



SEMINARIO INTERNACIONAL : RESPONSABILIDAD PENAL DE LAS PERSONAS JURÍDICAS EN CHILE Y EXPERIENCIAS COMPARADAS

**PANEL 1 : MODELOS COMPARADOS DE
RESPONSABILIDAD PENAL DE LAS PERSONAS JURÍDICAS**

Speaking Notes
Patrick Moulette
Head of the Anti-Corruption Division
OECD

Santiago, 19-20 July 2010

Introduction [Slide 1]

- Thank the Public Ministry of Chile and the University of Los Andes for taking this important initiative to generate public debate in Chile on the issue of corporate criminal liability, while at the same time drawing on international experience in this area. Corporate liability has been identified as a key challenge for most of the States Parties to the OECD Anti-Bribery Convention.
- On 2 December 2009, when Law No. 20,393 on Criminal Responsibility of Legal Persons for the Crimes of Money Laundering, Financing of Terrorism and Offences of Bribery entered into force, Chile broke new ground in its fight against foreign bribery.
- Since Chile took this important step, two other Latin American countries—Brazil and Argentina—have also introduced bills on liability of legal persons to parliament. It is therefore timely that we consider the new Chilean model in the context of global efforts to combat foreign bribery, and how you, the enforcement experts and legal practitioners who will put it into practice, can learn from the experiences of other OECD countries.

Outline [Slide 2]

- I will explain the framework for responsibility of legal persons set out in the OECD Anti-Bribery Convention and mention in particular the new good practice guidance contained in the Recommendation agreed by the Working Group on Bribery and adopted in November 2009.
- At the same time, I will outline some of the different models for corporate liability in place in the various States Parties to the Anti-Bribery Convention. You will hear in more detail about the American, Italian and Spanish models from the experts who will be speaking later in the agenda and I encourage you to make the most of this invaluable opportunity to share experiences and knowledge.
- Finally, I will present the good practice guidance on internal controls, ethics and compliance, the first of its kind—agreed by governments of 38 countries—to provide guidance to companies, business organisations and professional associations on how to prevent and detect the bribery of foreign public officials in their international business transactions.

- Although this session is 45 minutes long, I plan not to take up the entire time so as to allow for questions and discussion—so please take advantage of this to seek clarification or ask for more information about the points that I will raise today.

The OECD Anti-Bribery Convention [Slide 3]

- The Anti-Bribery Convention entered into force over 10 years ago and is the first and only international anti-corruption instrument focused on the ‘supply-side’ of bribery. It requires its States Parties to make laws that hold their citizens and companies accountable for the bribery of foreign public officials committed anywhere in the world.
- The Convention also requires Parties to put in place complementary measures to ensure the effective prevention, detection, investigation and prosecution of foreign bribery, such as providing for international cooperation, denying tax deductibility of bribe payments and establishing false accounting offences.
- There are currently 38 States Parties to the Anti-Bribery Convention, made up of the 31 members of the OECD (including Chile) and 7 non-members (Argentina, Brazil, Bulgaria, Estonia, Israel, Slovenia and South Africa). The OECD Working Group on Bribery in International Business Transactions comprises representatives of each of these countries and meets at the OECD in Paris four times a year.
- Aside from being the Conference of States Parties to the Anti-Bribery Convention, the Working Group on Bribery acts as a unique peer-review mechanism to monitor implementation of the Anti-Bribery Convention. This mutual evaluation process creates peer pressure within the Working Group and motivates countries to ensure the highest level of compliance with the Convention, thereby strengthening the fight against corruption.
- It was as a result of this peer review process that Chile was able to work together with the OECD Secretariat, and the lead examining countries—Argentina and Mexico—to develop legislation which conforms, overall, with the OECD Anti-Bribery Convention’s standards for corporate liability. The Working Group will now follow Chile’s implementation of this key legislation with interest. Chile is scheduled to be evaluated by the Working Group under the third phase of monitoring in four years’ time—

enforcement of the foreign bribery offence (in relation to natural and legal persons) will be a key focus of this review.

