Public consultation on liability of legal persons: Compilation of responses

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Context

This document presents a compilation of responses received to the public consultation conducted by the Working Group on Bribery (WGB) from August to November 2016. These comments will be made available at the OECD Roundtable on Corporate Liability for Foreign Bribery on 9 December 2016. They will also be used by the OECD Working Group on Bribery as inputs to its process of continually improving its monitoring of Parties' foreign bribery laws. Information about the public consultation can be found online at www.oecd.org/corruption/public-consultation-foreign-bribery-liability-legal-persons.htm.

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1. General remarks

According to Art. 3 OECD Convention, bribery of a foreign public official shall be punishable by "effective, proportionate and dissuasive criminal penalties." In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons are subject to "effective, proportionate and dissuasive non-criminal sanctions".

Effective, proportionate and dissuasive (criminal or non-criminal) sanctions can only be imposed, if the following requirements are fulfilled:

- Statutes (within the substantive law, e.g. criminal code) that allow for sanctioning legal persons and confiscating the proceeds of crime, if
    - (at least) a top-level person of the legal person neglects his/her duties to supervise the employees with the effect that an employee bribes a foreign public official, or
    - (at least) a mid or top-level person of the legal person him- or herself bribes a foreign public official in the course of business relations.
- Statutes or other rules, which specify the conditions, according to which law enforcement bodies are obliged to investigate against a legal person, as well as the conditions, according to which they may abstain from investigating or terminate them.
- Sufficiently staffed and specialized law enforcement bodies and (criminal) courts which are trained to conduct investigations against large, often multinational enterprises.
- A positive attitude within the law enforcement bodies towards laws allowing for sanctioning legal persons. This isn't trivial, as many German prosecution offices simply do not apply the existing law, due to a diffuse opposition against the law and/or a lacking tradition of investigating against legal persons.
- Comprehensive statutes (within the procedural law) that allow for conducting (criminal) investigations against legal persons, including conducting the necessary investigation measure, e.g. search and seizure (including electronic data on servers or within an electronic cloud), wire-tapping.
- Statutes, which allow for flexible sanctions relating to the size of the enterprise respectively its turnover (and not the legal person, as the latter can be smaller than the enterprise).
- Statutes, which allow for sanctioning the legal successor of a fined legal person.

2. Nature of liability

a) Currently, the German law does not provide for a criminal liability of legal persons. Rather, according to the German Administrative Offence Act a legal person (or an association with legal capacity) can be fined for criminal offences or administrative offences committed by certain types of managers and employees. The fine is an administrative fine, not a criminal sanction. It is a non-

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obligatory legal consequence, which can be imposed by prosecutors or representatives of other state institutions (such as regulatory authorities). When the legal person refuses to pay the fine, a circuit judge of a local court has to decide; typically, these judges have neither specialization nor training in proceedings against (multinational) legal persons. The fine cannot exceed a threshold of 10 million euro, but can be summed up with the confiscation of the proceeds of the crime or administrative offence.

b) In comparison to that, a criminal liability has several advantages:

- A stronger symbolic notion than an administrative fine. Administrative fines are, at least in Germany, related to breaches of lower-grate duties, whereas a criminal sanction reveals that the perpetrator has violated a norm of greater importance.
- In Germany, prosecutors are obliged to investigate given sufficient suspicion of a criminal offence. In contrast, they have a margin of discretion whether to start investigations or not, when a breach of duty can only be sanctioned by an administrative fine. Legal persons are currently subject to administrative fines in Germany. Hence, prosecutors are not obliged to investigate against legal persons. According to a representative survey, my research group is currently conducting,[74] German prosecution offices use to apply the law incoherently: 19 out of 48 prosecution offices did not have a single case of investigations against a legal person from 2011 to today. Germany seems to be divided: Whereas the prosecution offices in Bavaria and Baden-Württemberg seem to apply the law, three federal states (Bundesländer) only had one case, one federal state even did not have a single case.
- Criminal trails in Germany are public, while administrative sanctions are being imposed following non-public proceedings. For this reason alone, criminal proceedings are far more deterrent than administrative proceedings.
- Criminal sanctions in Germany, in particular fines, are flexible in scale as they must reflect the gravity of the crime and relate to the guilt of the perpetrator. In contrast to that, a legal person can only be subject to an administrative fine up to 10 million euros, irrespective of the severity of the breach of duty, the consequences of the criminal act and the financial potential of the enterprise, in which the crime occurred.[75]
- Criminal sanctions can be imposed for actions inside and outside the Federal Republic of Germany. The principle of territoriality is flanked by the principles of nationality and subsidiary protection of foreign states. In contrast to that, administrative fines can only be imposed for (corporate) actions committed on the territory of Germany.
- In criminal cases, cross-border legal assistance is by far easier, since most laws and treaties focus on investigations in criminal cases.

