
22 International aspects of corporate liability and corruption

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Introduction

In September 2003 the shares of Statoil, the Norwegian oil company, took a beating: over a three-week period the value of the shares fell by 11 per cent, whereas the crude oil price had declined by only 2 per cent in the same time span. The cause of this unexpected price drop was the revelation that the company was possibly implicated in bribery in its international business dealings. The news reports allege that Statoil had signed a contract for advisory services with an Iranian intermediary, named M.H. Rafsanjani, the son of the former Iranian president. The contract provided for a \$15 million fee to be paid over an 11-year period. The Norwegian financial crime police announced that a payment of \$5.2 million of Statoil money had wound up in an account in the Turks and Caicos Islands belonging to a consulting company registered in the UK (Horton Investment) and which appears to have been used in the transaction. The services that the Iranian consultant was supposed to render included supplying information on social developments in Iran, but the whistle was blown by internal audit staff at Statoil, with the resulting furor in the world press. Within two weeks the chief executive officer of Statoil, the chairman, and the head of exploration, all resigned from their posts. It would appear that once this had happened, the share price began to recover, although it took until mid-December 2003 for the price to regain its September level. During that same period oil prices had gained 11.6 per cent.¹ At the time of writing in November 2004, the Norwegian and US stockmarket authorities (Securities and Exchange Commission) are still investigating, and no charges against the company or any of its personnel have been brought.

The Statoil story serves to illustrate some of the issues associated with corporate liability and corruption. Perhaps most striking were the immediate financial repercussions felt by the company: the share price slid until the resignations took effect, indicating that a company's reputation really is its most valuable and fragile asset. The facts also illustrate the importance of protection for whistleblowers and the dilemmas faced by staff as to who to turn to when confronted with a serious problem (the question of whistleblower protection is an important and relevant aspect of this subject but will not be

addressed here). The question also arises what might constitute suitable sanctions for a company found liable for bribe payments. We shall return to the issue of sanctions and their corollary of preventive measures later on.

Although Statoil has not been indicted, the facts do provide a useful example that highlights where ‘corporate liability’ might attach in connection with acts of bribery. First, with respect to the consulting company mentioned above – a small company in a major financial centre with an account located offshore to facilitate the collection of funds for later disbursement. The risk of corporate vehicles, such as international business corporations, foundations, and trusts and so on, being misused for illegal purposes is well known (OECD, 2001). Second, corporate liability might attach to the intermediaries executing the transactions involved in paying the bribes, such as banks or other financial intermediaries which may act as conduits, enabling illicit funds to flow.² In the Statoil case, investigations are also being conducted by Swiss authorities into the role played by certain banks, according to media reports.³ Under some circumstances, these financial intermediaries may be accused of complicity in these transactions, rendering them liable to charges of money laundering.⁴ Third, companies engaged in international trade which may engage in illicit payments to foreign public officials in order to obtain or retain business. This last group is the subject matter of this chapter. The following questions will be addressed are. When may a legal entity be held liable for bribery of a foreign public official when the offence is committed by its officers or employees? What sanctions should be imposed and what preventive measures might be appropriate for multinational enterprises competing for business globally? Before considering these issues, the legal and historical context of the development of international anti-corruption law will be briefly outlined, followed by an overview of the main relevant international instruments.

From Watergate to the world

All of the industrialised countries and many in the developing world passed laws in the nineteenth and early twentieth centuries that made the bribery of public officials illegal. For example, England enacted the Corrupt Practices Act in 1883 and the Public Bodies Corrupt Act in 1889, and current laws date back to 1906. Countries like Canada, Denmark, France (as early as 1810), Germany, Italy, the Netherlands, Spain and Switzerland similarly adopted provisions in their criminal codes to address this issue. The USA passed the Federal Practices Act in 1910 (repealed in 1972 and replaced by the Federal Election Campaign Act). All these laws were restricted to the bribery of domestic (that is national) officials (Timothy Martin, 1999). It was not until the Watergate scandal in the 1970s revealed the widespread practice of US companies paying bribes when engaging in contracts abroad that the extra-territorial leap was made by the USA. The payment of bribes to foreign public

officials by natural and legal persons was subsequently criminalised. The Foreign Corrupt Practices Act⁵ was later to become the catalyst for change at the international level, although not before early attempts to address the question at the UN failed (Brademas and Heimann, 1999). The motivation for American companies to push for an international approach was the recognition that they were at a competitive disadvantage compared to their foreign competitors, who not only could pay with impunity but could also invariably deduct these payments for tax purposes (Hines, 1995; US Department of Commerce, 1995).

