

**THE OECD CONVENTION ON BRIBERY:
A COMMENTARY**

A Commentary on the Convention on Combating Bribery of Foreign
Public Officials in International Business Transactions
of 21 November 1997

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Article 2 – The Responsibility of Legal Persons

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Article 2 – Responsibility of Legal Persons

Each Party shall 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 – Sanctions

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.

3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.

4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Official Commentaries

Article 2 – Responsibility of Legal Persons:

20. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.

Article 3 – Sanctions

Re paragraph 4:

24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

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The Significance of Corporate Liability in Combating Bribery

Considering that criminal law traditionally focuses on personal guilt, we can suppose that a criminalisation convention would concentrate in the first place on the conditions of *individual* responsibility. However, the *Travaux Préparatoires* to the Convention make clear that the topic of *corporate* liability was addressed from the very beginning of the drafting process, recognising the fact that corporate responsibility is crucially important in the context of combating transnational commercial bribery.¹

Large multinational corporate structures, in particular, have become increasingly decentralised. In practice, their activities involve complicated decision-making procedures and it is frequently difficult, if not impossible, to find an individual responsible for a decision to bribe.² It may happen that an individual employee resorts to illegal practices in order to boost his personal sales performance; alternatively the occasional rogue employees will be caught colluding with criminal officials to defraud company and state authority alike.³ It is, however, overall not uncommon for companies to become involved in bribery quite deliberately, and in a premeditated fashion. On the other hand, the instances in which a clear management decision to bribe will be on record are bound to be very rare and these will probably not be the serious cases envisioned by the OECD Convention. Typically, managers will leave it to front-line operators to take the actual decisions. They might, however, tolerate corrupt behaviour more or less implicitly, supply the necessary means or at least create the corporate climate that condones such illegal behaviour. Frequently euphemisms like ‘business as usual’⁴ are used in-house to describe what may be considered inevitable according to corporate culture. Under these circumstances the fairness of prosecuting individual low-level decision-makers alone, rendering them exclusively responsible, is highly questionable.⁵

Beyond individual wrongdoing, it is exactly this devious corporate culture that needs to be tackled, if the Convention wants to change attitudes in its centre of gravity, if, that is, it really wants to reduce ‘grand corruption’⁶ or the ‘supply side’ of corporate bribery.⁷ It is therefore no coincidence that most modern international instruments against bribery include provisions on corporate liability.⁸ The OECD text can in fact be seen as a forerunner of a world-wide harmonisation effort.⁹

¹ OECD 1999, F-1031.

² DE-Ph2, 31; BG-Ph2, 26 et seq.

³ Cf. the case *U.S. v. Steindler*, 3 FCPA Rep. 699.131 (S.D. Ohio 1994).

⁴ Cf. the OECD publication with this title: OECD 2000a.

⁵ DE-Ph2, 31; on individual responsibility in relation to corporate responsibility cf. Wells 2001, 160 et seq.

⁶ Moody-Stuart 1997.

⁷ Low 2003a, 13; Pieth 2000a, 52; Sacerdoti 2003, 71 et seq.

⁸ Cf. Arts. 2 and 3(2) OECD 1997b; Arts. 18 and 19 COE 1999a; Arts. 3 and 4 EU 1997b; Art. 26 UN 2003.

⁹ Möhrenschrager 1999, 102; Tarullo 2004, 665 et seq.

Academics, frequently referring to the US experience, claim that corporate liability has a particularly high deterrent effect, since it raises legal and ‘reputational’ risks for corporations as such.¹⁰ Whereas ‘general deterrence’ has remained a heavily disputed theory when referring to the effects of criminalisation on individuals, it seems that the *homo oeconomicus*, to whom the liberal thinkers of enlightenment (Beccaria, Smith, Bentham) alluded, is a far more realistic perspective in the corporate world. The simplicity of shareholder value concepts corroborates the claims of the ‘law and economics’ scholars.¹¹

In the materials developed by the OECD’s Working Group on Bribery (WGB) additional technical reasons were given for insisting on corporate liability, especially in relation to reluctant state Parties: in the Phase 2 evaluation of Bulgaria, for example, examiners held that ‘corporate entities’ were ‘frequent vehicles for the payment of bribes’, and went on to say that ‘the use of elaborate financial structures and accounting techniques to conceal the nature of transactions is commonplace’.¹² On the closely related issue of confiscation – another key instrument to raise the stake in cases of bribery – the WGB has repeatedly warned that the absence of liability of legal persons severely undermines the ability to confiscate in cases of foreign bribery.¹³

Whereas the regional anti-corruption instruments deal with more or less related legal systems, the OECD Convention has to span a far wider universe. Its concepts apply to Common Law, Civil Law, Eastern European and Far Eastern legal systems and must also be embraced by possible newcomers like China, India, Russia and South Africa. Since corporate liability is a matter where concepts diverge considerably across the world, and since it is a legal construct very much in development,¹⁴ the OECD negotiators opted for a very broad common denominator indeed. Above all the OECD refuses to become involved in the debate on criminal versus non-criminal corporate liability: the Convention deliberately allows both approaches, even if the international trend points towards criminal responsibility.¹⁵ The bottom line is, however, defined in Article 3(1) and (2): whatever kind of sanctions are imposed, they must be ‘effective, proportionate and dissuasive’. The Convention merely adds two elements: first, non-criminal as well as criminal sanctions have to include as a minimum ‘monetary sanctions’; second, Article 3(4) requests state Parties to consider the imposition of additional civil or administrative sanctions upon a person, even where the Party has chosen criminal liability for companies (the solution also chosen by the European Union (EU), whereas the Council of Europe (COE) Convention is silent on this issue).

¹⁰ Coffee 1999, 28 et seq.

¹¹ Posner 1994; Arlen and Kraakman 1997, 687 et seq.; Cohen 1996, 399 et seq.

¹² BG-Ph2, 26.

¹³ BG-Ph2, 27; CH-Ph1, 23.

¹⁴ Low 2003a, 44.

¹⁵ Art. 3(2); Official Commentary 20; whereas more recent international instruments, especially the Revised 40 Recommendations of FATF 2003, contain a primary obligation to create a criminal corporate responsibility: cf. Rec. 2b FATF 40/2003: ‘Criminal liability and, where that is not possible, civil or administrative liability should apply to legal persons.’

It should already be evident that the Convention's approach is rather 'basic' and that in order to define 'functional equivalence'¹⁶ in this area, further 'horizontal analyses' will be necessary.¹⁷

In the following discussion of Article 2 the most frequent models of corporate liability will be outlined (part I.); then the requirements of the Convention will be discussed in detail, with reference also to other international treaties (part II.), and certain conclusions will be drawn in part III.

I. The Variety of Models Available

Academics proffer several concepts to describe the various approaches to corporate liability. The following overview will outline the most common models of corporate criminal liability (section II.1.) and give an account of the furthest developed non-criminal concepts (section II.2.).

1. Models of corporate criminal liability

From a historical perspective there are essentially two major approaches. The development started, both in the Anglo-Saxon world and later in Civil Law countries, with traditional 'anthropomorphic' models,¹⁸ namely by imputing individual misbehaviour of agents to companies. This is quite a logical development, replicating the legal emancipation of corporate personality in civil law. Two sub-concepts (the 'identification-model' and 'vicarious liability') will have to be distinguished. Furthermore some legal systems chose a simple and radical variation of vicarious liability, namely 'strict' or 'absolute' liability, blocking all excuses or defences of the master for acts of his servant: this approach was believed to be at the same time more dissuasive and more easily manageable, especially in a jury trial system.

Both in Common Law and in Civil Law countries a more recent development has seen a shift towards a fundamentally different, more autonomous objective concept of corporate liability, the emergence of genuine 'corporate fault' or even 'the deficient company'.

1.1. Imputation theories

The negative effects of industrialisation, both in the United States and the United Kingdom, led legislators and courts to develop two early forms of corporate liability. They have their 'anthropomorphic' basis in common.