Corporate liability under the OECD Anti-Bribery Convention [Slide 4]

- Legislating for corporate liability is vital to prevent the bribery of foreign public officials in international business transactions. Enforcement measures against natural persons will not be dissuasive without effective provisions to prosecute and punish corporate entities, and foreign bribery will continue to be perceived as business as usual. For this reason, liability for legal persons is a key pillar of the Anti-Bribery Convention.
- Specifically, Article 2 of the Anti-Bribery Convention requires each Party to take measures to establish the liability of legal persons for the bribery of a foreign public official. It does not specify whether this liability must be criminal or civil and Parties have employed various legislative approaches to implementing this provision.
- We have learned through the peer review process that so far 25 countries have established criminal liability for legal persons (Australia, Austria, Belgium, Canada, Chile, Denmark, Estonia, Finland, France, Iceland, Israel, Japan, Korea, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Slovak Republic, Slovenia, South Africa, Spain, Switzerland, the UK and USA) and nine (Bulgaria, Germany, Greece, Hungary, Italy, Mexico, Poland, Sweden and Turkey) have established a non-criminal form of liability.
- This leaves only three countries without any current provisions for responsibility of legal persons (Argentina, Brazil, and Czech Republic). Of these, Brazil recently introduced a bill for administrative liability of legal persons to Congress and Argentina introduced a draft bill on criminal liability of legal persons.
- The successful adoption of legislation providing for either criminal or non-criminal liability of legal persons in almost all Parties to the Convention is a testament to the success of the principle of 'functional equivalence' outlined in the commentaries to the Convention, enabling Parties to tailor their methods of establishing the liability of legal persons for the foreign bribery offence to the limitations in their legal systems.
- In particular, commentary 20 to the Convention states that in the event that criminal responsibility is not applicable to legal persons under the legal system of a Party, that

Party shall not be required to establish criminal responsibility. As a result some States Parties have opted to introduce civil or administrative liability for corporations.

- A key challenge now that the legislation is in place, is enforcement. The true test of the 'functional equivalence' between legal systems will be the interaction of criminal and non-criminal liability when it comes to international cooperation in foreign bribery cases. For the purposes of mutual legal assistance, Parties will need to treat non-criminal liability as 'criminal'. This practice will develop as more cases emerge, but it is important to be aware of, even at this point.

Sanctions [Slide 5]

- From this very flexible framework for establishing liability (criminal, civil or administrative), the Convention sets a strict benchmark for assessing the adequacy of each approach of corporate liability – the need for 'effective, proportionate and dissuasive sanctions'. It sets out, in Article 3, several elements that must be achieved when countries are implementing their obligations to hold companies liable for foreign bribery.
- Firstly, the range of penalties must be comparable to those applicable to domestic bribery and include monetary sanctions.
- Until recently, some of the toughest criminal penalties for offences of foreign bribery were found within the US Foreign Corrupt Practices Act (FCPA), which provides for a fine of up to USD 2 million per violation for corporations and other business entities. Applicable sentencing guidelines also allow courts to increase these penalties, opening the way for heavy fines, such as the record amount of EUR 1.24 billion which was imposed in combined fines on a single company for foreign bribery. In addition, the US FCPA provides for extensive jurisdiction, applying not only to companies registered in the US but also to those registered on the US stock exchange.
- With the passage of the UK Bribery Act in April this year, the UK set a new record in providing for unlimited fines for corporations that violate the foreign bribery offence. The UK Bribery Act provides for very expansive jurisdiction over companies doing business in the UK. British companies and citizens are subject to the Act, which applies to their

conduct anywhere in the world. Non-UK companies doing business in the UK can also be prosecuted for bribery undertaken on their behalf without regard to where it occurs.

