effects. A catalogue that outlines in a clear and transparent fashion what exactly is understood by § 130 OwiG as suitable measures of due diligence may ease the latter problem to some extent. Its actual application, however, is difficult because of companies' heterogeneity. Besides, such a catalogue again runs the risk of fomenting window-dressing. When push comes to shove, a company's management could argue that it implemented all the required measures, and corroborate its stance with some performance appraisals. Prosecution would have a hard time to bring forward convincing counterevidence.

¹⁹ OECD Working Group on Bribery in International Business Transactions (2008): *Consultation Paper – Review of the OECD Instruments on Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption*, p. 13.

²⁰ *Idem*, p. 13.

The problem of both window-dressing and legal uncertainty can be reduced by tying strict-liability to a pre-detection voluntary disclosure program. According to such a program, a company is exculpated automatically if its management voluntarily discloses offences committed by agents in the financial interest of the company prior to detection by prosecution.²¹ The double-system on the one hand provides a true incentive for management to report bribery or venality because of automatic exculpation. Penal and civil law's deterrence is not undermined. On the other hand, it pushes real due diligence. If it is only voluntary disclosure that leads to a company's exculpation, management is strongly encouraged to take measures of supervision that make detection of offences more likely.

A pre-detection voluntary disclosure program thus operates like § 130 OwiG. Management is urged to exercise due diligence in the interest of (its own and) the company's well-being. The fundamental difference to the current system is, however, that "due" is no longer measured (or tried to be measured) on the basis of formal, vague and sometimes opaque criteria, but by means of the actual use of measures of supervision. Attendance to the duties of supervision and due diligence are appraised on the basis of whether or not management was able to disclose offences before they were partly or entirely detected by prosecutors. In other words, since it is only effective measures that make timely disclosure possible, management is urged to exercise real due diligence. The possibility of window-dressing and paying lip service is eliminated. If managers decide against specific measures of supervision or intentionally design them weakly, they bear the risk that the company is going to be held liable in case of detection by prosecution.

Critics of such a system may argue that less ethically inclined managers could still command or brook corrupt practices, but by the same token could hastily disclose offences in case of imminent detection by prosecution. No liability would result. Such double standards, however, would swiftly be exposed by prosecutors. Not least, because those immolated by management on the altar of penal, civil and labour law would readily disclose the actual facts. Thus, the leeway for abuse of a voluntary disclosure program is rather limited. Besides, the program can be designed such that exculpation of liability is only conceded in the case management, if applicable, reveals its own involvement in corruptive acts. Otherwise, leniency both for management and the company expires.

Obviously, even well-designed measures of supervision and due diligence are not capable of detecting all offences in a timely manner. Nevertheless, prosecution may get wind of them by anonymous tips or own investigations. The proposed model runs the risk of holding corporations liable whose management were not able to detect and report offences, yet did not act culpably. To avoid making such a mistake, it may be conceivable to abstain from imposing liability if management can prove beyond reasonable doubt that it took measures by whose means the offences in question should have been avoided or significantly impeded. This would be equal to a reversal of the burden of proof: It is no longer prosecution that has to prove a wilful or negligent breach of the duties of supervision – as in the current §§ 30, 130 OwiG-liability system – but management has to prove the opposite. Put differently, management would be obliged to demonstrate that the procedures and measures of supervision taken (or consciously omitted) as well as the motives thereof are in no causal relation with the commission of corruptive acts.

Such a system disburdens prosecution and may be perceived by the public as fair treatment. If an agent is convicted for corruption, but a company's management can prove that it did all it reasonably could to avoid that agent's misconduct, the company is exonerated from liability. One, however, has to keep in mind that opportunities for window-dressing again arise. In fact, this system would only be different to §

²¹ Voluntariness could be interpreted analogous to § 371 (2) Nr. 1 and 2 of the German Fiscal Code (Abgabenordnung). Applied to corporate liability, a company is not sanctioned if its management discloses offences before they have been partly or entirely detected by prosecution, or must not have reckoned with investigations being under way.

130 OwiG-liability in one respect: the reversal of the burden of proof. To ward off window-dressing opportunities, I argue that corporations should always be held liable if some (unidentifiable) agent of them commits a bribery offence (strict liability) and if the offence was not voluntarily disclosed by management prior to detection by prosecution (voluntary disclosure program).

