ANTI-CORRUPTION HELPDESK

PROVIDING ON-DEMAND RESEARCH TO HELP FIGHT CORRUPTION

LIABILITY OF LEGAL PERSONS FOR CORRUPTION

QUERY

Does Transparency International have any information on responsibility of legal persons and sanctions against legal persons in international perspective?

PURPOSE

The Ministry of Justice has asked us to comment on a legal proposal with fairly short notice. As a part of our answer, we would like to draw on some comparable experiences of other countries. These countries are Austria, France, Switzerland, the United Kingdom and the United States. The two relevant dimensions are the responsibility of legal persons and sanctions against legal persons.

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SUMMARY

Liability of legal persons for corruption is one of the requirements of the most important international instruments against corruption, such as the United Nations Convention against Corruption, the OECD Anti-Bribery Convention and the Council of Europe Convention on Corruption.

In recent years, many countries across the world have reformed their anti-corruption legislation to include corporate criminal, civil or administrative liability among its provisions. This answer analyses related regulations in Austria, France, Switzerland, the United Kingdom and the United States. All of these countries have fairly comprehensive laws in place. However, application is uneven across countries. While it is early to assess the impact of such laws, lack of implementation could also be explained by a lack of awareness and understanding of the law by prosecutorial authorities.

1 LIABILITY OF LEGAL PERSONS FOR CORRUPTION

General recommendations on liability of legal entities for corruption

The issue of corporate liability with regards to corruption-related offences is addressed by several international instruments such as the United Nations Convention against Corruption (UNCAC), the OECD Convention on Combating Bribery of Foreign Public Officials (1997), and the Council of Europe Criminal Law Convention on Corruption (1998) and additional Protocol (2005).

Common features of such international instruments include:

- The establishment of criminal, civil or administrative liability. A country's legal tradition and fundamental principles should play a decisive role in determining the type of liability.
- The definition of legal person is not included in any of the conventions; it is left to be prescribed by national legislations.
- The grounds for imposing liability against a legal person are based on two fundamental complementary conditions: (i) the offence is committed for the benefit of a legal person; (ii) a person with a position within a legal entity is involved in the offence.

In addition, it is important that liability against a legal person does not exclude, preclude or substitute criminal proceedings against a natural person who has committed the legal offence in question.

General recommendations on sanctions

Conventions require states to provide effective, proportionate and dissuasive criminal and non-criminal sanctions, including monetary sanctions to ensure that a legal person is held liable for corruption related offences. Other penalties might include: exclusion from public procurement, exclusion from obtaining licenses, confiscation of proceeds from the crime, placement on debarment lists, placement under judicial surveillance and prohibition from exercising their occupation, among others.

2 COUNTRY EXAMPLES

This answer analyses how Austria, France, Switzerland, the United Kingdom and the United States punish legal entities for corruption.

Austria

Responsibility of legal entities

In Austria, legal entities became criminally liable after the 2006 enactment of the Austrian Federal Statute on the Responsibility of Entities for Criminal Offences, or the *Verbandsverantwortlichkeitsgesetz* (VbVG). This statute determines that all criminal offences contained in the Austrian Penal Code and in other laws, including corruption-related offences and more specifically bribery of foreign public officials, are applicable to legal persons.

Legal entities, as defined by the statute, are entities with or without a legal personality, as well profit or non-for-profit, and public or private – with the exception of state entities, which relates to law enforcement and religious bodies. A parent company is not directly liable for actions committed by its subsidiaries.

Requirements for establishing criminal liability of legal persons are:

(i) The criminal offence has been committed by a representative (that is, directors and managers) or an employee of a legal entity**.** It is not necessary to identify or convict the individual offender in order to prosecute a company, and both individuals and legal entities can be prosecuted for the same offence. In the case of actions or omissions committed by employees (which does not include consultants, agents and commissioners), the legal entity is only liable if the action or omission was facilitated by a failure of the company's management to take the necessary measures to prevent such an act. In the case of crimes committed by a company's representative, the legal entity can be held liable even if all precautionary measures were in place.

