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Transparency International Anti-Corruption Helpdesk Answer

Prosecuting corporate corruption in Europe

An analysis of legal frameworks and their implementation across selected jurisdictions

Author(s): Jennifer Schöberlein, tihelpdesk@transparency.org
Reviewer(s): Roberto Martinez B. Kukutschka, rkukutschka@transperency.org
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There has been a substantial movement in the adjudication of private sector corruption across European jurisdictions in recent years. The Sapin II law, passed in 2016 in France, joined the UK Bribery Act in providing some of the most thorough and far-reaching anti-bribery legislation in Europe. But other countries, such as Germany, Italy and the Netherlands, have also seen significant legal reform and/or enforcement action to increase the liability of legal persons for misconduct.

Non-trial resolutions, such as deferred prosecution agreements, have been used increasingly and have led to a substantial rise in bribery cases brought against companies. And while non-trial resolutions come with certain risks that need addressing, they have led to a notable increase in sanctions applied against legal entities. Sanction mitigation for effective compliance programmes, self-reporting, and/or cooperating with authorities has also become more common and has provided a strong incentive for companies to put more effort into preventive measures and addressing shortcomings. Additionally, whistleblower protection has also improved in some jurisdictions over the past few years.

Despite this progress, shortcomings remain in both the legal frameworks and their stringent, transparent, and coherent implementation.

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Query

Please provide a comparison of the Sapin II law in France with anti-corruption laws in three or four other European countries as these relate to private companies. In particular, we are interested in comparing the provisions in Sapin II related to whistleblowing, reporting requirements of companies' anti-corruption measures, companies' criminal liability and deferred prosecution agreements (CJIP in France)

Contents

Main points

- Legal frameworks have strengthened across Europe and are increasingly able to hold legal entities accountable
- Non-trial resolutions can be very effective measures to adjudicate corporate corruption, especially in multijurisdictional corruption cases
- Sanction mitigation for self-reporting, cooperation with authorities and effective compliance programmes provide a hugely effective incentive to change business behaviour
- Where non-trial resolutions and sanction mitigation are applied, clear and transparent guidelines are needed to ensure clarity for companies and the public and to ensure sanctions remain dissuasive and proportionate

Introduction

There has been substantial movement in the adjudication of private sector corruption across European jurisdictions in recent years. For decades, the United States' Foreign Corrupt Practices Act (FCPA) was the "gold standard" of anti-corruption legislation globally when it came to holding companies accountable for bribery-related misconduct. In 2010, it was joined by the UK Bribery Act, which became the most expansive anti-corruption legislation covering private sector bribery in Europe.

In late 2016, France passed the Sapin II law (Law No. 2016-1691) regarding "transparency, the fight against corruption, and the modernisation of economic life" (Journal officiel de la République française 2016). Sapin II, which came into effect in 2017, constituted a big step for the French anti-bribery legislation, as it expanded its jurisdiction, added offences and strengthened the requirements for companies to prevent incidents of corruption. In some areas, it goes even further than the UK Bribery Act – for example, by introducing a requirement for compliance programmes, mandating internal reporting lines and sanctioning the obstruction of whistleblowing reports – possibly pushing the standard for what is considered good practice. Other European countries have substantially ramped up enforcement (Germany, for example) or have reformed legal frameworks that were deemed insufficient (Italy).

Measures that have been implemented to prevent and adjudicate bribery in the private sector include criminal liability of legal persons, incentives for self-reporting, strong compliance measures, deferred prosecution agreements and strong whistleblowing provisions.

This Helpdesk Answer looks at the status of legal frameworks in selected European jurisdictions (France, UK, Germany, Italy, and Netherlands) with regards to their adjudication of bribery in the private sector. It also provides a comparison of these different legal frameworks and the relevant measures, especially those that have been newly introduced through Sapin II.

Overview of legal frameworks

France

During its last full observation by the OECD Working Group on Bribery (OECD 2012), France received an overall negative evaluation of its legal framework on corporate corruption, as well as its track record on enforcement. Only 33 foreign bribery proceedings had been initiated since France joined the OECD Convention in 2000, of which only five led to a conviction and only one concerned a legal person. Subsequently, France made efforts to step up its enforcement performance by opening 40 investigations between 2014 and 2017, but still received only a "limited enforcement" categorization from Transparency International (Transparency International 2018).

Regarding the French legal framework, the OECD criticised its limited jurisdictional reach due to a requirement of "dual criminality"[1], noted that available and applied penalties were not "effective, proportionate, or dissuasive", and further suggested that France needed to ensure that companies would not be able to escape criminal liability (OECD 2012). While some reforms and improvements had been noted since previous reports, it was clear that the French legal framework needed reform.

New legal requirements under Sapin II

This reform came in the form of the Sapin II law, or officially "law regarding transparency, the fight against corruption, and the modernisation of economic life (*Loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*" (No. 2016-1691) in 2016.

Maybe most notably, Sapin II put forward a requirement to establish internal measures to prevent and detect violations for all companies with more than 500 employees and an annual turnover of more than €100 million. Other jurisdictions (such as the UK) have criminalised a failure to prevent bribery, meaning if bribery occurs, the absence of preventive measures can be penalised. With its general mandate to implement compliance programmes, irrespective of a violation occurring, Sapin II goes further and provides a novelty in European anti-corruption legislation.

The law includes the requirement to:

- establish a code of conduct and internal reporting lines for employees to report violations
- conduct and document regular risk assessments
- evaluate relevant third parties regarding their corruption risk exposure
- implement adequate internal controls
- train relevant employees on the programme
- establish a sanctioning regimen for employees violating the code

Violation of this requirement can result in fines of up to €200,000 for natural persons and up to €1 million for legal persons (Journal officiel de la République française 2016).

The law also established a new anti-corruption agency, Agence française anti-corruption (AFA), which is responsible for monitoring and

[1] "Dual criminality" means that France only had jurisdiction over foreign bribery cases if the conduct constituted a legal offence not only in France but also in the country where it occurred.

investigating non-compliance with the new requirement for compliance programmes (Transparency International 2018). The AFA was also empowered to "refer cases to its Sanctions Committee to prosecute and punish non-compliant legal entities" (Clifford Chance 2019: 22). The AFA has issued non-binding guidelines to help private and public sector entities conform with the required Sapin II measures to be implemented internally[2] (Agence française anti-corruption 2017).

In addition, Sapin II removed the previously criticised dual criminality requirement, expanded the extraterritorial reach of French jurisdiction by covering offences committed by individuals "'habitually resident in France' or 'having all or part of their economic activity in France'" (Clifford Chance 2019: 21), and strengthened the status for whistleblowers by introducing penalties for obstructing a whistleblowing alert and additional protections for whistleblowers, such as measures to protect their identity (see below) (Journal officiel de la République française 2016).

Finally, trading in influence in connection with foreign public officials was criminalised and the law mandated the creation of a register for lobbyists. It also introduced a form of deferred prosecution agreement *Convention judiciaire d'intérêt public* (CJIP) similar to that available in the UK (see below) (European Parliament 2017 and Journal officiel de la République française 2016).

Sanctions

Individuals found guilty of bribery can be sanctioned with imprisonment of up to 10 years and fines of up to €1 million for bribing (domestic or foreign) public officials and imprisonment of up to five years and fines of up to €500,000 for bribing a private sector representative. Fines can be increased to twice the amount of the proceeds of the crime, if higher than the maximum penalty (Clifford Chance 2018). Additionally, individuals may also face restrictions of certain rights, professional restrictions or a publication of the ruling. Fines for legal entities can be up to five times as high as those for individuals. Additionally legal entities may face debarment, confiscation, professional bans, placement under judicial supervision, closure of establishments and a publication of the ruling (Clifford Chance 2018).

Legal entities can be charged if they violate a particular requirement under Sapin II (such as the requirement to establish a compliance programme) or if a representative of the legal entity bribed on behalf of or to the benefit of the legal entity (see below) (Baker McKenzie 2017b).

United Kingdom

The UK Bribery Act

The centrepiece of anti-corruption legislation in the UK is the 2010 Bribery Act. The Bribery Act covers four core offences: active bribery, passive bribery, bribing a foreign public official and failure of commercial organisations to prevent bribery (UK Bribery Act 2010).