Renewed efforts for a multilateral approach were made by the USA in 1993 under the Clinton administration. The conclusion of the Cold War prompted the USA to focus its attention on global economics, and the problem of the so-called 'supply side' of bribery by corporate entities was given high priority. The organisation chosen to pursue this multilateral approach was the Organisation for Economic Cooperation and Development (OECD), which had been working on the topic since 1989. Other organisations had also been tackling this problem for quite some time. The Rules of Conduct on Extortion and Bribery in International Business Transaction of the International Chamber of Commerce (ICC) were first published in 1977 and updated in 1996. These rules prohibit extortion and bribery as such, and are not just confined to bribery to obtain or retain business (the scope of the OECD Convention).⁶ The anti-corruption non-governmental organisation (NGO) Transparency International, founded in 1993, has attained a high profile and developed a worldwide network of chapters. It seeks to prevent and eradicate corruption through dialogue and partnerships with business and governments.⁷ International financial institutions such as the World Bank also began to take up the issue by acknowledging that corruption was not solely a political problem but also an economic one that had to be tackled through a multi-pronged approach (World Bank, 1997). It introduced a policy that permits investigating complaints of corruption and where sufficient grounds exist, companies and governments risk being blacklisted. Evidence of corruption could mean that the World Bank would cancel financing and/or prevent a company from taking part in contracts financed by the bank.⁸ The confluence of these political and civil society developments indicate the extent to which the climate had changed, and provide the backdrop for what had been brewing at the OECD since 1989.

The OECD deliberations resulted in a recommendation in May 1994, a 'soft law' document that outlined the issues for the future.⁹ The next few years saw the participants address the issues in more detail and the outcome was a further 'soft law' instrument with more prescriptive language. This revised recommendation of May 1997 provided for monitoring the implementation of the recommendation by member states. It was soon followed by the

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter the OECD Convention).¹⁰ As at June 2004, 35 countries had signed and ratified the convention, almost all had undergone a first phase of monitoring their implementing legislation, and 13 have been submitted to the second phase to assess the efficacy of their legislation in practice. The rapidity with which the OECD Convention was ratified and implemented is unprecedented in international law.

The EU and the Council of Europe have developed regional instruments which include provisions for dealing with the question of corporate legal liability for corrupt practices. The UN Convention Against Corruption, signed in December 2003 and entering into force after ratification by 30 states, also includes an article on the liability of legal persons.¹¹

An overview of the provisions of the international instruments

The aforementioned regional and international instruments establish the liability of legal persons engaging in corrupt practices. This liability may be criminal, administrative and/or civil in nature. The European instruments are relatively more detailed on the standard of liability and also identify the range of entities covered. The relevant provisions are:

1. *OECD Convention*: Article 2 on the liability of legal persons and Article 3 concerning sanctions.
2. The *European Union Second Protocol* of 19 June 1997 is drawn up on the basis of article K.3(2)(c) of the Treaty on European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of member states of the European Union (26 July 1995) to the Convention on the Protection of European Communities' Financial Interests (26 May 1997). This convention does not itself provide for the liability of legal persons but provides for criminal liability for heads of businesses. The relevant provisions of the EU 2nd Protocol are Article 1 on the definition of legal persons, Article 3 on their liability and Article 4 on sanctions (*Official Journal* C 221, 19 July 1997).
3. The *Council of Europe Criminal Law Convention on Corruption* (hereinafter CoE Convention) of 27 June 1999: Article 1 concerns the definition of legal persons, Article 18 their liability and Article 19 on sanctions.
4. The *UN Convention Against Corruption*: Article 26 defines the liability of legal persons.

The definition of legal persons

The UN Convention, the main text of the OECD Convention and its commentaries¹² do not include a definition of 'legal persons'. The EU 2nd Protocol and

the CoE Convention provide for the same definition and put the onus upon domestic legislation to clarify the point: ‘“Legal person” shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organizations’.

Private entities Parties to the OECD Convention¹³ as well as EU countries include private incorporated companies as legal persons liable for bribery.

Public entities The exclusion of public entities in the EU and CoE instruments is clarified in the latter’s explanatory report.¹⁴ ‘State or other public bodies exercising State authority, such as ministries or local government bodies as well as public international organizations such as the Council of Europe’ are expressly excluded from the scope of the definition of legal persons potentially liable for bribery. Furthermore, ‘the exception refers to the different levels of government: State, Regional or local entities exercising public powers’. This exemption is included in the legislation of most EU and other OECD countries (for example: Belgium, Greece, Italy, Mexico – which excludes all public authorities – and the USA. In France the liability is not applicable to the state but can be applied to local authorities).

