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Strengthening capacities to fight and prevent corruption in Azerbaijan

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LIABILITY OF THE LEGAL PERSON (ENTITY)

INTRODUCTION

Anti-corruption investigators and prosecutors should note that international standards require states to create liability of legal persons for bribery and impose adequate criminal, civil or administrative sanctions against such entities. The principal instruments are set out in the table below:

LIABILITY OF LEGAL PERSON		
UNCAC	**OECD Anti-Bribery Convention**	**CoE Criminal Law Convention on Corruption**
Article 26: 1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention. 2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative. 3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences. 4. Each State Party shall, in particular, ensure that legal	Article 2: Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official	Article 1(d) – Use of terms: "legal person" shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations. Article 18 – Corporate liability 1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually

LIABILITY OF LEGAL PERSON		
UNCAC	**OECD Anti-Bribery Convention**	**CoE Criminal Law Convention on Corruption**
persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.		or as part of an organ of the legal person, who has a leading position within the legal person, based on: – a power of representation of the legal person; or – an authority to take decisions on behalf of the legal person; or – an authority to exercise control within the legal person; as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences. 2. Apart from the cases already provided for in paragraph 1, each Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority. 3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offences mentioned in paragraph 1.

The issue of liability of the legal person is a crucial, and yet sometimes complex one. In all jurisdictions, the criminal law evolved as the response of society and the state to the actions of individuals. In the modern world, and in relation to corruption cases, however, it is very often the legal person, the corporation, which drives, and benefits from, corrupt activity. No anti-corruption strategy will succeed unless the enforcement component makes provision for the liability of legal persons.

Article 26 of UNCAC, as one would expect from an international instrument in this regard, does not seek to get states parties to change the whole basis of their domestic laws, but rather requires them to establish liability for corruption on the basis of a functional equivalence with the approach in existing domestic law. However, that principle of functional equivalence only applies where a state already has criminal, civil or administrative liability for legal person. Interestingly some states (e.g. Japan, Republic of Korea) recognise liability of a legal person in respect of foreign bribery but cannot be held liable for domestic bribery.

For those states that do not recognise any form of liability of legal person, or where the laws provide for legal liability, but the attribution test remains unclear, UNCAC requires one of the three forms of liability to be introduced:

i. Promising, offering or giving a bribe by a company.

ii. Directing, or authorising by parent company of a bribe to be paid by a domestic subsidiary.

iii. Directing, or authorising by a company that a bribe be paid by a foreign subsidiary. (this will, in turn, require consideration of the responsibility, if any, of a parent company for the activities of a subsidiary and the relevant test to be deployed.)

CRIMINAL LIABILITY

The approach to criminalisation will depend on two main factors:

i. The type of legal system involved (common law jurisdictions displaying a difference approach to those countries with a Roman law or Napoleonic code background);

ii. The basis of jurisdiction being claimed in relation to corruption offences themselves.

It is important for practitioners to have a basic understanding of the ways in which states have addressed criminal liability, as corruption and bribery cases will invariably involve mutual legal assistance requests (general and asset recovery), extradition, and concurrent jurisdiction.

Common law approach to liability of legal person

In considering the common law model, focus will be placed on the UK and Canada.

UK

The UK Bribery Act 2010 (which was passed to bring the UK corruption offences in line with international standards and in order to comply with the OECD Anti-Bribery Convention) does not expressly mention liability for legal persons. The word “person” in legislation is construed (by the Interpretation Act 1978) as including not only natural persons but also “a body of persons corporate or unincorporated”.

An unincorporated body, such as a trust, remains the same and is capable of committing a criminal offence in the UK, but it is particularly difficult to prosecute such an entity. In essence, it must be proved that each person who is party to, or a member of, the unincorporated body is guilty of the criminal offence.

