# Public consultation on liability of legal persons: Compilation of responses

November 2016

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

## Context

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

**TABLE OF CONTENTS**

**Jennifer Arlen, Professor of Law, New York University, United States**

*Jennifer Arlen is Norma Z. Paige Professor of Law and Director of the Program on Corporate Compliance and Enforcement at New York University School of Law.*

The OECD Working Group on Bribery (WGB) has launched a public consultation to inform its thinking on liability of legal persons for foreign bribery. The consultation document invites the public to share insights and experiences concerning the impact, advantages and disadvantages of particular features of LP liability regimes.

I am a law professor at New York University School of Law. I have been conducting research on how to best to structure individual and entity-level liability to deter wrongdoing, including corruption, by large organizations and their employees.

This white paper examines the question of how best to structure individual and corporate liability for corporate misconduct in order to deter corporate misconduct. This white paper focuses on corporations whose individual controlling shareholders do not manage the firm on a day-to-day basis—e.g., publicly-held corporations and privately held firms owned by hedge funds, governments and others who are not directly personally involved in management. The analysis below does not apply to small, closely held firms with a small number of owners who directly control the firm's activities.

The discussion below is drawn from my prior work, alone and with co-authors. The relevant articles are listed at the end.

## 1. **Purposes of Corporate Criminal Liability**

Corporations are subject to a host of laws that criminalise acts that are potentially profitable for the firm but harm society. Some of these laws criminalize intentional wrongdoing. Others, such as many environmental regulations, use criminal law to encourage firms to invest in measures to prevent harms that otherwise would naturally occur as part of their operations. Almost all of these laws are enforced though a combination of individual and corporate liability. The central policy question facing enforcement authorities is how to structure individual and corporate liability and corporate civil and criminal sanctions to optimally deter such crimes (Arlen 2012).

### *1.1. Why Focus on Deterrence?*

Criminal liability traditionally is viewed as serving multiple objectives. These include retribution/moral blame; specific deterrence, general deterrence and rehabilitation. In the case of liability imposed on corporations (of the type considered here) the primary focus should be on deterrence (specific and general). Retribution may have a role to play but policy makers and enforcement authorities should never take actions designed to achieve retributive ends that would undermine deterrence.

Retribution and punishment should take a back seat to deterrence for two reasons. First, governments must deter corporate crime because the potential costs of failing to do so are so high. Individuals, acting alone, are limited in the harm they can cause (even if it can be large when they use explosives). By contrast, individuals acting through corporations can take actions that harm hundreds of thousands or millions of people. The software engineers at VW who created VW's defeat devices both harmed the environment of many countries and hurt millions of consumers. Similarly, corruption that enables the wrong firm to obtain an important government contract may harm an entire city—or country—if it leads to money being wasted and perhaps even to an important project being placed in the hands of an

incompetent firm that cannot complete it. Thus, if there is a choice between deterring future crimes and punishing a past one, the focus should be on deterrence.

Second, deterrence should be the primary focus because it is far from clear that it is appropriate to blame—and target retributive sanctions at--the owners of publicly held firms and other large firms (whose owners do not run the firm day-to-day). Corporate liability ultimately falls on shareholders. Yet corporate crime is committed by employees (including managers). Shareholders of publicly held firms don't commit the crimes. They also are not legally empowered to take actions needed to deter crime. In the US, they have no right to directly manage the firm. They are allowed to vote on directors nominated by the board, but they have little power to nominate their own directors. They have no right to oversee the compliance program and no right to restructure the compensation and promotion policies that reach below top-level management to provide incentives deep within the firm. It is hard to see how a crime—say a bribe—by an employee in a distant locale can be said to be the "fault" of the people who bought shares in the firm.

Thus, policymakers can best serve the public by focusing on deterrence.

### *1.2. Central Importance of Individual Liability*

In order to deter crime by publicly held (and other large) firms, lawmakers and enforcement officials must ensure that the individuals responsible for the crime are personally sanctioned for the wrongs they commit.[1] Corporate sanctions alone are not sufficient because, in publicly-held firms, the individuals who actually commit crimes[2] generally own only a small percentage of the firm's stock. Thus, these individuals are not likely to be motivated to commit corporate crimes by the benefit they derive as shareholders. Instead, they are motivated by a personal benefit, such as increased job security, additional compensation, or promotion resulting from an undetected crime that boosts real or apparent profits.[3] Put differently, crimes by publicly-held firms often are an agency cost, best deterred by imposing liability directly on the individual wrongdoers.[4]

To deter crime, individual liability must ensure that the employees/managers tempted to commit crimes conclude that corporate crime doesn't pay. We need to be sure that the expected benefit of crime is less than the expected cost. If so, employees will stay on the right side of the line. To do this, we need to (1) reduce the benefit to employees of committing crime and (2) increase the expected cost by both imposing real criminal sanctions (imprisonment) on intentional wrongdoers and increasing the probability that misconduct is detected and individuals are sanctioned.

The government cannot achieve these goals on its own. The government cannot control the benefit of crime—which can be enormous. And it doesn't have the resources to ferret out crime with sufficient regularity to ensure employees will expect to be caught. The government also doesn't have sufficient resources to obtain the evidence needed to identify and convict individuals, if the government is required to rely on its own resources. This is important because high sanctions do not deter unless people expect to be caught. Evidence shows that people discount low probability events to zero. To deter, the government must raise the probability that wrongdoing is detected and wrongdoers are sanctioned.

This provides a justification and a set of purposes for corporate liability. But it also helps us understand why we should not impose strict respondeat superior liability on firms—as some outspoken people in the US would seem to prefer.

### *1.3. Justification for Corporate Liability*

Corporate crimes differ from classic individual street crimes because they involve an additional actor, the firm, which can intervene to deter crime by reducing the benefit to its employees of wrongdoing and increasing the expected cost of misconduct by increasing the probability that misconduct is detected and sanctioned.

Corporations have direct control over the expected benefit of crime--control that even the state does not have. Most employees do not benefit directly from corporate crime. They generally benefit indirectly. The crime boosts corporate profits or short term measures of employees' success. The employee hopes to benefit through the impact of crime on his/her own bonus, promotion or job retention. Corporations determine the degree to which crime pays through their decisions about the structure of employee incentives—e.g., bonuses tied to short-run metrics versus stock grants that do not vest for years (and thus after a firm might well have detected and been sanctioned for wrongdoing). Accordingly, firms are uniquely positioned to intervene ex ante to deter crime through their ability to structure compensation and promotion policies so as to make crime less profitable. Firms also can intervene ex ante in other ways that increase the direct costs of committing crimes, interventions we call 'prevention measures.'

Corporations also can help deter crime by intervening to increase the probability that the government detects and sanctions wrongdoers. Corporate intervention is needed for two reasons. First, the threat of sanctions does not deter unless people expect to be caught. Evidence shows that people discount low probability events to zero. To deter, the government must raise the probability that wrongdoing is detected and wrongdoers are sanctioned. To see this, one only needs to take a drive along any large highway (at least in the US). Drivers regularly exceed the speed limit—often by wide margins—unless they expect there is a reasonable likelihood of getting caught (for example, because they spot cops on the road, they know they are near a "speed trap," or it is a holiday that prompts more traffic stops by the police). Even when actual sanctions stay constant, behaviour varies because the threat of sanction changes. Unfortunately, the government also doesn't have sufficient resources to obtain the evidence needed to identify and convict individuals, if the government is required to rely on its own resources. But the firm can.

Firms can do this by undertaking ex ante monitoring, ex post investigation and cooperation to increase the probability that the government detects the wrong, identifies the individuals responsible and obtains the evidence needed to convict them. We refer to interventions that increase the probability of sanction as 'policing measures'.

Corporations can not only deter crime, but, as previously explained, they generally are the most cost-effective providers of many vital forms of prevention and policing. This implies that, in the case of corporate crime, the state has an extra instrument available to it when (as is usually the case) it cannot rely entirely on maximal individual sanctions (with minimal enforcement). In the corporate context, the state can, and generally should, deter crime by inducing firms to reduce the expected benefit of wrongdoing and also to intervene to increase the probability wrongdoing is detected and wrongdoers are sanctioned (corporate policing).

To achieve these goals, the state usually must impose liability on firms that is structured to ensure firms do not obtain an expected benefit from misconduct.[5] It also must ensure that liability is structured to induce firms to undertake optimal policing measures (monitoring, self-reporting and cooperation).[6]

One might wonder why corporate self-reporting is important given that the firm could just intervene to fire wrongdoers. There are two reasons. First, employees are not adequately deterred from many crimes by the threat of termination alone. The reason is that often employees are motivated to commit crimes by compensation and promotion policies that put them at threat of termination if they do not meet their numbers. We have seen this most recently with Wells Fargo. There also is theory and evidence that most securities frauds (intentional misleading statements) can be attributed to job retention concerns (Arlen and Carney 1992). Employees who expect to be fired if they do not boost their numbers by committing the crime will not be deterred from misconduct by the threat of being fired if they do commit the crime and are caught, if the chances of being caught and fired are less than the chances of being fired if they do not act to boost their numbers. Second, some crimes are sufficiently lucrative that the mere threat of job loss is not a sufficiently high sanction to ensure that "crime does not pay."

## 2. How Should Corporate Liability Be Structured

Many countries hold corporations strictly criminally liable for wrongdoing by employees or managers. US law imposes broad liability: holding firms liable for crimes by any employee committed in the scope of employment with any intent to benefit the firm (see Appendix A for a more complete discussion of the US system). Many other countries hold firms strictly liable for misconduct by certain employees: those who are in effect the brains (or managing mind) of the firm. Finally, some countries impose liability on corporations for their employees' crimes unless the firm had an effective compliance program. None of these approaches lead to the right result: assuming that the goal is to ensure that the firm wants to both implement measures that reduces the benefit to employees of wrongdoing (such as compensation/promotion policy reform) and undertake corporate policing to help the government sanction the employees who do violate the law.

### *2.1. The Perverse Effects of Strict Respondeat Superior Liability for Employees'/Managers' Crimes*

Countries that hold firms strictly liable for crimes by employees or managers undermine their ability to deter corporate misconduct. This form of liability deters firms from undertaking vital corporate policing, instead of encouraging it.

Corporations held liable for all employee misconduct—and subject to a fixed sanction of F (say equal to the harm caused)—do have strong incentives to intervene to deter crime by altering corporate compensation and promotion policies. They also have incentives to adopt compliance measures designed to make crime harder to commit (Arlen 1994; Arlen and Kraakman 1997). But they do not have strong incentive to undertake measures that help the firm detect wrongdoing.

Upon careful reflection, the reason is intuitively apparent. Firms that expect to be convicted for their managers' crimes are caught on the horns of a dilemma. They can intervene to detect and report wrongdoing, and thereby deter employees (who now are more afraid of being caught). This is the deterrent effect of corporate policing. But this deterrent effect comes at a cost: the liability enhancement effect. Corporations that undertake effective policing know they will not deter all wrongdoing. This is a problem because, to the extent crimes occur, corporate policing both increases the probability that employees are sanctioned and increases the probability that firms are sanctioned. Thus, when firms are held strictly liable for their employees' or managers' misconduct, firms are discouraged from seeking to detect wrongdoing, self-report it and fully cooperate because these actions will increase the firm's own liability.

To illustrate, consider a firm that has detected misconduct and now must decide whether to report it and fully cooperate. Reporting and cooperating (by providing strong evidence about the crime and the actions various individuals took to commit it) will help the government deter. But it will also hurt the firm—if the firm expects to be convicted for its employees' crimes.

If the firm reports and cooperates, the government will seek to hold it liable, imposing the appropriate sanction (e.g., $100 million). If the firm does not report, there is a risk that the government will detect the crime and hold it liable (for the same sanction, say $100 million). But the risk of liability if it does not report is substantially less than the risk of liability if it does. Governments do not detect most crimes on their own. And, even if they do, often they cannot easily get the evidence they need to obtain a conviction unless the firm cooperates. As a result, the firm's expected sanction if it reports is $100 million (in our example) whereas its expected sanction if it does not report is P * $100 million, where P, the probability of detection/sanction is much less than one. It is easy to see that not reporting is the wiser course of conduct.

Strict corporate liability not only deters firms from self-reporting, but it also disables them from deterring employees by threatening to do so (Arlen and Kraakman 1997). Firms can deter misconduct when they can credibly threaten employees that they will report any and all detected misconduct to the government. Of course, employees understand that threats are cheap talk. Employees will decide whether or not to believe the threat based on whether they think that the firm, having detected, benefits from self-reporting. Employees understand that firms facing the threat of criminal liability for reported misconduct will not self-report detected crimes that otherwise could remain hidden. So they will not believe firms' threats to report. They only believe them when firms are better off when they self-report.

### *2.2. How Should Liability Be Structured?*

To induce corporate policing, the government should employ a duty-based regime under which firms are obligated to undertake optimal monitoring, self-reporting and cooperation and are subject to a special sanction for violating any one (and each) of these duties. Firms that satisfy all policing duties should escape criminal sanction. Nevertheless, they generally should face 'residual' civil liability designed to ensure that they adopt optimal prevention measures unless market forces ensure that the firm internalised the social cost of employees' wrongs.[7]

Notice that here criminal liability is imposed if the firm failed to implement an effective compliance program, failed to self-report and failed to cooperate. Firms that undertake any of these three should avoid full conviction but should be subject to a criminal resolution, for example through a deferred prosecution agreement. Deferred prosecution agreements (DPA) enable governments to fine-tune incentives by avoiding the collateral consequences that attend a conviction. Enforcement authorities can further refine them by announcing that certain actions (self-reporting before a risk of detection and full cooperation) not only lead to a DPA with lower sanctions, but also will enable the firm to avoid having a monitor imposed, whereas other actions (detecting and failing to self-report), will subject the firm to high sanctions and a monitor, even if its other actions (say its compliance program) justify the use of a DPA.

What is key is that the government must ensure that firms that self-report are much better off than those that detect, fail to self-report, but then provide valuable cooperation should the government later detect. The government can only do this by clearly announcing both the benefits to self-reporting and the negative consequences of failing to self-report. In so doing, it's important to bear in mind that the government often cannot simply say that failure to self-report will lead to automatic conviction because often prosecutors not only need self-reporting, they also need cooperation.

One way to accomplish this goal within the US framework would be to have the following multi-step levels of liability in situations where employees committed a crime in the scope of employment with some intent to benefit the firm:

> (1) Criminal liability: reserved for firms where (1) employees committed a crime in the scope of employment to benefit the firm and (2) either (a) senior management knowingly implemented a defective compliance program and failed to self-report and cooperate or (b) the firm detected the wrong and then failed to fully self-report and cooperate. In this situation, criminal liability with sizable sanctions generally should be accompanied by compliance programs and an external monitor (Arlen and Kahan 2017).
>
> (2) DPA with Monitor: The firm agrees to fully cooperate with sufficient detail to provide evidence on the crime (including evidence on the participation of all employees, including senior managers, in both the crime and any inadequate supervision that led up to the crime or followed it) yet managers detected the wrong and failed to self-report or did not detected the crime because they knowingly implemented a deficient compliance program.

(3) NPA with No Monitor or Civil Sanction: The firm self-reported the wrong and agreed to fully cooperate with sufficient detail to provide evidence on the crime including evidence on the participation of all employees, including senior managers, in both the crime and any inadequate supervision that led up to the crime or followed it. NPA or Civil sanction is needed if the crime benefitted the firm. The monetary penalty must remove the benefit to the firm of wrongdoing and be sufficiently large to motivate firms to want to deter wrongdoing through measures that go beyond compliance programs, including compensation and promotion policy reform.

### *2.3. The Case Against Granting a Compliance Defence*

A growing number of countries are adopting corporate liability regimes that hold firms liable only if the firm failed to have an effective compliance program. Other variations on this approach grant firms a defence to liability if they had an effective compliance program or hold firms liable for failure to adopt effective measures to supervise the employees who committed the crime. This approach will not induce firms to take the steps we need them to take to deter corporate crime.

Firms that adopt and implement effective compliance programs should avoid the full threat of criminal liability. In the US, this can be accomplished by using a DPA with monetary and others sanctions. Nevertheless, they should not be allowed to avoid liability altogether. The reason for this is simple. Compliance programs are not the only—or even necessarily the most effective—way to deter crime. They are simply an important tool.

In order to effectively deter corporate crime, we need firms to take three additional steps. We need them to reform compensation/promotion/retention policies to ensure that they encourage productivity without also encouraging misconduct. We need them to self-report all detected misconduct. We also need them to fully cooperate by investigating the wrong and turning over all materials to the government. Regimes that insulate firms from liability if they have an effective compliance program do not provide corporations with needed incentives to self-report, fully cooperate, or to take other actions to deter crime (such as compensation and promotion policy reform).

By contrast, firms threatened with criminal liability (through conviction or a DPA) that is predicated on their adherence to these duties have an incentive to intervene to adopt effective compliance, self-report and cooperate. The imposition of civil (or NPA-based liability) on firms that took all these actions gives the needed incentive to reform compensation (Arlen 2012; Arlen and Kraakman 1997).

### *2.4. The Case Against Restricting Liability to Crimes by Senior Managers*

Some countries impose liability on corporations and other organizations for crimes requiring intent (such as bribery) only in situations where the crime was committed by someone in the directing mind of the corporation. The scope of liability imposed through this approach is too narrow to effectively deter corporate crime. This approach enables corruption by firm that take a decentralized approach, granting discretion to individuals outside the "directing mind" to take actions that violate the law.

As discussed above, in order to deter corporate crime we need to do more than deter corporate managers from committing or ordering corruption themselves. We need to ensure that the firm's expected profits are lower when (i) the firm structures promotion and compensation policies in ways that reward misconduct, (ii) hires third parties who are likely to bribe, and (iii) detects misconduct without reporting it or sanctioning the employees. Properly structured liability for all crimes by all employees is needed to ensure that firms have incentives to deter crime using all the tools available to them.

## 3. Mandates

In the United States, prosecutors not only use criminal settlements (pleas, DPAs and NPAs) to impose monetary penalties, they also use them to impose mandates (as discussed in the appendix). These mandates include mandated compliance program reforms and monitors.

Mandates can be justified to address one problem. Yet they are not justified whenever a firm commits a crime. They also are not justified by evidence that the firm had an ineffective compliance program. They are only justified when enforcement officials have clear evidence that a regime that imposes a clear duty on firms to adopt effective compliance, self-report and cooperate (policing duties) will not induce the desired behaviour by the firm because the liability falls on the firm but the managers obtain personal benefits from deficient policing (Arlen and Kahan 2017). In other words, mandates are not needed when managers can be relied on to manage the firm to maximize the firm's profits. In this situation, properly structured monetary penalties imposed on the firm, coupled with clear policing duties, will induce firms to take appropriate steps to deter crime. Indeed, monetary penalties are superior because they impose a direct and immediate cost on firms that failed to take appropriate steps. Mandates are only needed when senior managers gain private benefits from deficient policing, either because they benefit from the crime or benefit from deficient oversight. In this case, enforcement officials need to intervene to mandate compliance and also ensure that oversight of compliance ultimately resides with an actor other than the senior management (Arlen and Kahan 2017).

## 4. Standards versus Discretion

The US regime shares some features in common with the "deterrence" regime described above. Yet there are important differences that undermine the effectiveness of the US regime (Arlen 2012; Arlen and Kahan 2017). These differences also create a rule of law problem for the US system (Arlen 2015).

Governments can best hope to deter corporate crime by adopting ex ante standards (through statutes or regulations) imposing duties on corporations to (1) adopt an effective compliance program, (2) self-report detected wrongdoing, and (3) fully cooperate. These rules or standards need to clearly state the consequences firms face if they breach these duties, and, in turn, the benefits firms obtain if they adhere to these duties.

The US does not provide firms clear benefits for undertaking effective policing. In the US, firms are strictly liable for their employees' crimes committed in the scope of employment (with any intent to

benefit the firm). Prosecutors are then granted discretion to pursue a conviction or impose a DPA or NPA. Prosecutors also have enormous discretion when determining the monetary penalties and mandates to be imposed.

When deciding whether to seek a conviction, prosecutors in the US look to the US Attorneys' manual which sets forth 10 factors that they are to consider. The problem is that compliance, self-reporting and cooperation are but three of these factors. Size of the crime, past conducts, and collateral consequences also are factors. As a result, a firm that detects wide-spread wrongdoing cannot be sure that if it self-reports it will avoid conviction because the prosecutor can point to the size of the misconduct as a factor favouring conviction. In turn, an important firm facing serious collateral consequences if convicted may be able to avoid conviction, even if it fails to self-report, because the collateral consequences are an important factor that militate against conviction. This multi-factor, discretionary approach means that enforcement officials cannot provide sufficiently strong incentives to self-report.

The Fraud Section of the US Department of Justice has tried to address this through its Pilot Program. The policies in the written program still do not provide sufficient certainty to induce self-reporting. Yet the program as applied appears to be designed to send a strong message that failing to self-report detected wrongdoing will result in a much more serious sanction than is imposed on firms that do self-report.

In the US prosecutors also have enormous discretion over the monetary sanctions and mandates imposed. Indeed, it appears that prosecutors imposing sanctions through DPAs and NPAs can impose any sanction a firm will agree with without being subject to judicial review (unless the mandate is unconstitutional).

This degree of discretion is not consistent with a commitment to the Rule of Law (Arlen 2015). Nevertheless, allowing judicial review would not suffice to remedy this problem in the US because judicial review simply substitutes one level of excessive discretion for another (by the judge) unless the state provides rules and standards governing both the decision to convict and the appropriate sanction enhancements for violations of policing duties. In the US these enhancements are contained in the US Sentencing Guidelines, but the Guidelines are not binding. Moreover, the Guidelines were never well-designed to induce corporate compliance, self-reporting and cooperation (Arlen 2012b) and therefore prosecutors consistently deviate from the Guidelines to promote the public interest.

## 5. Civil versus Criminal Liability

In the case of corporate liability, there is no particular reason why the most serious form of liability (Category (1) above)) must be criminal. Civil penalties or regulatory sanctions could be used, as long as the monetary sanctions imposed are sufficiently serious to ensure firms would rather self-report (and guarantee the lower sanction) than face the most severe sanction. It also is important to be able to impose an external monitor on firms that knowingly fail to self-report as this is evidence that managers cannot be relied on to undertake appropriate acti ons for the firm. Countries can use civil or regulatory liability to achieve these goals.

Nevertheless, there are reasons to believe that countries should use both civil and criminal liability to deter crime—perhaps reserving criminal for situations where firms detected and failed to self-report and/or failed to fully cooperate. In many countries, reasons exist to conclude that prosecutors may be better able to pursue large powerful firms and impose very serious sanctions. Prosecutors' budgets often are more independent—or at least legislatures face a greater threat of political backlash if they undercut the budget of the prosecutors (who, after all, also pursue crimes directly injuring the public)

than if the undercut the budget of a regulatory agency. In addition, prosecutors are less likely to expect to seek employment in the firms they are pursuing. It happens—and in some cases can be beneficial as the prosecutor can bring an important new perspective to a board. But it is rarely the case that most prosecutors in an office expect to find future employment in any particularly industry. By contrast, regulators often find future employment in the regulated industry. The revolving door can provide complex motivations. No regulator will knowingly to a bad job in order to obtain future employment in the industry as people tend not to hire people who failed in their last job. Yet there are reasons to worry that the revolving door may lead some people not to be exceptionally tough, as being a stand-out, exceptionally tough regulator will not make friends in the industry. Finally, relying entirely on civil or administrative sanctions will not be as effective as using both criminal and civil in regime, like the US, where independent agencies' enforcement decisions are require approval by a multi-person, politically divided commission (as in the case of the Securities and Exchange Commission). These regulatory agencies often are not willing and able to undertake the bolder moves against powerful actors that senior prosecutors regularly take.

The considerations outlined above have relevance for the issue of whether prosecutors should have authority to settle cases and whether they should be able to use DPAs and NPAs. To the extent that prosecutors are likely to be better able to take on large corporations (or to the extent that having two actors with that power is better than relying on only one), then deterrence is served by given prosecutors multiple tools: pleas, DPAs and NPAs. The key is to give them these tools with a clear mandate on when and how to use them.

## 6. Do DPAs Undermine the Reputational Sanction

It has been suggested that DPAs should not be used because they undermine the reputational sanction. If prosecutors are given a clear (and the correct) mandates on when to use pleas and when to use DPAs, this is not the case. Indeed, proper use of DPAs and NPAs would strengthen and fine-tune the reputational impact of criminal settlement by providing a quick and easy signal to those dealing with the firm of whether the firm's past crimes are a strong signal that future bad conduct is likely.

Firms that are actively seeking to deter crime (through effective compliance, self-reporting and cooperating) are presumably less likely to violate the law going forwards. Using NPAs (or civil enforcement) for these firms enables people to know that these are lower risk firms. By contrast, firms that neglected their policing duties (for example by detecting and failing to self-report misconduct) weaken employees' incentives to refrain from misconduct. These firms are more likely to commit misconduct in the future. Reserving criminal sanctions for these firms tells the public that the firm didn't simply commit a crime; it took actions that make future wrong-doing more likely. This would strengthen the reputational consequence of a criminal conviction (Alexander and Arlen forthcoming).

**Association of Corporate Counsel**

The contributors to this submission are: Amar D. Sarwal, Vice President & Chief Legal Strategist; Mary Blatch, Director of Advocacy and Public Policy; Kate Arthur, Chair, Compliance & Ethics Committee.

The Association of Corporate Counsel ("ACC") appreciates the opportunity to comment on the OECD Working Group on Bribery's public consultation on the liability of legal persons. ACC is a global bar association of in-house counsel with more than 40,000 members, employed by more than 10,000 organizations in 85 countries. Our Compliance & Ethics Committee has 7,260 attorneys who practice in corporate compliance and ethics matters, including many who specialize in anti-bribery and corruption matters. As in-house lawyers, much of our members' work is focused on ensuring their organizations' compliance with laws and regulations on a preventative basis. In-house counsel also has responsibility for coordinating the defence of a company when compliance systems are not able to prevent the misconduct of a rogue employee. Our members know the benefits of a strong corporate compliance system, and so ACC will focus its comments on those areas of inquiry that address the role of corporate compliance systems in anti-bribery enforcement issues for legal persons (hereinafter corporations).

**A. Compliance systems as a means of precluding liability or mitigating sanctions upon a finding of liability**

The OECD consultation paper seeks input on the role that corporate compliance systems should play in the application of anti-bribery laws. Issue #10 of the public consultation document asks how corporate liability for foreign bribery offenses has helped sharpen incentives for implementation of effective compliance systems and whether expressly including incentives in the foreign bribery offence itself facilitates or impedes effective enforcement of anti-bribery laws. Issue #11 also asks to what extent the implementation of an effective compliance system should act as a mitigating factor in the imposition of sanctions. Issue #10 and Issue #11 address the different forms of incentives for corporate compliance systems. Rather than debating about the proper form of incentives for corporate compliance, ACC believes it is better to focus efforts on getting all signatories to the OECD Convention on Combatting Foreign Bribery to offer some mechanism within their anti-bribery laws to incentivize effective corporate compliance, as was recommended by the OECD in 2009.

The benefits of strong corporate compliance systems far outweigh any potential (and as yet unproven) disadvantages to lessening the liability of those corporations that implement effective compliance systems against bribery. Corporate compliance systems fight misconduct and illegal acts through multiple channels – prevention, detection, and remediation. Perhaps equally as important, an effective compliance system promotes an ethical corporate culture by defining what is right and what is wrong. A corporate statement of ethical values and an effective compliance system that implements those values is a signal to employees that misconduct, including offering bribes to foreign officials, will not be tolerated by the corporate entity.

This corporate commitment to an ethical culture is important in combatting bribery and corruption. Governments cannot possibly police all corporate misconduct, and it appears that many governments are not even trying when it comes to foreign bribery offenses.
Transparency International's 2015 status report on the OECD Convention on Combatting Foreign Bribery found that 22 of the 41 OECD signatory countries have failed to investigate or prosecute any foreign bribery cases during the last four years. Viewed against this backdrop of lax enforcement, it makes sense for governments to view the private sector as a partner in preventing corruption and

uncovering it when it occurs. The primary mechanism through which the private sector prevents and uncovers corruption (as well as other misconduct) is through effective corporate compliance systems.

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

ACC is not aware of evidence showing that incorporating compliance incentives into anti-bribery laws impedes effective enforcement of those laws. The OECD Working Group on Bribery's draft report on the liability of legal persons shows that 19 of the signatory countries either offer the ability to defend against the foreign bribery offense itself through the existence of an effective compliance system or to receive mitigation against sanctions for an foreign bribery offense through the existence of such a system (some offer both). This includes the four countries that Transparency International has ranked as most active for anti-bribery enforcement: Germany, Switzerland, the United Kingdom and the United States. Four out of the six countries ranked moderately active by Transparency International also incentivize effective corporate compliance systems through their anti-bribery laws. While this is not conclusive evidence, it certainly suggests that incentivizing corporate compliance systems does not act as an impediment to anti-bribery enforcement, at least not relative to other countries.

Many countries and public interest groups are currently debating whether compliance systems should be a defence to the foreign bribery offense itself or serve as a mitigating factor during the application of sanctions. Rather than engaging in a global debate about the form of such incentives, ACC believes the more important question is the country's approach to emphasizing the *effectiveness* of corporate compliance systems. When governments include leniency provisions in their anti-bribery regimes, they should clearly lay out the expectations of an "effective" compliance system. The OECD issued its Good Practice Guidance on Internal Controls, Ethics, and Compliance in 2009, and there are other widely accepted guidelines for the establishment of effective corporate compliance systems. OECD should further encourage governments introducing leniency provisions to look to already-existing guidance on corporate compliance to achieve greater harmonization across jurisdictions. In addition to allowing for more efficiency within multi-national corporations, greater harmonization of compliance requirements will also lead to greater pressure on non-compliant entities to bring their compliance systems in line with global standards.

**B. The ability to offer settlements in bribery cases enhances corporate efforts to comply with anti---bribery laws**

Issue #12 of the public consultation document asks about the use of settlements in the resolution of foreign bribery charges. ACC views the issue of settlements as very much entwined with incentivizing compliance systems and the issue of self-reporting by corporations (see Issue #11c of the consultation document). One of the greatest benefits of an effective corporate compliance system – both for corporations and for governments – is the corporation's ability to uncover and investigate instances of potential wrongdoing by its employees. Once discovered, the corporation is faced with the decision of whether or not to report the suspected wrongdoing to the government and cooperate with any investigation. Allowing the corporation to negotiate a more favourable resolution with the government

is further incentive to report the violation and cooperate with the government investigation, and also adds to the value the corporation receives from its compliance system.

ACC recognizes that the concepts of prosecutorial discretion, deferred prosecution and plea bargaining are not common practices in all the signatory countries of the convention. The OECD should encourage the development of similar practices in the countries where they do not currently exist, as well as the use of such procedures in the countries where they already exist. For example, we note that France recently approved a new anti-bribery law that for the first time will allow a company to negotiate a settlement of charges. The lack of such a mechanism had been seen as an impediment to effective enforcement within France.

In addition to incentivizing effective corporate compliance systems, settlement mechanisms also avoid the costs associated with a trial. Governments with limited resources devoted to anti-bribery enforcement may be able to bring more charges against companies if they do not have to commit to taking them through a trial. In this way, settlements can be a great enhancement to the enforcement process itself.

The four "active enforcement" countries identified by Transparency International all use settlement mechanisms to help resolve foreign bribery offenses against corporations. Some public interest groups have questioned whether these settlement procedures are transparent enough – especially those that are not subject to judicial review. Rather than developing an international standard for settlement agreements, the OECD should focus on getting more countries to employ settlement agreements in anti-bribery enforcement efforts. If companies are not encouraged to come forward with the potential violations uncovered by their compliance systems, there is little chance that anti-bribery enforcement rates will increase.

Our members' experience is that the settlement mechanisms that allow for the settlement of charges without a conviction are especially valuable in encouraging their companies to report violations. These arrangements have benefits for the government as well because the corporation's desire to avoid formal charges can give the government significant leverage to demand meaningful sanctions without spending the resources a full trial would require. If a corporation is faced with the prospect of a settlement that includes formal charges, it may be more willing to take the chance of a trial. Lack of pre-trial settlement can also affect the calculus when violations have occurred in more than one jurisdiction, as corporations may decide against self-reporting in one country because no leniency would be offered in the other jurisdictions.

The other valuable characteristic of effective settlement mechanisms is clear guidance regarding what companies stand to gain if they self-report potential violations of foreign bribery laws. Even in countries with well-developed settlement practices and a history of applying leniency to companies that self-report potential violations, there is still enough uncertainty involved in self-reporting that some companies will choose not to do so. If governments want to encourage more self-reporting, they need to develop guidelines that clearly communicate the benefits that can be attained through self-reporting, and such benefits need to be significant enough to actually incentivize the company to come forward.

* * *

Fighting corruption and bribery on a global scale is a big task, and ACC appreciates the OECD's leadership in this area. Through continued focus on encouragement of effective corporate compliance systems, the OECD can assist the signatory countries partner with legal and compliance professionals of the private sector to tackle this important issue.

**BHP Billiton**

*(Letter submission on behalf of BHP Billiton via Chief Compliance Officer, Audrey Harris)*

As a leading global resources company that's among the world's top producers of commodities, BHP Billiton welcomes the opportunity to support global anti-corruption efforts, including the OECD Public Consultation on Liability of Legal Persons for Foreign Bribery.

BHP Billiton's zero-tolerance to bribery and corruption is set out in our Code, and implemented through our global anti-corruption compliance program. Key program components are featured on our website[1] and our numerous submissions in support of anti-corruption enforcement, including the Australian Senate Economics References Committee inquiry into Foreign Bribery[2] and to the Australian Attorney-General's Department Public Consultation on Deferred Prosecution Agreements.[3]

We look forward to the resulting analysis and comments of legal experts on the issues raised in the Working Group on Bribery's (WGB) draft Stocktaking Report. We want to take this opportunity to express our support for some key themes and principles arising from the consultation, including reforms that support:

- Consistent and effective enforcement of anti-corruption laws that level the playing field for ethical companies.
- Well defined conditions which must be met before a company is liable for alleged corrupt conduct of its employees and third-parties and clear compliance program guidance that:
    - provides clarity to global companies as to applicable standards;
    - facilitates the development of global best practices in promoting ethical business conduct; and
    - provides a common benchmark against which enforcement agencies can assess corporate conduct.
- Applying the same anti-corruption laws that apply to companies and individuals, to other entities including foreign and domestic state owned entitles (SOEs) and not-for-profit entities.
- Enforcement frameworks that provide meaningful incentives for companies that implement compliance programs to deter and prevent corrupt conduct.
- Frameworks, including appropriate successor liability enforcement policies, that encourage ethical companies with anti-corruption compliance programs to invest in:
    - acquiring entities with less developed anti-corruption compliance programs; and
    - operations in challenging jurisdictions and communities where ethical companies can have a positive impact.

---

1 http://www.bhpbilliton.com/society/operatingwithintegrity/anti-corruption

2 http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreign_Bribery/Submissions

3 https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreements/BHP.pdf

- Incentives for self-reporting and cooperation which strengthen enforcement and promote efficient investigations and transparent outcomes. These incentives could include mechanisms such as Deferred Prosecution Agreements (DPAs)[4] and/or penalty reductions.
- Continued WGB monitoring of implementation by parties to the Convention, which promotes consistent laws and effective enforcement.

BHP Billiton looks forward to playing a continuing role in the global fight against corruption in the resources industry.

[4] BHP Billiton has previously provided a detailed submission to the Australian Attorney-General on alternative enforcement options. https://www.ag.gov.au/Consultations/Documents/Deferred-prosecution-agreements/BHP.pdf

**Business Industry Advisory Committee to the OECD (BIAC)**[5]

**1. What are the most important components of an effective system for the liability of legal persons?**

First of all an effective system of liability of legal persons implies that there is a deterrent from bribery as well as a clear approach to enforcement and prosecution from authorities that are well resourced and acted upon. Effective compliance systems at the company level increase the likelihood of detection of offenses in the company and thus have a positive impact not only on detection and prosecution but also on prevention. This is because compliance systems have a strong potential for deterrence within the company. Companies should therefore be urged to carry out effective compliance work in order to prevent white-collar crimes, shed light on internally detected misconduct, and disclose it to the authorities. In return, the compliance measures should be taken into consideration when setting the amount of the financial penalty in the event of a violation of the law, even to the extent of waiving a sanction on the company.

In Germany, for example, sections 30 and 130 of the Administrative Offenses Act *(Ordnungswidrigkeitengesetz, OWiG)* do not as yet contain any provisions regulating the extent to which compliance efforts in the company are to be taken into consideration when imposing sanctions. It is true that the competent authority, when imposing a sanction, can exercise its own discretion as to whether such a sanction should be imposed, the severity of any such sanction, and whether and to what extent compliance efforts should be taken into consideration. However, the practice is inconsistent, and there is a lack of clarity regarding the exact preconditions under which compliance measures can be taken into consideration to waive sanctions or mitigate their severity. Accordingly, companies are facing significant legal uncertainty. Without consistent, clear regulation, there is no incentive for companies to invest in the preventive introduction of compliance measures, as is already customary and recognized in certain countries.

It should be clarified what is meant by *effective:* good at getting convictions, i.e. establishing liability, or good at preventing the commission of the offence in the first place? Getting a conviction is not going to undo the harm done by the initial offence, whereas prevention through implementation of compliance systems etc. is a far better outcome for society. So the question falls into two parts: how can we prevent bribery, and what are the specific features of legal person liability (as distinct from individual liability) that need to be addressed in order to achieve those outcomes? The focus should therefore be on a system for establishing liability which prevents commission of the offence in the first place. What that looks like in different local environments of course is going to vary – in a fundamentally compliant, sophisticated environment with high levels of transparency and accountability simply raising the spectre of a prosecution may be enough; jurisdictions where attitudes to corruption are less progressive may require a more assertive regime which genuinely creates a realistic prospect of conviction allied to substantive penalties. *Effective* in this context will be taken to

[5] *For further information and BIAC papers on Anti-Corruption, please visit the BIAC website at http://biac.org/policy_groups/anti-bribery-and-corruption/*

mean the prevention of bribery from occurring, with a secondary goal of increasing public confidence in the probity of both business and officials[6].

In addition, an effective compliance should be proven around policies, processes and people. The human factor is important in demonstrating effective compliance and a general culture of compliance. Sound decisions in transactions and deals are to be documented and should include an assessment regarding the risks of bribery and corruption. Effective monitoring is important. Consideration should be given to connecting with auditor's guidelines on operational effectiveness of internal control frameworks.

**2. Nature of Liability. As shown in Section B.1 of the draft report, of the 40 Parties to the Anti-Bribery Convention having some form of LP liability for foreign bribery, 27 countries have criminal liability, 11 have some form of non-criminal liability, and 2 countries have both.**

**a) What are the advantages and disadvantages of criminal liability for legal persons for foreign bribery?**

Criminal law provides a powerful and appropriate tool to deter and punish legal persons (and their officials) who engage in such conduct. Legal theory indicates that earlier rationalisations of the doctrine of corporate liability relied heavily upon pragmatism, taking corporate liability simply as a means to plug possible gaps in the personal liability of officers. However, for a large proportion of modern consumers the nature of the global corporation is certainly such that a significant proportion of the public identifies directly with brands in a way that they would not identify with the managers or directors of the corporate entity embodied in the brand, underlining the importance of deterrence and the relative impact of criminal vs. civil action in the public mind.

The effects of bribery upon not just the society in which it is perpetrated but also on the wider economic community seeking to operate within that society are such that prevention is a key aim of anti-bribery measures. The existence of clear criminal prohibitions on a particular behaviour, combined with the scope for mitigation of punishment if other particular behaviours can be demonstrated, is an effective means of shaping corporate conduct. Where legal persons are able to influence the likelihood of prosecution or conviction by putting in place appropriate systems and procedures to build a culture of compliance and prevention, then the reputational and economic consequences of criminal, rather than civil, risk will act as a greater incentive.

The disadvantages of pursuing criminal, rather than civil, proceedings tend mostly to be procedural. Criminal liability typically demands a higher standard of proof than civil liability, which in turn puts a greater burden on investigators and prosecutors to gather and present sufficient evidence.

[6] It is interesting to note from the survey that Japan on the one hand implements its relevant legislation within the code on preventing unfair competition (an explicitly business/consumer focused concept) whereas the UK debarment provisions make it quite clear that bribery is viewed as a matter of public policy, with the integrity of the public systems being of paramount importance. The UK's position is further reinforced by the possibility of requiring convicted persons to make payments in the territory where the bribe itself was paid; there is an implication that it is the system in which the official is located which has suffered the harm as much as it is the person committing the offence who should be punished. (See Table 13, p. 126)

It has to be noted that the legal situation of liability of legal persons is more diverse, as in some countries – for example Germany – the liability is not of criminal but administrative nature. However, Germany is according to the OECD Foreign Bribery Report one of the strongest enforcers of the OECD Convention with high (administrative) fines against legal persons. Therefore, a system of administrative legal liability which is working should be taken into consideration as a valid mechanism to deter and punish legal persons.

**b) What are the advantages and disadvantages of non-criminal liability for legal persons for foreign bribery?**

Typical justifications will include the lower evidential hurdles and relevance of sanction (civil penalties are almost invariably monetary, which of course is the fundamental measure of a company's existence; a company with no money left is insolvent – effectively capital punishment for corporations).

While natural persons may have non-financial incentives to offer bribes (e.g. to facilitate production of travel documentation enabling attendance at a significant family event), legal persons are far less likely to have any such non-profit motivated intent. A civil, financial penalty reflects the nature of the offence.

However, there is the difficulty of assessing the precise economic consequences of a particular bribe – the consequences will go beyond the additional profits accruing to the guilty party, as there will have been impacts for the affected competitors, of lost profits and further lost opportunities both the tender for other work and reinvest the lost profits.

As already described above, it has to be noted that the legal situation of liability of legal persons is more diverse, as in some countries – for example Germany – the liability is not of criminal but administrative nature. However, Germany is according to the OECD Foreign Bribery Report one of the strongest enforcers of the OECD Convention with high (administrative) fines against legal persons. Therefore, a system of administrative legal liability which is working should be taken into consideration as a valid mechanism to deter and punish legal persons.

**c) In your experience, does the choice between criminal and non-criminal liability carry any procedural or substantive consequences for the effectiveness of an LP liability system? For example, does it affect: jurisdiction over domestic or foreign entities; the availability of investigative techniques; the ability to cooperate across law enforcement communities, both domestically and internationally (e.g. mutual legal assistance); or public education and awareness?**

Consistency of legal liability across countries is important. Although the extra-territorial reach is effective by some jurisdictions, the current improvement in cooperation from various authorities will benefit further from consistent criminal liability.

At the same time, the existence of cross-border criminal liability for legal persons is far more problematic than for civil liability. While the availability of civil remedies against legal persons is universal, there are still many jurisdictions where the concept of attributing *mens rea* or the equivalent to a legal person causes conceptual and procedural difficulties.

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

**3. Legal basis of liability. As shown in Section B.2, the draft report groups the types of laws used by the Parties to the Anti-Bribery Convention to establish LP liability for foreign bribery into four categories: (1) general criminal law; (2) other statute; (3) case law; and (4) bribery-specific legislation. While the most common category used by the Parties is "general criminal law", many Parties make use of several of these categories. One Party – South Africa – uses all four.**

**b) What is the value, if any, of having bribery-specific legislation for foreign bribery (as opposed to enacting a prohibition in the general criminal law or other statute)?**

A bribery-specific legislation for foreign bribery may put a greater focus on respective enforcement and enable international organisations such as the OECD to better monitor the statistics and developments in this area. Bribery-specific legislation is more likely to be insulated from the impact of changes to the general legal environment, and so able to stay aligned to the aims of the Convention.

**8. Successor liability. As described in Section B.7 of the draft report, "successor liability" refers to whether and under what conditions the liability of a legal person for the offence of foreign bribery is affected by changes in company identity and/or ownership. Although not expressly covered in the Anti-Bribery Convention, the WGB has examined this issue for certain countries.**

*Legal succession in relation to sanctions*

If, following the restructuring of a company, the legal entity no longer exists, the financial penalty sanction imposed on the company is difficult to enforce. In Germany, for example, the law previously provided for a financial penalty to be asserted against a legal successor only under extremely narrow preconditions. With the 8th Amendment of the German Act Against Restraints on Competition *(Gesetz gegen Wettbewerbsbeschränkungen, GWB),* in 2013, the legislator did however extend liability for financial penalties to the legal successor. There is now a legal basis for asserting a financial penalty against the universal successor or the partial successor following a partial universal succession as a result of the splitting up of a company according to Section 123 (1) of the German Reorganization Act *(Umwandlungsgesetz, UmwG).*

This legislative change was made explicitly in the law governing administrative offenses (Section 30 (2a) OWiG) and its validity therefore extends beyond purely antitrust-related offenses. Even if Section 30 (2a) OWiG does not yet establish a completely seamless legal basis for the liability of legal successors, an extension is not considered necessary from the company's perspective. A far more preferable approach would be to focus on the positive value added of compliance by providing a corresponding incentive in the law, as put forward in I above.

**10. Compliance systems as means of precluding liability. As Section B.4.3 of the draft report shows, several of the Parties have made an effective compliance system a defence to prosecution or, conversely, they have made the lack of an effective compliance system an element of the offence.**

(See also part 1 above)

*Fundamental elements of an effective compliance system*

In the interest of legal certainty, fundamental elements for an effective compliance system which have the effect of reducing liability must be defined by law. Examples of specific fundamental elements for an effective compliance system based on international and national standards include (but are not limited to): "selection, instruction and supervision of employees; compliance risk assessment; internal guidelines and training; whistleblowing system; prosecution and punishment of detected misconduct".

Consideration should also be given to specific anti-corruption measures, such as robust Gifts and Entertainment Policies and procedures, robust policies in the selection and relationships with third parties, in the tendering for contracts, recruitment, involvement of "tone in the middle" on communicating top management anti-corruption, guidelines on dealing with JVs/Alliances, etc.

Governance structures for a risk management framework that drive accountability and responsibility for risk and execution of relevant activities should be supported by a robust management information production and distribution to enable monitoring, oversight and assurance to be fully embedded within the Risk Management structures.

**a) Based on your experiences, how has LP liability helped to sharpen incentives for legal persons to implement effective compliance systems?**

In the UK, for example, the LP liability with a defence of Adequate Procedures has certainly created action towards the development of enhanced anti-bribery risk management frameworks within the corporate sector. This should go beyond paper policies but through to the implementation of well embedded frameworks that require senior management involvement and cultural change.

One observed side effect in the UK, for example, has been for businesses of all sizes to have formal anti-bribery policies in place. The transmission mechanism has been M&A activity and the resulting warranties as to Bribery Act compliance. The standard pro formae used by lawyers for any trade sales activity now contain bribery policy warranties, meaning that many businesses which might not otherwise have had the need to create and implement formal documented policies now have them in place; risk averse advisers incorporate them as a matter of course into all deals.

As already described above, it has to be noted that the legal situation of liability of legal persons is more diverse, as in some countries – for example Germany – the liability is not of criminal but administrative nature. However, Germany is according to the OECD Foreign Bribery Report one of the strongest enforcers of the OECD Convention with high (administrative) fines against legal persons. Therefore, a system of administrative legal liability which is working should be taken into consideration as a valid mechanism to deter and punish legal persons. While the overriding objective

of effective compliance system is to do business ethically, implementing an effective compliance system also has the potential for lower fines for LP liability.

**c) In your view, how should prosecutors and courts assess whether a compliance system is adequately designed and implemented? Who should bear the burden of proof in showing that a compliance system is effective or ineffective?**

*Burden of proof*

The burden of proof in relation to circumstances with a mitigating effect on sanctions should lie with the company. As a general rule of course, all facts that are material to the decision regarding the type and extent of the legal consequences must be investigated by the authorities. However, the responsible officers within the company are themselves in the best position to provide information as to what preventive organizational and personnel measures have been taken, and this is to be recommended in view of their greater proximity to the proof. On this basis, authorities and courts are indeed in a position to assess the compliance measures of a company and to determine in relation to the specific individual case whether or not the company has fulfilled the stipulated compliance requirements. In this context, the compliance measures to be implemented must be reasonably proportionate to the size of the business and the risk arising from it. In this way, it is also feasible for small and medium-sized companies to implement them. Under the German law governing administrative offenses, the courts are already tasked with verifying whether appropriate organizational and supervisory measures have been implemented.

As part of a robust anti-bribery risk management framework a number of conditions should be in place that should enable a corporate to demonstrate its risk management framework, including the following:

- A systematic (integrity) risk assessment demonstrating an understanding of the ethical and compliance risks the business faces and a link through to the policies and procedures in place designed to mitigate the risks identified.
- Evidence of execution of control activities through documentation of execution and rationale in decision making.
- Oversight and monitoring to ensure effective operation of controls and understanding of risk profile.
- Evidence of assurance processes undertaken on a risk based approach across the risk management framework.
- Setting up effective compliance mechanisms must include monitoring.

*Conduct before and after the offense*

When imposing sanctions, the conduct of the company (on which the financial penalty is to be imposed) both before and after the offense must be taken into consideration. This includes the company's unreserved assistance in clarifying the facts of the case but also the implementation or subsequent introduction of compliance measures, which can be understood as a clear indication of the company management's commitment to act in accordance with the law.

*Leniency Regime*

As a further incentive, the incorporation of a leniency regime into the law governing administrative offenses is to be recommended. A voluntary disclosure resulting in the waiver of a financial penalty creates a strong incentive for companies to detect and disclose misconduct through their own investigations and to take effective measures to prevent further misconduct on the same grounds. Until now, companies have faced legal uncertainty with regard to the disclosure of internally detected misconduct to the authorities.

**11. Sanctions and mitigating factors. Section B.10 of the draft report catalogues various sanctions or consequences that can be imposed on a legal person for foreign bribery, including (but not limited to) fines, confiscation, disbarment, and judicial or corporate monitoring. As described in Section B.11 of the draft report, some countries may also reduce the sanctions imposed in order to give credit for certain mitigating circumstances, such as whether the legal person voluntarily reported the offence to authorities or cooperated with the investigation. They may also give credit if the company had implemented a corporate compliance programme either before the offence occurred or perhaps even after the offence (but before trial).**

For a-d) see also answer to 1 & 10

**12. Settlements. As described in Section B.12, for the purposes of this consultation, the term "settlements" refers to all agreements to resolve or forestall a foreign bribery case involving a legal person. Twenty-five Parties currently permit the resolution of foreign bribery cases through settlements either with or without a conviction.**

Settlements between companies and individual criminal prosecution authorities regarding the punishment of white-collar crime are of significant importance both for companies and for criminal prosecution authorities. This applies above all to globally active companies. Complex cases, sometimes involving cross-border transactions, entail lengthy investigations due to the need for collaboration with authorities in different countries and the language barrier. These can have a detrimental effect on the company's reputation and prevent a "new start". They also tie up the human resources of both the company and the criminal prosecution authorities. It is therefore in the interest of both the company and the criminal prosecution authority to bring investigation proceedings to a close as soon as possible. If a settlement is reached in such cases between the company and the criminal prosecution authority, steps must be taken in the interest of legal certainty to ensure that the cause of action of the case at hand cannot be cited in any further investigation proceedings ("ne bis in idem"). See also our answer to question 2. c)

**a. What are the advantages and disadvantages of settlements that do not result in a conviction?**

If we accept that the best outcome is prevention of bribery culture, to avoid that bribery is committed and has to be punished, then DPAs and the like have a number of benefits. They will appeal to businesses which may suffer in respect of public sector procurement if convicted of an offence. They also typically offer a wider range of discretion for "creative" solutions. Where the bribery has occurred at a relatively low level, strengthening of controls and culture within the existing business is likely to be the most productive long term remedy; a conviction of the legal person is likely to have deeper

impacts on its wider business with reduced scope for specific anti-bribery measures. In the most extreme cases, a conviction may lead to the failure of the business.