The report states the rationale in the following terms:

The reason is that the responsibilities of public entities are subject to specific regulations or agreements/treaties, and in the case of public international organization, are usually embodied in administrative law. . . . A contracting State may, however, go further as to allow the imposition of criminal law or administrative law sanctions on public bodies as well.

In relation to the question of how to treat state-owned and state-controlled enterprises, the report states that the exclusion of public entities ‘is not aimed at excluding responsibility of public enterprises’. It does not, however, define a public enterprise.

Standard of liability

The OECD and UN Conventions are similar in their approaches. Article 26 of the UN Convention provides that:

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.

Article 2 of the OECD Convention provides that:

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Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

The European provisions develop a more comprehensive approach to the required standard, and there is no significant difference between Article 18 of the CoE Convention and Article 3 of the EU 2nd Protocol, which reads as follows:

1. Each member state shall take the necessary measures to ensure that legal persons can be held liable for fraud, active corruption and money laundering committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on
 - a power of representation of the legal person, or
 - an authority to take decisions on behalf of the legal person, or
 - an authority to exercise control within the legal person,as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud.
2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made the commission of a fraud or an act of active corruption or money laundering for the benefit of that legal person by a person under its authority.
3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money laundering.

The 'for the benefit of the legal person' criterion According to the EU and CoE provisions, and in contrast to the OECD Convention, there are certain criteria to be met in order for a legal person to be held liable for bribery offences. There are three interpretations of these criteria at the national level. The first refers to the objective of the act: committed for the benefit of, or on behalf of the legal person. The second criterion is either used cumulatively with the first, or alternatively, requires that the act be 'in connection/relative to the business' of the legal person. Third, in some jurisdictions the narrower criterion of the infringement of duties by the perpetrator is used. Each of these interpretations will be examined below.

1. *Of benefit to the legal person:* This is a common requirement in many jurisdictions (such as the USA, Iceland, Italy and Canada where the phrase has been interpreted to mean 'by design, or result partly for the benefit of'). German law states that the 'legal entity . . . has gained, or was supposed to have gained, a profit'. Other countries like Belgium, France, Norway and Poland use the term 'on behalf of', drawing on the language

of the CoE explanatory report. Under French law, criminal responsibility will be incurred if the acts have been committed on behalf of the company in the broadest sense, namely in the course of activities intended to advance the organisation, operation or objectives of the legal person, even where there is no resultant benefit or advantage. Greece, on the other hand, requires clear proof that the benefit is actually realised. Several States (Belgium, France, Italy, Norway and the USA) justify this causal link to differentiate the situation where the natural person is acting purely in his/her own interest or even against the interest of the legal person.

2. *In connection/relation to the business of the legal person* This requirement is found in some national laws either as an alternative (in Japan, Korea and the UK) or in addition (Canada, USA) to the benefit to the legal person mentioned above. In the UK, the criterion finds expression in case law that states that the offence be committed 'in connection with the business of the legal person and 'within the scope of the authority of the representative'. Mexico adds the requirement that the offence must have been committed in the name or on behalf of the legal entity using means provided by the entity itself.

The distinction between (1) and (2) above is not always clear. For example, Finnish law provides that the offence has to be committed 'in [the legal person's] operations', referring to the sphere in which the crime has to occur. This is further defined such that the 'offence shall be deemed to have been committed in the operation of a corporation if the offender has acted on behalf of, or for the benefit of the corporation': in other words, back to the aim of the offence.

3. *Infringement of duties* An additional criterion in some countries (Germany, Italy, Sweden) is the requirement of infringement of duties. German law states, as an alternative to acts committed on behalf of the legal person, that 'legal entities can be liable for fines, if a "person" has committed a crime or an administrative offence by means of which duties incumbent upon the legal entity or association have been violated'. Italy refers to 'duties connected with the functions of the responsible person'. Finally, Swedish law provides that the illegal act committed when carrying out business activities 'entailed gross disregard for the special obligations associated with the business activities or to be otherwise of a serious kind'.