1.1.1. 'Vicarious liability' ('*respondeat superior*')

In the United States¹⁹ the development started from the civil responsibility of the master for his servant ('*respondeat superior*') and developed, especially in federal law, into the theory of vicarious criminal liability, allowing the imputation to the corporation of the misbehaviour of

¹⁶ Official Commentary 2; Pieth 2000a, 56 et seq.

¹⁷ E.g. MX-Ph1, 24.

¹⁸ Heine 2000, 5.

¹⁹ Coffee 1999, 14 et seq.; DiMento and Geis 2005, 159 et seq.; Wells 2000, 4.

employees acting within their responsibilities and for the intended benefit of the company. The theory was first developed on the basis of specific statutes, but it was rapidly generalised. In US federal law the approach was construed as a form of strict liability. This concept also applies to the Foreign Corrupt Practices Act (FCPA).²⁰ It is therefore not possible to exonerate the company simply by prohibiting illegal behaviour in company by-laws or even by elaborate compliance concepts. Sentencing Guidelines,²¹ however, provide for considerable mitigation of sentences for sound compliance plans.

Critics²² of the vicarious liability approach in general consider it at the same time too broad – blaming the company whenever the individual employee was at fault, even where the company itself was faultless - and too narrow (liability still needs to be triggered by the fault of an individual related to the company). Critical voices from the defence counsel community on the other hand regard its application to the FCPA as excessive, since it goes far beyond international requirements.²³

1.1.2. ‘Identification theory’ (‘alter ego’)

Beginning in the 1940s, an alternative model emerged in the United Kingdom, allowing corporate liability to be extended beyond statutory offences in general to the most serious crimes implying intent or recklessness (‘true crimes’, especially ‘*mens rea* offences’). The traditional ‘nominalist’²⁴ perspective of incorporation in the United Kingdom disputed the existence of a corporation beyond the collectivity of individuals. Based on this view, courts held the corporation exclusively responsible for acts of its ‘*directing mind*’.²⁵ In an analogy to the human body Lord Denning and others²⁶ distinguished between the ‘hand’ and the ‘brain’ of the company. This approach was formulated most explicitly in *Tesco v. Natrass*²⁷ by the House of Lords.

This ‘identification’ or ‘alter ego’ approach has had a significant influence on the development of corporate liability around the world,²⁸ even if it became evident that it is too narrowly focused on the involvement of the most senior company officials. The theory was hardly adequate for the modern decentralised structures of large multinational corporations.²⁹ Whereas the development in the United Kingdom itself was rather slow, the concept was

²⁰ Acquaviva 2003, 172; Coffee 1999, 28 et seq.; Wells 2001, 132.

²¹ Coffee 1999, 27, 37; US-Ph2, 16; Sentencing Guidelines 1991: ch. 8; for practical experience: cf. e.g. *U.S. v. Goodyear International Corp.*, 2 FCPA Rep. 698.1601 (D.D.C. 1989).

²² Wells 2000, 4; 1993, 109 et seq.; Heine 2000, 4.

²³ Cf. Low 2003a, 1, 44; for a more fundamental critique cf. Parker 1996, 381 et seq.

²⁴ Wells 2000, 2; cf. also C. Wells 1999, 120 et seq.

²⁵ Viscount Haldane, in *Lennard’s Carrying Co. v. Asiatic Petroleum* [1915] A.C. 713.

²⁶ *Lord Denning in Bolton (Engineering) Co. v. T.J. Graham & Sons Ltd.*, 1 Q.B. 159, 172 (C.A. 1956).

²⁷ *Tesco Supermarkets, Ltd. v. Natrass* [1972] Appeal Cases 153.

²⁸ Cf. its influence in Canada, New Zealand and US state law; but also the French systems of corporate liability.

²⁹ Critical: Coffee 1999, 30; Ferguson 1999, 155 et seq.; Heine 2000, 4; C. Wells 1999, 121.

extended dynamically in the Commonwealth.³⁰ Canada in particular gave the concept of the ‘directing mind’ a broader meaning.³¹

In *Civil Law countries* these ideas have been picked up and concepts have been generated based either on vicarious liability or on an identification approach.³² They generally adopted imputation models which hold companies responsible for the acts and omissions of their leading persons.³³ Both the COE and the EU in its Second Protocol have used identical formulae to define these leading persons:

‘Article 18, Council of Europe Convention – Corporate Liability

1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- a power of representation of the legal person; or
- an authority to take decisions on behalf of the legal person; or
- an authority to exercise control within the legal person;

as well as for involvement of such a natural person as accessory or instigator in the above mentioned offences.’³⁴

They have, however, gone beyond the traditional ‘identification theory’ by adding a second paragraph, according to which state Parties engage to:

‘ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority’.³⁵

Even with this addition the approach remains an imputation concept, since it still implies a personalised lack of control by one of the leading persons mentioned above. By indirectly holding the corporation responsible for mistakes of ordinary employees or even agents it moves, however, towards a wider concept of ‘corporate fault’.

1.2. Objective theories

Concurrently, not only in the realm of Common Law or Civil Law, but also in other legal jurisdictions, including South-East Asian law, a move towards a more objective focus on the

³⁰ C. Wells 1999, 119 et seq., 222 with reference to *Meridian (Meridian Global Funds Management Asia Ltd. v. Securities Commission)* (1995) All England Reports 918; cf. also Wells 2001, 112.

³¹ Coffee 1999, 19; Ferguson 1999, 170 et seq. (with reference to *Canadian Dredge & Dock Co. Ltd. v. The Queen* (1985), 19 C.C.C. (3d) 1 (S.C.C.); CA-Ph1, 8 et seq.

³² For France cf. Delmas-Marty 1994, 305 et seq.

³³ Austria: § 2(1) *Verbandsverantwortlichkeitsgesetz*.

³⁴ Art. 18(1) COE 1999a; cf. also Art. 3(1) EU 1997b.

³⁵ Art. 18(2) COE 1999a; cf. also Art. 3(2) EU 1997b.

fault of the corporation itself³⁶ has taken place, under the influence of changing corporate structures. This has been felt particularly during the last decade.³⁷

Among Common Law jurisdictions the Australian approach probably provides the best example:

The provisions of the new Australian Criminal Code Act 1995³⁸ hold the corporation responsible for acts by an agent, employee or officer to the corporation (section 12.2). In addition, for *mens rea* crimes (intention, knowledge or recklessness) the *'fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence'* (section 12.3). Authorisation or permission can be fulfilled in three ways: the first approach reproduces the traditional identification liability (misconduct by leading officer); the second extends the imputation to acts and omissions of 'high managerial agents' (and thereby replicates the Canadian approach); and the third indent refers to a 'corporate culture' which *'directed, encouraged, tolerated or led to non-compliance with the relevant provisions'*. The Act goes as far as to address *tacit authorisation* or even (in a fourth indent) the *failure to create* a culture of compliance.³⁹

Similar 'holistic approaches' are now to be found in several modern laws and in practice.⁴⁰ In effect, they shift the focus of corporate responsibility from misbehaviour of a leading person to a deficiency of the company, which could be quite independent of individual failure: the deficiency could even predate the arrival at the company of the current managers.

The new Swiss law on corporate criminal liability entered into force on 1 October 2003; it relies entirely on objective criteria when introducing a primary corporate liability for serious economic crime (corruption, money laundering, financing of terrorism)⁴¹ committed by any employee or representative. Regarding corruption the text requires: first, an (intentional) act of bribery by an employee or agent; second, that this act was in the potential interest of the company; and third, that it was an expression of the *'lack of reasonable organisational measures'*.⁴²

Both Japanese and Korean⁴³ corporate criminal liability are construed according to this model of organisational deficiency: the fact that a crime was committed by a company representative (including agents) in relation to its business, creates a reputable presumption that there has been a lack of due diligence in the corporation. Although the legislation offers a defence, under both laws the burden of proof is on the defendant.

³⁶ Coffee 1999, 30; Heine 2000, 4; Wells 2000, 6.

³⁷ Cf. esp. Fisse and Braithwaite 1988, 468.