It should be noted that DPAs are not only beneficial for the LPs, but they are also beneficial to the enforcement agencies. DPAs often require cooperation with the government on any other investigations which should ultimately help bring them to a close.

**Business Law Section of the Law Council of Australia**

Foreign Corrupt Practices Working Party of the Law Council

The Foreign Corrupt Practices Working Party of the Business Law Section of the Law Council of Australia (BLS Working Party) is pleased to contribute a submission to the OECD Working Group on Bribery (WGB) in response to its public consultation on liability of legal persons.

The Law Council of Australia is Australia's peak professional body representing the interests of lawyers in Australia. The Law Council of Australia is concerned to ensure that Australian laws relating to corrupt practices involving foreign public officials are effective, proportionate and dissuasive.

This submission is primarily approached from the perspective of the lessons available from the operation of the Australian regulatory regime in the international context. As noted in the Phase 3 Report concerning Australia (2012) and the Phase 3 Follow Up Report (April 2015), the Australian enforcement record has been poor to date, although substantial progress has been made in recent years to improve enforcement outcomes.

The BLS Working Party has the following submissions on the issues for discussion raised in the consultation paper. In the interests of brevity, a degree of familiarity with the Australian regime is assumed. The Phase 3 Report contains an accurate summary of the Australian regime. We can elaborate on any point we make below if that would assist.

*1. General*

The BLS Working Party considers that the most important components of an effective system for the imposition of liability on legal persons are:

- a regime that is designed to ensure that legal persons adopt measures that mitigate the risk of foreign corrupt practices occurring within their organisation and that, conversely, rewards organisations that do effectively adopt measures reasonably designed to mitigate that risk;

- equally as important is an enforcement regime that is properly designed to investigate and root out foreign corrupt practices when they occur.

The BLS Working Party briefly expands on each of these components as follows.

In terms of the regulatory framework, the BLS Working Party supports the regulatory approach that imposes fault on legal persons reflected in the United Kingdom Bribery Act (section 7(2), adequate procedures). We do not support an identification principle of legal person liability (culpability only if directing mind of the legal person is responsible for the conduct) as that imposes too high a prosecutorial burden in the context of bribery and does not encourage mitigation of risk. We do not support the US style approach of *respondeat superior* liability for legal persons because there is no express relief in circumstances where appropriate mitigation steps have been adopted. There are issues with the effectiveness of the Australian culpability regime for legal persons as discussed in point 10 below.

As to the second component, from an enforcement perspective further work needs to be done in Australia around making the regulatory infrastructure more effective and dissuasive. Areas for particular ongoing focus are:

- effective encouragement to drive self-reporting as a logical outcome where bribery is uncovered in an organisation (including as part of a deferred prosecution agreement scheme);

- effective corporate whistleblowing protections in the private sector;

- improving the expertise of investigating authorities, particularly with regard to understanding corporate governance in the context of legal persons.

*2. Nature of liability*

The foreign bribery offence in Australia (Division 70 of the Criminal Code Act 1995 (Cth) (Criminal Code)) is currently restricted to a statutory criminal liability regime. The BLS Working Party is of the opinion that the main reason the Australian regime has not been effective in achieving effective and dissuasive penalties is because of a lack of enforcement outcomes rather than the essential nature of the criminal sanction itself.

The consultation paper raises the question of whether other forms of sanction such as non-criminal penalties may be more effective. An interesting area of Australian enforcement activity that has exhibited positive enforcement outcomes in recent years is the differently structured civil penalty regimes that exist under Australia's Corporations law and Competition law for some offences (Part 9.4B of the Corporations law and Part VII of the Competition law). These regimes impose a lower prosecutorial burden of proof (balance of probabilities rather than proof beyond reasonable doubt) but with commensurately lower penalties than for criminal culpability (maximum AU$1 million for Corporations law and AU$10 million for Competition law for legal persons as the measure of pecuniary liability). For clarity, civil penalty liability is not applicable to Australia's foreign bribery or false accounting offences. There has been no debate as yet in Australia to extend a civil penalty regime to foreign bribery offences. The BLS Working Party considers that the emphasis should be on improving enforcement outcomes in criminal prosecutions.

*3. Legal basis of liability*

Having regard to Australia's English sourced common law background, the BLS Working Party considers that statutory criminal law is the proper basis for imposing legal person liability. This is to overcome the lack of clarity as to the common law position, to impose appropriate culpability standards on legal persons, as well as an appropriate definition of the territorial scope of the legislative provisions.

The Anti Bribery Convention and the WGB monitoring of its provisions has contributed to debate on strengthening Australia's legal person liability system for foreign bribery. Similarly, the WGB's work on legal person liability has resulted in the adoption of other laws covering offences that sit beside the foreign bribery offence. For example, an additional books and records offence with substantially increased penalties for legal persons was inserted in Australia's Criminal Code from 1 March 2016, partly in response to comments made by the WGB in the Phase 3 Report.

*4 Types of entities covered*

Australia's regime applies to individuals as well as corporations that have distinct legal personality. There is no express recognition of entities that lack legal personality.

In the opinion of the BLS Working Party, this is not a significant issue in the context of the Australian business environment. The vast majority of Australian business organisations are conducted through legal entities with legal personality. To the extent that some business is undertaken through organisations lacking legal personality (the primary examples under Australian law would be a partnership or an unincorporated joint venture) liability would be sufficiently attributable through the individuals and legal persons constituting the unincorporated venture.

*5. Standard of liability - Whose acts?*

The physical standard for legal person culpability in Australia is the act of an employee or agent acting in accordance with their actual or apparent authority.

As noted in point 1 above, the BLS Working Party supports a failure to properly supervise as the culpability standard for holding a legal person liability for bribery. We do not consider that a strict respondeat superior approach provides an appropriate incentive for the adoption of appropriate compliance measures.

*6. Standard of liability - What conditions?*

The conditions adopted when determining whether a legal person should be held liable for bribery in Australia (Division 70 of the Criminal Code) involves a degree of complexity and ambiguity. Those conditions are:

- the conferring of a benefit on a person;
- the benefit not being legitimately due;
- influence of a foreign public official;
- the obtaining or retaining of a business advantage being not legitimately due.

The Australian regime is also complicated by the application of "default fault" culpability elements as part of Australia's federal criminal law system. Under Australian law, principles of mens rea as they apply to potentially criminal acts have default culpability requirements when a specific culpability requirement is not expressed for a physical element. This is a feature of the Australian foreign bribery offence (in section 70.2 of the Criminal Code) in relation to some of the conditions noted above. Default fault and culpability for a legal person can be established through poor culture as noted in point 10 below.

Again, the UK Bribery Act simplification of the conditions to legal person liability provides a better model of regulation than the Australian conditions. For example, the UK Bribery Act explicitly rejected a proposal that a benefit be "undue" because that would be an unnecessary and complex requirement in circumstances where the model of the regulation should instead focus on the impropriety of the benefit (see discussion in Law Comm 313) .

*7. Intermediaries*

The Australian regime imposes liability on legal persons conduct undertaken through "agents" but is not otherwise explicit in its approach to imposing liability for the risk of conduct engaged in through agents. The Australian regime involves uncertainty if the agent does not have specific or apparent

authority to undertake illegal activities or where the agent is not directly engaged by the legal person (or is engaged by non-Australian subsidiaries of an Australian legal person).

The UK Bribery Act approach to imposing acts of associates as directly attributable to a legal person irrespective of authority and the separate limb in the United States of prohibiting payments to third parties knowing that any part of the payment will be offered to a foreign public official (which includes deliberate ignorance where high risk) are better forms of regulation in relation to imposing responsibility on legal persons for the conduct of intermediaries.

*8. Successor liability*

The BLS Working Party does not consider the issue of successor liability is a significant matter in the Australian context.

In Australia, change of control transactions typically involve the acquired corporation remaining a distinct legal entity rather than becoming merged into an acquiring entity. To the extent an entity is dissolved (winding up on the grounds of insolvency), if subsequent legal liability were to be established there are processes to revive the legal entity.

*9. Jurisdiction*

Australian law does not restrict liability to legal persons for foreign bribery that occur entirely outside Australia only if it could assert jurisdiction over the natural person who committed the offence. The BLS Working Party would not support the adoption of such a restriction as it would significantly and needlessly reduce the potential territorial reach of the offence as it applies to Australian legal persons.

The Australian offence has territorial operation where the conduct occurs wholly or partly in Australia or in an Australian aircraft or ship or relates to conduct wholly outside Australia engaged in by Australian citizens, Australian residents or companies incorporated in Australia.

Australian territorial scope does not extend to foreign incorporated subsidiaries of an Australian legal person. To extend liability to an Australian legal person for such subsidiaries, it would be necessary to establish that an Australian incorporated parent company was an accomplice to the conduct engaged in by the foreign subsidiary. The BLS Working Party does not support this limitation in the territorial scope of the offence as it can be expected that many Australian legal persons act through foreign incorporated subsidiaries where those foreign incorporated subsidiaries are the alter ego of the Australian legal person for practical purposes.

*10. Compliance systems as means of precluding liability*

The Australian regime of attributing fault to legal persons (Part 12.3 of the Criminal Code) has some merits over regimes that are based on identification principles of corporate culpability (see point 1 above), in that issues of poor corporate culture and absence of compliance systems are explicitly recognised as relevant to the imposition of corporate culpability. However, ultimately, the Australian mechanism seems to have failed because of complexity of drafting and obscurity of meaning. This is demonstrated by the lack of reliance by Australian prosecuting authorities on the Australian provisions (both in the context of foreign bribery offences and more generally as a matter of criminal law) in proceedings to date. Indeed, there have been no cases brought in Australia to the knowledge of the BLS Working Party where any liability for an offence against a Commonwealth law concerning corporate liability and compliance systems has been considered.

The BLS Working Party would instead have a preference to establish an effective compliance system as a defence where the burden of proof is on the legal person to establish that the compliance system is effective in a manner analogous to the UK Bribery Act.

The adequate design and implementation of a compliance system should most appropriately be determined by an Australian Court based upon the circumstances of a particular case rather than being prescriptively set out in legislation as determination of the adequacy of the system is specific to the circumstances of the relevant organisation.

There has been a recent broader debate in Australia concerning the desirability that good "culture" be exhibited by corporations and, for example, raising the question whether the Australian securities regulator should endeavour to pursue enforcement activities when it considers that poor culture exists. The BLS Working Party does not believe this debate is particularly significant to the issue raised in the consultation paper as we prefer (as noted above) an approach where a culture of compliance is a defence with the burden of proof imposed on the legal person.

*11. Sanctions and mitigating factors*

In Australia, the prescribed criminal penalty for a contravention of the foreign bribery offence by a legal person is a fine that is currently an amount up to but not exceeding AU$1.8 million or 3 times the value of the benefit or 10% of the annual consolidated revenue of the legal person.

Gains received through bribery can be confiscated under Australian law by forfeiture order (Proceeds of Crime Act 2002 (Cth)). Disbarment from public contracts is likely to be a potential penalty available within Australia although the current Commonwealth Procurement Rules July 2014 do not currently specifically provide for any debarment sanction and the degree of rigour that is currently applied is open to some question. Court supervised corporate monitoring might also be a tool used in an Australian settlement process but this will require some legislative intervention as currently, there is no means by which a monitor may be imposed by Court order on a company.

The BLS Working Party believes that an effective sanctions regime should also explicitly allow for recognition of mitigating circumstances that are transparent and predictable to enhance the effectiveness of sanctions. As noted in point 0 above, further work is required in Australia to encourage self-reporting and to protect corporate whistleblowing in the private sector.

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

*12. Settlements*

The BLS Working Party supports the development of additional mechanisms in Australia to facilitate settlements, including by the adoption of a deferred prosecution agreement scheme for Commonwealth financial crimes (including foreign bribery and other serious financial offences).

Experience in Australia to date has been an absence of successful enforcement outcomes. As such the lack of enforcement precedent does not advance and reinforce a strong community expectation of compliance.

For Australia, a better outcome would be to have a record of settlements as is beginning to be the case in the United Kingdom.

The disadvantages of a settlement system are clear (an attitude that the merits might not matter). However, for Australia, it would be better to risk that potential disadvantage in order to reinforce the importance of a culture of compliance in the business community.

**José Antonio Caballero Juárez, Centro de Investigación y Docencia Económicas, Mexico**

*José Antonio Caballero Juárez is Research Professor in the Division of Legal Studies, Centre for Economic Research and Education (CIDE), Mexico.*

This note is divided in two sections. The first section analyzes the current status of the criminal liability of legal persons in Mexico. The second section focuses on foreign bribery as a criminal offense in Mexican law.[7]

***Criminal Liability of legal persons in Mexico. A brief introduction***

Last year the Mexican Supreme Court decided that legal persons (LPs) where entitled to sue to claim reparations from third parties that affected their honor.[8] The decision acknowledges that LPs do not have honor in the same way as natural persons do, still the Court found grounds for the recognition of such a right for LPs. In another case the Supreme Court accepted that LPs where entitled to the safeguards that natural persons have in regards to personal data protection.[9] These decisions tend to draw important parallels between LPs and natural persons from a rights perspective.[10] As a consequence, LPs enjoy a wide variety of rights.

However, when it comes to criminal liability and even administrative liability, the trend is not that clear. The Court has not heard any recent cases involving criminal liability of LPs. Despite legal reforms that recognize LPs as defendants in criminal cases, there is hardly any evidence that shows that state or federal prosecutors have filed charges against LPs.[11]

The reasons for the lack of prosecutions against LPs are not clear. Some possible explanations include problems with the interpretation of the new statutory rules; the lack of incentives to prosecute LPs; and poor capacities to conduct successful criminal investigations.

---

7 This not does not address developments in administrative law on foreign bribery.

8 DERECHO FUNDAMENTAL AL HONOR DE LAS PERSONAS JURÍDICAS. Décima Época, Registro: 2000082, Semanario Judicial de la Federación y su Gaceta, Libro IV, Enero de 2012, Tomo 3, Tesis: 1a. XXI/2011 (10a.), Página: 2905.

9 PERSONAS MORALES. TIENEN DERECHO A LA PROTECCIÓN DE LOS DATOS QUE PUEDAN EQUIPARARSE A LOS PERSONALES, AUN CUANDO DICHA INFORMACIÓN HAYA SIDO ENTREGADA A UNA AUTORIDAD. Décima Época, Registro: 2005522, Gaceta del Semanario Judicial de la Federación, Libro 3, Febrero de 2014, Tomo I, Tesis: P. II/2014 (10a.), Página: 274.

10 PERSONAS MORALES. LA TITULARIDAD DE LOS DERECHOS FUNDAMENTALES QUE LES CORRESPONDE DEPENDE DE LA NATURALEZA DEL DERECHO EN CUESTIÓN, ASÍ COMO DEL ALCANCE Y/O LÍMITES QUE EL JUZGADOR LES FIJE. Décima Época, Registro: 2005521, Gaceta del Semanario Judicial de la Federación, Libro 3, Febrero de 2014, Tomo I, Tesis: P. I/2014 (10a.), Página: 273.

11 A case took place in Mexico City and involved a gas company for its liability in the explosion of one of its trucks in front of a Hospital. The LP involved in the accident admitted liability and offered reparations. A judge accepted the plea and the case was closed. See "Absuelven a Gas Express Nieto tras el pago de 66 mdp", *Excélsior*, 20-08-2015.

*Statutory and Interpretation Problems*

From a Federal perspective, criminal liability for LPs is governed by articles 11, 11 bis, and 32 section IV (on civil liability related to the impact of a crime) as well as articles 421, 422, 423, 424 and 425 of the National Code of Criminal Procedure.

Long standing precedents in Mexico have considered impossible to prosecute LPs.[12] In this context, legal reforms that recognize criminal liability of LPs are still to be tested by the Supreme Court. Under these circumstances, it is very likely that prosecutors adopt a skeptical approach towards any case involving the possibility of pressing charges against an LP. But even if they go ahead and use them, there are still several problems that need to be addressed.

First, the National Code of Criminal Procedure includes a standard that details the situations in which LPs are liable from a criminal perspective (article 421). This standard is not in accordance with the one contained in article 11 of the Federal Criminal Code. The question here is which standard should be considered? The standard in article 11 is narrower than the one considered in article 421. Article 11 requires that the criminal offense is executed with means obtained from the LP that will be benefitted by the crime. On the other hand, article 421, considers the means element as only one of the possible ways in with a criminal offense can be committed. Also, the compliance standard considered in article 421 is not considered in article 11.

The compliance rule itself poses a problem under Mexican jurisprudence. It may be argued that the duty that the compliance rule demands is not properly defined and therefore produces an open ended description of a crime. Such an argument may well be accepted by federal judges or the Supreme Court under a judicial review proceeding.[13]

It may also be argued that the National Code of Criminal Procedure is not the proper statute to govern LPs criminal liability since it is a procedural code and criminal liability is a substantive issue.

---

12 PERSONAS MORALES, RESPONSABILIDAD PENAL DE LOS REPRESENTANTES DE LAS. No puede admitirse que carezcan de responsabilidad quienes actúan a nombre de las personas morales, pues de aceptarse tal argumento los delitos que llegaran a cometer los sujetos que ocupan los puestos de los diversos órganos de las personas morales, quedarían impunes, ya que las sanciones deberían ser para la persona moral, lo cual es un absurdo lógica y jurídicamente hablando, pues las personas morales carecen de voluntad propia y no es sino a través de las personas físicas como actúan. Es por esto que los directores, gerentes, administradores y demás representantes de las sociedades, responden en lo personal de los hechos delictuosos que cometan en nombre propio o bajo el amparo de la representación corporativa. Amparo directo 2489/83. Leonel Sorola Ruán. 4 de agosto de 1983. Unanimidad de cuatro votos. Ponente: Mario G. Rebolledo F. Séptima Época, Registro: 234319, Instancia: Primera Sala, Tipo de Tesis: Aislada, Semanario Judicial de la Federación, Volumen 175-180, Segunda Parte, Página: 114

13 See for example, the following precedent published by the Supreme Court: DELITO CONTRA LA SEGURIDAD DE LA COMUNIDAD. EL ARTÍCULO 165 BIS, FRACCIONES I, IV Y VII, DEL CÓDIGO PENAL PARA EL ESTADO DE NUEVO LEÓN QUE LO PREVÉ, VULNERA EL PRINCIPIO DE LEGALIDAD EN SU VERTIENTE DE TAXATIVIDAD. Décima Época, Registro: 2010488, Gaceta del Semanario Judicial de la Federación, Libro 24, Noviembre de 2015, Tomo I, Tesis: 1a. CCCLXXIII/2015 (10a.), Página: 966.

*Criminal Policy*

Prosecutors face a wide array of cases that involve violent crimes. The pressure to solve these type of cases demands most of the resources available to prosecutors. The priorities expressed in action programs and other policy documents usually ignore corruption and white collar crime.[14] Watchdogs usually focus in the performance of prosecutors in cases that involve violent crimes.[15]

Even in non-violent crimes that are strictly linked to priorities described in Criminal Policy documents, investigations are scarce. Money laundering activities most likely amount important figures.[16] There have also been several statutory reforms designed to reduce money laundering.[17] However, the number of criminal investigations reported is so small that the National Institution specialized in public statistics does not report them independently.[18]

Efforts to fight corruption have been uneven at best. Although it is possible to see that corruption is included in many criminal policy documents, criminal investigations are limited. The best example of this trend is the still unoccupied office of the special federal prosecutor on corruption. This office was created in 2014 and is still waiting for the appointment of the first special prosecutor.

The recent anticorruption movement supported by civil society may be the starting point for a stable and permanent effort against corruption in Mexico. The movement was able to obtain the approval of a Constitutional amendment that promises the establishment of a National Anticorruption System.[19] It is expected that the System will start working by the end of this year.

*Criminal Investigation Capabilities*

The capacity for conducting effective criminal investigations is limited. Most of the cases relay on witnesses or even on defendants' guilty pleas. Sophisticated criminal investigations are not common. And whenever sophisticated criminal investigations take place it is very likely to find important problems during their development. The most relevant example of this is the Ayotzinapa case that involved the forced disappearance of 43 students in the southern city of Iguala. The office of the Federal Prosecutor announced a thorough investigation on the case. An independent group of experts

---

14 Plan Nacional de Desarrollo. Section México en Paz, subsection I.2. page 39. http://pnd.gob.mx/wp-content/uploads/2013/05/PND.pdf (Last visit November 2016).

15 See for example: Observatorio Nacional Ciudadano Seguridad, Justicia y Legalidad. *Reporte sobre Delitos de Alto Impacto, Julio 2016*, México, Observatorio Nacional Ciudadano. http://onc.org.mx/wp-content/uploads/2016/09/mensual-julio-digital_VF.pdf (Last visit November 2016)

16 Leyva Pedrosa, Ernesto C. "Lavado de dinero en México. Estimación de su magnitud y análisis de su combate a través de la inteligencia financiera"in *Realidad, Datos y Espacio. Revista Internacional de Estadística y Geografía*, Vol. 4, Num. 2, mayo agosto 2013.

17 See for example Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita, published in 2012.

18 See data published by the Secretariado Ejecutivo del Sistema Nacional de Seguridad Pública, where these type of crimes appear under the other crimes classification. "Reporte de incidencia delictiva del fuero federal por entidad federativa, 2012-2016", October 2016 in: http://secretariadoejecutivo.gob.mx/docs/pdfs/fuero_federal/estadisticas%20fuero%20federal/Fuerofederal092016.pdf (Last visit November 2016).

19 Reform published in the Diario Oficial de la Federación May 27, 2015.

selected by the Inter-American Commission on Human Rights found multiple inconsistencies and mistakes in the investigation.[20] More than two years later many of the facts surrounding the disappearance of the students are still no clear.

In addition to the technical problems, prosecutors in Mexico face widespread public distrust.[21] High profile criminal investigations are presumed to be rigged. Also, many question why some cases are left behind without further investigations. Until very recently such was the case of state governors that left office leaving behind important debts.[22]

### *B. The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) and its Impact in Mexico*

The Anti-Bribery Convention has had a clear impact over the drafting and enactment of criminal statutes. However, as mentioned above, the main problem is not necessarily in the lack of statutes but in their enforcement. Still there are some legal issues that arise from the Statutes that are worth addressing.

In the following lines I will comment on the statutory reforms adopted by Mexico to comply with the Anti-Bribery Convention as well as with other international conventions on corruption. Secondly, I will provide a brief analysis of the problems that the current definition of Bribery of Foreign Public Officials has under Mexican criminal law.

*Criminal Law Reforms*

Statutes that seek to reduce and punish corruption include criminal as well as administrative laws. The first time corruption was addressed in a presidential campaign as a national problem in Mexico was in 1982. Since those days, Mexico has signed international treaties and enacted statutes to fight corruption. The incorporation of the Anti-Bribery Convention took place in 1999 with the enactment of a reform to the Federal Criminal Code that incorporated article 222 bis.[23] In 2005, article 222 bis was reformed in order to meet the standards of the Anti-Bribary Convention in accordance to the recommendations of the Working Group on Bribery.[24] The amendment changed the definition of

---

20 See the report in http://prensagieiayotzi.wixsite.com/giei-ayotzinapa/informe- (Last visit November 2016).

21 See ENVIPE 2016 http://www.inegi.org.mx/saladeprensa/boletines/2016/especiales/especiales2016_09_04.pdf (Last visit November 2016)

22 Recent cases involve the governors of Veracruz, Sonora and Chihuahua. On the other hand, Mr. Humberto Moreira, who governed Coahuila and is famous for leaving a huge debt has been able to successfully overcome accusations against him. Earlier this year he was prosecuted on money laundering in Spain and his case was dismissed by a Spanish Judge. A Spanish Newspaper published that the Mexican Embassy in Spain as well as officers of the Federal Prosecutor's Office were openly assisting the defense of Mr. Moreira. Mexican government denied these accusations. See Irujo, José María. "El hermano de un consejero de la Judicatura ayudó a Moreira en Madrid" *El País*, February 29, 2016 and Gallegos, Zorayda. "El Gobierno mexicano rechaza haber gestionado la liberación de Moreira" *El País*, February 24, 2016.

23 Published on the Diario Oficial de la Federación May 17, 1999.

24 Working Group on Bribery in the International Business Transactions. *Mexico Phase 2. Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions andthe Recommendation on Combating Bribery in International Business Transactions*, OECD, September 2, 2004, paragraphs 33 and 34.

foreign official, included third parties as possible beneficiaries of the bribe, the method to determine fines and the incorporation of liability for LPs.[25]

Later, in 2015, further reforms were enacted in order to include any third party as possible beneficiary of the bribe as well as the possibility for witnesses to access the special witness protection program.[26] These reforms were passed in compliance to recommendations by the Working Group on Bribery.[27]

This year the Federal Criminal Code was amended two times in sections that involve anti-corruption efforts. The first amendment incorporated article 11 bis to the Federal Criminal Code. The bill also amended article 421 of the National Code of Criminal Procedure. The new text seeks to harmonize the Federal Criminal Code with the National Code of Criminal Procedure in cases involving LPs criminal liability, as mentioned above (section A.1.). It also complies with observations from the Working Group on Bribery.[28] The new text of article 421 adds additional hypothesis to find criminal liability on LPs.[29] It also includes a due diligence (compliance) clause as an obligation to LPs to take the necessary steps to avoid the risk of committing a crime. Finally, it states that criminal liability of LPs is separated from criminal liability of natural persons. All of these issues were also considered by recommendations of the Working Group.

The second amendment represents the enactment of Mexico's new Anticorruption System in the Federal Criminal Code. The bill does not amend articles 11 and 222 bis of the Federal Criminal Code nor article 421 of the National Code of Criminal Procedure.

*Possible objections to article 222 bis of the Federal Criminal Code*

The current text of article 222 bis may be contested before constitutional judges under the following grounds:

a. The text is open ended since it requires interpretation of foreign law in order to be completed. Article 222 bis may be considered unconstitutional under the legality clause of article 14 of the Mexican Constitution since it leaves to external and indefinite sources one of the necessary elements to consider that the criminal offense happened. Case law from the Mexican Supreme Court requires that criminal laws need to be clearly written with the necessary and explicit limits, without references to extralegal standards.[30] The reference to an external legal system may only be incorporated into Mexican law through an expert witness.[31] Considering this

25 Published on the Diario Oficial de la Federación, August 23, 2005.

26 Published on the Diario Oficial de la Federación, March 12, 2015.

27 Working Group on Bribery in the International Business Transactions. *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Mexico*, OECD, October, 2011.

28 Working Group on Bribery in the International Business Transactions. *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Mexico*, OECD, October, 2011, paragraph 25.

29 The Working Groups observation complained that article 11 of the Federal Criminal Code only accepted cases where the offense was commited with means provided by the LP.

30 NORMAS PENALES. AL ANALIZAR SU CONSTITUCIONALIDAD NO PROCEDE REALIZAR UNA INTERPRETACIÓN CONFORME O INTEGRADORA. Novena Época, Registro: 167445, Semanario Judicial de la Federación y su Gaceta, Tomo XXIX, Abril de 2009, Tesis: P./J. 33/2009, Página: 1124.

31 PROTOCOLO SOBRE UNIFORMIDAD DEL RÉGIMEN LEGAL DE LOS PODERES. EL HECHO DE QUE NO REQUIERA QUE EL FUNCIONARIO EXTRANJERO ANTE QUIEN SE OTORGA EL PODER, TRANSCRIBA O AGREGUE LOS DOCUMENTOS QUE LE FUERON

criteria, any reference to a foreign legal system may be deemed as extralegal and therefore unconstitutional.

b. The text penalizes the act of offering or giving a public officer or a third party an undue benefit without considering the impact in the interests of the party that provided the said benefit. Under those circumstances, it may be argued that the text does not require that the party that produced the bribe receives in exchange a material benefit. This leaves an open door for the prosecutor to decide when a certain benefit may be deemed improper or undue. It also leaves open the criteria to determine what sort of improper benefit was sought or obtained by the accused party. In both cases, it may be argued that the criminal offense contained in article 222 bis violates the legality clause of article 14 of the Constitution.

***Conclusions.***

It is quite clear that the Working Group on Bribery's recommendations have had an impact in the drafting of Mexican criminal statutes. These may be clearly observed in the case of criminal liability of LPs and the foreign bribery as a criminal offense. Still, despite efforts to comply by Mexico, several problems remain. Some of them are already stated by the Working Group such as the problem of territorial jurisdiction to prosecute all cases of foreign bribery.[32] There are also other relevant issues expressed by the group in the follow up report of 2014.[33] Some of them have been addressed by the 2015 and 2016 reforms. Others are still pending. In some cases, there is an open debate between Mexican government officials and the Working Group on the grounds of the observations.

This note discusses some other problems that may arise with the prosecution of LPs under the foreign bribery criminal offense. Case law is still not ripe enough to provide an estimation of the possible outcomes of a case challenging articles 11, 11 bis and 222 bis of the Federal Criminal Code and article 421 of the National Code for Criminal Procedure. Still, it is very likely that defendants on foreign bribery cases will present challenges that include the problems mentioned here. Considering the precedents of the Supreme Court on the interpretation of article 14 of the Mexican Constitution, challenges may be successful.

Another set of problems have to do with the enforcement of the criminal provisions on foreign bribery. This paper advances some possible reasons that may help explain why there has been such a limited activity in the prosecution of cases.

---

EXHIBIDOS POR EL COMPARECIENTE PARA SU OTORGAMIENTO, NO IMPLICA UNA VIOLACIÓN AL DERECHO DE IGUALDAD. Décima Época, Registro: 2005459, Gaceta del Semanario Judicial de la Federación, Libro 3, Febrero de 2014, Tomo I, Tesis: 1a. XVI/2014 (10a.), Página: 680.

32 Working Group on Bribery in the International Business Transactions. *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Mexico*, OECD, October, 2011, Commentary after paragraph 23.

33 Working Group on Bribery in the International Business Transactions. Mexico: Follow-Up to the Phase 3 Report & Recommendations, OECD, June 2014.

**Corruption Watch, United Kingdom**

*Susan Hawley is Policy Director at Corruption Watch, United Kingdom.*

Corruption Watch is a UK based NGO which focuses on ending corporate impunity for grand corruption. In particular it holds the UK authorities to account for how it enforces its anti-corruption laws. In 2015 Corruption Watch held a Roundtable in the UK specifically on the UK regime for holding corporations to account. Building on the discussions at that Roundtable, Corruption Watch produced a briefing on UK corporate liability in September 2015, *Off the Hook: Corporate Impunity and Law Reform in the UK (http://www.cw-uk.org/2015/09/29/off-the-hook-corporate-impunity-and-law-reform-in-the-uk/).* Corruption Watch also looked closely at the issue of out of court settlements for dealing with corruption and produced a report in March 2016, *Out of Court, Out of Mind: Do Deferred Prosecution Agreements and Out of Court settlements deter overseas corruption (http://www.cw-uk.org/2016/03/10/out-of-court-out-of-mind-do-deferred-prosecution-agreements-and-corporate-settlements-deter-overseas-corruption/).*

Additionally, Corruption Watch monitors corruption trials in the UK and produces reports and a blog covering enforcement actions on corruption. The most relevant for the purposes of the OECD's consultation on corporate liability are its report and blog on the first Section 7 Deferred Prosecution Agreement (http://www.cw-uk.org/wp-content/uploads/2015/12/Corruption-Watch-UK-Report-and-Analysis-UKs-First-Deferred-Prosecution-Agreement-December-2015.pdf) and its blog on the first guilty plea under Section 7 (http://www.cw-uk.org/2016/02/16/sfo-plays-hardball-sweett-case-sets-new-standards-for-cooperation-in-corruption-cases/).

*What are the most important components of an effective system for the liability of legal persons?*

Corruption Watch believes that the most important components of an effective corporate liability regime are:

1. That it should be clear, straightforward, fair and easily enforceable.
2. That companies should be held to account under criminal law, so as not to give the appearance that companies are above the law. Public confidence in the justice system dictates that companies should be criminally liable not least because the consequences of wrongdoing by a company can have a social impact which is in many cases far greater than individual wrongdoing.
3. That such liability should not depend upon proving that senior executives intended for the offence to happen (as per the identification doctrine), as this is not only difficult to prove in large multinational or global companies but also creates perverse incentives to insulate the board and executives from knowledge of wrongdoing. It also penalizes SMEs where senior executives can be proved more easily to have known and intended wrongdoing to happen.
4. That a corporate liability regime should ensure that companies can be liable both for failing to prevent an offence but also for carrying out an offence so that serious offending can be properly punished.
5. That those responsible for overseeing a company should face penalties where a company has committed an offence as well as the individuals who directly engaged in an offence.
6. That companies should not be able to evade liability by selling off or renaming the part of the company that has committed the offence.
7. That corporate liability should be similar across the board, at least for economic crime, given the inter-relatedness between corruption and other financial crimes such as money laundering and fraud. A higher standard of liability for foreign bribery creates unevenness

in the legal framework for dealing with economic crime and reduces the range of tools available to prosecutors.

8. That corporate liability systems must have proper extra-territorial effect, including where the wrongdoing occurred exclusively abroad, in order to be fit for purpose in an era of multinational and global business. Lack of extra-territorial effect creates perverse incentives for companies to operate different standards at home and abroad, and also for multinationals to structure their operations in such a way that any wrongdoing is effectively beyond the reach of the law.
9. That a corporate liability system is only as good as its enforcement and serious consideration needs to be given to ensuring an effective enforcement system for dealing with corporate misconduct, including funding for the bodies that deal with such misconduct, training for prosecutors, and strong political will from government agencies.

*Legal basis of liability*

There is no doubt that the Working Group on Bribery's work has helped to change the legal landscape for corporate liability in the UK, due to its ongoing insistence that the UK introduce modern and fit for purpose bribery legislation and tackle its corporate liability rules. This resulted in the Bribery Act in in 2010 which introduced a whole new standard of corporate liability into the UK, the Section 7 'failure to prevent' model.

The attractiveness of the Section 7 failure to prevent model has led to the introduction of a similar offence in relation to corporate failure to prevent criminal tax evasion. In October 2016, this was introduced for Parliamentary approval following a consultation process in a draft Criminal Finances Bill.[34] Additionally, at the UK Anti-Corruption Summit in May 2016, the UK government announced that it would consult on extending the scope of the corporate failure to prevent offence beyond bribery and tax evasion to economic crime in general.[35] The Serious Fraud Office (SFO) has argued strongly for further corporate liability reform in the form of an extension of a Section 7 style offence to economic crime.[36]

It is worth noting that as the issue of the inadequacy of the UK's ongoing corporate liability regime has become more high profile with the SFO's intervention, the Crown Prosecution Service has also started to highlight non-economic crime cases where it has not able to prosecute the company due to the corporate liability laws. This includes the phone-hacking scandal involving News of the World which included corruption of police officers[37] as well as a case involving G4S under the Corporate Manslaughter Act 2007 under which the 'directing mind' test still applies.[38]

---

34 http://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0075/cbill_2016-20170075_en_11.htm#pt3-pb1-l1g36. The offence is drafted slightly differently than the Section 7 offence. A company is guilty of an offence "*if a person commits a UK tax facilitation offence while acting in the capacity of a person associated with*" the company. The new offence has an adequate procedures defence.

35 https://www.gov.uk/government/news/new-plans-to-tackle-corporate-fraud

36 https://www.sfo.gov.uk/2016/09/06/control-liability-good-idea-work-practice/; https://www.sfo.gov.uk/2016/09/05/cambridge-symposium-2016/

37 http://www.cps.gov.uk/news/latest_news/no_further_action_to_be_taken_in_operations_weeting_or_golding/

38 http://blog.cps.gov.uk/2014/03/death-of-jimmy-mubenga-charging-decisions-following-inquest.html

This shows that by raising the standard for corporate liability in one area, it highlights inconsistencies across the board. Ultimately, this could lead to a levelling up of corporate liability standards if the UK government choses to tackle these inconsistencies. But it also points to the desirability of introducing a broader, coherent system of corporate liability rather than a high standard of liability for bribery on its own.

*Standard of liability – whose acts?*

There is still relatively little case law in relation to the Section 7 failure to prevent offence for bribery in the UK. All three actions so far have involved a guilty plea by the company (two via Deferred Prosecution Agreements and one via a guilty plea in court). Consequently, Section 7 is untested in the courts.

A Section 7 offence has huge benefits for the prosecutor particularly in a situation where a company pleads guilty. As Section 7 is a failure to prevent offence rather than a substantive offence, it has in effect a lower threshold of evidence and is therefore easier and quicker to prove. Although a prosecutor must prove the underlying substantive offence which the company failed to prevent, if a company pleads guilty to a Section 7 offence particularly through a Deferred Prosecution Agreement, then in practice, the prosecutor will not need to prove the underlying offence to the full standard. However, there are several 'downsides' to Section 7 not being a substantive offence. The first is that it will not be considered by the judiciary as the most serious form of offending. In the Standard Bank Deferred Prosecution Agreement, Justice Leveson specifically noted, while assessing culpability of the bank (para 46 of the Preliminary Judgement)[39], that the Joint Prosecution Guidance on the Bribery Act makes clear that Section 7 is not a substantive offence, and that "*the evidence does not reveal that executives or employees of Standard Bank intended or knew of an intention to bribe*." During the hearing at which Sweett pleaded guilty to a Section 7 offence, the company's defence also made a point of the fact that Section 7 was not a substantive offence as a potential 'mitigating factor' that the Judge should take into account. If companies cannot be held liable for the most serious form of offending in the UK, which owing to the identification doctrine governing substantive offences it is virtually impossible to do for large companies, it may prove difficult in the UK to achieve the high level of fines needed to seriously deter bribery.

The second downside is that Section 7 does not incur mandatory exclusion from public procurement. Legal opinion sought by Corruption Watch suggests that Section 7 could not incur mandatory exclusion under the EU Procurement Directives or the UK implementing legislation, the Public Contract Regulations, because it is not a substantive offence. While the government could have decided to make it mandatory, it did not need to do so to be compliant with the EU Directive. Section 1 and 6 of the Bribery Act, as substantive offences, do incur mandatory debarment. The result is that as it is hard to prove large companies guilty of substantive offences, large companies will large avoid exclusion from public procurement while smaller companies, who can more easily be proven guilty of a substantive offence, are more likely to face this sanction. Not only does this remove a crucial deterrent factor for large companies to engage in bribery, it also creates an uneven enforcement playing field with SMEs facing potentially harsher penalties than large ones.

A third downside is that Section 7 may be inadequate for holding individuals to account for wrongdoing. It is noticeable that in the two enforcement actions that have taken solely in relation to Section 7 (the Standard Bank DPA and Sweett) no individuals have yet been charged in the UK. In relation to the Standard Bank DPA, it is clear from the Statement of Facts that key UK individuals

[39] https://www.judiciary.gov.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Preliminary_1.pdf

were involved in: approving an agency agreement that Standard admitted to be a vehicle for alleged corruption; drawing the agency agreement up; and concealing the agency agreement from the compliance team at Standard Bank. Yet no individuals in the UK were charged nor any regulatory action taken against them. In the case of Sweett, the prosecution stated at the hearing where Sweett pleaded guilty in December 2015 that it would bring charges against individuals within three months. However, no charges have yet been laid. It is noticeable that the third Section 7 enforcement action also involved a Section 1 offence and has resulted in charges being laid against individuals. This raises a question as to whether companies are able in effect to trade off a guilty plea for a Section 7 offence for non-prosecution of its employees. Or whether prosecutors, who are under pressure to prove results, may focus on the quick and easy win of a Section 7 conviction in the investigative process and as a result fail to gather enough evidence of individual wrongdoing.

Furthermore, Section 7 may leave senior executives untouched. It is crucial for public confidence and for deterrence that not just the individuals who engaged in the wrongdoing, but also the individuals at a senior level, and ultimately the board of directors who are responsible for the organisation's failure and hence its criminal culpability are themselves held to account for such failures. Current UK legislation provides no grounds upon which directors can be held publically to account, regardless of how seriously they may have failed in their duties. One way of resolving this would be for making Directors of companies convicted of a Section 7 offence liable to disqualification where it can be proven that a director or directors behaved in such a way that led to the company's failure to prevent an offence. This could create a strong incentive on board members to ensure that companies are fully compliant with the Bribery Act, but would require an amendment to the Company Directors Disqualification Act 1986, which already provides for Director's disqualification for breaches of competition law.

*Compliance systems as means of precluding liability.*

The adequate procedures defence in Section 7 is commonly cited as having raised corporate governance standards across the UK and as encouraging companies to exercise due diligence over intermediaries and subsidiaries. Both of these benefits of Section 7 are dependent upon effective, proactive and frequent enforcement of the offence however. It is worth noting that proactive and frequent enforcement is probably of greater effect in incentivizing improvement to compliance systems than the nature of legal liability itself. Additionally, as the US example shows, compliance systems can be taken into account through the enforcement process without being included as a legislative factor. Without proactive enforcement however, there is a strong risk of 'paper compliance' becoming a dominant trend.

Courts and prosecutors are unlikely to have the expertise to assess whether a compliance system is adequately designed and implemented. Outside expertise to help courts and prosecutors assess systems is highly desirable. The arrival of standards such as the ISO 37001 raises particular issues about what courts and prosecutors should rely on and what constitutes adequate compliance. The experience in the UK with regard to the BS 10500 anti-bribery standard suggests that courts and prosecutors should not rely solely on such standards. In the UK there is no accreditation process for the bodies that certify the BS 10500 and companies can also self-certify that they have met the standard. In the Smith and Ouzman case, shortly before the company's trial date, the company sought a BSI 10500 from a body that is controversial for lack of accreditation in health and safety certification (where accreditation is obligatory). This appeared to be a clear attempt to take a quick and easy route to proving to the court that the company had taken remedial action rather than a genuine review of its compliance procedures. Proper examination of compliance systems with external verification should be required by courts and prosecutors with the cost born by the company that has been charged.

It is also essential that prosecutors can seek similar corporate remediation in cases where companies are convicted as they can when they negotiate a Deferred Prosecution Agreement. In the UK, there is a real need for the introduction of Corporate Probation Orders, so that a prosecutor can seek an order requiring a company to get external verification of its compliance procedures as part of sentencing. Currently, under UK law, companies that self-report and cooperate and are therefore eligible for a DPA may be required to get external verification (as in the Standard Bank DPA), but a company that does not cooperate and is convicted and is therefore by definition likely to require greater external monitoring, in practice gets none. This creates perverse incentives for companies not to cooperate. While the UK prosecutors could use Serious Crime Prevention Orders to achieve this effect, these are a very heavy handed approach, which require a separate civil court process and clear evidence of the risk of further wrongdoing making them difficult to use in practice.

*Sanctions and mitigating factors.*

It is clear that criminal sanctions are likely to be a greater deterrent against foreign bribery than civil sanctions. Criminal sanctions are likely to be accompanied by a greater reputational loss than civil sanctions and are an important means for indicating society's disapproval and lack of acceptance of wrongdoing. Effective sanctions against companies must involve several factors to achieve deterrence:

1. *A significant level of fine commensurate with the harm caused and the benefit gained and compensation to victims*. If prosecutors were to spend greater effort and resources building up the picture of the full harm caused and benefit gained, it could help raise fine levels as well as raising the profile of how serious the harm is that bribery causes. In particular ensuring that victims of corruption are able to provide input into the sentencing process may help bring home to courts and the public the real harm that bribery causes.
2. *Transparency, full disclosure of the wrongdoing concerned, and publication of monitoring reports*. It is essential that companies are perceived as having come clean, admitted to guilt, and that details of wrongdoing are available to the public. Allowing companies to manage what information they put in the public domain about their wrongdoing undermines public confidence and creates the perception of cosy deals between companies and prosecutors. It is also important that companies should make public at least an overview of what external monitors imposed by courts or prosecutors have found when reviewing their compliance reports.
3. *Enforcement or regulatory action against senior executives who were in charge at the time that wrongdoing occurred where it can be proved that their failure to take action or negligence resulted in the wrongdoing*. Individual prosecutions are essential to ensuring deterrence. Companies must be required to hand evidence of individual wrongdoing over to prosecutors and this should be considered as a mitigating factor for the company.
4. *Real potential consequences as a result of a conviction, including loss of licenses and exclusion from public procurement*. There is strong anecdotal evidence that companies fear exclusion from procurement or loss of an operating license possibly more than any other sanction. However, exclusion is extremely rare in OECD countries.

Because of the powerful deterrent effect of criminal sanctions and in particular the consequences they can bring, it is essential that their use is not undermined by inconsistent application of and low standards for mitigating factors. High mitigating standards should include for instance a definition of self-report which is based on the provision of information that a prosecutor could not otherwise have known about. Standards of cooperation should include the provision of detailed information about wrongdoing by individuals, unedited first witness accounts, provision of access to witnesses, full evidence of other wrongdoing discovered in the course of investigating a specific offence, among

other things. Remedial steps taken with regard to compliance systems should be externally verified rather than self-certified.

It is essential to differentiate fines and consequences for companies that self-report and cooperate and those that do not, in order to encourage companies to come forward with their wrongdoing. Ultimately however it is increased enforcement, increased risk of detection, increased risk of high fines and the real risk of exclusion from public procurement that are together likely to persuade companies of the benefits of corporate self-reporting. It will be useful for there to be a transparent assessment of the results of the US DOJ's Pilot Program on self-reporting and the new policy introduced by the UK's second Deferred Prosecution Agreement both of which reduce fines for self-reporting companies to 50% of what they would have received if they had pleaded guilty. Hard evidence on whether lowering fines can be effective in encouraging self-reporting is needed. However, it is highly undesirable for countries to engage in a race to the bottom of providing lower and lower fines for companies that self-report rather than ensuring that the downsides and consequences of not self-reporting are sufficiently high to make the risk of not doing so unpalatable. The idea that companies can engage in wrongdoing and evade sanction altogether by self-reporting is likely to become increasingly unacceptable to the public.

*Settlements*

There is no doubt that out of court settlements are a useful tool for prosecutors, providing speed and certainty of outcome. The US has managed to achieve significant enforcement results by using settlements through guilty plea, and settlements through negotiated means such as Deferred or Non Prosecution Agreements. Settlements resolved through a guilty plea in court and settlements resolved through an agreement with a prosecutor should theoretically result in significantly different outcomes as the former should lead to companies facing further sanctions such as exclusion from public procurement. In practice, it is not always clear how significantly different the two types of settlement are given the apparent lack of significant consequences that result from a guilty plea.

Guilty pleas are a legitimate and important element of many justice systems. However, the increasing use of negotiated agreements between prosecutors and company (whether approved by a court or not) raises significant issues that need to be considered. These include the following:

1. *Lack of individual accountability.* Research in the US suggests that where enforcement actions result in a DPA or NPA rather than a guilty plea, individual convictions are far rarer.[40] The US has recognized this issue with the introduction of the Yates Memo which made cooperation credit awarded to companies conditional on a company handing over evidence of individual wrongdoing. In the UK, the first DPA resulted in no individual action and there were serious concerns that prosecutors had not undertaken an independent enough investigation to ascertain individual culpability.[41] The deterrent effect of anti-corruption law is undermined if individuals, particularly at a senior level, are not held to account for wrongdoing by a company.

---

40 Mike Koehler, "*Measuring the impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement,*" 49 U.C. Davis Law Review 497 (2015)

41 See Corruption Watch (http://www.cw-uk.org/wp-content/uploads/2015/12/Corruption-Watch-UK-Report-and-Analysis-UKs-First-Deferred-Prosecution-Agreement-December-2015.pdf) and Michael Bowes and Judith Krieg, "DPAs: ensuring public confidence and third party fairness", International Bar Association's Anti-Corruption Committee Newsletter, June 2016.

2. *Lack of transparency*. In many jurisdictions, out of court settlements are accompanied by very scant details of the wrongdoing concerned and individuals are not named. This means that bribe takers and corrupt officials in bribe taking countries are rarely exposed. The fight against corruption necessitates greater transparency and the naming of officials who have received bribes is a powerful way of holding those officials to account, increasing pressure on the authorities in the relevant country to take action against those officials, and enabling the public in those countries to hold authorities to account for taking action against them.[42]
3. *Lack of victim representation.* Whereas in court proceedings there are usually some means by which victims can be represented, there is little scope for this in out of court settlements. Victims, whether countries or communities or individual affected by corruption, need to be recognized and given voice in corruption enforcement actions.
4. *Appearance of over-leniency*. Countries must avoid the appearance of giving companies a slap on the wrist through settlements. For that reason, where settlements are used they should:
    - Only be used for companies that self-report and cooperate;
    - Require an admission of guilt;
    - Be transparent with full details of wrongdoing made public;
    - Require strengthening and monitoring of compliance procedures with public reporting of how companies have done so;
    - Require companies to provide evidence of individual wrongdoing;
    - Require companies to provide evidence of any further wrongdoing encountered through internal investigations;
    - Not be used where wrongdoing is egregious and has resulted in significant harm;
    - Not be used where a company has previously received a corruption-related enforcement or regulatory action against it;
    - Require companies to cooperate with authorities in other jurisdictions;
    - Not be eligible for tax relief or deduction.[43]

Due to the varying standards with which countries use out of court settlements to deal with foreign bribery and the fact that this creates incentives for companies to forum shop, it is crucial that greater harmonization of standards for settlements is achieved.

---

42 In the UK's first DPA, the naming of third parties has raised issues of fairness. In the Standard case, it is important to note that this was raised not by the official alleged to have taken the bribe but an executive of the local subsidiary alleged to have organized the bribe and is now suing Standard Bank in Tanzania on the grounds that all actions taken by the local subsidiary were approved and authorized by the UK office leading the deal (http://www.independent.co.uk/news/business/news/serious-fraud-office-tanzanians-slam-sfo-s-plea-bargain-on-africa-corruption-case-a6931146.html). Rather than not naming officials which undermines transparency, strategies for ensuring that third parties are notified and can be given a right to reply should be developed.

43 See letter from Transparency International, Global Witness, Corruption Watch and the UNCAC Coalition to OECD Secretary General calling for global standards for settlements, 10/3/2016, http://www.cw-uk.org/wp-content/uploads/2016/03/OECD-Ministerial-letter-final.pdf

**Frederick Davis, Adjunct Professor, Columbia Law School, United States**

*Frederick Davis, Adjunct Professor, Columbia Law School; former Assistant US Attorney in the Southern District of New York, United States; member of the Paris and New York bars.*

I am submitting this comment to provide background relevant for considering legal person liability in general, but it also addresses the questions raised in the consultation document on self-disclosure and cooperation as mitigating factors.

The WGB's "public consultation" stocktaking document shows that it would be very hard to come up with proposed international principles of corporate criminal responsibility. To some extent this is because the present laws are so diverse and different, ranging from the idea that you should never hold corporations liable but rather go after the individuals who caused it to do something wrong, to the US position which is basically that corporations are more or less automatically liable for what pretty much anyone in the organizational chart does that might benefit it, with intermediate positions in the UK ("directing mind" and "identification principle") or France (Art. 121-2 of the Code Pénal makes legal persons liable for infractions committed on their behalf by their organs or representatives).