The 'leading person' criterion The 'identification' doctrine underwent most of its development within the Anglo-Saxon tradition in a series of cases reported in 1944 (*D.P.P. v. Kent & Sussex Contractors, Ltd* (1944); *R. v I.C.R.*

Haulage Co Ltd (1944); *Moore v I. Bresler Ltd* (1944)). The process was first set in motion by a civil liability decision of the House of Lords in 1915 in *Lennard's Carrying Co. Ltd v Asiatic Petroleum Co.* (1915). The law in the UK up until the 1940s dealt with the criminal responsibility of corporations on the basis of vicarious liability. In contrast to strict liability offences (where the company was liable for the conduct of its employees without proof of any criminal state of mind) the courts began to extend vicarious liability to cover offences where some mental element was required. The culmination of the doctrine in *Tesco Supermarkets Ltd v Natrass* (1972) established that the principle of identification applied to all offences not based on vicarious liability. The House of Lords held that a corporation could be convicted of a non-regulatory offence requiring proof of *mens rea* if the natural person who had committed the *actus reus* of the offence could be identified with the company.

This criterion has been picked up in both civil and common law systems (for example, by France and Canada). The triggering of corporate liability requires that a relationship exist between the natural and the legal person. This can include the natural person him/herself or a person under his/her authority. Where the latter case arises, the acts of the subordinate must have been made possible by 'the lack of supervision or control by a person having a leading position'. Some national laws provide a standard of liability that is based on both the EU and CoE instruments and draws together the acts committed or condoned by management and personalised management failure, originally an approach of French law (for example, Australia, Finland, France, Germany, Greece, Italy and Poland). Canada and the UK confine themselves to the 'directing mind' definition, although the Canadian approach is relatively broader since it includes the board of directors, the superintendent, the manager, or anyone else to whom the board has delegated the governing executive authority of the corporation. Canada is reportedly also considering the case where these senior company officers were aware of or wilfully blind to criminal behaviour by their subordinates.¹⁵

Many countries accept that the misdeeds of any employee can trigger corporate liability. In some instances, agents or other parties are explicitly included (for example, Denmark, Iceland, Korea, Switzerland and the USA). Whereas the USA employs a strict liability approach such that participation, acquiescence, knowledge or authorisation by higher-level employees or officers is relevant to determining the sanction, other states such as Finland, Korea, Japan, Switzerland and Sweden require that a standard of objective corporate liability be met. In Japan and Korea, this has resulted in the burden of proof for the absence of negligence being put onto the corporation. Thus in Japan the principle is based on the premise that the company did not exercise due care in the supervision or selection of an officer or employee to prevent the criminal act.

The identification concepts within corporate liability have been criticised for being overly focused on the behaviour of senior officials (Fisse, 1983a; Wells, 2001). Given the complexity of corporate structures and different modes of organisation in today's multinational enterprises, the rather simplistic 'chain of command' model based on anatomical analogy is no longer a realistic metaphor. Decision-making may be more diffuse both geographically and/or functionally, making it more realistic to use an aggregation model that looks at combined and cumulative behaviour for the purposes of corporate criminal liability (Ferguson, 1998: 14).

The critique of the identification doctrine may be particularly apposite for acts of bribery by a company. The collective and cumulative behaviour of a range of employees may provide the corporate climate in which the payment of bribes may occur. Dispersing managerial responsibilities (such as authorising purchases and payments, opening bank accounts, advising on tax arrangements, selecting and employing intermediaries as well as using under-regulated financial centres to effect payments to third parties) may make it difficult to pin the blame on a single directing mind.¹⁶ For complex industries such as defence, it is not unusual to find that the buyer of the weapons system (usually a government) has insisted upon a wholly separate set of terms and conditions that are unrelated to the subject matter of the main contract. These so-called 'offset agreements' may require specialised brokers to facilitate the performance of these secondary agreements since their subject matter is outside the core business of the defence company. This scenario, with its reliance on external parties for a contract that is a *sine qua non* to the main sales agreement, creates a risk situation vulnerable to bribery. For example, a major European manufacturer of military equipment related to the authors how a (government) customer insisted upon an offset agreement involving the purchase of a large number of pork bellies. This agreement required the services of a specialised broker since it was a business area in which the company had neither knowledge nor interest, other than being a condition for an agreement being made alongside the main contract (the purchase of military equipment). In executing the offset agreement the defence company had only limited control over the specialised broker and the variety of third parties involved in this agreement. Although there were no indications of any wrongdoing by any of the parties in that particular instance, this type of agreement is neither uncommon nor unusual and may be open to misuse.