Of more importance to the present discussion is the position with corporations. The difficulty faced by the UK, and the common law generally, is the difficulty in attributing criminal acts to a legal person at common law. The concept of criminal liability for a corporation grew up in the nineteenth century when, of course, it was relatively straightforward to identify who in fact ran a company. Unfortunately, with a few additional glosses and in the interim, the nineteenth century test remains the one still in place today. In the UK, where an offence involves a mental element such as intent, a finding of liability in relation to a legal person depends on identifying someone in a corporation with an appropriate level of authority who can be said to possess the state of mind of the corporation: in other words, “the so called “directing” or “controlling” mind.

The traditional test of who was the controlling mind, was the so-called ‘identification theory’. That worked on the basis that certain officers within a corporation are the embodiment of it when it acts in the course of its business. The acts and states of mind of such company officers are deemed to be those of the company. The leading case is that of *Tesco Supermarkets Limited v Nattrass* [1972] AC 153 which restricts such liability to the acts of “the board of directors, the managing director, and perhaps other superior managers of the company who carry out functions of management, and speak and act as the company”. Thus, on the basis of this test, one needs to consider, inter alia, the constitution of the company, its memorandum or articles of association, the actions of directors in general meetings etc. and the extent, if any, of delegation.

However, a more recent attribution test, and perhaps one more akin to the realities of corporate life, is that of the Privy Council case of *Meridian Global Funds Management Asia Limited v Securities Commission* [1995] 2 AC 500. There it was held that the test should depend on the purpose of the provisions that create the relevant offence rather than simply a search for a directing mind. It envisaged a broader test, one which sought to identify the purpose of the offence. But, the *Meridian* case related to securities law disclosure (regulatory offences) not to crime in the conventional sense.

Whichever of the above two tests is preferred, the traditional common law stance does not permit the creation of a corporate intent by aggregating the states of mind of more than one person within the company. Even on the *Meridian* test, one individual has to be the company for the purpose of the mental element. In essence, the criminal liability of a legal person depends on proving both the culpable act/omission and the required mental element by a single person within the company, even though a criminal conviction of that particular individual is not a prerequisite.

The traditional common law approach to liability creates another difficulty in relation to anti-corruption enforcement: in the event of a wholly owned foreign subsidiary of a UK parent company paying a bribe, the parent company will, of course, only be liable if it can be shown to have directed or authorised the bribe. Moreover, on the principle of attribution just discussed, any such direction or authorisation will have to be shown to have been carried out by the controlling or directing mind.

In addition to the criminal responsibility of legal entities, the UK has taken the innovative step of holding commercial organisations to account, under the Bribery Act 2010, for failing to prevent bribery. Given its significance as a new measure to fight corruption and hold corporate to account, it is one that other states may wish to consider adopting.

The offence of ‘failing to prevent bribery’ is set out in section 7 of the Act and creates a strict liability offence of ‘failing to prevent bribery’ even if there was no corrupt intent. This is designed to make companies, whether they are large or small, culpable for bribery committed on their behalf, be it by their directors, senior managers or anyone else in a position to make or receive a bribe in exchange for an advantage to that business. The only defence will be for a company to show that it had in place “adequate procedures” to prevent bribery and corruption.

The offence has wide jurisdiction, as it includes a UK commercial organisation (incorporated or acting as a partnership in the UK carries on business in the UK or elsewhere), any other body corporate/partnership (wherever incorporated) which carries on a business, or part of a business, in any part of the UK. The company will be held liable where someone associated with the organisation is found to have bribed another person with the intention of obtaining or retaining business or an advantage in the conduct of business. Such persons ‘associated’ with the organisation could include employees, agents, sub-contractors and joint-venture arrangements (amongst others). The bribery could take place anywhere in the world.

The offence has altered the corporate landscape, and one that was heavily debated in the UK prior to the entering into force of the Act on 1 July 2011. Following consultations with the commercial sector, civil society organisations such as TI (UK), and other relevant stakeholders, the Government issued a set of guidelines of best practice on what would amount to ‘adequate procedures’. The Guidelines are founded on 6 main principles:

1. Proportionate procedures (relates to the nature, scale and complexity of the activities)

2. Top-level commitment (to prevent bribery and foster a culture within the organisation of non-tolerance to bribery)

3. Risk assessment (company must assess the nature and extent of its exposure to potential external and internal risks, such as country, sectoral, transaction, business opportunity and business partnership risks. Therefore, for those companies engaged in high risk industries such as defence and aerospace, extractive industries and construction and/or operating in countries low down on the corruption index, the onus would be higher

