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Research Article

GENERAL PRINCIPLES OF CORPORATE LIABILITY FOR CORRUPTION

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ABSTRACT

Measures of responsibility for corruption offences adopted by countries originally targeted natural persons. The fact that bribery and other most serious corruption offences are traditionally subject to criminal sanctions has contributed to the focus on individual liability.

In many legal systems, one of the fundamental foundations of criminal law has been that for conviction a culpable mental attitude must be concurrent with the proscribed conduct and other material elements of an offence. At the same time, the ability of a legal entity to have any mental attitude still raises serious doubts among lawyers. Nevertheless, there are several significant arguments in favour of holding not only natural but also legal persons liable for corruption. Some of these arguments as well as the main models of corporate liability for corruption, the key elements of corruption offences, and the types of sanctions are discussed in this article.

KEYWORDS

Corruption, corporate, legislation, corporate liability.

INTRODUCTION

Corruption offences are plotted and directly committed by individuals. Thus, measures of responsibility for corruption adopted by countries originally targeted natural persons.

The fact that bribery and other most serious corruption offences are traditionally subject to criminal sanctions has also contributed to the focus on individual liability. In many countries, one of the fundamental foundations of criminal law has been that for conviction a culpable mental attitude must be

concurrent with the proscribed conduct and other material elements of an offence. At the same time, the ability of a legal entity to have any mental attitude still raises serious doubts among lawyers.

Nevertheless, there are several significant arguments in favour of holding not only natural but also legal persons liable for corruption. Some of these arguments will be discussed further.

Arguments in Favour of Corporate Liability for Corruption.

4. A legal entity could be the main organizer and beneficiary of a corruption offence.

In many cases, an employee or a contractor, who directly delivers a bribe, does not possess the necessary funds and receives them from their employer or customer.

For example, companies can use various schemes to create a “slush fund” by withdrawing money from the company’s budget under an “official pretext,” which will later be used to pay bribes, for example, concluding unnecessary or sham services agreements with various counterparties, purchasing goods at inflated prices, paying fictitious salaries/remuneration/compensation to their employees, etc.

Another example, KT Corporation, prosecuted in 2022 for violating the U.S. Foreign Corrupt Practices Act, used the following scheme: the executive director approved inflated bonuses for employees and executives, which were then returned to the executive director in cash and used to create a slush fund of about USD 1 million; some of these funds were kept in the personal bank account of one of the company’s executives, and the cash was kept in a safe on the sixteenth floor of the company’s Bundangu office.

Moreover, an individual’s profit may be limited to a relatively small remuneration, or sometimes simply to keep his or her job. All the main benefits for which the bribe is paid- obtaining expensive public contracts, securing licenses to conduct certain activities, getting exemption from liability, etc. are received by the organization. In the case against Glencore, which was resolved/under Investigation by the authorities of the United States, the United Kingdom, Brazil, Switzerland, and the Netherlands, traders and other company employees passed bribes through intermediaries to employees of state enterprises in several countries in Africa and Latin America to obtain government contracts on favourable terms. As a result, the company made more than three hundred million dollars in illicit profits.

In the case against WPP Plc, which was prosecuted by the U.S. Securities and Exchange Commission, employees of the company, among other things, paid bribes through intermediaries to tax officials who audited the company so that the company would be audited positively.

And in the case against Herbalife, also prosecuted by U.S. law enforcement, one of the benefits the organization received was the removal of negative articles about it in the media after company employees passed bribes to government media company officials.

Thus, the purpose of introducing corporate liability for corruption is a more equitable distribution of responsibility. The costs of punishment should be borne not only by individuals, who acted more as a means of committing the offence but also by the organizations that made the offence possible and profited from it.

2. Corruption can become a habitual means for organizations to achieve their goals

Representatives of legal entities often say that corruption is an “evil they have to put up with” if they want to work in certain markets. Sometimes this is true.

However, a company, being primarily profit-oriented, may also see corruption as a convenient way to increase its efficiency. Corruption often makes it possible to cheapen the production and supply of goods by circumventing quality standards and other rules, to gain advantages over competitors through priority or monopoly access to markets and resources, etc. In these cases, corrupt payoffs become for a company just another type of cost or even investment.