In contrast to the 'alter ego' concepts, some jurisdictions have moved towards an objective focus on the fault of the corporation itself. Under the 1995 Australian Criminal Code, a corporation can be held responsible for the acts of an agent, employee or officer, where, for crimes requiring a mental element, the 'fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the

offence'. Authorisation or permission can be fulfilled in three ways: (a) the traditional identification liability; (b) by extending the imputation to acts and omissions of 'high managerial agents'; or (c) a 'corporate culture . . . that directed, encouraged, tolerated or led to non-compliance with the relevant provisions'. Swiss law also provides a clear example of an objective approach in its law of 1 October 2003, which states that the crime has to be as a result of 'the lack of reasonable organisational measures'.¹⁷

The link between proceedings against natural and legal persons The UN Convention as well as the EU and CoE instruments address the link between legal proceedings against the natural person and the legal entity. The UN Convention under Article 26 provides that: 'Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences'. On this point the CoE is similar to the EU 2nd Protocol and states that:

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offence mentioned in paragraph 1.

Both the EU and CoE explanatory reports examine only one side of this equation (the consequences of the prosecution of the legal person on the prosecution of the natural person) but not vice versa. According to the EU explanatory report, measures taken against an entity for whose benefit a fraud has been committed by a manager, shall not exclude criminal prosecution of that manager. The CoE explanatory report provides that:

In a concrete case, different spheres of liability may be established at the same time, for example the responsibility of an organ etc. separately from the liability of the legal person as a whole. Individual liability may be combined with any of these categories of liability.

The OECD Convention is silent on this issue. However, if corporate liability is meant to be 'effective, proportionate and dissuasive' it would be hard to see how national laws could permit anything less than the UN or European instruments. In fact most of the OECD Convention members do not require the conviction of the natural person in order to prosecute or convict the legal person (Canada, Denmark, Finland, France, Greece, Germany, Iceland, Italy, Japan, Korea, the Netherlands, Sweden and the UK). The OECD has criticised two countries that require the conviction of an individual before proceedings against a corporation can commence.¹⁸ The conviction of a natural person is a requirement to establish the liability of a legal person in Mexico, and in Poland a final judgment against a natural person is a prerequisite to start proceedings against the legal person.

In several countries the culpability of the legal person does not preclude the individual responsibility of the natural person who intended to commit the bribery (Denmark, France (explicitly), and Greece, Japan and Mexico (implicitly)). Under Finnish law, the prosecution of the legal person may be waived if the offender is a member of the management of the legal person and has already been sentenced (subject to the size of the corporation and the share held by the offender). A similar provision exists in Norway where the proximity between the natural and legal person is such that it may not be necessary to fine the company.

Sanctions

The debate about whether civil or criminal liability is appropriate for corporate misdeeds has provoked large amounts of academic literature, particularly on the subject of the range, appropriateness and effectiveness of sanctions (Coffee, 1991). The controversy relates back to philosophical notions of the aims of criminal law, the nature of criminal punishment generally, the specific sanctions available for companies, and whether blurring the distinctions between offences in torts (civil law) and criminal law somehow diminishes either field of law. In the USA, corporations themselves have engaged in efforts to influence the development of laws that would hold them accountable.¹⁹

Criminal liability is but one means of regulating corporations. Civil law, self-regulation or a combination thereof offers a panoply of possible sanctions. Traditionally, a fine is the most common sentence imposed on companies, but probation, restitution, forfeiture, confiscation and dissolution are all sentencing options that are currently available in many jurisdictions. Civil sanctions may take the form of a declaration, injunction, community service order, compensation order or a pecuniary penalty. Administrative sanctions may include infringement notices, financial penalties, publicity orders, restricting rights and revoking licences. It is also conceivable for sanctions to involve some form of arbitration or conciliation process.

The advantage of criminal sanctions most often cited is that it expresses social condemnation of the behaviour in question. Such censure may result in the loss of corporate reputation which in turn causes financial damage which is arguably the most powerful sanction that can be imposed on a corporation (Fisse, 1983b). It is of course usually the case that criminal penalties are more severe than civil penalties and fines tend to be higher. The loss of reputation for the company, and the deprivation of liberty for corporate management means that criminal penalties are perceived as harsher.

Several commentators have identified the disadvantages of criminal sanctions for corporations: companies cannot be incarcerated and fines are 'water off a duck's back' with few consequences for management (Coffee, 1981).

The ‘deterrence trap’ means that the fine is limited by the wealth of the corporate offender: if a corporation is made bankrupt or is already so then fines are meaningless (ibid.: 407). Members of the OECD Convention who have employed this approach have been criticised. Poland, for example, makes sentencing dependent on the last year’s tax return, which immediately benefits poor earners and newcomers.²⁰ Denmark and Portugal have adopted the ‘day fine system’ which may be a more effective way of fining a company.

