



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

Panel 6. Desafíos para Chile y el Ministerio Público en la Investigación de casos de Responsabilidad Penal de las Personas Jurídicas

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Introduction

- We have heard over the last two days from Chilean and international experts on best practice in legislating for corporate criminal liability. We have also delved into the provisions of the new Chilean law on responsibility of legal persons. The question now is how this legislation will be enforced, and the challenges that Chile and the Public Ministry will face in investigating cases of bribery of foreign public officials by Chilean companies.
- In this session I will outline some of the major impediments to investigations of bribery of foreign public officials by legal persons that have been encountered by Parties when enforcing their corporate liability legislation for the foreign bribery offence.
- I will start by setting out key factors in a proactive approach to investigating and prosecuting foreign bribery offences. Then I will outline some of the specific challenges involved in foreign bribery investigations in particular, such as completing investigations within the statute of limitations, obtaining mutual legal assistance, giving consideration to corporate compliance programmes (particularly in the context of Chile's prevention model) and establishing the nexus between the conduct of the natural person and the liability of the legal person.
- Chile has already taken a step in the right direction by hosting this international seminar, which provides an invaluable opportunity for dialogue between a number of international experts on the universal enforcement challenges related to liability of legal persons. I encourage Chile to continue to identify opportunities to exchange international knowledge and experience.

Proactive investigation and prosecution

- Before seeking to address specific challenges in investigating foreign bribery offences, it is important to establish a proactive approach to investigating and prosecuting foreign bribery. This is a relatively new crime—the Convention itself is only 10 years old—and it requires unique investigation and prosecution techniques. Foreign bribery offences involve complex issues related to legal persons, international evidence gathering, and the analysis of international transactions recorded in books and records, among others. As such, adequate awareness-raising and training activities, targeted to police, prosecutors

and other law enforcement officials is essential for the effectiveness of investigations and prosecutions of the foreign bribery offence.

- Chile should also ensure that sufficient resources (both human and financial) are devoted to investigating and prosecuting foreign bribery cases, in particular given the highly technical nature of such offences. This includes specific training of police officers, judges and prosecutors on economic and bribery offences. Investigative and prosecutorial authorities should be provided with comprehensive guidance. There are numerous examples of the form that such guidance could take in the practice of other Parties to the Anti-Bribery Convention and Chile may wish to consider adapting these to the Chilean context.
- Another key element in a proactive approach to enforcement is effective coordination between relevant government agencies. The Working Group on Bribery recognises the positive efforts made by Chile's National Group of Experts against Corruption (GNECC) to raise the level of awareness of public officials about the Convention and Chile's implementing legislation. The GNECC should continue this important work and also promote close coordination when it comes to investigating and prosecuting actual cases.

Statute of Limitations

- Turning now to practical challenges to investigations, the limitation period for the foreign bribery offence is an overarching issue for all members of the Working Group on Bribery. The issue is so important because once the statute of limitations for the foreign bribery offence has expired the conduct cannot be further investigated or prosecuted, regardless of the weight of the evidence or the seriousness of the offence.
- Chile provides for a five-year limitation period in Article 19 of the Law on responsibility of legal persons. This is in line with the average limitation period in other Parties to the Convention. It is difficult to know whether this limitation period is adequate, due to the lack of lack of actual foreign bribery cases involving legal persons.
- However, it is clear that in cases of bribery of foreign public officials by companies, the transnational nature of the crime, coupled with the extensive searches needed to identify

evidence of bribery in a complex and decentralised corporate structure, will take a longer period of time than in the case of domestic bribery, or foreign bribery by individuals.

- In addition, to obtain evidence sufficient to meet the nexus between the natural perpetrator and the related legal person, investigative authorities will need to rely on a range of different sources, including mutual legal assistance requests which can create extensive delays. Finally, complex investigations, lengthy trials, an overburdened judiciary and prosecutors' office, and too many cases in judicial systems with mandatory prosecutions, also contribute to the problem.
- Some countries have revisited their statutes of limitations as a result of concerns of the Working Group on Bribery, and in particular in relation to legal persons. I encourage investigative and prosecutorial authorities in Chile to bear the issue of limitation periods in mind in future cases and to make proactive use of any legislative provisions to suspend or interrupt the limitation period.