3. Legal basis of liability

a) The legal basis of liability does matter. The decision between an implementation inside or outside the criminal law has several legal consequences (supra 2. b). Against this background, the legislator in my view has only two options: providing for new rules of liability of legal persons either within the German Criminal Code (Strafgesetzbuch) or in a separate code. As the Criminal Code includes the most severe crimes, the first option would certainly send a strong signal to both law enforcement bodies and representative of legal persons. The second option would have a slightly minor "symbolic impact", but allows for a better implementation of rules on questions that only occur when it comes

74 The final results will be published in 2017.

75 There are different rules for fining in cartel/competition law.

to sanctioning legal persons. Moreover, it would help drawing a distinction between corporate criminal liability and individual criminal liability and its conceptual framework (e.g. guilt).

In my view, the German legislator should not enact a law specifically addressing corporate liability for foreign bribery, but should rather decide for a general law. There is no reason for differentiating between legal consequences for foreign bribery and legal consequences for other crimes. Rather, a bribery-specific legislation could have a negative effect since in Germany as a "country of codification" prosecutors, judges and other practitioners use to focus the crimes covered by the general codes, in particular the Criminal Code. For that reason, a bribery-specific legislation would certainly attract minor attention and could even be regarded as a law of a minor importance.

b) The OECD Anti-Corruption Convention only had a minor influence on the German discussion, since the national lawmaker is of the opinion that the current system (supra 2 a) complies with all obligations of international and European treaties. The fact that politics and scholars are currently debating, whether Germany should sharpen its law and even introduce corporate criminal liability, is caused by the financial crises, several scandals in banks and the automotive industry as well as by a shift of opinion under German criminal law scholars, who used to be very critical of corporate criminal liability.

4. Types of entities covered

Usually entities lacking legal personality are, economically spoken, of minor importance and therefore usually do not cause serious transnational corruption problems. However, exceptions do exist. For example a famous German drugstore-chain lacked legal personality as a sole proprietor formally led it. As the German law only allows fining legal persons and associations having legal capacity, such enterprises could not be sanctioned, would a representative of such an enterprise be responsible for a corruption offence. Thus, sanctioning entities lacking legal personality would close such loopholes.

Apart from that, covering such entities would have additional preventive effects as, for example, the scale of a fine could relate to the turnover of an (economic) entity and not to the turnover of a concrete legal person forming part of a multi-corporate enterprise.

From a conceptual point of view, the question, whether an entity lacking legal personality shall be sanctioned or not, does not imply particular problems: As soon as the legislator opts for sanctioning such entities, they become legal persons, at least within the framework of criminal law.

5. Standard of liability – whose acts?

In general, the "failure to supervise" model for holding legal persons liable is a rather unattractive for law enforcement bodies, since they must proof the insufficiency of the supervision or compliance management system or an individual fault. Proofing that can be difficult and sometimes impossible. Therefore, in my experience, law enforcement bodies seek to proof that a mid-level employee has committed a crime (for example: bribery; inciting bribery, assisting bribery).

When it comes to low-level persons are concerned, this strict liability model causes a conceptual, even constitutional problem: Why should a legal person be held liable for a crime committed by a natural person, who has no bearing on the management and even cannot legally represent the entity? Some argue, that a corporate liability in such cases can only be justified, if a mid or a top-level person has violated his/her duties to supervise his/her subordinates.

In cases of foreign bribery it is often difficult to proof who has actually committed the active bribery. In these cases it would be helpful, when the national law allows the sanctioning of the legal entity for a failure of supervision, which has led to a crime of an unknown employee.

6. Standards of liability

a) The choice of the said conditions clearly influences the scope of corporate liability and the factual ability to prosecute foreign bribery. For example, the term "for the benefit" is narrower than the phrase "in the interest of": The first term relates to a proper benefit, in some cases – like Germany – even a financial benefit ("enrichment"), whereas the latter encompasses all sorts of interests. Moreover, it makes a difference, whether the national law requires proofing that the entity actually had profited or whether it is sufficient that the employee acted with the intent to bribe in favor of his/her employer.