The law applies if any part of the relevant act or omission pertaining to the offence took place in the UK or if the person guilty of the offence has a close connection to the UK (Article 12). Under the UK Bribery Act, the general offence of bribery, given or received, makes no distinction between public or private sector representatives (UK Bribery Act 2010). Legal entities can be found guilty of an offence under the Bribery Act if a person associated with the company commits bribery to the benefit of the company, or if a company failed to prevent bribery (Article 7).

The Bribery Act provides for a legal defence if the company can prove that it had adequate procedures in place (see below). According to Transparency International, the Bribery Act "continues to provide a sound legal basis for

[2] https://www.economie.gouv.fr/files/files/directions_services/afa/2019-01-29_-_Guide_pratique_fonction_conformite.pdf

prosecuting foreign bribery by both natural and legal persons. The corporate offence of failure to prevent bribery under section 7 has proved a very effective incentive for businesses to adopt adequate corporate compliance measures and internal controls" (Transparency International 2018: 89).

Sanctions and enforcement

Sentencing guidelines were published in 2014 regarding the fines applicable to legal persons. A fine is calculated by reference to multipliers of between 20 and 400 of a figure representing the financial "harm" caused by the offence. Higher levels of "culpability", for example, through systematic or sustained wrongdoing, lead to the application of higher "multiplier" figures (Baker McKenzie 2017b). Additional sanctions for legal persons may include confiscation, debarment and appointment of an external monitor (Clifford Chance 2019).

The UK was commended for its increased enforcement and improved detection capabilities by the OECD Working Group in its latest full report (OECD 2017a). However, the follow-up to the report from 2019 notes that the number of enforcements in relation to the size of the UK economy is still relatively low (OECD 2019a).

Reforms and newer measures

Deferred prosecution agreements (DPAs) were introduced in 2014 (see below), which have supported and increased enforcement efforts.

The UK also improved its whistleblowing channels (OECD 2017a) and was commended for the exemplary disclosure by the Serious Fraud Office (SFO) of concluded foreign bribery cases. The SFO further publicises statistics on opened investigations, cases commenced and cases concluded through its annual report (Transparency International 2018). Other positive developments include the establishment of the International Anti-Corruption Coordination Centre and the introduction of a public central register of beneficial ownership information (Transparency International 2018).

Germany

Although Germany does not have a dedicated and encompassing anti-bribery law comparable to the UK Bribery Act or Sapin II, the OECD rates the country as one of the strongest enforcers of the Anti-Bribery Convention (OECD 2018). To do so, prosecutors in Germany draw on different offences and a range of proceedings. The 2015 Anti-Corruption Law covers corruption of public servants as well as corruption within the private sector, but is limited to individuals and does not cover any offences or penalties for legal entities (Bundesgesetzblatt 2015).

Other applicable laws and sanctions

Bribery of public officials is regulated under the German criminal code. A distinction is made between bribery and bribery that leads to an official act of duty violation. This distinction has an effect on the size of the sanction. Penalties can range from a fine or a prison sentence of maximum three years (for bribery) to imprisonment for three or six months to five years (for bribery leading to an active violation of public duties). In aggravated cases, imprisonment of up to 10 years can be applied (Baker McKenzie 2017a).

Bribery in the private sector, however, only covers benefits given or received to incentivise future action[3]. Penalties for individuals consist of fines or prison sentences of up to three years, five years in aggravated cases.

Companies cannot be held criminally liable in Germany. However, administrative fines may be applied to legal entities (see below). Likewise individual company representatives can be held liable for violating their supervisory duties, which may also be attributed to the company as an

[3] https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/germany

entity. However, the law does not specifically clarify what measures would be considered adequate to fulfil supervisory duties (Baker McKenzie 2017b).

Legal persons charged with an administrative offence can be fined up to €10 million (if the conduct is deemed as "committed with intent") or €5 million (if the offence occurred due to negligence). Additionally, any benefit gained from the offence can be disgorged (OECD 2018). A court may also order the forfeiture of assets gained through an offence. A new section of the Administrative Offences Act allows for forfeiture against a company without holding it officially liable (Transparency International 2018).

In 2017, a federal debarment register was created; however, it is not yet operational (OECD 2018).

Criticism

Germany does not have a centralised dedicated anti-corruption agency or other body with genuine executive functions (European Parliament 2017). Rather, cases of corruption are investigated and prosecuted by regular prosecutors and police at the state level and, where taxes are concerned, by the relevant tax authorities. This leads to a substantial variation in enforcement between regional states (OECD 2018).

Because companies can only be held liable under the Administrative Offences Act, prosecutors have substantial leeway in deciding whether or not to bring charges, and there is some concern that this discretion is being exercised "conservatively" (OECD 2018: 67). Transparency International also noted that cases against legal persons, if based on a violation of supervisory duties, are rendered by the prosecutor without sufficient transparency or involvement of a court (Transparency International 2018).

A further challenge relates to the fact that Germany lacks coherent sanctioning guidelines or guidelines for the application of non-trial resolutions. There are, for example, no clear guidelines to determine the size of the confiscatory component aimed at disgorging the proceeds of corruption (OECD 2018). There has also been some concern about the punitive effect of sanctions because of the often low fines as opposed to their confiscatory components. Additionally, confiscatory components are often calculated based on numbers provided by the companies or agreed upon in negotiations (OECD 2018 and Transparency International 2018).

While enforcement is overall high, the OECD (2018), has raised concerns that the vast majority of cases are brought against individuals whereas companies are rarely held accountable and that the punitive element of sanctions can be relatively low.

Italy

Legal framework and sanctions

In Italy, private-to-public corruption is covered under the criminal code while private-to-private corruption is covered in the civil code. The former is punishable with up to 10 years imprisonment for individuals and for legal entities with fines of up to 600 quotas (a quota ranging from €258 to €1,549). Additionally, companies may be temporarily suspended from doing business, have their authorisations, licences or permits suspended or revoked, be debarred from certain public tenders, be excluded from subsidies and contributions, or banned from advertising (Baker McKenzie 2017a). Under the civil code, individuals can be penalised with up to three years imprisonment. Legal entities can be charged with fines of up to 400 quotas, which can be increased by a third in cases where considerable profit was made from the violation (Baker McKenzie 2017a).

Courts can also order a profit confiscation if the company made any profit attributable to the misconduct. If the company has made significant profits due to misconduct or has been repeatedly sanctioned over a timeframe of seven years, a court may order the complete shutdown of the business (Baker McKenzie 2017b). Companies that have implemented appropriate measures may not be held liable, provided a model compliance programme is adopted (Baker McKenzie 2017a) (see below).

Italy has stepped up its enforcement in recent years, increasing from “moderate” to “active” enforcement from 2015 to 2018 (Transparency International 2018). In 2016, the highest monetary sanction ever to be applied on a legal person after a full trial was issued in the Saipem case. The total sanction was US$29 million, US$681,209 of which was a fine and US$28.3 million a confiscation (OECD 2019b, p. 16).

Reform efforts

Italy’s legal framework has undergone several reforms in recent years, starting with the passing of an Anti-Corruption Law in 2012. The law brought Italy’s legal framework in line with its international obligations and created the national anti-corruption authority (Autorità Nazionale Anticorruzione, ANAC) (European Parliament 2017).

There were more reforms in 2014 and increased responsibilities for the ANAC. This included more supervisory powers over public tenders and improved communication/information exchange with prosecutors[4]. Italy’s legal framework was again strengthened in 2015, increasing the scope and penalties for corruption offences, criminalising trading in influence and enhancing transparency in public contracts. In 2017, the statute of limitations was increased for certain corruption offences and new whistleblower legislation was enacted (Transparency International 2018).

In December 2018, the Italian parliament approved a host of changes to its anti-corruption laws, dubbed the “bribe-destroyer bill”. It raises the fines for certain offences and addresses some of the criticisms raised[5].