³⁸ Part 2.5, s. 12(2) et seq. Australian Criminal Code Act 1995.

³⁹ Coffee 1999, 20; Wells 2000, 8; *ibid.* 1999.

⁴⁰ Heine 1995, 248 et seq.

⁴¹ CH-Ph1, 7 et seq.; Pieth 2001; Heine 2003.

⁴² Art. 100^{quater} Swiss Criminal Code; Heine 2003, 24 et seq.; Pieth 2001, 1 et seq.; *ibid.* 2003, 353 et seq.; *ibid.* 2004, 597 et seq.; CH-Ph1, 7 et seq.; CH-Ph2, 37 et seq.

⁴³ For Japan: JP-Ph1, 7 et seq. and Shibahara 1999, 39 et seq.; for Korea: KR-Ph1, 7 et seq.

Such objective standard models come rather close to strict liability combined with mitigation of sanctions for convincing compliance concepts.⁴⁴

2. Non-criminal corporate liability

Most laws know some civil or administrative sanctions against serious misbehaviour of corporations, but only a few⁴⁵ have reorganised these rules in such a way as to meet the standards set by the most recent international instruments against corruption. The German and the Italian laws may be among these few.

The standards of liability in these systems are construed similarly to the approach taken with regard to corporate criminal liability: they address the same issues, defining the entities covered, the persons triggering liability by their acts, the link to the corporate goal and the issue of lack of adequate supervision.

As the Convention does not rule out a non-criminal solution, the question whether a model is ‘sufficient’ for the purposes of the Convention depends on the effectiveness of its application, as measured in the Phase 2 evaluation.

When carrying out its evaluations the WGB places great emphasis on the ‘functional equivalence’ of criminal and non-criminal corporate liability. Both, in the cases of the new Italian law⁴⁶ and the German *Ordnungswidrigkeitengesetz*,⁴⁷ it has been noted that administrative sanctions were determined by criminal courts responsible for trying bribery by natural persons. In both cases, establishing the liability of a natural person is not a condition for a finding of corporate liability.⁴⁸ Additionally, it is considered a crucial indicator of equivalence that for the purposes of mutual legal assistance, corporate liability may be treated as ‘criminal’.⁴⁹ The Phase 2 evaluation of Germany nevertheless raised serious questions as to whether prosecution practice, which seemed to diverge considerably within the country, took the issue of corporate liability seriously enough. Doubts were raised in particular when prosecutors based in some of Germany’s leading economic centres stated that they were not fully aware of their responsibilities regarding companies. This may be a reflection of the ancillary and non-criminal nature of the fines.⁵⁰ The insistence with which the WGB interviewed prosecutors may serve as an indicator that a general policy shift on an international level towards criminal responsibility and against administrative liability of legal persons is currently taking place.⁵¹

⁴⁴ See II.4.5.2. below.

⁴⁵ In the eyes of the WGB the laws in, inter alia, Brazil, Bulgaria, Czech Republic, Hungary, Slovenia, and possibly also in Poland are inadequate.

⁴⁶ IT-Ph1, 13, 34; Sacerdoti 2003.

⁴⁷ DE-Ph1, 5 et seq., 18 et seq.; DE-Ph2, 28.

⁴⁸ IT-Ph1, 13; critical however IT-Ph2, 40.

⁴⁹ IT-Ph1, 29; DE-Ph1, 15 et seq.; DE-Ph2, 31.

⁵⁰ DE-Ph2, 30.

⁵¹ See note 15.

The treatment of Italian and German administrative corporate liability contrasts clearly with the Polish solution, which was met with far more reservations by the WGB. Polish procedure is genuinely ‘administrative’ in that it presupposes a final judgement or other final decision in criminal proceedings against a natural person. Based on the judgement, the President of a special agency (The Office for Protection of Competition and Consumers) may, under certain circumstances, institute proceedings against the enterprise.⁵² The WGB expressed doubts whether the standard of effective, proportionate and dissuasive sanctions was fully met and recommended re-examination in Phase 2.⁵³ This very cautious formula is clearly a consequence of the lack of a horizontal evaluation of corporate liability standards within the OECD framework. Considering the heightened scrutiny the WGB gave the German model, it seems highly doubtful that the Polish arrangement will pass the test in the Phase 2 evaluation.

II. Setting Standards for Corporate Liability: The Requirements of the OECD Convention

1. General remarks

Despite the insistence that responsibility of legal persons is particularly crucial in preventing bribery in international business transactions, the texts of Article 2 and 3 of the Convention are not very articulate when it comes to defining the minimum standard to be implemented by state Parties.

Article 2 merely obliges state Parties ‘to establish the liability of legal persons for the bribery of foreign public officials’. The clause inserted, ‘in accordance with its legal principles’, does not add anything new: it simply recalls the overarching principle under which the Convention has been drafted, i.e. ‘functional equivalence’ (Official Commentary 2). When compared with the far more eloquent clauses in the Convention of the COE on Corruption of 27 January 1999 (Article 18) and the Second Protocol to the EU Convention on the protection of the European Communities’ financial interests of 19 June 1997 (Article 3), Article 2 of the OECD Convention indicates just how mindful the drafters were of national particularities. Article 26 of the more recent UN Convention Against Corruption follows the model of the OECD.

The interpretation of the Convention therefore has to respect such differences. Nevertheless, within the process of evaluation the WGB is forced to develop standards. The anchor point for ‘benchmarking’ is contained in Article 3. First, Article 3(1) makes clear that ‘the bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties’. The second paragraph of the text adds:

‘In the event that under the legal systems of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.’

In the context of evaluating the functional equivalence of corporate liability, the formula ‘effective, proportionate and dissuasive’ addresses the adequacy of the entire approach for the whole concept of corporate liability. It goes well beyond mere sanctioning. Based on the

⁵² PL-Ph1, 11 et seq., 15.

⁵³ PL-Ph1, 32 et seq.

models discussed above⁵⁴, but also by reference to treaties covering similar terrain (EU and COE) the WGB attempts to develop standards in its evaluation practice by addressing four sets of issues:

- the definition of legal entities covered;
- standards of liability;
- sanctions;
- enforcement.

2. Defining the legal entities covered

2.1. Legal person v. business entity

The term ‘legal person’ is not defined in the OECD Convention. The understanding is that this term refers back to the law of the state Parties. This is the solution chosen by the COE and EU instruments.⁵⁵

First, it must be mentioned that not all state Parties limit themselves to ‘legal persons’ when dealing with corporate liability. Some address the responsibility of ‘enterprises’, ‘corporations’, or ‘business entities’.⁵⁶ Other state Parties try to achieve a similar result by expanding the scope of traditional legal persons (usually a definition to be found in their civil code or company law⁵⁷) to all entities ‘entitled to rights’⁵⁸ or ‘capable of doing business’. In various state Parties mere partnerships are now included in the list of legal entities covered.⁵⁹ Some state Parties explicitly include single owner businesses, at least beyond a certain size.⁶⁰ With a few exceptions, the older concepts of corporate liability, are defined more narrowly, especially in Common Law jurisdictions,⁶¹ even though a tendency to expand the definition has been recorded.⁶²

So far, the WGB intervened on this point only where a Party fell below the standard set by its own law. In the case of Greece⁶³ not all legal persons – according to the Greek definition of this term – were covered by the scope of the anti-corruption law: foundations and associations were not included at the time of the Phase 1 examination. Considering the possibilities of

⁵⁴ See part I. of this ch.

⁵⁵ Cf. the definition provision of each instrument referred to above: COE 1999a; Art. 1(f) EU 1997b.

⁵⁶ E.g. Poland, Sweden, Switzerland.

⁵⁷ For Common Law cf. Wells 2001, 81 et seq.

⁵⁸ Iceland.

⁵⁹ Belgium, Germany, Italy, Netherlands, New Zealand, Norway.

⁶⁰ Denmark, Switzerland.

⁶¹ Australia, Canada, United Kingdom.