- However, the Working Group on Bribery has expressed concern that the maximum monetary sanctions available in other Parties to the Convention alone are not high enough to be sufficiently dissuasive to major corporations. In particular, in Korea's first case of corporate liability for its foreign bribery offence, the fine imposed amounted to less than a quarter of the total amount of the bribes.
- For this reason, the Convention requires Parties to take measures to ensure that the bribe and its proceeds are subject to seizure and confiscation (or monetary sanctions of comparable effect). The commentaries clarify that the proceeds of bribery are the profits or other benefits derived by the briber from the transaction, or other improper advantage obtained or retained through bribery.
- Switzerland takes a pro-active approach to confiscation: confiscation is not linked to the conviction of the offender and assets can still be confiscated even if the offender manages to escape Switzerland's criminal authorities. Finland's criminal code provides that if no evidence can be presented as to the amount of the proceeds of the bribe, the proceeds can be estimated. With regard to confiscation in *practice*, there have not been enough actual cases to assess the effectiveness of the various models for confiscation as dissuasive sanctions for foreign bribery.
- Finally, Parties are required to consider the imposition of additional civil or administrative sanctions. The commentaries contain a list of examples of additional sanctions, which include exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placement under judicial supervision or a judicial winding-up order.
- The imposition of additional civil or administrative sanctions upon legal persons has not been universal or consistent among Parties to the Convention. Some Parties have introduced express laws applicable to legal persons that entail particular prohibitions or deprivations of rights upon conviction for the foreign bribery offence, whilst others rely on the policies of particular government bodies to preclude participation in public

procurement contracts, official development assistance contracts, and to restrict access to official export credits or other governmental assistance.

- One example of express laws applicable to legal persons is that of the German public procurement law, under which companies can be excluded from public contracts for bribing domestic or foreign public officials. Corruption registers have been established at a municipal level to implement these provisions, and there are plans to create a federal corruption register.
- The US has powerful provisions enabling the suspension of export privileges, or the withdrawal of eligibility to bid for government contracts or apply for government programmes, sometimes on the grounds of a mere indictment for an FCPA violation.
- In relation to the new UK Bribery Act, there is a possibility that a corporate conviction for foreign bribery, including a failure to prevent bribery, could result in permanent exclusion from all government contracts—including other EU government contracts. This question remains to be resolved before the entry into force of the Bribery Act later this year.
- Having examined the fundamental obligations set out in the Anti-Bribery Convention, and the challenges that Parties have encountered in implementing these obligations, I will turn now to consider some of the best practices that have emerged in the ten years that the Anti-Bribery Convention has been in force.

2009 Recommendation: Good Practice Guidance on Article 2 [Slide 6]

- In 2009, ten years after the entry into force of the Anti-Bribery Convention and nearing the completion of two phases of peer review of its implementation, the States Parties agreed on a new recommendation for further combating foreign bribery.
- This recommendation includes an annex with good practice guidance to governments on implementing specific articles of the Convention, including the Article 2 obligation to establish responsibility of legal persons.
- This Guidance clarifies the approach to be taken with regard to the **standard of liability** when legislating for liability of legal persons. A majority of countries provide for corporate liability on the basis of the acts of an individual in the corporation.

- For these countries, the Guidance suggests that the liability should not be restricted to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted.
- The issue of the nexus between the natural person and the legal person is crucial to the success of any corporate liability framework. This issue has not been fully explored in the context of foreign bribery offences due to the low number of actual cases involving corporate liability. However, in France, despite the non-identification of the natural perpetrator, a legal person was prosecuted in 2000 for forging attestations in the course of a judicial inquiry. French magistrates agreed that the identification of the natural perpetrator is an important pre-condition for prosecuting the legal person, although such identification was not required under law. This example makes it clear that there is a need for comprehensive guidelines for investigatory and prosecutorial agencies when dealing with these new corporate liability offences.
- The Guidance provides further clarification on the standard of liability by recommending that Parties take a flexible approach to determining the requisite level of authority of the person whose conduct triggers the liability of the legal person. This is particularly important in the context of large multinational corporate structures that are increasingly decentralized and involve complicated decision-making procedures, which are not necessarily overseen by the highest level managerial authority.
- Alternatively, the Guidance recommends that Parties ensure that corporate liability is triggered in the following three situations:
 - When a person with the highest level managerial authority offers, promises or gives a bribe to a foreign public official;
 - When a person with the highest level managerial authority directs or authorises a lower level person to offer, promise or give a bribe;
 - When a person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise or through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