4. Due diligence (who will perform services on behalf of the organisation)

5. Communication, including training (ensure that the bribery prevention policies and procedures are embedded and understood throughout the organisation)

6. Monitoring and review (companies will need to put in place systems to monitor and evaluate the effectiveness of their bribery prevention procedures and adapt, where necessary)

The Guidelines do not provide a complete defence to the corporate; it remains the responsibility of the commercial organisation to ensure that its conduct is regulated, and where malpractice is uncovered, to self-report to the Serious Fraud Office (SFO).

The Serious Fraud Office has already issued guidelines on self-reporting by businesses who uncover bribery; the practice of self-reporting had developed prior to the Bribery Act 2010.

UK case example of self-referral

In 2009 Mabey & Johnson (as it then was) became the first company to be prosecuted in the UK for corrupt practices in overseas contracts and also for breaching a United Nations embargo on trade with Iraq[1]. In 2008, following a self-referral to the Serious Fraud Office, the company admitted to corrupt practices in a number of jurisdictions, namely, Angola, Bangladesh, Ghana, Jamaica, Madagascar and Mozambique. In negotiations with the SFO, the company agreed to plead guilty to the Jamaica and Ghana offences and to the UN sanctions breaches, and agreed that it would be subject to financial penalties and an independent monitoring regime reporting to the SFO. The court imposed financial penalties, a confiscation order, and costs against the company. It also ordered reparations to be paid by the company to the UN and to the governments of Jamaica and Ghana[2]. In total the financial penalty amounted to approximately £6.6 million.

The Act also introduces an enhanced individual liability in section 14, and is aimed at individuals who are senior officers of a body corporate and who consent or connive in a substantive bribery offence committed by the legal person (i.e. the body corporate itself). This would, for instance, catch the company director whose involvement is not sufficient to render him/her liable under ordinary principles of liability, but who has, by action or inaction, facilitated the commission of the substantive offence

Canada

Canada, in contrast to the UK, has already taken legislative steps to move away from the tradition of ‘identification theory’. It had previously been subject to the same restrictions described above. The Supreme Court of Canada case of *Canadian Dreg and Dock Co v The Queen* [1985] 1 SCR 662, had formulated attribution to a company on the basis of the “directing mind” or “ego” of the corporation. The court in that case had provided that the “directing mind” could be located in the board of directors, the managing director, the

[1] At the time it was also under investigation for making payments to the then Iraqi government in 2001/2002 for contracts to supply bridges bought by Iraq with revenue controlled by the UN under the "oil-for-food" programme. Two directors, Charles Forsyth and David Mabey were convicted at Southwark Crown Court on 10 February 2011 of making illegal payments to Iraq in breach of UN sanctions. On 23 February 2011 both men were sentenced to 21 months imprisonment and 8 months' imprisonment respectively and disqualified from acting as company director for 5 years' and 2 years', respectively, SFO Press Releases 10 February and 23 February 2011.

[2] Fines: Ghana £750,000, Jamaica £750,000, Iraq £2 million; Confiscation order £1.1million; Reparations - Ghana £658,000 Jamaica £139,000 Iraq £618,000 (total reparations £1,413,611); Costs to the SFO £350,000 and first year monitoring cost up to £250,000 – SFO Press Release, 25 September 2009, and transcript of sentencing remarks by HH Judge Rivlin

superintendent, the manager or anyone else to whom the board of directors has delegated the governing executive authority of the corporation.

However in 2002, the Government of Canada accepted the findings of a Standing Committee and decided to introduce legislation on legal liability. That initiative is now reflected in Bill C 45, an Act to amend the Criminal Code (Criminal Liability of Organisations), which came into force on March 31st 2004. It established new rules for attributing to organisations, including corporations, criminal liability. In essence, it criminalises on the basis that: when a senior person with policy or operational authority commits an offence personally, or has the necessary intent and directs the affairs of the corporation in order that lower level employees carry out the illegal act, or fails to take action to stop criminal conduct of which he or she is aware or wilfully blind, then criminal liability will be attributed to the corporation.

