



Public consultation on liability of legal persons: Issues for discussion

Deadline for response: 28 October 2016

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

Context

The liability of legal persons is a key feature of the emerging legal infrastructure for the global economy. Without it, governments face a losing battle in the fight against foreign bribery and other complex economic crimes.

For the purposes of this consultation, “legal persons” refers to organisations (e.g. corporations) that have legal rights and are subject to legal obligations. Among these, the Anti-Bribery Convention requires the Parties “to establish the liability of legal persons for foreign bribery” and to apply “effective, proportionate and dissuasive” penalties to legal persons for foreign bribery. In this way, the Anti-Bribery Convention helps to ensure that business organisations or other entities—not just individuals—can be held responsible for foreign bribery.

As part of its work to promote the implementation of the Anti-Bribery Convention, the Working Group on Bribery (WGB) is conducting a public consultation in order to seek insights on the liability of legal persons.

Information about the public consultation can be found online at www.oecd.org/corruption/public-consultation-foreign-bribery-liability-legal-persons.htm.

Invitation to contribute

Experts involved in the fields of anti-corruption, law and criminal justice, corporate governance, civil society engagement, as well as interested members of the public at large, are invited to contribute. The WGB welcomes participants in this consultation to share their experiences with the implementation of existing systems for the liability of legal persons as well as their perspectives on how they could be better implemented or improved.

This document lists proposed issues for discussion. Consultation partners are invited to address any or all of these issues.

Comments should be sent to kathryn.gordon@oecd.org and brooks.hickman@oecd.org by 28 October 2016.

What happens to the contributions?

Comments received will be posted on the consultation web page and will be made available at a Roundtable to be held at the OECD on the occasion of International Anti-Corruption Day on 9 December 2016. They will also be used by the WGB as inputs to its process of continually improving its monitoring of Parties' foreign bribery laws.

Comments and questions

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This document does not necessarily reflect the official views of OECD member countries or Parties to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

PUBLIC CONSULTATION:

BACKGROUND AND PROPOSED ISSUES FOR DISCUSSION

About the public consultation

Purpose. The Working Group on Bribery (WGB) has launched this consultation in order to seek insights on the liability of legal persons (LP liability) from those involved in the fields of anti-corruption, law and criminal justice, corporate governance, civil society engagement, as well as interested members of the public at large. The WGB invites participants in this consultation to share their experiences with the implementation of existing systems for the liability of legal persons as well as their perspectives on how such systems could be better implemented or improved.

The background paper for the consultation. The draft paper entitled *Liability of Legal Persons for Foreign Bribery: A Stocktaking* presents the results of an on-going “mapping” exercise, which catalogues the features of LP liability systems found in the 41 Parties to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“Anti-Bribery Convention”). It also contains a chronology of how such legal systems have evolved in the 41 Parties.

Please note the following about the use of this paper in the context of this consultation:

- The paper is a working draft still in progress and is not for citation.
- It is based primarily on information provided in roughly 200 monitoring reports that the WGB, the inter-governmental body charged with monitoring the Parties’ compliance with their obligations under the Anti-Bribery Convention, has prepared over three phases of monitoring. The WGB’s monitoring activity is based on the Anti-Bribery Convention and on the 2009 Recommendation on Further Combating Bribery of Foreign Public Officials.
- In some instances, the paper contains additional information that individual Parties have provided to supplement the WGB’s findings in areas not yet covered in the WGB’s evaluations for that country or to report new developments that the WGB has not yet had the opportunity to review. This additional information is identified by grey highlighting.
- While the paper primarily reflects the WGB work, it is not binding on the WGB and its contents do not prejudice the WGB’s on-going or future evaluations of the WGB members’ compliance with the Anti-Bribery Convention.
- Consultation partners are invited to comment on the paper and on the WGB work reflected there. The aim of the consultation is not to change past WGB results, but to provide additional insight to the WGB on the LP liability issues that it has examined.

Issues for discussion. A list of issues for discussion is proposed below. Consultation partners are invited to address any or all of these issues.

Publication of consultation partners’ submissions. Unless otherwise requested at the time of submission, comments submitted to the OECD in response to this invitation may be posted on the Working Group on Bribery web page and provided to the Parties to the Anti-Bribery Convention. In this way, the submissions can help inform the thinking of the WGB and other policy-makers in government, the OECD and other international organisations.

Disclaimer. This consultation document and the associated stocktaking paper are discussion drafts released solely for the purpose of inviting comments from interested parties. They do not necessarily reflect the views of the OECD, the WGB, or their member countries. These papers are not binding on the WGB and their contents do not prejudice the WGB's on-going or future evaluations of the WGB members' compliance with the Anti-Bribery Convention.

Issues for discussion

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

4. **Types of entities covered.** According to Section B.3 in the draft report, at least 15 Parties to the Anti-Bribery Convention expressly include at least some legal entities that lack legal personality in their LP liability frameworks.
 - 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?
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?
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.
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)?

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

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?
 - b. In your view, which sanctions for legal persons are the least effective? Why?
 - 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?
 - d. In your view, which mitigating factors are the most effective for incentivising the prevention and detection of foreign bribery?
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?