

THE 2003 UNITED NATIONS CONVENTION AGAINST CORRUPTION: CRIMINALISATION

INTRODUCTION

The 2003 United Nations Convention against corruption (“UNCAC”) lays down a comprehensive and far-reaching framework for the criminalisation of corruption.

Where not already provided for in domestic law, the UNCAC requires countries to criminalise a wide range of corrupt acts and transactions. In some instances, for example the promising, offering or giving to a national public official of an undue advantage, countries are obliged to establish criminal offences; whilst, in others, for example the solicitation or acceptance by a foreign public official of an undue advantage, they are required to consider such criminalisation.

The UNCAC goes further than previous international counter-corruption instruments by addressing not only bribery, but also trading in influence and the concealment and laundering of the proceeds of corruption. In addition, it seeks to address activities, such as money laundering, which facilitate corrupt acts.

However, for the purpose of this paper, the discussion will confine itself principally to the bribery of national and foreign public officials under the UNCAC.

1. THE CRIMINALISATION REQUIREMENTS OF THE UNCAC

Article 15

(Bribery of National Public Officials)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself/herself or another person or entity, in order that the official act or refrain from acting in the exercise of his/her official duties.
- b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself/herself or another person or entity, in order that the official act or refrain from acting in the exercise of his/her official duties.

Article 16

(Bribery of Foreign Public Officials and Officials of Public International Organisations)

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official, or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself/herself or another person or entity, in order that the official act or refrain from acting in the exercise of his

or her official duties; in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself/herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

2. RELEVANT DEFINITIONS **WITHIN THE UNCAC**

Article 2

(Use of Terms) for the purposes of this Convention:

“Public Official” shall mean:

- i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority;
- ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;
- iii) any other person defined as a “public official” in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, “public official” may mean any person who performs a public function or provides a public service as defined in the domestic law State Party and as applied in the pertinent area of law of that State Party;

- b) “Foreign Public Official” shall mean any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any other person exercising a public function for a foreign country, including for a public agency or public enterprise;
- c) “Official of public international organisation” shall mean an international civil servant or any person who is authorised by such an organisation to act on behalf of that organisation.”

3. ELEMENTS OF THE BRIBERY OFFENCES AND POTENTIAL DIFFICULTIES

The Active Bribery Offence re: National Public Officials

- Intentionally
- Promising, offering or giving
- To a public official
- Directly or indirectly
- Of an undue advantage
- For the official himself or herself or another person/entity
- In order that the official act or refrain from acting in the exercise of his/her official duties

The Passive Bribery Offence re: National Public Officials

- Intentionally
- Solicitation or acceptance
- By a public official
- Directly or indirectly
- Of an undue advantage
- For the official himself or herself or another person/entity

- In order that the official act or refrain from acting in the exercise of his/her official duties

Active Bribery re: Foreign Public Officials

- Intentionally
- Promising offering or giving
- To a public official or an official of a public international organisation
- Directly or indirectly
- Of an undue advantage
- For the official himself or herself or another person/entity
- In order that the official act or refrain from acting in the exercise of his/her official duties
- In order to obtain or retain business or other undue advantage in relation to the conduct of international business

Passive Bribery re: Foreign Public Officials

- Intentionally
- Solicitation or acceptance
- By a foreign public official or an official of a public international organisation
- Directly or indirectly
- Of an undue advantage
- For the official himself or herself or another person/entity
- In order that the official act or refrain from acting in the exercise of his/her official duties

Articles 15 and 16 establish a standard which is to be met by parties in respect of the bribery of national public officials (Article 15) and the bribery of foreign public officials (Article 16). There is not a requirement to utilise the precise terms of the UNCAC in defining the offence under domestic law, although, as we shall see, adoption of a convention's terms in criminalisation will often ensure that difficulties and potential loopholes are avoided. But, of

course, a party may use various approaches to fulfil obligations so long as the end result is convention compliance.

Whose behaviour is to be criminalised?

The natural or legal person who promises etc a bribe to a national public official (Article 15(a)) or to a foreign public official (Article 16(1)), and the national public official who solicits or accepts such a bribe (Article 15(b)). (Although, in the case of a legal person, subject to the legal principles of the party, liability may be criminal, civil or administrative). In addition, consideration will be given by each party to the UNCAC to criminalisation of the solicitation or acceptance of a bribe by a foreign public official.