Canada is not the only OECD country to have sought a workable reformulation of the test of attribution. New Zealand has also moved away from the strict identification theory as generally understood. In New Zealand, although criminal responsibility of a corporation still depends upon assigning responsibility on the basis of a culpable act and of the requisite state of mind of a representative of the corporation, the position of that representative does not have be to that of a "directing mind". Rather, the test is whether the director or employee of the corporation had actual authority within it in relation to the area of the alleged conduct. In essence, does the natural person in question have real control on behalf of the legal person, over the activities which relate to the alleged offence? (For the avoidance of doubt, the position in New Zealand remains the common law one that the conviction of the natural person is not needed as a pre-condition to the prosecution of the legal person).

Those wrestling with trying to create a test of attribution might do well to consider alternative approaches. One might, for instance, ask whether domestic law allows for what is essentially criminal vicarious liability to be created. Such an approach best describes the liability of legal persons in the USA and the Republic of Korea.

'Strict' Liability approach

United States of America (USA)

In the USA (unlike common law systems), a company is criminally liable for the acts of its directors, officials or employees, whenever they act within the scope of their duties and for the benefit of the company. Importantly, these elements are interpreted broadly to the extent that an argument cannot be advanced on behalf of a company that the act of giving or authorising a bribe is itself outside the scope of duties when the company is the beneficiary of the unlawful conduct.

In a real sense, indeed, the basis for legal person liability in the USA is almost strict, since there is no requirement for any imputed "mental element" by the "mind" of the company. Thus it is irrelevant whether the conduct has been allowed, condoned, or even condemned by the management at a particular level.

The liability described is applicable not just for domestic bribery and offences under the Foreign Corrupt Practices Act (FCPA) 1977, but generally. In relation to preventive measures, however, the advantage of this approach is obvious: companies will react to the legal threat by introducing stringent due diligence practices.

In relation to foreign bribery, it should be noted that the FCPA 1977 takes the principle further, and also imposes criminal liability on legal persons for foreign bribery committed by third parties acting as agents. In the past few years the US has enjoyed a level of success in bringing corporates to account under the FCPA 'books and records' provisions[3] by both the US Department of Justice (DOJ) and the US Securities & Exchange Commission (SEC) through a combinations of measures: plea to underlying criminal conduct (invariably counts under the 'books and records' provisions), deferred prosecution agreement (DPA) by both US DOJ and SEC (this was an innovative step for US SEC in relation to companies under the FCPA), independent monitors, financial penalties and disgorgement of profit.

This model of enforcement has been highlighted by the OECD Bribery Working Group[4] as good practices developed within the U.S.; it has also had the benefit of coaxing corporates to implement vigorous compliance programmes to eliminate the risk of bribery. For those states that are considering putting in place measures to hold corporates liable, may wish to consider adapting the US model.

The two notable early cases which paved the way for future cases are:

(i) <u>Siemens AG</u>: In December 2008, Siemens reached plea agreements with the US Department of Justice (DOJ), US Securities & Exchange Commission (SEC) [5] and the Munich Prosecutor's Office.

Matters came to light in 2006 when law enforcement officials in Germany executed a number of search warrants at the offices of Siemens and the homes of its senior executives. Following the search by the German law enforcement agencies, Siemens voluntarily disclosed its activities to US Department of Justice (DOJ) and US SEC, and provided full co-operation to law enforcement in both Germany and the US.

The US DOJ preferred four separate indictments relating to Siemens AG, Siemens SA (Argentina), Siemens Bangladesh Ltd and Siemens SA (Venezuela)[6]. In addition, the US SEC brought a civil action against Siemens AG[7] which included allegations related to the bribery of foreign officials in connection with the same projects as the US DOJ against

[3] A key provision of the US FCPA and reflected in both the OECD Anti-Bribery Convention and CoE Criminal Law Convention on Corruption to cover 'off the books' payment or a disguised commission.