Establishing corporate liability for corruption sends a clear message to any organization that it is not acceptable to resort to corruption to achieve its goals and that the risks for the organization increase when using improper methods of business development.

3. Legal entities often have the capacity to prevent corruption offences

Many companies, especially large ones with significant financial and human resources, are capable of implementing useful measures to deter the corrupt behaviour of their management, employees, and agents. Such measures can help prevent even those offences that are committed solely for personal gain or based on a misunderstanding of the company's interests and the permissible means of pursuing them.

However, companies are often reluctant to take anti-corruption measures as they entail additional costs. The risk of substantial penalties for corruption may encourage companies to incur these costs and become more proactive.

4. Legal persons can be used as vehicles for committing corruption offences

Legal entities are actively used in corrupt interactions to accumulate slush funds, make and conceal corrupt transactions, facilitate the use of stolen assets, etc. This role may be played by professional enablers – banks, law and consulting firms, real estate agencies, etc. as well as other types of organizations, including those created for criminal purposes. For example, in a U.S. Foreign Corrupt Practices Act (FCPA) proceeding against Linde, it was found that a joint venture was formed to carry out corrupt schemes in which a foreign affiliate owned 51% of the profits, while another foreign affiliate was retained to provide fictitious “management services” for the joint venture. Thus, the joint venture acted as a conduit for bribes to the officials – a total of 75% of its profits were used to pay dividends and “management services.”

In the case of Unaoil, whose officials were investigated/prosecuted by the UK and U.S. law enforcement officials, the organization positioned itself as a consultant on industrial solutions for the energy sector in the Middle East, Central Asia, and Africa, although in practice its officials facilitated bribes on behalf of companies in these regions in order to secure oil and gas contracts.

Corporate liability helps to bring to justice the organizations that contributed to the commission of corruption offences.

International Standards

At the international level, the need to apply corporate liability for corruption along with the liability of natural persons is widely recognized.

The liability of legal persons is addressed in the key anti-corruption conventions as well as in numerous guidelines, recommendations, and analytical materials of international organizations.

United Nations

UN Convention against Corruption-UNCAC (Article 26);

UN Convention against Transnational Organized Crime (Article 10);

UN General Assembly resolutions S-32/1 of June 2, 2021 (paragraphs 23 and 25) and 75/194 of December 16, 2020 (paragraph 28);

UNODC Reference Guide to State Measures to Strengthen Corporate Integrity 2013 (currently under revision);

UN High Level Panel on Financial Accountability, Transparency and integrity (FACTI) report “Current Trends in the Investigation and Prosecution of Foreign Bribery.

G20

- High Level Principles on the Responsibility of Legal Persons for Corruption 2017.

OAS

Inter-American Convention against Corruption (Article VIII);

Publication “Corporate Liability for Corruption Crimes in Latin America”.

World Bank

Publication “The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It”;

Council of Europe;

Criminal Law Convention on Corruption (Article 18);

Analytical report “Liability of Legal Entities for Corruption Offences”.

OECD

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;

Recommendations adopted in its follow-up, especially the OECD Council Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions (revised in 2021);

Analytical publications, such as “Liability of Legal Persons for Corruption in Eastern Europe and Central Asia,” “The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report,” “Corporate Anti-Corruption Compliance. Driving Forces, Mechanisms and Ideas for Change,” etc.

FATF

Interpretive Note to Recommendation 3.

National Legislation

The active position of international organizations, especially the fact that relevant provisions were included in the UNCAC and the OECD Anti-Bribery Convention, encouraged countries to introduce corporate liability for corruption into national legislation.

Countries take different approaches to establishing the liability of legal persons, taking into account the peculiarities of their legal systems.

Provisions on corporate liability for corruption can be included in:

- criminal/administrative laws. For example:

France: The provisions on the liability of legal persons are contained in Article 121-2 of the Criminal Code.

Mexico: Corporate liability is established by Article 421 of the Code of Criminal Procedure.