(ii) The act or omission has been committed for the benefit of the legal entity or it violates duties addressed to the company.

(iii) All elements of the criminal offence have been fulfilled.

Sanctions

The law does not provide for the imposition of criminal sanctions other than fines. In this context, the law establishes a scale of maximum fines, ranging from 40-180 daily rates, depending on the imprisonment sentence for the offence in question.

For example, a crime of foreign bribery sentenced as a two-year offence would be limited to a maximum of 70 daily rates. These daily rates are based on the income situation and financial performance of the company, but the law does not specify the revenue period to be considered. The maximum daily rate has been fixed at €10,000 – meaning a maximum fine for foreign bribery of €700,000. Mitigating and aggravating factors will also play a role in defining the amount of the fine in individual cases (OECD 2006; OECD 2010).

In addition, as opposed to other criminal offences in Austria, prosecutors have discretion to not proceed or to drop cases against legal persons. While this provision is supposed to be an exception (as defined in section 18 of the VbVG), meaning that prosecutors are allowed to refrain from or abandon prosecution of legal persons in only a few cases, there is still a lack of clarity with regards to when such an exception applies (OECD 2010). The government has committed to issue a decree, as well as a guideline clarifying that prosecution of allegations of foreign bribery is always required, but as of 2010 such regulation was still pending (OECD 2010).

Assessment

The OECD Working Group on Bribery (2006, 2008, 2010) and the Group of States against Corruption (GRECO) (2008) have assessed the law and its enforcement, and have highlighted several weaknesses, such as:

(i) The law is quite complex, containing several provisions which leave significant room for interpretation, particularly with regards to the assessment of the fine and the determination of the income period.
(ii) The initial maximum amount of fines is too low to ensure that sanctions for corruption offences are effective, proportionate and dissuasive (GRECO 2008). In addition, the law does not provide for effective sanctions in cases where the legal person may not have generated profits over the relevant period (OECD 2006).
(iii) The fact that a legal entity is not responsible for actions by outside consultants, agents or commissioners (unless they have an employee-like status) could actually restrict the application of the law in cases where outside agents are retained and paid by the company to act in its interests (OECD 2006).
(i) The exceptional prosecution discretion to proceed or to drop cases, as opposed to general rules applicable to criminal procedures in Austria, might also be a disincentive to hold companies liable.
(ii) Until 2010, the provisions governing the criminal liability of legal persons appear to be rarely used in practice.

The Austrian Government carried out a study on the application of the VbVG and its impact. The study was finalised in 2011, but the results were not made publicly available. A summary of the main findings can be found (in German) here.

France

Responsibility of legal entities

In France, general criminal corporate liability is determined by the Penal Code. According to the law, legal entities, with the exception of the state, are criminally liable for offences committed on their account by representatives or organs (Article 121, 122 French Penal Code), including for bribery, trading in influence and money laundering (GRECO 2004).

The requirements for establishing criminal liability of legal persons are:

(i) The act has been committed by an employee empowered to represent the company (that is, high level managers) acting within the scope of his/her employment or by an organ (that is, a parent company). Lower level employees do not have the capacity of representing the company in business dealings and therefore they are not subject to criminal liability. Liability may also be extended to persons to whom the legal person's organs have given powers of authority (for example, lawyers and consultants, among others) (GRECO 2004).
(ii) The act has been committed for the benefit of the legal entity.
(iii) All elements of a criminal offence have been fulfilled.

The criminal liability of a legal person does not exclude the liability of natural persons who are engaged in the same act. Moreover, it is not necessary to identify and/or convict the individual offender in order to prosecute a company.

French parent companies may also be held liable if it is proven that they have authorised, encouraged or ordered foreign subsidiaries to act corruptly.

In addition, legal persons may also be held civilly liable for corruption and trade in influence (Article

1382 Civil Code) (GRECO, 2004). As opposed to corporate criminal liability, corporate civil liability may be triggered by offences committed by low level employees.