[4] http://www.oecd.org/document/33/0,3746,en_21571361_44315115_46223073_1_1_1_1,00.html

[5] Case: 1 :08-cv-02167, United States District Court for the District of Columbia

[6] (i) Case no. 08cr367 – US v Siemens AG (pleaded to 2 counts (i) violating internal control provisions of FCPA (ii) violating the books and records provisions of the FCPA); sentenced to pay a fine of $448,500,000 and ordered to pay a special assessment fee of $800; (2) Case no. 08cr 368 – US v Siemens S.A (Argentina) – pleaded guilty to one count of conspiracy to violate the books and records provisions of the FCPA; ordered to pay a fine of $500,000 and will be ordered to pay a special assessment fee of $400; (3) Case no. 08cr 369 – US v Siemens Bangladesh Ltd – pleaded guilty to one count of conspiracy to violate the anti-bribery provisions and the books and records provisions; ordered to pay a fine of $500,000 and also be ordered to pay a special assessment fee of $400; (4) Case no. 08cr 370 – US v Siemens S.A (Venezuela) – pleaded guilty to one count of conspiracy to violate the anti-bribery provisions and the books and records provisions; ordered to pay a fine of $500,000 and be ordered to pay a special assessment fee also of $400

[7] Case no. 08cv2167 – US SEC v Siemens AG (civil action)

Siemens S.A. Argentina, Siemens Bangladesh Limited and Siemens S.A. Venezuela, but in addition, the SEC's disposition related to allegations of corruption in Vietnam, Israel, Mexico, Nigeria, China and Russia.

Siemens AG pleaded to two counts of violating the books and records and internal controls provisions of the Foreign Corrupt Practices Act (FCPA) 1977; Siemens Argentina pleaded to one count of conspiracy to violate FCPA; whilst Siemens Bangladesh Ltd and Siemens SA (Venezuela) pleaded to a count of violating the anti-bribery and books and records provisions of the FCPA.

Siemens was ordered to pay a fine of $448.5million, whilst Siemens Argentina, Venezuela and Bangladesh were each ordered to pay $500,000 in fines (total financial penalty was $450million) and $350million in disgorgement of profits to settle the SEC's charges[8].

In Germany, the company agreed to pay a fine of €395million in relation to charges relating to a corporate failure to supervise its offices and employees and another €201million in relation to a similar investigation relating to Siemens' former Communications Group. The total amount paid to authorities in Germany in connection with these legal proceedings to €596million[9].

The total financial penalties imposed for both US and Germany proceedings amount to approximately $1.6billion[10]. In addition to the financial penalties, Siemens was required to retain an independent compliance monitor programme for 4 years. [11]

(ii) Statoil: an international Norwegian energy company, with operations in 34 countries was also held accountable both in Norway and the US following media disclosure of corruption.

The company was investigated by the National Authority for Investigation and Prosecution of Economic and Environmental Crime ("Økokrim"). On June 29, 2004, Økokrim issued penalty notices to Statoil in the amount of approximately $3 million, and to the Senior Executive in the amount of approximately $30,000, charging them with violating Norway's trading-in-influence statute[12]. Statoil and the Senior Executive agreed to pay the penalties without admitting or denying the violations.

In the US, Statoil entered into a Deferred Prosecution Agreement (DPA) in October 2006 (filed on 13 October 2006) with the US DOJ, Criminal Division, Fraud Section, and the United States Attorney's Office for the Southern District of New York. The Criminal Information[13] lodged with the US District Court contained two counts against Statoil, ASA.

[8] Transcript of the Plea Hearing & Sentence, US District Court for the District of Columbia, 15 December 2008

[9] Siemens Annual Report issued on 3 December 2009 (section 30 of the Consolidated Financial Statements, page 179 – 181.

[10] US DOJ Press Statement of 15 December 2008

[11] Siemens also agreed to pay US$100 million to agreed anti-corruption organizations over a period of not more than 15 years.

[12] Article 276(c) of the Norwegian Criminal Code

[13] Case 06 Crim 960

Count 1 of the Information alleges a violation of the FCPA (bribery)[14] and Count 2 relates to falsifying books and records[15].

