BIAC THE VOICE OF BUSINESS AT THE OECD

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Public consultation on foreign bribery and the liability of legal persons

BIAC RESPONSE

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

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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 mean the prevention of bribery from occurring, with a secondary goal of increasing public confidence in the probity of both business and officials[1].

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.

[1] 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)

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.

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 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.

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.

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