Sanctions

French law provides a wide range of statutory criminal sanctions. In this context, primary penalties for domestic bribery of public officials are fines up to approximately €750,000 (OECD 2004). Along with fines, additional penalties may be imposed to legal entities, including , among others, a ban on directly or indirectly performing the professional or social activity in connection with the offence which was committed; placement under judicial supervision; exclusion from public procurement; confiscation; publication of the sentence (Articles 435, 436 Criminal Code). Convictions also result in legal persons' formal notification to the criminal records office (Article 768 Criminal Code).

The sanctions are decided by the judge based on the circumstances of the offence, as well as on the financial resources of the perpetrator (Article 132-24 Criminal Code).

Assessment

Assessments of the law and its enforcement by French authorities were carried out by GRECO in 2004 and by the OECD Working Group on Bribery in 2004 and 2006. According to observers of both groups, the statutory sanctions appear to be sufficiently effective, proportionate and dissuasive.

Nevertheless, in practice, at least until 2006, the provisions governing corporate liability were rarely used. In 2004, the French authorities tried to address the issue by publishing a circular to all prosecutors, demanding the indictment of legal persons who might be held criminal in cases related to bribery of foreign public officials (OECD 2006). In addition to that, the reform of the Criminal Code in 2006, which established general criminal liability for legal persons, was also considered a key step in order to stimulate prosecutions, as prosecuting authorities now have clarity on whether criminal liability may be assigned for a given offence (OECD 2006). It is still to be assessed whether the circular and the reform in question have had any effect in the number of prosecutions.

Switzerland

Responsibility of legal entities

In Switzerland, criminal liability of legal person for active bribery of (foreign) public officials, and for active bribery in the private sector has been in place since 2003 and 2006, respectively (Articles 102, 103 Criminal Code). According to the law, legal entities include private and public entities, with the exception of local authorities, as well as partnerships.

Companies in Switzerland have subsidiary liability, meaning that they may be held criminally liable when the individual perpetrator of an offence cannot be identified due to the company's lack of organisation[1].

In the case of specific offences, such as money laundering, bribery of domestic and foreign officials, granting an advantage, and bribery in the private sector, an enterprise will have primary liability if it has not taken the necessary steps to prevent the offence, irrespective of the position (low or high ranking) occupied by the perpetrator. In this case, an enterprise will be held criminally liable regardless of the criminal nature of the specific individual. If the latter is identified, both may be held liable (GRECO 2008).

The burden of proof with regards to the lack of organisation and the existence of preventive measures lies with the legal entity (Pestalozzi 2008)

In addition to the requirements described above, corporate criminal liability will also require that:

(i) The bribery is committed by a natural person within the enterprise.
(ii) The bribery must occur within the scope of the enterprise while exercising a business activity; corporate criminal liability is limited to offences that are committed in the exercise of activity within the scope of the enterprise's business. Hence, the enterprise can be liable for an employee's crime if committed within the scope of their employment, even if it is committed contrary to corporate orders.

[1] Article 102 of the Swiss Criminal Code establishes that "Liability under the criminal law: If a felony or misdemeanour is committed in an undertaking in the exercise of commercial activities in accordance with the objects of the undertaking and if it is not possible to attribute this act to any specific natural person due to the inadequate organisation of the undertaking." However, the code does not specify what would be considered as "inadequate organisation".

Sanctions

The criminal code provides for fines amounting to no more than 5 million Swiss franc (€4.16 million) (Article 102 Swiss Penal Code). In case of a repeat offence or if the legal person in question is concurrently culpable of other offences, the fine may be increased to a maximum of 7.5 million Swiss franc (€6.24 million). Other penalties such as confiscation of the proceeds of bribery, publication of the court judgment, as well as other civil and administrative sanctions are also possible (GRECO 2011).