I shall look at the liability of legal persons and the effect of Article 26 in due course. First, though, a word on the jurisdictional position applicable to both natural and legal persons.

The UNCAC requires that a party shall have jurisdiction over an offence established in accordance with Articles 15 and 16 where the offence is committed within the territory of the party (Article 42(1)(a)). In accordance with international expectations generally, it will be envisaged that such territorial jurisdiction is given a broad interpretation. In addition, a party may decide to establish a nationality jurisdiction, although not required to do so (Article 42(2)(b)). It may also take jurisdiction when a person has committed an offence against one of its nationals or against the State itself; however, in such circumstance it will have to have regard to the sovereignty provisions set out in Article 4.

In establishing over whom to extend jurisdiction for offences criminalised in accordance with the UNCAC, parties must also bear in mind that they are required to establish jurisdiction over an alleged offender when that offender is present within the party's territory and the party does not extradite solely on the ground that the offender in question is one of its own nationals (Article 42(3)). Parties may also decide to establish jurisdiction to meet the situation where the alleged

offender is present within its territory, and it would not otherwise have territorial or nationality jurisdiction, but it does not extradite the offender in question.

Turning to the public official, Article 30(2) of the UNCAC sets out the following cautionary words in relation to immunities and privileges etc:

“Each party State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, where necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention”.

As to the definition of the “public official”, those drafting legislation will be well advised to consider taking on board the definition contained within Article 2.

In relation to the definition of foreign public official, the preference should be, where possible, to adopt an autonomous definition which follows the provisions of Article 2 (and which does not require proof of how the foreign country defines the individual in question). The aim, after all, is to cover all the categories of foreign public official envisaged within the Article 2 definition. It will be of assistance to have in mind the guidance given within the Commentary (Comms 12-18) to the OECD Convention on this point of definition:

- i) “Public Function” includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.
- ii) “Public Agency” is an entity constituted under public law to carry out specific tasks in the public interest.
- iii) “Public Enterprise” is an enterprise, regardless of its legal form, over which a government or governments, may, directly or indirectly, exercise a dominant

influence. [Including the position where a government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise, or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board].

- iv) An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market (i.e. on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidiaries or other privileges).
- v) In certain circumstances some persons (e.g. political party officials in single party states), not formally designated as public officials, may, through their de facto performance of a public function, under the legal principles of some countries, be considered to be foreign public officials.
- vi) "Public International Organisation" includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of confidence, including, for example, a region economic integration organisation such as the European Communities.
- vii) "Foreign Country" is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.

It will be noted that the UNCAC replicates much of the OECD Convention terminology in its definition of '(foreign) public official'. In stressing, then, the benefit provided by an autonomous definition (particularly in relation to the foreign bribery offence), it is worthwhile highlighting some of the comments on OECD countries as to definition during the Phase 2 reviews. In the UK, for instance, when corruption law was extended in 2001 to criminalise the bribery of foreign public officials (on the basis of nationality jurisdiction) the legislation added what might be

described as a “foreign” element to existing definitions of “agent”, “principal”, “public office”, “public body”, and “public authorities”. It has, as a result, been queried whether all the categories set out in the OECD convention as being required to be covered are in fact provided for.

In the event that domestic law or practice does not accommodate an autonomous definition, care must be had to ensure that anyone carrying out a public function is in fact regarded as being a public official. Such a result might, for instance, be achieved by the insertion of a specific provision to that effect. One example will be Article 322^{Octies}, para 3 of the Swiss Criminal Code, which provides that “individuals who carry out public functions are deemed to be public officials”.

Those from other jurisdictions may wish to consider whether there is any bar in their own criminal code or criminal legal theory to an autonomous interpretation. Certainly some states do encounter difficulties in addressing the point. For instance, the newest member of the OECD Convention and the first country to accede since the Convention’s adoption in 1997, Slovenia, had this issue raised as a result of its Phase 1 evaluation. Its definition of foreign public official is not autonomous and the nature of the relevant provisions in Slovenian law indicate that to determine whether a person is a foreign public official it is first necessary to determine whether the person would conform to the definition of a Slovenian public official. Such a position does not, of course, mean in itself there has been convention non-compliance. For instance, the Slovenian authorities are of the view that, pending any decision or case law on the point, the substantive criteria in place for domestic public officials is sufficiently wide to cover all conceivable types of foreign public official.