⁶² The United States gave up the limitations to ‘issuers’ and ‘domestic concerns’ in the 1998 Amendment to the FCPA.

⁶³ GR-Ph1, 17.

hiding ‘slush funds’ behind such corporate structures this point was rightly criticised by the OECD.

2.2. Public entities?

The question arises whether the state itself or departments of state and also international organisations may be exempted from the scope of regulation by anti-corruption legislation. In some countries it may be the case that at least the central government of the state cannot be taken to court by the state itself.⁶⁴ It is another question whether agencies of local government may fall under the remit of legislation covering corporations.⁶⁵ Certainly, where the state has endowed entities with powers to engage in contracts on its behalf, these bodies should not be allowed to escape regulation. The nature of ‘state-owned’ or ‘state-controlled’ enterprises differs from one state to the next, but the WGB has insisted that such bodies be covered by the state Parties’ definitions of ‘legal persons’.⁶⁶ Nowadays, most state Parties simply subject state-owned or state-controlled enterprises to the general law, though others distinguish them according to the social goal⁶⁷ of the enterprises. This issue is examined in greater depth in the chapter on Article 1 of the Convention.

3. Substantive liability

Based on the national systems and the other international instruments, standards of liability must address the following issues:

- crimes covered by corporate liability;
- benefit to the legal person;
- level of person engaging corporate responsibility;
- relationship between procedure against natural and legal persons;
- standard of liability (strict liability?, corporate negligence?).

3.1. Crimes covered

The corporate liability provisions of the OECD Convention must apply to all forms of corruption under Article 1. The way state Parties achieve this goal does not matter for the purposes of the Convention: they may introduce a generally applicable concept of corporate liability,⁶⁸ by listing specific crimes for which corporate liability would be applicable, including transnational bribery,⁶⁹ or by addressing the issue of transnational bribery in a specific code.⁷⁰

⁶⁴ E.g. Germany; according to Austrian law (§ 1(3) Verbandsverantwortlichkeitsgesetz) not even local public entities are criminally accountable.

⁶⁵ France.

⁶⁶ Cf. the comments directed at the Mexican law: MX-Ph1, 24.

⁶⁷ Commercial or public; e.g. Denmark, Finland.

⁶⁸ United Kingdom.

⁶⁹ France, Switzerland.

⁷⁰ United States.

3.2. Benefit to the legal person

3.2.1. Company interest

All concepts of corporate liability seek to make a distinction between crimes serving purely private goals of the perpetrator and bribery intended to further the interests of the corporation.⁷¹ The delimitation of the field of corporate responsibility for acts of company employees is far from uniform. Frequently the formulae refer to acts ‘on behalf of’, ‘in the name of’, ‘in the interest of’ or ‘for the benefit of’ the legal person.

One can distinguish between at least three levels of ‘connection’ between the act concerned and the company interest, ranging from a rather loose connection to a very ‘intense’ relationship: the closer the connection required, the more exclusive is the approach to corporate liability.

A first group of countries merely requests that the bribery has been committed ‘in relation to’ or ‘in connection with’ the business of the legal person, or simply ‘in the course of its operations’.⁷² According to a second group of countries, a ‘general interest test’ is required: ‘on behalf of’, ‘in the name of’, ‘in furtherance of the interest of’, ‘for the gain of’ etc. These are the standard formulations adopted by most Party states.⁷³ From the point of view of effective, proportionate and dissuasive corporate liability provisions, it seems excessive to require evidence that the corporation has actually *benefited* from the crime. It is therefore questionable whether a country would meet the standard of the Convention, if the issue was addressed by the formula that the company has ‘accepted the act or the benefit’.⁷⁴ Finally, some countries attempt to exclude crimes for mere personal interest by an explicit exception clause.⁷⁵ Rather original is the Swedish solution to relax the supervisory duties where the link to the company activities becomes weak.⁷⁶

3.2.2. Within the scope of corporate duties

Additional qualifiers need to be distinguished from the interest test that may be found in some laws, such as that the employee in question acts within the field assigned to him/her or within his/her duties.⁷⁷ This requirement should not be confused with the question whether he or she has acted contrary to instructions: the latter question should be addressed in terms of fulfilment of the standard of liability.⁷⁸

⁷¹ For a historical perspective cf. Ferguson 1999, 161 et seq.

⁷² Iceland, Japan, Korea, United Kingdom.

⁷³ Belgium, Canada, Finland, France, Germany, Italy, Mexico, Norway, Portugal, Switzerland, United States.

⁷⁴ Coffee 1999, 21: with reference to Art. 51 Dutch Criminal Code.

⁷⁵ Canada (except where company becomes a victim), Denmark, Italy.

⁷⁶ SE-Ph1, 7.

⁷⁷ Canada, United Kingdom, United States; for the usual conditions of the ‘identification doctrine’ cf. Wells 2001, 85 et seq.

⁷⁸ See II.3.5. below.

3.3. Level of person engaging corporate responsibility

For the purpose of benchmarking the most relevant requirement is probably the so-called ‘leading person criterion’. As highlighted in our overview of models⁷⁹ the more traditional approaches made corporations liable only for the acts of senior company officials. This had a theoretical basis in the ‘*alter ego*’ concept and a practical grounding in the then prevailing patriarchal leadership model.⁸⁰ In the light of modern, decentralised decision-making these approaches are coming under pressure.

A rough overview of existing laws (not necessarily reflecting all the intricacies of modern case law and ongoing discussions in law committees) allows us to distinguish between four groups of Party states:

- The United Kingdom’s definition of ‘*directing mind*’, even after the more recent case law⁸¹ and the Law Commission’s Report,⁸² still seems to be the most demanding of the laws discussed here.
- Canada applies a somewhat broader definition of ‘*directing mind*’ (including all employees with ‘*decision-making authority on matters of corporate policy*’)⁸³ and is apparently planning to include cases where these senior company officers were aware of or wilfully blind to criminal behaviour of their subordinates. New Zealand seems to have relaxed the elitist standards of Common Law in a slightly different direction by focusing on the real (factual) control over related activities.⁸⁴
- According to a further category, made up mostly of Continental European countries and in line with the approach of the COE and EU, two separate criteria are cumulated: first, beyond acts committed or condoned by senior management, personalised management failure is included; second the company will additionally be held responsible for ‘*culpa in eligendo, instruendo et custodiendo*’ of senior managers (‘lack of supervision rule’).⁸⁵
- The largest group of countries has decided to impute misbehaviour of ‘any employee’ to the company.⁸⁶ Some countries explicitly include agents and other third parties engaged in the company’s interest in their texts or explanatory reports.⁸⁷ Among these the United States follows a strict liability rule;⁸⁸ others demand an objective corporate fault;⁸⁹ Japan

⁷⁹ See part I. of this ch.

⁸⁰ For an early example cf. *Lennard* case (see reference in note 25).

⁸¹ Cf. the *Meridian* case of 1995 (see reference in note 30).

⁸² Law Commission 1996; C. Wells 1999, 121 et seq.; Wells 2005, 154 et seq.

⁸³ CA-Ph1, 8; CA-Ph2, 29; Ferguson 1999, 171 et seq., referring to the *Canadian Dredge & Dock* case (see reference in note 31).

⁸⁴ NZ-Ph1, 12.

⁸⁵ Art. 3(2) EU 1997b; Art. 18(2) COE 1999a; Austria, Finland, France, Germany, Greece, Italy, Japan, Sweden.

⁸⁶ Belgium, Denmark, Iceland, Korea, Mexico, Netherlands, Norway, Switzerland, United States.

⁸⁷ Denmark, Iceland, Korea, Switzerland, United States.

⁸⁸ United States.