Criticisms

Even though reforms have been implemented through an extension of the statute of limitations and whistleblower protections, both areas still have shortcomings. The new whistleblower protection law, for example, applies almost exclusively to public sector employees (Transparency International 2018). The statute of limitation rules in Italy have long been a concern because they have led to an inability to prosecute cases. This is exacerbated by an overburdened judiciary and a large backlog of cases. The extension of statutes of limitations is considered insufficient to tackle the issue (European Commission 2014; OECD 2014; Transparency International 2018). The newly adopted reform package from December 2018 looks to rectify this by freezing the statute of limitations after a verdict in the first instance.

Netherlands

Legal framework and sanctions

Both private-to-public and private-to-private corruption are regulated in the Dutch criminal code. Penalties for individuals can include: imprisonment of up to four years (six for private-to-public), exclusion from certain professions, fines of up to €82,000 and confiscation of the proceeds of the crime. The last two may also be applied to legal persons, whereas the fine can be raised to up to 10 per cent of the annual turnover and certain rights may be withdrawn (for example, temporary termination of certain business activities). In cases of private-to-private corruption, the judgements may also be made public. Non-punitive measures, such as asset forfeiture, may also be imposed (Baker McKenzie 2017a; Loyens & Loeff 2018).

A Whistleblowers Authority Act came into force in 2016 and relevant amendments were made to the Dutch criminal code in 2015 (Transparency International 2018 and OECD 2015) to harmonise

[4] https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/italy

[5] http://www.fcpablog.com/blog/2019/1/14/italy-adopts-new-bribe-destroyer-law.html

the offences for foreign bribery and increase sanctions (OECD 2015).

Enforcement

The Netherlands did not enforce its foreign bribery offence for over 10 years after the OECD Anti-Bribery Convention came into force, but it did prosecute cases of domestic bribery. The first foreign bribery case occurred in December 2012 when the Netherlands had their first out-of-court settlement in the Ballast Nedam case, which resulted in a €5 million penalty and the abandonment of a tax claim worth €12.5 million. Consequently, a second resolution was reached with Ballast Nedam's auditors, KPMG, on the accusation that they helped conceal payments to foreign agents. KPMG agreed to a payment of €7 million in fines and confiscation, and committed to strengthen its compliance programme under the supervision of the Netherlands' Authority for the Financial Markets (OECD 2019b).

Since then, the Netherlands has significantly increased its enforcement efforts. From 2014 to 2017, at least seven investigations were opened, two cases were commenced, and four concluded with sanctions. At the same time, more funds were made available for enforcement agencies and important efforts were made to improve investigative and prosecutorial capacities. Furthermore, the public prosecution service set up a forum where all relevant government parties can share information (OECD 2015 and Transparency International 2018).

Criticism

A criticism regarding jurisdictional reach has been that Dutch anti-bribery law only applies if the violation occurred in the Netherlands or was conducted by a Dutch national (plus persons in the service of international organisations based in the Netherlands). Provisions to hold foreign nationals accountable under specific conditions, even if the offence is not committed entirely in-country, are lacking. This makes it difficult, for example, to try foreign nationals working for Dutch companies abroad (Clifford Chance 2019 and Transparency International 2018).

Until now, all Dutch enforcement actions on foreign bribery were non-trial resolutions. The only foreign bribery case that was ever brought to trial (against Takilant Ltd.) was tried in absentia (OECD 2015).

A comparative look at selected issues

In the following, the jurisdictions discussed above are compared as to how they incorporate and implement selected measures. These are: i) corporate (criminal) liability; ii) non-trial resolutions; iii) regulations regarding compliance programmes; iv) regulations regarding self-reporting and cooperation; v) whistleblower protection; and vi) external reporting.

Corporate liability

When assessing to what extent and how effectively corporations can be held liable for corruption related misconduct, a crucial question is that of the liability of legal persons.

While the act of paying or receiving a bribe is done by an individual, it needs to be acknowledged that such an individual might be undertaking the violation to benefit their employer or at the (indirect) encouragement of their employer. Consequently, legal measures need to be in place to hold legal entities accountable for misconduct.

While globally this is not always the case, all European jurisdictions allow for the liability of legal entities. But how this is achieved varies: companies can be held criminally liable in 66 per cent of OECD countries, while 27 per cent have adopted non-criminal approaches, such as administrative liability. Both of these can be compliant with the OECD Convention on Foreign Bribery "in accordance with the principle of 'functional equivalence'" (OECD 2016: 8).

Corporate criminal liability

Out of the countries considered in this paper, companies can be held criminally liable in three: UK, France and the Netherlands (OECD 2016).

Both private-to-public and private-to-private bribery are covered in the Dutch criminal code for both natural and legal persons. Article 51 of the Dutch criminal code states that criminal offences can be committed by natural or legal persons, giving them equal standing (Baker McKenzie 2017b). Yearly statistics are kept on prosecutions of legal persons, and law enforcement is trained on corporate liability (OECD 2015).

In the Netherlands, liability of legal persons needs to be established by attributing the relevant behaviour of a natural person to the legal person. This is possible if one or several of the following apply (Loyens & Loeff 2018):

- the person violating the law (either by act or omission) is considered to be employed by the company or otherwise acting on its behalf
- the misconduct is considered to be aligned with the normal course of business in or by the company
- the misconduct benefitted the company
- the company is considered to accept or has accepted such behaviour in the past and/or has not taken any measures to prevent it

Furthermore, intent or negligence of the legal entity must be proven, depending on the specific offence (Loyens & Loeff 2018).

Under Dutch criminal law, individuals who are in a leadership position over a criminal misconduct may also be prosecuted if they were in a position to take preventive measures but did not (Baker McKenzie 2017b and OECD 2016).

Under English criminal law, a company has a legal personality and can be prosecuted for a range of criminal offences. To criminally convict a company, it needs to be shown that the company "had a guilty state of mind" (Baker McKenzie 2017b).

Because companies are legal entities with no mind or intention of their own, the "identification principle" is used to attribute intention to a company. Generally speaking, the identification principle confers the intention and will of those "with directing mind" to the company itself (International Bar Association 2018). The identification principle is necessary for a corporation to be held criminally liable under sections 1,2, and 6 of the Bribery Act, but it can be difficult to apply. So section 7 created the additional offence of a corporate failure to prevent bribery. This creates a separate strict liability for corporations if a violation of bribery laws occurs at the company and the company failed to put adequate measures in place to prevent such misconduct (International Bar Association 2018).

According to the French criminal code, any legal person, excluding the French state, may be held criminally liable for offences committed by their representatives (Baker McKenzie 2017b and International Bar Association 2018).

Similarly to the other jurisdictions, a company's liability is determined if a representative, who is in an immediate or de facto position of power, commits a violation on behalf of and/or to the benefit of the company. "Benefit" has been applied liberally, and companies have been held criminally liable even if there was no direct benefit to the company, as long as the act or omission was not to the exclusive personal benefit of the offender. "Representative" may also be defined somewhat broadly in applying not only to employees but also to persons "to whom powers have been delegated" (Baker McKenzie 2017b).

While French companies cannot generally speaking be held liable for misconduct of their subsidiaries, according to the criminal code they may be charged as an "accomplice" if they have facilitated the misconduct (Baker McKenzie 2017b).

Liability according to administrative law

In the other two jurisdictions (Germany and Italy), companies cannot be held criminally liable. However, both jurisdictions allow for a liability of legal entities based on administrative/civil law.

In Germany, legal entities can be held liable under the country's Administrative Offenses Act (OECD 2016). As with criminal liability, responsibility needs to be established to do so. In Germany, this may be the case if (OECD 2018 and OECD 2016):

- a criminal act is committed by a person who is a representative in a managerial or otherwise representative position
- the legal entity benefited from, or was meant to benefit from, the offence
- a lower level company representative commits bribery and the company's management is deemed to have failed in their supervisory duties

In addition to establishing liability of a legal person and imposing a regulatory fine, forfeiture orders can be issued against a company without holding the legal person liable. This is applicable if the administrative offence of a violation of supervisory duty by a senior manager occurred. In such cases, the legal person is considered a third party, so the order does not amount to a conviction.