- The Australian model for corporate liability, set out in its Criminal Code, is considered to be one of the most progressive models of the Working Group, in particular because corporate liability is in part based on a corporate culture conducive to the criminal conduct in question. That is, companies can be liable for the foreign bribery offence when an employee commits the offence and the body corporate 'expressly, tacitly, or impliedly authorised or permitted the commission of the offence'.
- This broad basis for triggering liability has been taken even further in the new UK Bribery Act, by legislating for an offence of failure to prevent bribery. The only defence is to show that the organisation had 'adequate procedures' in place to prevent employees or agents committing bribery. The UK government must issue guidance on what constitutes 'adequate procedures' and the requirements will be different depending on the nature and size of each organisation.
- For its part, the Working Group has broken new ground in providing guidance to companies on measures to prevent and detect the bribery of foreign public officials in their international business transactions.

Good Practice Guidance on Internal Controls, Ethics and Compliance [Slide 7]

- The Good Practice Guidance adopted earlier this year is the first time that governments have agreed, at an international level, on guidance addressed to companies for establishing and ensuring the effectiveness of internal controls, ethics and compliance programmes to combat foreign bribery.
- Now that Chile has legislated to hold companies liable for foreign bribery, it is important to raise awareness among the private sector of this offence and the relevant penalties. More importantly, Chile will need to educate companies about the comprehensive offences prevention model set out in article 4 of the new law on responsibility of legal persons. In doing this, Chile should encourage companies to develop and adopt adequate internal controls, ethics and compliance programmes to prevent and detect foreign bribery in their international business dealings.

- Along with the measures set out in article 4, I encourage Chile to make use of the new Good Practice Guidance, and the fact that it is now available in Spanish, when engaging with the private sector on prevention models specific to the foreign bribery offence.
- The Good Practice Guidance is flexible and intended to be adapted by companies, in particular small and medium sized enterprises (SMEs), according to their individual circumstances, such as size, type, legal structure and sector. It is addressed to companies, business organisations and professional associations.
- The Guidance recommends developing internal controls, ethics and compliance programmes based on regular risk assessments and periodic reviews and outlines a list of good practices to ensure that these programmes are effective.
- This list includes a clearly articulated and visible corporate anti-bribery policy that applies to individuals at all levels of the company, including subsidiaries, and oversight of the policy by one or more senior corporate officers with an adequate level of autonomy from management, resources and authority. It also includes good practice on due diligence measures with regard to business partners and a system of financial and accounting procedures designed to ensure fair and accurate bookkeeping.
- The Guidance also suggests periodic training at all levels of the company, including on procedures for internal and confidential reporting, as well as appropriate disciplinary procedures to address violations of the anti-bribery policy.
- Finally, the Guidance addresses the essential role played by business organisations and professional associations in assisting companies, in particular SMEs, in the development of effective internal controls, ethics and compliance programmes. This role includes the dissemination of information on foreign bribery issues, making available tools and providing advice on training, prevention and due diligence and providing general advice and support on measures to resist extortion and solicitation.

Conclusion

- In conclusion, I thank the Chilean government once again for making the fight against foreign bribery a clear national priority and encourage Chile to continue this momentum up to and beyond its Phase 3 review in 2014. The introduction of this new legislation on

corporate liability is a vital first step and the challenge now is to inform and educate the private sector and general public. Enforcement of this new legislation will also have its own challenges and I will speak later in the programme about some of these challenges. The role of the OECD Secretariat is to assist Parties to effectively implement their obligations under the Convention and we stand ready to assist Chile. I encourage you to identify new and creative ways in which the Secretariat can help so that we can continue to fight foreign bribery together.