⁸⁹ Finland, Japan, Korea, Sweden, Switzerland.

and Korea have shifted the balance of proof for the absence of negligence onto the corporation.⁹⁰

Even though this criterion is crucial for the effectiveness of corporate liability, the WGB has so far been hesitant to pronounce itself on a minimum standard relating to the level of the person required to engage responsibility. Discussions were held in 2000 and 2002 whether the European standard contained in COE and EU instruments (see Article 18(2) of the COE Convention and Article 3 of the EU Second Protocol) should be adopted by the OECD as a kind of compromise solution. So far, no decision has been taken. It nevertheless seems that in Phase 2 pressure on the first group of countries to widen the range of persons triggering corporate liability will grow. Similarly, in relation to the third group of countries referred to above, the WGB has already criticised those which have not yet established the ‘lack of supervision’ rule.⁹¹

3.4. The relationship between procedures against natural and legal persons

The relevant provisions of both EU and COE instruments emphasise that proceedings against legal persons⁹² should not exclude action against natural persons. For an established concept of corporate liability the reverse situation should also apply: the fact that an individual has been prosecuted should not automatically exclude corporate liability.⁹³ Even though the text of the OECD Convention is silent ‘in both directions’, it may be assumed that for an ‘*effective, proportionate and dissuasive*’ concept of corporate liability there should be no categorical exclusion of the prosecution either of natural or legal persons.⁹⁴

It is a different matter whether an individual offender must be identified and convicted or even sanctioned before corporate liability can be engaged. This question has however stirred an unnecessary debate: bribery is a mens rea crime, requiring intent or at least knowledge. Therefore someone in the company must fulfil these requirements.⁹⁵ However, there are cases in which, due to complex decision-making procedures, the information is scattered over several officers and only its combination brings full knowledge. Furthermore, it could be that within a group of decision-makers it remains unclear whether they all have participated in the decision. For such situations modern legislation in some states, or current jurisprudence, is satisfied, if one person in the relevant circle can be shown to have had knowledge, intent or to

⁹⁰ Japan, Korea; for details see II.3.5. below.

⁹¹ FR-Ph1, 12, 30; however, academic writing and practice suggests this concern may be unfounded in the case of France: cf. Delmas-Marty 1994, 308 and further comments in II.3.6. below.

⁹² Cf. more recently Art. 26(3) UN 2003.

⁹³ Cf. the discussions in Switzerland: Pieth 2001, 10; *ibid.* 2003, 358; Heine 2001, 307 et seq.; *ibid.* 2003, 27 et seq.

⁹⁴ On this issue from a perspective of national law: Cohen 1996, 399 et seq.; Fisse 1991, 255 et seq.; Wells 2001, 160 et seq.

⁹⁵ Cf. explicitly: Denmark.

have violated his or her supervisory duties.⁹⁶ Other jurisdictions have explicitly repudiated such concepts of ‘*aggregate knowledge*’.⁹⁷

In two cases the WGB expressed doubts whether a country met its obligations according to international law, since the state Parties’ laws require the conviction of an individual as a prerequisite even to begin proceedings against a corporation.⁹⁸

3.5. Standard of liability

Classic imputation theories (‘identification theory’ and ‘vicarious liability’) have held the corporation responsible for the misconduct of its officers.⁹⁹ Under all systems even the best of compliance models will not be able to shield the corporation from liability, if the ‘*directing mind*’ him- or herself authorised or even ordered the illegal conduct. As far as such systems impute the behaviour of junior staff to the organisation, they either apply an absolute (strict) liability¹⁰⁰ or a duty-based approach. The European development of the ‘identification theory’, especially on the Continent, has seen the evolution of a personalised ‘lack of supervision’ approach, promoting and following the COE and EU instruments:¹⁰¹ thus, the corporation will be held liable for mismanagement in selecting, instructing and supervising junior staff.

So-called ‘objective’ or ‘holistic’ theories¹⁰² move away from personal blame for the lack of supervision by employees or managers in order to define organisational blame¹⁰³ or ‘*corporate fault*’.¹⁰⁴ Based on experience with environmental disasters, explosions, rail crashes, maritime disasters etc. this theory implies that creating a complex corporate structure may in itself be hazardous. This risk needs to be counterbalanced by adequate organisational concepts, an appropriate corporate culture and credible compliance efforts, the lack of which will entail corporate responsibility independently of individual management failure.¹⁰⁵ As Celia Wells puts it, this ‘*model locates corporate blame in the procedures, operating systems, or culture of a company*’.¹⁰⁶

⁹⁶ DE-Ph2, 32, § 120; IS-Ph1, 6; FR-Ph1, 12; NO-Ph1, 4 et seq.; United States: for ‘collective knowledge’ doctrine: Wells 2001, 134.

⁹⁷ Cf. United Kingdom: *Bingham J.* in the case against *P. & O. Ferries* in the aftermath of the disaster of Zeebrugge: Wells 2001, 108 et seq.

⁹⁸ MX-Ph1, 24; PL-Ph1, 11, 32.

⁹⁹ See I.1.1. above.

¹⁰⁰ E.g. United States.

¹⁰¹ Cf. especially Austria, France, Germany and Italy.

¹⁰² Wells 2001, 85 et seq. and see I.1.2. above.

¹⁰³ Heine 2000, 4; Coffee 1999, 30.

¹⁰⁴ C. Wells 1999, 119 et seq.

¹⁰⁵ Australia, Denmark, Finland, Japan, Korea, Sweden, Switzerland.

¹⁰⁶ Wells 2001, 85.

Under these systems, in contrast to a system of strict liability, the prosecution would have to prove the insufficiency of compliance concepts. Alternatively, the corporation could be granted a ‘due diligence defence’.¹⁰⁷ One of the reasons for the choice of strict liability seems to be that this task can be formidable, especially in the context of a jury trial.¹⁰⁸ Practical reasons may therefore dictate shifting the discussion of adequate compliance plans into the sentencing phase, governed by a professional judge. Whereas some of the European countries, with a far more inquisitorial trial system, are confident that the adequacy of corporate organisational arrangements can be discussed in court,¹⁰⁹ some countries have, however, chosen – as an intermediary solution – a due diligence approach with reversal of the burden of proof. In Australia, Japan and Korea the law offers an exception to the responsibility of the corporation, under the condition that it has fulfilled its organisational and supervisory obligations. The corporation itself bears the burden of proof for this assertion.¹¹⁰

3.6. Defining the ‘bottom line’ of substantive liability of corporations according to the OECD Convention

3.6.1. Corporate criminal liability

It is not just sanctions and sanctioning practice, but also the choice of attribution model, which need to pass the test of ‘*effectiveness, proportionality and dissuasiveness*’.

From the point of view of ‘dissuasive power’ strict vicarious liability seems to come out on top.¹¹¹ Additionally, this approach has the advantage of being simple to manage. So simple that even laymen, including members of a jury, can apply the concept. As we have seen, critics¹¹² have, however, maintained that the system oversimplifies: it holds the company responsible even where it has done all it could to prevent the crime (although it may receive a mitigated sentence for a sound compliance programme). In our view, there is not and should not be a requirement in international law to adopt strict liability of legal persons for corruption cases.

The identification model, the second and most significant school of thought in corporate criminal liability, with practical examples both in Common Law countries (Canada, New Zealand, UK and US state law) and Civil Law states (France, Belgium), equally depends upon the wrongdoing of an individual imputed to the company. But our preceding analysis has shown that some of the applications of this approach focus narrowly on crime committed either by the most senior company representatives only,¹¹³ or by those concerned with business policy decisions.¹¹⁴ This would exclude liability of the company for the wrongdoing

¹⁰⁷ Gobert 1998, 14.

¹⁰⁸ Coffee 1999, 31.

¹⁰⁹ Heine 2003, 36 et seq., 38 et seq.; Pieth 2001, 14 et seq.; *ibid.* 2004, 604 et seq.

¹¹⁰ Cf. for a similar approach: Law Commission 1996 (see note 82); Wells 2001, 120 et seq.

¹¹¹ Coffee 1999, 28 et seq.

¹¹² See I.1.1.1. above.

¹¹³ For United Kingdom: *Tesco* or *Meridian* case (see references in notes 27, 30).