In Germany, contrary "to the principle of mandatory prosecution which applies to criminal offences (…), the principle of discretionary prosecution applies to initiate proceedings against legal persons (…). A decision of a prosecutor not to prosecute the legal person is not appealable" (OECD 2018: 67). In its latest evaluation report, the OECD Working Group voiced some concerns that discretion was "exercised conservatively" and that there was no guidance available on how to apply prosecutorial discretion (which would be particularly useful to ensure consistency across regional states) (OECD 2018).

In Italy, as in Germany, a company's liability is classified as an administrative offence (OECD 2011 and OECD 2016). However, court cases against companies are usually tied (in process) to the cases against the individuals of that company. As such, while legally classified an administrative offence, cases against companies can be tried in criminal court according to criminal procedure. However, companies may still be tried if no natural person is tried alongside it (OECD 2011).

Companies can be held liable for crimes committed by their representatives, provided they held administrative or (de facto) managerial positions or if the crime was at least partially in the interest or to the benefit of the company (International Bar Association 2018; OECD 2016). A legal defence is provided for companies that have put adequate preventive measures in place (see below) (OECD 2011).

Non-trial resolutions

"Non-trial resolutions, commonly known as 'settlements', refer to a wide array of mechanisms developed and used to resolve criminal matters without a full court proceeding, including foreign bribery cases, based on an agreement with an individual or a company and a prosecuting or another authority" (OECD 2019b: 17).

Non-trial resolutions have become the primary enforcement vehicle of anti-corruption laws in all 44 countries that have adopted the OECD Anti-Bribery Convention (OECD 2019b). Of the five countries in this paper, one (the Netherlands) has used only non-trial resolutions in their foreign bribery action. The other four have used both trial and non-trial solutions. "The three biggest enforcers of the foreign bribery offence have used non-trial resolutions to resolve over 78% of their cases, namely: Germany (79%), the United Kingdom (79%) and the United States (96%)" (OECD 2019b).

Conditions and reasons for entering non-trial resolutions

For non-trial resolutions to be offered as an alternative to (criminal) prosecution, the alleged offender is required to show a level of cooperation and good behaviour towards the authorities. What exactly is required differs, but commonly considered are: self-reporting, admission of facts, cooperation with authorities, information about third parties or assistance in investigations against other entities, implementation of compliance measures (before or after the offence), remedial actions, internal investigation (if a legal person) and agreement to a monetary penalty (International Bar Association 2018 and OECD 2019b).

Many of these conditions also serve to mitigate sanctions either as part of a non-trial resolution or as part of a court case, which will be discussed in more detail below.

Governments generally opt for non-trial resolutions out of public interest and for efficiency reasons. A trial and corresponding investigation can be lengthy and costly and require substantial resources. This is especially true in increasingly complex cross-border cases. Going for any type of settlement in cooperation with the offender decreases some of that burden. Non-trial resolutions, especially in multi-jurisdictional cases, can also give the defendant and prosecutors more certainty regarding the overall penalty and allow for a fair distribution of the sanction among affected jurisdictions (OECD 2019b; Transparency International 2015a).

In the UK's Deferred Prosecution Agreement (DPA) with Standard Bank, for example, the company agreed to cooperate with authorities and pay US$25.2 million in penalties and confiscation. Consequently, the "US DOJ agreed to take no action to the extent that the conduct would be captured in the UK DPA and that appropriate sanctions be imposed. The SEC imposed a civil penalty of US$4.2 million with regard to conduct not covered in the UK DPA" (OECD 2019b: 41).

Frameworks and guidelines for the implementation of non-trial resolutions

All jurisdictions considered here allow for some form of non-trial resolution built on cooperation and allowing for reduced sanctions while not requiring a guilty plea. However, some are more formalised than others. Some jurisdictions have formalised non-trial resolution programmes with guidelines laying out the conditions under which such resolutions might be entered into, what requirements would be put up in its execution and how this would affect penalties. Such "frameworks provide a measure of transparency and consistency by explaining the full range of potential mitigation behaviours available to companies. The more explicit the guidance, the more likely it can be used as a guide by corporations seeking to adapt their behaviours in such a way as to mitigate or avoid culpability" (International Bar Association 2018).

The DPAs in the UK, for example, come with guidelines as to when they should be entered into and how (Serious Fraud Office 2014). The factors to consider when deciding whether to enter into a DPA include: public interest, a history of similar conduct and past business practices, existence of compliance programmes, timely disclosure, level of harm caused and cooperation shown. Other jurisdictions have formalised non-trial resolution provisions – the Netherland's *transactie* (transaction), for example – that have, however, been criticised for not providing sufficient guidelines on their implementation (Transparency International 2018). Lastly, Germany does not have a single source for non-trial resolutions in bribery cases. Rather, different forms of DPA and Non Prosecution Agreement (NPA)-style measures are available, but guidelines regarding their applicability and implementation are lacking (Transparency International 2018).

Guidelines are necessary to give a level of predictability to companies and an understanding of what behaviour would be rewarded and how. Likewise, clear guidelines, as well as transparency about the outcomes of settlements, are paramount to ensure accountability and trust in the system. This is particularly the case in systems where the prosecution holds a high degree of discretion

(International Bar Association 2018 and Transparency International 2015a).

Sanctions under non-trial resolutions

What is required to resolve a resolution and what the associated penalties are differs between the type of non-trial resolution applied. But they almost always include a financial penalty, which usually consists of an element of fine and an element of confiscation. A restitution to victims is also relatively common followed by an admission of facts, even if not guilt. (OECD 2019b).

While penalties in non-trial agreements can be high, the fact that they contain an element of negotiation with the alleged offender and the opportunity to reduce sanctions, sometimes quite substantially, make them susceptible to the criticism of being too soft on companies. It is thus paramount to provide clear sanctioning principles. This needs to include information on what sanctions will be applied and to what extent and under what conditions they might be reduced (International Bar Association 2018).

Some of the jurisdictions analysed here have such guidelines. In Italy's *patteggiamento* (the Italian version of a non-trial resolution), the amount of a possible reduction (up to one third), is grounded in the law. In the UK, sanction reductions are covered in the sentencing guidelines (OECD 2019b). To determine the size of sanctions applied as part of a DPA, the DPAs code of practice lays out a list of common sanctions applied, such as: payment of a financial penalty, compensation to victims, payment of the prosecutor's costs, donations to charity and a confiscation of proceeds (Serious Fraud Office 2014). Further sanctions may include a ban on certain business activities, financial reporting obligations, implementing a compliance programme and the appointment of an external monitor (Serious Fraud Office 2014). The code of practice further lays out potential sanction reductions for genuine cooperation.

Under France's CJIP (introduced in December 2016 with Sapin II) fines of up to 30 per cent of the average annual turnover of the company over the last three years and at least a multiple of the profits gained can be applied. Additionally, a monitoring through the French anti-corruption agency (AFA) and compensation to victims can also be ordered (International Bar Association 2018 and Journal officiel de la République française 2016). To determine the size of sanctions, a memo was issued by the French Ministry of Justice in January 2018 listing factors that may increase a fine (seriousness of the facts, length of wrongdoing and criminal record), as well as those that may reduce it (prompt self-reporting, cooperation with authorities, measures taken to prevent further wrongdoing and/or to compensate injured parties) (International Bar Association 2018).

Increasing compensation to victims is a demand often made by civil society organisations (Transparency International 2015a). A clear majority of non-trial resolutions in OECD countries now allow for such a restitution (OECD 2019b).

Another aspect of a penalty can be the appointment of an external monitor who examines whether or not a company complies with the requirements laid out in the non-trial resolution. In the UK, a company can be required by the SFO to appoint a monitor (subject to the authority's veto) as part of a DPA (Serious Fraud Office 2014). In France, as part of a CJIP, a company may be required to implement a compliance programme under the supervision of the AFA. In the Netherlands, monitoring by the public authorities can also be added to a non-trial resolution (International Bar Association 2018 and OECD 2019b).