To me, one thing to emphasize is that the simple fact that there are such different rules is itself a problem – irrespective of which ones may or may not be "better" than others: What I see frequently in cross-border investigations – that is, situations where a corporate (and perhaps individual) entities are being pursued simultaneously or successively by investigators in different countries – is that the defence of the corporation, and in particular the determination of its optimal strategy, may be entirely different in one country to the next depending on corporate criminal liability rules. As an example that I have noted elsewhere, a decision-maker (CEO, General Counsel) of a corporation subject to US rules will generally reason that since the liability of the corporation flows virtually automatically from any finding that a person within the organization committed a crime with any intention of benefitting the corporation, it makes obvious sense immediately to learn the underlying facts, and in many cases it may well be optimally advantageous to enter into negotiations with a prosecutor (for which US laws provide many procedures). In France, by contrast, while a corporation can under certain circumstances be found criminally liable, the relevant article in the criminal code (Code Pénal art. 121-2) provides obstacles to a successful corporate prosecution that are surprisingly difficult to surmount – and occasionally leads to a corporate acquittal, even if individuals are found responsible. Under such circumstances, it may well be irrational for a corporation to attempt an early negotiated outcome.

Thus, in the abstract it would be greatly beneficial to the aims of the OECD Anti-Bribery Convention if common rules of corporate criminal liability could be established. However, since different national rules are so embedded in national legal culture, I am pessimistic that this can be done. A more modest nearer-term goal is to develop critical thinking on why national laws differ so markedly, so that in the event of a multi-state investigation, the participants can better understand each other's viewpoint and work toward mutually acceptable outcomes, consistently with Article 4(3) of the Convention that when multiple member states are investigating, they should "consult with a view to determining the most appropriate jurisdiction for prosecution. "

I submit that further analysis may involve asking at least one question and perhaps two. The first, of course, is: why do we prosecute corporations, what is the theory, and what are the expected benefits? Few people ask that but it is a crucial question if one wants to do a comparative analysis and encourage cooperation. This would include difficult questions such as the dissuasive effect of corporate convictions, on which many views have been expressed.

A second, deeper question is: why do we have corporations anyway? Or more bluntly, what exactly is a corporation? While this may seem simple or obvious, in fact I think that if one digs down there are different underlying ideas.

An over-simplified and exaggerated statement of the US posture on the second question might be: Corporations do not exist in nature, but are artificial creations of the State; the State gives significant advantages to shareholders, officers and employees, notably limited liability and the ability to capitalize value. In exchange, many people reason, the corporation "owes" duties to the state, such that in a criminal case it does not, for example, have a right to silence (no 5th amendment privilege), and in fact is often (for public companies) under an affirmative obligation to divulge. From this perspective, one might conclude that corporations do not really have the right to defend themselves to the same degree as a natural person. Prosecutors in the US clearly believe that large corporations have a public duty to "cooperate" with investigations, and should suffer if they do not respect that obligation. In Europe, again to generalize broadly, the corporation is often seen to really represent the interests of its officers and (in particular) its employees. It does not have any duty to the State other than those explicitly imposed by regulation.

These different views show up very strongly on the issue of voluntary "cooperation." In the US, prosecutors feel comfortable taking the Yates Memo seriously, and basically treating a corporation as a vehicle that can be forced to turn over highly incriminating information about officers and employees, absent which they will seek a very high fine and perhaps sanctions that bar access to public markets. In Europe, or at least France, the idea that a corporation would cooperate with prosecutors against the interest of its officers or employees is viewed with strong distaste, even as a form of treachery.

Given these conceptual, practical and cultural differences, it will be very hard to come up with common principles, but much can be done to harmonize and coordinate.

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

Article 4(3) of the OECD Anti-Bribery Convention clearly contemplates that multinationals will face only one prosecution, but does not give right to such, and as a result companies often face multiple procedures. As I have noted elsewhere, there is interesting law on this in Europe, both in terms of domestic legislation and international treaties.

I would encourage the WGB to think through the implications of fairly fundamental differences in legal standards of many of the member states, and consider developing standards to harmonize how its members will assess when a prosecution is warranted (or how a case will be resolved) when another member has already resolved a proceeding on the same set of facts. In particular, should prosecutors in one country defer to the outcome of another country, even though the result might have been different had its own law applied? For example, and very relevantly to the issue being studied by the WGB, if a French company is prosecuted in France and is acquitted because the necessary elements under Art. 121-2 for corporate responsibility are not met, what effect should such an acquittal have in another country (e.g., the United States) where that defense would not work because the principles for attributing liability to legal persons are much broader?

**Kevin E. Davis, Professor of Law New York University School of Law, United States**

*Kevin Davis is Vice Dean and Beller Family Professor of Business Law, New York University School of Law*

The OECD Working Group on Bribery (WGB) has launched a public consultation to inform its thinking on liability of legal persons for foreign bribery (LP liability), presumably with a view to guiding future evaluation of the WGB members' compliance with the Anti-Bribery Convention. The consultation document invites the public to share insights and experiences concerning the impact, advantages and disadvantages of particular features of LP liability regimes.

I conduct research and teach courses on regulation of foreign corrupt practices, with particular emphasis on the laws of the Canada, the United States and the United Kingdom, as well as, to a lesser extent, Argentina and Brazil. I also conduct research and teach courses on the general relationship between legal institutions and economic development. These comments draw on that knowledge and experience.

This submission aims to make a general point that has significant implications for the use to which the results of the consultation are put: the impact of any particular feature of LP liability is likely to be highly context-dependent and so insights or experiences taken from one context may be of little or no use in other contexts. More specifically, I argue that any given feature of an LP liability regime may have different impacts in different contexts, and different LP liability regimes that employ different combinations of features might be functionally equivalent. This is because each feature of an LP liability regime interacts with other features of the LP liability regime. The features of an LP liability regime also depend on legal and non-legal features of the overall context in which the regime is implemented, including alternative forms of liability for individuals or organizations and characteristics of the organizations to which LP liability applies. The argument that the impact of features of LP liability tends to be context-dependent represents just one application of the more general claim that the impact of legal rules tends to be context dependent. This broader claim is widely accepted among scholars of comparative law (see generally, Davis 2010).

I assume throughout that the impact of LP liability ought to be assessed by reference to the terms of the OECD Convention. Articles 2 and 3 suggest that the impact of LP liability should be assessed by reference to whether it results in sanctions for legal persons that are "effective, proportionate and dissuasive," subject to the qualification that LP liability need only be "in accordance with [the member's] legal principles". I interpret the objective of proportionality to include the idea that the benefits of LP liability should not exceed the costs, recognizing, however, that this cost-benefit analysis will be largely qualitative in nature since most of the relevant of benefits and costs are unquantifiable.

The potential benefits of LP liability are well-understood: it induces legal persons to prevent, detect and sanction misconduct, as well as to report wrongdoing to, and cooperate with, public enforcement agencies and tribunals charged with conducting investigations and imposing sanctions. These self-

regulatory measures are particularly valuable because they can either replace or enhance the effectiveness of proceedings against individuals (Arlen and Kraakman 1997).

At the same time, LP liability can be costly. The costs of prevention include, pulling employees away from other tasks to participate in training programs, vetting suppliers and agents, auditing transactions, paying compliance personnel to design and implement all of these programs, and, in extreme cases, giving up opportunities to do business in high-risk countries.

The costs of LP liability also include the costs of conducting investigations and imposing sanctions. It is increasingly common, in the United States at least, for a significant portion of the costs of investigations to be borne by the organizations suspected of misconduct. It is quite possible that these internal investigations are more cost-effective than if they had been conducted by public bodies. As for the costs of sanctioning legal persons, those will depend greatly on the extent to which evidence has to be reviewed by some sort of public tribunal before sanctions can be imposed; unreviewed settlements such as U.S. style non-prosecution agreements are particularly inexpensive. Finally, it seems plausible to assume that the costs of implementing a given form of LP liability in a particular legal system will be particularly large if it deviates from principles of liability used in areas of law besides foreign bribery, if only because of additional learning costs.

The impact of each feature of an LP liability regime on the benefits and costs mentioned above is likely to depend in part on interactions with other features of the LP liability regime. This makes it impossible to assess the impact of any given feature in isolation and raises the possibility that distinct LP liability regimes that combine different packages of features will be functionally equivalent.

The interaction between different features of an LP liability regime is most obvious when it comes to different types of sanctions. Organizations are likely to regard disbarment, confiscation, monitoring, and monetary penalties, as substitutes for one another, because many organizations are primarily motivated by profits and all these types of sanctions have adverse effects that can be translated into monetary terms. This means that many firms will view several different types of sanctions as functional equivalents. Alternatively, the same sanction might have different effects on different firms – for instance some might be more concerned about disbarment while others might be more concerned about the impact of a monitor. In this scenario, the effectiveness of the LP liability regime will depend on the combination of sanctions it employs, and several combinations might be functionally equivalent. In either scenario, it is impossible to isolate a single type of sanction and determine whether it is more effective than another type (Issues 11a and 11b).

In a similar vein, different processes for imposing sanctions might be regarded as substitutes for one another, depending on the sanctions and likelihood of settlement associated with each process. So for instance, it might be impossible to say whether criminal or noncriminal processes is the most effective means of imposing dissuasive liability (Issue 2) without taking into account differences in the resulting sanctions (Issue 11) and the likelihood of settlement (Issue 12). Again, several different combinations of processes, sanctions and approaches to settlement, might be functionally equivalent.

Even though some LP liability regimes may be functionally equivalent, many regimes will be different from others, in terms of both benefits and costs. For instance, all other things being equal, a regime that holds legal persons liable for the acts of a broader range of agents and intermediaries, under a broader range of conditions, and imposes more potent sanctions, will often induce more self-regulation, with all the associated benefits and costs.

All other things might not be equal though. To begin with, the presence of legal substitutes may diminish the incremental benefits of certain features of an LP liability regime. For instance, a system of rewards for individual whistleblowers may be a substitute for a practice of treating self-reporting as a mitigating factor in sentencing of legal persons, and a whistleblower reward system may present less risk of compromising deterrence at the organizational level. Moreover, the incremental benefits of the entire LP liability regime may vary depending on the presence of legal substitutes. For example, holding firms liable for deficient accounting can serve as a substitute for holding them liable for foreign bribery. Or more speculatively, liability for individuals who supervise individual bribe payers might serve as a substitute for LP liability.

Complementary legal and non-legal norms can enhance the impact of LP liability. The benefits of self-regulation are likely to be greatest in a legal and cultural environment that places few restrictions on legal persons' ability to engage in investigation and surveillance of employees, agents, and trading partners (including sellers of businesses), and grants legal persons the power to terminate relationships with employees, agents, trading partners for violations of privately-formulated anti-corruption standards. Without those powers, the case for LP liability is weaker, suggesting that the scope of LP liability, in terms of the acts and actors who can trigger liability, should be tailored to reflect constraints on legal persons' powers (Issues 5, 6, 7, 8).

Complements for LP liability, or at least certain features of it, might take the form of legal institutions rather than legal rules. For instance, an LP liability regime that permits sanctions to be imposed with very little judicial oversight runs the risk of imposing disproportionate sanctions. That risk will be low if prosecutors have a sophisticated sense of the benefits and costs associated with different levels of sanctions and are inclined to be 'reasonable'. Where prosecutors are neither sophisticated nor reasonable, the risk of disproportionate sanctions will be greater (Issue 12). In fact, in this kind of setting, because judicial oversight is costly, LP liability on the whole will be less attractive.

The level of sophistication of both prosecutors and judges will also bear on the benefits and costs of treating implementation of a compliance system as a mitigating factor (Issue 11c). Sophisticated legal actors can use this tactic to induce organizations subject to LP liability to detect and sanction individuals' misconduct even when such measures increase the likelihood of misconduct being detected by public enforcement agencies (Arlen and Kraakman 1997). Unsophisticated actors may give too much credit to cosmetic efforts at self-regulation and thereby undermine the deterrent effect of LP liability.

Sometimes complements for LP liability will be found in the private sector. In the U.S. system, the investigative costs associated with LP liability are probably mitigated by the fact that internal investigations can be outsourced to service providers staffed by people with sophisticated

understanding of the relevant languages and business practices. Those service providers operate in a competitive market, which tends to induce them to minimize prices, but they also have reputational incentives to provide high-quality services. In the absence of this kind of market for investigative services, LP liability is likely to entail higher investigative costs and should therefore, at the margins, be less attractive. Although many providers of investigative services operate in multiple countries, it is far from clear that firms answerable to enforcement agencies outside the U.S. will benefit from the same level of expertise and mix of competitive and reputational incentives.

Various non-legal characteristics of the entities subject to a country's LP liability regime, as well as the social context in which those entities operate, will determine the extent to which they are subject to alternative forms of social control, such as moral scruples, reputational sanctions, or foreign laws. All of these factors will bear on the net benefits of LP liability. For instance, in certain societies actors within organizations might be more or less susceptible to regulatory interventions aimed at persuasion rather than punishment. This can influence the impact of high monetary sanctions (Issue 11), which tend to convey an intention to punish rather than to persuade, and risk provoking defiance and evasion rather than compliance. Similarly, the impact of relying on criminal as opposed to non-criminal liability (Issue 2) will vary depending on the stigma generally associated with criminal as opposed to non-criminal sanctions. There is no reason to expect that stigma to be the same across societies. On yet another tack, if the firms in a jurisdiction tend to be subject to the anti-bribery laws of other jurisdictions it will be especially costly to adopt an LP liability regime that diverges from the foreign regimes.

Non-legal factors will also affect the impact of disbarment, an especially significant issue when automatic disbarment is being considered. The deterrent effect of disbarment (Issues 11a and 11b) will vary depending on the extent to which potential defendants rely on revenue from government contracts. At the same time, the social costs of disbarment will depend on the efficiency and distributional consequences of shifting government procurement to alternative providers. For instance, disbarment will be extremely costly in a society in which there is a small number of providers of an essential good or service, or where shifting from domestic to foreign providers will cause significant harm to local stakeholders.

In light of the context-dependent nature of LP liability, the WGB should refrain from using the results of this consultation to draw conclusions about the best approach to LP liability. The consultation promises to shed light on how particular features of LP liability have worked in specific contexts. This information can provide a basis for generating hypotheses about how particular forms of LP liability will work in other contexts, but only if used with caution. When it comes to LP liability, there is no reason to believe that one size fits all.

References

Arlen, Jennifer and Kraakman, Reinier, 1997. "Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes," 72 *New York University Law Review* 687.

Davis, Kevin E, 2010. "Legal Universalism: Persistent Objections," 60 *University of Toronto Law Journal* 537.

**Federation of German Industries (BDI)**

## Introduction

It is self-evident, that criminal acts committed by corporate representatives should be sanctioned by effective legal means. However, this should not always be regulated by criminal law. In its current form, the German legal system already provides for adequate mechanisms for stringently sanctioning criminal offences. Therefore no gap is existing in German legislation. Over the past years judicial practice in Germany has demonstrated the possibility to impose sanctions on corporations in the form of fines in the hundreds of millions.

The BDI's response to some of the individual issues raised by the consultation is as follows:

## Nature of liability and components of an effective system for the liability of legal persons (Question 1 and 2 of the public consultation)

In Germany, the liability of corporations is not established under criminal law but under administrative law. However, the current German legal system provides for a range of different options to prosecute and sanction infringements committed by corporate representatives. This system works very well and is considered as adequate. As already set out in the Final Report (2000) of the *Commission on the Reform of the Criminal Law Sanction System* established by the Federal German Ministry of Justice, legal systems in other countries do not distinguish between administrative and criminal offences. For example, criminal law in the Anglo-American system includes provisions that are part of administrative law in Germany. The commission rightly concluded that these differences do not require an amendment of German law.

Moreover, the existing legal provisions in Germany are not less effective than those of other countries. Germany ranks second after the US in terms of sanction proceedings conducted by the signatory states of the OECD's Anti-Bribery Convention. There is thus no deficit in sanctions as compared with other countries. In Germany, unlike in other countries, findings from tax audits are directly transferred to the public prosecutor's office. This system leads to a high rate of prosecution of infringements.

The 2011 report of the OECD reaches a similar conclusion. Germany has already implemented the recommendation of the OECD to "increase the maximum level of the punitive component of administrative fines available in law for legal persons, to a level that is effective, proportionate and dissuasive" by substantially increasing the maximum level of administrative fines in 2013.

The German Act on Regulatory Offences (OWiG) provides sufficient mechanisms to sanction infringements. Under the current legal system, the misconduct of persons responsible for the management of companies or corporations (e.g. board members, authorised representatives and other top executives) can already be sanctioned by imposing fines on the legal persons. Fines can be imposed for infringements committed with intent as well as by negligence (Section 30(2) first sentence, German Act on Regulatory Offences, OWiG). The "failure to supervise", both with intent and by negligence, can also be sanctioned with a fine on the corporation (Section 30(2) third sentence, Section 130(3) second sentence, German Act on Regulatory Offences, OWiG).

It should also be taken into account that the relevant provisions in the German Act on Regulatory Offences were rigorously tightened lastly in June 2013. As a major amendment the maximum level of fines had been increased by tenfold. According to current German law, fines up to 10 million euros can be imposed for infringements committed with intent (previously one million euros) and up to 5 million euros for infringements committed by negligence (previously 500,000 euros).

Furthermore, a newly adopted clause (Section 30(2a) German Act on Regulatory Offences, OWiG) also provides for fines to be imposed on the legal successor of a corporation, where the offending corporation has changed ownership as a whole or partly following a division.

The allegation that the corporate risk is calculable due to the low level of fines does also not apply. The German Act on Regulatory Offences itself provides according solutions for such cases: The level of the fine should not only correspond to the advantage gained through the committed offence, but should exceed it. In cases in which the maximum fine as foreseen by law is considered objectively inappropriate, this upper limit can be exceeded (Section 17(4) OWiG). The maximum level of fines should not constitute an obstacle to leave the benefit generated by illegal conduct with the corporation. This provision has already been used in practice to impose sanctions on corporations in the form of fines in the hundreds of millions. As an alternative to a fine, forfeiture of a sum up to the amount of the pecuniary advantage gained may be ordered (Section 29a OWiG).

Furthermore, German administrative law provides for additional measures to sanction illegal corporate conduct.

In a nutshell, the existing instruments in German administrative law provide for sufficient possibilities to sanction and prosecute corporations for any legal infringements.

**Compliance systems as means of precluding liability (Question 10 of the public consultation)**

Representatives of corporations have realized how important it is for both their internal and external reputation to establish a compliance system. Therefore, companies have a strong interest in ensuring that their market operations are in compliance with the law. Corporations spend a large amount of time and money on maintaining and expanding their compliance systems. Effective compliance also increases the possibility of uncovering misconduct.

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

**Brandon L. Garrett, Professor of Law, University of Virginia, United States**

*Brandon L. Garrett is Justice Thurgood Marshall Distinguished Professor of Law, University of Virginia School of Law.*

The WGB is correctly interested in examining more closely the question of legal liability of organizations, including corporations. The broad question raised is what makes for an effective system for the liability of legal persons and as the WGB recognizes, there are many choices that follow if corporate criminal liability is adopted. Corporate criminal liability has evolved enormously in the United States, not in the legal standard, but in the details of its implementation, and many lessons can be learned from that experience.

To summarize my comments below: First, I do think that there are some answers to that question that are relevant in a range of legal systems, but the underlying criminal procedure rules and institutions matter a great deal. The standard for entity criminal liability standing alone cannot serve its purposes without accompanying procedure and institutions that can make entity criminal liability practical and useful as an addition to the other mechanisms available in a criminal justice system. There can be comparative advantages to adopting corporate criminal liability, but they may depend on other features of a county's system. Second, if the decision is made to adopt a form of corporate criminal liability, I do think that a *respondeat superior* standard has clear advantages. Third, I discuss settlements and remedies. Fourth, I discuss advantages of general corporate criminal liability.

## *I. Costs and Benefits of Corporate Criminal Liability*

One advantage of entity legal liability for foreign bribery, and a range of crimes, is that often employees and agents are not facilitating the payment of bribers purely or even chiefly for their own benefit, but rather for the benefit of a corporation. The bribe money may come from the corporation, with the intent of securing business for the corporation, and the employees may at best want to be rewarded in their careers at the corporation. The corporation may create the environment that encourages employees, officers, and agents to pay bribes to secure business. The corporation itself must be deterred from promoting bribery. The corporation may also be in the best position to adopt measures to prevent bribery in the future. Employees may be fired or prosecuted, but their replacements will continue the same practices if the corporation does not change its own policies and culture.

For those reasons, punishing only individuals may not affect the incentives and the culture that the corporation created. That said, corporations need not be punished criminally if civil alternative suffice to deter bribery. Whether civil fines and civil injunctions are adequate to do so, may depend on what penalties are available to civil enforcers and whether they have the investigative resources to effectively uncover and penalize bribery schemes. In many countries, civil regulators cannot impose punitive fines. If a company, for example, need only disgorge its gains from bribery when it is caught, there is little incentive not to continue paying bribes to secure profitable business. However, if civil regulators can impose punitive fines (for example fines up to twice the gains to the company or the losses to victims – the standard under the criminal Alternative Fines Act in the US) then the outcome may not be much different than if the case was denominated as criminal. The only difference may be the reputational threat of a criminal case, the collateral consequences of a criminal action, and requirements in criminal cases that a company cooperate in any investigations of individuals. Each of those features of criminal enforcement in the US could in theory be made part of a civil enforcement scheme – even cooperation in any pending criminal investigations of individuals. Collateral consequences such as debarment or suspension can also (and often are) be associated with civil enforcement.

The main reasons to denominate penalties and sanctions (such as monitoring or compliance) as criminal would be that civil authorities in a given country might not have the enforcement resources, investigative resources, or penalties and sanctions available to sufficiently deter and punish foreign bribery.

Procedure may enhance or limit the ability to adopt corporate criminal liability in a jurisdiction. For example, if entities have self-incrimination rights, then an entity target will be able to resist providing documents and information about wrongdoing – corporate criminal liability will make it more difficult for enforcers to secure information about what transpired. Or if corporate criminal liability better incentivizes cooperation in investigation of individual offenders, it may enhance accountability in such cases.

Jurisdictional obstacles to bringing bribery cases against employees of a multi-national corporation may not exist for corporations that have an operating presence in a country. As a result, jurisdiction may be another practical reason to have corporate criminal liability (however, civil liability could also be premised on the same concept of jurisdiction).

*II. Form of Corporate Criminal Liability*

Some countries adopt modified forms of corporate criminal liability in which prosecutors must prove involvement of high level officials, for example, or that the criminal actions were endorsed or ratified by top-level officers. Such approaches make it far too difficult to impose liability and they lead to complex investigation and litigation of questions regarding knowledge of particular actors within a company. Individual accountability can and should be investigated separately, but to intermingle such questions with the question of corporate liability hinders effective enforcement.

A strict or *respondeat superior* standard imposes liability on a company for the actions of agents acting with the scope of their employment and at least in part to benefit the corporation. That broad standard, adopted in federal court in the United States, makes it clear that a company cannot avoid liability for actions of employees, or of contractors or subsidiaries acting at least in part in the interests of the corporation. If a jurisdiction is to adopt corporate criminal liability, that liability standard is preferable, in my view. All conduct by agents, including hired intermediaries, contractors, broadly defined, should support liability. Nor are such agents "unrelated" if they are hired by the corporation.

There is no reason to excuse bribery when it is a "low-level" employee that commits it. The problem is not a mere failure to supervise; the low level employee has no reason to engage in bribery except to benefit the corporation. If there is a low-level employee exception to bribery law then corporations can tacitly encourage the most dispensable low-level employees to violate bribery laws.

Nor is there any reason to excuse successors from the criminal actions of the entity they acquired. A sale or merger should not wipe the criminal slate clean. Otherwise, companies would play a shell game, engaging in mergers or sales simply to avoid consequences of their crimes. Companies should be expected to do due diligence regarding criminal exposure before making a purchase, and that potential liability and need to do due diligence will further encourage compliance to detect and prevent bribery.

More nuanced questions concerning whether the corporation should be fully blameworthy can be addressed as a matter of sentencing or through settlement with prosecutors. Whether to credit corporate cooperation and self-reporting or existing compliance efforts, for example, can be considered as a matter of sentencing, or in negotiation of settlement agreements. Keeping such case-specific questions separate from the question of the liability standard, however, has real advantages.

*III. Settlements and Remedies*

There is much to discuss regarding how settlements can or should occur and options for guiding and structuring corporate settlements. I have argued that having judicial involvement in the approval and supervision of settlements enhances the legitimacy of the process and permits the public interest to be better considered. Purely out-of-court settlements should be avoided.

Compliance may be important to reforming a corporation going forward, and as a condition of resolving a bribery case. Prospective compliance is more important, in my view, than the question whether to reward retrospective compliance. It is problematic to excuse penalties based on pre-existing compliance – which was by definition ineffective in detecting bribes – and because assessing compliance from the outside is challenging. It is important to carefully assess a company's compliance, and if it truly did everything it could to prevent bribers, then it should be mitigating factor, but not a shield from liability.

There should also be clear incentives to audit and assess compliance, even if the result uncovers self-critical information. Indeed, there should be incentives to share best practices across industry. Enforcers and prosecutors should make the rewards for sharing best practices clear and they should promote sharing of best practices.

More important will be imposition of deterrent fines – and on the detection side of the equation, rewarding self-reporting by companies, since it can be very difficult for enforcers to know whether bribes were paid. Enforcers should also reward whistle-blowers who report bribery.

*IV. General Corporate Criminal Liability*

Having a general standard for corporate criminal liability has the advantage that bribery crimes may be accompanied by other corporate crimes, like money laundering, fraud, or antitrust violations, to name just a few examples. Adopting anti-corruption crimes but not having mechanisms to address accompanying criminal conduct can weaken enforcement. That said, as with any crime, it is far better for bribery crimes to be detailed in statutes to provide clear notice as to what conduct is prohibited.

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

**Global Infrastructure Anti-corruption Centre (GIACC), United Kingdom**

*This contribution was prepared by Catherine Stansbury and Neill Stansbury.*

The following paragraphs contain the Global Infrastructure Anti-corruption Centre's (GIACC's) responses to OECD's questions contained in its consultation document. The same numbering system is used. The questions are not repeated.

**Question 1:**

i) Clear laws establishing the liability of legal persons.

ii) Effective and proportionate penalties for both the legal persons and the individuals responsible for the relevant actions or failures.

iii) Effective enforcement.

iv) Effective education and publicity in relation to the law and how to comply.

**Question 2:**

(Our answer relies on the definition of criminal and non-criminal liability in para 17 of "A Stocktaking" draft report.)

a) The advantage of criminal liability is that it is widely regarded as being more serious than non-criminal liability. It is the manner by which society condemns the most reprehensible acts. As a result, criminal liability for a legal person carries with it a considerable stigma (in addition to penalties that may be attached) signalling that the legal person may be ethically undesirable and risky to do business with, and thus damaging the legal person's business and reputation. Thus, the threat of criminal liability for a legal person presents a greater deterrent to bribery than does non-criminal liability. There are no disadvantages of criminal liability, unless under a country's specific laws the standards of proof or penalties for criminal liability are too stringent or restricted respectively. However, these restrictions could be dealt with by changes in the law.

b) Non-criminal liability for legal persons is useful as an additional enforcement tool against a legal person. The armoury possessed by the prosecution authorities should contain both criminal and non-criminal liability for legal persons, so that the most proportionate and effective response can be taken in the circumstances. For example, if standards of proof for criminal liability could not be satisfied, the prosecution could fall back on non-criminal liability. It might also present a wider range of penalties to have both options. Sanction could, according to the circumstances of a specific case and difficulties of proof, be (1) criminal only; (2) non-criminal only; (3) both criminal and non-criminal. There are no disadvantages.

c) There may currently in some countries be procedural or substantive limitations depending on the use of criminal or non-criminal liability. But these limitations could be overcome by changes in the

relevant countries' laws. Such changes could be made if countries were persuaded of the benefits of such changes in terms of deterring and punishing bribery.

**Question 3:**

a) As far as we are aware, these legal differences should not matter, as long as they do not affect the ultimate outcome.

b) As far as we are aware, this should not matter, as long as the ultimate outcome is clear.

c) Definitely yes in the UK. We do not know in other countries, but it is likely to have had a positive effect.

d) We do not know. It is likely to have had a positive effect.

**Question 4:**

a) It is vital that any type of person, organisation, trading vehicle etc., whatever its nature, is equally liable for bribery. Otherwise, any non-liable types of entity may be used as bribery facilitators.

b) The advantage is the equal treatment of all types of entity and so blocking any possible loopholes. There are no disadvantages.

**Question 5:**

a) We would commend the approach taken under section 7 of the UK Bribery Act 2010:

***7. Failure of commercial organisations to prevent bribery***

*(1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—*

*(a) to obtain or retain business for C, or*

*(b) to obtain or retain an advantage in the conduct of business for C.*

*(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.*

We also commend the use of preventive tools such as ISO 37001 anti-bribery management system, as a suitable programme under which to implement "adequate procedures".

b) In our view, it would be wrong to hold a legal person responsible for the foreign bribery committed by a low level employee when it had made its best efforts to supervise the employee. If the legal person had implemented all appropriate controls, and had properly trained and instructed the employee, but yet, against all the legal person's instructions and requirements, the employees still pays a bribe, then the legal person should not be responsible, but the employee should. It would in this case be incumbent on the legal person, if it was to avoid prosecution, to appropriately discipline the employee (e.g. termination), and to co-operate with the prosecution authorities.

**Question 6:**

a) The choice of wording used will have a very wide impact on the ability to prosecute. Too limited wording may result in legal persons escaping liability. We support the term *"on behalf of or for the benefit of"*, which is quite wide in interpretation. However, to be fair, if this term is used, then it must be supported by an adequate procedures defence (as per 5 a) above) otherwise it could result in unfair prosecutions.

b) No comment.

**Question 7:**

Countries should expressly legislate for legal person liability in the event of bribes paid on their behalf or for their benefit. See, for example, section 7 of the UK Bribery Act 2010 which deals with persons "associated with" an organisation paying bribes, and section 8 which gives a wide definition of "associated with".

**Question 8:**

a) This is a very important issue. It is currently too easy for an organisation which is convicted of bribery to transfer its assets, contracts and employees to a new organisation, which then sets up the same business, with the same owners and employees, but free from the conviction of its predecessor.

b) The law must ensure that any liability and penalty is transferred alongside any transfer of assets and personnel to avoid this type of liability and penalty avoidance. This is particularly important in the case of criminal liability so that a company does not escape the stigma attached to this type of conviction. (See answer to 2 (a)).

**Question 9:**

a) A country should be able to prosecute a legal person and/or individual which is resident or incorporated in, or otherwise located in, that country for an offence committed totally abroad. If a country does not allow this type of prosecution, then it is clearly an obstacle to effective enforcement, as a legal person resident in a country can avoid prosecution in that country by ensuring that the bribe act occurred totally abroad.

b) The law would need changing appropriately.

**Question 10:**

a) Both in the UK and internationally, legal person liability has provided a strong incentive for the development of anti-bribery systems and for the effective implementation of such systems by legal persons. Both BS 10500 and ISO 37001 are examples of such systems, and numerous companies are implementing these types of systems.

b) Providing incentives for the use of compliance systems in relation to foreign bribery offences facilitates effective enforcement as it helps raise standards (thereby helping prevent offences being

committed) and helps legal persons to clarify the standards according to which a legal person's obligations and liability can be assessed.

c) The design and implementation of an organisation's compliance programme can be assessed against an international benchmark (e.g. ISO 37001). The organisation being investigated should bear the burden of proof to show that its compliance programme was effectively designed and implemented with the purpose of preventing the offence in question. Independent certification of such a programme (e.g. an ISO 37001 certification) can greatly help legal persons in this regard.

**Question 11:**

a) All the sanctions listed are necessary, so as to provide a variety of sanctions which can be used alone, or together, so as to provide a reasonable and proportionate penalty.

b) As per a).

c) All three of these mitigating factors should be taken into account, and should have an impact on the ultimate penalty. The purpose of criminal liability is not only to penalise, but also to encourage good behaviour. An organisation will not be incentivised to implement a compliance programme, or to self-report or co-operate with the authorities, unless there is some benefit to them in doing so.

d) An effective compliance programme is definitely the most effective factor, as it is a complete programme designed to prevent, detect and deal with bribery. Voluntary disclosure and co-operation only apply if a bribe actually occurs. Therefore, the most weight should be put on the compliance programme.

**Question 12:**

a) Settlements that result in a conviction are an advantage in that they ensure that the guilty party does not escape the stigma of conviction and the penalties that may result from conviction. The disadvantage is that it may discourage settlement and also increase the cost and time of the process.

b) There is a risk that settlements without conviction may mean that a guilty legal person can avoid the penalties and stigma which normally go alongside a conviction, and can claim to the public that it never committed any wrongdoing. There is also a risk that prosecutors can effectively force a legal person to pay a large fine without conviction and proof of liability, when the alternative to the legal person can be years of uncertainty and legal and other costs which defending a court case can result in. However, the possibility of a settlement without a conviction remains a necessary part of the enforcement armoury.

c) There should be appropriate guidance on when a settlement is acceptable, the type of sanction which is as a result appropriate, and appropriate judicial oversight over the settlement.

**Gönenç Gürkaynak, ELIG, Attorneys-at-Law, İstanbul, Turkey**

*Gönenç Gürkaynak is managing partner of ELIG, Attorneys-at-Law, İstanbul, Turkey*

*5. a. In your view, does the "failure to supervise" standard for holding an LP liable for bribery committed by a low-level employee adequately address foreign bribery in practice?*

Yes. The "failure to supervise" standard for holding a legal person liable, adequately addresses foreign bribery for bribery committed by a low-level employee. This failure to supervise should of course not preclude the existence of liability for the acts of high-level management and the direction of the high-level management to lower level employees.

A system of liability based on the "failure to supervise" principle both holds legal persons liable to the point of equity, as it allows a type defense to legal persons in alleging that they "did not fail to supervise". Thus, such standard would also serve the interest of justice by not holding legal persons responsible for situations arising without their intent or omission. In such a system, the legal person can only eliminate liability in case it proves that it took all of the measures that it could to supervise the employee to not perpetrate the criminal act. For example, if a legal person has an effective compliance program, created a compliance culture within the company, trained the employees, warned incompliant acts and incentivized compliant acts, encouraged employees to speak up and investigated incompliance allegations, holding that legal person liable could be deemed inequitable. In such a system, however, it is crucial to define what would constitute "adequate supervision" in order to not to create inconsistencies and uncertainty.

Therefore, the legal systems which adopt the "failure to supervise" standard as the legal person liability basis are advised to determine what would constitute "adequate supervision" through legislation or guidelines.

*5. b. What advantages or disadvantages do you see for holding LP responsible for foreign bribery committed by low-level employees even when management has made its best efforts to supervise them?*

We do not see any advantages in holding a legal person liable for the corrupt acts of a low-level employee when the legal person has made best efforts to supervise them. That said, what would constitute "best efforts" should be clearly defined and the efforts of the management of the legal person should be in line with these standards. In such a system, sovereign law makers would decide what higher or lower standards they would impose as the "best efforts" standards, provided that the legal person liability is "effective, proportionate and dissuasive". Disadvantages on the other hand, would be holding a person liable for an act which the person did not intend or did not omit. We believe such an accountability system would not be equitable.

Furthermore, a system where an "adequate standard of supervision" would be enough to preclude liability would encourage legal persons to adopt compliance systems that both deter and detect the wrongdoings. To that end, another disadvantage of holding legal persons liable even though they showed best efforts in supervision would discourage the adoption of such preventative measures. After all, a legal person would be held liable, whether or not they dedicated significant resources to adopting a compliance program.

*10. c. In your view, how should prosecutors and courts assess whether a compliance system is adequately designed and implemented? Who should bear the burden of proof in showing that a compliance system is effective or ineffective?*

We believe assessment of a compliance system should go beyond a check list exercise. Although an assessment can of course be realized through multiple benchmarks, authorities should go on to assess whether the compliance system has been put to life as it appears on paper. For example, assessing whether training took place should not be satisfied through a piece of paper which says the employees participated in the training, signed by the employees. The authorities should examine whether the training actually took place and how frequent it took place. If there are compliance documents, authorities should check whether the document has been communicated to the employees (through trainings etc.) or whether it was only distributed. Authorities can extract such information not only from the documentation provided to them, but also through manager and employee interviews. In a nutshell, authorities must investigate whether the legal person has done everything it could, to abide by the standard of precluding liability.

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

*11. a. In your view, which sanctions for legal persons are the most effective? Why*

Whether criminal or administrative, an effective legal person liability system should have the following sanctions at its core: monetary sanctions, disgorgement and confiscation. However, these could be supplemented by further economical and reputational sanctions in order to increase the deterrence element of the system. Debarment from public tenders is a significant sanction for legal persons, as it affects the future profitability of the legal person. The more jurisdictions whose legislations provide debarment for foreign bribery increase, the riskier it will be to engage in corruption for legal persons. It is also important to note that these debarment decisions should be proportionate. In addition, multi-lateral development banks' ability to debar legal persons in case of corruption is also an effective sanction, albeit not a measure up to states parties. Finally, sanctions relating to reputation of the company would also be very effective, as corruption stigma would decrease stakeholder trust into the brand name of a given legal person. Thus, the abovementioned economic sanctions could be supplemented with an order to publish the facts of the case, as well as the sentence.

**Jorge Hage, Head of the Office of the Comptroller General, Brazil**

*Jorge Hage is former Minister of State and Head of the Office of the Comptroller General.*

The Brazilian law establishing the liability of legal persons for foreign (and domestic) bribery is very recent. It was enacted in August 2013 and became effective in January 2014. Regardless of the short period of implementation, it is certainly useful to draw some conclusions from this experience at this point, as we have already identified, in my view, a number of positive and negative points regarding the options made by the time of its proposal and approval.

## 1st option made: The Nature of Liability

As registered by OECD in the Comparative Law Study, our option was for **non-criminal liability**, either because, under our legal system, criminal responsibility is not fully (and indisputably) applicable to legal persons, or because we were convinced that it would not be the most appropriate option. And, in fact, we are happy with that decision up to this moment.

Among many other advantages of this choice, there is one which deserves to be highlighted over any other: the possibility of adopting a full corporate liability regime, absolutely independent from the liability of natural persons or of any mental element (*mens rea*).

In our legal system, this would not be easily acceptable in criminal law, where some requirements are mandatory in order to hold anyone responsible, such as the individualization of illicit misbehavior of a natural person, and the evidence of some degree of subjective element (intention) on the commitment of an offense – which, obviously, would be possible only in relation to a natural person.
On the other hand, by adopting alternative legal basis for liability – such as civil liability and administrative liability, as we did in Brazil – those restrictions can be put aside, with enormous advantage in terms of the effectiveness of the process and eventual conviction of legal persons.
Our experience during the first two years of implementation of the law is confirming our hypothesis, as the dispute over the legal possibility of dismissing those requirements has not succeeded up to this moment. The situation would certainly be very different and much more difficult had we made the option for criminal law.
Besides the abovementioned, there are other advantages on the option for non-criminal liability, such as:

- While criminal sanctions are basically distinguished by the personal (or physical) character of the penalty inflicted on a natural person – imprisonment, incarceration – civil and administrative sanctions are more adequate to legal persons, as they include mostly sanctions affecting assets and property of the companies, or their capacity to produce, or the possibility to participate in public procurement, or their public image, or even the license to operate.
- As made clear by the previous list of examples, another advantage of this option is exactly the diversity of sanctions which are applicable, granting the competent authorities – either judicial or administrative, according to the case – the possibility of choosing the most appropriate for the specific case at hand, which is of particular relevance due the extreme variety of situations that may occur, regarding the diversity on type, size, or economic activity of the legal person, and the variety of offenses, their consequences, damages, etc.
- Possibility of holding liable other legal persons belonging or related to the same economic or business group.
- Greater flexibility on the legal definition and description of the offenses (in criminal law, in Brazil, this is an extremely rigorous requirement).

There are, of course, some advantages on criminal liability, which, by no means, surpass its disadvantages. Here are the most relevant, from my point of view:

- Additional means of investigation, not allowed in civil or administrative processes, such as phone interception (either individual or strategic monitoring), search and seizure, and pre-trial detention (the latest, in any case, not applicable to LP).
- Facilitation in international cooperation, since some countries refuse to exchange information unless for a criminal investigation/process. The Netherlands is a concrete example in our experience: when Brazilian authorities asked for cooperation in the SBM Offshore case with Petrobras, it was refused on the grounds that cooperation for administrative process was not listed in the treaty existing between both countries (is spite of the rules existing in the International Conventions, like OECD or UNCAC).

**2nd option made: Legal Basis of Liability**

In this issue, our option in Brazil was for a bribery-specific legislation, for a number of reasons, listed below, and our experience shows that to be the best choice for us:

- As our option was for non-criminal liability (see Point 1, above), it automatically eliminates the alternative of "general criminal law"(Penal Code). Among the remaining alternatives, Brazil has opted for a bribery-specific law, but a statute regulating only the liability of legal persons, since that of natural persons was already included in the Penal Code ("general criminal law"), referring both to domestic or transnational bribery . Correlatively, the new law regulates LP liability both for domestic or transnational bribery.
- On the other hand, the kind of liability included in this law refers not only to bribery itself, but to various other related offenses, all of them, nevertheless, connected to the problem of corruption. In other words: the law is not only about bribery, but it is not about all species of liability of LP, as, for example, environment, consumers, and so on, each one of which is regulated in other specific laws.
- Our experience, even though still short, is showing that the inclusion, in the same law, of other offenses related to corruption – besides bribery – and also the inclusion of domestic offences – not only transnational offenses – had significant effect in obtaining political support for the approval of the law, by the simple connection with the OECD Convention; and that it has a clear potential to help and strengthen the effectiveness of the law in its implementation, by the same reason.

**3rd option made: Types of Entities Covered**

Concerning this issue, the main question that has been raised in our experience is the one related to State Owned Enterprises (SOEs) – whether or not they should be included in the scope of the law, in one or both of its possible dimensions: as possible subjects of its sanctions, or as eventual enforcers of them.

The first of these questions has been answered by a new law recently passed establishing general rules for SOEs. One of its articles has determined that they can be subject to the sanctions of the anticorruption law, except the suspension of activities, the compulsory dissolution and the prohibition of financing by public institutions. It means they can suffer the penalties of fines, loss of assets and advantages resulting from the offenses, none of which – it is important to emphasize – exempt the LP from the obligation of reimbursing public coffers on the equivalent of the damages.

On the other hand, there seems to be little doubt that SOEs – being part of Public Administration, as they are by Brazilian law – shall be able to enforce the anticorruption law, wherever the offense is committed against their legitimate interest. The only plausible exception being the sanctioning of other companies with which they eventually compete in the market.

**4th option made: Standards of Liability**

In consequence of the short time of implementation of the law, we do not have, as yet, any judicial precedents on this issue, but the law is set forth, undoubtedly, to hold liable legal persons in any of the hypothesis listed in the consultation document, such as:

- failure to supervise employees of any level, including lower level, regardless of the best efforts made in that direction (which, of course, will be considered as a mitigating factor)
- use of intermediaries – no matter whether these are natural persons, or related or unrelated legal persons

As a matter of fact, our experience is showing that this is absolutely essential to make such a law really effective. It is a capital point. Without this, the central element of such a liability regime (objective or organizational responsibility) would be jeopardized and not make any sense in practice.
Having said this, it is important to point out that there is one single condition that must, in any case, be required in order to hold liable a legal person: **the act has to be committed in the interest or for the benefit (not necessarily exclusive) of the LP**.
It is from the interplay of those rules and directives that the administration can expect to collect one of the principal results/effects of such a legislation, namely to transform the high level management of the companies into active partners of the public agencies in the fight against corruption – because they will be, more than anyone else, deeply interested and committed in the supervision of their employees and intermediaries, in the due diligence on their suppliers and partners, and, ultimately, in the adoption and implementation of an effective compliance system.

**5th option made: Compliance System as a means of precluding liability**

Under the Brazilian anticorruption law, the existence of an effective compliance system serves as a means of reducing the sanctions both in administrative and civil-judicial processes, and can also be a condition to be required for an eventual settlement.
Our brief experience indicates that the inclusion of that element in the law has been of utmost importance to incentivize companies to implement compliance systems, which was something scarcely present in our tradition. In current days, the demand for specialists in this area has remarkably increased.
As for an assessment of eventual difficulties, created by this kind of incentive, for the enforcement of the law by the Judiciary, or of possible difficulties, in Court, on the evaluation of its design and implementation, I don't have, at this point, any factual evidence, since there is no judicial process in that stage. But, as far as administrative investigations and processes are concerned, the answer is certainly negative, that is, the existence of this incentive does not create any relevant difficulty. On the contrary, **it is a most welcome outcome of the new law**, and the administration (CGU, in particular) has been quite well prepared for the assessment of the compliance programs presented by companies.

**6th option made: rules on Settlements**

Concerning this issue, it is important to take into consideration the fact that this law came into force at the exact moment when Brazil was facing one of its most critical economic and political crisis.
This unfortunate coincidence meant, for the purposes of this assessment of the anticorruption law, that its implementation and enforcement occurred within a climate of political turmoil and extreme radicalization of the political dispute among parties, resulting in an environment of profound suspicion from side to side, which made impossible any kind of collaboration among institutions whose partnership would be essential for the achievement of the best results.
Such collaboration would be extremely relevant because this law has one specific shortcoming: it does not sets up any mechanism of necessary coordination among the various agencies and institutions with enforcement powers in face of corruption cases, namely the Office of the Comptroller General (CGU), the Public Prosecutors, the General Attorney Office, the Court of Accounts, and others yet.

Thus, when one company intends to celebrate a settlement with the agency conducting the investigation, it is not free from the risk of being investigated or prosecuted by another agency, as the Brazilian juridical system adopts the principle of independence among its various processing and sanctioning domains. For example, one corporation may be investigated, at the same time, for the same misconduct, by CGU, in the administrative sphere, and by a Public Prosecutor and also by the General Attorney, on the judicial-civil grounds. And, in addition to that, its directors or executives may also be prosecuted, now in terms of criminal law, by the Public Prosecutors Office.
Obviously, even in the absence of a legal prevision, these agencies and authorities could (and should) seek some sort of coordination among their roles. And this actually started to occur at the beginning of the implementation period. The supervening of the political crisis, however, has made it extremely difficult, if not impossible (clearly for political reasons).

## 7th – One additional issue: the "too big to fail" question

The implementation of the new Brazilian Anticorruption Law (n. 12.846/2013) is being, to some extent (in some occasions) embarrassed by a misinterpretation originated form sheer legal ignorance: the charge that the new law is contributing to the deepening of the economic crisis and putting at risk thousands of jobs, since the ten biggest Brazilian infrastructure constructors companies are threatened with the sanction of debarment.

The new anticorruption law does not contain, among its sanctions, such penalty as debarment. This exists in other Brazilian statutes at least since the year 1993, mainly in the Law on Procurement. Actually, it has never been object of relevant criticism, in spite of having been applied in thousands of cases, by all levels of government – national, state and local.
The difference, now, is that the companies investigated are the biggest in one strategic economic segment, and that practically monopolize the sector.

It is certainly a real and serious problem. But the enactment of the new anticorruption law has nothing to do with it.

The problem would have to be dealt with, in any case, with or without the new law.
The only innovation which is relevant for that matter is, precisely, the possibility of finding solutions, using the possibility of settlements, created by the new law, and attending all of its requirements, among them the adoption of a sound compliance program, the collaboration with the investigation, identifications of other persons involved (both legal and natural), etc.

**Stijn Lamberigts, University of Luxembourg**

*Stijn Lamberigts is a PhD researcher at the University of Luxembourg and a junior affiliated researcher at the Institute of Criminal Law of the KU Leuven*.

*Introduction*

In view of the importance of legal persons in society, the increasing use of corporate criminal liability or other mechanisms that seek to impose sanctions on legal persons is hardly surprising. The research and theory on the substantive criteria of the criminal responsibility of legal persons is, however, not paralleled by corresponding research into the fair trial rights of legal persons as criminal defendants.[44]

No one can deny the far-reaching impact of legal persons on modern society. Legal persons in general, and multinational legal persons in particular, have acquired substantial financial and socio-economic power. The impact and the transnational nature of corporate activities often confront states with the limits of their ability to regulate and control them within traditional state boundaries. This weakness becomes even more obvious when states deal with large multinationals, conglomerates or groups of multiple legal entities operating in different countries worldwide which can easily relocate activities to other countries.

Legal persons, regardless of their size and structure, can and do commit different types of offences. They can often be situated in the area of economic or financial criminal law, but the range of offences they can commit is much broader. Faced with this reality, the call for and use of corporate criminal liability have increased over the past few decades, which led in continental Europe to the gradual supplementing or even superseding of the initial approach based on (punitive) administrative law.[45] However, corporate criminal liability raises many questions, from both a theoretical and a practical point of view. To what extent can legal persons be held criminally liable for offences requiring a *mens rea* element? What kind of sanctions can be used to punish a legal persons? How should criminal proceedings against legal persons be conducted? Who will represent the legal person throughout an investigation or trial? To what extent do legal persons benefit from the procedural safeguards that were historically conceived for human beings?

States worldwide have adopted different approaches to the aforementioned questions. Some systems base corporate criminal liability on a model of vicarious liability, whereas others favour an anthropomorphic model.[46] Some states accepted the very idea of corporate criminal liability quite early on,[47] while others only did so a few years ago.[48] Yet some countries are still reluctant to accept

[44] See on this topic: M. Pieth and R. Ivory, "Emergence and Convergence: Corporate Criminal Liability Principles in Overview" in M. Pieth and R. Ivory, *Corporate Criminal Liability- Emergence, Convergence, and Risk* (Springer, 2011), 38-48.

[45] This increased attention for corporate criminal liability is equally matched by a growing literature on the topic, see: S. Adam, N. Colette-Basecqz and M. Nihoul, *La responsabilité pénale des personnes morales en Europe* (Brussels, die keure, 2008), 500 p; J. Gobert, and A.M. Pascal, *European Developments in Corporate Criminal Liability* (Oxford University Press, 2011), 360p; M. Pieth and R. Ivory, *Corporate Criminal Liability- Emergence, Convergence, and Risk* (Springer, 2011), 395 p; D. Stoitchkova, *Towards Corporate Liability in International Criminal Law*, (Intersentia, 2010), 240 p;

[46] See n 2 above.

G. Vermeulen, W. De Bondt and C. Ryckman, *Liability of legal persons for offences in the EU* (Maklu, 2012), 201 p.

corporate criminal liability.[49] The debate on corporate criminal liability mostly centres on the question how criminal liability can be attributed to a legal person. Procedural questions, such as the aforementioned question on how legal person should be tried and what specific measures can be taken during such trials, are often overlooked. The same can be said with respect to the applicability of fair trial rights to legal persons.

Despite the lack of debate, the applicability of fair trial rights, such as the right to silence, to legal persons is not self-evident considering the differences between legal persons and individuals. Nevertheless, several states have extended the application of fair trial rights to legal persons without a fundamental debate.

So far the European Court of Human Rights (ECtHR) has unambiguously accepted the overall applicability of the right to a fair trial to legal persons, without really paying attention to the differences between legal persons and individuals.[50] However, the Court has not yet dealt explicitly with more specific rights such as the right to silence and the privilege against self-incrimination of legal persons. Unlike certain other fair trial rights, such as the right to access to a court, which can be applied to legal persons *mutatis mutandis*, this seems less obvious for the right to silence and the privilege against self-incrimination, because this right was originally designed to protect *human beings* against physical coercion. Similarly, the Court of Justice of the European Union (CJEU) has already ruled that certain provisions of the EU Charter of Fundamental Rights[51] are applicable to legal persons.[52] Nonetheless, most of the case law of the CJEU concerning fair trial rights of legal persons can be found in the field of EU competition law.[53] In this field, there are indeed various cases where the CJEU explicitly ruled on the question of fair trials rights for legal persons. As far as the right to silence and the privilege against self-incrimination is concerned, this case law goes back to the late 1980s.[54] Therefore, even though EU competition law is formally speaking not considered to be

---

[47] Such as for example England and Wales.