¹¹⁴ For Canada: *Canadian Dredge & Dock* case (see reference in note 31).

of less senior staff, even where they carried major responsibilities on a technical level.¹¹⁵ Moreover, in some constituencies the ‘elitist’ character of this approach is reinforced when constructions like the ‘aggregate’ or ‘collective’ knowledge of the ‘directing mind’ are repudiated.¹¹⁶

Critics have raised doubts whether this approach meets the requirements of national¹¹⁷ and international law.¹¹⁸ We believe that the test of ‘effectiveness, proportionality and dissuasiveness’ can be met, only if this approach deems management failure to include the lack of due diligence in hiring, the absence of education and instruction and a failure of supervision and control. Those laws which comply with the requirements of Article 18(2) of the COE Convention or with the similar terms of Article 3(2) of the Second Protocol of the EU can therefore also be regarded as consistent with the requirements of the OECD Convention regarding corporate liability.¹¹⁹

From an effectiveness perspective, many academics are moving towards an ‘autonomous approach’.¹²⁰ For a ‘mens rea crime’ this approach, of course, also requires an offence to have been committed by an individual, employee or agent of the company; this person does not, however, have to be a ‘directing mind’. Rather, responsibility of the corporation is triggered by lack of organisation, a breakdown of management procedures or where management allows a deviant corporate culture to develop. Applying this model and going beyond the above-mentioned enlarged identification model mere disorganisation on the level of management - not attributable to individual managers - would suffice for corporate liability.¹²¹ This approach has the advantage of placing due diligence and compliance ‘centre stage’. Gobert rightly points out that offering a ‘due diligence defence’, rather than creating strict liability, is more subtle and more motivating to companies: it uses the ‘carrot’ rather than the ‘stick’.¹²² On the other hand, it is equally true that ‘due diligence’ and ‘compliance’ are not simple concepts and that a jury might well be at a loss to apply them. The challenges to professional judges do not, however, diverge substantially from other offences committed as a result of lack of diligence (e.g. cases of professional negligence by architects, surgeons, mountain-guides etc.).¹²³

¹¹⁵ Ferguson 1999, 176 et seq.

¹¹⁶ For United Kingdom: see II.3.4. above; critical Wells 2001, 156.

¹¹⁷ Aiolfi and Pieth 2005, 401 et seq.; Gobert 1998, 13 et seq.; Ferguson 1999, 13 et seq.; Wells 2001, 152; Wells 2005, 154 et seq.

¹¹⁸ Ferguson 1999, 176 et seq.; Wells 2001, 143. Still cautious at the time in the light of so many other deficiencies: UK-Ph1, 8 et seq.; now more forcefully: UK-Ph 2, 59 et seq.

¹¹⁹ Cf. the examples of France: II.3.3. above; Austria, § 3, s. 2.

¹²⁰ Coffee 1999, 33; Fisse 1991; Gobert 1998; Heine 1995, 319 et seq.; Pieth 2001, 1 et seq.; *ibid.* 2003, 353 et seq.; *ibid.* 2004, 597 et seq.; Wells 2001, 85, 156 et seq.

¹²¹ For example, Australia, Korea and Switzerland: see I.1.2. above.

¹²² Gobert 1998, 12 et seq.

¹²³ Pieth 2004, 604 et seq.

3.6.2. Non-criminal liability

The classic international instruments against corruption all allow for the alternatives of ‘*criminal or non-criminal sanctions*’.¹²⁴ It is equally true that the instruments attach these sanctions to the commission of ‘criminal’ offences (explicitly in Article 19(1) of the COE Convention. It is therefore obvious that the negotiators of anti-corruption treaties did not intend that corporate responsibility should be transferred fully into the domain of traditional civil or administrative law.

Indeed, more recent international legal sources are increasingly moving towards a primary requirement of corporate criminal liability. See for example the Revised Forty Recommendations of the FATF, which merely allow for administrative corporate liability on a secondary level.¹²⁵ Furthermore, evaluation task forces give those countries favouring non-criminal liability a far more thorough screening, mainly because corporate liability might not be pursued with the same rigour as in criminal law.¹²⁶ It may be assumed, therefore, that the pressure towards criminal liability in public international law will only grow further in the years ahead.¹²⁷

4. Sanctions

4.1. Sanctions against corporations

The objectives of corporate sanctions are contested.¹²⁸ Some systems, especially those based exclusively on corporate fines, are directed at general deterrence. The approaches which mix fines and forfeiture are primarily interested in siphoning off illegal profits (forfeiture, confiscation). Finally, the restrictions on corporate behaviour or ‘freedom’, such as orders, conditions, prohibitions etc., pursue a more preventive or rehabilitative goal (especially in the case of nomination of a trustee).¹²⁹ In sum, the regulation of sanctions for corporations reflects a very diverse range of attitudes to corporate control in the state Parties: given this situation, the imposition of an international standard becomes all the more difficult.

4.2. The international standard

At first sight the standards of the international treaties show considerable differences.

Article 4(1) of the EU’s Second Protocol contains the following provision on sanctions for legal persons:

‘Each Member State shall take the necessary measures to ensure that a legal person...is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:

¹²⁴ Art. 26(4) UN 2003; Arts. 18 and 19(2) COE 1999a; Art. 3 EU 1997b; Art. 3(2) OECD 1997b.

¹²⁵ Rec. 2b FATF 40/2003 (see note 15).

¹²⁶ This was a concern that was first raised in the OECD Phase 2 evaluation of Germany, cf. DE-Ph2, 30 and see I.2. above.

¹²⁷ Bundesministerium für Justiz (Austria) 2004, 15 et seq.

¹²⁸ Coffee 1981, 397 et seq.; Heine 1999, 237 et seq.

¹²⁹ Gobert 1998, 9 et seq.

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent disqualification from the practice of commercial activities;
- (c) placing under judicial supervision;
- (d) a judicial winding-up order.’

This first paragraph applies to crimes authorised by leading company officials. The enumeration of sanctions restricting corporate freedoms is taken from a COE Recommendation of 1988¹³⁰ and is also inspired by French law.

Interestingly enough, with regard to the second paragraph, the EU text diverges from the COE approach and restricts itself to requesting effective, proportionate and dissuasive sanctions or measures in the case of lack of adequate supervision.

Clearly, the formula ‘*effective, proportionate and dissuasive sanctions, including...fines*’ inspired the OECD in its drafting efforts of 1997. The OECD has, however, simplified the overall approach.

Article 3(1) of the OECD Convention, which sets the standard for criminal sanctions, applies to natural and legal persons alike. Article 3(2) then allows for non-criminal sanctions against corporations, but subject to the same standard. Article 3(3), again addressing natural and legal persons alike, provides for seizure and confiscation of bribe money or requires ‘monetary sanctions of comparable effect’. Finally, Article 3(4) asks state Parties to consider ‘*the imposition of additional civil or administrative sanctions*’ upon natural or legal persons: in this regard, Official Commentary 24 embraces the EU list of optional additional sanctions beyond fines.

In the preceding sections the analysis of binding sanctioning requirements under the OECD Convention must distinguish between financial and non-financial sanctions. Furthermore, the principles of sanctioning must also be discussed. This overview should then allow us to define a standard in order to judge overall effectiveness.¹³¹

4.3. Financial sanctions

Under the heading of financial sanctions the WGB evaluates whether:

- they are provided for at all;
- they are comparable to sanctions for domestic bribery or other serious domestic crime (e.g. fraud, theft etc.);
- forfeiture is precluded by fines or vice versa.

4.4. Other sanctions

4.4.1. Criminal sanctions

Common Law countries have maintained a broad range of sanctions for companies, going beyond fines and ranging from remedial orders, sometimes linked to probation, to Community service orders, to adverse publicity orders or restraint-oriented sanctions.¹³² Furthermore, one

¹³⁰ COE 1988.

¹³¹ See II.4.3.-II.4.6. below.