In most jurisdictions, including the ones compared here, both fines and confiscations are applicable to companies, but are not always used in unison. In the case against AgustaWestland in Italy in 2014, for example, Augusta Westland Ltd. concluded a *patteggiamento* "providing for both a €300,000 criminal fine and €7.5 million in confiscation", while Augusta Westland SPA received a fine of €80,000 with no confiscation being imposed (OECD 2019b: 112). “In the Netherlands, in the SBM Offshore case, the company received US$200 million in confiscation in addition to a US$40 million criminal fine as part of its *transaction* with the public prosecutor's office in 2014” . Whereas in the Ballast Nedam case of 2012, “the *transaction* between the prosecutors and Ballast Nedam provided no confiscation in addition to the criminal fine of €5 million” (OECD 2019b).

In a foreign bribery case, a CJIP was used for the first time in May 2018 with Société Génerale, in parallel with the United States in the first coordinated resolution with the US Department of Justice. Société Générale agreed to pay €250 million to the French Treasury (amounting to half of the total penalty). The bank was also to be monitored for two years by the AFA (OECD 2019b). In the Société Générale case, the French and US authorities did not apply separate confiscation measures. “However, Société Générale had agreed to resolve civil proceedings brought by the Libyan Investment Authority (LIA) in the United Kingdom over the bribery allegations prior to resolving the criminal proceedings with the French and American authorities. In 2017, Société Générale agreed to pay €963 million in compensation to the LIA” (OECD 2019b: 113).

Criticism of non-trial resolutions

Non-trial resolutions are sometimes criticised for not being harsh enough on companies or for apparently giving companies the opportunity to buy their way out of a trial with penalties sometimes not even covering the profits made from the crime (OECD 2019b and Transparency International 2015a).

Through a non-trial resolution, companies can sometimes avoid harsher penalties. For example, in non-trial resolutions that do not amount to a conviction, companies can often avoid a debarment. Through a settlement, the offender can also hope to avoid the publicity, length and possible spectacle of a (public) trial and might reduce the final sanction (OECD 2019b and Transparency International 2015a).

To increase transparency and to ensure accountability of the process, non-trial agreements should be publicised (Transparency International 2015a). But while the majority of OECD countries do publicise some information, the degree varies. This sometimes gives rise to the criticism that companies’ misconduct escapes public scrutiny and it becomes hard to assess whether sanctions were proportionate and dissuasive (OECD 2019b and Transparency International 2018).

Transparency International also notes that there was a risk that DPAs in the UK became the “new normal” as opposed to a measure only entered into in instances of a strong public interest. This criticism was most notably voiced in the Rolls Royce case as the company was able to enter a DPA without having self-disclosed. The lack of a requirement of self-disclosure to enter a DPA was also made against the French CJIP (Transparency International 2018).

However, while a possible reduction in sanctions might be a reason to enter a non-trial resolution agreement, some of the highest criminal sanctions so far have been the result of non-trial resolutions (OECD 2019b). This might be due to the fact that most of the large bribery cases are now multi-jurisdictional where non-trial resolutions are much easier to implement. Eight out of the ten largest foreign bribery actions levied against companies, were multi-party non-trial resolutions (OECD 2019b: 119).

However, some concerns regarding the deterring of sanctions as part of non-trial resolutions remain. This is, for example, due to the often small punitive element of monetary sanctions, or overall low sanctions compared to companies’ overall profit (OECD 2019b). A primary focus on monetary penalties may also lead to companies simply budgeting for potential penalties (Transparency International 2015a). Another criticism brought forward is that the size of sanctions often depends on the bargaining power of the company and their assessments regarding profits made (International Bar Association 2018;

OECD 2018; Transparency International 2018).

So, while non-trial resolutions can be beneficial instruments to facilitate and streamline cases of bribery against companies, it should be ensured that the process follows clear and transparent guidelines. Such guidelines need to include specific rules on whether or not a non-trial resolution is appropriate as well as sanctioning guidelines which ensure that sanctions applied act as a deterrent (International Bar Association 2018, and Transparency International 2015a).

Different forms of non-trial resolutions

A non-trial resolution or "structured settlement" is any case where an agreement is reached between an alleged offender and the authorities. Such an agreement is reached outside the courts and as an alternative to a trial. The alleged offender is required to cooperate and show good behaviour and in return can hope for a lower sanction and/or faster and more predictable process.

There are different types of approaches to achieve a non-trial resolution. The most common are deferred prosecution agreements, non-prosecution agreements and plea deals. The inclusion of the latter, as a trial alternative, is somewhat debatable (International Bar Association 2018). Plea deals have been around for a long time. And in as much as they can offer reduced penalties in exchange for cooperation, they can be considered a non-trial resolution. However, they also require an admission of guilt and often amount to a conviction. In this sense, they might be considered not a "true alternative" to a criminal trial. (International Bar Association 2018). In the following, focus will be given to newer types of resolutions not requiring a guilty plea and/or conviction.

DPAs and similar agreements

DPAs, as applied in the UK, France and the Netherlands, do not require an admission of guilt, although they may require an admission of facts. They are also not considered a final conviction but rather refer to the suspension of a prosecution under specific conditions. As they are not considered a final conviction, they usually do not trigger some of the consequences of a formal conviction, such as debarment. If the conditions set out in the agreement are not fulfilled over a certain time period, the suspension can be revoked and, unlike with NPAs (see below), initial charges are usually filed (OECD 2019b). DPAs in the Netherlands apply to legal and natural persons, while the DPA systems in the UK and France apply only to legal persons (OECD 2919b).

In the UK, DPAs, which are enshrined in the Crime and Courts Act for England and Wales of 2013, need to be approved by the courts to which the SFO makes an application after negotiations with the offending entity. A judge must determine that entering into a DPA is in the interest of justice and that the conditions negotiated are fair, reasonable and proportionate. The DPA also needs to be filed with the courts (International Bar Association 2018 and Serious Fraud Office 2014)

DPAs in the UK require a "statement of facts" and may include financial penalties, compensation to victims, disgorgement of profits, charitable donations and implementing or improving a compliance programme (International Bar Association 2018 and Serious Fraud Office 2014). Guidelines are provided for prosecutors through the Deferred Prosecution Agreements Code of Practice (Serious Fraud Office 2014). The code lays out factors to consider when deciding to prosecute or enter a DPA, as described above. Information and details about a DPA will be published, except for such details that would negatively affect an on-going prosecution. If a company does not comply with the conditions laid out in the DPA, the prosecution may make an application to the crown court, which can order to rectify the failure or cancel the DPA.

The new DPA system in France, *Convention judiciaire d'intérêt public* (CJIP) is largely modelled on the UK and US examples. A CJIP is applicable to legal persons suspected of bribery, trading in influence or tax fraud. A CJIP can be initiated by a public prosecutor both prior to prosecution and after criminal proceedings have started. It does not require an admission of guilt. However, if criminal proceedings have started, the accused needs to admit to related facts of the offence and its criminal status as set out by the prosecution (OECD 2019b and Transparency International 2018). The formal investigation is then suspended, but can resume if the obligations under the CJIP are not met. The obligations that can be imposed are: paying a public interest fine, implementing a compliance programme under the supervision of the French anti-corruption agency (AFA) and compensating the victims (OECD 2019b).

Guidelines have been provided to prosecutors, including guidelines regarding sanctions and how they shall be calculated. Cooperation with authorities and information disclosure are factors mentioned that would affect the size of the penalty applied (International Bar Association 2018).

Unlike the UK's DPA, a CJIP does not require an approval by the courts before an agreement is reached. However, once a settlement is reached it needs to be reviewed by the courts regarding the legality and proportionality of the fine. If a court does not approve a settlement, or if the company is found in breach of its provisions, the prosecution may start criminal proceedings. Information on the resolution is published through the AFA's website. (International Bar Association 2018 and OECD 2019b).

With *transacties* (transactions) in the Netherlands, as with the other DPA-type examples, prosecution is suspended under certain conditions in an agreement between the alleged offender and the prosecution. Unlike in the UK and France, however, Dutch transactions do not require a court's approval and are not filed in court (International Bar Association 2018). The agreement itself is not publicised, but a press release is published following a settlement providing key information about the case. Transparency International has criticised the limited transparency in the Netherlands, as well as the limited involvement of the courts (Transparency International 2018).