[48] For example in Luxembourg corporate criminal liability was only introduced in 2010. See: Act of 3 March 2010, Mémorial A n° 36 du 11.03.2010, 614.

[49] Germany has rejected the idea of introducing corporate criminal liability for years and it was only in 2013 that a draft bill has been launched. Another Member State of the EU which does not accept corporate criminal liability is Greece.

[50] ECtHR Judgment of 20 September 2007, *Paykar Yev Haghtanak LTD v Armenia*, 21638/03. See also P. Gilliaux, *Droit(s) européen(s) à un procès équitable (*Brussels, 2012), 73; P.H.P.H.M.C van Kempen, "The Recognition of Legal Persons in International Human Rights Instruments: Protection Against, and Through, Criminal Justice?", in M. Pieth and R. Ivory (eds.), *Corporate Criminal Liability. Emergence, Convergence, and Risk*, (Springer, 2011) 373. See also: ECtHR Judgment of 16 July 2009 *Baroul Partner-A v Moldova*, 39815/07, ECtHR Judgment of 7 June 2007 *Dupuis and Others v France*, 1914/02 and ECtHR Judgment 15 July 2003 *Fortum Oil and Gas Oy v Finland*, 32559/96.

[51] Since the entry into force of the Lisbon Treaty on 1 December 2009, the charter has according to Article 6(1) TEU the same Legal value as the treaties.

[52] Case C-279/09 *DEB* [2010] ECR I-13849. See more recently: Case C-418/11 *Texdata Software GmbH*, paras 72 and 73. See also: P. Oliver, "Case C-279/09, DEB v Germany, Judgment of the European Court of Justice (Second Chamber) of 22 December 2010", *Common Market Law Review*, vol. 48, 2011, 2023-2040.

[53] C-301/04 P *Commission v SGL Carbon AG* [2006] ECR I-5915.; Case C-374/87 *Orkem v Commission* [1989] ECR I-3283. Case T-112/98 *Mannesmannröhren-Werke v Commission* [2001] ECR II-729. See on that topic: T. Bombois, *La protection des droits fondamentaux des enterprises en droit européen répressif de la concurrence* (Brussels, Larcier, 2012), 293 p.

[54] C-374/87 *Orkem v Commission* [1989] ECR I-3283.

criminal in nature by the CJEU, this case law offers an interesting source of information regarding the procedural rights of legal persons when they face punitive measures.

*Legal persons and the right to silence and the privilege against self-incrimination*

In light of the growing use of punitive mechanisms, such as corporate criminal liability, it is essential to consider how and to what extent legal persons should be entitled to the (same) procedural rights as individuals. Whereas transposing certain procedural rights to legal persons can be done without too much difficulty, other rights may be more challenging. This is particularly true for the right to silence and the privilege against self-incrimination. These rights have traditionally been developed in the context of individuals and they are originally closely connected to the protection of natural persons against physical or psychological compulsion. If one wants to apply them in the corporate context, several questions come up, such as: which of the legal person's employees can invoke these rights?

All the employees, only the middle or top management, or only the legal person's legal representatives?

Nevertheless, they can be particularly relevant for legal persons as well: the (un)availability of these rights can have a substantial impact on the defence strategies open to legal persons. For example, if a legal person cannot rely on these rights when confronted with a demand for incriminating evidence by prosecuting authorities, the choices open to a legal person are limited. One may argue that if one accepts that legal person can face criminal liability, they should be entitled to choose their defence strategy, just like a natural person who is facing charges can. The legal person can have good reasons to decide to cooperate with the prosecuting authorities to obtain the most favourable outcome. In such scenarios, it is likely to cooperate for example by handing over evidence of the wrongdoing that has been going on. At the same time, a legal person may have decided that it does not want to cooperate with the prosecuting authorities. It is particularly in such cases that the right to silence and the privilege against self-incrimination come into play.

The question whether a legal person can rely on the privilege against self-incrimination and the right to silence has been answered differently throughout Europe, as well as abroad. This variety of approaches can be particularly challenging in the context of corporate wrongdoing that is not confined to the borders of one state, such as in the context of foreign bribery. In the following paragraphs we will highlight some of the different answers to the aforementioned question.

The answer given in the United States is very clear: corporations, like other collective entities,[55] cannot benefit from a right to silence and the privilege against self-incrimination under the Fifth Amendment.[56] This Supreme Court doctrine can be traced back to the landmark case of *Hale v Henkel* handed down at the beginning of the 20th Century and the cases that further developed the doctrine.[57]

---

55 Partnerships and unincorporated labour unions. See: US Supreme Court *United States v White*, 322 U.S. 694 (1944).

56 L. Cole, "Reexamining the Collective Entity Doctrine in the New Era of Limited Liability Entities-Should Business Entities Have a Fifth Amendment Privilege?", *Columbia Business Law Review*, vol 2005, 9.

57 US Supreme Court *Hale v Henkel*, 201 U.S. 43 (1906).

The exclusion of corporations from the scope of these rights was based on several arguments, some of which have meanwhile lost some appeal. The Supreme Court considered that as the privilege against self-incrimination is a purely personal privilege, it cannot be exercised by corporate employees or agents on the corporation's behalf. Moreover, the Supreme Court feared the detrimental impact on the prosecution of cases in a business context.[58] At the same time, the US Supreme Court has accepted that corporations could benefit from protection against unreasonable searches and seizures under the Fourth Amendment.[59] Interestingly the Supreme Court has been rather generous in applying other Amendments than the Fifth Amendment right to silence and privilege against self-incrimination to corporations and according to Cole the right to silence is the only provision of the Bill of Rights that has been entirely unavailable to corporations.[60] Although some authors claim that there is some reason to the Supreme Court case law on corporate constitutional rights,[61] finding that corporations do not have a right to remain silent, yet that they have a right to political speech is confusing. Particularly, if one takes into account the Supreme Court's argument that restriction of a corporation's political speech cannot be justified by relying on the argument that they are not natural persons.[62] The collective entity doctrine's primary foundation seems to be that extending the right to silence to corporations would have a too significant impact on law enforcement particularly in a white collar context.[63]

Quite the opposite answer has been given in other states. The Belgian Supreme Court was confronted with a case in which a financial institution had been required to produce self-incriminating evidence, failure to do so could result in a fine. The Court of appeal had excluded evidence that was produced under that threat as it considered that the right to silence had been infringed. Its judgment was

---

58 S.S. Beale and J.E. Felman, "The Fifth Amendment and the Grand Jury", *Criminal Justice*, 2007, 6; L. Cole, "Re-examining the Collective Entity Doctrine in the New Era of Limited Liability Entities-Should Business Entities Have a Fifth Amendment Privilege?", *Columbia Business Law Review*, vol 2005, 31. See: US Supreme Court *Braswell v United States*, 487 U.S. 99 (1988); US Supreme Court *United States v White*, 322 U.S. 694 (1944), 700.

59 US Supreme Court *Hale v Henkel*, 201 U.S. 43 (1906), 76.

60 L. Cole, "Reexamining the Collective Entity Doctrine in the New Era of Limited Liability Entities-Should Business Entities Have a Fifth Amendment Privilege?", *Columbia Business Law Review*, vol 2005, 10.

61 Garrett argues that the Supreme Court has considered the purpose of the different Amendments and that it has ensured that the exercising of corporate constitutional rights does not prejudice the rights of natural persons, nor that it allows corporations to conceal their conduct from the state. The Fourth Amendment protection of corporations is limited: as long as a subpoena is not too indefinite and as long as it seeks reasonably relevant information within the scope of the activities of the regulator that asks for the documents, making a successful Fourth Amendment claim is small. See: B.L. Garrett, *Too Big to Jail* (Harvard University Press, 2014), 217. See also M.I .Steinberg, Understanding Securities Law (New Providence, LexisNexis, 2009), 437.

62 US Supreme Court Citizens United v Federal Election Com'n, 130 S.Ct. 876 (2010), 903.

63 Alschuler critically examines the collective entity doctrine and finds none of its justifications convicing. A.W. Alschuler, "Two Ways to Think About the Punishment of Corporations*", American Criminal Law Review*, vol 46, 2009, 1366, n48.

confirmed by the Supreme Court.[64] Yet, even in those jurisdictions that accept the entitlement by legal persons to the right to silence and the privilege against self-incrimination, some doubts remain open.[65]

If one turns to the case law of the European Court of Human Rights, which has handed down several cases dealing with the right to silence and the privilege against self-incrimination in the context of natural persons, no detailed answer has been given to the aforementioned question.[66]

At the same time, the CJEU has handed several cases dealing with the right to silence and the privilege against self-incrimination of legal persons in the context of competition law.[67] It should again be stressed that EU competition law has not been considered to be criminal in nature by that Court. Thus, it may be that the CJEU would be more generous when corporations face classic criminal sanctions instead of punitive administrative sanctions. The Court's position can essentially be summarized as follows: legal persons cannot not refuse to hand over incriminating documents when the European Commission issues a Decision on the basis of Article 18(3) of Council Regulation (EC) 1/2003, nor can they refuse to answer questions, except where answering a question would entail an admission of an infringement of competition law. This has in practice resulted in the delicate exercise of determining whether a question is merely factual, or whether it would lead to an admission of a competition law violation.

The EU legislator has recently also adopted a Directive that could have provided an answer to the question whether legal persons benefit from the right to silence and the privilege against self-incrimination. Instead the Presumption of Innocence Directive[68] excludes legal persons from its scope. The Preamble to the Directive makes it clear that legal persons can nevertheless rely on existing legislative safeguards and case law. In other words, the Directive, does little to attempt to approximate the diverging approaches that exist in the EU to procedural safeguards for legal persons.

Conclusion

This contribution has attempted to highlight some of the uncertainties that prevail in relation to procedural safeguards for legal persons. Whether and how procedural safeguards are to be applied in the same way when a legal person is being prosecuted, is a complex question, which has been answered differently in various states. Admittedly, the right to silence and the privilege against self-

64 Cour de cassation, 19 June 2013, P.12.1150.F, available in French and Dutch at : http://jure.juridat.just.fgov.be/JuridatSearchCombined/?lang=fr.

65 See with regards to the Netherlands: I. Peçi, "The Netherlands" in K. Ligeti (ed), *Towards a Prosecutor for the European Union* (Hart, 2013), 131-132.

66 See on this issue: S. Lamberigts, "The Directive on the Presumption of Innocence", *Eucrim*, 2016, issue 1, 38-39.

67 C-301/04 P *Commission v SGL Carbon AG* [2006] ECR I-5915.; Case C-374/87 *Orkem v Commission* [1989] ECR I-3283. Case T-112/98 *Mannesmannröhren-Werke v Commission* [2001] ECR II-729.

68 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings [2016] OJ L65/1 (The Presumption of Innocence Directive). The implementation deadline of the Directive is 1 April 2018.

incrimination are not the easiest procedural rights to transpose to the context of a corporate prosecution.[69] Nevertheless, the wide variety of approaches taken in Europe and abroad highlights some of the challenges in the field. When a legal person faces investigations, for example for bribery, in different jurisdictions, it may be a minefield to assess which procedural safeguards apply in these jurisdictions, by whom they may be exercised and whether the safeguards apply fully, or to a more limited extent than where the suspect is an individual.

[69] See for some other examples of procedural issues : G. Vermeulen, W. De Bondt and C. Ryckman, *Liability of legal persons for offences in the EU* (Maklu, 2012), 119-123.

**Michel Levien González, DeForest Abogados, Mexico**

***What are the most important components of an effective system for LP Liability?***

The OECD Convention for Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention") does not make a qualitative distinction between effectiveness, proportionality and dissuasiveness of sanctions in Anti-Bribery laws; this is to say that, under the Convention, all three elements have equal importance and value. However, it is important to note that the element of dissuasiveness is particularly affected by widespread implementation of LP Liability regimes.

This is so because, on one front, law enforcement and/or regulatory authorities set out to punish and, ultimately, deter foreign bribery in the context of organizations, or legal persons by holding them accountable for the acts of their members. A tool which has proven useful for this is the incorporation of regimes which can hold liable a legal person for the acts of its members.

On a second front, however, the self-same authorities face growing pressure to shape public policy to also bring to justice the natural persons who engage in bribery. To address this issue, some governments/agencies have opted to keep in place their LP Liability regime as-is, but condition mitigating circumstances/conditions which could benefit an alleged corporate offender on the "delivery" of the natural person. The goal, of course, is to deter criminal activity and bring to justice corrupt organizations as well as corrupt individuals.

A point of some concern is that, in implementing these types of regimes (e.g. the United States of America, Department of Justice "FCPA Pilot Program") law enforcement authorities are at risk of incentivizing counterproductive behaviour the public. In essence, under a regime which fosters bringing the whole (the organization) as well as the part/s (its members) to justice by appealing to them to denounce each other, creates a clear conflict of interest.

In a system in which an organization can be held liable for the corrupt acts of individuals, and such liability entails large, exemplary fines, the incentive is clear; corporations must implement policies to prevent offences, their members are encouraged to report misdeeds, and corporations, to a degree, police their own members. On the opposite side of the spectrum, in a system where only individuals are held liable, the incentive is also clear, individuals are dissuaded from criminal activities and corporations are inclined to report such activities. However, in a system in which the individuals are at risk of prosecution for offences imputed to the organization (which, in turn necessitate a predicate offence committed by one or more individuals), the incentive is not as clear. Should the individuals at risk of prosecution self-report? Should the corporations implement draconian compliance systems? Should both of them simply deceive or attempt cover-ups?

Under such a framework, it seems more than likely that the individual members would see less of an incentive to, say maintain clear records or make anonymous tip-offs on potential offences, and more likely to attempt to hide traces of improper acts. Likewise, an organization struggling to maintain an integrity-oriented corporate culture, might face the awkward position of developing a corporate culture of compliance which may ultimately lead to its members' punishment, as well as organizational catastrophe.

This is not to criticize or dismiss such forward-thinking strategies; however jurisdictions adopting them and particularly their law enforcement authorities will be forced to tread a thin line in prosecuting individual offenders, later using these offenses as predicate offenses to prosecute Legal

Persons, and then using these proceedings to prosecute further individual offenders. It would be advisable to re-evaluate policies which could create –at least in appearance- conflict of interest, particularly now that modern economies heavily depend on industry, and that industry simply cannot spare the resources at risk.

**European Bank for Reconstruction and Development**

*Chiawen Kiew and Melissa Khemani, Office of the Chief Compliance Officer*

The Office of the Chief Compliance Officer ("OCCO") at the European Bank for Reconstruction and Development ("EBRD") has a mission to protect the integrity and reputation of the Bank, with particular emphasis placed on pre-investment screening as a means of managing integrity risks. In addition to developing and monitoring the EBRD's integrity and anti-corruption standards and policies, it is also responsible for investigating allegations of fraud, corruption and misconduct, both within the EBRD and in EBRD-financed projects. OCCO also cooperates with governments, international organisations and others to strengthen the global fight against corruption.

OCCO has prepared the following response to the Working Group on Bribery's ("WGB") invitation to contribute to the "Public Consultation on Liability of Legal Persons" in order to share OCCO's experiences of investigating and sanctioning corruption by legal persons under the EBRD's Enforcement Policies and Procedures ("EPPs"), and in assessing corporate anti-corruption compliance programmes as part of its pre-financing screening due diligence process. OCCO has in particular selected items from the proposed issues for discussion where its experience may assist the WGB in developing appropriate standards of liability of legal persons in advance of its Phase 4 round of monitoring WGB Parties' implementation of the OECD Anti-Bribery Convention.

**2. Nature of liability.** As shown in Section B.1 of the draft report, of the 40 Parties to the Anti-Bribery Convention having some form of LP liability for foreign bribery, 27 countries have criminal liability, 11 have some form of non-criminal liability, and 2 countries have both.

a. What are the advantages and disadvantages of criminal liability for legal persons for foreign bribery?

b. What are the advantages and disadvantages of non-criminal liability for legal persons for foreign bribery?

c. In your experience, does the choice between criminal and non-criminal liability carry any procedural or substantive consequences for the effectiveness of an LP liability system? For example, does it affect: jurisdiction over domestic or foreign entities; the availability of investigative techniques; the ability to cooperate across law enforcement communities, both domestically and internationally (e.g. mutual legal assistance); or public education and awareness?

The EBRD addresses allegations of Prohibited Practices,[70] which include corruption, through the EBRD's Enforcement Policies and Procedures ("EPPs"). The EBRD is not a governmental authority, and thus the EPPs are a quasi-administrative procedures for conducting investigations, and where warranted, imposing sanctions on individuals and companies that are found to have committed a Prohibited Practice. These sanctions include debarment from Bank-financed projects. OCCO believes that its experience as an organisation that conducts investigations and sanctions legal persons in an administrative framework may provide guidance on the relative advantages and disadvantages of investigation and sanctioning under a non-criminal liability regime. In particular, OCCO has highlighted the following areas where a criminal vs. a non-criminal liability regime may impact on the

[70] Section 2.1.29 of the EPPs define Prohibited Practices as: a coercive practice, a collusive practice, a corrupt practice, a fraudulent practice, a misuse of the EBRD's resources, an obstructive practice, and a theft.

effective sanctioning of legal persons.

- **Gathering and Obtaining Evidence:** The EBRD is not a governmental authority, and it cannot issue subpoenas to gather evidence and information. The EBRD instead primarily relies upon audit clauses in its financing contracts to gain access to records and other critical evidence. Alternatively, the EBRD can seek information from law enforcement authorities in order to obtain information. However, whether authorities are willing and able to provide assistance to the EBRD will depend upon that jurisdiction's legal framework and their willingness to cooperate. The limitations on EBRD's investigative authority, however, arise from the fact that the EBRD is not a governmental authority rather than a distinction between a criminal and non-criminal system.

- **Standard of Proof:** Under the EBRD's quasi-administrative regime, the burden of proof is on the EBRD to show that the legal person "more likely than not" committed a Prohibited Practice. This is a lower burden of proof than in the criminal context, which normally requires "proof beyond a reasonable doubt". Given the investigative tools at its disposal, OCCO could have difficulty meeting a criminal standard of proof, and could therefore have a negative impact on its ability to effectively sanction legal persons.

- **Sharing of Information:** The EBRD is able to share information with governmental authorities concerning allegations of corruption regardless of whether the jurisdiction has a criminal or non-criminal regime for liability of legal persons.

- **Types of Sanctions Imposed:** According to the EPPs, the outcome of the investigative process could result in sanctions up to and including debarment – meaning the entity is declared ineligible to become a Bank counterparty. The EPPs also provide for the entity to make restitution to the Bank or another party, calculated as "the economic benefit that [the entity] has obtained as a result of having committed a Prohibited Practice". The EPPs do not permit the EBRD to impose punitive fines on entities found to have committed a Prohibited Practice. The EBRD thus suggests that the OECD consider the impact on the types of sanctions available under criminal or non-criminal regimes of legal person liability.

- **Willingness to Settle:** The EPPs allow for the EBRD to enter into a settlement agreement in order to resolve allegations of Prohibited Practice. In OCCO's experience, the ability to settle cases with legal persons has been an efficient route towards resolving allegations of corruption: it achieves a sanction that is acceptable to both parties while avoiding a lengthy and contentious court process. OCCO has also found that most legal persons who are the subject of an investigation are willing (at least in principle) to settle allegations of corruption. Based on OCCO's experience, the willingness of legal persons to settle may in part be due to the fact that repercussions from a non-criminal settlement are limited and foreseeable, while the consequences from a criminal resolution are relatively difficult to predict.

OCCO notes that, although 25 Parties to the OECD Anti-Bribery Convention provide for settlement, only 14 Parties are able to settle a matter without a conviction being imposed. Given its experience, OCCO suggests that increasing the availability of settlements without conviction may increase the attractiveness of settlements and create an avenue to more efficiently resolve foreign bribery allegations with legal persons.

**5. Standard of liability – whose acts?** As explained in Sections B.4 and B.4.1 of the survey, the 2009

Recommendation sets forth approaches that the Parties should take to hold legal persons liable under the Anti-Bribery Convention. The draft report shows that about two-thirds of the Parties can hold legal persons liable for failing to supervise a lower-level employee who engages in bribery, as required under the second approach described in the 2009 Recommendation.
a. In your view, does the "failure to supervise" standard for holding an LP liable for bribery committed by a low-level employee adequately address foreign bribery in practice?
b. What advantages or disadvantages do you see for holding LP responsible for foreign bribery committed by low-level employees even when management has made its best efforts to supervise them?

OCCO suggests that the WGB consider developing guidance on the "failure to supervise" standard in order to facilitate clearer standards for WGB Members. OCCO is concerned that, without sufficient guidance on this issue, the "failure to supervise" standard may allow legal persons a broad swathe to argue that it had properly supervised its employees, but that its employees acted "rogue" in committing bribery.

In OCCO's investigative experience, companies often blame "rogue employees" when confronted with allegations of corruption and cite the company's extensive compliance documentation. However, in OCCO's experience, the legal person's arguments that the employee acted rogue are weak when considering that most employees pay bribes to benefit the legal person rather than to benefit themselves personally. Furthermore, in OCCO's view, the existence of compliance policies and procedures alone are not sufficient to establish that the legal person has "supervised" its employees; OCCO would instead expect that a compliance programme be implemented, monitored, and deeply embedded in the ethics of the organisation. While it is certainly possible for a lower-level employee to act "rogue" under these circumstances (i.e., subverting internal processes or affirmative misrepresentation for personal benefit), such an instance would be exceedingly rare if the organisation has indeed successfully implemented an effective anti-corruption compliance programme.

Furthermore, there may be a misunderstanding of the "failure to supervise" standard among legal practitioners and national authorities. OCCO's experience of compliance in the development context also reveals that there is particularly low level of awareness and technical expertise among the private sector to develop, implement and monitor compliance programmes in many jurisdictions. The compliance programmes that OCCO has seen are often rudimentary, and do not put in place controls to address and prevent the risk of corruption. The development of such a guidance could therefore also help inform companies in order that they may effectively design and implement compliance policies and procedures.

Finally, without sufficient guidance on the standards of "failure to supervise", a risk may exist that these legal persons may be wrongfully exonerated by prosecutors and judges who are not knowledgeable on the basic elements of an anti-corruption compliance programme, and who must rely on the legal person's self-assessment of its compliance programme as adequate. Development of international standards to expand upon the "failure to supervise" standard would provide national authorities with the international standards.

**6. Standards of liability – what conditions?** As shown in Section B.4.2 of the draft report, the Parties to the Anti-Bribery Convention consider a wide variety of conditions when determining whether a legal person should be held liable for foreign bribery (e.g. the act was committed "for the benefit", in the "interest", "on behalf", or "in the name" of the LP; or if the LP "could have enriched itself"). On occasion, some Parties have used more idiosyncratic conditions (e.g. that the offence must

have been committed "using the means" of the legal person provided "for that purpose"). Understandably, these conditions must be carefully chosen to ensure the effective enforcement of laws against foreign bribery, while also ensuring that legal persons are not held liable for acts that society, for policy reasons, does not want to attribute to them (e.g., perhaps acts beyond the control of the LP).
a. How does the choice of these conditions for establishing LP liability affect governments' ability to prosecute foreign bribery?
b. Please list any conditions that are required in the jurisdiction(s) in which you are most familiar and describe their advantages and disadvantages in practice for ensuring that LPs cannot avoid liability for foreign bribery either committed directly or through intermediaries.

In OCCO's investigations, liability is attributed to the legal person where the actions taken were for the benefit of the legal person. OCCO presumes that the standards requiring that actions be taken in the "interest", "on behalf" of, or "in the name" of the LP; or if the LP "could have enriched itself" are functionally equivalent in this regard. In OCCO's experience, this standard has worked well to capture the many ways that legal persons could be implicated in the commission of bribery.

The Stocktaking Report on Liability of Legal Persons notes that the vast majority of Parties to the Anti-Bribery Convention establish liability of the legal person where "it participated in or directed a subsidiary's wrongful conduct." Based on OCCO's experience in investigating complex organisations, we believe that this formulation would be overly restrictive to capture the myriad ways that a legal person may be involved in committing bribery. The incentive structures and lack of controls within a complex organisation could allow, and may even motivate, employees to commit bribery without the direct intervention of the legal person. Therefore, while OCCO would certainly find a legal person liable where it had directed or participated in the wrongdoing, a legal person should also be held liable where employees took actions for the benefit of the legal person.

Similarly, OCCO believes that standards requiring the "using the means" of the legal person provided "for that purpose" do not promote the effective sanctioning of legal persons for bribery. Legal persons could easily evade this requirement by committing bribery by lower level employees "indirectly" or through shell/offshore companies.

**7. Intermediaries**. As described in Section B.6 of the draft report, the 2009 Recommendation states that LPs cannot avoid liability for foreign bribery "by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf". How can countries best ensure that legal persons cannot avoid liability when intermediaries bribe foreign public officials – whether those intermediaries are related entities (e.g., subsidiaries or other entities in a corporate group) or other unrelated persons (e.g., agents or contractors)?

OCCO's investigations of foreign bribery reflect the findings of the OECD's 2014 Foreign Bribery Report: the vast majority of corruption is conducted through the use of intermediaries. Additionally, the use of the intermediaries is often masked through the use of shell companies and other legal persons. The EBRD's EPPs, in line with international anti-corruption standards, does not differentiate between bribery that is paid directly or indirectly, and therefore intermediaries that commit bribery may be held accountable on the same basis as the principals that commissioned the corrupt acts.

In OCCO's view, enforcement actions should not be limited to the acts of the intermediary alone and

must also extend to the principals that commissioned the corrupt acts. In a number of the EBRD's countries of operations, there is no dearth of intermediaries and agents able to be used to facilitate bribe payments. This makes it all the more imperative to hold liable the source of the bribe payments.

The EBRD's integrity policy stipulates that the Bank will not proceed with a Project without a thorough understanding of the prospective client's ultimate beneficial owners. The EBRD also checks the integrity profile and legitimacy of relevant agents, consultants and other third parties involved in a Project. However, as mentioned above, when an entity has been used to facilitate a corrupt transaction in a Bank project, the difficulty lies in identifying the individuals behind the shell companies and untangling the relationships between the entities. For these reasons, OCCO is supportive of the WGB's wider focus (through its monitoring of the Anti-Bribery Convention) on ensuring that Member Countries ensure that appropriate measures are adopted (e.g. national registries) that require the identification of the ultimate beneficial owners of such companies, and that such entities are effectively captured by the country's foreign bribery offence.

**8. Successor liability**. As described in Section B.7 of the draft report, "successor liability" refers to whether and under what conditions the liability of a legal person for the offence of foreign bribery is affected by changes in company identity and/or ownership. Although not expressly covered in the Anti-Bribery Convention, the WGB has examined this issue for certain countries.

a. In your view, how important is this issue for ensuring that legal persons are held liable for foreign bribery?
b. What are the relevant considerations for framing laws on successor liability that enable the effective enforcement of foreign bribery laws? Do these considerations differ depending on whether the system is "criminal" or not?

OCCO recommends that the WGB consider including guidance on successor liability as part of its standards on liability of legal persons because this issue is an essential element in developing an effective regime for sanctioning of legal persons. Without standards to address successor liability, legal persons (and their beneficial owners) could evade sanctions by dissolving and taking on another legal form. As explained below, OCCO also believes that effectively addressing successor liability creates incentives for companies to improve their anti-corruption compliance programmes.

A problem that has been experienced among the multilateral development banks has been the evasion of debarment sanctions by companies that dissolve and re-incorporate in another form. These so-called "phoenix companies" would not be covered by the original debarment. In order to assure that the debarment is effective, OCCO has attempted to sanction the ultimate beneficial owners (i.e., individuals) as well as the companies wherever possible. OCCO has found that while legal persons could change name and form, it is more difficult for individuals to evade sanctions.

The multilateral development banks (MDBs)[71] have developed harmonised principles to address the treatment of corporate groups, including treatment of successor entities. Under those principles, "[i]n the case of acquisitions, mergers, reorganisations or other corporate events involving the debarred

[71] African Development Bank Group, Asian Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank Group, the International Monetary Fund, the Inter-American Development Bank Group, and the World Bank Group.

entity, a rebuttable presumption will be applied that successors and assigns are subject to any sanction imposed on their predecessors."[72] Furthermore, the harmonised principles encourage MDBs to "extend a sanction to any entity that the Institution determines is necessary to prevent evasion or to any entity that seeks to evade or that has been created or acquired for the purpose of evading the sanction imposed".

These principles are reflected in the EBRD's EPPs, which provide that a sanction can be imposed on an affiliate of a legal person who has been sanctioned. The EPPs state that the Enforcement Commissioner or Enforcement Committee shall consider, among other things, the following factors:

- the management and organisational structure of the relevant entity;
- if the relevant Affiliate was involved in or influenced the commission of the Prohibited Practice, or was the intended beneficiary of such act;
- the possibility that the Respondent may circumvent an Enforcement Action through an Affiliate, taking into account the influence the Respondent has on an Affiliate and vice versa; and
- whether the Respondent may obtain benefits through the relevant Affiliate.[73]

Furthermore, if OCCO believes that an entity is *prima facie* the successor entity to a sanctioned legal person, OCCO can apply to the Enforcement Commissioner to have the sanction extended to the successor entity.

In addition to concerns over evasion of sanctions, OCCO believes that successor liability creates incentives for companies to strengthen their anti-corruption compliance programmes in the context of mergers and acquisitions. If buyers were liable for the anti-corruption risks of the companies they purchased, buyers would be wary of purchasing a company with a weak anti-corruption compliance programme. On the other side of the transaction, companies hoping to be purchased would have an incentive to improve their anti-corruption compliance programmes in order not to deter potential buyers.

In developing a framework for analysing successor liability, OCCO would recommend that the WGB consider the following factors:

- Encouraging the sanctioning of natural persons who are ultimate beneficial owners of sanctioned entities when possible;
- The definition of "control" sufficient to trigger liability by the successor entity;
- Ensuring that "control" is defined by both actual control and not only a threshold share ownership;
- Ensuring that companies can be held liable for "failure to supervise" their affiliates and/or subsidiaries;
- Defining which entities should remain sanctioned where sanctioned entity has divided or merged;
- Allowing prosecutors to apply to a court for sanctions to be modified to cover successor

[72] 10 September 2012, "MDB Harmonized Principles on Treatment of Corporate Groups", *available at* http://lnadbg4.adb.org/oai001p.nsf/0/A7912C61C52A85AD48257ACC002DB7EE/$FILE/MDB%20Harmonized%20Principles%20on%20Treatment%20of%20Corporate%20Groups.pdf

[73] November 2015, European Bank for Reconstruction and Development, Enforcement Policies and Procedures, Section 12.1

entities if a *prima facie* case is established (i.e., same beneficial owner, same line of business, same geographical market).

**10. Compliance systems as means of precluding liability**. As Section B.4.3 of the draft report shows, several of the Parties have made an effective compliance system a defence to prosecution or, conversely, they have made the lack of an effective compliance system an element of the offence.
a. Based on your experiences, how has LP liability helped to sharpen incentives for legal persons to implement effective compliance systems?
b. Law enforcement experience in this area is limited in many jurisdictions and the survey shows that the Parties' approaches to this issue are diverse. Based on your experience, does expressly including incentives for compliance systems in a country's foreign bribery offence (either as a defence or as an element of the offence) facilitate or impede effective enforcement?
c. In your view, how should prosecutors and courts assess whether a compliance system is adequately designed and implemented? Who should bear the burden of proof in showing that a compliance system is effective or ineffective?

OCCO would not view the existence of a compliance system as a means of precluding liability on the part of a company that has been involved in bribery/foreign bribery. OCCO may, however, view the existence of such systems as a mitigating factor in assessing the appropriate sanction that should be applied. One sanction that OCCO may impose under the EPPs is conditional non-debarment. Under that sanction, the legal person is not debarred, but must comply with certain conditions and report on its compliance to OCCO for a period of time. Applying that sanction, OCCO has required that companies develop and implement effective anti-corruption compliance and auditing systems as a condition of non-debarment. The sanction of conditional non-debarment, therefore allows OCCO scope to help a company reform its controls, and at the same time avoids taking an enforcement action that may have draconian consequences on the company, the market, the project, and the community at large.

In OCCO's experience, the 'burden of proof' lies with the company to convince the Bank that its compliance systems and controls have been effectively designed and implemented. As explained above in the response to Question No. 5, what qualifies as an "effective" compliance system will differ depending on the unique risks and challenges of each organisation, and law enforcement authorities and courts are not best-placed to determine whether a company's compliance system adequately addresses the risks presented. Additionally, beyond the existence of such a system, the effective implementation of the compliance system and its value within the company is critical to assessing the success of the company's systems. Indeed, the fact that a violation has occurred should serve as an indicator that the company's compliance system could be improved. The company is best placed to argue why its system works despite the violation that occurred.

In summary, OCCO understands that a complete defence to prosecution for an effective compliance system would create a significant incentive for companies to develop and implement such systems. However, OCCO believes that enforcement actions have a general deterrent effect that may likewise motivate companies to develop effective systems to prevent corruption.

**Michael Kubiciel, Professor of Law, University of Cologne, Germany***

*Professor Dr. Dr. h.c. Michael Kubiciel is Professor at the Institute for Criminal Law and Criminal Procedure (Managing Director) and Chair for Criminal Law, Criminal Law Theory and Comparative Criminal Law at the University of Cologne.*

## 1. General remarks

According to Art. 3 OECD Convention, bribery of a foreign public official shall be punishable by "effective, proportionate and dissuasive criminal penalties." 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 are subject to "effective, proportionate and dissuasive non-criminal sanctions".

Effective, proportionate and dissuasive (criminal or non-criminal) sanctions can only be imposed, if the following requirements are fulfilled:

- Statutes (within the substantive law, e.g. criminal code) that allow for sanctioning legal persons and confiscating the proceeds of crime, if
    - (at least) a top-level person of the legal person neglects his/her duties to supervise the employees with the effect that an employee bribes a foreign public official, or
    - (at least) a mid or top-level person of the legal person him- or herself bribes a foreign public official in the course of business relations.
- Statutes or other rules, which specify the conditions, according to which law enforcement bodies are obliged to investigate against a legal person, as well as the conditions, according to which they may abstain from investigating or terminate them.
- Sufficiently staffed and specialized law enforcement bodies and (criminal) courts which are trained to conduct investigations against large, often multinational enterprises.
- A positive attitude within the law enforcement bodies towards laws allowing for sanctioning legal persons. This isn't trivial, as many German prosecution offices simply do not apply the existing law, due to a diffuse opposition against the law and/or a lacking tradition of investigating against legal persons.
- Comprehensive statutes (within the procedural law) that allow for conducting (criminal) investigations against legal persons, including conducting the necessary investigation measure, e.g. search and seizure (including electronic data on servers or within an electronic cloud), wire-tapping.
- Statutes, which allow for flexible sanctions relating to the size of the enterprise respectively its turnover (and not the legal person, as the latter can be smaller than the enterprise).
- Statutes, which allow for sanctioning the legal successor of a fined legal person.

## 2. Nature of liability

a) Currently, the German law does not provide for a criminal liability of legal persons. Rather, according to the German Administrative Offence Act a legal person (or an association with legal capacity) can be fined for criminal offences or administrative offences committed by certain types of managers and employees. The fine is an administrative fine, not a criminal sanction. It is a non-

* The author is the spokesman of an interdisciplinary research group concerning the application of the (German) rules on corporate liability as well as a national Research correspondent of the European Commission on Anti-Corruption policies. The views and opinions expressed in this paper are those of the *author* and do not necessarily reflect the position of the research group or any other institution.

obligatory legal consequence, which can be imposed by prosecutors or representatives of other state institutions (such as regulatory authorities). When the legal person refuses to pay the fine, a circuit judge of a local court has to decide; typically, these judges have neither specialization nor training in proceedings against (multinational) legal persons. The fine cannot exceed a threshold of 10 million euro, but can be summed up with the confiscation of the proceeds of the crime or administrative offence.

b) In comparison to that, a criminal liability has several advantages:

- A stronger symbolic notion than an administrative fine. Administrative fines are, at least in Germany, related to breaches of lower-grate duties, whereas a criminal sanction reveals that the perpetrator has violated a norm of greater importance.
- In Germany, prosecutors are obliged to investigate given sufficient suspicion of a criminal offence. In contrast, they have a margin of discretion whether to start investigations or not, when a breach of duty can only be sanctioned by an administrative fine. Legal persons are currently subject to administrative fines in Germany. Hence, prosecutors are not obliged to investigate against legal persons. According to a representative survey, my research group is currently conducting,[74] German prosecution offices use to apply the law incoherently: 19 out of 48 prosecution offices did not have a single case of investigations against a legal person from 2011 to today. Germany seems to be divided: Whereas the prosecution offices in Bavaria and Baden-Württemberg seem to apply the law, three federal states (Bundesländer) only had one case, one federal state even did not have a single case.
- Criminal trails in Germany are public, while administrative sanctions are being imposed following non-public proceedings. For this reason alone, criminal proceedings are far more deterrent than administrative proceedings.
- Criminal sanctions in Germany, in particular fines, are flexible in scale as they must reflect the gravity of the crime and relate to the guilt of the perpetrator. In contrast to that, a legal person can only be subject to an administrative fine up to 10 million euros, irrespective of the severity of the breach of duty, the consequences of the criminal act and the financial potential of the enterprise, in which the crime occurred.[75]
- Criminal sanctions can be imposed for actions inside and outside the Federal Republic of Germany. The principle of territoriality is flanked by the principles of nationality and subsidiary protection of foreign states. In contrast to that, administrative fines can only be imposed for (corporate) actions committed on the territory of Germany.
- In criminal cases, cross-border legal assistance is by far easier, since most laws and treaties focus on investigations in criminal cases.

**3. Legal basis of liability**

a) The legal basis of liability does matter. The decision between an implementation inside or outside the criminal law has several legal consequences (supra 2. b). Against this background, the legislator in my view has only two options: providing for new rules of liability of legal persons either within the German Criminal Code (Strafgesetzbuch) or in a separate code. As the Criminal Code includes the most severe crimes, the first option would certainly send a strong signal to both law enforcement bodies and representative of legal persons. The second option would have a slightly minor "symbolic impact", but allows for a better implementation of rules on questions that only occur when it comes

74 The final results will be published in 2017.

75 There are different rules for fining in cartel/competition law.

to sanctioning legal persons. Moreover, it would help drawing a distinction between corporate criminal liability and individual criminal liability and its conceptual framework (e.g. guilt).

In my view, the German legislator should not enact a law specifically addressing corporate liability for foreign bribery, but should rather decide for a general law. There is no reason for differentiating between legal consequences for foreign bribery and legal consequences for other crimes. Rather, a bribery-specific legislation could have a negative effect since in Germany as a "country of codification" prosecutors, judges and other practitioners use to focus the crimes covered by the general codes, in particular the Criminal Code. For that reason, a bribery-specific legislation would certainly attract minor attention and could even be regarded as a law of a minor importance.

b) The OECD Anti-Corruption Convention only had a minor influence on the German discussion, since the national lawmaker is of the opinion that the current system (supra 2 a) complies with all obligations of international and European treaties. The fact that politics and scholars are currently debating, whether Germany should sharpen its law and even introduce corporate criminal liability, is caused by the financial crises, several scandals in banks and the automotive industry as well as by a shift of opinion under German criminal law scholars, who used to be very critical of corporate criminal liability.

**4. Types of entities covered**

Usually entities lacking legal personality are, economically spoken, of minor importance and therefore usually do not cause serious transnational corruption problems. However, exceptions do exist. For example a famous German drugstore-chain lacked legal personality as a sole proprietor formally led it. As the German law only allows fining legal persons and associations having legal capacity, such enterprises could not be sanctioned, would a representative of such an enterprise be responsible for a corruption offence. Thus, sanctioning entities lacking legal personality would close such loopholes.

Apart from that, covering such entities would have additional preventive effects as, for example, the scale of a fine could relate to the turnover of an (economic) entity and not to the turnover of a concrete legal person forming part of a multi-corporate enterprise.

From a conceptual point of view, the question, whether an entity lacking legal personality shall be sanctioned or not, does not imply particular problems: As soon as the legislator opts for sanctioning such entities, they become legal persons, at least within the framework of criminal law.

**5. Standard of liability – whose acts?**

In general, the "failure to supervise" model for holding legal persons liable is a rather unattractive for law enforcement bodies, since they must proof the insufficiency of the supervision or compliance management system or an individual fault. Proofing that can be difficult and sometimes impossible. Therefore, in my experience, law enforcement bodies seek to proof that a mid-level employee has committed a crime (for example: bribery; inciting bribery, assisting bribery).

When it comes to low-level persons are concerned, this strict liability model causes a conceptual, even constitutional problem: Why should a legal person be held liable for a crime committed by a natural person, who has no bearing on the management and even cannot legally represent the entity? Some argue, that a corporate liability in such cases can only be justified, if a mid or a top-level person has violated his/her duties to supervise his/her subordinates.

In cases of foreign bribery it is often difficult to proof who has actually committed the active bribery. In these cases it would be helpful, when the national law allows the sanctioning of the legal entity for a failure of supervision, which has led to a crime of an unknown employee.

**6. Standards of liability**

a) The choice of the said conditions clearly influences the scope of corporate liability and the factual ability to prosecute foreign bribery. For example, the term "for the benefit" is narrower than the phrase "in the interest of": The first term relates to a proper benefit, in some cases – like Germany – even a financial benefit ("enrichment"), whereas the latter encompasses all sorts of interests. Moreover, it makes a difference, whether the national law requires proofing that the entity actually had profited or whether it is sufficient that the employee acted with the intent to bribe in favor of his/her employer.

Phrases that speak of "on behalf" or "in the name of" are even narrower since they might require the proof that the person was legally entitled to act for or represent the entity. In these cases, the legal entities cannot possibly be held liable for external persons such as local consultants although these persons bribe in favor for (and with knowledge of) the entity.

b) According to the German law, a legal entity can be fined, when a mid- or top-level (see infra c)) manager has committed a criminal or administrative offence that has

- either enriched the entity (respectively has been committed in order to enrich the entity),
- or has violated duties of the legal entity.

The failure of supervision by the owner of an enterprise is an administrative offence, when this failure of supervision has facilitated a criminal offence or another breach of duty by an employee.

c) According to the German law, mid- or top-level persons are only persons, who

- either legally represent the entity as an organ,
- legally entitled to act for the entity,
- or hold an executive office, including those, who have a leading role in supervising employees.

Hence, the scope of the German law is narrower than those of other jurisdictions. In the context of combatting foreign corruption the question is crucial, whether a person in a leading supervisory position knew of the bribes or must have had knowledge. Therefore, the entity cannot be held liable in cases, in which local consultants, who must not or cannot be supervised by executive persons, have committed the acts of bribery.

**7. Intermediaries**

In order to ensure that legal persons avoid liability by using intermediaries (might they be consultants, subsidiaries or other entities) countries should first of all provide for a sufficiently wide scope of persons, whose supervisory failures can trigger corporate liability. If the law (such as in Germany, see supra 6.) only covers persons in a leading supervisory position, it is comparably unlikely that these persons have knowledge or can have knowledge of bribes paid by external persons in foreign countries. The knowledge, and with this the legal responsibility, thins out, when the chain of persons between the intermediary and the leading supervisory person is long. Moreover, states should provide for rules, which do not limit supervisory duties to the internal sphere of the legal entity (normative approach), but rather opt for a functional approach: According to the latter,

supervisory duties emerge every time, an entity uses an intermediary as a necessary tool to make contacts with foreign public officials in order to establish or carry on business transactions. By means of such rules, the possibility of outsourcing legal responsibilities for (natural or legal) persons running business for the legal entity can be minimized.

**8. Successor liability**

a) Providing for a liability of successors of a legal entity is important for ensuring that legal persons can be held liable. The dimension of this issue is however linked to the dimension of possible sanctions and fines. If a national legislation only enables minor fines (Austria) or medium-scaled fines (Germany), the incentive for enterprises to avoid liability by means of restructuring the enterprise is low. For this reason, in German cases, in which enterprises have avoided fines by changing the identity of a legal person, its ownership or even terminating the legal existence, can only be found, where fines are significant: in competition law, that does not limit the fines to 10 million euro.

b) A good approach to hamper the described avoidance strategies is providing for sanctions that do not address a concrete legal person, but the economic enterprise as such (the European competition law includes such an instrument). By means of that, all individual legal persons of an enterprise can be held liable, including the parent company.

**9. Jurisdiction**

a) In international business that is dominated by multinational enterprises, the Parties' lack of direct jurisdiction over legal persons for offences committed entirely abroad present a major obstacle to the enforcement of foreign bribery offences. If, for example, a German enterprise cannot be held liable in Germany, because all relevant acts have been committed abroad, in particular by means of foreign company daughters, the German laws do not apply.

b) In order to avoid this, the principle of territoriality (cf. § 5 German Law on Administrative Offences) should be accompanied by the principle of nationality. The principle of (active) nationality is based on the idea that a state has sovereignty over its citizens.[76] If a state applies that principle on legal entities, one has to decide under which circumstances a legal person is to be regarded as a national. The typical answers are that a company's nationality can either be based on the location of its registration or the location, in which it carries out its business transactions. The second answer would cause a multitude of overlapping jurisdictions, since the majority of major and medium-sized enterprises do business in more than one country. For that reason, the first answer – place of registration – is preferable. However, as a mother company dominates its (foreign) daughters, the homeland of the mother company also has sovereignty over the daughter companies. Therefore a national legal person can be held liable for criminal offences committed by representatives of a foreign daughter company, at least in cases, in which the mother company benefits significantly from the relevant business transaction.

**10. Compliance systems as means of precluding liability**

a) Corporate liability, especially a liability under the FCPA, had a major impact on sharpening compliance management systems in big and medium-sized German enterprises. Already in 2011,

[76] SCHNEIDER, A. (2014) *Corporate Criminal Liability and Conflict of Jurisdiction* in: Borodowski et al. (ed.) Regulating Corporate Criminal Liability, p. 249, 251-2.

59% of all German enterprises had implemented compliance programmes;[77] some of them have even set international standards.[78] In 2013, 74% of all enterprises had implemented compliance programmes.[79] It is likely, that the percentage has even increased during the last three years. Against that background, one could argue that introducing corporate criminal liability is not necessary to trigger the implementation of compliance programmes in German enterprises.[80] However, several scandals in enterprises, which already had implemented a compliance management system, show that the sheer act of implementation does not prevent corruption: Compliance programmes must be adaptive and come at the core of the corporate culture. In my view, a modern code on corporate criminal liability, providing for prosecution agreements, can be an effective tool to change the corporate culture for the better.

b) In Germany, several lobby groups and professional associations have presented proposals for laws that explicitly acknowledge compliance as a reason for waiving liability or mitigating the sanction.[81] However, a general incentive to implement compliance system exists, if the latter influences liability and its dimension, as enterprises and its organs have a rational interest in avoiding (personal) liability. This effect exists irrespective of the form of acknowledgement by law. In my view, it is hence not necessary to explicitly provide for that in the law. In any case, a legislator should abstain from the attempt to specify the conditions, under which the mere existence of a compliance program could affect the sanction, for this might lead to rather static, non-adaptive programs, that simply try to match the standards mentioned in the law.

c) In general, the prosecution office has to carry the burden of proof. However, in enterprises, in which several corruption cases or a case of a huge dimension has occurred, the burden of proof de facto is being shifted to the enterprise. In such cases, it simply arguing that the compliance system has worked well simply does not seem plausible to prosecutors. According to my experience, that is how law enforcement bodies in Germany assess the quality of a compliance system.

**11. Sanctions and mitigating factors**

The most efficient sanction, beside fines, is the legal obligation to alter the internal control and compliance systems under the supervision of a monitor. Both sanctions, especially when combined, allow for a fair retribution and effective prevention of corruption. In contrast to that, the least effective sanctions, in my view, are the suspension from public tenders or state subsidies, since these sanctions do not enhance internal reforms, but could even hamper the process of internal renewal.

All aspects – implementation of a compliance system, voluntary disclosure, cooperation – should mitigate the sanction, since these aspects are indicators for a process of internal renewal, that

77 BUSSMANN, K./NESTLER, Cl./SALVENMOSER, S. (2011) *Wirtschaftskriminalität* Frankfurt a.M./Halle, p. 34.

78 BUSSMANN/NESTLER/SALVENMOSER, supra note 4, p. 60.

79 BUSSMANN, K./NESTLER, Cl./SALVENMOSER, S. (2013) *Wirtschaftskriminalität und Unternehmenskultur 2013* Frankfurt a.M./Halle p. 26.

80 For a discussion of that argument see KUBICIEL, M (2014) *Verbandsstrafe - Verfassungskonformität und Systemkompatibilität* in: 47 Zeitschrift für Rechtspolitik, p. 133, 135-136.

81 See KUBICIEL, M. (2016) Compliance als *Strafausschlussgrund in einem künftigen Unternehmensstrafrecht* in: Ahlbrecht et al. (ed.) Unternehmensstrafrecht. Festschrift für Jürgen Wessing, p. 69-79.

prevents future acts of corruption. Moreover, all aspects mentioned could also mitigate a sanction imposed on a natural person; there are no reasons, why legal persons should be treated differently.

**12. Settlements**

a) The German law does not allow proper settlements, however, they are not unknown in Germany due to settlements between German enterprises and US authorities. Moreover, the German law enables the cessation of criminal proceedings against individuals under obligations, which is an instrument comparable with settlements. The advantages of instruments like settlements are their flexibility and their potential to improve compliance systems and the corporate culture.

b) A conviction as a fundamental requirement for sanctioning a (natural or legal) person. Neither a conviction nor the act of sanctioning is an end in itself. Rather, they must be justified by retributive and preventive goals. A conviction is necessary for a sanction as a mean of retribution: Only when it is clear that a (natural or legal) person has actually committed an offence, a proper sanction may be imposed. If a legal consequence to a suspicion however aims at preventing possible future crime, a conviction is not necessary. Rather, the fact-based assumption, that the corporate compliance did not work well, may be regarded as a sufficient trigger for imposing preventive sanctions, such as the condition to improve compliance programs. Therefore, a settlement without conviction can be both legitimate and rational.

c) I would question whether it makes sense to differ between a settlement and a sanction, since any settlement will include several conditions, with which the enterprise has to comply with. As the implementation of these conditions usually is expensive, these settlements have a deterrent effect. Moreover, a settlement comprising the implementation of a new compliance programs to be monitored by law enforcement bodies or a official representative provide for corporate compliance in the future in a better way than fining companies.