An example of a non-OECD country with a broad and reasonably thorough definition of “foreign public official” is South Africa. Under section 1(v) of the Prevention and Combating of Corrupt Activities Act 2004, the definition covers all persons “holding a legislative, administrative or judicial office of a foreign state”. Even this, however, does not address all issues of the Article 2 definition. In particular, does it in fact cover all public officials, whether appointed or elected?

Promise, Offering or Giving

The promise, offering or giving of a bribe must be criminalised. Those legislating should consider incorporating the three key words themselves into the bribery offence. In the UK, Section 1 of the Prevention of Corruption Act 1906 refers to any person who “... corruptly gives or agrees to give or offers...” and appears to cover the requirements of the UNCAC and indeed those of the OECD Convention. After all, although “promise” is not specifically mentioned, any promise must surely involve an offer? However, at the UK’s Phase 1 and 1 bis reviews by the OECD Bribery Working Group, it was recommended that any amendment to the UK law should cover the notions of “offering”, “promising” or “giving” specifically. Certainly any criminalisation which does not include those three words explicitly is liable to subsequent argument of interpretation, certainly when monitored and reviewed in an international setting.

The OECD Phase 1 and Phase 2 reviews have highlighted the difficulties which some countries have in creating a substantive offence not only of giving, but of promising or offering a bribe. For example, under Italian law, acceptance of a bribe by an official is an essential element of the basic substantive offence of bribery (including foreign bribery). However, the international expectation, as we have seen, is broader and anticipates that substantive criminality will reflect not just giving, but offering or promising even when there has been no acceptance. Such difficulties do not automatically mean convention non-compliance (since the criminality might be reflected by complicity, participation or attempt offences), but parties will wish to avoid them when possible. Real difficulties will arise, however, when a complicity or attempt offence is the only one available, e.g. to reflect an offer, and the available sanctions are much lower and arguably not dissuasive (see the discussion on sanctions, below).

On the Italian example, the offence of incitement (*istigazione alla corruzione*) will be available where the public official does not accept an offer or promise of a bribe, whilst attempted bribery will be the appropriate offence where the offer or promise was, in effect, impossible.

The notion of the substantive bribery offence requiring some sort of meeting of minds between briber and public official is not one unique to Italy. In Luxemburg, for instance, the offence of bribery traditionally required the prior existence of a corruption pact concluded before the

official performed or abstained from the act in question. Any steps taken unsuccessfully in order to create such a “pact” were only capable of prosecution as an attempt. Thus, even the giving of a bribe might not amount to the substantive offence. Luxemburg has, now, taken steps to address the problem. A new offence of bribery *ex post facto* has now been introduced (Article 249 of the Luxemburg Criminal Code) and it is now an offence where an unlawful corruption pact has been concluded after a public official has performed or abstained from an act. Therefore, payment of a bribe alone will establish the bribery offence, even in the absence of a prior agreement between the parties.

French law displays a similar requirement of a corruption pact. On the face of it, active bribery is made out by an offer or a promise, whether that offer or promise has been accepted or not. However, in examining the bribery of a French public official, the courts in France adopted the notion of a corruption pact by demanding evidence of a meeting of minds between briber and recipient. What is required is not proof of a contract, but rather that the briber knows that the purpose of his proposal is to obtain an act or an omission and that the bribed party is aware that he will receive an undue advantage in doing that act or making that omission. Such a notion is a case law, rather than a statutory, one. However, it seems that the existence of a pact can be established and inferred from a range of evidence; direct, circumstantial, and by way of explanation from the parties involved.

The requirement of a meeting of minds is not unique to continental European jurisdictions. Thus, it was ascertained during the OECD Phase 2 of the Republic of Korea that an offer, promise or gift that does not result in the provision of a benefit to a public official or is not accepted by the public official (or does not come to his attention) may not constitute the full offence. In addition, attempts to bribe a foreign public official are not criminalised. Domestically, Article 133(1) of the Criminal Act does establish the offence of promising, delivery or manifesting a will to deliver a bribe to a domestic public official, but, it appears, even that is not intended to cover domestic attempts. Thus, by way of example, an offer not accepted (or at least not received by the public official) and a bribe sent but not received may not amount to criminal offences.