Non-prosecution agreements or similar

Non-prosecution agreements differ from DPAs in that the case is dropped fully instead of deferred and no charges are filed. NPAs do not require an admission of guilt and usually need to be approved by a court. Such non-trial resolutions are "generally designed for offenders who self-report and/or fully cooperate with the prosecution, including, when relevant, through providing information on third parties" (OECD 2019b: 46).

In Germany, natural persons "may be conditionally exempted from prosecution where the 'public interest' no longer requires the prosecution of the case" (OECD 2019b: 61). Conditions may include a compensation for damages and payment of a penalty to the treasury or a non-profit organisation, and must be agreed upon by the court and offending individual. "The conditional exemption does not form a record of conviction and does not become public. If the defendant rejects conditional exemption, the matter goes to full trial" (Oduor et al. 2014: 26)

Non-trial resolutions with a (de facto) conviction

Italy's *patteggiamento* is "akin to a plea deal, (and) allows for an immediate resolution of charges that leads to the alleged offender being sanctioned (but without an admission of guilt)" (OECD 2019b: 18).

Unlike DPAs, the *patteggiamento* can be considered a final decision tantamount to a conviction. In that sense, it is similar to plea deals. However, unlike plea deals, it does not require the accused to admit guilt (OECD 2019b). The prosecutor and defendant (natural or legal person) agree on a penalty and present it to the courts for judicial approval.

In Italy, settlements can only be entered into once the accused has repaid the proceeds of the offence (Transparency International 2015b). As part of a *patteggiamento* sanctions can be reduced by up to a third (OECD 2011). The court hearing is open, however, and people have to establish an interest to be allowed to attend. Resulting dispositions will not appear on the defendant's criminal record (Oduor et.al. 2014).

Other non-trial resolutions

Germany does not have a structured form of non-trial agreement, comparable to a DPA or NPA (International Bar Association 2018). However, different approaches can be applied to settle bribery cases outside of court without an admission of guilt. (One option for natural persons was discussed above).

While there is no explicit legal provision for a legal person to resolve a case in a non-trial resolution, forfeiture orders are an opportunity to resolve a case without a trial under the condition that the proceeds of the crime are recovered/forfeited (OECD 2019b). As prosecution in Germany is heavily decentralised, forfeiture orders have been used at the regional level as non-trial resolutions for companies that have self-reported and cooperated. Forfeiture orders do not establish corporate liability and do not impose regulatory fines (OECD 2019b; OECD 2018; Transparency International 2018).

Negotiated sentencing agreements have also been entered into in Germany, which amount to a de facto non-trial solution and can be applied to natural and legal persons. Some form of confession is usually required as part of negotiated sentencing agreements, but they do not constitute a guilty verdict. While penalties that have been applied have been quite substantial, there are no formalised processes or adequate guidelines in place (International Bar Association 2018; OECD 2018; Oduor et al. 2014; Transparency International 2015b).

While formal guidelines are lacking, voluntary disclosure, cooperation with authorities and existing preventive measures have been used to determine the size of sanctions applied. As part of such an agreement, companies may be asked to improve their compliance programmes, compensate victims and pay a monetary penalty before the settlement is finalised (International Bar Association 2018).

Information on settlements is not generally publicised and will only be available to the extent that media requests information according to the German Freedom of Information Act or if public hearings took place (International Bar Association 2018).

Regulations surrounding compliance programmes

As discussed above, deciding whether or not to prosecute a company and to what extent, usually depends on two questions:

1. Did the company (or its management) benefit from the misconduct?
2. Did the company (or its management) attempt to prevent the misconduct?

If the answer to either of these is yes, a prosecution becomes possible/likely. If the answer is no, prosecutors might refrain from bringing charges or reduce possible sanctions.

Some jurisdictions have official legal defences, so that, if certain measures are in place, companies can use them as a defence if a case is brought against them. Some jurisdictions do not have an official legal defence in place but will nonetheless look at the company's processes and behaviour prior to and during the misconduct when determining the size of a sanction or whether to bring a case at all.

Legal requirements for compliance programmes

Often, a well-implemented compliance programme can be used to mitigate a sanction. But only in France is it a legal requirement.

Sapin II makes the existence of a compliance programme mandatory for certain companies (headquartered in France, over 500 employees and over €100 million in annual turnover). A compliance programme is thus not just a mitigating factor in case a violation occurs but is a general requirement, and its absence can constitute an offence (Clifford Chance 2019; Journal officiel de la République française 2016). To be considered adequate under Sapin II, a compliance programme must include the following elements:

1. a code of conduct defining and illustrating the different types of prohibited behaviours
2. an internal reporting system enabling employees to report misconduct
3. a documented risk assessment
4. a process for due diligence on third parties
5. internal financial controls
6. training for managers and employees
7. a sanction regime for employees that violate the code of conduct
8. evaluation procedures to assess the efficiency of the programme.

Failure to comply with the requirement can result in a fine of up to €200,000 for individuals and €1 million for legal persons (Clifford Chance 2019; Journal officiel de la République française 2016)

Legal defence for compliance programmes

In the UK, adequate internal measures may be used as a legal defence for companies in the event of misconduct occurring (OECD 2017a). Guidance is provided by the UK Ministry of Justice (UK Ministry of Justice 2010), laying out what would be considered adequate in terms of preventive measures. The guidance does not prescribe a specific set of measures but rather lays out principles to follow to allow them to take their specific circumstances into account. The principles are:

1. proportionate procedures
2. top-level commitment
3. risk assessment
4. due diligence
5. communication (including training)
6. monitoring and review

The first time a court has considered the "adequate procedures" defence was in the 2018 case against Skansen. The company had self-reported and cooperated with authorities on bribery charges. But when trying to argue that their procedures were adequate enough to warrant a defence, the court decided against the company, which led to a conviction.[6]

In Italy, companies may be exempted from liability if they have adopted and appropriately implemented an effective compliance programme (Clifford Chance 2019 and OECD 2011). Such a programme is referred to as "model of organisation, management and control" (Baker McKenzie 2017a and 2017b). The company needs to demonstrate that such a model has been implemented and that a monitoring body was set up to supervise, enforce and update the model adequately. The company may then be exempted from liability if it is established that the offending employee fraudulently bypassed the programme (Clifford Chance 2019 and OECD 2011)

Guidance regarding the programme is set out in the law itself and, in further guidelines, prepared by the industry representative organisation (*confindustria*) (Clifford Chance 2019). To be considered effective, the model (Baker McKenzie 2017b) needs to:

1. identify relevant bribery risks
2. identify financial (transaction) processes suitable to prevent violations
3. establish policies and protocols aimed at preventing violations
4. establish a monitoring body to monitor and review the model and its implementation
5. inform and train management and employees about the model
6. provide for disciplinary measures for violating the model

A model code is provided through a business association and approved by the Ministry of Justice. However, should a violation occur, a court will ultimately evaluate and decide whether a

[6] https://globalcompliancenews.com/adequate-procedures-rejects-defence-20180313/

programme implemented within a company was adequate for its operations (OECD 2011).

Should bribery occur in a company without adequate procedures in place, a judge may still mitigate sanctions if the company implements adequate procedures during the course of the trial.

In the Netherlands, having appropriate internal measures in place may lead to a legal entity not being held criminally liable or having their sanctions reduced if it is found that the misconduct does not seem to reflect the usual business culture, adequate preventive measures were in place and the company generally is not deemed accepting of such behaviour (Clifford Chance 2019). While effective internal controls and compliance programmes can serve as an affirmative defence (OECD 2016), official guidelines as to what would be considered effective and to what extent sanctions would be reduced seem lacking (Transparency International 2018).

While there is no specific legal defence for an existing compliance programme in the German legal framework, "a company may be subject to a corporate administrative fine, or a forfeiture order, if a representative or manager of the company has intentionally or negligently refrained from taking appropriate preventive measures (i.e. the administrative offence of violation of supervisory duties)" (Clifford Chance 2019: 28).

Consideration of compliance programmes without a clear legal defence

Germany does not have a legal requirement for a compliance programme or an official legal defence. However, whether a company has implemented strong preventive measures will still be factored into a decision to prosecute and determine sanctions.