New Assessment Base for the Fine

Finally, the system of skimming revenues should be abandoned in favour of assessing the fine on the basis of proven bribe payments. Sufficient deterrence – also for those companies or branches of trade that have a low cost-structure and for whom skimming hardly has a deterrent effect – could be achieved by imposing a fine of, say, 50 times the size of the bribes. Besides, also those companies would be fined whose agents bribed unsuccessfully or engaged in “feeding” or “baiting”. At the same time, proportionality would be preserved. The aforementioned construction company, whose representative paid a EUR 1,000 bribe, would have to pay a EUR 50,000 fine. Yet, it would not be unduly hit by seeing a loss of EUR 5 million following the skimming of revenues.

4. Policy Recommendations

In cases of corruption, a reformed § 30 OwiG should be the sole basis for corporate liability in Germany. § 130 OwiG-liability should be abandoned in favour of un-limited strict liability tied to a pre-detection voluntary disclosure program. However, corporate liability pursuant to § 30 OwiG does not only apply to corruption, but also to other offences such as unlawful competition or environmental impairment. The mechanisms of such offences may be very different from those of corruption and may call for other reform. Therefore, instead of reforming § 30 OwiG universally, German legislators are urged to make corruption-specific amendments to § 30 OwiG. For example, the following amendments may be viable:

§ 30 OwiG (Fine against Legal Persons and Associations of Individuals) - Amendments

(X) If it is established that an employee, designee or any other present or former contractual partner of a legal person or an association of individuals engaged in the giving or taking of undue advantages under §§ 299, 300, and 331-335 German Criminal Code, the legal person or the association of individuals is to be fined to the amount of fifty times the size of the undue advantages given or taken.

(Y) The legal person or the association of individuals is not fined if those people responsible for performing duties of supervision voluntarily report and disclose the facts under (X). If those responsible for performing duties of supervision are guilty partners in the offences stated in (X), they have to disclose their involvement. Otherwise, (X) remains applicable.

Such legislation would bring about the following advantages. Amendment (X) expands corporate liability, because corruption offences committed by all natural persons in a contractual relationship with the company activate its liability. Liability-excluding delegation of authority without commensurate supervision is not possible anymore. In addition, liability cannot be circumvented by annulling the contractual relationship or by “covering” the actual culprits via complex corporate decision-making processes. Personal identification of an offender is not required anymore under amendment (X). Besides, the condition that bribery did or should have benefited the corporation is no longer present. This ensures that cases where a corporation engages in bribery on behalf of another legal person also trigger liability. Furthermore, the new assessment base of the fine avoids the problems associated with the skimming of revenues. In particular, also those companies are menaced by liability whose agents have not (yet) secured an economic advantage for the company. At the same time, proportionality is maintained as minor offences are not sanctioned overly severe.

Amendment (Y), sentence one, provides incentives to a corporations' management for taking those measures that make internal detection of corruption and voluntary disclosure likely. Window-dressing is not possible anymore. Moreover, corporations are given the chance to clear the air and to stop corruption of their own accord. Sentence two avoids abuse: If those eligible for initiating the voluntary disclosure process are guilty partners in the offence, they have to report this. Otherwise, the company is not exonerated.

5. Conclusion

In its Consultation Paper the Working Group identifies three main issues for reforming corporate liability in the countries party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: (a) expanding the base for corporate liability so that it is activated by the time some agent commits a bribery offence; (b) abandoning the prerequisite of personal identification, prosecution or conviction of a natural person; (c) giving up the condition that for corporate liability to be triggered the legal person was or should have been benefited by the offence.²²

Against the background of corporate liability in Germany, this paper confirms these points. However, it identifies two further crucial issues. First, reform should also entail assessing the fines levied on a legal body on a proper basis. In particular, fines should be a multiple of the bribes given or taken. Countries applying concepts such as revenues-skimming should abandon these and levy fines on the basis of the bribes. Second, countries with duty-based liability should change their system to strict liability, tied to a pre-detection voluntary disclosure program. By doing so, the main deficiency inherent in any duty-based liability scheme, specifically window-dressing, can be eliminated. At the same time, by a targeted pre-detection voluntary disclosure program corporations are both urged to exercise serious due diligence and given the opportunity to stop corruption of their own accord. Where management has already taken a zero tolerance stance on corruption, a voluntary disclosure program assists them with keeping corruption at bay without having to fear wrongful liability and a loss of reputation.

²² OECD Working Group on Bribery in International Business Transactions (2008): *Consultation Paper – Review of the OECD Instruments on Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption*, p. 13.