“Directly or Indirectly”

The promise, offering or giving may be direct or indirect, with the bribe or the offer of a bribe made directly to a public official or through an intermediary. As corruption becomes more sophisticated and increasingly transnational, the use of intermediaries is a reality which needs to be addressed. The active briber must be criminalised when an intermediary is used and, similarly, for the purposes of Article 15(b), the public official who solicits or accepts an undue advantage through the offices of an intermediary must also be brought within the scope of the (passive) bribery offence.

Whilst the UNCAC used the terms “directly or indirectly”, the OECD Convention (in Article 1) talks of an offer etc “whether directly or through intermediaries”. Problems will arise if the wording of the offence is couched in terms which do not reflect explicitly “directly or indirectly” or “directly or through intermediaries”. In the UK, neither the provisions of the 1906 Act, nor those of the common law offence, expressly refer to an offer being made through an intermediary. It might be argued that the UK offences do in fact criminalise bribery through an intermediary on two bases: first, in relation to the 1906 Act, that the provision talks of “gives or agrees to give or offers any gift or consideration to any agent...”; whilst, in respect of both the statutory and common law offence, a bribe passing through an intermediary (or indeed an offer of a bribe) will be caught since, on general principles, use of an agent (whether innocent or a knowing accomplice) will not allow the principal offender to escape criminal liability. Similarly, in relation to passive bribery, under the 1906 Act, any agent who corruptly accepts, or obtains a gift or consideration etc “from any person” will fall prey to the offence.

Where bribery through an intermediary is not to be specifically provided for within the element of the offence, those countries in particular which require there to be an agreement between the briber and the official for the substantive offence of bribery run the risk of convention non-compliance, both in relation to the UNCAC and the OECD Convention. It may well be, though, as in the example of Italy referred to above, that an offence of complicity, such as incitement, can be used. Subject to sufficiency of sanction, this will be in accordance with the UNCAC.

Third Party Beneficiaries:

The undue advantage, whether for the active or passive offence, may be for the official himself or for another. Again, as sophistication grows, the advantage may well not even go through the hands of the public official, but may go directly to the third party (perhaps the spouse or an associate). Such activity under the UNCAC must be criminalised in relation to active and passive bribery of national public officials and in relation to the active bribery of foreign public officials. Similarly, those parties who put into their legislation the passive foreign bribery offence envisaged at Article 16(2) should also address the same issue. The UK, for its part, does not explicitly refer to third party beneficiaries in the existing statutory offence in its 1906 Act. However, on the basis that “corruptly accepting or obtaining for any other person” reflects the position for passive bribery and that giving or offering to give “to any agent” criminalises for the purposes of active bribery, the position is addressed, although perhaps not ideally so.

Those in the process of criminalising must take into account that two scenarios need to be addressed:

- i) The advantage which goes directly to the third party beneficiary without passing through the hands of the public official:
- ii) The advantage that goes through the hands of a public official but to, and for the benefit of, the third party beneficiary.

Given the possible limitations which some parties’ legislation has in relation to the substantive bribery offence when intermediaries are involved or when there is no agreement between briber and bribee, the UNCAC’s requirements as to participation and attempt, as set out in Article 27, need to be considered:

- 1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law,

participation in any capacity such as an accomplice, an assistant or instigator in an offence established in accordance with this Convention.

- 2) Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.
- 3) Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.

It follows from the above that there is a requirement that participation/secondary party involvement must be criminalised on the basis of functional equivalence with the criminalisation of participation in other offences in domestic law.

However, in relation to “attempt” and “preparation” it should be noted that the provision is not mandatory. However, if, for instance, attempt is established as a criminal offence, then again it should be on the basis of functional equivalence with the approach to other offences of criminal attempt in the relevant domestic law.

Undue Advantage

Some jurisdictions may have the difficulty of imprecision in using the term “undue” (see the discussion, below, of the UK’s draft Corruption Bill). However, those that do not may wish to follow the wording of the UNCAC and incorporate the phrase of “undue advantage” into their legislation. Given the nature of corrupt transactions, it is important that any definition used to convey the UNCAC meaning encompasses both the pecuniary and non-pecuniary. “Undue” clearly refers to something to which the recipient concerned was not entitled. Taking into account the realities of commerce, the giving, obtaining etc of the intangible and the non-pecuniary is just the sort or situation which should be covered by any definition.