Phrases that speak of "on behalf" or "in the name of" are even narrower since they might require the proof that the person was legally entitled to act for or represent the entity. In these cases, the legal entities cannot possibly be held liable for external persons such as local consultants although these persons bribe in favor for (and with knowledge of) the entity.

b) According to the German law, a legal entity can be fined, when a mid- or top-level (see infra c)) manager has committed a criminal or administrative offence that has

- either enriched the entity (respectively has been committed in order to enrich the entity),
- or has violated duties of the legal entity.

The failure of supervision by the owner of an enterprise is an administrative offence, when this failure of supervision has facilitated a criminal offence or another breach of duty by an employee.

c) According to the German law, mid- or top-level persons are only persons, who

- either legally represent the entity as an organ,
- legally entitled to act for the entity,
- or hold an executive office, including those, who have a leading role in supervising employees.

Hence, the scope of the German law is narrower than those of other jurisdictions. In the context of combatting foreign corruption the question is crucial, whether a person in a leading supervisory position knew of the bribes or must have had knowledge. Therefore, the entity cannot be held liable in cases, in which local consultants, who must not or cannot be supervised by executive persons, have committed the acts of bribery.

7. Intermediaries

In order to ensure that legal persons avoid liability by using intermediaries (might they be consultants, subsidiaries or other entities) countries should first of all provide for a sufficiently wide scope of persons, whose supervisory failures can trigger corporate liability. If the law (such as in Germany, see supra 6.) only covers persons in a leading supervisory position, it is comparably unlikely that these persons have knowledge or can have knowledge of bribes paid by external persons in foreign countries. The knowledge, and with this the legal responsibility, thins out, when the chain of persons between the intermediary and the leading supervisory person is long. Moreover, states should provide for rules, which do not limit supervisory duties to the internal sphere of the legal entity (normative approach), but rather opt for a functional approach: According to the latter,

supervisory duties emerge every time, an entity uses an intermediary as a necessary tool to make contacts with foreign public officials in order to establish or carry on business transactions. By means of such rules, the possibility of outsourcing legal responsibilities for (natural or legal) persons running business for the legal entity can be minimized.

8. Successor liability

a) Providing for a liability of successors of a legal entity is important for ensuring that legal persons can be held liable. The dimension of this issue is however linked to the dimension of possible sanctions and fines. If a national legislation only enables minor fines (Austria) or medium-scaled fines (Germany), the incentive for enterprises to avoid liability by means of restructuring the enterprise is low. For this reason, in German cases, in which enterprises have avoided fines by changing the identity of a legal person, its ownership or even terminating the legal existence, can only be found, where fines are significant: in competition law, that does not limit the fines to 10 million euro.

b) A good approach to hamper the described avoidance strategies is providing for sanctions that do not address a concrete legal person, but the economic enterprise as such (the European competition law includes such an instrument). By means of that, all individual legal persons of an enterprise can be held liable, including the parent company.

9. Jurisdiction

a) In international business that is dominated by multinational enterprises, the Parties' lack of direct jurisdiction over legal persons for offences committed entirely abroad present a major obstacle to the enforcement of foreign bribery offences. If, for example, a German enterprise cannot be held liable in Germany, because all relevant acts have been committed abroad, in particular by means of foreign company daughters, the German laws do not apply.

b) In order to avoid this, the principle of territoriality (cf. § 5 German Law on Administrative Offences) should be accompanied by the principle of nationality. The principle of (active) nationality is based on the idea that a state has sovereignty over its citizens.[76] If a state applies that principle on legal entities, one has to decide under which circumstances a legal person is to be regarded as a national. The typical answers are that a company's nationality can either be based on the location of its registration or the location, in which it carries out its business transactions. The second answer would cause a multitude of overlapping jurisdictions, since the majority of major and medium-sized enterprises do business in more than one country. For that reason, the first answer – place of registration – is preferable. However, as a mother company dominates its (foreign) daughters, the homeland of the mother company also has sovereignty over the daughter companies. Therefore a national legal person can be held liable for criminal offences committed by representatives of a foreign daughter company, at least in cases, in which the mother company benefits significantly from the relevant business transaction.

10. Compliance systems as means of precluding liability

a) Corporate liability, especially a liability under the FCPA, had a major impact on sharpening compliance management systems in big and medium-sized German enterprises. Already in 2011,

[76] SCHNEIDER, A. (2014) *Corporate Criminal Liability and Conflict of Jurisdiction* in: Borodowski et al. (ed.) Regulating Corporate Criminal Liability, p. 249, 251-2.