**Sharon Oded, Professor, Erasmus University Rotterdam, the Netherlands**

*Sharon Oded is Professor of Corporate Compliance and Enforcement, Erasmus University Rotterdam, the Netherlands; formerly, Visiting Fellow, University of California, Berkeley School of Law; and a Senior Associate at De Brauw Blackstone Westbroek (Sharon.oded@debrauw.com).*

The global battle against foreign corruption has significantly developed since the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Anti-Bribery Convention") entered into force two decades ago. This development is multifaceted and evidenced, for example, by the increasing price label attached to foreign anti-bribery action in recent years. The U.S., which has been the dominant jurisdiction in taking severe enforcement action against foreign corruption, has seen a clear escalation in fines in recent years. In 2014, for instance, companies paid on average more than USD 150 million to resolve FCPA cases, which is about 7.5 times higher than the average total value of monetary resolutions in corporate FCPA cases in 2012, and almost double the same value in 2013.[82]

The OECD data clearly indicates that, in addition to the U.S., enforcement action against foreign corruption has also been gaining priority in other jurisdictions, including the U.K., Germany and the Netherlands.[83] Specifically, after the OECD Anti-Bribery Convention took effect in February 1999 until June 2014, signatories to the convention took more than 400 enforcement actions against corporations and individuals for foreign bribery offences.[84] In 2013 alone, the total amount imposed in combined monetary sanctions was more than USD 1.2 billion, compared to USD 0.65 million only a decade earlier.[85]

While the global fight against foreign corruption is clearly stepping up, the 2016 draft of the OECD Report on Liability of Legal Persons for Foreign Bribery: A Stocktaking suggests that there is no global consensus on how the liability system for legal persons (LPs) should be structured to reach its goal effectively. The 2016 draft report specifically highlights substantial differences between jurisdictions on the extent of an LP's liability for foreign corruption. Approaches differ, for instance, on the nature of liability (criminal, non-criminal, both), the legal basis (general criminal law, other statutes, bribery-specific legislation, or case law), the standard of liability (strict liability, negligence-based, other), and other aspects.

This contribution provides an academic outline of selected topics included in the consultation. The contribution focuses primarily on clarifying the functions of LPs' liability system in the overall battle against foreign bribery as derived from the main objective of this system. Accordingly, in the following section this contribution poses the fundamental question: ***what does the OECD want to achieve by holding LPs liable for foreign corrupt practices?*** Clarifying the objectives of the liability system is useful for the discussion of each of the topics included in the public consultation. Based on the answer proposed, I will continue by addressing selected topics of the public consultation lists. In doing so, this contribution relies on the economic analysis of law approach.

---

82 *See* GIBSON DUNN, 2014 YEAR-END FCPA UPDATE (Jan. 5, 2015), http://www.gibsondunn.com/publications/pages/2014-Year-End-FCPA-update.aspx.

83 *See* OECD, OECD FOREIGN BRIBERY REPORT: AN ANALYSIS OF THE CRIME OF BRIBERY OF FOREIGN PUBLIC OFFICIALS (2014), *available at* http://www.keepeek.com/Digital-Asset-Management/oecd/governance/oecd-foreign-bribery-report_9789264226616-en#page4 (**OECD Report**).

84 *See* OECD REPORT, *supra* note 3, at 13.

85 *See id.* at 20.

## TOPIC 1: EFFECTIVE LIABILITY SYSTEM

**What are the most important components of an effective system for the liability of legal persons?**

This contribution does not provide a "shopping list" of components of LP liability systems. Instead, it proposes an analytical framework for the evaluation of policy components. In practical terms, I suggest that for an LP liability system to be effective, its components must be derived from the key objective of LPs liability system, that is, *maximising the sum of (1) the social costs generated by foreign bribery and (2) the costs of its prevention, including the cost of enforcement.*

Following this approach, each contemplated component of the LP liability system should be evaluated based on: (1) generating deterrence; (2) enhancing effective corporate control.

***The key objective of an LP liability system*.** As a starting point for the discussion of a socially desirable PS liability system, one may consider the following facts, all of which are rather straightforward:

*(1)* foreign corruption generates harm to society;

*(2)* enforcement against foreign corruption is costly;

*(3)* alternative policy instruments differ in their productivity and costs;

*(4)* resources available for enforcement against foreign corruption are limited.

Taken together, these basic facts may suggest that in order to be socially desirable, an enforcement policy against foreign corruption cannot afford to focus only on the most *effective* ways of deterring and preventing foreign corruption. Instead, while seeking to maximise the use of highly effective policy measures, a socially desirable policy would also aim to utilise the available resources "smartly", that is, to use less costly mechanisms to reach high enforcement productivity. A socially desirable objective of LP liability can therefore be determined as *minimising the sum of (1) the social harm generated by foreign corruption and (2) the cost of its prevention, including the cost of enforcement.*[86]

***How can an LP liability system reach the objective of minimising the sum of the social harm of foreign corruption and its prevention costs?*** Law and economics scholars suggests that to reach its objective, LP liability must fulfil simultaneously two key functions:[87]

***Deterring foreign corruption***, that is, generating a threat of fines, and potentially also reputational losses, to ensure that that LPs are better off by avoiding foreign corruption, rather than engaging in it. This function is fulfilled by holding LPs liable for foreign corrupt practices taking place

86 See Sharon Oded, CORPORATE COMPLIANCE: NEW APPROACHES TO REGULATORY ENFORCEMENT, Edward Elgar (2013), 158-202; Sharon Oded, Coughing Up Executives or Rolling the Dice? Individual Accountability for Corporate Corruption (2016), forthcoming, to be published in the Yale Law & Policy Review.

87 Id. See also Jennifer Arlen & Reinier Kraakman, Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes, 72(4) N.Y.U. L. REV. (1997), 700; Jennifer Arlen, The Potentially Perverse Effects of Corporate Criminal Liability, 23(2) J. LEGAL STUD. (1994), at 833–867.

within the scope of the corporate activity. If LPs expected to pay a fine or suffer reputation damages for their involvement in foreign corruption practices, a rational LP would weigh the costs against the benefits of engaging in such practices. If the fines and reputation damages were sufficiently high to outweigh the benefit associated with the foreign corrupt practices, a rational LP would choose to avoid the corrupt practices altogether. This way, the LP liability acts as a deterring mechanism against foreign corruption.

***Utilising effectively corporate control***, that is, inducing corporations to use their ability to control their employees and proactively join the battle against foreign corruption. The second function of LP liability relies on the understanding that LPs have more productive and less costly ways to control their employees compared to those available to public authorities. While public authorities do not have the tools, access, or capacity to continuously control all employees of LPs, LP liability systems may produce the right incentives for LPs to exercise they control over their employees to prevent foreign corruption. An LP liability system may, for instance, incentivise LPs to educate and instruct their employees to act with integrity; provide the relevant tone at the top and an incentive scheme that promotes integrity; monitor the activities undertaken by employees and apply anti-corruption controls; identify deviations from integrity values and act on them, take remedial and disciplinary action when needed; and report violations to the enforcement authorities and cooperate with the investigation.

***Selecting key components of an LP liability system*.** The functions of LP liability systems described above may serve as the analytical framework for the selection and evaluation of possible LP liability system components. Following this approach, a given component is desirable from a social perspective if it promotes the key objective of minimising the *sum of the social harm of foreign corruption and its cost of prevention, including the cost of enforcement*. The evaluation would consider to what extent the component promotes the deterrence of foreign corruption and the effective utilisation of corporate control.

Various questions posed by the consultation document refer to possible components of LP liability systems. In what follows, I briefly discuss some of these components, using the analytical framework proposed in this section.

## TOPIC 5: STANDARD OF LIABILITY: WHOSE ACT?

**Does the "failure to supervise" standard for holding LPs liable for bribery committed by (low-level) employees adequately address foreign bribery in practice?**

**What advantages or disadvantages do you see for holding LPs responsible for foreign bribery committed by (low-level) employees even when management has made its best efforts to supervise them?**

Neither a *negligence-based* nor a *strict liability* standard may always reach the objectives of LP liability systems, that is, maximising the *sum* of the social costs generated by foreign bribery and the costs of its prevention, including the cost of enforcement (see above, Topic 1).

A **negligence-based** liability standard, such as the "failure to prevent" standard of some LP liability systems, seeks to provide corporations with an incentive to proactively prevent foreign corruption and by that avoid liability. Nevertheless, under certain circumstances, such liability standards may be counter-productive. This could happen, for instance when the standards encourage LPs to adhere to demonstrable prevention measures, rather than to those that are most effective; or when the standards are applied with hindsight and therefore do not adequately assess the reasonableness of the measures applied by LPs.

A **strict liability regime**, such as those holding LPs liable regardless of their genuine efforts to prevent foreign bribery, may discourage LPs from investigating red flags, from voluntary self-reporting identified violations to the authorities, and from cooperating with the investigation.

A truly desirable LP system may need to deter corporations from engaging in foreign bribery while inducing them to effectively exercise their control over their employees (see response to Topic 1). Those systems can be constructed as hybrid systems, which combine elements of both negligence and strict liability standards.

Law and economics literature has thoroughly discussed the strengths and weaknesses of negligence-based and strict liability regimes.[88] When applied to the context at hand, a negligence-based liability standard, such as the "failure to prevent" standard applied by some LP liability systems, clearly seeks to provide corporations with incentives to act proactively to prevent foreign corruption, thereby avoiding liability. For that purpose, the negligence-based standard often provides LPs with a defence against liability if they can demonstrate that they have met a 'due level of care' by implementing adequate measures to prevent foreign corruption.

Nevertheless, negligence-based LP liability systems may not necessarily provide optimal levels of deterrence to LPs. To simplify matters, let's assume that by satisfying a concrete list of measures, such as the adoption of certain policies, the provision of training to employees and the application of certain financial controls, an LP meets the threshold of the 'due level of care' requirement, and is consequently shielded from liability.[89] Under those circumstances, some LPs may choose to focus on adopting prevention measures that are easily demonstrable to the authorities, such as formal

88 For a general overview, see Sharon Oded, CORPORATE COMPLIANCE: NEW APPROACHES TO REGULATORY ENFORCEMENT, supra note 86, at 167-176.

89 This example is obviously a simplification of reality, as satisfying a due level of care is normally more complex and less certain, but it is provided here for the sake of explaining the argument.

adoption of policies or the provision of formal training, rather than focusing on adopting the most effective measures, such as the creation of a culture of integrity within the LP. If a "failure to prevent" liability standard promotes a "technical" approach to compliance, which is motivated by the wish to establish a legal defence rather than by the wish to promote integrity and achieve a genuine culture impact within LPs, it may be counterproductive to the objective of LP liability systems (see Topic 1 above).

Additionally, negligence-based liability standards heavily rely on the ability of enforcement authorities and courts to determine the appropriate level of care and to adequately assess the actual level of care taken by LPs. In practice, enforcement authorities often assess the reasonableness of prevention actions taken by LPs *post factum*, after a concrete violation is identified, and with hindsight. Such assessment may increase the uncertainly LPs face with respect to the enforcement system they are subject to, which in turn dilutes the incentives provided by the LP liability system.

Contrary to the negligence-based LP liability system, a *strict liability* system does not rely on a determination by enforcement authorities or courts of the 'optimal level of the standard of care'. Instead, it holds LPs liable for corrupt practices conducted by their employees within the scope of the employment, regardless of the efforts and resources mobilised by the LP to prevent foreign bribery. By that, as suggested by the literature, a strict liability system induces corporations to internalise the social interest and tune their internal efforts exerted to prevent violation to the socially optimal level.[90]

However, strict liability standards of LP liability systems may discourage LPs to investigate violations, to voluntary self-report them to the authorities and to cooperate with the investigation, while knowing that those actions may increase the LP's expected liability.[91]

A truly desirable LP system needs to deter corporations from engaging in foreign bribery while inducing them to effectively exercise their control over their employees. Those systems can be constructed as hybrid systems that combine elements of both negligence and strict liability standards. Such hybrid systems may, for instance, reward corporations for measurable actions taken by corporations to self-report and take remediation action.

90 Id.

91 Id.

## TOPIC 9: JURISDICTION[92]

**To what extent does some Parties' lack of direct jurisdiction over LPs for offences committed entirely abroad present an obstacle to the effective enforcement of the foreign bribery offence?**

**What can be done to expand jurisdiction in these legal systems in accordance with their legal principles?**

Foreign corruption practices, by their nature, often link to several jurisdictions. This is particularly true in the reality of multinational LPs, operating globally on cross-border projects and using global teams and local agents.

The OECD anti-bribery convention requires parties to the convention to take measures against their nationals for offences committed abroad when they have jurisdiction to do so. Given the multinational dimension of foreign corruption cases, practices of parallel enforcement and consequent (carbon copy) enforcement have been developed.

Parallel and consequent enforcement actions by various parties to the Anti-Bribery Convention for similar foreign corruption schemes may be at odds with the objective of LP liability systems, that is, to minimise the sum of the social harm of foreign corruption and its prevention cost. Such enforcement practices generate duplication of enforcement costs and may dissuade LPs from voluntary self-reporting.

Accordingly, rather than targeting only at expanding jurisdiction by individual parties to the Anti-Bribery Convention, one could consider focusing on identifying socially desirable ways of coordinating the enforcement approach, for instance, by having a specific scheme enforced by one leading enforcer. For that purpose, a leading enforcer could be the enforcement authority of the country in which the LP is based, and only if this country has no jurisdiction, than the country with the closest links to the matter. This would minimise the adverse effects of multiple parallel or consequent enforcement actions in various countries.

Foreign corruption practices, by their nature, involve operators from and actions in several jurisdictions. This is particularly true in the reality of multinational LPs, operating globally on cross-border projects, using global teams and local agents. Section B.8 of the OECD's 2016 draft report indicates that some countries are only able to hold an LP liable for foreign bribery that occurred entirely outside their territory if they can assert jurisdiction over the individual who committed the offence. Additionally, in some jurisdictions, such as the U.S. and U.K., anti-foreign corruption laws are being interpreted and implemented that also allow holding LPs liable when the actual links to the relevant jurisdiction is rather remote.

In light of the parallel jurisdiction over foreign corruption matters, recent years show cross-jurisdictional cooperation between enforcement authorities in detecting, investigating, and action taking. In some instances, such as in the recent VimpelCom case in February 2016, this cooperation resulted in joint or coordinated enforcement actions by public prosecutors in different jurisdictions.[93] In others, enforcement authorities have run parallel to subsequent enforcement

92 I am grateful to Angelique Groen-Boon (Senior Associate at De Brauw Blackstone Westbroek) for her valuable assistance and comments on this section.

93 PRESS RELEASE U.S. DEP'T OF JUSTICE, VIMPELCOM LIMITED AND UNITEL LLC ENTER INTO GLOBAL FOREIGN BRIBERY RESOLUTION OF MORE THAN $795 MILLION; UNITED STATES SEEKS

actions based on the same common nucleus of operative facts (known as "carbon copy" prosecution).[94]

Parallel and consequent enforcement actions by various parties to the Anti-Bribery Convention against a similar foreign corruption scheme may be at odds with the objective of LP liability systems, that is, to minimise the sum of the social harm of foreign corruption and its prevention cost. Such

---

850 MILLION FORFEITURE IN CORRUPT PROCEEDS OF BRIBERY SCHEME (Feb. 18, 2016), *available at* http://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million (reporting that on 18 February 2016 the world's sixth-largest telecommunications company, VimpelCom Limited and Unitel LLC, entered into a global foreign bribery resolution of more than $795 million in relation to bribery payments to officials in Uzbekistan between 2006 and 2012. The enforcement actions resulted from a cooperation between the DOJ, the SEC, the Public Prosecution Service of the Netherlands (OM), the Swedish Prosecution Authority, the Office of the Attorney General in Switzerland, and the Corruption Prevention and Combating Bureau in Latvia, as well as law enforcement authorities in Belgium, France, Ireland, Luxembourg, and the United Kingdom. In the DOJ's press release, Assistant Attorney General Leslie R. Caldwell was cited as saying: "*The FCPA resolution in this case is also one of the most significant coordinated international and multi-agency resolutions in the history of the FCPA, and demonstrates our commitment both to pursuing justice and to bringing about corporate reform.*"

According to the global settlement, VimpelCom agreed with the DOJ on a penalty of more than USD 230 million, including USD 40 million in criminal forfeiture. VimpelCom also agreed to implement rigorous internal controls, to retain a compliance monitor for a term of three years, and to cooperate fully with the department's ongoing investigation, including of individuals. In related proceedings, VimpelCom settled with the SEC and the OM. Under the terms of its resolution with the SEC, VimpelCom agreed to a total of USD 375 million in disgorgement of profits and prejudgment interest, to be divided between the SEC and the OM. VimpelCom agreed to pay the OM a criminal penalty of more than USD 230 million for a total criminal penalty of more than USD 460 million, a total resolution amount of more than USD 835 million. The department agreed to credit the criminal penalty paid to the OM as part of its agreement with the company. The SEC agreed to credit the forfeiture paid to the department as part of its agreement with the company. Thus, the combined total amount of U.S. and Dutch criminal and regulatory penalties paid by VimpelCom will be USD 795,326,398.40, making it one of the largest global foreign bribery resolutions ever.

*See also* PRESS RELEASE SERIOUS FRAUD OFFICE, SFO AGREES TO FIRST UK DPA WITH STANDARD BANK (Nov. 30, 2015), *available at* https://www.sfo.gov.uk/2015/11/30/sfo-agrees-first-uk-dpa-with-standard-bank/(reporting the Deferred Prosecution Agreement reached with the UK-based Standard Bank (now known as ICBC Bank PlC) in November 2015 by the UK Serious Fraud Office, according to which the bank agreed to pay financial orders of USD 25.2 million as well as USD 7 million in compensation to the Government of Tanzania); PRESS RELEASE U.S. SEC. & EXCH. COMM'N, STANDARD BANK TO PAY $4.2 MILLION TO SETTLE SEC CHARGES (Nov. 30, 2015), *available at* http://www.sec.gov/news/pressrelease/2015-268.html (reporting that Standard Bank agreed to pay USD 4.2 million to the U.S. SEC in connection with the Tanzania bond transaction, which was presented to U.S. investors). "*The DOJ has closed a related investigation. In their press release, the SFO stated: "The SFO has worked with the US Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) throughout this process. […] We are very grateful to the DOJ, the SEC, the Foreign and Commonwealth Office, the Financial Conduct Authority for their assistance in resolving this investigation and deferred prosecution.*"

94 *See, e.g.*, PRESS RELEASE U.S. SEC. & EXCH. COMM'N, SEC CHARGES KBR, INC. WIH FOREIGN BRIBERY: CHARGES HALLIBURTON CO. AND KBR, INC. WITH RELATED ACCOUNTING VIOLATIONS - COMPANIES TO PAY DISGORGEMENT OF $177 MILLION; KBR SUBSIDIAIRY TO PAY CRIMINAL FINES OF $402 MILLION; TOTAL PAYMENTS TO BE $579 MILLION (Feb. 11, 2009), *available at* http://www.sec.gov/litigation/litreleases/2009/lr20897.htm (reporting that in February 2009 Halliburton Company entered into a record-breaking settlement with the US authorities, in which the company agreed to pay USD 579 million to resolve bribery charges in relation to bribes allegedly paid to Nigerian officials to obtain a multibillion dollar contract); *see also* Andrew S. Boutros & T. Markus Funk, *"Carbon Copy" Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World*, 2012 U. CHI. LEGAL F. 259, 269 (2012) (reporting that on 7 October 2010, the Nigerian authorities charged Halliburton, along with several others with a sixteen-count criminal complaint largely relating to facts to which Halliburton has already admitted in their settlement with U.S. authorities. In December 2010, Halliburton agreed to pay USD 35 million to resolve these bribery charges).

enforcement practices generate duplication of enforcement, for instance, when several enforcement authorities review a large number of similar (electronic) documents and hold multiple interviews with the same employees. Additionally, because the anti-corruption normative standards as well as the enforcement policy are not always fully identical between different legal systems, the multiplicity of enforcement actions against the same corruption scheme increases uncertainty and may reduce LPs incentives to voluntarily self-report and cooperate with the investigation. This would be the case, for instance when LPs are entitled to a lenient approach in exchange for self-reporting under one country's anti-corruption law but not under another law that simultaneously applies.

While requesting parties to the Anti-Bribery Convention who have jurisdiction in a certain matter to act against their nationals for offences committed abroad, the Anti-Bribery Convention does not seem to encourage the adverse effects resulting from multiple and subsequent enforcement actions for the same or similar set of facts. Accordingly, the Anti-Bribery Convention provides a framework for parties having jurisdiction over a certain matter to consult with each other at the request of one of them, to determine the "most appropriate" jurisdiction for prosecution. Article 4 of the Anti-Bribery Convention stipulates:

**Article 4**

**Jurisdiction**

*"...*

*(3) When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution."*

Nevertheless, in practice parties to the convention appear not to embrace the 'lead enforcer" approach. [95]

There have been recent initiatives to establish further coordination between different countries in enforcing anti-foreign corruption laws, most notably the U.K.'s proposal to establish an international anti-corruption coordination centre. Whether these initiatives will result in a coordinated approach that prevents the adverse effects of parallel and subsequent enforcement actions for the same of similar foreign corruption scheme remains to be seen.

The current challenge posed by the parallel and subsequent enforcement actions for the same or similar set of facts may suggest a departure from the approach that mainly focuses on expanding jurisdiction by individual parties to the Anti-Bribery Convention. Rather, these challenges may justify focusing on identifying socially desirable ways of coordinating the enforcement approach, for instance, by pursuing the matter only by a single enforcer who has the closest links to the case. For that purpose, a logical choice of the enforcer would be the country in which the LP is based. Only if this country has no jurisdiction, another country with which the matter has most links could play the

95 See for instance, United States of America v Gi-Hwan Jeong, Appeal from the United States District Courtfor the Northern District of Texas, (22 October 2010), *available at* http://www.ca5.uscourts.gov/opinions%5Cpub%5C09/09-11127-CR0.wpd.pdf: "*We conclude that the plain language of Article 4.3 does not prohibit two signatory countries from prosecuting the same offense. Rather, the provision merely established when two signatories must consult on jurisdiction*." Additionally, based on the U.S. Attorney's Manual, Sec. 9-28.300. A U.S. prosecutor seems to have the discretion to decide whether to bring charges against a foreign LP, while taking into account prosecution by other jurisdictions.

leading enforcer role. This construction would minimise the adverse effects of multiple parallel or consequent enforcement actions by various countries.

## TOPIC 10: COMPLIANCE SYSTEMS AS MEANS OF PRECLUDING LIABILITY

**How has LP liability helped to sharpen incentives for legal persons to implement effective compliance systems?**

**Does expressly including incentives for compliance systems in a country's foreign bribery offence (either as a defence or as an element of the offence) facilitate or impede effective enforcement?**

**In your view, how should prosecutors and courts assess whether a compliance system is adequately designed and implemented?**

Implementing effective compliance systems may help LPs to reduce their LP liability in several different ways, for instance by: (1) reducing the absolute number of incidents of foreign corruption; (2) identifying and addressing foreign bribery incidents before they become systemic; (3) in some jurisdictions, providing a defence against liability or a basis for a regulatory credit, such as fine mitigation. As such, for some organisations the prospect of LP liability may certainly play an important role in deciding to implement effective compliance systems.

Including express incentives in a country's foreign bribery offence by itself has limited effect, if any, when the implementation of the policy is largely surrounded by uncertainty. This uncertainty could relate to what is determined as an effective compliance system or to the actual credit that an LP can expect in exchange for having an effective compliance system.

In jurisdictions in which having an effective compliance system could affect an LP's liability, the assessment of the adequacy of the system should be: (1) transparent and well communicated in advance; (2) reasonable given the circumstances of the relevant company; (3) without hindsight.

Implementing effective compliance systems can be instrumental for LPs to mitigate their liability for foreign corruption in several different ways. For example, effectively implemented compliance systems may reduce the absolute number of incidents of foreign corruption by LP's employees. Additionally, a well-functioning compliance system may allow LPs to detect and address incidents of foreign corruption before they become systemic. Moreover, in some jurisdictions, when LPs maintain effective compliance systems, they may be benefiting from a lenient enforcement approach or a legal defence against LP liability. As such, for some organisations, the prospect of LP liability may certainly play an important role in deciding to implement effective compliance systems.

Including explicit incentives towards adopting compliance systems in a country's foreign bribery offence, by itself, may have limited impact on LPs' incentives when the implementation of the enforcement policy is vague and the outcome of the process is largely uncertain. That may be the

case if what is determined as an "effective compliance system" is unclear and subject to ex-post interpretations, or there is no clear credit for holding an effective system in place, voluntary self-reporting and cooperating with the investigation.

In legal systems in which maintaining an effective compliance system could affect an LP's liability, the assessment of the adequacy of the system could be based on some key principles, such as:

(1) **Transparency** - to reduce uncertainty, it is useful to clearly communicate the elements enforcement authorities would consider as the focus for assessing compliance systems. Several guidelines provide some indications on what some enforcement authorities consider an effective anti-corruption system. Nevertheless, those guidelines provide a high level overview of the key components of a compliance system and do not always provide a clear picture as to the detailed features looked at by enforcement authorities as part of an enforcement action.

(2) **Reasonableness** - in evaluating the effectiveness of compliance systems, it would be useful that enforcement authorities adopt a reasonable approach that considers the complete picture and the broader circumstances to which a company is subject. Following this line of thought, under some circumstances a compliance system should be considered as effective even if it did not directly address the specific behaviour that was eventually revealed as violating anti-foreign corruption laws. After all, compliance systems are expected to be designed as risk-based, and therefore may not always address every single risk in full force.

(3) **Assessment without hindsight** - when assessing the reasonableness of compliance systems one may want to avoid hindsight. A compliance system could be regarded as adequately designed if, at the relevant time and based on the available information and expectations, it adequately addressed on a risk basis the corruption risks faced by the LP.

**Martin Polaine and Arvinder Sambei, Amicus Legal Consultants, United Kingdom**

*Overall educational need among investigators and prosecutors*

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

*Availability of investigative tools and international co-operation*

Having investigative tools available is, of course, fundamental to legal person liability implementation. While criminal, rather than administrative proceedings are at an advantage in that regard (given that, typically, coercive actions such as search and seizure, surveillance, interception of communications and undercover deployment are only available in criminal cases), it is sometimes forgotten that the hurdles to obtaining evidence from a state with an administrative framework are often more apparent than real. In such states, there has usually been a criminal investigation carried out and, in those circumstances, the product of such investigative means will be able to be used as evidence against the legal person. However, if a criminal investigation against the natural person has not taken place or has not resulted in evidence being gathered, it may mean that an investigation against the legal person does not have the benefit of covert or coercive means. (A quasi-criminal criminalisation framework might also experience similar difficulties.)

Whilst recognising that MLA is, by its nature, concerned with criminal matters, the opportunity should be taken to build upon UNCAC Article 43(1), which seeks to facilitate the provision of assistance in civil and administrative proceedings. Additionally, in those administrative/quasi-criminal states where there is not, presently express legal provision allowing MLA requests in respect of legal persons, consideration should be given to legislating accordingly.

Similarly, as to requests made by states with administrative liability, in most cases a request will be made during the judicial stage where a natural person is under investigation and so no obstacles should be encountered. However, where the legal person is being investigated separately or where criminal proceedings against the natural person have concluded, problems are likely to arise; save, again, where an express legal provision has been introduced.

*Successor Liability*

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

*Corporate investigations and indirect (circumstantial) evidence*

The traditional approach to investigating corporate corruption and other economic or financial crimes was to pursue reactive investigations. As the name suggests, such an investigation involves the piecing together of strands of information/evidence after an alleged offence has taken place. In relation to legal person cases, this often involves reliance on financial transactions, analysis of financial transactions through forensic accountancy, asset tracing and the interviewing of witnesses. Of course, those involved are often unwilling to provide an account of what occurred. The investigation and any subsequent prosecution may, therefore, be denied any direct evidence and reliance may need to be placed on indirect methods of proof, such as financial and asset transactions.

When we speak of direct and indirect methods of proof, we have in mind the distinction between direct and indirect (or 'circumstantial') evidence. Direct evidence is that which, if believed, proves the existence of a particular fact without the need of any inference or presumption being required. Indirect evidence relates to a fact or matter that by reason and experience, is so closely associated with the fact to be proved that the fact to be proved may be inferred from the existence of what is circumstantial (i.e. indirect).

Indirect evidence is, of course, adduced in the full range of criminal cases. However, it is of particular importance in a corporate corruption or economic crime case, where there may be little or no direct material proving a transaction or the involvement of the parties to it. An understanding of the legality and value of piecing together stands of indirect evidence is vital and yet a common concern expressed by both the judiciary and by lawyers is that, in many States, there is little practical guidance or training on how to approach and evaluate indirect evidence; indeed, there is sometimes confusion as to the legality or otherwise of drawing an inference from an aggregation of individual indirect strands.

**Nicola Selvaggi, Law Faculty, Mediterranean University of Reggio Calabria, Italy**

*Nicola Selvaggi is Associate Professor in the Law Faculty of the Mediterranean University of Reggio Calabria, Italy.*

***1. General. What are the most important components of an effective system for the liability of legal persons?***

An effective system for the liability of legal persons should be based on several components. As already emerged in most of countries that adopt liability of legal persons, this system should be constructed on all that elements that could show the "connections" between the entity and the crime.

One of these connections could be certainly considered the existence of an interest of the corporation in committing the crime. From this point of view, it could be well regarded the Parties' formulations which consist in "acting in the legal person's name or on its behalf", or "for the legal person's benefit or interest". This connection, therefore, should not be considered as the simply fact the entity received a benefit from the crime.

As a fundamental component of an effective system for the liability of legal persons, it should be also considered the role played by the author of the offence within the organisation. As we'll explain, it seems to be preferred the approach based on a selection of triggering persons as those with the highest level of managerial authority.

Finally, the most important component for an effective system of liability of legal persons is the provision of the adoption of compliance programs before the commission of the crime as a basis of the liability itself, and not only as a mitigating factor.

As a matter of fact, this provision could have several functions: first of all, it could guarantee fundamental principles of criminal law, avoiding the creation of a strict liability system; furthermore, the provision could be a concrete incentive for companies to really prevent foreign bribery.

Generally speaking, (see Gobert-Punch, Rethinking Corporate Crime) by considering an entity responsible whether a linkage between offence and organisation exists (this connection is often grounded on a 'structural negligence'), it seems possible to:

- preserve the element of 'fault' and so address the theoretical, constitutional and policy objections to liability that is strict: these objections are traditionally raised up by argueing that a collective entity would not have, other than a proper behaviour, a guilty mind and have brought, at a first stage, to the idea of identification between agent and entity: actus reus and mens rea of individuals acting with a pre-emiment position for the company would be transferred to the entity. Experience of English system has shown that, for various reasons, patterns of imputation based on this theory can present sometimes insurmountable limits: that explains the reasons why, for instance, UK legislations have introduced models of responsibility for the crime of manslaughter and the offense of corruption in which there is a reference to the violation of the due diligence and prudence in organization;

- create a proportionate sanctionary system against entities, since an evaluation over the degree of real involvement of corporation leads to a better sentencing;

- ensure the goal of prevention of crimes typically associated with collective activities, especially entrepreneurial, acting on their structural causes: by exonerating from liability,

corporations are encouraged to set up controls over their own activities and organizations and to adopt procedures in order to prevent the commission, for their benefit, of any offence;

- permit entities to effectively defend themselves in the process and prove that they do not have anything to do with the offence committed.

In this context, interest in the Italian legal system becomes clear, considering that the decreto legislativo 231/2001 represents one of the disciplines in which the connection between crime and organization (whole body) results in a technically more specific way by reference to "compliance programs" (Modello di organizzazione e di gestione).

Only a few years ago, in a broad analysis focused on understanding nature and causes of corporate crimes, aiming at "rethinking" the patterns by which corporation can be held responsible for the economic crime, the Italian model was subject of special attention, to the point that, in exposing the essential features of the discipline, there was a talk of "lessons from Italy": "the innovative element in the Italian statute is the concept of 'structural negligence'. It is in structural negligence that can be located the 'blame' that warrants attaching criminal liability to a company. (....) the conpany needs to have established guidelines and control systems that take into account the risk of the offence being committed. If it has not, then it will be found to be 'structurally negligent'" (Gobert-Punch, Rethinking Corporate Crime).

As it has been pointed out, the model of liability embodied by Legislative Decree no. 231/2001, in particular the part concerning the so-called "compliance programs", seems to achieve the goals mentioned above, and particularly:

a) building a mechanism for allocating the liability in accordance with the principles ruling the responsibility for offences, especially with that provided by art. 27 Costituzione;

b) promoting mechanisms internal to the enterprise, such as preventive procedures, controls and also consitution of an internal body whose task is specifically to supervise that compliance programs are implemented (in that perspective, it must be underlined that the so called Organismo di Vigilanza is not properly a whistleblowing system);

c) providing a fair notice to companies of crime-prevention that it must be set up so to be complaint and to be exonerated from liability, by giving the essential contents of compliance programs (see art. 6 and 7; art. 6 also provides for a possibility of the Ministero di Giustizia to formulate observations concerning compliance programs elaborated by representative associations of corporations; also, a recent legislative proposal would introduce a system of pre-validation of the abovementioned programs);

d) supporting judge in his ascertaining activities.

***2. Nature of Liability. As shown in Section B.1 of the draft report, of the 40 Parties to the Anti-Bribery Convention having some form of LP liability for foreign bribery, 27 countries have criminal liability, 11 have some form of non-criminal liability, and 2 countries have both.***

***a. What are the advantages and disadvantages of criminal liability for legal persons for foreign bribery?***

The advantage of criminal law provisions for legal persons for foreign bribery consists certainly in the more effective impact of the liability system. In particular, opting for a criminal model of liability it is

possible to consider very dissuasive and effective sanctions against companies that do not consider the prevention of bribery.

As disadvantage, we could remind the theoretic problem of principles that emerge when it should be attributed to the entity the subjective element of the offence.

Although it is true that many countries (i.e. Italy, Spain) do provide for forms of culpability specifically conceived for collective entities, or at least give relevance to a link between the offence occurred and the lack of organisation, it is also true that in practice liability of LP may turn into a sort of strict liability.

Please note that, to avoid the "compliance paradox", the Italian legislative decree 231 provides that a LP, in order to be insulated from responsibility, shall have adopted and effectively implemented compliance programs adequate to preventive not the wrongdoing which has been committed but rather offences of the same kind of that occurred.

Nonetheless, even if recently there have been some acquittals based on the lack of the organisational fault on the part of the defendant corporation, in Italy judges and prosecutors are still generally reluctant to give relevance to preventive systems and compliance programs when an offence has been committed.

***b. What are the advantages and disadvantages of non-criminal liability for legal persons for foreign bribery?***

The advantage of non-criminal liability for legal system for foreign bribery is that no theoretical problems (or less problems), such as those generally raised up if the option is criminal law, could be posed by the provision of a LP liability.

This solution, nevertheless, would have the disadvantages that, not providing for all criminal guarantees, we should exclude those sanctions that have a significant punitive content.

In general, in terms of deterrence a non-criminal system of liability may not play the same role of a parallel criminal system of liability, since especially corporations are much more discouraged by the possibility of being involved in a criminal proceeding, especially given the consequent loss of reputation and image.

***c. In your experience, does the choice between criminal and non-criminal liability carry any procedural or substantive consequences for the effectiveness of an LP liability system? For example, does it affect: jurisdiction over domestic or foreign entities; the availability of investigative techniques; the ability to cooperate across law enforcement communities, both domestically and internationally (e.g. mutual legal assistance); or public education and awareness?***

As far as the Italian experience is concerned, the choice between criminal ad non-criminal liability may carry some consequences, both from a procedural point of view and from a substantive point of view. We can say that, normally, a pure administrative solution provides for minor guarantees both in procedure and in substantive law, while a criminal or quasi-criminal model would take all guarantees necessary to apply effective sanctions.

Generally speaking, non-criminal liability does not constitute a serious obstacle for MLA procedures, also considering that, in any case, investigative measures in relation to offences (or wrongdoings)

committed by legal entities are in general not as incisive to fundamental rights as the proceedings against individuals.

Looking at the EU area in particular, it seems that the different legal nature of the sanctions is not the biggest obstacle to judicial cooperation, since the principal of mutual recognition is deemed applicable to legal entities, when the sanctions imposed are criminal or otherwise denominated.

***3. Legal basis of liability. As shown in Section B.2, the draft report groups the types of laws used by the Parties to the Anti-Bribery Convention to establish LP liability for foreign bribery into four categories: (1) general criminal law; (2) other statute; (3) case law; and (4) bribery-specific legislation. While the most common category used by the Parties is "general criminal law", many Parties make use of several of these categories. One Party – South Africa – uses all four.***

***a. Does the legal basis for LP liability matter? If so, why?***

The choice of legal bases for LP liability surely have relevant consequence, as in particular the ones concerning the "adapting" of natural persons (individuals) related categories to LP. As a matter of fact, the provision of LP liability in a specific statute (as the Italian case) could be useful to consider all the particularities of this kind of liability. Nevertheless, it is always necessary to provide for coordination with general criminal substantive and procedural law.

***b. What is the value, if any, of having bribery-specific legislation for foreign bribery (as opposed to enacting a prohibition in the general criminal law or other statute)?***

If we should consider the value of having a bribery-specific legislation for foreign bribery, we can take into account the possibility of evaluating the specific aspects that LP liability have in bribery matter, such as: a) jurisdiction for offences committed overseas and also in case liability of foreign LP, since relying to general provisions may not cover the particularities of these cases; b) types or categories of individual agents who may trigger the responsibility of LP

***c. In your view, has the Anti-Bribery Convention – or the WGB's monitoring of its provisions – contributed to creating or strengthening your jurisdiction's LP liability system for foreign bribery?***

Yes, I think that the Anti-Bribery Convention contributed to creating our LP liability system. This is proved by the fact that bribery has been one the first crime considered by Italian legislation on LP liability. Also in application of Italian law, the first and most important cases of liability of legal persons have been related to cases of bribery.

***5. Standard of liability – whose acts? As explained in Sections B.4 and B.4.1 of the survey, the 2009 Recommendation sets forth approaches that the Parties should take to hold legal persons liable under the Anti-Bribery Convention. The draft report shows that about two-thirds of the Parties can hold legal persons liable for failing to supervise a lower-level employee who engages in bribery, as required under the second approach described in the 2009 Recommendation***.

***a. In your view, does the "failure to supervise" standard for holding an LP liable for bribery committed by a low-level employee adequately address foreign bribery in practice?***

In our opinion, the "failure to supervise" standard for holding an LP for bribery is absolutely necessary in case the provision should consider the bribery committed by a low-level employee. As already explained, an essential component for an effective system is the selection of acts of trigger the corporate liability. We consider, in particular, the fact that the management play a fundamental role in

the activity of the company and – as a consequence – in the prevention of bribery. This means that LP liability should anyway be based on a crime in which, directly or indirectly, management is involved.

***b. What advantages or disadvantages do you see for holding LP responsible for foreign bribery committed by low-level employees even when management has made its best efforts to supervise them?***

Providing for liability of the entities even when management has made its best efforts to supervise low-level employees could have, in our opinion, almost only disadvantages. Even if, from a practical point of view, the further considerations of acts that trigger corporate liability could seem more effective, it could instead lead to a non-effective system of liability. As a matter of fact, if management should know that, even with his best efforts in supervising low-level employees, entities would anyway be held liable, the same management would probably pay no attention in avoiding foreign bribery within the company. In other words, a similar provision could have as effect to discourage the leading persons by adopting all necessaries measures to prevent bribery.

***Standards of liability – what conditions? As shown in Section B.4.2 of the draft report, the Parties to the Anti-Bribery Convention consider a wide variety of conditions when determining whether a legal person should be held liable for foreign bribery (e.g. the act was committed "for the benefit", in the "interest", "on behalf", or "in the name" of the LP; or if the LP "could have enriched itself"). On occasion, some Parties have used more idiosyncratic conditions (e.g. that the offence must have been committed "using the means" of the legal person provided "for that purpose"). Understandably, these conditions must be carefully chosen to ensure the effective enforcement of laws against foreign bribery, while also ensuring that legal persons are not held liable for acts that society, for policy reasons, does not want to attribute to them (e.g., perhaps acts beyond the control of the LP).***

***a. How does the choice of these conditions for establishing LP liability affect governments' ability to prosecute foreign bribery?***

As considered above, the existence of a connection between the LP and the offence occurred consisting in formulations as "for the benefit", "in the interest", "on behalf" of LP should be considered a fundamental component of a reasonable and effective system of corporate liability. From this point of view we can exclude that this condition impedes the prosecution of foreign bribery.

***b. Please list any conditions that are required in the jurisdiction(s) in which you are most familiar and describe their advantages and disadvantages in practice for ensuring that LPs cannot avoid liability for foreign bribery either committed directly or through intermediaries.***

The Italian legal system provides for a condition that, literally, could be translated as "in the interest or for the benefit" ("nell'interesse o a vantaggio").

Among the courts and the scholars the discussion has been focused on the meaning of the formulation, in particular evaluating if it is enough that a LP has took any advantage from the commission of the offence.

Case law seems to uphold the idea that the legislative decree provides for two alternative imputation criteria: the 'ex ante' interest and the 'ex post' advantage; in one decision it has been excluded the possibility that an "incidental" benefit could be sufficient to attribute the offence to the corporation.

***9. Jurisdiction. As documented in Section B.8 of the draft report, some countries appear to be able to hold an LP liable for foreign bribery that occurred entirely outside their territory only if they can assert jurisdiction over the natural person who committed the offence. Under Article 4(2) of the Anti-Bribery Convention, "Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles".***

***a. To what extent does some Parties' lack of direct jurisdiction over LPs for offences committed entirely abroad present an obstacle to the effective enforcement of the foreign bribery offence?***

In our opinion, the lack of direct jurisdiction over LPs for offences committed entirely abroad could be an obstacle to the effective enforcement of the foreign bribery offence.

The Italian legislative decree states that, in cases of offences committed abroad, with reference to Articles 7, 8, 9 and 10 of the criminal code, entities whose head office are located in Italy can be held liable, in accordance with general provisions of the criminal code, under the condition that the State where the crime has been committed doesn't undertake legal actions against them.

On the contrary, Italian law does not provide for the case of a foreign LP whose agents commit an offence in Italy. According to the case law (note that there are only few decisions on this issue), judge should rely on general provision (with consequent application of the Italian law).

***b. What can be done to expand jurisdiction in these legal systems in accordance with their legal principles?***

One solution would be to set forth broader criteria to trigger jurisdiction, following the example of the UK bribery act or FCPA

***10. Compliance systems as means of precluding liability. As Section B.4.3 of the draft report shows, several of the Parties have made an effective compliance system a defence to prosecution or, conversely, they have made the lack of an effective compliance system an element of the offence.***

***a. Based on your experiences, how has LP liability helped to sharpen incentives for legal persons to implement effective compliance systems?***

As far as Italian experience is concerned, we have observed a growing attention of companies to the matter of compliance and organization in order to prevent the commission of crime.

At the beginning (2001), the most of corporations were not really aware of risk of crime and of necessity of prevention. In the last years we had instead an improvement of adoption of compliance programs by companies, especially by the biggest ones.

Also we can record some cases of acquittals when the following conditions occur: a) the legal entity has enacted and effectively implemented, before the offence was committed, organizational and managerial models adequate to prevent offences of the same kind of the one occurred; b) the supervision and the updating of the models had been allocated to a body with autonomous powers of controls (the so called Organismo di Vigilanza); c) the offender had fraudulently managed to evade the organizational and managerial models; d) there had not been a lack of supervision by the body listed under b).

***b. Law enforcement experience in this area is limited in many jurisdictions and the survey shows that the Parties' approaches to this issue are diverse. Based on your experience, does expressly including incentives for compliance systems in a country's foreign bribery offence (either as a defence or as an element of the offence) facilitate or impede effective enforcement?***

In our opinion, the provision of incentives in case of adoption by the entity of a compliance system (either as a defence or as an element of the offence) facilitates an effective enforcement of the legal system of LP liability for foreign bribery offence. At this proposal, it should be considered, that – as shown by most courts in evaluating this element – the adoption of a compliance program could not automatically lead to the exclusion of liability when the compliance programs itself does not consist in a real system of effective prevention and is used by the company only to escape from liability without real efforts against bribery (as a "window dressing" or a sort of "cosmetic exercise"). This means that a concrete investigation on compliance systems would not impede the enforcement of anti-bribery provisions. On the contrary, it could help companies to understand how to better organize themselves in preventing bribery.

***c. In your view, how should prosecutors and courts assess whether a compliance system is adequately designed and implemented? Who should bear the burden of proof in showing that a compliance system is effective or ineffective?***

Guidelines for the adoption and the implementation of a compliance programs are already considered by the Italian Decree 231 (see Art. 6), that requires the provision of adequate systems of risk assessment, organization and supervision throughout the institution of a supervisory body. In particular, the decree provides for the essential contents of a proper compliance system, requesting LP to ensure: a) a complete and comprehensive assessment of the risk of offences being committed; c) delegation system and decision-making protocols (with special but non-exclusive regard to procedures for financial resources management); d) a system of information duties, which may include whistle blowing systems.

Following these guidelines and – in case – with the support of management experts, prosecutors and court could evaluate whether a compliance system is adequately designed and implemented.

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

***11. Sanctions and mitigating factors. Section B.10 of the draft report catalogues various sanctions or consequences that can be imposed on a legal person for foreign bribery, including (but not limited to) fines, confiscation, disbarment, and judicial or corporate monitoring. As described in Section B.11 of the draft report, some countries may also reduce the sanctions imposed in order to give credit for certain mitigating circumstances, such as whether the legal person voluntarily reported the offence to authorities or cooperated with the investigation. They may also give credit if the company had implemented a corporate compliance programme either before the offence occurred or perhaps even after the offence (but before trial).***

***a. In your view, which sanctions for legal persons are the most effective? Why?***

As far as Italian system is concerned, we can observe that the most effective sanctions for legal persons are interdictions. We have several sanctions that provide for a prohibition for the entities in

prosecuting the activity (in part or totally), or to suspend part of activity, also by retiring necessary licenses. These kinds of sanction are probably the most dissuasive because they will affect the real possibility for the company to survive.

Another effective sanction should surely be considered the confiscation. As it affects the benefit coming from the crime, it could discourage the company to use the crime as a method to maximize the economic profit.

***b. In your view, which sanctions for legal persons are the least effective? Why***?

Maybe, we could say that the least effective sanctions are fines, at least in case fines are not really proportionated to the global economic capacities of the entities. As a matter of fact, the company could "plan" in advance the costs of the crime and assumes them as a natural cost of the activity. Anyway, this problem could be solved by forbidding any kind of assurance and providing for significant level of fines.

***c. In your view, to what extent should the final sanction be affected by the mitigating factors discussed in the paper: (i) implementation of a compliance system; (ii) voluntary-disclosure; and (iii) cooperation with the investigation?***

In our opinion, the most important mitigating factor is represented by the implementation of a compliance system, even 'post factum'. This means that for this factor it should be considered a significant incidence on the final sanctions, because this activity will be already useful to avoid other crimes.

As far as voluntary-disclosure and cooperation with investigation are concerned, we can surely consider them as important mitigating factors, but we'll probably shall recognize a lower level in reducing final sanction.

***d. In your view, which mitigating factors are the most effective for incentivising the prevention and detection of foreign bribery?***

1. As already explained, the most important mitigating factor for incentivising the prevention and detection of foreign bribery is represented by the implementation of a compliance system. This factor will have the advantage of inducing the entity to an organization that will not commit any more crimes in future.

**Siemens Aktiengesellschaft, Germany**

*This contribution was submitted with the following information: BDI Circular No. RV 2016-180 dated September 2, 2016: OECD consultation on the liability of legal persons; Position statement of Siemens AG.*

We welcome a joint position statement regarding the OECD consultation on the liability of legal persons, coordinated by the BDI, and are pleased to state our position on behalf of the Compliance department of Siemens Aktiengesellschaft.

The Working Group on Bribery (WGB) issued an explicit invitation to submit proposals including in particular for improving the implementation of an "existing system for the liability of legal persons". These constitute the main subject matter of our remarks, which also take into account the ongoing debate on the regulation of corporate criminal liability in Germany.

Summary:

The liability of legal persons, as demanded by the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, is implemented in Germany by Sections 30 and 130 of the Administrative Offenses Act (Ordnungswidrigkeitengesetz, OWiG). Recent-ly and in particular since the presentation of the draft law on the "Introduction of criminal liability for companies and other associations" of North Rhine-Westphalia in 2013, there has been intensified debate regarding the introduction of corporate criminal liability.

Doubts have already emerged from a criminal law doctrine and constitutional law perspective against the imposition of sanctions on companies under criminal law. The main stumbling block is incompatibility with the principle of culpability, since there can be no punishment under German law without culpability and such culpability does not exist in relation to the company on which the sanction is to be imposed ("societas delinquere non potest"). Neither is such a departure even necessary; it is not demanded explicitly by the UN Convention. What is required is the imposition of effective, appropriate and deterrent sanctions on legal persons, which can however also be con-ceived outside of criminal law.

It is already possible to address the objective of combating white-collar crime by imposing corporate sanctions using the instruments of the law governing administrative offenses. This requires above all legal certainty and an effective incentive to introduce compliance systems. High importance is placed on compliance efforts in companies. Accordingly, prevention should be "acknowledged" to a sufficient degree by the law. To this end, we advocate a legal provision that expressly includes the possibility for compliance measures to be taken into consideration as a mitigating factor when determining liability.

The individual questions are addressed as follows:

I. Compliance defense

1. Incentive to behave in accordance with the law

Effective compliance increases the likelihood of detection of offenses in the company and thus has a positive impact not only on detection and prosecution but also on prevention. This is because compliance systems have a strong potential for deterrence within the company.

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

Sections 30 and 130 OWiG do not as yet contain any provisions regulating the extent to which compliance efforts in the company are to be taken into consideration when imposing sanctions. It is true that the competent authority, when imposing a sanction, can exercise its own discretion as to whether such a sanction should be imposed, the severity of any such sanction, and whether and to what extent compliance efforts should be taken into consideration. However, the practice is inconsistent, and there is a lack of clarity regarding the exact preconditions under which compliance measures can be taken into consideration to waive sanctions or mitigate their severity. Accordingly, companies are facing significant legal un-certainty. Without consistent, clear regulation, there is no incentive for companies to invest in the preventive introduction of compliance measures, as is already customary and recognized in certain countries.

2. Fundamental elements of an effective compliance system

In the interest of legal certainty, fundamental elements for an effective compliance system which have the effect of reducing liability must be defined by law. Examples of specific fundamental elements for an effective compliance system based on international and national standards include (but are not limited to): "selection, instruction and supervision of employees; compliance risk assessment; internal guidelines and training; whistleblowing system; prosecution and punishment of detected misconduct".

3. Burden of proof

The burden of proof in relation to circumstances with a mitigating effect on sanctions should lie with the company. As a general rule, of course, all facts that are material to the decision regarding the type and extent of the legal consequences must be investigated by the authorities. However the responsible officers within the company are themselves in the best position to provide information as to what preventive organizational and personnel measures have been taken, and this is to be recommended in view of their greater proximity to the proof. On this basis, authorities and courts are indeed in a position to assess the compliance measures of a company and to determine in relation to the specific individual case whether or not the company has fulfilled the stipulated compliance requirements. In this context, the compliance measures to be implemented must be reasonably proportionate to the size of the business and the risk arising from it. In this way, it is also feasible for small and medium-sized companies to implement them. Under the German law governing administrative offenses, the courts are already tasked with verifying whether appropriate organizational and supervisory measures have been implemented.

4. Conduct before and after the offense

When imposing sanctions, the conduct of the company (on which the financial penalty is to be imposed) both before and after the offense must be taken into consideration. This includes the company's unreserved assistance in clarifying the ¬facts of the case but also the implementation or subsequent introduction of compliance measures, which can be under-stood as a clear indication of the company management's commitment to acting in accordance with the law.

5. Leniency Regime

As a further incentive, the incorporation of a leniency regime into the law governing administrative offenses is to be recommended. A voluntary disclosure resulting in the waiver of a financial penalty creates a strong incentive for companies to detect and disclose misconduct through their own investigations, and to take effective measures to prevent further misconduct on the same grounds. Until now, companies have faced legal uncertainty with regard to the disclosure of internally detected misconduct to the authorities.