As part of the settlement agreement Statoil had to agree to the following underlying conduct:

1. Statoil agreed that they had paid bribes to an Iranian public servant in June 2002 and January 2003, with the aim of securing contracts for Statoil in the development of stages 6, 7 & 8 of the South Pars oil and gas field in Iran.

2. Statoil agreed that bribes were paid to secure other contracts in the country, and to get hold of confidential information.

3. Statoil agrees that they had used wrong accounting procedures in order to hide the bribes from their records.

4. The settlement also stipulated that no Statoil employee or representative for the company could make any statements to the media that contradicts the verdict for the following three years.

The Settlements included a monetary component consisting of a fine of US$ 10.5 million[16] and the confiscation of benefits gained by the violations of the FCPA payments ("disgorgement") of US$10.5 million. As Statoil had also paid a criminal fine of approximately US$ 3 million[17] under the penalty notice ("*forelegg*") issued by Norwegian authorities (*Økokrim*), the Norwegian fine was deducted from the US fine making a total penalty of $7.5million[18] In relation to the SEC proceedings Statoil agreed a disgorgement of $10.5million[19]. The DPA was discharged on 18 November 2009[20] after Statoil had fulfilled all the obligations set out in the terms of the DPA.

<u>Republic of Korea</u>

The Republic of Korea has adopted a similar approach, creating what is in essence a vicarious liability. Article 4 of the Foreign Bribery Prevention Act in International Business Transactions (FBPA) provides:

"In the event that a representative, agent, employee or other individual working for a legal person has committed the offence as set out in Article 3.1 in relation to its business, the legal

[14] Title 15, United States Code, Section 78dd-1(a)
[15] Title 15, United States Code, Sections 78m(b) (2) (A), 78m(b) (5) and 78ff
[16] Paragraph 19 of the Deferred Prosecution Agreement between Statoil ASA and the US DOJ, Fraud section and US State Attorney's Office for the Southern District of New York
[17] NOK20,000,000 (see paragraph 19, ibid)
[18] Paragraph 19, ibid
[19] Paragraph VII (iii) of the Administrative Proceeding, File No. 3-12453
[20] US DOJ Press Statement of 19 November 2009 '*The Department of Justice has received the final report of the compliance consultant and determined that Statoil has fully complied with all of its obligations under the deferred prosecution agreement, including the obligation to adopt the compliance-related recommendations of the compliance consultant. Accordingly, on Nov. 18, 2009, the Department filed a motion with the court to dismiss with prejudice the criminal information against Statoil. Yesterday, in federal court in Manhattan, U.S. District Judge Richard J. Holwell granted that motion and dismissed the charges*.'

person shall also be subject to a fine of up to 1 billion won in addition to the imposition of sanctions on the actual performer… if the legal person has paid due attention or exercise proper supervision to prevent the offence against this act, it shall not be subject to the above sanctions."

The above provision does, however, beg the question as to what amounts to due attention or proper supervision? In addition, it is on the surface unclear whether the natural person has to be prosecuted and/or convicted for the legal person to be liable. However, at the OECD Phase 2 review, the lead examiners were informed that the natural person who is the perpetrator must be identified but, if he is not proceeded against, the court is able to make a finding of fact that he bribed a foreign public official. However, in the event that the natural person is proceeded against under the Act, then the legal person may only be found guilty if the natural person perpetrator is convicted and sanctioned. In any event, Korea imposes the liability of legal person only in relation to foreign but not domestic bribery.

'Imputed or Deemed' Liability

Some jurisdictions have chosen to criminalise on the basis of an imputed or deemed liability, rather than on the basis that the legal person itself has committed the offence.

Thus, since 1994, the Criminal Code in France has allowed a judge, in respect of active bribery as well as other prescribed offences, to assign criminal responsibility to legal persons. At the same time the French provision does not preclude the prosecution of a natural person or persons.