¹³² Clough 2002; Gobert 1998, 6 et seq.; Préfontaine 1999, 277 et seq.; Wells 2001, 31 et seq.

has to consider the sanctions as elements in a graded approach, including into the equation also civil sanctions.¹³³

In Continental Europe, following the Recommendation of the COE of 1988, some Mediterranean countries in particular have gone well beyond mere monetary sanctions. France, for example, has developed an elaborate system of restraint orders. French law provides for the:

- disallowance of the performance of specific professional or social activities;
- prohibition of public appeals for funds;
- issuance of cheques, using payment orders;
- placement under supervision;
- closure of one or more establishments;
- exclusion from public procurement.

Italy and Portugal have introduced similar sanctioning systems (even if the Italian approach is only quasi-criminal in nature).

Official Commentary 24 mentions such restraint-orientated sanctions as illustrations of the additional ‘civil or administrative sanctions’ referred to in Article 3(4) of the OECD Convention, thereby overlooking the fact that in some countries these non-financial sanctions are really penal sanctions.

4.4.2. Additional civil or administrative sanctions

Many countries have indeed followed up Article 3(4) by introducing further civil or administrative sanctions against legal persons.

Measures introduced include civil fines,¹³⁴ exclusion from public procurement¹³⁵ or public subsidies¹³⁶ and from certain business operations. Civil liability for corporate wrongdoing is foreseen in general terms by all countries and general civil and/or company law also regulates the dissolution of the companies (a general Civil Law sanction for legal persons pursuing an illegal goal).

4.5. Sanctioning principles

Sanctioning principles are closely linked to the sanctioning rationale.¹³⁷ Depending on whether deterrence, prevention or restitution is in the foreground systems will give different emphasis to:

- crime-related factors;
- corporate culpability (‘personal’ dimension);

¹³³ Fisse (1993), 255 et seq.

¹³⁴ United States.

¹³⁵ Austria, Belgium, Brazil, France, Germany (partially), Hungary, Italy, Poland, Portugal, Spain, Switzerland, United States.

¹³⁶ Italy, Portugal, United States.

¹³⁷ See II.4.1. above.

- the situation of the company and ‘post-offence’ issues.

Some countries, notably the United States, have codified these factors, specifically for corporate liability, in their Sentencing Guidelines.¹³⁸ Others refer to the general rules of sanctioning.

4.5.1. Crime-related factors

The starting point of most sanctioning procedures is the gravity of the fault. Here the dimensions of illegal gain or savings or, alternatively, the damage inflicted on victims is relevant.¹³⁹

4.5.2. Corporate culpability

This criterion of corporate culpability attempts to capture all references to the level of deliberateness, recklessness or negligence in hiring, instructing and supervising personnel. In the context of so-called ‘objective models’ the degree of the ‘disorganisation’ of the company – independently of the extent of the culpability of individual managers – would be taken into account.¹⁴⁰ The absence of a sufficient corporate compliance programme would be considered an essential element of culpability.¹⁴¹

4.5.3. Situation of the company and post-offence development

a. Economic situation of the company

Many sentencing systems for corporations admonish judges to take into consideration the economic potential of the company to be sentenced.¹⁴² On the one hand, sanctions (especially fines) need to have a sufficient deterrent effect. On the other hand, they should not suffocate all incentive to do business. Additionally, sentencers need to be aware of undesirable spill-over effects¹⁴³ which may affect third parties, particularly employees of the enterprise concerned.

In the case of Poland sentencing is made directly dependent on the previous year’s tax returns, thus potentially excluding weak earners and new companies from sanctions.¹⁴⁴ The OECD’s WGB has criticised this approach, since new companies and bad earners could elude sanctions entirely. A more subtle way of taking the economic situation of a company into account is by the application of a ‘day fine system’ (first developed for natural persons) to companies.¹⁴⁵ With regard to small companies the fact that managers and major stockholders

¹³⁸ Sentencing Guidelines 1991, ch. 8.

¹³⁹ Denmark, Finland, France, Germany, Greece, Mexico, United States.

¹⁴⁰ Sweden and Switzerland.

¹⁴¹ United States.

¹⁴² E.g. Denmark and Italy.

¹⁴³ Gobert 1998, 2 et seq.

¹⁴⁴ PL-Ph1, 15 et seq., 32 et seq.

¹⁴⁵ Cf. the examples of Denmark and Portugal.

may have already been personally sanctioned for the bribery in question could also be considered under this heading and lead to a dramatic reduction of the sanction.

b. Restitution and rehabilitation

Some countries apply the general sentencing principle that the imposition of fines should not get in the way of restitution of damage caused.¹⁴⁶ In its new law on corporate liability Italy offers a considerable ‘rebate’ of up to 1/3 or 1/2 of the fines for credible rehabilitative efforts within the corporation.¹⁴⁷ The concept of restitution depends on the notion of ‘victim’. Sometimes corruption is described as a ‘victimless crime’. But this perspective is too narrow. Both, the state whose public official is being corrupted as well as corporate competitors, will suffer as a result of the crime. On the other hand, it is true that the extent of damage caused is rather difficult to assess.

Thus it would appear that ‘symbolic restitution’ (e.g. Community service of some kind or payments to charities) and the siphoning off of profits would be the most adequate response.

4.6. Judging effectiveness

In general, the OECD WGB has been hesitant to give directions on which sanctions it considers ‘effective, proportionate and dissuasive’ in the abstract. The occasional statement in the context of the Phase 1 evaluations appears to be rather ad hoc and uncoordinated.

Where there is a clear gap in a country’s law the task of criticism is easier: see the evaluative reports criticising certain countries for the complete absence of corporate liability.¹⁴⁸ Apart from these cases, the strongest verdict on sanctions can be found in the evaluation of Japan:

‘The WGB does not consider the sanctions available for legal persons to be sufficiently effective, proportionate and dissuasive in view of the large size of many of its corporations, particularly since seizure and confiscation (as noted below) are not available under Japanese legislation.’¹⁴⁹

By virtue of this finding the WGB established two principles: first, that sanctions against corporations must be sufficiently ‘tough’ to have an impact on large multinational corporations; second, that according to the concept of functional equivalence a trade-off is possible between two theoretically quite different instruments, i.e. the corporate fine and the forfeiture/confiscation of illicit profits (Article 3(3) of the Convention).

On the basis of these principles judging effectiveness of sanctions involves a three-step procedure:

- In a first step, the scope of sanctions needs to be tested against domestic law in each country. Article 3(1) mentions the primary concept: *‘The range of penalties shall be comparable to that applicable to the bribery of the Party’s own public officials’*. Since

¹⁴⁶ Cf. the case of The Netherlands, whereas other countries insist that fines should pass a deterrent message beyond mandatory restitution or forfeiture (United States).

¹⁴⁷ Magrini 2003, 120.

¹⁴⁸ In Phase 1: Argentina, Austria, Brazil, Bulgaria, Czech Republic, Luxemburg, Poland, Slovak Republic, Spain, Switzerland.

¹⁴⁹ JP-Ph1, 28 et seq.

bribery is considered a serious offence, the WGB has repeatedly compared the scope of sanctions for domestic and foreign bribery with the sanctioning options for serious economic crime in general (theft, fraud, embezzlement etc.). Under these rules some maximum fines are allowed to be low, as long as the national threshold for corporate sanctions is low overall.

- In a second step, the sanction that is in tune with domestic sanctioning principles will be compared on an international level. Here the desire to secure a level playing field of commerce and prevent ‘regulatory arbitrage’ by imposing sufficiently high sanctions is at the forefront of considerations. The WGB has considered 300 million yen (approx. \$/€2.7 million) to be insufficient.¹⁵⁰ This raises the question how maximum sanctions of \$/€1 million contained in the legislation of most countries could ever pass muster with the OECD.
- On a third level, an answer could be given by including quasi-corporate fines in the equation. The US maximum of \$2 million dollars did not convince the WGB, especially since forfeiture and confiscation of profits is only available in exceptional circumstances (in cases of money laundering). The United States nevertheless satisfied the OECD on this point, both in Phase 1 and Phase 2, because it was able to prove that under their ‘*alternative fine provisions*’¹⁵¹ they could go well beyond the statutory maximum of the FCPA. In practice, heavy monetary sanctions have been imposed.¹⁵²

One should not, however, accept forfeiture as a complete substitute for corporate sanctions. Article 3(3) of the Convention proposes the introduction of unlimited forfeiture of the proceeds of transnational bribery separately from and in addition to ‘*effective, proportionate and dissuasive sanctions*’.¹⁵³

Under Article 3(2) of the Convention, the WGB has so far not gone beyond requesting financial sanctions. Only under the additional requirement of Article 3(4) has the topic of non-financial sanctions been raised in the context of additional administrative or civil sanctions.