In Germany, the existence of an effective compliance programme prior to the misconduct as well as the implementation of a programme after the misconduct have been used to reduce the punitive component of applied fines, although there are no specific guidelines as to what are considered necessary elements of an effective compliance programme (OECD 2018).

Regulations surrounding self-reporting and cooperating with authorities

Self-reporting[7] is a valuable detection source for cases of foreign bribery. Since companies that self-report often continue to cooperate with authorities, there is an interest to increase self-reporting. Detection is notoriously difficult in, for example, international bribery cases. As such, many jurisdictions have implemented, either formally or de facto, incentives for self-reporting, such as reduced sanctions (International Bar Association 2018 and OECD 2017b). Some jurisdictions in this study consider self-reporting when determining whether to enter into non-trial resolutions; in all countries, it may be looked at as a factor to reduce a sanction.

Self-reporting as a basis for entering into non-trial agreements

Among others, both the Netherlands and the UK have used the act of self-reporting as an argument to enter into non-trial resolutions. But many countries, including the Netherlands, have no specific legal framework or guidelines governing the process of self-reporting or the resulting mitigating factors. In the UK, the SFO explicitly encourages self-reporting as a factor when considering DPAs (OECD 2017b and Serious Fraud Office 2014).

However, while self-reporting is encouraged, its absence does not always take a DPA off the table, as was seen in the Rolls Royce case. Prosecutors argued that the cooperation shown by the company was so substantial that it warranted

[7] Self-reporting refers to the voluntary disclosure by a company of misconduct that the authorities up until that point were unaware of. It also requires an acceptance of wrongdoing or indication that the company may accept wrongdoing (OECD 2017b, p.13).

entering into a DPA and reducing the fine even in the absence of self-reporting. But such decisions have garnered some criticism as they might disincentivise companies from voluntary disclosure (International Bar Association 2018, OECD 2017a, Transparency International 2015a).

Self-reporting and cooperation as mitigating factors for sanctions

While Germany has no legal provisions for sanction mitigation for self-reporting in cases of bribery, "self-reporting foreign bribery can in practice be taken into account as a mitigating factor to reduce the level of a fine, or as a ground for dispensing with prosecution and entering into a resolution" (OECD 2018: 17). In the past, self-reporting has been used as a reason to abandon a prosecution and penalties in favour of a forfeiture order. However, the OECD (OECD 2018) has previously complained that there are no guidelines regarding corporate self-reporting in Germany, resulting in differing approaches between regions and a lower incentive to self-report. Other measures that have been considered when determining the level of fines are cooperation with prosecuting authorities and changes in management. But, as with self-reporting, the is a lack of guidelines to determine the size of sanctions (OECD 2018 and Transparency International 2018).

In Italy, no specific legal provisions exist regarding a mitigating effect for self-reporting in bribery cases. "However, cooperation before a trial generally (as well as removal of responsible individuals, compensation of damages, implementing compliance programs etc.) can substantially reduce pre-trial and final sanctions" (Baker McKenzie 2017b).

In the **UK**, self-reporting may have an effect on the decision to enter a DPA, as explained above, but can also have an effect on the size of a sanction. According to the UK sentencing guidelines, factors to consider in determining the seriousness of an offence and possible mitigating factors include self-reporting and cooperating with authorities. In recent DPAs "the courts have approved discounts of between 33.3% and 50% in the financial penalties imposed on companies with specific reference being made to the need to incentivise self-reporting" (OECD 2017b: 17).

Similarly, in the Netherlands, consideration can be given to self-reporting and on-going cooperation when deciding on appropriate penalties for legal persons. For example, in the case of SBM Offshore, the company disclosed that it had initiated an internal bribery investigation. This, as well as a good level of cooperation, was taken into account by the authorities when determining the non-trial resolution (OECD 2019b).

Whistleblowing

Whistleblowers are a potentially crucial source in bribery cases as they often have first-hand knowledge of misconduct. However, few come forward. According to the OECD "only 2% (5 cases) of foreign bribery schemes resulting in sanctions was detected by whistleblowers" (OECD 2017b: 29).

The hesitancy of possible whistleblowers to come forward might be linked to the lack of a legal framework of whistleblower protections in many jurisdictions, including Germany and Italy (Transparency International 2015b). "According to a 2016 OECD study, of the 43 Parties to the Anti-Bribery Convention, only 14 had adopted measures that satisfactorily meet the 2009 Anti-Bribery Recommendation's provisions on private sector whistleblower protection … (which) recommend that countries ensure that 'appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees, who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery'" (OECD 2017b: 29).

France

In France, Sapin II created a comprehensive framework for the protection of whistleblowers (European Parliament 2017). It provides a definition of whistleblowers that extends beyond employees, includes rules on how to raise an alert, and bans any discrimination against whistleblowers. The law also provides for sanctions of up to a year imprisonment and €15,000 in fines for persons preventing a report being made or retaliating against a whistleblower (Journal officiel de la République française 2016 and OECD 2017b).

As in the Netherlands (see below), employees should initially report misconduct internally within their organisation. Should that report be unsuccessful, they may report to the relevant authorities. In situations of an imminent risk of danger or damage, reports can be made to authorities directly. "As a last resort, and failing a response by the abovementioned organisations within three months, the report may be made public" (OECD 2017b: 34).

Sapin II also guarantees the protection of whistleblowers' identity by requiring that internal procedures to receive reports guarantee strict confidentiality of the identity of the reporting individual. "Elements that could identify the whistleblower may not be disclosed except to law enforcement authorities and only with the consent of the whistleblower and once the report has been substantiated" (OECD 2017b: 42). Disclosure of confidential information is punishable with up to two years imprisonment and €30,000 fines (Journal officiel de la République française 2016).

Under Sapin II a requirement is put on companies to establish internal reporting channels open to employees or external individuals working with the company (Journal officiel de la République française 2016). A further decree (No. 2017-564) mandates that companies with over 50 employees (who are not necessarily covered under Sapin II), implement internal whistleblowing procedures as well.[8]

United Kingdom

The UK is generally deemed to have an advanced legal framework for whistleblower protection (European Parliament 2017). Protection of whistleblowers is enshrined in the Public Interest Disclosure Act (PIDA) of 1998. The act protects employees from detrimental treatment for disclosing violations. PIDA contains important elements to protect whistleblowers such as (OECD 2017a: 18):

- covering most UK workers except armed forces and national security
- defining wrongdoing broadly
- protecting concerns raised internally and externally
- compensating for dismissal and detriment short of dismissal

Amendments to the law were made in 2013 to replace a "good faith test" with a "public interest test" (OECD 2017a: 18), which removes scrutiny from the whistleblower.

The OECD raised the concern that expatriate employees of UK companies were often not covered (OECD 2017a: 18), and civil society has suggested that more should be done to require companies to set up internal reporting mechanisms.

According to the SFO, the number of bona fide reports made by whistleblowers has increased in recent years, which is attributed to the launch of a new website and reporting mechanism, Make a Report, in 2016, which streamlined reports and allows for anonymous reporting (OECD 2017a).

The OECD Working Group has commended the SFO for efforts to promote and raise awareness to the importance of whistleblowers as a source of information, for example, through the publication of an Annual Report on Whistleblowing Disclosures (OECD 2019a). However, while awareness of legal protection for whistleblowers has improved, it remains low. "67% of respondents to a 2015

[8] https://www.osborneclarke.com/insights/whistleblowing-a-new-regulation-in-france-in-january-2018/

survey of UK workers were either unaware or believed there was no whistleblowing protection in the UK" (OECD 2017a: 20).

Germany

While Germany has some protections for whistleblowers through the labour law, which has received further definition though the courts, there is no comprehensive legal framework for whistleblower protection (OECD 2018 and Transparency International 2018).

Italy

Italy passed a new whistleblower protection law in 2017. However, it applies mostly to the public sector with the exception of private entities that are under public control or supplying goods and services related to public administration, thus leaving out the vast majority of private sector employees (Transparency International 2018).