From the OECD Phase 2 evaluation of France, the underlying principles in relation to France's approach can be stated thus:

i. A delegation or sub-delegation of power to an employee or subordinate is sufficient for the employee or subordinate to be treated as a representative of the legal person for the purposes of criminal liability (query, also, whether de facto delegation will suffice?).

ii. "Legal Person" includes not only commercial companies but also not-for-profit entities such as trade associations and also public law legal persons such as local authorities, semi-public companies and public institutions.

iii. A legal person might be able to avoid the imputation of criminal liability by allowing itself to be taken over.

iv. The bribe has to be on behalf of the legal person. What, therefore, of the position when, for instance, a legal person has an internal policy of refusing to offer bribes?

v. If an employee or insubordinate does not have a delegated authority, it seems uncertain whether there is still a basis for liability: for instance, would an employee have to have acted on the orders, or with the authorisation of, a company representative? Alternatively, will knowledge of the bribe of someone with delegated authority in that particular area be sufficient?

vi. A natural person will have committed the bribery offence. He/she will be identified.

Some further assistance is provided by the following:

(i) In Finland, criminal liability of legal persons was introduced in 1995, and required that a person belonging to the management must have been an accomplice or allowed, authorised or directed the offence. However, following an amendment to the Penal Code in 2001, liability was extended to include a natural person exercising a *de facto* management function regardless of whether that natural person was formally a part of the management.

(ii) Norway introduced criminal liability for legal persons in 1991, which has been increasingly used to hold companies to account in relation to foreign bribery[21]. In principle, Norwegian law does not require the involvement of a leading person within the company or enterprise; thus liability may be triggered by the acts of a single employee who is not part of the management structure.

However, it is governed by a special set of discretionary criteria. Section 48a(1) of the Penal Code provides that when a penal provision is contravened by a person who has acted on behalf of an enterprise, the enterprise may be liable to a penalty: “This applies even if no individual person may be punished for the contravention.” Here, the Penal Code goes on to provide that the word “enterprises” includes “a company, society or other association, one-man enterprise, foundation, and state or public activity”.

In deciding whether the legal person will be liable for a penalty, the court will consider:

a) the preventive effect of the penalty,

b) the seriousness of the offence,

c) whether the enterprise could have prevented the offence by guidelines, instruction, training or control,

d) whether the offence had been committed in order to promote the interest of the enterprise,

e) whether the enterprise has obtained an advantage by the offence,

f) the economic capacity of the enterprise, and

g) whether any penalty has been imposed on an individual person.

ADMINISTRATIVE LIABILITY

Some states, for example, Germany and Italy, have introduced/retained administrative liability.

[21] The OECD Phase 3 Review of Norway (June 2011) praised the efforts of Økokrim in the investigation and prosecution of companies involved in foreign bribery:
http://www.oecd.org/document/24/0,3746,en_2649_37447_1933144_1_1_1_37447,00.html

In Germany, under the Administrative Offences Act, a fine may be imposed on the legal person in the course of criminal proceedings against the natural person. However, if a natural person is not prosecuted because he cannot be identified, or has died, it is then possible to sanction the legal person in separate proceedings. The liability of the legal person is regarded as an “incidental consequence” of an offence committed by the natural person, and it appears that it is, in fact, very unusual to proceed against the legal person where the natural person has not been proceeded against.

Similarly, in Italy, the theory of administrative liability is that it is attributed to a legal person for certain criminal offences (including bribery) committed by the natural person (Decree 231/2001).

The Italian decree imposes liability on the legal person for offences committed by two categories of natural person:

(i) those in senior positions, and

(ii) those subject to the management or control of those in (i).

A person is in a senior position if he/she carries out activities of representation, administration or management of the corporate body or one of its autonomous units.

However, the legal person is liable only for offences “committed in its interest and its advantage”. It will not be liable where the natural person acted exclusively in his/her own interests or for a third party.

Some of the examples above highlight central difficulties in attribution: does one look to the post actually held by the person? Is a *de facto* management function sufficient? Is the key the nature of the function exercise by the natural person (along with any delegated authority) regardless of the *de jure* or de facto management post held?

The OECD Working Group on Bribery in International Business Transactions has provided the following guidance[22] for corporate liability:

(a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.

(b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

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[22] Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (2009): http://www.oecd.org/dataoecd/11/40/44176910.pdf