Moral condemnation cannot attach to an inanimate object like a company. The rehabilitative effect of criminal sanctions is also lost – sending management to prison may not necessarily contribute to changes in corporate structure to prevent future repetition of the illegal behaviour. Criminal sanctions which focus on punishment rather than cooperation promotes disharmony that deters self-regulation and puts enforcement agencies and businesses on an adversarial footing.

The EU instrument provision on sanctions is set out in Article 4 and in relation to legal entities states:

1. Each member state shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3(1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:
 - (a) exclusion from entitlement to public benefits or aid;
 - (b) temporary or permanent disqualification from the practice of commercial activities;
 - (c) placing under judicial supervision;
 - (d) a judicial winding-up order.

The CoE instrument and the UN Convention do not identify the alternative sanctions listed above but in identical language mandate for ‘effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions’.

The OECD Convention has also adopted this phrase. However, Article 3(1) applicable to both natural and legal persons envisages criminal penalties whereas Article 3(2) allows for the possible substitution of non-criminal sanctions against corporations. Confiscation and seizure are foreseen for both legal and natural persons in Article 3(3). Finally, Article 3(4) considers the ‘imposition of additional civil or administrative sanctions’ for both natural and legal persons. The OECD Commentary refers to the list of EU sanctions listed above as examples of sanctions beyond fines.

Countries have taken a mix of approaches in applying these standards at the national level. France, Italy (in para-criminal form) and Portugal served as models for the European instruments²¹ and therefore have similar sanctions. Many others have followed suit with respect to exclusion from public procurement (the aforementioned countries as well as Austria, Belgium, Brazil,

France, Germany (partially), Hungary, Poland, Spain, Switzerland and the USA). Several countries have attempted to address the issue of restitution (for example, the Netherlands), although the USA has taken the position that fines act as a stronger deterrent than seizure and that the former should take precedence. Italy's law has a built-in incentive with the possibility of substantially reduced fines if credible rehabilitative efforts are made within the company.

The notion of rewarding conduct is an approach promulgated by the US Sentencing Guidelines. The guidelines envisage a three-stage process by which courts set fines for convicted corporate offenders. The basis of the fine reflects the gravity of the offence. Seriousness is assessed against the pecuniary gain to the offender; the pecuniary loss to the victim (and whether it was caused intentionally, knowingly or recklessly); and the intrinsic wrongfulness of the offence according to a statutory table. The court will then multiply the fine by a numerical factor that reflects culpability. This gives a recommended fine range from which the court will determine the amount due unless departure therefrom is justifiable. In calculating 'culpability' the court will have regard to factors that affect the position negatively and positively. The most important mitigating factor is establishing a generally effective compliance programme to prevent and detect violations and reporting possible offences to appropriate authorities before they learn of it from another source. Developing internal codes of compliance to address anti-corruption issues are gaining currency, and not only in the USA. Once this initial step has been taken, companies may develop the courage to address the issue more widely with their competitors.

Alternative measures

Corporations are an omnipresent feature of society, several wield more power than states (Jorgensen, 2000: 174), and the continuing technological revolution keeps them globally active. It is not unreasonable to 'impute to corporations social duties including the duty not to offend all relevant parts of the criminal law'.²² Notions of corporate responsibility continue to develop. The UN Global Compact,²³ originally conceived as a means for global businesses to address human rights, labour and environmental issues, has recently added a new tenth principle stating that 'business should work against corruption in all its forms, including extortion and bribery'. The UN noted the importance of 'developing sectoral initiatives' in its report on the consultation process. Certain industry groups have already embarked upon this course in recognition that this could be a useful way to 'level the playing field' when competing for international business.

Developing industry standards

The Engineering and Construction Industry Anti-Bribery Principles²⁴ were concluded under the auspices of the World Economic Forum with the Basel

Institute on Governance and Transparency International acting as joint facilitators. This is an example of what can be achieved by rival companies who want to take a proactive approach in tackling transnational bribery. The methodology used to develop these principles built upon that developed by 12 major private banks known as the Wolfsberg Group. Their Principles on Anti-Money Laundering²⁵ stand out as an example of what can be achieved by major players who are normally rivals in a highly competitive market. They were developed by the banks together with civil society over a relatively short period of time. Continually refined and added to, their website contains a range of statements and guidance documents that this group has agreed to implement on a global basis. Interestingly, the principles have been adopted by other banks that are not formally members of the Wolfsberg Group and used for compliance training purposes. Unlike the engineering and construction industry principles, the Wolfsberg Principles do not deal with the issues of bribery and corruption directly. The integrity standards developed by the International Federation of Consulting Engineers (FIDIC)²⁶ directed at reducing corruption in aid-funded public procurement from the private sector are a similarly dynamic set of principles that commit the industry to a standard of behaviour from which it is difficult to deviate.