II. Settlements

Settlements between companies and individual criminal prosecution authorities regarding the punishment of white-collar crime are of significant importance both for companies and for criminal prosecution authorities. This applies above all to globally active companies. Complex cases, sometimes involving cross-border transactions, entail lengthy investigations due to the need for collaboration with authorities in different countries and the language barrier. These can have a detrimental effect on the company's reputation and prevent a "new start". They also tie up the human resources of both the company and the criminal prosecution authorities. It is therefore in the interest of both the company and the criminal prosecution authority to bring investigation proceedings to a close as soon as possible. If a settlement is reached in such cases between the company and the criminal prosecution authority, steps must be taken in the interest of legal certainty to ensure that the cause of action of the case in hand cannot be cited in any further investigation proceedings ("ne bis in idem").

III. Legal succession in relation to sanctions

If, following the restructuring of a company, the legal entity no longer exists, the financial penalty sanction imposed on the company is difficult to enforce. Previously, the law provided for a financial penalty to be asserted against a legal successor only under extremely narrow preconditions. With the 8th Amendment of the German Act Against Restraints on Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) in 2013, the legislator did however extend liability for financial penalties to the legal successor. There is now a legal basis for asserting a financial penalty against the universal successor or the partial successor following a partial universal succession as a result of the splitting up of a company according to Section 123 (1) of the German Reorganization Act (Umwandlungsgesetz, UmwG). This legislatory change was made explicitly in the law governing administrative offenses (Section 30 (2a) OWiG) and its validity therefore extends beyond purely antitrust-related offenses. Even if Section 30 (2a) OWiG does not yet establish a completely seamless legal basis for the liability of legal successors, an extension is not considered necessary from the company's perspective. A far more preferable approach would be to focus on the positive value added of compliance by providing a corresponding incentive in the law, as put forward in I above.

**Joseph Murphy, Society of Corporate Compliance and Ethics**

*Joseph Murphy, JD, is Director of Public Policy at the Society of Corporate Compliance and Ethics.*

The Society of Corporate Compliance and Ethics (the "SCCE")[96] is a non-profit organization comprised of more than 6000 members (individual professionals and companies), dedicated to improving the quality of corporate governance, compliance and ethics. The SCCE champions ethical practice and compliance standards in all organizations, and seeks to provide the necessary resources for compliance professionals and others who share these principles.

SCCE supports the mission of the Organization for Economic Cooperation and Development ("OECD") Working Group on Bribery in International Business Transactions (the "Working Group"), and believes that corporate and other organizations' effective compliance and ethics programs, including anti-corruption programs, are essential to the success of this mission. We also believe that governments play an indispensable role in promoting the types of programs that can truly prevent and detect corrupt practices in all corners of the world.

These comments are submitted by SCCE in response to the OECD's Consultation on Liability of Legal Persons: Issues for Discussion.

In these comments we make the following points:

1. Legal Person (LP) liability does help promote compliance and ethics programs, but liability alone is not enough to promote truly effective programs.
2. Only if government takes effective compliance and ethics programs into account in how it treats LPs does it have the leverage to promote such strong programs.
3. Governments must avoid a merely cosmetic approach to compliance and ethics programs.
4. Governments have unfortunately used LP liability too often to undermine compliance and ethics programs.
5. Programs should be assessed along a spectrum, not on a "pass-fail" basis.
6. Government needs to be more effective in leveraging its enforcement actions to provide useful guidance on what are considered strong and weak compliance practices.
7. The burden of proof should be on the party that knows what is in the compliance and ethics program – the LP.
8. Governments can assess programs just as they determine other issues of fact.
9. The OECD's Working Group on Bribery has provided an excellent standard for assessing programs.
10. Governments should acquire expertise in this field, just as they would in any important area of practice
11. Governments should have their own internal compliance and ethics programs.
12. Punishing LPs is not enough to prevent corruption.
13. To promote prevention, programs implemented before a violation occurs need to be credited.

We respond to the particular questions related to compliance and ethics programs. (The original OECD language is in italics and our comments in regular font.)

[96] www.corporatecompliance.org

*Compliance systems as means of precluding liability. As Section B.4.3 of the draft report shows, several of the Parties have made an effective compliance system a defence to prosecution or, conversely, they have made the lack of an effective compliance system an element of the offence.*

*Based on your experiences, how has LP liability helped to sharpen incentives for legal persons to implement effective compliance systems?*

LP liability does help promote compliance and ethics programs. LP liability does help promote compliance and ethics programs, but history shows that it is a mistake simply to think that mere liability will cause this result. Corporations and other large organizations tend to be insular, and not predictably responsive to penalties. Merely ratcheting up fines may result only in more paper (e.g., policies and codes) and preaching (e.g., lectures) in companies, but not the types of strong program steps necessary for effective compliance and ethics programs.

For LP liability to result in effective compliance and ethics programs it takes serious and intelligent government efforts. Where government takes programs into account in its treatment of LPs it obtains the leverage necessary to influence LP behavior. This, in turn, allows it to promote the types of steps that matter in programs. Otherwise, liability tends to be a blunt force that does not, on its own, lead to effective compliance and ethics efforts without intelligent input from government.

LP liability does not maximize compliance diligence when government takes a cosmetic approach to compliance. Mere LP liability followed by enforcement that ignores compliance efforts does not lead to diligent compliance efforts. Governments need to avoid empty, formalistic approaches with respect to compliance. For example, an unfortunate model of this cosmetic approach is the European Commission's enforcement of competition law. The Commission's effort at compliance appears to be a paper policy of advising companies to have programs. Yet this agency uses these same programs against companies,[97] refuses to recognize any compliance programs in any case no matter how diligent, and does not require them for companies committing violations and otherwise being exempted from any punishment (through its immunity program).[98] Thus it appears to focus only on collecting fines from violations and not preventing them. This negative approach contrasts with the focus more widely in use against corruption, where offenders are held accountable, but governments actively promote and recognize effective compliance and ethics programs in companies. Prevention, rather than revenue harvesting, is the major focus in this fight, and this approach should be emphasized going forward.

It should be noted that the Working Group on Bribery, in its Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, calls on signatory nations to take certain steps to promote compliance and ethics.[99] However, the Working Group needs to be more active in its reviews of the signatory parties to report what these countries

---

97 See EI DuPont de Nemours et Cie v. Commission (T-76/08 2 Feb. 2012)(sharing of compliance program between parent and subsidiary as evidence of subsidiary's lack of autonomy and basis for holding parent liable in subsidiary's violation; fines are thus calculated based on the parent's revenue, rather than the subsidiary's).

98 Unfortunately, the impact of such negative approaches in one major enforcement area like competition law may have spill-over effects in other areas serving to discredit all compliance activities in the eyes of skeptical managers.

99 OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, X, Accounting Requirements, External Audit, and Internal Controls, Ethics and Compliance http://www.oecd.org/daf/anti-bribery/44884389.pdf

have actually done in following these recommendations and promoting compliance and ethics programs.

LP liability and related enforcement actions have been used to undermine compliance and ethics programs. While LP liability is certainly a driver for the development of effective compliance and ethics programs, there is unfortunately an opposite side of this picture that is consistently overlooked – imposing or increasing liability and risk *because* an LP takes steps to implement compliance and ethics programs. This, in turn, serves as a deterrent to effective programs.

Promotion of truly effective compliance and ethics programs calls for a strong and consistent message from government supporting this goal. But this has not consistently been the case. Instead, there have been numerous actions taken by courts and enforcement and regulatory agencies that have perversely undercut the effort to promote effective compliance and ethics programs. This is addressed in detail in the article, Joseph E. Murphy, **Policies in conflict: Undermining corporate self-policing,** 69 Rutgers U.L. Rev. 2 (forthcoming 2017), draft available at http://ssrn.com/abstract=2827324

There is a strong need for government recognition of the importance of corporate self policing and that this activity serves an important societal value. Much good work by compliance and ethics professionals has been undercut by regulatory agencies pursuing their own special interests. Thus, privacy regulators in the European Union have undercut compliance programs, including throwing barriers in the way of scared employees trying to report corrupt management actions through corporate speak up systems. Labor regulators in the U.S. have opened companies up to idiosyncratic attacks for "unfair labor practices" simply for writing codes of conduct and employee guides. Other agencies, enforcers and courts have proceeded as if compliance and ethics efforts were merely irritating corporate side-shows, to be tossed aside or even used against companies. There is a need for recognition, at all levels of government, of the importance of corporate self-policing and compliance efforts.

Law enforcement experience in this area is limited in many jurisdictions and the survey shows that the Parties' approaches to this issue are diverse. Based on your experience, does expressly including incentives for compliance systems in a country's foreign bribery offence (either as a defence or as an element of the offence) facilitate or impede effective enforcement?

The need to avoid inflexible, "pass-fail" systems. Expressly including compliance and ethics programs as a defense certainly gets the attention of companies. However, it remains the case that the arrangement has to be one that truly promotes effective programs and is not easily gamed. It should not incent companies to do the minimum needed barely to meet the standard; rather, there should be a dynamic and flexible standard and system that provides an incentive for companies to keep improving their programs on an ongoing basis.

One of the core purposes of a compliance and ethics program is to fight corporate crime. Crime, including corruption, by its nature, tends to be dynamic. There is no one more dedicated and focused than an employee or agent determined to break the law. If companies design programs to meet minimum standards and do not have an ongoing stimulus to improve the program, the efforts can quickly become stale and easily gamed by determined wrongdoers. Thus, while programs should have to meet certain core, minimum standards to be considered by government, they must also remain dynamic and designed to fit the specific risks of each company – risks which also are dynamic. This approach to program standards has been called "structured flexibility." Thus in each case government would determine whether a compliance program first met the minimum standards, but then also

determine whether it merited credit given the nature of the risks and other circumstances in the specific case.[100]

There needs to be more effective communications from government. When governments do credit compliance and ethics programs there has been a tendency merely to tack this on in press releases after noting the company's voluntary disclosure and cooperation. In such cases there may be an absence of useful detail about what the company did in its compliance and ethics program, and thus little or no opportunity for others to learn. But learning is essential for compliance and ethics.

Governments need to focus on this element of communications in their enforcement activities. Compliance and ethics professionals look for this input; if government praises innovative and effective efforts, companies can learn from this. When government points out weaknesses (e.g., a chief ethics and compliance officer who has her tiny, windowless office in the basement and does nothing but fill out forms, or a so-called compliance "officer" who is a second tier, unempowered lawyer in the Legal Department), this serves as a powerful warning to companies to improve their programs. Even the best enforcers have tended to overlook this point, and compliance and ethics programs suffer as a result.

Government also needs to use its leverage to promote truly effective programs. This leverage only exists when programs matter to the government. Again looking to the enforcement of competition law for an example, the Canadian Competition Bureau provides a model for taking compliance and ethics programs into account, and providing guidance that includes advising that the "Bureau will consider . . . *any new or innovative features* that the company employs to promote compliance with the law."[101] This contrasts sharply with those who attempt to use the shortcut of mandating compliance and ethics programs. Such mandates unfortunately invite companies to meet technical, minimal requirements rather than continuing to strive to meet best practices. Mandating programs also necessarily puts the burden on enforcers to prove the program did *not* meet the standards. Mandates also tend to create a "command and control" compliance environment which behaviorists warn can lead to resistance and circumvention by employees.

*In your view, how should prosecutors and courts assess whether a compliance system is adequately designed and implemented? Who should bear the burden of proof in showing that a compliance system is effective or ineffective?*

Burden of proof. Companies should bear the burden of proof relating to compliance and ethics programs. A compliance and ethics program is inherently internal; a company knows best what it has done. For many reasons, it makes sense for the company to be the one showing the steps it has taken in its compliance program and what indications it has that the program is effective. Moreover, the issue comes up after someone acting for the company has broken the law, and the company is facing

100 Size of the company should also be considered, but it should be clearly understood that smallness is no excuse for violations or failure to take preventive steps. Even small companies can have effective programs, as long as they are willing to make a commitment to that goal. See Murphy, A Compliance & Ethics Program on a Dollar a Day: How Small Companies Can Have Effective Programs (SCCE; 2010) http://www.corporatecompliance.org/Portals/0/PDFs/Resources/ResourceOverview/CEProgramDollarADay-Murphy.pdf

101 Competition Bureau Canada, Bulletin - Corporate Compliance Programs 5 (June 3, 2015), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-bulletin-corp-compliance-e.pdf/$FILE/cb-bulletin-corp-compliance-e.pdf

enforcement action for its offense. It makes sense for the company to establish why a violation occurred despite its best efforts to prevent the violation.

It is also in the long-term interest of companies for them to make their own case about their diligence in preventing violations. If the burden is on the government, then ultimately the public will perceive that companies are "getting away with something." It only takes one bad case for the public to insist on changing the law and removing the defense completely. In such circumstances, compliance and ethics programs can become broadly discredited. With the burden on the companies this will both appear fairer to the public and be fairer in reality.

How can governments assess programs? Governments can assess compliance and ethics programs in the same way they deal with other fact issues in cases. In the course of an investigation the government will approach the company with a degree of skepticism. In the investigation of wrongdoing by the time the government must make a decision about an LP's compliance and ethics programs it has already been established the organization violated the public's trust by breaking the law. The company now bears the substantial burden of establishing that there were individual violators who went to significant effort to hide their wrongdoing.[102]

The government, for its part, starts making its assessment of the program at the beginning of the investigation. Interaction with the company at a variety of levels during the course of an investigation provides an opportunity to assess the reach and impact of the program.[103] For those individual employees tied into the violation, the more it is established that the company had a good program, the greater the risk of punishment for them individually. Thus they have no interest in helping protect the company at their own expense. In such an adversarial environment where the investigator has access to the inner parts of the company, the burden is on the company, and the focus is on the compliance efforts in the particular area at issue, the risk of a wrong result is probably less on the issue of the compliance program than it is on the overarching issue of whether the entity committed the violation in the first place. In this context, determining whether a real compliance and ethics program existed is no more difficult than other issues of fact routinely addressed in litigation.

What standard should be used? As for the standard to be applied for compliance programs, while these have varied somewhat among countries, there tends to be substantial similarity among the standards; this is naturally so, because an effective compliance and ethics program is basically the application of management practices and techniques for the purpose of preventing misconduct, and

---

[102] *See* MorganStanley, U.S. Department of Justice Press Release Apr. 25, 2012, "Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA," http://www.justice.gov/opa/pr/2012/April/12-crm-534.html . (In this prominent case where the Department of Justice declined to prosecute a company for an alleged violation of the FCPA based in part on the company's compliance and ethics program, the individual defendant "admitted today that he actively sought to evade Morgan Stanley's internal controls in an effort to enrich himself and a Chinese government official," said Assistant Attorney General Breuer. . . . "This defendant used a web of deceit to thwart Morgan Stanley's efforts to maintain adequate controls designed to prevent corruption.")

[103] There is no reason for investigators to make the mistake of simply waiting for a company to present a "dog and pony show;" asking employees a few key questions before a grand jury or similar official inquiry or otherwise in the course of the investigation will provide important insight on the bona fides of a compliance and ethics program. See Joseph E. Murphy, Assessing Compliance and Ethics Programs: A Guide for Enforcers, on file with the author and available for enforcers and regulators. See also Jaclyn Jaeger, *Defining compliance program effectiveness*, COMPLIANCE WEEK 26 (July 2016)(quoting Steven Cohen, then associate director, Division of Enforcement, SEC: "I like to ask compliance officers to come in to hear about their compliance programs at the outset of an investigation." "Lots of times, lawyers look at me quite stunned when early on in an investigation I ask not only to hear about the compliance program, but recently I've even asked to meet the chief compliance officer.")

such management techniques are universal in nature. Any agency looking for a strong starting point should draw from the excellent work of the OECD's Working Group on Bribery in its Good Practice Guidance.[104]

Government's need for expertise in this field. On the question of how authorities should assess programs, this is no mystery; it is a determination of an issue of fact. Determining facts is what courts and enforcers do. But like any assessment, it is necessary for those doing the assessment to know what they are doing. Thus one key is for courts and enforcers to learn about compliance and ethics. Compliance and ethics is an important subject that deserves study.

The field of compliance and ethics – organizational self-policing - is a subject that can be learned by those in government, and if need be the expertise can also be provided under contract. The author of this filing has personally done assessments for companies and (with a colleague) for a prosecutor, and has given training for those in government on how to assess programs.

There have been some recent examples of agencies understanding this need. Some have designated specific experts on staff to help with this process. The first of these was the Canadian Competition Bureau, which has designated an expert and had the person trained and certified by SCCE. The second is the Fraud Section, Criminal Division, United States Department of Justice, which hired a compliance and ethics professional who had previously worked in the private sector. In Brazil, anti-corruption enforcers made a point of attending the SCCE academy held in Sao Paulo, in order to obtain the expertise needed under the Clean Companies Act. Any agency can do this: hire an expert from outside, have an inside person take training and learn the field, and/or retain experts under contract.

Governments should have their own compliance and ethics programs. It is time for governments to institute their own, internal compliance and ethics programs. There are two very important policy reasons for this. First, this should be a front-line tool in the fight against bribery. Bribery involves two parties, and government compliance and ethics programs can address the "demand side." Second, this is an excellent way to increase the enforcers' and regulators' familiarity with compliance and ethics programs.[105]

*Sanctions and mitigating factors. Section B.10 of the draft report catalogues various sanctions or consequences that can be imposed on a legal person for foreign bribery, including (but not limited to) fines, confiscation, disbarment, and judicial or corporate monitoring. As described in Section B.11 of the draft report, some countries may also reduce the sanctions imposed in order to give credit for certain mitigating circumstances, such as whether the legal person voluntarily reported the offence to authorities or cooperated with the investigation. They may also give credit if the company had*

---

[104] OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Appendix II, http://www.oecd.org/daf/anti-bribery/44884389.pdf

This Good Practice Guidance was adopted by the OECD Council as an integral part of the *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* of 26 November 2009. See Murphy & Boehme, "Commentary on the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance," 9 Rutgers Journal of Law & Public Policy 581 (Spring 2012), http://www.rutgerspolicyjournal.org/sites/rutgerspolicyjournal.org/files/issues/9_4/9-4_Murphy_RTPv2.pdf

[105] For further detail on this, see Rutgers Center for Government Compliance and Ethics, "Compliance And Ethics Programs For Government Organizations: Lessons From the Private Sector"(December 2010) http://rcgce.camlaw.rutgers.edu/

*implemented a corporate compliance programme either before the offence occurred or perhaps even after the offence (but before trial).*

*In your view, which sanctions for legal persons are the most effective? Why?*

*In your view, which sanctions for legal persons are the least effective? Why?*

Punishing LPs is an incomplete answer. Common law countries create a fiction that companies are just like giant individuals. For certain purposes this fiction serves a purpose. But it should not be forgotten that at heart it is a fiction, and those who operate tied to fictions are likely to make serious mistakes.

One reason compliance and ethics professionals emphasize prevention is that there is no fully effective way to punish large organizations. Yes, it is initially satisfying to see giant, publicly traded companies "punished." But when we get to the details it tends to be an ugly, dysfunctional mess. Either the penalty appears to be too small and is dismissed as a "cost of doing business" or it is big enough that it causes mass harm to people and institutions totally unconnected with the wrongdoing.

Examples abound. When Arthur Andersen in the United States was convicted of a federal crime, it went out of business. Thousands of employees were thrown out of work. Suppliers were harmed. Plus, a highly concentrated market became even more concentrated. To add irony to this mess, the conviction was overturned by the US Supreme Court, but reversing a death penalty that has already been imposed is meaningless. Plus, there are those who speculate today that the government can no longer credibly pursue a criminal case against the remaining "final four" accounting firms because the death of Andersen left the market already too concentrated.

Moreover, the shareowners of large publicly traded companies are often pension funds and sovereign wealth funds. An instructive example is a case involving hundreds of millions in penalties imposed on VimpelCom for corrupt practices. However, later in the news stories it is revealed that VimpelCom is part of Norway's Telenor. Norway's government owns 54 percent of Telenor; thus Norway's taxpayers pay 54% of the fine.[106] Corporate managers, in effect, write a check on the accounts of these shareowners who had nothing to do with the violation.[107]

The point here is not that wrongdoers should escape punishment, but that a system that relies only on a legal fiction is going to overshoot and undershoot the mark in too many cases. It is far better to include a strong focus on prevention that relies on the facts of how large organizations operate.

In your view, to what extent should the final sanction be affected by the mitigating factors discussed in the paper: (i) implementation of a compliance system; (ii) voluntary- disclosure; and (iii) cooperation with the investigation?

---

106 *VimpelCom reaches $795 million resolution with U.S., Dutch authorities,* FCPA Blog, http://www.fcpablog.com/blog/2016/2/18/vimpelcom-reaches-795-million-resolution-with-us-dutch-autho.html#sthash.UxHloJYQ.dpuf .

107 For further explanation of the dysfunctional nature of LP punishments, see Joseph E. Murphy, Policies in conflict: Undermining corporate self-policing, 69 Rutgers U.L. Rev. 2 (forthcoming 2017), draft available at http://ssrn.com/abstract=2827324 , p. 17 n.68.

*In your view, which mitigating factors are the most effective for incentivising the prevention and detection of foreign bribery?*

Should credit be given for programs instituted or enhanced after a violation? Compliance programs need to play an important role in how the government treats companies. But it is worth asking first which should count most: programs implemented before the violation, or those implemented afterward?

Of course we want wayward companies to mend their ways, and it is a very good sign when companies recognize the need for change and enhance their programs. But we need to beware of unintended consequences. If we do not reward prior programs but only those implemented after the fact, there is no escaping the fact that we create a perverse incentive.

Consider the role of an advisor who is asked her advice about implementing a strong program *before* anything happens. If she is smart she will want to prevent bad things happening, but she will also know that no matter how good the program there is always a risk of a violation. She can picture what negotiations with an enforcer would be like and can see the value of not putting all her chips on the table beforehand. So could anyone blame her for implementing perhaps a decent program beforehand, but at least holding something back to win points when a negotiation occurs?

This would be a good faith approach, but one that is suboptimal. However, there will also be those who err on the side of doing nothing substantial now, holding back much more for possible negotiations. This advisor may tell management, "look, they don't care what you do now. All that matters is what we do if something goes wrong and we get caught. So why incur the expense and bother now. If we get caught, let's pledge to do it all then. For now we save money, and have something to promise if we need to."

Moreover, the highest objective of all of us in this fight against corruption is not to fix things after they go wrong: it is to prevent the evil of corruption before it happens.[108] We should reward most what it is we really want, not give companies an incentive to hold back on preventive efforts.

What mitigating factors work best? Unlike other factors for which mitigation may be offered, e.g., voluntary disclosure and cooperation, compliance and ethics programs are the only ones with a focus on prevention. Above all, our first objective is not to catch bribery but to prevent it.

In this context, for mitigation to work most effectively in promoting effective compliance and ethics programs, it is best if there is substantial flexibility for the government evaluator. It is strongly preferable to take a graduated approach, rather than using a simplistic pass/fail test. Using pass/fail invites companies only to do what is barely acceptable; from an economic perspective, that would be the logical approach. If doing "A" results in reward "B", then why bother with "A+" if it only gets the same B reward. We should not be encouraging companies to aim for the bottom. But if benefits are along a graduated scale, there is no simplistic calculation involved. Moreover, what is appropriate in each industry and company varies based on various factors including risk. It is better to provide a system that promotes dynamic approaches in assessing programs. This system, in turn, would promote company compliance and ethics programs that included such dynamic features as conducting ongoing

[108] A recent study by SCCE reports on the effectiveness of compliance and ethics programs in preventing violations in organizations, see 2016 Compliance Effectiveness Survey September 2016 http://www.corporatecompliance.org/Resources/View/tabid/531/ArticleId/5697/2016-Compliance-Effectiveness-Survey.aspx

program assessments and regularly adjusting the program based on these assessments and changes in risk profiles.

It is similarly not as helpful to use a single, limited approach, where the only benefit is confined to one set number or percentage. Using such numbers tends to shift managers' thinking toward an arithmetical approach instead of one based on what is right. For example, in competition law one jurisdiction has unduly limited itself by fencing in any possible benefit by limiting itself to a 10% reduction in potential fines. This over-emphasis on fixed numbers invites a reciprocal approach in industry to consider only numbers to determine how much effort to put into compliance and ethics. By contrast, a more open-ended approach avoids this unfortunate, narrow push.

In short, the incentives should be determined along a spectrum, based on such factors as the nature of the offense, who in the organization was involved, and whether culpable individuals actively hid their conduct from the company, and in light of these types of factors, how rigorous was the compliance program. In the right circumstances where a company was truly diligent, no policy purpose would be served by taking any action against the company; instead the enforcement would concentrate on culpable individuals. In a second circumstance where there were legitimate but modest compliance efforts but it is clear that greater diligence would have prevented the violation, perhaps a modest reduction in the penalty is warranted. In a third case, the program may have had little substance, the violators may have been senior managers, and the risks may have been readily apparent but unaddressed. In such a case no incentive is warranted.

**Tina Søreide, Professor of Law and Economics, Norwegian School of Economics**

Governments normally want to use their law enforcement systems to deter and prevent crime, while securing legitimacy through fair treatment of offenders. These aims are difficult to obtain unless the systems ensure a high detection rate for offences, consistency in the form and extent of reactions, a set of consequences that outweighs the benefits of the offence for the offender, while they let the public have access to information about the law enforcement reaction and its justification.

In practice, we find governments struggle substantially when it comes to all of these objectives, especially in cases of corporate liability for bribery. Among the most common hindrances for efficient law enforcement we find *external factors* (financial secrecy, hidden ownership/responsibility, weak mutual legal assistance ), *too rigid criminal justice principles* (crime definition, identification, guilt, proof, human rights), *inadequate laws* (unclear terms, strict conditions for liability), *organization of enforcement* (prosecutor's lack of autonomy, confusing allocation of responsibilities across institutions, statute of limitations), and an astonishing *lack of resources* even in otherwise wealthy countries. Of course, the many legitimate and less legitimate obstacles contribute to explain the low number of law enforcement reactions against bribery.

Governments' law enforcement shortcomings makes it necessary to "incentivize" companies to collaborate with law enforcers and bring forward evidence of their own crime, and this is why duty-based sanctions (compliance-based defense) has become more common, i.e. firms are sanctioned milder the more they have done to prevent bribery and the more convincingly they have self-reported the offence. However, across the globe there seems to be serious challenges associated with these arrangements, including a lack of guidelines, deviation from guidelines, low predictability in penalties, and too few details shared with the public – which may well cause suspicions of firms paying their way out of the law enforcement problem.

Governments will not reach their law enforcement ambitions unless these difficulties are taken seriously. The OECD has an obvious role in the process because governments need its assistance for reaching harmonized solutions. This is very important for players operating in international markets, yet difficult to achieve. A main challenge – within and among governments - is to reach consensus around the balance between flexibility in law enforcement solutions (incentivizing collaboration) with conditions intended to secure legitimacy (fair treatment, transparency). In some countries, including on what appears to be the best performing countries in terms of cases processed, the prosecutors have wide discretion for settling cases out of court. They can bring the case to court, however, and in the shadow of such a more comprehensive process with more severe punishment as a possible result, investigators nearly dictate the terms of a settlement. This position – where they investigate, instruct and decide the penalty –implies very high concentration of power. Increasingly, firms have their penalty reduced upon what they promise to do in the future (better compliance, external monitoring, different management structure – and so on), and in these cases it is difficult to secure legitimacy because the practice violates fundamental law enforcement principles (for explanation, see the attached paper by Jennifer Arlen, a professor at NYU). Accordingly, the trade-offs between efficiency gains and other concerns need to be considered carefully for well-functioning incentive-based law enforcement reactions, both in the countries with many criminal law reactions as well as in those were there is nearly none. In should be noted, the principles for incentive-based corporate criminal liability may function also vis-à-vis state institutions. It is essential improve the form and procedures around criminal law reactions also in cases involving government institutions (when a unit is responsible for misconduct while it is difficult to determine individual liability).

Another major problem with settlements comes to expression when cases may involve several forms of law enforcement reaction – from several institutions - as well as claims for compensation. Debarment from public procurement, for instance, will not serve as a crime deterrent if firms can settle the case by help of compliance-based defense. This is because such a step is normally found sufficient for self-cleaning under public procurement law (i.e. what it takes to regain status as eligible for bidding). As another example, if bribery is committed by a member of a price cartel, the offender can seek lenient treatment under competition law. Also this authority settles its cases often with wide discretion. If it encourages investigation of suspected bribery (for which the competition authority cannot offer lenient treatment) it may demotivate other cartel members to come forward with information about their competition law offences. In these cases, a settlement under competition law may undermine the function of the criminal justice system. The character of cross-institutional problems depends on the country's institutional landscape, but the problem is common – and leaves the impression that many government initiatives to protect markets against corruption have been introduced in an uncoordinated way – as if each strategy's role is introduced with little concern for how it will work together with other anticorruption tools. The lack of a coherent approach in the governance of various anti-bribery tools is a problem that I have studied and summarized in the attached paper - forthcoming in the *Concurrences* review (cannot be shared on the web without permission from the journal), co-authored with Prof. Emmanuelle Auriol at Toulouse School of Economics and Prof. Erling Hjelmeng at the University of Oslo.

We argue in that paper for much more coordination between law enforcement institutions, and even more concentration of such authority. We explain why settlements in bribery cases will require a concern for the function of markets, and we recommend that governments establish an authority with the responsibility to hold corporations liable for a number of market-related offences (competition law violations, bribery, and profit-motivated management-condoned crime of other sorts). This authority – which could be an expanded competition authority – should settle the cases and consider firms' eligibility for bidding on public contracts (procurement agents should not make the debarment decisions); we think it would solve several of the challenges mentioned above. Such an authority would need to cooperate with the criminal justice system on individual liability but that would now be in the interest of the unit because it would aim at protecting markets (it would also have incentives to impose substantial penalties because of their deterrent effect). Reactions vis-à-vis individuals would include criminal law reactions while also administrative reactions - such as exclusion from professional office – would make sense.

As a final comment, I want to emphasize the importance of the OECD-managed evaluations of governments' law enforcement performance in bribery cases. Conventions against corruption are the simplest thing for governments to sign – regardless of what intentions they have to actually enforce the rules. Many governments are committed in the fight against corruption in international markets, but there are also those that are not. They can still proclaim their anticorruption ambitions because the true extent of the problem is unknown and there are many possible excuses why their law enforcement track record is weak. I think it is necessary to consider what concerns governments may have when they fail to enforce the OECD convention. Some of them might be discouraged to enforce the law if they think other countries fail to enforce because that – they may suspect - would lead them to believe they carry too large a burden for the sake of a common public good (i.e. markets free from corruption). However, they might be discouraged to enforce the laws also if they believe other countries enforce the rules more forcefully than they do themselves; that – they may suspect - may provide them with a competitive advantage in some markets. The point is that governments cannot be trusted on their proclaimed law enforcement ambitions. For this reason, external monitoring of performance is

essential. The processes already coordinated by the OECD in this respect seems to be a very important driver for reform.

**Nicolas Tollet, Hughes, Hubbard & Reed LLP, France**

*Nicolas Tollet works as Counsel at Hughes Hubbard & Reed LLP, is Founder of The European Compliance Network, and lecturer at the University of California, Berkeley*

**General.** What are the most important components of an effective system for the liability of legal persons?

What companies fear the most in my opinion are the following features:

- Threat of a real ban from public bids;
- Publication of settlement or sanction with the reputation damage that goes along; and
- Monetary sanctions if they are really meaningful.

**Nature of Liability.** As shown in Section B.1 of the draft report, of the 40 Parties to the Anti-Bribery Convention having some form of LP liability for foreign bribery, 27 countries have criminal liability, 11 have some form of non-criminal liability, and 2 countries have both. What are the advantages and disadvantages of criminal liability for legal persons for foreign bribery? What are the advantages and disadvantages of non-criminal liability for legal persons for foreign bribery? In your experience, does the choice between criminal and non-criminal liability carry any procedural or substantive consequences for the effectiveness of an LP liability system? For example, does it affect: jurisdiction over domestic or foreign entities; the availability of investigative techniques; the ability to cooperate across law enforcement communities, both domestically and internationally (e.g. mutual legal assistance); or public education and awareness?

In certain countries criminal liability can mean automatic ban from public bid, which is unreasonable and may lead to non-application of sanctions. Nevertheless, from an anti-corruption compliance standpoint, whether the liability is criminal or not, we will treat the wrongdoings the same way and we will investigate with the same standards.

**Standard of liability – whose acts?** As explained in Sections B.4 and B.4.1 of the survey, the 2009 Recommendation sets forth approaches that the Parties should take to hold legal persons liable under the Anti-Bribery Convention. The draft report shows that about two thirds of the Parties can hold legal persons liable for failing to supervise a lower-level employee who engages in bribery, as required under the second approach described in the 2009 Recommendation. In your view, does the "failure to supervise" standard for holding an LP liable for bribery committed by a low-level employee adequately address foreign bribery in practice? What advantages or disadvantages do you see for holding LP responsible for foreign bribery committed by low-level employees even when management has made its best efforts to supervise them?

In my opinion, it is important that a legal entity can be held liable for failing to supervise a low-level employee. It is a good way to ensure the company puts in place robust compliance program. Similarly, I believe that the representatives of a company should also be held liable if they turn a blind eye on the acts of their low level employees.

**Intermediaries.** As described in Section B.6 of the draft report, the 2009 Recommendation states that LPs cannot avoid liability for foreign bribery "by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf". How can countries best ensure that legal persons cannot avoid liability when intermediaries bribe foreign public officials – whether those intermediaries are related entities (e.g., subsidiaries or other entities in a corporate group) or other unrelated persons (e.g., agents or contractors)?

Under the Clean Company Act, Brazil implements strict liability of the legal entity in case of corruption by an intermediary. That is certainly an incentive to do your best to avoid corruption by intermediaries, but it is necessary to provide for a defense for the legal entity if it did all what was reasonably possible to ensure the probity of the intermediary.

**Compliance systems as means of precluding liability.** As Section B.4.3 of the draft report shows, several of the Parties have made an effective compliance system a defence to prosecution or, conversely, they have made the lack of an effective compliance system an element of the offence. Based on your experiences, how has LP liability helped to sharpen incentives for legal persons to implement effective compliance systems? Law enforcement experience in this area is limited in many jurisdictions and the survey shows that the Parties' approaches to this issue are diverse. Based on your experience, does expressly including incentives for compliance systems in a country's foreign bribery offence (either as a defence or as an element of the offence) facilitate or impede effective enforcement? In your view, how should prosecutors and courts assess whether a compliance system is adequately designed and implemented? Who should bear the burden of proof in showing that a compliance system is effective or ineffective?

UKBA establishes a defence in case of proper compliance program. Such position was important in the current trend of European companies to set up robust compliance programs. It is a very good incentive. I also believe that if a company demonstrates that it has put in place a compliance program with all the required features, the prosecution should bear the burden of proving that such compliance program is not efficient.

**Transparency International**

*This submission was prepared by Gillian Dell, Head of Conventions Unit, and Adam Földes, Advocacy Adviser.*

I. BACKGROUND

The OECD Working Group on Bribery (WGB) is conducting a public consultation in order to seek insights on systems for the liability of legal persons for foreign bribery. The WGB has invited participants in this consultation to share their experiences with existing systems as well as their perspectives on how such systems could be improved. The questions for the consultation are contained in a consultation document.

Chapter III of this paper contains Transparency International's responses to the OECD's consultation questions.

Through its more than 100 chapters worldwide, Transparency International has been advocating for effective systems of liability of legal persons for many years. Recent publications containing recommendations on an international level are:

- Letter to OECD Secretary General Angel Gurria: Global Standards for Corporate Settlements in Foreign Bribery Cases, 11 March 2016 (together with UNCAC Coalition, Corruption Watch UK, Global Witness).

- Transparency International Policy Brief # 01/2015, Can Justice Be Achieved Through Settlements?

- Transparency International, Progress Report 2015 on Exporting Corruption

II. Key Recommendations

1 The OECD should prepare a concrete checklist and manual for prosecutors in countries where the concept is new on how to prosecute a legal person in practice and what challenges they could face

2 Statutes should make it clear that legal persons are liable for related entities as well as agents or contractors or other third parties. OECD and other international organisations should provide guidance on how legal provisions could be formulated in this regard and what issues need to be considered.

3 The OECD and other international organisations should make it a legal standard that in case a legal person merges, transforms, or demerges – de jure or by legal transaction – after the offence is committed, that the liability for sanctions will rest upon the legal person(s) resulting from the reorganisation. The same should apply where the same owners continue essentially the same business with another legal person.

4 States parties should provide that the law applying in the territory where the legal person has its registered or effective seat should apply notwithstanding where the natural person committed the offence related to the legal person.

5 Statutes should foresee the issuance of official guidance on the essential ingredients of an effective compliance system.

6 States parties should ensure that sanctions are transparent. To deter corruption offences it is necessary to effectively sanction acts of corruption in an open procedure that is fully accessible to the public, including the resolution of the case, be it a judgement or a settlement.

7 Settlement agreements should receive judicial approval, their terms need to be transparent, and penalties should be effective, proportionate and dissuasive.

8 States parties should require public registers of beneficial ownership

9 Calls for introducing the offence of "grand corruption" are growing.[109]1 The offence should apply not only to natural but also to legal persons.

III. ANSWERS TO CONSULTATION QUESTIONS

**1. Most important components of an effective system**

Transparency International believes that depending on the context any component of a system for the liability of legal persons can be essential. However, it seems as if the following issues have been overlooked so far in many instances and are left unregulated. It is therefore important that legislators address them and that the Working Group considers them for its monitoring:

- Applicability of domestic law in international cases;

- Domestic jurisdiction of courts;

- Reorganisation of legal persons (merger, demerger, transformation) and the fate of ongoing procedures and of sanctions;

- Liability for offences by related entities;

- Personal liability of partners in particular for financial sanctions against the partnership (notwithstanding further liability if partners are involved in the offence);

- Personal liability of executives in particular for financial sanctions against the company (notwithstanding further liability if executives are involved in the offence);

- Official guidance as to what is expected in terms of compliance systems

- Clarification of whether the legal person can enjoy the right to remain silent (or whether only natural persons enjoy this right); Transparency International notes that case law from the Germany and the United States supports the view that legal persons do not enjoy this right (German Constitutional Court, decision no. 1 BvR 2172/96 of 26 February 1997; United States Supreme Court Hale v. Henkel,

[109] On the necessity and concept of this offence, see: http://www.transparency.org/news/feature/what_is_grand_corruption_and_how_can_we_stop_it

201 U.S. 43, 75-76 (1906)). This issue becomes relevant where prosecutors want to question executives of a company as witnesses, but the executives choose to remain silent (not in their personal capacity, but on behalf of the company);

- Preliminary measures such as bans on reorganisation, liquidation, or transfer of assets. This is necessary where owners try to escape the economic consequences of sanctions by letting the legal person or only its assets "disappear" before a final judgement is reached.

- Legal mechanisms which bring allegations of foreign bribery (or other wrongdoing) to the public's and prosecutors/regulators' attention. These can include public disclosure requirements (for example, of information material to investors in the company's securities) and/or whistleblower protections.

- Existence of a twin-track regime of non-criminal (administrative; in the U.S. "civil") and criminal liability for legal persons (included application of ne bis in idem); however, there needs to be a clear criteria for choosing each track and criminal liability should not be avoided only because administrative liability is the "easier way to get the case over with".

**2. Nature of Liability.**

**a. What are the advantages and disadvantages of criminal liability for legal persons for foreign bribery? b. What are the advantages and disadvantages of non-criminal liability for legal persons for foreign bribery?**

Advantages (depending on the jurisdiction):

- The dissuasive and deterrent effect of criminal convictions, including the higher social "stigma" of a criminal conviction (including greater reputational damage; there are often flow on effects of conviction as well, such as loss of licences to operate business, inability to bid for new business, requirement to disclose conviction);

- Longer statutes of limitation under criminal law in some cases;

- Where applicable, debarment from public contracting can be more easily imposed on entities;

- Well established procedural guarantees for the defendant/legal person;

- The availability of special investigative techniques and other means of evidence;

- The expertise of criminal court judges on corruption offences triggering liability;

- The availability of non/deferred prosecution agreements, plea agreements and similar mechanisms (where this would be available under criminal law);

- There is a higher probability that criminal codes contain provisions on applicability of domestic law in international cases than in non-criminal laws (such as codes of administrative offences);

- Criminal law enforcement bodies sometimes have more or easier access to evidence than administrative bodies, and might achieve cooperation with other domestic state bodies more easily.

- The natural and legal person can be tried at the same time in criminal court, while this is not necessarily possible if the legal person only falls under the jurisdiction of a non-criminal court.

- Better opportunities for international legal cooperation (mutual legal assistance).

Disadvantages (depending on the jurisdiction):

- The standard of proof might be higher for a criminal conviction in some countries, in particular those following the Common law approach. This concern is substantially mitigated where administrative liability (in the U.S. called "civil"), and a corresponding lower standard of proof, for transnational corruption offences are available in addition to criminal liability.

- Often the criminal case has to come first, and take a long time which delays civil cases in which people might seek financial redress for the conduct

**c. In your experience, does the choice between criminal and non-criminal liability carry any procedural or substantive consequences for the effectiveness of an LP liability system?**

Theoretically, legal provisions on administrative liability could in many regards be formulated in a way to be as effective as criminal liability. However, when it comes to special investigative techniques (e.g. covert surveillance) or international legal assistance, there are often limits. For constitutional reasons, special investigative techniques might only be available in case of serious (criminal) offences and countries are usually better linked internationally in the sphere of criminal cooperation than in the sphere of administrative cooperation. In some continental law jurisdictions, confiscation of illicit proceeds is limited to criminal liability, and cannot be imposed in non-criminal procedures.

Administrative procedures may offer speed, flexibility and lower burden of proof.

**3. Legal basis of liability**

**a. Does the legal basis for LP liability matter? If so, why?**

Liability of legal persons does not only matter for bribery, but also for other corruption offences. It should thus not only be addressed by bribery-specific legislation. It also matters for other crimes, such as environmental, fraud, physical harm, manslaughter, etc. For the sake of foreseeability and comprehensiveness, general criminal law or a separate statute seems to be the better option. With regard to general criminal law, it would be advisable to connect to other concepts of participation, such as aiding, abetting, or the joint criminal enterprise.

A separate statute has the challenge of fully aligning with the rest of the body of criminal law. It may create unnecessary duplication in supporting laws and procedures which may be challenging and inefficient to administer.

**b. What is the value, if any, of having bribery-specific legislation for foreign bribery (as opposed to enacting a prohibition in the general criminal law or other statute)?**

From a legal point of view, this is in the end only a matter of technicality. However, in terms of making foreign bribery legislation visible to foreign stakeholders, a separate legislation is easier to communicate as "one package". A separate law might also give local focus to the issue.

**c. In your view, has the Anti-Bribery Convention – or the WGB's monitoring of its provisions – contributed to creating or strengthening your jurisdiction's LP liability system for foreign bribery?**

It is obvious from the monitoring reports not only of the OECD Working Group on Bribery but also of GRECO and the UNCAC peer review, or by TI, that monitoring played a key role in introducing and strengthening the concept in many countries. For example, in the U.S. monitoring reports have created pressures for the enforcement authority to provide more guidance on their interpretation of the statute and expectations regarding compliance which has been very helpful.

**d. In your experience, has the WGB's work on LP liability strengthened systems for the liability of legal persons for offences beyond the scope of the Convention?**

Liability of legal persons applies in most if not all countries to more than only corruption offences. European Union law contains liability of legal persons as a mandatory element for example in the context of organised crimes, environmental protection, or combating terrorism (Article 6, Directive 2008/99/EC on the protection of the environment through criminal law; Article 5, Council Framework Decision 2008/841/JHA on the fight against organised crime; Article 7, Council Framework Decision on combating terrorism 2002/475/JHA). Any strengthening of the general mechanism thus benefits accountability of legal persons regarding non-corruption crimes as well. In the US, liability of legal persons is the norm, not the exception, and the FCPA pre-dated the Convention, so the Working Group on Bribery's work has had more limited impact.

**4. Types of entities covered**

**a. How important is it to cover entities lacking legal personality as a policy matter?**

In the United Kingdom, 62% of all businesses were sole proprietorships in 2015 (Department for Business Innovation, Statistical Release, 14 October 2015). In Germany, sole proprietorships constituted 68.8% of all businesses performing services and deliveries worth 557 billion € in 2011 (Federal Agency for Statistics, VAT-statistics 2011, series 14, chapter 8.1). It is thus commendable to include also business entities with only partial or no legal personality. The Swiss Criminal Code does not draw the liability from the term of legal person, but from the term of an "enterprise", thus including "companies without legal personality" and "sole proprietorships" (Article 102).

Liability of legal person covers partnerships in many countries. Where it does, often if not always the following issue is not addressed by regulation or even only case law: Are partners personally liable for the payment of the fine owed by the partnership (= legal entity)? Clearly, partners are liable for debts of civil nature (contracts, torts), but are they for "debts" stemming from criminal law obligations? For example, if one looks up this question in the many commentaries on partnership law in Germany, one does not find an answer.

**b. What are the advantages and disadvantages in practice of holding such entities accountable for foreign bribery?**

If liability of legal persons does not apply to such entities, prosecutors will have to prove that the proprietor was intentionally involved in the corruption offence. With imputed or objective liability of the entity, prosecutors only have to prove that an employee committed the offence in the course of business, while it is up to the proprietor to produce evidence for mitigating circumstances (having had a compliance system in place, etc.).

**5. Standard of liability – whose acts?**

**a. In your view does the "failure to supervise" standard for holding an LP liable for bribery committed by a low-level employee adequately address foreign bribery in practice?**

No. In many countries with little or no experience on liability of legal persons, prosecutors or courts (mis-)understand the concept of "failure to supervise". They feel they need to show a concrete failure or involvement of the senior manager related to the corruption offence. However, this approach is too narrow. In theory, it should suffice to show that the senior manager failed to install a proper supervision system. "Failure to supervise" thus corresponds to objective liability (= liability due to the lack of a sufficient compliance system). So in practice, the "failure to supervise" concept is often an invitation to prosecutors or courts to drop cases that in other countries could easily lead to a conviction or settlement.

The concept of master-agent (or, in the common law tradition, *respondeat superior*) or objective liability thus is clearer to understand for practitioners and subject to significantly less ambiguity. We note in this context that there have been several technical assistance efforts by international organisations such as the Council of Europe, OECD or the UNODC to clarify the concepts on a policy or law-setting level. However, a concrete checklist and manual for prosecutors how to prosecute a legal person in practice and what challenges they could face, are missing. The challenges prosecutors face, are similar in all countries. It should be feasible to draw up an international guidance or manual that prosecutors could easily adapt to their local context.

**b. What advantages or disadvantages do you see for holding LP responsible for foreign bribery committed by low-level employees even when management has made its best efforts to supervise them?**

There are two important reasons for holding legal persons responsible in this case. First, for many countries, a complete release from liability would make it too easy for legal persons to evade liability. They would show their compliance system and pretend that the employee was a "loose cannon"; however, in practice it is often the "invisible" culture from the top that facilitates bribery offences despite a compliance system being in place. Second, in most cases where employees are able to commit corruption offences despite a "state of the art" compliance system being in place, the question is justified how at least any larger bribery offence was possible if the compliance system is really "state of the art". It is more justified to mitigate the sanctions even if only down to a warning, deferred prosecution agreement, probation, or a symbolic fine. Obviously, one needs to ensure that cases of

actual minimal corporate fault should not necessarily entail debarment just because the legal person was found guilty with only a small sanction applying.

However, it can also be an important incentive if a company is not subject to enforcement action where it has taken all appropriate compliance steps, and low-level offences have nevertheless been committed.

**6. Standards of liability – what conditions?**

**a. How does the choice of these conditions for establishing LP liability affect governments' ability to prosecute foreign bribery? b. List any conditions requires in the jurisdictions in which you are most familiar.**

Each condition brings a different emphasis on the connection between the corruption offence and the legal person. The understanding of each term varies across jurisdictions. Transparency International aims for the widest understanding possible of this connection. Therefore, it welcomes concepts that combine several of these terms ("for the benefit, in the interest, or on behalf") in order to avoid that any case meriting liability falls through.

**7. Intermediaries.**

Statutes should make it clear that legal persons may be held liable for related entities as well as agents or other third parties. Unfortunately, in most countries, this issue is left for individual judges to decide. Internationally, the state of research on this issue is rather weak. International organisations should provide guidance on how legal provisions could be formulated in this regard and what issues need to be considered. Having statutory provisions providing for vicarious liability for third parties should be a standard feature of interest for international monitoring. In essence, liability for third parties' actions on behalf of a principal should be available. Equally, legal persons should be concurrently liable in case third parties, including employees or agents of subcontractors, commit the offence for the benefit of the legal person and it did not observe care and diligence regarding third parties as required by law.

**8. Successor liability.**

**a. In your view, how important is this issue for ensuring that legal persons are held liable for foreign bribery?**

Many if not most laws on liability of legal persons seem to overlook this important issue. Legal persons could easily merge, demerge, or transform. Their legal personality as such would disappear. One can expect that in many jurisdictions this would throw prosecutors and courts off course in view of legal gaps in the criminal code. High-profile cases are proof of the practical relevance of this issue. For example, in the case of an international coffee producer, the German Federal Anti-Trust Agency found that the reorganisation (merger) of a defendant legal person "was carried out with the aim of avoiding liability for payment of the fines." (Bundeskartellamt, Press release of 11 February 2014).

Transparency International therefore calls for the OECD and other international organisations to make it a legal standard that in case a legal person merges, transforms, or demerges – de iure or by legal transaction – after the offence is committed, that the liability for sanctions will rest upon the legal

person(s) resulting from the reorganisation. The same should apply where the same owners continue essentially the same business with another legal person.

The issue is not limited to the issue of succession, but also concerns liquidation and bankruptcy. Statutes should also foresee liability of owners who intentionally liquidate legal persons or sell their assets in order to avoid sanctions being enforced.

**b. What are the relevant considerations for framing laws on successor liability that enable the effective enforcement of foreign bribery laws? Do these considerations differ depending on whether the system is "criminal" or not?**

See previous answer. In our opinion, successor, liquidation, and bankruptcy liability are possible both in criminal and non-criminal concepts.

**9. Jurisdiction.**

**a. To what extent does some Parties' lack of direct jurisdiction over LPs for offences committed entirely abroad present an obstacle to the effective enforcement of the foreign bribery offence?**
**b. What can be done to expand jurisdiction in these legal systems in accordance with their legal principles?**

Jurisdiction over legal persons for offences committed abroad is one of the most pressing issues calling for legislative reforms in many countries. Criminal codes often focus still on the liability of natural persons. The narrow wording designed around "citizens" or "residents" do not allow application to "legal persons". Transparency International calls on States Parties to make the following a standard requirement: The law prohibiting foreign bribery applied in the territory where the legal person has its registered or effective seat shall apply notwithstanding where the natural person committed the offence related to the legal person. This principle corresponds to the "nationality" principle of jurisdiction whereby countries exercise criminal jurisdiction over corrupt acts of their citizens, even if committed abroad (see Article 42 paragraph 2 lit. b UNCAC).