Netherlands

In the Netherlands, the Whistleblowers Authority Act, which went into effect in 2016, states that "an individual must be able to report misconduct and may not be treated prejudicially based on this report" (Loyens & Loeff 2018: 9). It applies to employees, former employees and individuals reporting misconduct at a company they are familiar with based on their duty. Prejudicial acts covered under the law include dismissal, internal transfer, denying a transfer request, denying a raise or denying a request for leave without cause. Protection is provided as long as reports are made on reasonable grounds and if the violation reported could endanger public interest.

The law also includes a requirement for companies with more than 50 employees to implement internal reporting processes. A policy needs to be made available to all employees and must include at least (Loyens & Loeff 2018):

- procedures for handling internal reports
- definition of a suspicion of misconduct
- an employee appointed for handling reports
- a duty for the employee to treat the report confidentially
- a possibility for the whistleblower to consult a confidential adviser

However, Transparency International complained that there was a lack of adequate standards for these measures, and a study in 2017 found half of the companies studied not compliant with the legal requirement (Transparency International 2018).

The act "provides for a tiered approach to reporting: first internally within the company, then to the relevant authority and finally to the (newly established) Whistleblowers Authority as a last resort" (OECD 2017b). The latter may also be contacted in cases of retaliations. This tiered approach can be bypassed in cases of emergency, if the company has no reporting mechanism or if management is involved in the wrongdoing. Employees further have the right to seek confidential advice prior to making a report.

Reporting requirements

EU Directive 2014/95/EU

Under EU Directive 2014/95/EU[9] certain companies are required to report on their environmental and social impacts, including anti-corruption and bribery.

The directive applies to companies that are:

- publicly listed
- have over 500 employees
- fulfil two out of the three following: i) a balance sheet total of €20 million; ii) a net turnover of €40 million; iii) an average of 250 employees (CSR Europe / GRI 2017, p.8)

[9] https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en

Countries in the EU have incorporated this directive into their national legislation.

The UK and the Netherlands require the inclusion of the non-financial reporting in the company's annual management report. France requires the report to be included in the company's annual report, which is also to be published online. Germany and Italy allow for a separate publication outside of annual or management reports.

In 2017, the EU published non-binding guidelines regarding reporting requirements, which laid out the general principles and elements companies are expected to consider.

According to the guidelines, the areas to be covered are[10]:

- environmental matters
- social and employee matters
- respect for human rights
- anti-corruption and bribery matters
- where relevant: supply chain and conflict minerals
- board diversity

An adequate report should include information with regards to these areas:

- the company's business model
- existing policies and due diligence processes
- outcomes of policies
- main identified risks and their management
- key performance indicators (KPIs)

In their local implementation, countries stick mostly to the wording of the directive. However, Italy and, to a greater degree, France have provided additional and more specific sub-categories (CSR Europe/GRI 2017; Frank Bold 2017).

Legal frameworks

In the UK, the requirement to submit a non-financial statement has been in effect since 2017, when the previous requirement to submit an annual strategic report was expanded and added to the Companies Act of 2006 (Frank Bold 2017).

Additionally, the guidelines on the UK Bribery Act, provided by the Ministry of Justice encourage companies to report externally on their anti-corruption programme (UK Ministry of Justice 2010, p.23).

Before incorporating the EU directive in 2017, Germany did not have a specific legal requirement for non-financial reporting. Only very few matters regarding the environment and employment had to be reported since 2005 (Frank Bold, p. 19). While Germany did have a sustainability code, this was a non-mandatory measure.

France was considered a role model in sustainability reporting prior to the EU directive and "was the first country to legislate for mandatory reporting on sustainability issues in the 1970s" (Frank Bold 2017, p. 30). In subsequent years, this requirement was repeatedly extended to widen the scope, lastly in August 2017 to implement the EU directive.

Furthermore, the guidelines on Sapin II encourage companies to communicate to "external partners about the organisation's policy for preventing and detecting corruption and the main thrusts of its compliance programme" (Agence française anti-corruption 2017, p.7).

Since 2008, limited liability companies in Italy have been required to include a non-financial statement in their management reports, if "necessary for a proper understanding of their situation, operating trends and performance" (Frank Bold 2017, p.44). This made non-financial reporting limited in practice until the EU directive was implemented.

Sanctions for non-compliance

Generally, the consequences for non-compliance vary. In the UK, Italy and Germany fines may be imposed. In France, no immediate penalties are

[10] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0705(01)

applicable, but if an interested party asks for the report and it is unavailable, a judge may impose a fine. The Netherlands omitted penalties for non-compliance (CSR Europe/GRI 2017).

Conclusions

All the jurisdictions analysed above have measures in place to hold legal persons liable for misconduct. While the liability is not always criminal, all frameworks have been able to apply substantial sanctions on companies. However, some countries lack clear guidelines as to how sanctions are applied and how legal persons are held accountable, leading to uncertainty and a concern for the deterrent effect and appropriateness of sanctions (International Bar Association, OECD 2018; OECD 2016; Transparency International 2018).

Similarly, all these countries allow for the application of non-trial resolutions for legal persons. But again, not all provide clear guidelines as to when they would be applied and how. This, however, is crucial to ensure predictability, accountability, and an international and regional alignment. Non-trial resolutions hold great potential, especially in the increasing multi-jurisdictional bribery cases. But where they are applied, it remains paramount to ensure accountability, due process, public interest, transparency and the deterrent effect of sanctions are safeguarded (International Bar Association 2018, OECD 2019b; Transparency International 2018; Transparency International 2015a).

The same goes for the mitigation of sanctions (either as part of non-trial agreements or court cases). Self-reporting, cooperation with authorities and duly implemented compliance programmes all serve as mitigating factors in the jurisdictions discussed, which provides for a useful incentive to encourage preventive measures and greater cooperation from companies. But again, many jurisdictions lack formalised processes that would give companies reliability while ensuring the deterring effect of sanctions (OECD 2019b; OECD 2018; Transparency International 2018). "While providing for mitigating factors may be an effective way of creating incentives for effective compliance, cooperation, and voluntary disclosure, the use of mitigating factors without clear criteria or instructions could render the sanctioning process less transparent and predictable" (OECD 2016).

While whistleblower protections have improved in recent years, some countries need to do more, especially with regards to protecting whistleblowers in the private sector and incentivising companies to implement internal reporting lines (OECD 2017; Transparency International 2018).

	France	UK	Germany	Italy	Netherlands
Liability of legal persons	Criminal liability	Criminal liability	Administrative liability	Administrative liability	Criminal liability
Sanctions for legal persons	• fines (up to €5 million or five times proceeds) • disgorgement of proceeds • debarment • external monitor • licence revocation	• fines between 20 and 400 times a figure representing the harm done • disgorgement of proceeds • compensation • debarment • external monitor	• fines (up to €10 million) • disgorgement of proceeds • compensation • (debarment) • “judicial dissolution”	• fines (up to 600 quotas, ranging from €258 to €1,549) • disgorgement of proceeds • debarment • exclusion from subsidies, contributions • advertisement ban • suspension • licence revocation	• fines (up to 10% of annual turnover) • disgorgement of proceeds • (debarment) • external monitor
Formalised non-trial resolutions (except plea deals) available for legal persons?	Legal framework for DPAs available. Guidelines available.	Legal framework for DPAs available. Guidelines available.	Non-trial resolutions available in practice. Framework and guidelines lacking.	Legal framework for DPAs available. Implementation guidelines insufficient.	Legal framework for DPAs available. Implementation guidelines insufficient.
Requirement to implement compliance programmes?	Yes	No	No	No	No
Compliance programmes an official legal defence?		Yes, with guidelines	No	Yes, with guidelines	Yes
Sanction mitigation for good behaviour?	Yes, with guidelines	Yes, with guidelines	Yes, without guidelines	Yes, with guidelines	Yes, without guidelines
Whistleblower protection laws?	Yes	Yes	No	Only for public sector employees	Yes
Requirement for internal reporting channels?	Yes	No	No	No	Yes
Reporting requirements?	Yes	Yes	Yes	Yes	Yes

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Transparency International
International Secretariat
Alt-Moabit 96
10559 Berlin
Germany

Phone: +49 - 30 - 34 38 200
Fax: +49 - 30 - 34 70 39 12

tihelpdesk@transparency.org
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