Some examples might help: in Bulgaria, the Penal Code describes the advantage as “a gift or any other material benefit”. However, following the OECD Phase 1 review, that definition was amended to: “Gift or any other kind of advantage”. It will be seen that the later amendment made clear that both non-pecuniary and intangible benefits were covered as well as a pecuniary advantage. In Mexico, meanwhile, the domestic active bribery offence (Article 222) defines “money or any other advantage”, whilst, in relation to the foreign bribery offence, the definition is “money or any other advantage, whether in assets or services” (Article 222 bis). It would perhaps be wise to avoid the definition favoured by Chile, that of “an economic advantage”, as although such a definition will cover perhaps both tangible and intangible pecuniary advantages, it will not cover non-pecuniary advantage such as providing an admission to a school or university which the official’s child might not otherwise have reached.

“In order that the official act or refrain from acting in the exercise of his or her official duties”

The above requirement is that the act of the public official/foreign public official relates to the performance of his/her official duties. In other words, the expected act or omission must be in his/her official capacity. However, it also carries with it, for common law jurisdictions and for some others, the notion of intention as to consequence. Thus, Section 105C of the Crimes Amendment Act 2001 in New Zealand applies where a bribe is provided with intent “to influence a foreign public official in respect of any act or omission by that official in his or her official capacity (whether or not the act or omission is within the scope)”. In the UK, the present law has tended to shy away from a thorough discussion of “intent” in relation to the statutory offence of corruption under the 1906 Act. Rather, the courts have envisaged an intent in relation to the giving of the advantage itself and then an ulterior mental element as to consequence which is not dishonesty but rather the purposely doing an act which the law forbids (i.e. offering money for an official to exert influence etc).

Legislators must take care to ensure that the wording they use to reflect “in order that the official act or refrain from acting” covers all situations: including that of an official being giving money in order to do something he or she would / would not have done anyway.

Given that the words of the UNCAC, just like to the OECD Convention, are phrased to encompass acts which would have been otherwise proper for the official to do/not do had there been no offer or giving of a bribe, care must be taken if legislation is phrased along the lines of “to induce a breach of the official’s duty”. This wording, and wording like it, will cause difficulties in relation to both domestic and foreign bribery offences. In relation to the foreign offence, as Commentary 3 to the OECD Convention makes clear, an offence defined in those terms is capable of being convention compliant so long as it is understood that every public official has a duty to exercise judgement or discretion impartially and that the phrase “to induce etc” was therefore an autonomous definition which did not require proof of, for instance, the law governing duty in the particular official’s country. Similarly, for domestic bribery cases, such a wording will cause difficulties unless it is understood that the breach of the duty is the failure to exercise an impartial discretion unaffected by the giving or offering of an advantage etc; after all, the official may be being bribed to do what he or she would have done in his/her duty in any event.

“In order to obtain or retain business or other undue advantage in relation to the conduct of international business”

Some jurisdictions may choose to limit the foreign bribery offence in accordance with the above; others may choose to leave the offence boarder in scope.

This aspect of the wording of Article 16(1) reflects the wording of Article 1 of the OECD Convention. The phrase “other undue advantage” should be noted. The requirement is that the criminalisation must include an advantage such as the company which obtains an operating permit for a factory in circumstances where it clearly fails to meet the statutory requirements usually required for such a grant. In short, obtaining an advantage to which there is clearly no entitlement.

Under this section, it is worthy of note that, in relation to this element of the offence (and unlike the OECD Convention), there is not commentary pursuant to the UNCAC to say that small

facilitation payments do not constitute payments made to obtain or retain business or other improper advantage. Given that Commentary 9 to the OECD Convention itself recognises the “corrosive phenomenon” of facilitation payments, the criminalisation process should not include an exemption for these. However, countries will inevitably consider how, in terms of enforcement, they should react to small facilitation payments. To assist that discussion, I invite you to consider the appropriateness or otherwise of the UK’s “concession” made to business in the UK that: it is difficult to envisage circumstances in which a prosecution would take place in relation to a small facilitation payment made in circumstances of extortion.