**10. Compliance systems as means of precluding liability.**

**a. Based on your experiences, how has LP liability helped to sharpen incentives for legal persons to implement effective compliance systems?**

There is a direct link between liability of legal persons and the increased implementation of compliance systems in the business sector: Liability of legal persons usually incentivises companies to show that they had a proper supervision system in place – if they do, sanctions are milder or prosecutions deferred. The more explicit the statutory provisions are on the role of compliance systems, the more impact one should expect on the side of legal persons. In this context, Transparency International welcomes concrete official guidance by some jurisdictions for legal persons on what is expected from them in terms of setting up an effective compliance system (United Kingdom, United States). Similarly relevant can be alternative mechanisms of criminal dispute resolution (non/deferred prosecution agreement) in which implementing effective compliance programmes is a condition.

**b. Law enforcement experience in this area is limited in many jurisdictions and the survey shows that the Parties' approaches to this issue are diverse. Based on your experience, does expressly including incentives for compliance systems in a country's foreign bribery offence (either as a defence or as an element of the offence) facilitate or impede effective enforcement?**

It should facilitate effective enforcement. Many aspects of compliance systems directly support effective prosecution. For example, the availability of an internal control system makes it easier for companies to detect issues of interest to enforcement authorities, and for prosecutors to trace who has been involved in a business process and with what degree of responsibility. Incentives to adopt compliance systems in companies in national law and practice is an important element of causing companies to adopt and maintain such systems.

Regarding the protection of whistleblowers, our Progress Report 2015 on Exporting Corruption states (page 10): "Because bribery is usually conducted in secrecy whistleblowers can play a central role in uncovering corruption. Therefore, whistleblowers must be protected from retaliation where they report suspected incidents of foreign bribery in good faith. In the majority of OECD Convention countries the regulation and implementation of the protection of whistleblowers has significant inadequacies. […] The OECD Working Group on Bribery adopted its Recommendation on Reporting Foreign Bribery in 2009; six years should have been sufficient for developing effective laws and practices in this area. We recommend that high priority be given to correcting the deficiencies in the countries mentioned above."

**c. In your view, how should prosecutors and courts assess whether a compliance system is adequately designed and implemented? Who should bear the burden of proof in showing that a compliance system is effective or ineffective?**

As stated already in answer (a), statutes should foresee the issuance of an official guidance for the essential ingredients of an effective compliance system. A good example is the "Resource Guide to the U.S. Foreign Corrupt Practices Act" by the U.S. Department of Justice and the U.S. Securities and Exchange Commission. It is also worth noting that section 9 of the United Kingdom Bribery Act 2010 mandates the Secretary of State with publishing guidance on prevention procedures.

Most systems put the burden of proof on the defendant. TI welcomes this. From a practical perspective, the company has all the information on its compliance system. Thus, it poses no undue burden. From a legal perspective, compliance is not a crime, but the opposite, a defence.

Compliance systems, in order to prove effective, must ultimately personalize liability within the organization. Furthermore, while the legislation may set minimum standards (and be supported by guidance), it should remain risk-based so that a corporation takes measures that are appropriate for its operations.

**11. Sanctions and mitigating factors.**

**a. In your view, which sanctions for legal persons are the most effective? Why?**

In our Progress Report 2015 on Exporting Corruption (page 8) we stated: "Because adequate sanctions are crucial for the success of the Convention, therefore Convention parties should take

action to ensure that their enforcement efforts result in effective, proportionate and dissuasive sanctions."

Supervision might seem at first sight as a rather unimportant sanction without economic effect. However, it affects the existing structures and procedures of a company. While a fine will often not affect senior management at all, but only shareholders, supervision directly affects the real and perceived freedom with which they will be able to conduct their affairs for the period of the supervision. It is therefore a rather dissuasive sanction.

In addition, debarment is an important sanction that is still underused. While, for example, Siemens was able to finance the high fines it had to pay in its cases so far, it might have been hit much harder had it been debarred from doing business where money from international development banks was involved. In this context, we want to underline that debarment is a standard consequence of corruption offences in international standards (Article 57, Directive 2014/24/EU on public procurement; Article VIII paragraph 4, WTO Revised Agreement on Government Procurement).

Sanctions can only be effective to the extent they are transparent. The only way of deterring acts of corruption is effectively sanctioning corruption offences in an open procedure that is fully accessible to the public, including the resolution of the case, be it a judgement or a settlement. In case these are not rendered in public and their texts are not published, the preventive effects of sanctions will be very limited or very absent. In our Progress Report 2015 on Exporting Corruption (pages 10-11) we therefore highlighted: "The availability of information concerning investigations, court cases, judgements and settlements continues to be a challenge in numerous countries. This is disappointing in view of the ever-increasing public interest in the enforcement of prohibitions against bribery. The Working Group on Bribery review in Phase 4 should make sure that availability of, and access to, enforcement information is improved."

In addition, TI strongly welcomes the disqualification of the company's executives as foreseen by the 4th Anti-Money Laundering Directive 2015/849/EU (Article 59 paragraph 1 lit. d): "[T]he administrative sanctions and measures that can be applied include at least the following: […] a temporary ban against any person discharging managerial responsibilities in an obliged entity, or any other natural person, held responsible for the breach, from exercising managerial functions in obliged entities".

A system which provides for many different gradations of sanctions, calibrated to different levels of seriousness of the offence at issue, and taking into account remedial steps that have been taken by the company, including the state of its compliance programme, can be the most effective in striking the appropriate balance between punishing past wrongdoing and deterring future misconduct on the one hand, and preserving companies' ability to operate while raising compliance standards on the other. The range of such sanctions will include various grounds of liability, as well as sanctions such as fines, penalties and disgorgement; compliance supervision and monitoring, potential for debarment from public contacts; civil forfeiture of criminally derived property and potentially additional remedies.

**b. In your view, which sanctions for legal persons are the least effective? Why?**

We do not believe that any sanction is generally weak or negligible. On the contrary, the OECD should call for countries to make the full array of sanctions available for legal persons, so these sanctions can apply as fitting the case:

- Forfeiture at the legal person and at third parties;
- Publication of judgement;
- Fines;
- Supervision;
- Bans and orders;
- Liquidation;
- Temporary or permanent closure of branches of business that have been used for committing the offence.
- Inclusion in a public register of convicted legal persons;
- Exclusion from public funding;
- Disqualification from public contracts;
- Temporary or permanent disqualification from the practice of commercial activities
- Annulment of procurement decisions;
- Loss of export privileges;
- Debarment by international development banks, debarment by EU institutions (not yet functioning effectively);[110]
- Civil liability.

In addition, "probation" and "bail" should be available in order to allow for flexible and proportionate sanctions. Some countries allow for suspending part of the sanctions, unless the defendant repeats the offence (probation). Bail can apply where a company is put under restrictions (e.g. ban on asset transfers) for the time of investigations or procedures. For example, where the expected maximum fine would be US$ 1 million the bail could be set at US$ 1.5 million while allowing the company after depositing the bail to freely dispose of its assets.

**c. In your view, to what extent should the final sanction be affected by the mitigating factors discussed in the paper: (i) implementation of a compliance system; (ii) voluntary-disclosure; and (iii) cooperation with the investigation?**

[110]http://www.transparency.org/news/feature/blacklisting_the_corrupt_why_the_eu_debarment_system_does_not_work

All three factors should weigh in when determining sanctions. Effective prosecutions depend on factors (ii) and (iii), while factor (i) is an important incentive for setting up compliance systems as stated earlier. Voluntary cooperation is a mitigating factor for sanctions under the Fourth Anti-Money Laundering Directive 2015/849/EU (Article 60 paragraph 4 lit. f).

**d. In your view, which mitigating factors are the most effective for incentivising the prevention and detection of foreign bribery?**

Factor (i) "implementation of a compliance system" is among the most effective aspect in this regard. Compliance systems include inter alia internal control systems, audit procedures, as well as reporting mechanisms and whistleblower protection schemes. According to statistics, reporting mechanisms and whistleblower protection schemes are highly important for alerting senior management to irregularities. Self-reporting and cooperation with authorities are equally relevant. On a general level of detecting corruption offences and hidden assets, public registers of beneficial ownership transparency are essential and it is essential to know the beneficial owners in order to apply effective sanctions.[111]

It is of utmost importance, that the compliance system is reviewed, monitored and the reward system acknowledges the good and punishes the bad. The cultural embedding of an approach is more important than systems that can descend into tick box processes.

**12. Settlements.**

**a. What are the advantages and disadvantages of settlements that result in a conviction?**

**b. What are the advantages and disadvantages of settlements that do not result in a conviction?**

**c. What arrangements are needed to ensure that any settlement reached imposes sanctions that are "effective, proportionate and dissuasive" in accordance with Article 3 of the Convention?**

The answers to questions (a) to (c) depend largely on country contexts. However, as a general position on settlements, we stated in our Progress Report 2015 on Exporting Corruption (page 9): "A widespread practice has developed in the United States, and in other countries, whereby foreign bribery cases are resolved through negotiated settlements. This reflects the recognition by prosecutors and defendants that litigation is complicated, costly and will take years to reach a final decision. Public interest groups have expressed concerns about whether settlements serve the public interest. To overcome such concerns, settlements should be subject to judicial approval, the terms of any settlement should be made public, and the penalties applied should be effective, proportionate and dissuasive. […] We recommend that the Working Group on Bribery undertake a review of settlement practices in foreign bribery cases. The Working Group should ensure that settlement agreements

111 See for example: http://www.transparency.org/whatwedo/publication/just_for_show_g20_promises.

http://www.transparency.org/whatwedo/publication/technical_guide_implementing_the_g20_beneficial_ownership_principles.

receive judicial approval that their terms are transparent, and that penalties are effective, proportionate and dissuasive (as provided by Article 5.1 of the Convention)."

Transparency International has laid down its viewpoint in detail in particular via its Policy Brief # 01/2015, Can Justice Be Achieved Through Settlements? Transparency International's recommendations from this Policy Brief are the following:

"When settlements are pursued, the following elements must be respected for them to be considered to effectively sanction and deter corruption.

GENERAL:

- Settlements should require companies to acknowledge wrongdoing and admit to relevant facts.

- Settlements are appropriate in cases where the company has self-reported the wrongdoing and should be used to incentivise such self-reporting.

- Settlements should be reached if the company genuinely cooperates with the investigation.

- Settlements must not be influenced by factors that fall outside of the case. These include economic influence, the potential effect upon relations with another state, or the natural or legal persons involved.

TRANSPARENCY:

- Settlements must be made public. This includes their terms and justification, the nature of the offence and other violations of law as well as a statement of relevant facts and how the company has met the terms of the settlement.

- The facts surrounding the case should be made public. This can provide lessons learnt for the prevention of similar wrongdoings in the future.

DUE PROCESS:

Court approval

- All settlements, including their detailed terms, should be submitted to judicial review and public hearing. This review should enable a judge to form an opinion on the extent of the violation and on whether the settlement is in the public interest. It should occur prior to concluding the settlement.

- The terms of the settlements and the judicial review should take into account the views of other affected stakeholders, such as competitors, as well as those of the government or civil society organisations in other affected countries (i.e. where the bribes were paid or sought).

Evidence-sharing with other jurisdictions

- Settlements must not preclude further legal actions in other jurisdictions that are not parties to the settlement subject to applicability of the non bis in idem principle (double jeopardy). Authorities should make all relevant evidence available to their counterparts in other relevant jurisdictions.

ACCOUNTABILITY:

- Settlements should provide for effective, proportionate and dissuasive sanctions.

- Settlements must at a minimum cover the estimated profit from the wrongdoing reflecting the full value of benefits accrued as a result of the wrongdoing in addition to monetary sanctions. Sanctions should include confiscation of the profit from the corrupt deal and the proceeds of bribery.

- Compliance with the terms of the settlement should be monitored by the government agency that negotiated the settlement.

Sanctions

- Settlements with companies (i.e. legal persons) should not preclude the prosecution of individuals. Where evidence is sufficient, criminal prosecution of individuals should be the standard practice.

- Fines levied on individuals should not be covered by the company, a corporate indemnity or third parties. These stipulations should be made part of the settlement.

- Debarments or voluntary restraints (from public procurement, concessions or subsidies) should be considered and linked to acknowledging liability.

- Sanctions should also include, where relevant, disqualification from particular commercial activities (temporary or permanent), placement under judicial supervision, and forfeiture or disgorgement of profits.

Prevention

- Settlements should require the corporation to commit to reviewing and strengthening its compliance programme and include relevant monitoring arrangements (see side bar, pg. 3).

- The company should publish a report on how it has met the terms of the settlement.

Prosecution of intermediaries

- Settlements should allow for the prosecution of intermediaries (i.e. lawyers, accountants, corporate service providers) who facilitated the corrupt act.

REPARATION FOR VICTIMS:

- Settlements should provide for compensation to those harmed by the offence, including victims in other countries, wherever possible.

- If possible, part of the fines paid or profits reimbursed could be reserved for anti-corruption work by independent actors and disbursed under the management of an entity independent from the corporation and from the government that received the bribe.

Transparency International also mentions in this context its "Letter to OECD Secretary General Angel Gurria: Global Standards for Corporate Settlements in Foreign Bribery Cases", 11 March 2016 (together with UNCAC Coalition, Corruption Watch UK, Global Witness).

**Transparency International, Canada.**

The Transparency International, Canada submission is available in a separate document at the following link:

http://www.oecd.org/corruption/anti-bribery/TI-Canada-Submission-Corporate-Liability-12-12-2016.pdf.

**Transparency International, United Kingdom**

*Rory Donaldson, Programme Manager, Business Integrity Programme, Transparency International, United Kingdom*

## Executive summary

The OECD's overall consultation question is 'What are the most important components of an effective system for the liability of legal persons?' Our overall response is that we believe the UK Bribery Act (UKBA) is a broadly effective approach, although there is considerable room for improvement.

The UKBA is ambitious, challenging for companies, and is well-designed for driving corporate behaviour and we would encourage the world-wide adoption of similar legislation. We would also reject the suggestion that there is any need to 'water down' the UKBA, and we highlight that it has received endorsement from large parts of the business community.

The UKBA could, however, be made more effective still, and below we outline our suggestions for how.

### 1. Legal Framework

It is not clear how case law relating to the UKBA will develop, however there is evidence to suggest that in practice it is difficult to hold individuals to account. Serious consideration should therefore be given to holding directors to account in some form for corporate convictions for a Section 7 offence by making them liable to disqualification. This would require an amendment to the Company Directors Disqualification Act 1986, which already provides for Director's disqualification for certain criminal offences or as a civil sanction upon application to the High Court.

There should also be a stronger emphasis on the use of Corporate Probation Orders which may be particularly appropriate where a company has demonstrated a reluctance to reform its practices.

### 2. Resourcing the Serious Fraud Office (SFO)

The Serious Fraud Office has taken on an increasingly large workload in relation to foreign bribery with some high profile investigations against large UK companies ongoing. There are, however, a number of issues relating to the current enforcement set up in the UK:

- Resources for the SFO are still inadequate and its funding model problematic.
- There is ongoing uncertainty over the future of the SFO.
- There are issues with coordination, intelligence sharing and case attribution between the SFO and the International Corruption Unit at the National Crime Agency.

### 3. Key barriers to effective enforcement

The SFO is facing two key barriers to effective enforcement. First, there is a lack of dedicated crown courts to try serious economic crime cases, coupled with underfunding of the court system, resulting in long delays. Second, there is a lack of tools for ensuring that courts can impose a review of compliance procedures as part of sentencing.

**4. Deferred Prosecution Agreements (DPAs)**

The first DPAs have included some examples of good practice in terms of transparency and of appropriate compensation being paid to the victim country. There are, however, significant issues with the current approach. First, there is an over-reliance on companies own internal investigations, which risks the process lacking rigour and objectivity.

Second, DPAs will only be offered if a company cooperates with the SFO, but there is so far a lack of consistent definition as to what counts as cooperation. So far there have been instances of what appears to be less that fully cooperative behaviour which is still being rewarded with a DPA.

**5. Areas for improvement in the SFO's strategy**

There is currently a failure by the SFO to use civil recovery orders where criminal prosecutions have failed. Because civil recovery operates lower standards of evidence, the use of civil recovery processes where a prosecution fails would send a strong message that companies will still pay a penalty for wrongdoing. There is also a lack of transparency around the SFO's basic investigation and enforcement statistics, which makes it difficult for assess effectiveness.

**6. Exclusion from public procurement**

There is little evidence that the exclusion provisions of the Public Contracts Regulations are being used in practice on a regular or meaningful basis. This lack of implementation is becoming starker as more convictions, including under Section 7, occur. We urge that the mechanisms to determine whether companies convicted of bribery offences should be debarred from public contracts need to be more robust.

**7. Small and Medium Enterprises (SMEs)**

Small and Medium Enterprises (SMEs) may be disadvantaged under the UKBA compared to large corporations. Our concern is that SMEs are at greater risk of prosecution, at risk of more severe prosecution, and due to their relative lack of resources, less likely to be able to provide an 'adequate procedures' defence. Research studies have shown that levels of awareness and understanding of the UKBA among SMEs are also very low.

- As a priority, the UK Government should provide greater support and education for SMEs on the UKBA.

- We acknowledge that UKBA case law is still developing, but we urge that a review of UKBA's approach to corporate liability, including the use of the identification principle, be considered.

**Contents**

Here we present an analysis of how effective the UK's current corporate responsibility framework is and how well that framework is enforced. We cover seven main topics:

1. The legal framework
2. Resourcing the Serious Fraud Office (SFO)
3. Key barriers to effective enforcement

4. Deferred Prosecution Agreements (DPAs)
5. Areas for improvement in the SFO's strategy
6. Exclusion from public procurement
7. Small and Medium Enterprises (SMEs)

1. The legal framework

The Bribery Act: The Bribery Act is a widely respected piece of legislation which has helped put the UK at the forefront of global anti-corruption enforcement efforts. The UK government has expressed its commitment to the Act on various occasions, including at the UK's Anti-Corruption Summit. It also cited the value of the Bribery Act in its 2013 National Action Plan on Business and Human Rights as a key instrument through which it has sought to promote good corporate behaviour and respect for human rights, and in its 2013-2015 Open Government Partnership National Action Plan.

There have however continued to be some parts of the private sector which have argued that UK business is disadvantaged by the Bribery Act and this argument has at times had advocates from within certain parts of government. In July 2015, the National Security Council and the Export Implementation Framework ordered an informal consultation with business groups as to whether the Bribery Act was considered 'a problem' and whether it could be made 'simpler' and 'less costly' to follow. The message that the government received from large parts of the business community was that there was no perceived problem with the Bribery Act.

It is possible that with Brexit, concerns may be raised again and gain traction as to whether the Bribery Act disadvantages UK business. The UK government needs to send a strong signal that the Bribery Act is not up for negotiation in a post-Brexit world and that the UK intends to meet its international commitments with regard to having the right legal instruments to fight corruption. With other countries putting in place new anti-corruption legislation, such as France, Germany and Ireland, any move to weaken the Bribery Act would also undermine the emerging global process of levelling up anti-corruption standards. A weakened Bribery Act in fact would put the UK behind emerging global standards for anti-corruption, effectively giving UK companies a competitive advantage compared to companies in those countries that have enhanced their legislation.

The Bribery Act and the corporate liability framework in the UK: The introduction of the Section 7 '*failure to prevent*' offence in the UKBA has been invaluable as a tool to both incentivise improvements in corporate governance and for prosecutors to hold companies to account within a criminal law framework. We welcome the proposed extensions of Section 7 to cover money laundering and other corruption-related crime. It will be important that such extensions provide maximum clarity and certainty to companies – at least in the form of official guidance, as was provided for the UKBA – to help guide the implementation of effective procedures. These extensions, if appropriately targeted and rigorous, will help level the playing field among corruption-related offences and will help to ensure that all such offences are tackled effectively.

There is a lack of individual accountability: While it is perhaps too early to tell about how Section 7 case law will develop, it is noticeable that of the three Section 7 enforcement actions taken so far (two by Deferred Prosecution Agreement and the other by guilty plea[112]) only one has resulted in

[112] At the Sweett hearing in December 2015, the SFO stated that it expected to charge an individual within three months. However, that has not happened yet.

individuals being charged within the UK for Sections 1 or 6 offences that the organisation concerned failed to prevent. In the case where individuals have been charged, the organisation received a DPA for both a Section 7 offence and a Section 1 offence. The lack of individual charges being laid in the other two cases which involved solely Section 7 offences raises the question of whether more consideration should be given to how to ensure that there is at least some kind of accountability for the individuals involved.

One of the substantial benefits of Section 7 is that it enables companies to be held to account for broad systemic failures that occur across an organisation and which may not be attributable to one or two individuals. That conduct by the organisation is held sufficiently serious to attract criminal liability. However, it is also crucial for public confidence and for deterrence that the individuals at a senior level, and ultimately the board of directors who are responsible for the organisation's failure and hence its criminal culpability are themselves held to account for such failures. Current legislation provides no grounds upon which directors can be held publically to account, regardless of how seriously they may have failed in their duties.

In the UK, serious consideration should be given to holding directors to account for corporate convictions for a Section 7 offence by making them liable to disqualification. This would require an amendment to the Company Directors Disqualification Act 1986, which already provides for Director's disqualification for certain criminal offences or as a civil sanction upon application to the High Court. If Directors proven to have behaved in such a way that led to the company's failure to prevent an offence were disqualified this could create a strong incentive for board members to ensure that companies are fully compliant with the Bribery Act.

2. Resourcing the Serious Fraud Office (SFO)

The Serious Fraud Office has taken on an increasingly large workload in relation to foreign bribery with some high profile investigations against large UK companies ongoing. A number of issues arise from the current enforcement set up in the UK:

a) Ongoing uncertainty over the future of the SFO: Continuous question marks over the SFO's future are potentially detrimental to its morale and ability to recruit and maintain high quality talent, although good leadership in the past few years has helped to cushion the impact of uncertainty on morale and the ability to attract and maintain talent. Continual questioning over the existence of the SFO however undermines the fight against corruption and potentially the efforts of the SFO to encourage self-reporting.

   The SFO has specific powers and expertise that are crucial to the fight against corruption, has corruption as one of a few top priorities and uses the Roskill model, with prosecutors leading investigations which is vital for complex financial crime. It has now built up considerable expertise among its staff for fighting corruption and built up international networks that are crucial for such work.

   It is vital that the UK government draws a line under the continual uncertainty over the UK's anti-corruption enforcement set up and a final decision be taken. The enforcement review that the Cabinet Office undertook during 2015 has never been made public despite suggestions that it would be and it is not clear what the outcome or policy recommendations of that review are. There were suggestions earlier in 2016 that the NCA would be given a power of direction over

the SFO as a result of that review[113] which raised concerns about potential political interference in SFO investigations.

b) Resources for the SFO are still inadequate and its funding model problematic: SFO core funding has gone from £52 million in 2008 to £33 million in 2016. The SFO is able to ask for 'blockbuster funding' from the Treasury, and between 2014 and 2016 it asked for a total of £47 million this way. The HM Crown Prosecution Services Inspectorate found in May 2016 that the blockbuster funding model was preventing the SFO from building expertise and capacity as it encouraged the SFO to rely on temporary staff.[114]

   The blockbuster funding model has also been criticised for giving the impression that HM Treasury could in effect make a political decision as to whether to deny funding for a particular case, thus interfering in the exercise of the SFO's discretion. An increased permanent budget for the SFO (in the region of around £75 million annually) would send a clear signal from the UK government as to its intention to drive out corporate irresponsibility and hold companies to account for financial crime.

c) Case attribution continues to be an issue and the International Corruption Unit at the National Crime Agency has yet to find its feet: The creation of a single International Corruption Unit at the NCA was a key output of the UK's December 2014 Anti-Corruption Action Plan. It was designed to ease coordination issues between agencies. The transition has not however been an entirely a smooth one. The City of London Police Overseas Anti-Corruption Unit (OACU) decided not to move to the unit, resulting in loss of expertise in relation to fighting bribery. OACU was tasked to finish off the investigations it had on its books already, while funding for the unit from the Department for International Development (DFID) was to be slowly transferred to the ICU. While members of the Metropolitan Police Proceeds of Crime Unit did move to the ICU, it is not clear, 18 months on how many of them remain.

   The ICU has had to build up new expertise through recruitment. Recruitment of suitable staff is an issue for the ICU. It is not clear what impact this has had on casework. So far, there appear to have been no arrests made or charges laid by the ICU in relation specifically to foreign bribery.[115]

Additionally, as the ICU is primarily funded by DFID it may only focus on DFID priority countries. There has been lack of clarity over whether the Home Office has put up matching funds for the ICU to cover investigators that cover non DFID priority countries. There is a danger that lack of

---

113 http://www.ft.com/cms/s/0/daa673be-d0da-11e5-831d-09f7778e7377.html#axzz4M1WQ6xxr

114 https://www.justiceinspectorates.gov.uk/hmcpsi/inspections/sfo-governance-arrangements/

115115 Arrests made by the ICU in October 2015 appear to have been in relation to potential theft of state resources by former Nigerian oil minister, Alison-Madueke Diezani, though little public information has been released. http://www.nationalcrimeagency.gov.uk/news/718-international-corruption-unit-arrests; http://www.independent.co.uk/news/world/africa/reformer-of-nigerian-oil-industry-diezani-alison-madueke-arrested-on-bribery-charges-a6685146.html

clarity over the use of aid money may undermine the credibility of a funding model that has for all intents and purposes been successful in getting dedicated resource for fighting corruption in the UK.

Coordination between the ICU and law enforcement agencies in other jurisdictions has in some cases been problematic. In the OPL 245 case involving the restraint of money suspected to be destined for use in the payment of bribes in relation to a Nigerian deal, which is currently under investigation by the ICU, administrative errors and other issues led to substantial delay in providing Italian prosecutors with crucial information. The case raises important questions around coordination between the ICU, the Crown Prosecution Service, UK Central Authority and the impact this has on being able to deliver prompt assistance to foreign law enforcement agencies.

Meanwhile, it is not clear that issues around coordination, intelligence sharing and case attribution (a main justification for the creation of the ICU) have been fully resolved between the SFO and the ICU. This is particularly so with foreign bribery cases. Now that the SFO has removed its £1 million threshold for taking on cases and has shown an appetite for taking on smaller cases in developing countries such as Smith and Ouzman, it is not clear what the exact remit of the ICU on foreign bribery is.

In terms of case attribution and coordination there is a strong case to be made for making the SFO the main and only international anti-corruption enforcement agency with the NCA taking a lead on domestic bribery and corruption. The SFO would clearly need to be funded properly to do so and also ensure that its remit is officially broadened to include all bribery and corruption and not just the 'very top-most level'. It would also still need to have a clear agreement with police forces that it relies on for making arrests, or be given powers of arrest directly. Having one main agency would have the advantages of building a centre of excellence for fighting overseas corruption and of providing a one stop shop for whistleblowers and others with crucial information.

Alternatively, clearer case attribution guidelines need to be drawn up so that it is clear which agency is responsible for which cases.

3. Key barriers to effective enforcement

There is no doubt that the SFO's recalibration towards a more prosecutorial approach has been slow to produce results. The number of enforcement actions taken has fallen. This is not surprising given that it takes much longer to prove corruption or bribery to a criminal standard than to a civil standard. As a result, the period from August 2012 to 2016 cannot be easily compared to 2008-2012 when civil settlements were the norm. Arguably, the quality of enforcement actions has significantly improved. A significant number of investigations have been going on for over four years and results on such investigations should be expected in the next two years. Whether the SFO can sustain successful prosecutions in large and complex foreign bribery cases such as Rolls Royce, Airbus, GSK and GPT will be a key test of its recalibrated approach.

Despite a lack of prosecutions, the SFO has won some important satellite judgements in the course of investigations including at the Court of Appeal that are setting the legal parameters for investigating and prosecuting corruption. These include:

- a long overdue judgement in January 2016 that the Prevention of Corruption Act does apply to payments made to foreign officials prior to 2002, when the Anti-Terrorism Crime and Security Act 'clarified' UK law in this regard;[116]
- a December 2013 Court of Appeal judgement, that a prosecutor does not need to prove that an employer had no knowledge of the payment to an employee – essentially undermining a key argument used by former Attorney General, Lord Goldsmith, as to why an SFO investigation into alleged bribes by BAE Systems in Saudi Arabia was doomed to fail[117] - ensuring that a Principal's knowledge of bribes taken by an agent does not legitimise bribe payments;
- an important Court of Appeal ruling in July 2016 about whether diary entries of a former executive who could not be extradited to give evidence can be admitted as evidence in court against a company;
- a ruling in relation to its investigation into GSK that the SFO's policy not to allow individuals being interviewed under its Section 2 powers to be represented by lawyers that are also representing a corporate suspect was legitimate;[118]
- a high court ruling upholding how the SFO handles material that is potentially subject to legal professional privilege;[119] and
- a settlement with Barclays prior to a court hearing whereby Barclays handed over material that it had previously claimed was subject to legal professional privilege.

However, the SFO faces some considerable barriers:

a) Lack of dedicated crown courts to try serious economic crime cases and underfunding of the court system: It takes the SFO on average around 18 months to get a court slot. While Southwark court is the main crown court dedicated to trying serious economic crime cases, it also covers many other prosecutions, placing a heavy load on the court system there. Having a ring-fenced dedicated crown court, with judges who have received specialist training in trying serious economic crime cases would significantly help the prosecution of overseas corruption and financial crime in general.

b) Lack of tools for ensuring that courts can impose a review of compliance procedures as part of sentencing: Under a Deferred Prosecution Agreement, a court can approve an agreement between the prosecutor and a company which includes a requirement that the company will take remedial measures such as implementing or modifying its compliance programme. Such agreements can also require that a company has an independent monitor to review its compliance programme. However, for companies that choose not to cooperate and self-report, there are few tools available to the court or prosecutors to require such companies to take remedial measures. Prosecutors may apply for a Serious Crime Prevention Order but this is a very heavy-handed approach, requiring a separate civil process and the prosecutor to present evidence of the risk of re-offending. In practice such orders are unlikely to be used routinely.

[116] http://www.bailii.org/ew/cases/EWCA/Crim/2016/2.html

[117] *R v J, B, V and S* [2013] EWCA Crim 2287, http://www.bailii.org/ew/cases/EWCA/Crim/2013/2287.html

[118] http://www.bailii.org/ew/cases/EWHC/Admin/2015/865.html

[119] http://www.bailii.org/ew/cases/EWHC/Admin/2016/102.html

It would be better for 'remedial orders' or corporate probation orders that can be imposed at the time of sentencing to be introduced for economic crime. The UK Corporate Manslaughter Act 2007 has just such a process with remedial orders and publicity orders (where a court can require a company to publicise its conviction and the terms of a remedial order) available to the court as a sentencing option. Under the current system in the UK, a company that self-reports and cooperates faces greater scrutiny of its corporate governance standards than a company that chooses not to do so. This creates a potentially perverse incentive not to self-report.[120]

4. Deferred Prosecution Agreements (DPAs)

Since the introduction of Deferred Prosecution Agreements (DPAs) in February 2014, there have been two such agreements. The SFO has made clear on numerous occasions that the criteria for being offered such agreement are strict and require a self-report of information that the prosecutor would not otherwise have been aware of, and cooperation from the company. The SFO has also made clear that it will use DPAs as part of a broader prosecution strategy in which companies that do not cooperate or self-report will be prosecuted.

*First Deferred Prosecution Agreement: Standard Bank:* The first agreement with Standard Bank in December 2015 set some good standards, particularly with regard to transparency. The Statement of Facts was comprehensive and identified people said to be involved in the alleged acts of bribery either by name or by position. The Standard Bank DPA also set a precedent for compensation being paid to the victim country. However, the DPA also raised some significant concerns in particular:

a) Reliance on a company investigation: The Standard Bank DPA made clear that the SFO had not request any documentation or evidence from the Government of Tanzania and that the SFO has relied for large part on the company investigation for its information. It further emerged in April 2016 from a Global Investigations Review report[121] that the SFO had only received oral summaries for key first witness accounts from Standard Bank rather than the full transcripts; that it had not re-interviewed several of those key witnesses; and that Standard Bank had deliberately kept all reference to witness interviews out of the internal investigation it handed the SFO. This has led some legal experts to question whether the SFO '*pressure-tested*' the company's internal investigation beyond asking some of its staff.[122]

b) Lack of a consistent definition of cooperation: Sweett group, which pleaded guilty in December 2015 to a Section 7 offence, was criticised for lack of cooperation on the basis of failing to provide first witness accounts to the SFO. At the Sweett hearing, it was noted that Sweett had reported to the SFO seven days before an article appeared in the Wall Street Journal in June 2013, but that as this was regarded as a report in anticipation of the newspaper

[120] These arguments have also been made by the criminal defence sector. See http://thebriberyact.com/2016/06/27/exclusive-u-turn-on-dpas-sfo-director-points-to-concerns-over-lack-of-incentives-for-dpas-while-sir-brian-leveson-says-dpa-companies-entitled-to-bigger-discounts/

[121] http://globalinvestigationsreview.com/article/1035486/standard-bank-dpa-interview-transcripts-not-required

[122] Michael Bowes QC and Judy Krieg, International Bar Association Anti-Corruption Digest, June 2016

article, it was not regarded as a self-report. Despite this and despite various actions that Sweett took during the course of the investigation, including electing at one stage to self-investigate, and taking a position for six months that the payments were in fact legal under the laws of the United Arab Emirates, in July 2015, the SFO offered Sweett the possibility of entering into negotiations for a DPA.[123]

Some of the criminal defence sector have suggested that whether the SFO offers negotiations for a DPA may depend on which prosecutor is assigned to the case.[124] The SFO needs to ensure public confidence that its standards on self-reporting and cooperation are applied consistently.

c) Lack of individual accountability: Despite the fact that key staff based in the UK office of Standard Bank approved the use of the agent who was alleged to have paid the bribes, drew up the agency agreement, and concealed the use of the agent from compliance staff, no UK individuals were held to account for the failure to prevent bribery in the Standard case. Charges have been laid against individuals in Standard's Tanzanian sister company by the Tanzanian authorities. It is noticeable that one of these individuals is suing Standard Bank in Tanzania for damages, including misrepresenting facts in order to obtain the DPA.

*Second DPA: anonymous:* In its second DPA in July 2016, the SFO launched proceedings against individuals concerned before seeking court approval for the DPA. As a result, all details in the DPA with regard to the name of the company and the wrongdoing have been anonymised and no Statement of Facts released, in order not to prejudice the proceedings against the individuals. Some commentators have stated that if the SFO proceeds with this policy, the anonymity would be a "*significant boon*" for companies ensuring that they do not have their named dragged through the public eye twice, once in the DPA and again when the individuals are prosecuted.[125] The issue of delayed transparency in DPAs and the impact this has on deterrence and public confidence in the DPA process is clearly an issue that needs to be watched.

Perhaps most significantly, the second DPA introduced, essentially by the back door, a new policy of providing a 50% discount to companies that self-report and cooperate. Following extensive public consultation prior to DPA's being introduced, the government decided in 2013 that DPAs should provide a one-third discount so that getting a DPA would not be seen as a 'soft' option. This was enshrined in the Crime and Courts Act which introduced the legislative basis for DPAs, where it states that the fine imposed on a DPA shall be equivalent to a guilty plea at the earliest opportunity. Additionally, the Sentencing Guidelines Council introduced new guidelines on sentencing corporate offenders for economic crimes including money laundering, fraud and bribery (again following public consultation). These guidelines were "*created as part of a package to support the introduction of*

123 http://www.cw-uk.org/2016/02/16/sfo-plays-hardball-sweett-case-sets-new-standards-for-cooperation-in-corruption-cases/

124 http://globalinvestigationsreview.com/article/1017389/gir-live-london-uk-dpa-unattractive

125 http://economia.icaew.com/finance/july-2016/the-uks-second-dpa-a-hopeful-judgment

*Deferred Prosecution Agreements*."[126] While not guidelines for DPAs as such, they were designed specifically to be '*of assistance as a point of reference*' for fines levied in DPAs.

The introduction through a DPA of a new policy of significantly greater reduction in penalty for companies that self-report is therefore a major change which has been introduced without any consideration by the Sentencing Guidelines Council or public debate on the issue. This raises real questions about accountability in policy making.

There is no doubt that the SFO has been under pressure from the criminal defence sector to provide greater incentives for companies to self-report. The criminal defence sector has argued that having the same financial penalty for a company that does not self-report and cooperate but pleads guilty and one that self-reports and cooperates undermines any incentive for self-reporting (particularly given the more onerous remedial requirements under a DPA).[127] Additionally, the introduction of a one-year pilot programme by the DOJ in April 2016 to reduce penalties by 50% for self-reporting companies in FCPA cases will have increased that pressure.[128] However, the DOJ has announced the programme both as a pilot and as a government policy. That means it is both reversible and open to challenge and public debate. The UK policy has been introduced without consultation and without public debate. Introducing de facto changes to the Crime and Courts Act through DPAs in this way will undermine public confidence in the DPA regime.

Furthermore, it is not clear whether the lure of a 50% discount will incentivise greater self-reporting in the absence of a significant increase in detection and prosecution of companies that do not self-report. As the SFO will not release statistics on the number of self-reports it receives from companies (see below),[129] it is not possible to establish whether the new discount levels allowed for in the second DPA has or will lead to an upswing in corporate self-reporting. It is worth noting that the DOJ significantly increased capacity, doubling its FCPA prosecutors, at the same time as introducing its policy.

Finally, while the SFO was at pains to lay out in the second DPA how it had conducted an investigation independent from the company including interviews under Section 2 powers, it is noticeable that once again the company was allowed to provide oral summaries rather than full versions of first witness accounts. As one defence lawyer has put it, this policy enables companies to "*retain a greater degree of control over the information that they provide the SFO.*"[130] Put another way, it potentially reduces the amount of information a company must provide the SFO, and allows the company to manage information in such a way that it could reduce its exposure in relation to wrongdoing.

---

126 https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud_Response_to_Consultation_web1.pdf

127 http://thebriberyact.com/2016/06/27/exclusive-u-turn-on-dpas-sfo-director-points-to-concerns-over-lack-of-incentives-for-dpas-while-sir-brian-leveson-says-dpa-companies-entitled-to-bigger-discounts/

128 https://www.justice.gov/opa/blog/criminal-division-launches-new-fcpa-pilot-program

129 In a September 2016 speech, Ben Morgan, Joint Head of Bribery and Corruption at the SFO, stated that the SFO was receiving more self-reports than at any time in the previous four years and mentioned that in the prior week to his speech there had been three "*significant matters*". Morgan stated however that the vast majority of their case load is from self-generated work resulting from increased intelligence capacity at the SFO (https://www.sfo.gov.uk/2016/09/15/ben-morgan-global-investigations-review-live/ )

130 http://globalinvestigationsreview.com/article/1035486/standard-bank-dpa-interview-transcripts-not-required

*Scotland:* The DPA regime was not introduced in Scotland but only applies to England and Wales.[131] Scotland continues to rely on civil settlements with companies that self-report. Scotland has disposed of four bribery cases (including in the past year, Braid and Brand-Rex) through civil recovery orders since the introduction of a self-reporting policy in 2011 by the Crown Office and Procurator Fiscal Service (COPFS) in Scotland.

The guidance issued by COPFS in 2011 is similar to that issued by the then Director of the SFO in 2009 which the current Director of the SFO distanced himself from shortly after his appointment. The use of civil settlements for foreign bribery cases was criticized by the OECD in its Phase 3 report into the UK. Lord Justice Thomas (as he then was) in his 2010 *Innospec* ruling also stated that it will rarely be appropriate for corruption of foreign government officials to be dealt with by way of civil sanctions.

The Scottish guidance introduced in 2011 was for five years and is currently under review. COPFS see it as a success so it is unlikely to change. The Scottish approach however lacks transparency and fails to achieve real deterrence. Little information is made available about the nature of the alleged offending. Meanwhile, the sole penalty imposed through these settlements is loss of gross profit compared to a penalty imposed under DPAs in England and Wales that includes a multiple of assessed harm in addition to disgorgement.

Given that Scotland has a strong oil industry and this industry is very high risk for corruption, it is a matter of concern that Scotland continues to rely on civil recovery orders to deal with these offences. Major differences in approach between Scotland and England/Wales also mean that the accident of whether a company is incorporated in Scotland or England and Wales results in substantially different penalty levels.

5. Areas for improvement in the SFO's strategy

Lack of transparency: The SFO provides on its website a list of companies against which it has opened investigations. Its policy it only to state publically investigations which companies have already announced to the market. On its list of SFO cases published on its site there are 11 cases that relate to bribery and corruption. The SFO has refused to give further detail publically about how many investigations it is undertaking. In 2014, for instance, the SFO refused to provide information in response to a Freedom of Information Request about how many self-reports it had received and how many investigations it had underway. This decision was upheld by the Information Commissioner in April 2016, who accepted the SFO's grounds that to state how many investigations it had underway might lead to less self-reports being made if the corporate world knew that it was conducting only a few investigations. This lack of transparency about basic enforcement statistics is not only undesirable in itself but makes it hard to assess the effectiveness of the SFO's approach.

Additionally, there are issues around transparency of documents mentioned in open court. In the UK, it is very hard to get information about cases unless one is either present in court or one can afford transcripts of cases which are prohibitively expensive for the public. The SFO could significantly aid the transparency in such cases by providing on a routine basis its prosecution opening note (which usually sums up the evidence and the charges being made) and the sentencing remarks of Judges. Neither of these are routinely made public at the moment.

[131] This was in part because of Scottish judges had concerns that DPAs would blur the distinction between judges and prosecutors.

Failure to use civil recovery where criminal prosecutions have failed: The SFO appears to be failing to use civil recovery against companies where a prosecution has failed. Because civil recovery operates lower standards of evidence, the use of civil recovery processes where a prosecution fails would send a strong message that companies will still pay a penalty for wrongdoing.

Inadequate assessment of the full harm and full benefit to a company: In both the Smith and Ouzman case and the Standard Bank DPA, issues emerged as to whether the SFO had conducted a full assessment of the whole range of harm caused and benefit received. For instance, in Smith and Ouzman, the SFO could have counted as a benefit to the company a further contract won under suspicious circumstances with the same authority that it was found guilty of having bribed to win earlier contracts. This would have resulted in a substantial uplift in the full fine level. Likewise, with the Standard Bank DPA, the SFO did not appear to pay attention either to additional benefits and business gained by Standard as a result of the bribes allegedly paid, nor the full damage to Tanzania as a result of entering into an uncompetitive contract won without tender.

Given increasing evidence that fine levels for foreign bribery are currently insufficient for real deterrence, and given the importance of ensuring that the full harm of corruption is represented in court hearings to give voice to the victims of corruption, it would be hoped that prosecutors should seek to establish as broad and full a picture of both benefit and harm as possible.

6. Exclusion from public procurement

The UK continues to be in a similar position to where it was when the OECD reviewed it for Phase 3 with regards to exclusion from public procurement. In particular, several of the OECD recommendations made at Phase 3 including for a national register of excluded companies and for guidance to contracting authorities on the circumstances in which convictions under Section 7 should incur discretionary exclusion, remain unimplemented. Limited guidance was published on 9th September 2016 by the Crown Commercial Service which covered exclusion.[132]

In a model Selection Questionnaire provided by the CCS in its September 2016 guidance, under the grounds for exclusion, a contractor must declare whether they have received a conviction for corruption. Arguably, a conviction for a Section 7 offence under the Bribery Act is not a conviction 'for' corruption. Despite the fact that the government has stated that a conviction under Section 7 would incur discretionary exclusion, the model Selection Questionnaire does not include a question as to whether the contractor has received a conviction under Section 7. Under this model Selection Questionnaire, a contractor could potentially not declare a Section 7 conviction as there is no obvious request for them to do so. Since Section 7 of the Bribery Act is not mentioned anywhere in the official government guidance on grounds for Mandatory and Discretionary Exclusion, this makes it even more likely that a contractor could conclude that they did not need to declare it.[133]

While grave professional misconduct needs to be declared, there is no clear definition of what that misconduct consists of or whether it would include a conviction for Section 7. A conviction under

132 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/558531/PPN_8_16_StandardSQ_Template_v3.pdf

133 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/551130/List_of_Mandatory_and_Discretionary_Exclusions.pdf

Section 1, 2 or 6 of the Bribery Act by an 'associated person' who has powers of representation, decision-making or control on behalf of the person would need to be declared. If however the associated person who committed the offence has left the company, the company would therefore not need to declare it. Likewise if the offence were committed by a subsidiary, since subsidiaries are not associated persons, the company would not need to declare the conviction.

Meanwhile, there is little evidence that the exclusion provisions of the Public Contracts Regulations are being used in practice on a regular or meaningful basis. This lack of implementation is becoming starker as more convictions, including under Section 7, occur. For instance, Sweett group which pleaded guilty to a Section 7 offence on 18th December 2015 has had 24 contract awards with UK local authorities since its conviction.[134] It is not clear whether they were required to declare their conviction to those authorities, or prove what action they had taken with regard to self-cleaning.

Additionally, there is no comprehensive collection of data about how procurement authorities are implementing the exclusion provisions. For the sake of introducing clarity, transparency and consistency into the exclusion regime, the Crown Commercial Service should collect meaningful data on how many exclusions are made by contracting authorities, when they accept that a company has self-cleaned, and when they have used discretionary exclusion for Section 7 offences. This data should be stored centrally and made available to all contracting authorities. Lack of comprehensive data collection means that situations are more likely to arise where one authority excludes a company while another does not.

Ultimately, the UK could and should adopt a policy, which would significantly enhance its anti-corruption policies, of requiring companies to declare whether they are under investigation by a law enforcement authority when bidding for public contracts. This would enable contracting authorities to have a fuller picture of the integrity and responsibility of the contractor when assessing their suitability for a public contract.

7. Small and Medium Enterprises (SMEs)

Awareness among SMEs: The single most important issue that has emerged both from a 2015 informal consultation with business and from a survey published by the government in July 2015 is the need for awareness raising among SMEs. In the 2015 survey, a third of SMEs had not heard of the Bribery Act. And of those that had heard of it, 74% were not aware of the Ministry of Justice guidance to help corporations understand the procedures they need in place to prevent persons associated with them committing an offence.[135] As SMEs are already at a disadvantage under the Bribery Act because they have less resources to deploy than large multinationals to pay for external lawyers and accountants to scrutinise and verify their compliance procedures, it is crucial that the UK government devotes more time, energy and resources on awareness raising with SMEs.

SMEs and the identification principle: The substantive offences of the Bribery Act, in particular Sections 1 and 6, are subject to the identification principle (as are virtually all criminal offences). This means that the prosecution must prove that the criminal act was committed by an individual who represented the 'directing mind and will' of the company (a '*controlling mind*).' This usually means an individual at board level, or someone to whom specific authority has been delegated by the board.

134 Ted Electronic Tenders Daily Database.

135 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf

This test that was recently described by the SFO's counsel, Alun Milford, as "*unfair in its application, unhelpful in its impact and … unprincipled in scope*."[136]

A key risk of unfairness is that it is far easier to prove the controlling mind when prosecuting SMEs than with larger, decentralised or global companies. In practice therefore SMEs are open to being prosecuted more easily under both Sections 1 and 6 of the Act as well as Section 7 whereas large companies are more likely to be prosecuted solely under Section 7 of the Act. Given that convictions under Section 7 only incur discretionary exclusion from public procurement, while convictions under Sections 1 and 6 incur mandatory exclusion (subject to the self-cleaning clauses of the Public Contract Regulations), SMEs are therefore more likely to face exclusion from public procurement for bribery and other economic crimes than large companies as they are more likely to face Sections 1 and 6 convictions. Given that this is an important sanction, it is essential that the government addresses this issue both through looking at the wider issues of the identification doctrine in the long term, and through addressing more clearly how Section 7 can lead to discretionary debarment.

It may be desirable for a broader review of how the identification doctrine impacts on the UK's ability to hold companies to account to be undertaken. The Law Commission project initiated over a decade ago on codification of the UK criminal law as it relates to corporations has never been completed. It would be helpful for the Law Commission to look at the identification doctrine as it applies to substantive corporate offences to ensure that a level playing field can be developed between SMEs and large companies when it comes to the Bribery Act. It would also be helpful for a review of whether different parts of the UK's corporate law which have a bearing on the fight against corruption are fit for purpose.[137]

136 https://www.sfo.gov.uk/2016/09/06/control-liability-good-idea-work-practice/

137 For instance, in November 2015 the SFO was forced to drop a case looking at fraud in relation Gyrus, the UK subsidiary of Olympus, following a Court of Appeal ruling that Section 501 of the Companies Act, which makes it an offence to mislead an auditor, does not apply to companies, but only individual officers of a company. http://www.lexology.com/library/detail.aspx?g=cabfe80b-ce29-48f9-89bc-4f3f4fe9e2a0

**U4, Norway.**

The U4 submission is available in a separate document at the following link:

www.oecd.org/corruption/anti-bribery/U4-Submission-Corporate-Liability-28-10-2016.pdf.

**UN Office on Drugs and Crime**

*Bo Mathiasen, Representative, UNOCD Colombia and Brigitte Strobel-Shaw, Chief, Conference Support Section, UNODC, Vienna, Austria.*

**Legal persons liability in Colombia, with a global perspective from the UNCAC country reviews**

Colombia has established significant regulatory instruments to fight corruption. Among these are the National Anti-Corruption Strategy of Integral Politics (167 CONPES, November 9, 2013) and the recently approved Law 1778 of 2016 which provides for administrative liability of legal persons for the bribery of foreign public officials in relation to an internal business or international transactions.

Law 1778 of 2016 is based on several international provisions that have been ratified by Colombia; worth noting among these are article 26 of the United Nations Convention against Corruption (implemented through Law 970 of 2005), articles 2 and 3 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the OECD (implemented by Colombia through Law 1573 of 2012), article VIII of the Inter-American Convention against Corruption (implemented through Law 412 of 1997) and article 10 of the United Nations Convention against Transnational Organized Crime and its Protocols (implemented through Law 800 of 2003), all of which relate to the liability of legal persons and in general obligate every State Party to:

(i) take measures (criminal or non-criminal) as may be necessary to establish the liability of legal persons for the bribery of a foreign public official (according to its legal principles);

(ii) where the system of liability for legal persons is non-criminal, to ensure that legal persons are subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials;

(iii) to impose sanctions comparable to those applicable to the bribery of foreign public officials by a natural person (this is not a direct requirement under UNCAC);

(iv) not to restrict the liability of legal persons to cases where natural person or persons who perpetrated the offence are prosecuted or convicted (i.e. the liability of the legal person is independent from that of the corresponding natural person);

(v) take measures to ensure 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 effects are applicable.

The above international provisions require or encourage States to prioritize the implementation of effective programmes intended to investigate and punish acts of bribery of foreign public officials (referred to in Colombia as “transnational bribery”), targeting those who are responsible for this behavior including any legal persons involved.

Accordingly, and as noted above, Colombia issued Law 1778 of 2016 which provides for the administrative liability of legal persons for the bribery of foreign public officials in relation to an internal business or international transactions (in article 2 therein).

Taking the above into consideration, the following is UNODC's contribution on the "Issues for discussion" proposed in the Draft report by the OECD Working Group on Bribery entitled "Liability of Legal Persons for Foreign Bribery: A Stocktaking".