The court has discretion to determine the level of the fine, depending on the seriousness of the offence, the damage caused and the company's financial situation (GRECO 2011)

Assessment

Although the law on corporate criminal liability complies, to a great extent, with the requirements of different international conventions, its provisions are yet to be fully applied in practice (GRECO 2008). With regards to the sanctions, observers found them to be effective and proportionate to the gravity of the offences. Nevertheless, observers have suggested that the penalties could be strengthened by including the possibility of excluding convicted companies from public procurement processes (GRECO 2011).

One of the weaknesses assessed by GRECO is the absence of a register of criminal convictions. While such a register is not yet common in other countries (of the countries analysed here, only France keeps records of legal entities convicted), in the case of Switzerland, the absence of such a register makes it nearly impossible to apply the rules on repeat offending, for example.

Another weakness raised by the OECD Working Group on Bribery relates to the requirement that the bribery must be committed by a natural person "within the enterprise." The term could limit the application of the law, for example, when the company uses an outside intermediary (OECD 2007). The term "all the reasonable organisational measures that were required in order to prevent such an offence" (Article 102 Criminal Code) may also leave room for interpretation, particularly when applied to transnational bribery, as the Swiss law does not establish any organisational standard to be followed by companies (OECD 2007).

United Kingdom

Responsibility of legal entities

The United Kingdom Bribery Act, which came into force in July 2011, replaced the existent bribery laws in the country. In the case of corporate liability under sections one and six of the act, as with previous legislations, a company will only be held liable if the "identification doctrine" is satisfied. This means that a company may only be prosecuted if a "controlling mind" (that is, board member or senior executive) committed – or was responsible for key elements of – the offence. In such cases, offences committed by a regular employee would not enable corporate liability (UNCAC Review 2012).

The bribery act, however, introduces a new corporate liability offence of failure to prevent bribery (Section 7 UK Bribery Act). This new criminal offence places the burden of proof on companies to show they have adequate procedures in place to prevent bribery.

A company can commit an offence under section seven of failure to prevent bribery if an employee, subsidiary, agent or service provider ("associated persons") bribes another person anywhere in the world to obtain or retain business or a business advantage. A foreign subsidiary of a UK company can cause the UK parent company to become liable under section seven when the subsidiary commits an act of bribery in the context of performing services for the UK parent. If the foreign subsidiary were acting entirely on its own account, it would not cause the UK parent to be liable for failure to prevent bribery under section seven, as it would not have been performing services for the UK parent. However, the UK parent might still be liable for the actions of its subsidiary in other ways such as false accounting offences or under the Proceeds of Crime Act 2002.

A company is also guilty of an offence if an "associated person" carries out an act of bribery in connection with its business. A person is considered to be associated with the company when that person performs services for or on behalf of an organisation (this could include an employee, subsidiary, intermediary or supplier).

Moreover, a foreign company which carries on any part of its business in the UK could be prosecuted for failure to prevent bribery even where the bribery takes place wholly outside the UK and the benefit or advantage to the company is intended to accrue outside the UK.

Guidance on the relevant procedures that commercial organisations can put in place to prevent persons associated with them from bribing, as mentioned in section seven, were published by the Ministry of Justice. The guidance can be accessed

here.

Sanctions

The bribery act provides for strict penalties for active and passive bribery by companies. A company would face an unlimited fine and potential debarment from tendering for public contracts. Administrative sanctions, such as the appointment of a corporate monitor, would also be in place.

In addition, according to the Joint Prosecution Guidance, the fact that a relevant commercial organisation has adequate procedures in place to prevent persons associated with them from bribing can be used as a defence. Whether the procedures are adequate will ultimately be a matter for the courts to decide on a case by case basis (Joint Prosecution Guidance 2011).

There is also the possibility for a defendant in the UK to negotiate and reach an agreement with the prosecutor on particular matters before entering a guilty plea and being sentenced (Plea Negotiations, OECD 2012). In addition, the Serious Fraud Office may conduct civil settlements of foreign bribery cases, but most of these agreements are confidential (OECD 2012).