Mutual Legal Assistance

- Given the transnational nature of the crime of bribery of foreign public officials, mutual legal assistance is almost always involved in investigations. Parties to the Anti-Bribery convention are required to provide prompt and effective legal assistance to other Parties to the fullest extent possible under their laws.
- In cases that do not involve other Parties to the Anti-Bribery Convention, there are a range of other instruments that can be relied upon as a basis for requesting (and providing) mutual legal assistance. These include, primarily, the UN Convention against Corruption and in the case of Latin America, the Inter-American Convention against Corruption, as well as bilateral mutual legal assistance treaties.
- The key challenge when it comes to mutual legal assistance between Parties to the Anti-Bribery Convention and 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 the issues, even at this point.
- For example, the existence of non-criminal liability for legal persons will affect not only to the ability of countries with non-criminal liability of legal persons to obtain information through mutual legal assistance requests, but also to the ability of countries with criminal liability of legal persons to provide mutual legal assistance under their mutual legal assistance treaties. This is because these mutual legal assistance treaties traditionally relate only to criminal offences and in some cases may require dual criminality.
- This is a horizontal issue for all Parties to the Convention, including Chile, which has stated in the process of monitoring by the Working Group on Bribery that it will need to consider dual criminality in more complex cases.
- In the event that Chile does encounter difficulties in obtaining information via mutual legal assistance requests, the Working Group on Bribery provides a simple forum to raise these difficulties and seek the assistance of other countries. Other Parties have successfully resolved issues relating to mutual legal assistance in the context of the Working Group on Bribery and the OECD Secretariat stands ready to assist where possible.

The Chilean context: Prevention Model

- Another emerging challenge in investigations of the offence of bribery of foreign public officials in the context of corporations is the existence of corporate compliance programmes, which feature either as a complete defence or as a factor to mitigate sentences in most models for corporate liability. However, many investigators and prosecutors do not have the requisite skills and expertise to evaluate the effectiveness of corporate compliance programmes, so training and guidance is essential.
- Under the new Chilean law on responsibility of legal persons, a company can avoid liability for the offence of bribery of foreign public officials if it can demonstrate that it has adopted the prevention model set out in Article 4. Companies will also be able to undergo a certification process to confirm that the offence-prevention model complies

with the minimum requirements of Article 4. However this certification will not, by itself, exclude the company from liability for the foreign bribery offence as it will still be open to argue that notwithstanding the certification, the model did not meet the minimum requirements or that the model despite being certified, was not satisfactorily implemented.

- The prevention model set out in the Chilean law on responsibility of legal persons is an exception to the offence, rather than a defence. In other words, it will be up to the prosecutors to prove that the entity failed to comply with its duties of management and supervision. This will require prosecutors to prove that the company failed in the design and/or implementation of the offence prevention model including why, in the circumstances, the prevention model was insufficient.
- There are other countries that will face similar challenges, such as the UK, which will be enforcing the new offence of failure to prevent bribery under its Bribery Act. In addition, there will be lessons to be learned from the emerging body of case law on corporate liability for foreign bribery. I encourage Chile to use the OECD Secretariat and the Working Group on Bribery to compare experiences and share knowledge.

Conviction/Prosecution of Natural Perpetrator

- The issue of the nexus between the natural person and the legal person has not been fully explored due to the low number of actual cases involving corporate liability. However a number of potential issues have been raised in the course of evaluations in the Working Group on Bribery. The first relates to whether investigatory powers can only be applied to legal persons in connection with investigations of natural persons. The second relates to proving the necessary connection between the act of the natural perpetrator and the liability of the company.
- In the case of the Chilean legislation, this is particularly important where the law requires that the offence must be committed 'directly and immediately' in the interest of the company. Prosecutors will need to be prepared in the event that legal persons rely on arguments that the individual bribed a foreign public official with only his/her own interest in mind. Practice will develop as cases emerge but 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. This seminar is an excellent first step in providing the kind of guidance that is necessary for these agencies, and I encourage Chile to keep up this momentum.

Conclusion

- Finally, I wish the Chilean authorities every success in your efforts to put the new law on responsibility of legal persons into practice. Enforcement of this new legislation will be a challenge but it is important to remember that you are not alone. 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. The other 37 Parties to the Convention face the same challenges and we should all use the mechanism of the Working Group on Bribery to identify common solutions.
- Already Chile is off to the right start, by hosting awareness raising and educational activities such as this international seminar. The more that the public and private sectors, as well as the general public, know about this crime and the various forms that it can take, the stronger we will be in the fight against it.