1. **General. What are the most important components of an effective system for the liability of legal persons?**

The most important components of an effective system for the liability of legal persons are:

- ✓ The existence of consistency between the definition of, or what is understood by, the term "legal person" and the liability system that applies; i.e. in Colombia the legal person is defined as a fiction (article 633 of the Civil Code), which means it is not real and only corresponds to a creation of law. This makes it difficult to attribute criminal liability to legal persons. However, as noted in the UNCAC review of Colombia, accessory criminal penalties are available in respect of legal persons, such as the suspension or cancellation of legal capacity (art. 91 of the Code of Criminal Procedure). Moreover, Colombia like most other countries provides for non-criminal responsibility of legal persons, in the form of administrative and civil liability. Nonetheless, a key issue identified in a horizontal analysis of 68 States parties to UNCAC[1] is that much of the relevant criminal legislation is recent and untested, or has not been the subject of comprehensive analysis. This partly explains its limited or non-existent practical impact in some countries and the existing uncertainty as to the way in which the courts will assess some of its aspects, such as the attribution of intent and guilt, the applicable evidentiary rules and the criteria of choosing between different types of sanctions against legal persons.

It should also be noted that in jurisdictions that do not establish clear principles on the criminal liability of legal persons there may be obstacles to international cooperation in criminal matters (article 46(2) of UNCAC). The UNCAC further enables States parties to expand such cooperation to civil and administrative matters, which is of paramount importance in cases involving legal persons (article 43(1) of UNCAC).

- ✓ The adoption of a system which recognizes that the liability of legal persons is independent from the liability of the corresponding natural person as opposed to a system in which the liability of the legal person is conditional on the liability of the corresponding natural person (article 26(3) of UNCAC).

The liability of the legal person must be based on an autonomous legal assessment based on the behaviour executed by the legal person with the understanding that the legal person has recognized rights and is a subject of legal obligations and therefore can be held liable for wrongdoing, without prejudice to the liability of the natural persons who have committed the office.

- ✓ Determine with precision the elements of the contested conduct. To protect the rights of the legal person, in accordance with the principle of legality and the notion of the Rule of Law, each prohibited behaviour should be defined in detail allowing the legal person to understand clearly and in advance what conduct entails liability (i.e. when will it be held liable).

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

- ✓ An effective system for the liability of legal persons should guarantee that proceeds of corruption will be frozen, seized, confiscated and returned. It is important to apply measures to ensure 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 effects are applicable.

- ✓ Effective, proportionate and dissuasive criminal or non-criminal sanctions must be applied in the law and in practice (article 26(4) of UNCAC). According to the final system to be implemented in each State (criminal or non-criminal) it is important to include a catalogue of sanctions commensurate with the nature of the legal person and coherent with the sanctions that are imposed for the same behaviour on natural persons; moreover, penalties should be sufficiently dissuasive to have a deterrent effect. Other factors that are normally taken into account when applying sanctions to legal persons are the type of activities of the legal person; the particular circumstances of commission of the criminal offence; the status of the natural person within the institutional framework of the legal person; the actual actions of the legal person; the nature of the operations performed by the legal person and the consequences caused by such operations; and, as noted below, the measures taken by the legal person in order to prevent the commission of the criminal offence. In terms of assessing effectiveness of the liability regime, a key issue is the enforcement of existing penalties. Indeed one of the cross-cutting findings from the above-mentioned horizontal analysis of 68 States parties to UNCAC is the key challenge of lack of enforcement of criminal or non-criminal liability principles. The conclusion is based on the finding that many States continue to apply sanctions for corruption primarily to natural persons, except in the case of certain offences such as bribery or money-laundering. Accordingly, effectiveness of the liability regime in the case of corruption offences is found to be lacking in many jurisdictions, coupled with an absence of available statistics and case analyses on how the measures are applied.

- ✓ A system for the liability of legal persons should promote self-regulation. The system may provide the possibility to mitigate the sanction when the prohibited conduct occurred despite an effective compliance programme. Indeed, one of the objectives of the establishment of corporate liability is clearly to encourage legal persons to adopt adequate corruption prevention mechanisms, such as the appointment of a prevention manager and the establishment, supervision and certification of an internal control system. In this context, measures applying the strict liability of commercial organizations that fail to prevent associated persons from engaging in bribery in order to obtain or retain a business advantage may have an effective and deterrent impact.

2. **Nature of Liability**.

a. What are the advantages and disadvantages of criminal liability for legal persons for foreign bribery?

b. What are the advantages and disadvantages of non-criminal liability for legal persons for foreign bribery?

One of the main advantages of criminal liability is its efficiency. Prosecution allows liability to be attributed to the real beneficiaries and perpetrators of the contested conduct. Also, it has been shown that criminal liability has a greater deterrent effect and carries a stricter stigma which corresponds to the seriousness of corruption-related crimes, especially foreign bribery. A further impact, as noted, is that criminal liability regimes often lead legal persons to adopt and implement rigorous compliance programmes with a view to preventing the misconduct from occurring.

One of the main elements of criminal liability of legal persons is the obligation to apply due process norms which, in some cases, can be burdensome. For example, in Colombia every investigation that impacts fundamental rights must be subject to a prior or subsequent judicial review. This can be quite demanding, especially in countries where only natural persons can commit crimes (such as Colombia). Also the higher evidentiary burden of proof makes it more difficult to detect and substantiate the case against the legal person.

c. In your experience, does the choice between criminal and non-criminal liability carry any procedural or substantive consequences for the effectiveness of an LP liability system? For example, does it affect: jurisdiction over domestic or foreign entities; the availability of investigative techniques; the ability to cooperate across law enforcement communities, both domestically and internationally (e.g. mutual legal assistance); or public education and awareness?

The choice between criminal and non-criminal liability carries procedural consequences as it may affect the ability to cooperate across law enforcement agencies. Experience shows that delays have occurred in non-criminal investigations of legal persons because of a lack of cooperation by the relevant authorities in the procedure. Such lack of cooperation is sometimes a consequence of the failure to understand the nature of the procedure or relevant authority. For example, in one State, the minimal use of corporate liability laws is partly attributed to the limited capacity of law enforcement agencies, i.e. to a lack of knowledge among investigators and prosecutors on how to investigate and prosecute the offence; and in another State, where no cases had yet been brought to court against legal persons, the authorities stated that there was a general perception that bribery was not a problem associated with the private sector. Often also law enforcement agencies, such as the police and public prosecutor's office, do not have systems in place to report criminal cases involving legal persons to the administrative authorities responsible for imposing the relevant sanctions. In addition to issues of institutional cooperation, the investigative techniques differ, depending on whether the liability system is criminal or non-criminal. For example, as mentioned above, Colombia's criminal justice system provides increased guarantees of due process, which may complicate the prosecution as they entail the application of several controls (such as prior or subsequent judicial review). This does not apply to non-criminal investigations.

3. **Legal basis of liability**.

a. Does the legal basis for LP liability matter? If so, why?

b. What is the value, if any, of having bribery-specific legislation for foreign bribery (as opposed to enacting a prohibition in the general criminal law or other statute)?

This may differ depending on the State, but, in general, the legal basis for legal person liability should not matter. However, a practical difference between having a general criminal law or other statute as opposed to having a bribery-specific legislation is in the message sent. A specific legislation may be understood as expressing a higher interest in the prohibition of the specific behaviour (over others). But in terms of the consequences or the effects of the behaviour, these are the same regardless of the legal basis adopted in each country.

c. In your view, has the Anti-Bribery Convention – or the WGB's monitoring of its provisions – contributed to creating or strengthening your jurisdiction's LP liability system for foreign bribery?

Indeed. The law in Colombia has undergone several amendments that have strengthened the prevention of and fight against foreign bribery and legal person liability. These amendments were meant to reflect international standards, and they responded to the WGB's monitoring of the provisions of the Anti-Bribery Convention. Examples from other jurisdictions exist. For example, the UNCAC reviews revealed that a number of States have introduced new legislation on the criminal liability of legal persons. Specifically, three countries from different regions with civil and/or administrative regimes in force reported that either a law introducing criminal liability had already been signed and was expected to become effective within weeks, or a commitment had been made—in one case, apparently under the influence of the OECD Working Group on Bribery in International Business Transactions—to introduce such liability and legislation to this effect was pending. Other States reported that that their Governments intended to prioritize the enactment of criminal liability measures, despite the fact that alternative forms of civil and administrative liability would also satisfy the requirements of the Convention.

d. The draft report shows that most of the WGB Parties, when complying with the Anti-Bribery Convention's requirements concerning LP liability, have adopted laws covering at least some other offences besides foreign bribery. In your experience, has the WGB's work on LP liability strengthened systems for the liability of legal persons for offences beyond the scope of the Convention?

Yes. One reason for this is that once an effort to amend the law is underway, the door is open to improve and strength anticorruption provisions more generally. For example, in Colombia, in 2011, the Anticorruption Statute (Law 1474 of 2011) not only introduced provisions about legal persons' liability (i.e. through article 34) but it also created new offences (crimes) such as private corruption (article 250 A of the Penal Code) and disloyal administration (article 250 B of the Penal Code). Moreover, the recently issued Law 1778 of 2016 regulates not only Foreign Bribery but also Domestic Bribery (articles 34 and 35).

4. **Types of entities covered**.

a. How important is it to cover entities lacking legal personality as a policy matter?

b. What are the advantages and disadvantages in practice of holding such entities accountable for foreign bribery?

Entities lacking legal personality do not have rights or obligations under the law. Therefore, from a legal perspective, such an entity can only be considered a natural person or a group of natural persons. Given the prevalence of transnational bribery and corruption in the private sector, it should be considered a priority from a policy perspective to ensure effective liability of legal persons for these acts, and this view is also supported by the UNCAC reviews and the recommendations issued therein

5. **Standard of liability – whose acts?**

a. In your view, does the "failure to supervise" standard for holding an LP liable for bribery committed by a low-level employee adequately address foreign bribery in practice?

b. What advantages or disadvantages do you see for holding LP responsible for foreign bribery committed by low-level employees even when management has made its best efforts to supervise them?

It is important to hold legal persons liable for bribery committed by an employee based on a failure to supervise their conduct, regardless of whether the bribery was committed by a low-level or high-level employee, as this will encourage legal persons to develop mechanisms to supervise and monitor their employees (and thereby promote the principles of self-regulation and shared responsibility).

However, liability based on failure to supervise cannot be established based only on results, but should be determined based on the existence of mechanisms or tools designed to prevent the risk of corruption, and in light of the effectiveness of the self-regulation regime implemented by the legal person.

6. **Standards of liability – what conditions?**

a. How does the choice of these conditions for establishing LP liability affect governments' ability to prosecute foreign bribery?

The choice of these conditions affects governments' ability to prosecute foreign bribery because the conditions constitute elements that must be established during the prosecution. For example, if the condition is that the act was committed for the benefit of the legal person (as is the case in some countries, according to the draft report of the OECD Working Group on Bribery), the existence of such a benefit must be established by the prosecution. Moreover, during the prosecution, the government may have to meet the burden of proving an "intention" to obtain that benefit.

Corruption cases are already hard enough to investigate, partly because of the dynamism of the behaviour and the fact that the acts usually occur in secret. There is no reason to make it even harder through including elements that are themselves difficult to prove.

b. Please list any conditions that are required in the jurisdiction(s) in which you are most familiar and describe their advantages and disadvantages in practice for ensuring that LPs cannot avoid liability for foreign bribery either committed directly or through intermediaries.

In Colombia, Law 1778 of 2016 provides for administrative liability of legal persons for the bribery of foreign public officials in relation to an internal business or international transactions. Under Article 2, the liability of the legal person will be triggered whenever an employee, contractor, director, or associate of the legal person (or of its subordinate/parent legal entity, if the act was committed with the tolerance or consent of the legal person) gives, promises or offers, directly or indirectly, a bribe to a foreign public official in relation to an internal business or international transaction. What is given, offered or promised can be money or another article of monetary value, or any other benefit or profit. The act is performed with an expectation of gaining something from the foreign public official, but there is no requirement that the latter receives or accepts the bribe. Under paragraph 2 of Article, liability will be extended to branches of companies operating abroad, as well as state-owned , industrial and commercial companies in which the State has a share, or semi-public companies. Paragraph 3 of Article 2 states that when the behavior was committed by an associate with no control, the legal person will not be held liable.

The main advantages of the above conditions for ensuring that legal persons in practice cannot avoid liability for foreign bribery in Colombia are as follows:

- ✓ The wide scope of actors that can trigger legal person liability ensures maximum accountability. This also encourages legal persons to monitor and control what their employees, contractors, directors, or associates do, and encourages parent legal entities to monitor and control their subsidiaries.

- ✓ The scope of prohibited behavior (giving, promising or offering) and the irrelevance of the conduct of the foreign public official (liability can be established even if the foreign public official does not receive or accept the bribe) ensures maximum accountability.

- ✓ The fact that legal persons can be held liable for foreign bribery whether the act was committed directly or indirectly (i.e., through intermediaries) also ensures maximum accountability. If the act is committed through an intermediary, the legal person can be held liable, even if the intermediary does not know or is not aware of the existence of the bribe (i.e., intermediaries can be used as a tool), which also ensures maximum accountability.

- ✓ Maximum accountability is also ensured by the fact that what is "given", "promised" or "offered" could be sums of money, any articles of monetary value, or other benefits or profit. In cases of domestic bribery in Colombia, this is understood broadly to include: recommendations, sexual favors, promotions or donations to causes in which the public servant has some interest, as well as "other benefits or profit". This broad definition is likely to apply to transnational bribery as well.

Disadvantages of the above conditions for ensuring that legal person in practice cannot avoid liability for foreign bribery in Colombia are as follows:

- ✓ An implicit condition is that the prohibited act is committed with the intention to gain something from the foreign public official. Such an "intention" is hard to demonstrate. In practice, in cases of domestic bribery (which has the same elements as transnational bribery), it is demonstrated through indirect evidence, patterns of experience, among others.

- ✓ In practice, it is hard to demonstrate that an act of "giving" occurred, especially when there are no bank transfer records and when nothing tangible was actually given. In cases of a "promise" or "offer", it might even be harder for the prosecution to provide evidence. This can lead to the legal person avoiding liability for foreign bribery. Prosecuted cases have shown that most of the court decisions which end with a sanction imposed on a natural person (for the crime of domestic bribery under article 407 of the Penal Code) are those which involved acts of "giving" and where bank transfers were made.

- ✓ It is not completely clear what the term "business or international transaction" as stated in the law means and whether, under commercial law, this could be interpreted in a manner that could reduce scenarios of liability.

- ✓ Paragraph 3 of Article 2 states that when the behavior was committed by an associate with no control, the legal person will not be held liable. Even though this aims to exclude conduct committed in multiple shareholders' companies, due to a lack of clarity the exclusion could extend also to other situations leading the legal person to avoid liability for foreign bribery.

7. **Intermediaries**. As described in Section B.6 of the draft report, the 2009 Recommendation states that LPs cannot avoid liability for foreign bribery "by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf". How can countries best ensure that legal persons cannot avoid liability when intermediaries bribe foreign public officials – whether those intermediaries are related entities (e.g., subsidiaries or other entities in a corporate group) or other unrelated persons (e.g., agents or contractors)?

To ensure that legal persons cannot avoid liability when intermediaries bribe foreign public officials – whether those intermediaries are related entities or other unrelated persons – the relevant legal provisions should cover, as they do in Colombia, acts committed directly or through intermediaries.

Also, the provisions should specify that actions of intermediaries can trigger the liability of the legal person, as is the case in Colombia, including intermediaries that are related entities or other unrelated persons.

Finally, it is also possible to prevent such avoidance of liability by requiring legal persons to regulate or supervise intermediaries with which the legal person has contact, whether the intermediaries are related entities or other unrelated persons.

8. **Successor liability**.

a. In your view, how important is this issue for ensuring that legal persons are held liable for foreign bribery?

In our view, successor liability is important for ensuring that legal persons are held liable for foreign bribery. In fact, changing a company's identity and/or ownership has been identified as a common practice intended to avoid responsibility and prevent the application of sanctions and also to prevent reputational or other effects of prohibited behaviors. Changes in a company`s identity and/or

ownership should not affect the prosecution of the offence or warrant a limitation of successor liability.

b. What are the relevant considerations for framing laws on successor liability that enable the effective enforcement of foreign bribery laws? Do these considerations differ depending on whether the system is "criminal" or not?

The relevant considerations for framing laws on successor liability that enable the effective enforcement of foreign bribery laws are:

- ✓ This can be regulated by commercial laws which establish the conditions for new corporate identity and/or ownership and describe the effects of ongoing investigations or investigations based on events which occurred prior to the change of identity or ownership.
- ✓ The deterrent effects of such laws need to be considered. For example, it might be possible to prevent situations where legal persons avoid liability by changing their identity or ownership through the establishment of prior controls over changes in company`s identity and/or ownership.
- ✓ The liability system must include provisions referring to any laws on successor liability.

These considerations are similar in criminal or non-criminal systems, although criminal liability is sometimes understood as personal and only affecting the individual who commits the crime.

9. **Jurisdiction**. As documented in Section B.8 of the draft report, some countries appear to be able to hold an LP liable for foreign bribery that occurred **entirely** outside their territory **only** if they can assert jurisdiction over the natural person who committed the offence.

Under Article 4(2) of the Anti-Bribery Convention, "Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles".

To what extent does some Parties' lack of **direct** jurisdiction over LPs for offences committed entirely abroad present an obstacle to the effective enforcement of the foreign bribery offence? What can be done to expand jurisdiction in these legal systems in accordance with their legal principles?

Some States' lack of direct jurisdiction over LPs (or natural persons) for offences committed entirely abroad presents an obstacle to the effective enforcement of the foreign bribery offence because the prosecution and sanction of the offence will depend on the country were the offence occurs. If that country does not have an interest or lacks the regulations or capacity necessary to sanction the offence, the perpetrator will remain unpunished. This may be a problem even though the Convention requires each party to prosecute the offence (according to its internal law). The issue is particularly troublesome in the case of bribery of foreign officials, which by definition frequently occurs abroad and hence the extraterritorial reach of the law is fundamental. This conclusion is borne out by the UNCAC country reviews.

To expand its jurisdiction, the relevant State can apply principles of extra-territoriality, such as those provided in Colombia's Penal Code, in article 16, which expand the State's jurisdiction in the following cases:

- ✓ When the offender is a national of the State.
- ✓ When the victim is a national of the State.
- ✓ When the offence affects State means or defined means (it is possible to choose), i.e. to protect a public function any conduct against it can be prosecuted by the State even if the offence takes place entirely abroad.

10. **Compliance systems as means of precluding liability**. As Section B.4.3 of the draft report shows, several of the Parties have made an effective compliance system a defense to prosecution or, conversely, they have made the lack of an effective compliance system an element of the offence.

a. Based on your experiences, how has LP liability helped to sharpen incentives for legal persons to implement effective compliance systems?

In our experience, there remains a need to develop a culture of risk management in the context of which corruption is understood as a risk that should be considered by legal persons. In some cases, only once the risk materializes, the legal person understands the importance of implementing self-regulation systems. Nonetheless, in general, the possibility of consequences combined with the possibility of mitigating sanctions (where appropriate) could help sharpen incentives for legal persons to implement effective compliance systems. Moreover, as noted above, the possibility of criminal sanctions often lead legal persons to adopt or strengthen rigorous compliance programmes with a view to preventing the misconduct from occurring.

b. Law enforcement experience in this area is limited in many jurisdictions and the survey shows that the Parties' approaches to this issue are diverse. Based on your experience, does expressly including incentives for compliance systems in a country's foreign bribery offence (either as a defence or as an element of the offence) facilitate or impede effective enforcement?

As mentioned above, it is important to include incentives for establishing compliance systems. Unfortunately, there is in many countries a lack of culture of prevention in the private sector, especially when it comes to fighting corruption which is usually considered a duty of the State. For this reason, systems that promote self-regulation and train private sector officials on how to implement compliance programmes may be particularly effective. In addition, States could consider incorporating into existing provisions the possibility of mitigating sanctions when an effective and comprehensive compliance programme was implemented and the prohibited conduct was not related to a lack or failure of supervision but was committed despite a strict policy against corruption and cannot be attributable to the legal person.

c. In your view, how should prosecutors and courts assess whether a compliance system is adequately designed and implemented? Who should bear the burden of proof in showing that a compliance system is effective or ineffective?

This is an aspect that presents great difficulty in practice because, ultimately, such an assessment is subjective (depends on who is doing the assessment) and, as such, can lead to different interpretations.

The best way to avoid arbitrariness is to develop specific regulations which set the minimum requirements of a compliance programme, i.e. the leadership and support of executive staff; the development of a comprehensive risk assessment; implementation of a risk assessment and delineation of priorities; the incorporation of monitoring and evaluation systems; and so on.

Another option is to develop specific regulations or guidelines applicable to the evaluation itself. This would require prosecutors and courts to assess whether a compliance system is adequately designed and implemented to conduct their evaluation within set boundaries. For example, they would have to determine whether the compliance programme includes all elements required by law or other regulations, whether the compliance programme corresponds to a comprehensive risk assessment, whether the process applied corresponds to the requirements of the compliance programme, whether a warning was ignored, and so on.

The above regulation should define the burden of proof. A lot of helpful guidance and standards have been produced by the private sector and private sector regulators, which should be reflected in the relevant regulations.

11. **Sanctions and mitigating factors**. Section B.10 of the draft report catalogues various sanctions or consequences that can be imposed on a legal person for foreign bribery, including (but not limited to) fines, confiscation, disbarment, and judicial or corporate monitoring. As described in Section B.11 of the draft report, some countries may also reduce the sanctions imposed in order to give credit for certain mitigating circumstances, such as whether the legal person voluntarily reported the offence to authorities or cooperated with the investigation. They may also give credit if the company had implemented a corporate compliance programme either before the offence occurred or perhaps even after the offence (but before trial).

a. In your view, which sanctions for legal persons are the most effective? Why?

The most effective sanctions for legal persons are:

- ✓ "To do" sanctions. This is the most effective category of sanctions. It consists of specific obligations, i.e. to develop programmes, campaigns or trainings, or similar activities which compensate for the prohibited behavior.

This sanction is the most effective because: (i) it constitutes an economic sanction (and thus has the same advantages as a fine), (ii) it has a reputational effect because the activities, in a certain way, expose the legal person, (iii) it develops a culture of transparency and ethic by introducing campaigns or creating ideas that promote or support the norms violated by the legal person; and (iv) it helps to address the damage caused by the offence.

- ✓ Confiscation or similar measures that aim to seize or obtain the proceeds of the behavior. This is one of the most important measures and also reflects international standards that require States to pursue assets derived from corruption (article 31 of UNCAC). This measure is effective because it aims to eliminate the incentive that led to the corrupt act in the first place and to nullify any profit stemming from the act.

In Colombia confiscation is not considered a sanction. There are different possibilities to pursue assets derived from corruption: (i) through compensation of the victim (restoration of the affected rights); (ii) through seizure which is regulated by criminal procedure norms and, in Colombia, can only target natural persons who are found guilty and not legal persons (as they do not commit crimes according to Colombia`s legislation); and (iii) through forfeiture (*extinción de dominio*) which is regulated by law 1708 of 2014 and is the most effective penalty; considering there is no need for a criminal procedure against the natural person, it is not a sanction but an action that targets unlawful benefits rather than people.

- ✓ Reputational sanctions. In some cases sanctions which include a reputational effect, e.g. publication of the sanction, are more effective than other sanctions because legal persons have an interest in preserving their name and position, given that consumers take reputational considerations into account.

- ✓ Decisions over the Legal Person i.e. dissolution, closure, etc. The effectiveness of this measure depends on its severity (deterrent effect). The problem with these kinds of measures is the potential effects over uninvolved third parties (such as employees or consumers).

- ✓ Economic sanctions. This applies especially to for-profit legal entities. In this case, to be effective, the amount has to be set in light of the nature of the legal person. In other words, even if there are statutory limits, the sanction must be commensurate not only with the behaviour but also with the economic capacity of the legal person. Otherwise, powerful entities will have no problem to pay the fine and continue their corrupt behavior. Thus, economic sanctions can often be effectively coupled with other criminal or administrative penalties.

b. In your view, which sanctions for legal persons are the least effective? Why?

As mentioned above, the least effective sanctions are decisions over the legal person (e.g. dissolution, closure) because of the possible consequences that may affect uninvolved third parties, and economic sanctions as a stand-alone penalty when the subject has the economic capacity to assume the fine and there is no deterrent effect.

c. In your view, to what extent should the final sanction be affected by the mitigating factors discussed in the paper: (i) implementation of a compliance system; (ii) voluntary-disclosure; and (iii) cooperation with the investigation?

These factors have proven useful to (i) ascertain the truth (simplifies the prosecution) and possibly discover others who bear responsibility (see article 37 of UNCAC), (ii) expedite the decision and sanction, and (iii) encourage the private sector to share responsibility for fighting corruption with State authorities. At the same time, it is important to note that:

- ✓ When we talk about the implementation of a compliance system, the existence of such a system is not sufficient. If the compliance programme is comprehensive and considered effective, and the behavior occurred despite these facts, a possible consequence may be a limitation of sanctions. If a compliance programme was introduced but in practice remained only a document with no real effects, it should not mitigate the sanction.

- ✓ In the other cases (cooperation or voluntary disclosure), depending on how effective the disclosure was in helping to further the investigation and prosecution of the case or the recovery of assets (i.e., active cooperation in exposing other accomplices, collaborating in collecting evidence or recovering assets), and only after it proved to be truthful, these factors may have a mitigating effect on the sanction (article 37(2) of UNCAC).

d. In your view, which mitigating factors are the most effective for incentivising the prevention and detection of foreign bribery?

The most effective mitigating factors are:

- ✓ The adoption of compliance programmes. When this factor is taken to mitigate the sanction, it encourages the adoption by legal persons of self-regulation systems that both prevent corruption and foreign bribery and, at the same time, apply the Shared Responsibility principle. As noted in the draft report, such a measure *"casts legal persons as subjects of, and potentially actors in, the law enforcement process"* and *creates incentives that "encourage companies to prevent wrongdoing, to detect potential offences by policing themselves, their business partners as well as other third parties, and to resolve allegations of wrongdoing by cooperating with law enforcement authorities".*

- ✓ The mitigating effects of active collaboration and voluntary disclosure are also effective considering that the corrupt act usually occurs in secret and is difficult to discover (detect) and to prosecute.

12. **Settlements**. As described in Section B.12, for the purposes of this consultation, the term "settlements" refers to all agreements to resolve or forestall a foreign bribery case involving a legal person. Twenty-five Parties currently permit the resolution of foreign bribery cases through settlements either with or without a conviction.

a. What are the advantages and disadvantages of settlements that result in a conviction?

b. What are the advantages and disadvantages of settlements that do not result in a conviction?

c. What arrangements are needed to ensure that any settlement reached imposes sanctions that are "effective, proportionate and dissuasive" in accordance with Article 3 of the Convention?

Settlements can be beneficial for both the alleged offender and the investigating or prosecuting authorities. In the case of the authorities, settlements alleviate the burden of fully investigating all aspects of the case and reduce the risk of failing to successfully prove all elements of the alleged offence, including the liability of the alleged offenders; they may also reveal information that can be used for prosecuting others and recovering assets. Where settlements provide for the possibility of imposing large punitive fines, they may also alleviate the prosecution's burden of quantifying the benefits drawn from a bribery scheme or the damages caused by it. From the perspective of the defense, settlements can mitigate sanctions, reduce reputational damages (as an opportunity is provided to the offender to "come clean" by admitting responsibility and actively contributing to the full disclosure of the offences), and expedite the proceedings.

To prevent reinforcing a sense of impunity perceived to be associated with settlements, it may be beneficial if settlements are offered under very clear conditions, including full cooperation in the investigation by the authorities, admission of guilt and responsibility, and a clear commitment to avoid future offending conduct (in particular for companies, by putting in place specific anti-corruption measures and the agreement to a respective reporting regime on the implementation of such measures). Where settlements are reached, it may also still be possible to impose a mitigated punishment.

**Annex A. Jennifer Arlen's Appendix, List of References and Footnotes**

***Appendix -- Overview of US Federal Enforcement for Corporate Crime***

(drawn from Arlen (2015) and Arlen and Kahan (2017))

In the U.S., corporations can be held strictly criminally liable[8] for crimes committed by employees in the scope of employment through the doctrine of *respondeat superior*.[9] The scope of this liability is unusually broad. Corporations can be held criminally liable for crimes committed by low-level employees,[10] contrary to corporate directives,[11] or notwithstanding the firm's adoption of an effective compliance program.[12] Convicted corporations can be subject to substantial monetary sanctions, including fines, restitution, and remediation, as well as non-monetary sanctions (such as corporate probation). They also may be subject to civil penalties and administrative sanctions.[13] Administrative sanctions can include delicensing and debarment from contracting with federal agencies (such as the Defence Department, Health and Human Services, or the Securities and Exchange Commission), which can have ruinous consequences for the firm.[14]

Yet, in practice, federal prosecutors do not hold publicly-traded corporations strictly liable for their employees' crimes.[15] Instead, the Department of Justice instructs prosecutors to consider alternatives to criminal conviction based on a variety of factors, including (and especially) whether the firm maintained an effective compliance program, self-reported, and cooperated in the investigation of the wrongdoing.[16] Firms that fully self-report the wrong prior to threat of detection and cooperate are rarely prosecuted.[17] Firms that avoid prosecution are generally subject to pre-trial diversion agreements (PDAs).[18] PDAs can take one of two forms: deferred prosecution agreement (DPA) and non-prosecution agreement (NPA). Under a DPA, the prosecutor files charges but agrees not to seek conviction. Under a NPA, the prosecutor agrees not to file formal charges against the firm.[19] Both types of PDAs enable prosecutors to sanction the firm without triggering the collateral consequences of a formal conviction, such as debarment or delicensing.[20] Prosecutors' ability to use PDAs to both sanction firms for misconduct and insulate them from mandatory collateral penalties triggered by conviction enables them to reward firms that helped deter misconduct through effective compliance, self-reporting and/or full cooperation while still sanctioning the underlying crime. Prosecutors also respond to valued corporate policing by reducing the sanctions imposed through PDAs.[21]

Thus, in practice, publicly-held corporations are not held strictly liable for their employees' crimes. Instead, publicly-held firms are subject to something that approaches "duty-based" corporate criminal liability.[22] Duty-based liability imposes general upfront duties on all firms to adopt an effective compliance program, self-report detected wrongdoing, and fully cooperate with the government's investigation. Should a substantive violation occur, corporations that breach these duties face severe sanctions —including criminal conviction with substantial fines— whereas firms that satisfy these duties face no or lower sanctions.

Unfortunately, in the US liability steps towards a duty-based system but falls short. The reason is that federal enforcement officials are not obviously empowered to impose clear duties to adopt an effective compliance program, self-report and cooperate—they are simply allowed to take these actions into account in determining how to proceed. As a result, they have not clearly stated the firms are subject to these duties. Nor have they clearly stated the benefits firms get if they adhere to these duties—or, in turn, the cost to a firm of failing to self-report (while still cooperating) relative to self-reporting and cooperating. Instead, prosecutors are told to exercise discretion on whether to prosecute using a 10-factor test in which self-reporting, compliance and cooperation are simply three factors to

consider. Some divisions (such as the Fraud Section) have policies placing greater weight on self-reporting, but the overall framework still does not provide sufficient predictability or benefit for self-reporting to ensure that firms benefit if they self-report wrongdoing that otherwise would likely escape detection.

### *B. PDAs and Corporate Reform Mandates*

Today, firms with detected wrongdoing often satisfy some of their policing duties—for example by fully cooperating with prosecutors. As a result, PDAs have become federal prosecutors' primary tool for imposing sanctions on publicly held firms for offenses other than antitrust and environmental crimes, since 2003.[23]

In a conventional PDA, the firm acknowledges that its employees committed the acts that constitute the crime, agrees to waive its right to a speedy trial, and agrees to fully cooperate with the prosecutors' investigation. In return for the firm's compliance with the PDA, prosecutors agree to not seek the firm's conviction. PDAs further provide that if a firm fails to comply with the terms of the PDA, the prosecutor can proceed to convict the firm using its statement of facts admitting the crime against it. A firm that fails to comply with a PDA thus faces nearly guaranteed criminal conviction even when it does not commit any subsequent crime.[24]

The majority of PDAs require firms to pay fines and other monetary penalties. Monetary penalties imposed through PDAs can be substantial. PDAs entered into by the U.S. Attorney's Office or the DOJ's Criminal Division in 2010-2014 imposed mean fines of approximately $32 million. Total sanctions imposed contemporaneously with the PDA during this period averaged over $85 million; total sanctions imposed on the entire corporate group at the time of the PDA averaged over $167 million.[25]

In addition, most PDAs over the last ten years imposed at least one mandate, as shown in Table One.[26] PDA mandates usually govern the design and oversight of the firm's compliance program. Many PDA compliance mandates require firms to adopt a compliance program with specific features the firm otherwise would not be required to employ.[27] For example, the PDA may mandate the type of compliance information to be collected, the type and frequency of employee training, or the additional due diligence procedures or specific policies governing payments and disbursements. PDAs can also require firms to materially increase compliance expenditures.[28] Other compliance mandates simply require the firm to adopt an effective compliance program as defined by the Organizational Sentencing Guidelines.[29] Yet even these mandates can impose new duties on the firm because, but for the PDA, the firm generally could not be sanctioned for its failure to adopt such a program unless a substantive violation occurs.[30] We refer to mandates governing compliance and other efforts by the firm to detect violations of the law as "policing mandates."

Further, PDAs often include provisions governing internal and external oversight of the firm's efforts to comply with the law. For example, a PDA may require the appointment of a Chief Compliance Officer with authority to report directly to the board; the addition of specific independent directors;[31] the establishment of new board[32] or senior management committees;[33] or the separation of the positions of CEO and Chairman of the Board. Most PDAs with mandates also require firms to regularly report to prosecutors and other federal authorities on the firm's compliance activities. A substantial number of PDAs go even further and require firms to hire an outside monitor with authority to audit the firm to ensure its compliance with the duties imposed by the agreement and, in some cases, seek evidence of additional wrongdoing. We refer to provisions governing the internal or external oversight of compliance as "meta-policing duties."

To understand the breadth of the mandates that can be imposed, consider the PDA with Bristol-Myers Squibb (BMS) for conspiracy to commit securities fraud. Under the agreement, BMS agreed to adopt a compliance program with features specified in the PDA; to institute a training program covering specified topics; to separate the positions of Chairman of the Board and CEO; to have the Chairman participate in preparatory meetings held by senior management prior to BMS's quarterly conference calls with analysts; to have the Chairman, CEO and General Counsel monitor these calls; to appoint an additional outside director to the board, approved by the U.S. Attorney's office; to hire and pay for a prosecutor-approved corporate monitor with authority to oversee compliance with both the agreement and federal law and to report to management and the prosecutor's office; and, finally, to have the CEO and CFO make specific reports to the Chairman of the Board, the Chief Compliance Officer, the monitor, and the SEC relating to sales, earnings, budgeting and projections, and other matters.[34]

### *C. Prosecutorial Discretion to Impose Mandates*

As explained in this white paper, optimal deterrence supports federal authorities' use of both D/NPAs and mandates in appropriate situations (see Arlen and Kahan 2017). Yet mandates are only justified if imposed through a process that ensures that government power is exercised consistent with the rule of law.

Several features of the process employed by the US to impose D/NPA mandates, operating in concert, raise the question of whether prosecutorial discretion to create and impose mandates is inconsistent with the rule of law, as discussed in detail in Arlen (2015).[35]

First, mandates are created and imposed by individual prosecutors' offices rather than by legislatures or administrative agencies that are formally empowered with authority to create new duties. Second, unlike duties adopt by legislators or through formal rule-making, which tend to be imposed on all firms in a particular category (e.g., publicly held firms); prosecutors can use D/NPAs to impose firm-specific mandates that differ from the mandates imposed on other similarly situated firms.

Finally, unlike formal legislation or agency rule-making which require consent of multiple decision-makers, individual U.S. Attorneys regularly enjoy considerable discretion to create and impose the mandates they deem appropriate, unimpeded by opposing views of others. Senior DOJ officials have provided little if any effective guidance to prosecutors regarding what mandates to impose and when (Garrett 2007; Arlen and Kahan 2016; Cunningham 2014).[36] In addition, prosecutors who create mandates are subject to little, if any, genuine judicial oversight over mandates in a wide range of cases. Indeed, the DOJ has resisted isolated efforts by some judges to exercise authority over DPAs (see Arlen 2015). Prosecutors are thus, in effect, left with enormous discretion to create and impose the mandates they consider appropriate, often without any requirement that they defend their decisions to others empowered to determine whether their choices do indeed serve public aims.[37]

***Selected Publications on Corporate Liability***

- Cindy Alexander and Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed.) (forthcoming 2017).

- Jennifer Arlen and Marcel Kahan, *Corporate Governance Regulation Through Non-Prosecution*, 84 UNIVERSITY OF CHICAGO LAW REVIEW (forthcoming 2017).

- Jennifer Arlen, Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Pretrial Diversion Agreements, 8 JOURNAL OF LEGAL ANALYSIS 191 (2016)(Symposium Issue).

- Jennifer Arlen, *Economic Analysis of Corporate Criminal Liability: Theory and Evidence*, *in* RESEARCH HANDBOOK ON CRIMINAL LAW (Keith Hylton & Alon Harel, ed., 2012).

- Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 UNIVERSITY OF MIAMI LAW REVIEW 321 (2012b) (Symposium Issue).

- Cindy Alexander, Jennifer Arlen, and Mark Cohen, *The Effect of Federal Sentencing Guidelines on Penalties for Public Corporations*, 12 Federal Sentencing Reporter 20 (1999).

- Cindy Alexander, Jennifer Arlen, and Mark Cohen, Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms, 42 JOURNAL OF LAW AND ECONOMICS 393 (1999).

- Jennifer Arlen and Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 NEW YORK UNIVERSITY LAW REVIEW 687 (1997) (with Reinier Kraakman).

- Jennifer Arlen, The Potentially Perverse Effects of Corporate Criminal Liability, 23 JOURNAL OF LEGAL STUDIES 833 (1994).

- Jennifer Arlen and William Carney, Vicarious Liability for Fraud on Securities Markets: Theory and Evidence, 1992 ILLINOIS LAW REVIEW 691.

## Notes

[1] Arlen (2012); Arlen & Kraakman (1997); see also Sally Quillian Yates, Memorandum on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) http://www.justice.gov/dag/file/769036/download (discussing the importance of individual liability for corporate crime). By contrast, corporate liability could be used to optimally deter crime by owner-managers of closely held firms provided the firm has sufficient assets to pay the optimal fine. Arlen, supra note 15 (discussing corporate liability for closely held firms).

[2] This discussion focuses on the type of corporate crimes that cause direct social harm, such as securities fraud and bribery, which generally require an affirmative act of individuals who know they are acting unlawfully. This discussion does not apply to criminal liability imposed for breach of corporations' oversight duties. Responsibility for compliance with these duties can be diffuse and there can be circumstances where the firm is liable (or subject to a PDA) even though no individual in the firm made an affirmative decision to violate the law for personal benefit.

[3] Many of the gains employees seek—such as promotions, bonuses, and avoiding termination—are one-way effects: employees can get a promotion or bonus by committing a crime to benefit the firm which the employee may retain even if the wrong is detected either because the wrong is not attributed to the employee or the firm decides not to sanction or fire the employee. *See* Arlen, *supra* note 15 (discussing why the government generally cannot rely on corporate liability alone to optimally deter crime by employees of publicly-held firms).

[4] See Arlen (1994); Jonathan Macey, Agency Theory and the Criminal Liability of Corporations, 71 B.U. L. Rev. 315 (Symposium 1991); Arlen (2012, at 194 n. 39) (discussing why corporate crime can be treated as the product of self-interested rational decision-making even if many street crimes are not); see also Cindy R. Alexander & Mark A. Cohen, *Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost*, 5 J. CORP. FIN. 1 (1999) (evidence that the incidence of corporate crime by publicly-held firms is higher the lower the stock ownership of directors and senior officers is consistent with agency cost hypothesis); *see also* Jennifer Arlen & William Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691 (securities fraud is an agency cost arising in the shadow of a managerial last period).

[5] Arlen (2012)

[6] Ibid. page 167.

[7] Ibid. page 145.

[8] Corporations are "strictly" criminally liable in the sense that in the U.S. firms are liable for all crimes committed by employees in the scope of employment even if the firm did all it reasonably could to prevent the crime and no member of senior management or the board participated in or condoned the crime.

[9] Individuals also are criminally liable for crimes committed with the requisite *mens rea* even if they acted on behalf of the firm and were following instructions.

[10] *E.g.*, United States v. Dye Constr. Co., 510 F.2d 78 (10th Cir. 1975); Tex.-Okla. Express, Inc. v. United States, 429 F.2d 100 (10th Cir. 1975); Riss & Co. v. United States, 262 F.2d 245 (8th Cir. 1958); United States v. George F. Fish, Inc., 154 F.2d 798 (2d Cir. 1946).

[11] *E.g.*, United States v. Twentieth Century Fox Film Corp., 882 F.2d 656 (2d Cir. 1989); United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied* 409 U.S. 1125 (1973); United States v. Ionia Mgmt. S.A., 555 F.3d 303 (2d Cir. 2009).

[12] Under the Organizational Sentencing Guidelines, a corporation that had an effective compliance program, self-reported and cooperated is eligible for a reduced fine. United State Sentencing Commission, Chapter 8, Sentencing of Organizations, §8C2.5 (hereinafter Organizational Sentencing Guidelines), Yet the mitigation granted to larger firms is too low to incentivize firms to undertake effective compliance or self-reporting. Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. MIAMI L. REV. 321 (2012) (symposium issue). Moreover, convicted firms remain subject to the collateral penalties triggered by indictment or conviction, such as debarment, that can discourage corporate policing.

[13] Non-fine sanctions plus civil penalties often dwarf the criminal fine. *See* Cindy Alexander, Jennifer Arlen, & Mark Cohen, *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms*, 42 J. L. & ECON. 393, 410 (1999) (providing empirical evidence).

[14] *See* Miriam H. Baer, *Governing Corporate Governance*, 50 B.C. L. REV. 949 (2009).

[15] The USAM guidelines apply to all firms. Yet prosecutors tend to impose PDAs on firms where control is separated from day to day management, such as publicly held firms. Owner-managed firms tend not to receive PDAs because owner-managers often are implicated in their firm's criminal activity; these firms thus are unlikely to self-report and cooperate in return for leniency. See Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, 152-53, *in* RESEARCH HANDBOOK ON CRIMINAL LAW (Keith Hylton & Alon Harel, eds.) (2012) (finding that substantially more publicly-traded firms obtain PDAs than are convicted of crime governed by the Organizational Sentencing Guidelines). Indeed, there is evidence that prosecutors are particularly inclined to use PDAs to sanction parent corporations. See Alexander & Cohen, supra note 1, at 580 (finding that, from 2007-11, 58% of criminal resolutions with parent corporations were done through PDAs; by contrast 70% of criminal resolutions with subsidiaries involved guilty pleas).

[16] Then-Deputy Attorney General Eric Holder issued the first guidelines to federal prosecutors in 1999. The "Holder memo" detailed factors prosecutors should consider in deciding whether to indict a firm. Memorandum from Eric Holder, Deputy Attorney General, U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys (June 16, 1999) [hereinafter Holder Memo]. The current guidelines, which build on the Holder memo, are contained in Principles of Federal Prosecution of Business Organizations, § 9-28.900 of the United States Attorneys Manual (USAM).

[17] Firms also can avoid conviction under other circumstances, including when the firm would be subject to ruinous collateral penalties and agrees to fully cooperate. See United States Attorney's Manual Principles of Federal Prosecution of Business Organizations, § 9-28.900; see also General Accounting Office, *Preliminary Observations on the Department of Justice's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements*, GAO-09-636T (June 25, 2009).

[18] In some cases, the DOJ will formally decline to pursue a firm instead of imposing a PDA. The DOJ does not release data on most declinations, and thus it is hard to determine how often this happens. Declination appears to be more likely when the wrongdoing is limited and the firm self-reported and fully cooperated.

[19] NPAs are expressed in the form of a letter, often not filed in court. Garrett, supra note 3, at 928.

[20] See USAM § 9-28.900. It might appear that PDAs also enable the firm to avoid the reputational consequences of a criminal conviction. But under the DOJ's current policy, it is unlikely that the decision of most prosecutors to impose a PDA instead of a guilty plea has a material effect on the reputational sanction, holding constant the nature of the crime and other publicly disclosed information about the firm and the crime. Cindy R. Alexander and Jennifer Arlen Does Conviction Matter?: The Reputational Effects of Corporate Crime, RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed. forthcoming).

[21] See Organizational Sentencing Guidelines, supra note (mitigation provisions); FCPA Pilot Program, supra note 6 (offering substantial fine mitigation to firms that self-report, fully cooperate and/or had an effective compliance program at the time of the crime).

[22] To be precise, corporate liability governing publicly held firms resembles what one of us has called "composite liability." Under composite liability, firms are subject to both "duty-based" criminal liability and a

residual layer of strict liability. Arlen and Kraakman (1997, defining composite liability and showing that composite liability with optimal policing duties and monetary sanctions can be used to optimally deter corporate crime). For a discussion of when and why firms that satisfy all their policing duties should still bear monetary sanctions if a wrong occurs, see Arlen and Kraakman (1997); Arlen (2012).

[23] Alexander and Cohen, supra note 1, at 571; Arlen, supra note 15 (comparing PDAs with federal convictions of publicly held firms). Pre-trial diversion agreements were used prior to 2003, most prominently in the 1994 PDA with Prudential. Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, 237TH ANN. INST. SEC. REG. 815, 818 (PLI Corp. Law & Practice, Course Handbook Series No. B-1517, 2005). Nevertheless, the 2003 Thompson memo was the first official endorsement of these agreements, *see* Memorandum from Larry D. Thompson, Deputy Attorney General, U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys (Jan. 20, 2003) [hereinafter Thompson memo], and dramatically increased their use. In the entire period prior to 2002, prosecutors negotiated only 18 PDAs. *See* Garrett, *supra* note 3. By contrast, we find that they entered into at least 267 PDAs from 2004 through 2014 based on our dataset (we exclude agreements involving antitrust, tax, and environmental). See also Alexander and Cohen, supra note 1 (finding prosecutors entered into 155 PDAs against publicly held firms for all crimes from 2003-2011, and only 8 PDAs for antitrust or environmental). PDAs issued after the Thompson memo are more likely to impose firm-specific policing duties and monitors. *See* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 323 (2007); Spivack & Raman, 166–67; *see also* Baer, supra note 14, at 969–70.

[24] For example, in 2008 the DOJ concluded that Aibel Group "failed to meet its obligations" under its PDA and revoked its PDA with the firm. The firm pleaded guilty of its original offense and was required to pay a $4.2 million fine and serve two years on organization probation. Press Release, Department of Justice, Aibel Group Ltd. Pleads Guilty to Foreign Bribery and Agrees to Pay $4.2 Million in Criminal Fines (Nov. 21, 2008) http://www.justice.gov/opa/pr/2008/November/08-crm-1041.html; Christopher Matthews, Aruna Viswanatha, and Devlin Barrett, US Moves to Tear Up Past UBS Settlement, Wall Street Journal C1 (May 15, 2015) (discussing DOJ's move to convict UBS for 2012 Libor fixing, notwithstanding a 2012 PDA, following discovery of additional wrongs that occurred after that agreement). Courts have held that prosecutors have discretion to determine whether a firm's conduct constitutes a sufficient breach of PDA mandates to justify a decision to indict. E.g., See *Stolt-Nielsen v. U.S.*, 442 F.3d 177 (3rd Cir. 2006) (federal courts do not have authority to enjoin a prosecutor from indicting a firm that the prosecutor concludes violated a PDA); *U.S. v. Goldfarb*, No. C 11–00099 WHA, 2012 WL 3860756 (N.D. Cal. Sept. 5, 2012) (denying motion to dismiss indictment because of claimed substantial performance with DPA).

[25] Our data on sanctions and mandates imposed through PDAs is based on an analysis of all PDAs imposed by the U.S. Attorney's Offices or the Criminal Division in cases governed by the Principles of Federal Prosecution of Business Organizations and under the Organizational Sentencing Guidelines. Thus we exclude antitrust and environmental which are under the authority of the Antitrust and Environmental Divisions, respectively, and have their own enforcement policies and sentencing guidelines. Cf. Alexander & Cohen, supra note 1 (finding few PDAs for antitrust or environmental violations).

[26] Our findings are consistent with the results of Alexander and Cohen (2015), Table 13.

[27] PDA-imposed compliance program mandates regularly require firms to adopt compliance programs that differ materially from the programs firms generally adopt voluntarily. For example, whereas voluntary programs often integrate compliance efforts into the corporate divisions most directly affected by compliance efforts, the mandated programs generally require the adoption of a compliance office separate from the core workings of the firm. Finder et al., *supra* note 3. Moreover, voluntary programs tend to focus on addressing ethics issues that can lead to crime, and thus employ ethics officers, and not lawyers. By contrast, mandated compliance programs tend to take an enforcement approach, and generally employ lawyers as compliance officers. Id.

[28] PDA compliance provisions often dictate investment levels through provisions stating that the firm has increased its compliance to a particular level (usually following negotiations with prosecutors) and agrees to maintain at least this investment in compliance going forward. See, e.g., Alpha Natural Resources, Inc. NPA and the HSBC DPA.

[29] See Organizational Sentencing Guidelines, §8B2.1 (listing criteria to be employed to determine whether the firm has an effective compliance program.

[30] Moreover, PDAs also can affect the measures the firm employs to satisfy §8B2.1 of the Organizational Sentencing Guidelines. Absent a PDA, directors can determine how best to comply with the Organizational Guidelines' definition of effective compliance. By contrast, PDA mandates, as a practical matter, shift power to a specific prosecutor to determine whether the firm's actions satisfy the standard set forth in the Organizational Guidelines, since a prosecutor who requires the firm to satisfy §8B2.1 is free to indict the firm if the prosecutor determines that it breached the PDA. The threat of prosecutorial action is significant since if the prosecutor does proceed she will be armed with an admissible statement of guilt made by the firm. Prosecutors have particularly strong leverage over firms with NPAs because courts do not review a prosecutor's decision to indict a firm deemed to be in breach of an NPA. See supra note 24 (discussing prosecutorial authority to determine whether a firm's actions constitute a violation of the PDA that warrants sanction).

[31] For example, CA Technologies, Inc. was required to appoint three new independent directors to the board, including former SEC Commissioner Laura Unger.

[32] For example, Monsanto's DPA required that the board create a new committee to oversee the appointment of all foreign agents and to evaluate all joint ventures; General Reinsurance Corporation's PDA required a new Complex Transaction Committee with power to reject any proposed transactions.

[33] Merrill Lynch & Co., Inc. was required to create a special structured products committee of senior management to review all complex financial transactions with a third party; company X was required to create a new "Disclosure Committee" consisting of c-suite executives and other senior management.

[34] Bristol-Myers Squibb DPA, https://www.law.virginia.edu/pdf/faculty/garrett/bristol-meyers.pdf.

[35] Much of the discussion in this article on mandates in D/NPAs is similarly applicable to corporate plea agreements that impose firm-specific crime-contingent duties. There is one distinction: mandates included in pleas require judicial approval; judges can be expected to review them under the Organizational Sentencing Guidelines. Nevertheless, even with this review, prosecutors enjoy enormous discretion to design and impose mandates with little effective constraint, suggesting that most of this discussion applies to these mandates as well.

[36] The DOJ has limited some mandates, such as extraordinary restitution.

[37] In the federal system, prosecutorial discretion depends on the type of crime. Individual U.S. Attorneys' Offices have considerable discretion over most of the enforcement actions they bring. Nevertheless some cases, such as those involving fraud, foreign bribery, antitrust, tax, or environmental, either must be coordinated with, or delegated to, a specialized division of the DOJ, such as the Antitrust Division.