Intentionally

Although the requirement of “intentionally” prefaces each of the offences established under Articles 15 & 16, I have kept discussion of it until last. I do that on the basis that aspects of the mental element have already been covered and that there will be differences of approach as between various legal systems in the way that “intentionally” is reflected in any statute which brings about criminalisation.

For those with a common law tradition, the established approach to intent in relation to corruption will have been to reflect an intent as to the giving of the advantage and an intent as to consequence (i.e. that the official was to do an act or make an omission as a result of the advantage being given). In countries such as New Zealand and the UK, the two mental element components which have been used in corruption legislation have been “corruptly” and “with intent”, (i.e., in the case of New Zealand, as mentioned above, the Section 105C offence which is committed “...with the intent to influence a foreign public official...”).

However, an alternative approach to such jurisdiction is reflected within the provisions of the UK’s draft Corruption Bill, as discussed below.

Some jurisdictions regard “intentionally”, as covering both direct intention and recklessness. Thus, the Slovenian authorities were able to indicate during their Phase 1 review that their offence of foreign bribery would encompass the case where a company representative directed

an intermediary to obtain a contract from a foreign government “through any means”, without expressly directing the intermediary to offer a bribe. For them, such recklessness would be a form of intent.

If one was seeking to articulate the minimum international standard, I suggest that it would be: the giving etc of an advantage with the direct intent that the official would do an act or make an omission as a result.

The UK’s recent experience:

Our own experiences in the UK are perhaps instructive in highlighting the problems and pitfalls that may be faced in criminalisation.

The existing law on corruption is a combination of statute and common law and has been described, not unfairly, as a “patchwork quilt”. Indeed, dissatisfaction with the present position gave rise to an attempt, in 2003, to rationalise the law. Unfortunately, the draft Bill that resulted has been subject to much criticism: it still remains a draft!

The offence of corruption in the UK may be committed by either natural or legal persons. The main statutory offence is to be found in section 1 of The Prevention of Corruption Act 1906 which covers both private and public sector corruption and has, at its heart, the breach of the agent/principal relationship. However, some public officials and office holders (e.g. judges and members of parliament), not being in an agent/principal relationship, are outside the statutory offence, and would fall to be prosecuted either under the common-law offences of either Bribing a Public Official or that of Misconduct in a Public Office.

Here, I should pose a question: Does the concept of agent/principal have any part to play as a basis of a modern law of corruption? In the UK, we find ourselves in the somewhat strange position of having no definition of what is meant by “corruptly”. The courts have been quite good at saying what corruption isn’t (i.e. it does not have to involve an element of dishonesty), but rather less successful at saying what it is! The UK finds itself in the position where, for the

most often used corruption offence (section 1 of the 1906 Act), such implicit definition as there is of “corruption” is intertwined with the notion of the agent/principal relationship.

However the position is not unique to the UK. Australia, Canada and Ireland each have adopted an agent/principal approach to some of their offences of corruption, whilst several countries, including Germany and Austria, have a concept of private sector corruption based on breach of duty (conceptually very similar to agent/principal). Indeed breach of duty lies at the heart of the approach to private sector corruption found in international instruments: for example, the Council of Europe Criminal Law Convention, the EU Joint Action and Framework Decision on Private Sector Corruption and the UNCAC itself. However, agent/principal is simply one of the approaches open to legislators. In the UK we were faced with the decision of which avenue was the best in any rationalisation of the law: should one continue with the traditional “generic” approach, or look to a number of different corruption offences to reflect different types of corrupt transactions or relationships? Should one, for the first time in the UK, seek to formulate a freestanding definition of “corruption” or should one embrace agent/principal and indeed extend that notion?

In answering those questions we were faced, as any jurisdiction would be, with the difficulty of how to differentiate a corrupt act from the various kinds of legitimate giving and receiving of advantages that make up ordinary transactions of both business and social life.

As a prosecutor, I was satisfied that “advantage” reflected the whole range of gifts, rewards and payments which international conventions would expect us to criminalise. I, and those colleagues at the Home Office responsible for the draft Bill, were equally of a view that we had to formulate a test which could be applied by a jury to identify an advantage which the UK and the international community would regard as being an “improper” or “undue” one.

In arriving at that, however, the view was taken that the word “corrupt” could not be used to qualify the advantage, since no one could be confident that there was a generally understood meaning which was unequivocal and which could therefore be safely imported into the definition of the offence.