Industry standards are gradually gaining ground with new efforts discernible in various sectors, such as oil and gas and its supply chain, power, mining and defence. All are either contemplating the idea of collaboration or in the process of discussing the consequences of revealing their innermost secrets regarding the issue of bribery in international business transactions. Developing a common solution to commercially sensitive issues such as agents' contracts might prevent the use of agents as a conduit for bribery. Their motivation is the changing international legal framework, the costs of competitive advantage obtained through corruption and the attendant risks to corporate reputation in the event of exposure. Self-regulation through industry standards will be increasingly deployed in a variety of industries in the future.

Methodology of industry standards

The obstacles to bringing together rival companies to address these issues are significant. The whole process is very delicate if subsisting bribery exists within the particular industry. It is essential that the composition of the group is of the right balance – this means major companies in the sector in question that have a significant world market share, are active internationally and for whom the importance of a level playing field and preserving reputations are of economic significance. Timing is also of the essence: recognising and seizing the moment when an individual company has taken – or is well on the way to taking – the decision to confront the problem of corruption directly.

The way forward is a frank and forthright approach. The optimal size of the

group is in the region of 10–12 companies represented by the top echelons of management, thereby maximising their decision-making capacity. This lends momentum and weight to the whole process and is of crucial importance to the procedure. Since this process is undoubtedly a novel experience for most of the participants and may be outside their usual business experience, the use of external facilitators nurturing the process can be invaluable. How to control and monitor the implementation of the resulting standards needs to be considered for the longer term, either by adapting the peer review principle or through external agencies. After having formulated an industry standard the participants might either want to keep it ‘secret’ and monitor each other or they may want to make their document public, promote its implementation and encourage the participation of others. The latter may involve other companies directly (by ‘subscription’ as the Wolfsberg process was in the initial phase) or indirectly via regulators (its current state). When and how other companies within industry can join the ‘club’ must also be considered.

The advantages of industry standards are the speed and flexibility with which they can be created and their adaptation to specific aspects of corruption facing any given sector of industry. The acknowledgement by major companies that they are confronting issues related to bribery will, in turn, bolster government efforts to tackle the issues, making it harder for anyone to avoid their judicial, legislative or legal responsibilities. The disadvantage of industry standards relates to monitoring and how best to achieve it. Deferring this question affects the credibility of the process. This question falls to regulators for the Wolfsberg Group and remains unresolved for the engineering and construction group as a self-regulatory tool industry standards act as a dynamic spur to policy-makers and can achieve a complementary status to existing legislation.

Conclusion

The behaviour of corporations affects all our lives. The degree of economic and political influence they wield varies according to several factors, not least size and whether they engage in international activities. Those companies that operate on a transnational basis may have been less easily held to account for corruption in the past. This position has changed over the last two decades, and not only in legal terms. Corporations can no longer regard bribery as a legitimate, tax deductible means to oil the wheels of business. Corruption carries a risk that is explicit in legal provisions and implicit in economic terms through potential damage to reputation (adverse publicity, boycotting and blacklisting) as well as criminal and civil sanctions. These developments have occurred at voluntary and regulatory levels – through compliance codes which aim to moderate corporate behaviour both internally and more broadly through industry-wide initiatives and international and domestic legal changes which affect

the operating landscape. Both of these approaches put pressures on business, but is one route preferable or can they be reconciled?

Although companies may currently be wrestling with the question as to where the boundaries of, for example, their human rights obligations should be set,²⁷ there seems to be a steady momentum to ensure that corporate social responsibility will continue to expand. This has been clearly demonstrated in relation to corruption with the UN Global Compact. Self-regulatory approaches are traditionally regarded as being business orientated, risk based, flexible and adaptable to the complexities of the organisational structures of modern transnational corporations. On the other hand, the legal implications of voluntary initiatives can be problematic in some jurisdictions, most notably the USA.

On the regulatory side, the Phase Two country reviews of the implementation of anti-bribery laws under the OECD Convention are currently being conducted by the OECD Working Group on Bribery. The effectiveness of policies and procedures with respect to the prosecution of corporations suspected of paying bribes to obtain or retain business in their international transactions are being carefully assessed. The adequacy of sanctions, the degree of prosecutorial discretion and the vigour of preventive measures are taken into account before the country assessment is published on the internet. An international standard is emerging which may prompt the OECD Working Group to revisit the issue of 'effective, proportionate and dissuasive' sanctions. The working group will continue to use 'peer pressure' to raise the standards of corporate behaviour to ensure a more level playing field for all companies competing in the global market. These developments will continue to gain momentum with the entry into force of the UN Convention, which will subsequently harmonise laws and bring new challenges for legal entities with respect to asset recovery.