Ireland: Norms on the liability of legal persons for corruption offences are included in the Criminal Justice (Corruption Offences) Act (there is no unified criminal code in the country, and the regulation of criminal justice is implemented by issuing laws and regulations concerning certain types of crimes).

Germany: Legal persons, only administrative liability is provided, the relevant provisions are included in Section 30 of the Law of May 24, 1968 "On Administrative Offences."

Russia: The liability of legal persons for corruption is established by Article 19.28 of the Code of Administrative Offences.

- anti-corruption legislation. For example:

Brazil: The "Clean Company Act" (Law of August 1, 2013 No. 12,846) establishes "objective administrative and civil liability of legal persons for committing acts against national or foreign public administration."

Peru: For legal persons, liability for foreign bribery has been introduced under Law of April 21, 2016 No. 30424 "On Administrative Responsibility of Legal Persons for Transnational Bribery."

United Kingdom: The rules on the liability of legal persons for bribery at home and abroad are set out in the Bribery Act of 2010. Colombia: Provisions on corporate liability for corruption are included in the Law of July 12, 2011 No. 1474 "On Establishing Rules Aimed at Strengthening Mechanisms for the Prevention, Investigation, and Punishment of

Corruption Acts and Increasing the Effectiveness of Control of Public Administration."

- separate laws on the liability of legal persons. For example:

Chile: The Law of December 2, 2009 No. 20.393 "On the Criminal Liability of Legal Persons for Money Laundering, Financing of Terrorism and Bribery Crimes establishes the criminal liability of legal persons "for crimes provided by articles 136, 139, 139 bis and 139 ter of the General Law on fishing and aquaculture, article 27 of Law No. 19.913 [Law on money laundering, article 27-concealing assets obtained as a result of illegal activity, their use for profit). Article 8 of Law No. 18 314, Articles 240, 250 (giving a bribe to an official), 251-bis (giving a bribe to an official's relatives), 287-bis [receiving/extorting a bribe for a contract with a certain supplier to the detriment of others), 287-ter [giving/offering/agreeing to give a bribe for a contract), 318-ter, 456-bis and 470, parts 1 and 11, of the Criminal Code.

Italy: Legislative Decree No. 231 of June 8, 2001 "On the Administrative Responsibility of Legal Persons, Companies and Associations, and Those with no Legal Personality

Czech Republic: Peculiarities of application of liability against legal persons are established by the law of October 27, 2011 No. 418/2011 'On Criminal Liability and Proceedings against Legal Persons.

- other regulations. For example:

Japan: Liability of legal persons for corruption is established only for cases of bribery of foreign officials, the relevant provisions are included in the Unfair Competition Prevention Act.

Liability of natural persons and corporate liability can be combined in different ways:

- using similar rules for individuals and legal entities.

For example: Canada: According to Article 2 of the Criminal Code, the terms “every one, person and owner, and similar expressions, include Her Majesty and an organization.”

Australia: According to article 12.1 of the Criminal Code Act, its provisions apply to “bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals. [...] A body corporate may be found guilty of any offence, including one punishable by imprisonment.”

- developing separate articles on the liability of legal persons within framework laws.

For example: Azerbaijan: Norms on the liability of legal persons are included in Chapter 15-2 of the Criminal Code.

Spain: Provisions on corporate liability are contained in Articles 31 bis – 31 quinquies of the Penal Code.

India: The liability of legal persons is established by Section 9 of the Prevention of Corruption Act.

- Issuing special laws and regulations on corporate liability.

For example: Argentina: Corporate liability is governed by the Law of December 1, 2017 No. 27.401 “Criminal Liability of Legal Entities.”

Costa Rica: The country has enacted a separate Law No. 9699 “On the Liability of Legal Persons for Bribery, Transnational Bribery and Other Crimes.”

Slovakia: Prosecution of legal persons is carried out in accordance with the Law of November 13, 2015 No. 91/2016 Coll. “On the criminal liability of legal persons and on amendments to certain legislative acts.”

To an even greater extent, the differences between national approaches are apparent with regard aspects.

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