Assessment

The OECD Working Group on Bribery has been criticising the "identification doctrine" for imposing corporate criminal liability for foreign bribery since 2005. According to the group, such requirement imposes serious difficulties in holding a company liable for foreign bribery (OECD 2012). So far, only two companies have been held criminally liable (OECD 2012). On the other hand, observers welcomed the latest provision of the bribery act, which establishes a new corporate liability offence of failure to prevent bribery committed by any employee. While it is too early to assess how the provisions in question will be dealt with in practice, the act has helped raising awareness of anti-bribery issues in a very significant way.

Nevertheless, observers have also demonstrated a few concerns over the new regulation. For instance, one of the worries is that the term "associated person" may be interpreted restrictively by prosecutors to exclude foreign bribery that is committed through subsidiaries and joint ventures.

Moreover, as there were still no prosecutions under the new law, observers could not assess whether the sanctions being applied are effective, proportionate and dissuasive.

United States

Responsibility of legal entities

At the federal level in the United States, general civil, administrative and criminal liability for legal persons for (foreign) bribery, trading in influence and money laundering is in place, as US law equates legal persons with natural persons. The US Code provides that the words "persons" and "whoever" include corporations, companies, associations, firms, partnerships, societies and individuals (1 U.S.C. § 1).

The requirements for establishing criminal liability of legal persons are:

(i) The act has been committed by any employee (not only high ranking staff) acting within the scope of his or her employment, regardless of whether the agent has acted contrary to the company's policy or instruction. The fact of a company having in place an effective compliance system does not serve as a defence, but as a mitigating factor when determining the sanction (UNCAC review).
(ii) The act has been committed for the benefit of the legal entity.

A parent company, in principle, can also be prosecuted for offences committed within the subsidiary, if such offences benefit the corporation.

A company may be held criminally liable even if the individual who committed the offence has not been convicted or identified. The prosecutor shall decide whether to prosecute the company, the individual or both, and whether to do it in the same legal proceeding. In order to limit such wide discretionary power enjoyed by prosecutors, a guideline – Principles of Federal Prosecution of Business Organizations – was enacted. Prosecutors must, therefore, base their decision on this guideline, and some of the aspects that they should take into account are: the corporation's history of similar conduct; the corporation's timely and voluntary disclosure of wrongdoing and cooperation in investigations; and the existence of compliance programmes, among others.

Sanctions

US laws provide for a wide range of sanctions for legal entities. Civil and criminal fines may be imposed according to different norms. For instance, in criminal

prosecutions, the Foreign Corrupt Practices Act (FCPA) establishes fines up to US$2.5 million per violation of accounting provisions and US$2 million per violation of anti-bribery provisions or twice the gross pecuniary gain or loss resulting from the offence. The legal person may also be subject to a civil penalty of up to US$10 million (OECD 2010). Other penalties include the confiscation of the bribe and proceeds of bribery, prohibition from contracting with the federal administration, and suspension of export and import licences, among others (GRECO 2005).

Judges have full discretion to determine a sentence, depending on different factors such as the existence of an effective compliance and ethics programme, the participation or authorisation of higher level employees, whether the offender voluntarily reported the offence, and cooperated with the authorities, among others (OECD 2010; UNCAC review 2011).

Prosecutors also have the possibility of applying the Deferred Prosecution Agreement (DPA), meaning that the prosecutor will drop the case against a company which admits guilt and agrees to comply with civil sanctions and to establish rigorous compliance systems (GRECO 2005).

Assessment

Sanctions in place were assessed as effective, proportionate and dissuasive (OECD 2010). Between 1998 and 2010, fines amounting to more than US$2 billion were imposed against legal persons for violations of the FCPA, and fines amounting to more than US$63 million have been imposed as civil sanctions since 2000. Particularly after 2002, fines and disgorgement amounts imposed are considered high enough to provide disincentive for companies to bribe foreign public officials. Moreover, according to the OECD Working Group on Bribery, legal liability combined with strong enforcement by the US government is seen as a powerful incentive for companies to establish compliance programmes and measures (OECD 2010).

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