Can the regulatory and voluntary approaches be reconciled when considering corporate liability for corruption? A cumulative approach is called for if the aim of making corporations liable for corruption is to deter and reduce bribery within a larger effort to tackle the pernicious effects of corruption in 'southern' countries' governments, international organisations, civil society and business need to act in a concerted manner. In practice this means not just waving the stick of criminal law sanctions but also producing the carrots to bring about real changes in corporate behaviour on a voluntary basis. Hence codes of practice constitute a valuable output. Business is calling for a credible and effective form of international 'helpline' to which they can turn for guidance on how to proceed when confronted with extortive demands. Although this idea was initially mooted by the ICC several years ago, it has gained new currency and would be a welcome addition to the array of approaches that are needed to make inroads into the problem of corruption.

Notes

1. Press reports on Statoil by Kambiz Foroohar on www.Bloomberg.com. The authors thank him and Karina A. Litvack of ISIS Asset Management for information and interpretation of the Statoil share price.
2. For the 'red flags' that alert a company to risks when engaging an agent, see Davies (2003).
3. See Iranian news reports from Shargh quoted on www.Bloomberg.com, 8 April 2004, by Kambiz Foroohar and Marc Wolfensberger.
4. For the initiatives of financial intermediaries, see the statements and principles issued by the Wolfsberg Group of private banks: www.Wolfsberg-Principles.com, and Chaim Even-Zohar, *Diamond Industry Strategies to Combat Money Laundering and the Financing of Terrorism* (ABN-Amro, The Hague, 2004).
5. Foreign Corrupt Practices Act 1977 (US) amended 1988, USC Title 15, chap. 2B.
6. See www.iccwbo.org.
7. See www.transparency.org.
8. See, for example, the current case of the Canadian company Acres International found guilty by a national court in 2002 of paying bribes to a public official in relation to the Lesotho Highland Water Project.
9. Recommendation of the Council on Bribery in International Business Transactions, 27 May 1994.
10. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 17 December 1997 (signed December 1997 and entered into force 15 February 1999), http://www.oecd.org/document/21/0,2340,en_2649_37447_2017813_1_1_1_37447,00.html.
11. Over 100 countries have signed the UN Convention, and at May 2004, two countries had deposited their ratification documents (Kenya and Sri Lanka).
12. See further the Commentaries on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
13. Membership of the OECD Convention includes non-OECD countries: Argentina, Brazil, Bulgaria, Chile, Estonia and Slovenia.
14. The Explanatory Report is located at *Official Journal C* 091, 31 March 1999.
15. See the Phase 1 and Phase 2 Reports on Canada conducted by the OECD Working Group on Bribery, www.oecd.org/dataoecd/20/51/31643074.pdf.
16. See OECD Working Group on Bribery Phase 2 Review of Bulgaria at p. 26, www.oecd.org/dataoecd/8/19/2790505.pdf.
17. Pieth (2003). See also Phase 1 examination of Switzerland by the OECD Working Group on Bribery, www.oecd.org/dataoecd/16/45/2390117.pdf.
18. See OECD Working Group on Bribery Phase 1 reports, www.oecd.org/dataoecd/15/30/2388858.pdf and www.oecd.org/dataoecd/39/45/2020928.pdf. The critique was upheld by the Working Group in the Phase 2 evaluation in June 2004.
19. See Dobbin (1998: 43) for an account of the steps taken by General Electric to 'derail' the US corporate Sentencing Guidelines.
20. OECD Working Group on Bribery Phase 1 Review of Poland, www.oecd.org/dataoecd/39/45/2020928.pdf.
21. Council of Europe Committee of Ministers Recd. (88) 18 adopted 20 October 1988.
22. Per Turner J. in *P&O European Ferries (Dover) Ltd* (1991) 72, 83, quoted in Pinto and Evans (2003: 5).
23. See further, www.unglobalcompact.org/.
24. Business Principles for Countering Bribery in the Engineering & Construction Industry, www.skanska.com/files/EC%20Principles%2012.23.03.pdf. See also Aiolfi (2004).
25. See www.wolfsberg-principles.com/.
26. See www.fidic.org.
27. See www.novartisfoundation.com/en/articles/human/symposium_human_rights/speeches/speech_vasella.htm.

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- Tesco Supermarkets Ltd v Natrass* [1972] AC153; [1971] 2 WLR 1166 (HL).