59% of all German enterprises had implemented compliance programmes;[77] some of them have even set international standards.[78] In 2013, 74% of all enterprises had implemented compliance programmes.[79] It is likely, that the percentage has even increased during the last three years. Against that background, one could argue that introducing corporate criminal liability is not necessary to trigger the implementation of compliance programmes in German enterprises.[80] However, several scandals in enterprises, which already had implemented a compliance management system, show that the sheer act of implementation does not prevent corruption: Compliance programmes must be adaptive and come at the core of the corporate culture. In my view, a modern code on corporate criminal liability, providing for prosecution agreements, can be an effective tool to change the corporate culture for the better.

b) In Germany, several lobby groups and professional associations have presented proposals for laws that explicitly acknowledge compliance as a reason for waiving liability or mitigating the sanction.[81] However, a general incentive to implement compliance system exists, if the latter influences liability and its dimension, as enterprises and its organs have a rational interest in avoiding (personal) liability. This effect exists irrespective of the form of acknowledgement by law. In my view, it is hence not necessary to explicitly provide for that in the law. In any case, a legislator should abstain from the attempt to specify the conditions, under which the mere existence of a compliance program could affect the sanction, for this might lead to rather static, non-adaptive programs, that simply try to match the standards mentioned in the law.

c) In general, the prosecution office has to carry the burden of proof. However, in enterprises, in which several corruption cases or a case of a huge dimension has occurred, the burden of proof de facto is being shifted to the enterprise. In such cases, it simply arguing that the compliance system has worked well simply does not seem plausible to prosecutors. According to my experience, that is how law enforcement bodies in Germany assess the quality of a compliance system.

11. Sanctions and mitigating factors

The most efficient sanction, beside fines, is the legal obligation to alter the internal control and compliance systems under the supervision of a monitor. Both sanctions, especially when combined, allow for a fair retribution and effective prevention of corruption. In contrast to that, the least effective sanctions, in my view, are the suspension from public tenders or state subsidies, since these sanctions do not enhance internal reforms, but could even hamper the process of internal renewal.

All aspects – implementation of a compliance system, voluntary disclosure, cooperation – should mitigate the sanction, since these aspects are indicators for a process of internal renewal, that

77 BUSSMANN, K./NESTLER, Cl./SALVENMOSER, S. (2011) *Wirtschaftskriminalität* Frankfurt a.M./Halle, p. 34.

78 BUSSMANN/NESTLER/SALVENMOSER, supra note 4, p. 60.

79 BUSSMANN, K./NESTLER, Cl./SALVENMOSER, S. (2013) *Wirtschaftskriminalität und Unternehmenskultur 2013* Frankfurt a.M./Halle p. 26.

80 For a discussion of that argument see KUBICIEL, M (2014) *Verbandsstrafe - Verfassungskonformität und Systemkompatibilität* in: 47 Zeitschrift für Rechtspolitik, p. 133, 135-136.

81 See KUBICIEL, M. (2016) Compliance als *Strafausschlussgrund in einem künftigen Unternehmensstrafrecht* in: Ahlbrecht et al. (ed.) Unternehmensstrafrecht. Festschrift für Jürgen Wessing, p. 69-79.

prevents future acts of corruption. Moreover, all aspects mentioned could also mitigate a sanction imposed on a natural person; there are no reasons, why legal persons should be treated differently.

12. Settlements

a) The German law does not allow proper settlements, however, they are not unknown in Germany due to settlements between German enterprises and US authorities. Moreover, the German law enables the cessation of criminal proceedings against individuals under obligations, which is an instrument comparable with settlements. The advantages of instruments like settlements are their flexibility and their potential to improve compliance systems and the corporate culture.

b) A conviction as a fundamental requirement for sanctioning a (natural or legal) person. Neither a conviction nor the act of sanctioning is an end in itself. Rather, they must be justified by retributive and preventive goals. A conviction is necessary for a sanction as a mean of retribution: Only when it is clear that a (natural or legal) person has actually committed an offence, a proper sanction may be imposed. If a legal consequence to a suspicion however aims at preventing possible future crime, a conviction is not necessary. Rather, the fact-based assumption, that the corporate compliance did not work well, may be regarded as a sufficient trigger for imposing preventive sanctions, such as the condition to improve compliance programs. Therefore, a settlement without conviction can be both legitimate and rational.

c) I would question whether it makes sense to differ between a settlement and a sanction, since any settlement will include several conditions, with which the enterprise has to comply with. As the implementation of these conditions usually is expensive, these settlements have a deterrent effect. Moreover, a settlement comprising the implementation of a new compliance programs to be monitored by law enforcement bodies or a official representative provide for corporate compliance in the future in a better way than fining companies.