5. Application

The definition of the adequate procedure for the application of corporate liability is left to the Party states. One issue, however, needs to be addressed under this heading, namely: how wide is the discretion of prosecuting agencies when it comes to open a case against a legal person?

5.1. Prosecutorial discretion

The issue of prosecutorial discretion will be discussed in its wider context in the chapter on Article 5.¹⁵⁴ In this chapter the issue of possibly diverging practices in the treatment of natural and legal persons is in point. When prosecuting natural persons seventeen OECD state Parties

¹⁵⁰ JP-Ph1, 28 et seq.

¹⁵¹ US-Ph1, 11 et seq.; US-Ph2, 15.

¹⁵² As in the cases of *U.S. v. Crawford Enterprise* (1982) a fine of \$3.45 million; for *U.S. v. National Airmotive Corp.* (1994) a criminal sanction of \$1.25 million and civil forfeiture of \$1.75 million; for *U.S. v. Lockheed Corp.* (1994) a fine of \$21.1 millions; cf. Annex to US-Ph2, 41 et seq.

¹⁵³ For a critical assessment see part. VIII. in ch. on Article 3(3) below.

¹⁵⁴ See ch. on Article 5 below.

are bound by the rule of mandatory prosecution ('principle of legality'), whereas fourteen allow discretion ('principle of opportunity'). Regarding the prosecution of legal entities figures are rather different: eighteen of the twenty-four countries who have to date introduced either criminal or non-criminal corporate liability follow the discretionary approach. Even some of the strongest believers in mandatory prosecution of natural persons have converted to discretion when it comes to companies.¹⁵⁵ During its Phase 1 evaluation the WGB has observed that several countries lacked rules on how to apply prosecutorial discretion relating to corporate liability.¹⁵⁶ It was left to the Phase 2 evaluations to assess whether the principle of discretion undermines the effectiveness of corporate liability. So far, the results appear rather ambiguous.

In one group of countries which has known the concept of corporate responsibility for some time no cases of domestic or international bribery have been run against companies so far.¹⁵⁷

In a second group some cases are now appearing in which companies are involved as defendants.¹⁵⁸ It is, however, difficult to tell on what basis this prosecutorial decision has been taken.

In the United States twenty-one companies and twenty-six individuals have been convicted for criminal violations of the FCPA in the years 1997-2001.¹⁵⁹ Critics observe that, while in the early days FCPA liability and corporate liability in particular appear to have been invoked sparingly, a dramatic increase is now being recorded.¹⁶⁰

In the evaluation of Germany – a country maintaining strict mandatory prosecution for individuals but allowing discretion for companies – practitioners reported interesting regional differences: whereas in Frankfurt and Berlin corporate liability was 'rarely' applied to (domestic) corruption, in Munich far more prosecutions against companies have been launched in corruption and related cases.¹⁶¹

Overall, it emerges that the perseverance with which corporations are prosecuted for either domestic or foreign corruption is very much a matter of prosecution policy. This aspect must therefore form part of our criteria when the effectiveness of the system is evaluated.¹⁶²

¹⁵⁵ Finland, Germany and Iceland; in the case of Germany this is a consequence of its administrative approach to the sanctioning of companies (DE-Ph2, 32).

¹⁵⁶ Canada, Denmark, Germany, Iceland, New Zealand, Poland.

¹⁵⁷ FI-Ph2, 18; IS-Ph2, 27 et seq.

¹⁵⁸ For Canada no conviction of a company for foreign bribery has been reported to date; however, a first company is being prosecuted (CA-Ph2, 16); in Korea, so far two companies have been tried for foreign bribery (KR-Ph2, 8 et seq.).

¹⁵⁹ US-Ph2, 16.

¹⁶⁰ Tarullo 2004, 674.

¹⁶¹ DE-Ph2, 28 et seq.

¹⁶² See ch. on Article 5 below.

III. Corporate Liability and Sanctions: Conclusions

1. Corporate liability

One of the major deficits identified in mutual evaluations is a widespread failure to implement Article 2. So far only twenty-four of the thirty-six Party states have introduced corporate criminal liability. Most other countries maintain that they are planning to introduce it in the near future; typically, however, such reform would depend on wider criminal reform projects.¹⁶³

With respect to those countries which have implemented corporate criminal liability, the application of a mere identification model, imputing only offences of the most senior management to corporations and also frequently refusing a concept of ‘aggregate knowledge’, would in our view fail to meet the requirements of ‘effective, proportionate and dissuasive sanctions’.¹⁶⁴

On the other hand, the terms of Articles 2 and 3 of the Convention would be met by countries whose liability concept includes lack of due diligence by senior management, allowing junior agents to engage in bribery (cf. also Article 18(2) of the COE Convention).¹⁶⁵

Acting pursuant to Article 3(2) of the Convention some countries have chosen to introduce a non-criminal corporate liability for legal persons.¹⁶⁶ Manifestations of this approach are, however, very thoroughly screened by the WGB in the application phase, as it is well known that prosecutors are inclined to treat non-criminal liability less seriously than traditional criminal sanctions imposed on individuals.¹⁶⁷ We must, however, distinguish between Article 3(2) implementation and the imposition of additional non-criminal sanctions (of a civil or an administrative nature) suggested by Article 3(4) of the Convention. These are two entirely different matters.

2. Sanctions

Discussions of sanctioning requirements have, quite rightly, revolved around the imposition of ‘monetary sanctions’ (Article 3(2) of the Convention).

Some countries already find it difficult to pass the ‘internal coherence test’ (meaning coherence with the national treatment of domestic bribery or other serious crimes according to Article 3(1)). For example, Nordic countries generally apply low maximum penalties: certainly, the Danish maximum of sixty-day fines¹⁶⁸ would be too low in comparison with sanctions for other serious crimes.

¹⁶³ Cf. Argentina, Austria, Chile, Czech Republic, Luxembourg, Poland, Slovak Republic, Turkey.

¹⁶⁴ See II.3.6.1. above.

¹⁶⁵ See previous note 164.

¹⁶⁶ In particular Germany, Italy and Spain.

¹⁶⁷ See II.3.6.2. above.

¹⁶⁸ DK-Ph1, 10.

On the second level of evaluation¹⁶⁹ (testing against the international standard) three groups of countries need to be distinguished:

- Older manifestations of corporate liability generally adopt relatively low maximum fines,¹⁷⁰ well below \$/€500 000. This appears particularly unsuited and inadequate to sanction corrupt conduct by a multinational enterprise.
- A second group of countries, some of which have only recently enacted laws on corporate liability, foresees maximum penalties of around \$/€1 million.¹⁷¹ If the critique levelled against Japan is taken seriously,¹⁷² it must apply also to this group, unless special rules apply to aggravated cases.
- Several jurisdictions know no upper limits in serious cases or raise the sanction level well above the \$/€1 million threshold.¹⁷³ Alternatively, the aggregate of civil and criminal sanctions together with forfeiture has been considered sufficient.¹⁷⁴

¹⁶⁹ See II.4.6. above.

¹⁷⁰ Australia, Denmark, Sweden, The Netherlands.

¹⁷¹ Austria, Belgium, Finland, France, Germany, Italy, United States.

¹⁷² JP-Ph1, 28 et seq. and see II.4.6. above.

¹⁷³ Canada, Germany, Greece, Hungary, Iceland, Ireland, Korea, New Zealand, Norway, Portugal, Switzerland, United Kingdom

¹⁷⁴ United States: see critique in II.4.6. in fine above.

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