Similarly, our consideration concluded that there was no workable definition of “improper” or “undue” as, in English, the general understanding of those words ranges from “incorrect”, “unsuitable”, “unbecoming”, “unlawful (civil or criminal)”, or “criminal”. In particular, there was concern that to use either “improper” or “undue” might result in a position where any form of agreement between the corrupt parties precluded a corruption charge (on the premise that there was then a legal basis for the advantage). Such a position would clearly risk being a charter for corruption.

By way of example, the following draft provisions were therefore arrived at in respect of the active bribery offence:

Conferring an advantage: meaning of “corruptly”

- 1) A person (C) who confers an advantage, or offers or agrees to confer an advantage, does so corruptly if –
 - a) He intends a person (A) to do an act or make an omission in performing functions as an agent of another person (B) or as an agent of public;
 - b) He believes that if A did the act or made the omission it would be primarily in return for the conferring of the advantage (or the advantage when conferred), whoever obtains it;
- 2) A person (C) who confers an advantage, or offers or agrees to confer an advantage, does so corruptly if –
 - a) He knows or believes that a person (A) has done an act or made the omission in performing functions as an agent of another person (B) or as an agent for the public;

- b) He knows or believes that a person (A) has done the act or made the omission primarily in order to secure that a person confers an advantage (whoever obtains it);
 - c) He intends to regard the advantage (or the advantage when conferred) has conferred primarily in return for the act or omission.
- 3) For the purposes of subsection (1), the nature of the intended act or omission, and the time it is intended to be done or made, need not be known when the advantage is conferred or the offer or agreement is made.

It will be seen that, on the face of the above definition taken in isolation, many advantages which are, in fact, entirely legitimate, caught.

However, there are two main elements to the offence which go on to define what is corrupt. The first, as appears in the extract from the provisions set out above, is the concept of “primarily”. There is a requirement that the advantage is intended as the primary motivation. For example, if a salesman from a company gives another company’s purchasing officer a free gift, such as a pen, of minimal value as a promotional item, the salesman will not believe that it will be primarily the “gift” of the pen that will influence the purchasing officer to do business. It is, then, the concept of “primarily” that acts as a check to prevent everyday, legitimate transactions from being corrupt. Contrast, though, the position if the salesman conferred a substantial sum of money to the purchasing officer. In such circumstance, the primarily test would, prima facie, render the payment corrupt. In essence, hospitality or promotional activity should be secondary to purpose.

The second element which completes the definition of “corruption” in the draft Bill is that of principal’s consent. The consent of the principal is, however, only available, for obvious reasons, to the private sector, not to the public. The concept, again, is a much needed restriction on the definition of corrupt behaviour. A mundane example might be a waiter in a restaurant who is given a large tip by a customer in the expectation on the customer’s part that he will be

given better or particularly attentive service next time he uses the restaurant. A large tip, in such circumstances, can clearly be shown to have the consent of the principal and is therefore not brought within the definition of corrupt activity.

It has to be said that there are, arguably, concerns that the definition of the corruption offence contained within the draft Bill falls short of international requirements. The main criticisms which some might make are as follows:

- i) The use of the word “primarily” in relation to conferring an advantage, rather than the definition of “conferring an undue advantage”. What about the position when a corrupt payment is made for two equal reasons, one of which is corrupt? Primarily suggests the need for an overriding reason. One has to ask would the qualifying word “substantially” have been a better choice?
- ii) There is no autonomous definition of “public official” or “foreign public official”.
- iii) The absence of an explicit offence of trading in influence (required by the Council of Europe Criminal Law Convention).
- iv) The absence of an explicit offence of bribery of a foreign public official (see the OECD Convention).

However, equally, it might be said that by defining corruption in terms of so-called “transactional” activity, in other words the conferring of an advantage in return for a gain, the draft bill is reflecting simply an approach which a number of jurisdictions have adopted and which, in the views of many, is a method of approach which is capable of fulfilling obligations under international conventions.

Over and above these concerns, the Joint Parliamentary Committee had a more basic worry: that the structure of the proposed new criminalisation was unwieldy and would be difficult for the

public to understand. Consequently, the Joint Committee proposed a different model. They concluded that the essence of corruption could be better expressed as follows.

“A person acts corruptly if he gives, offers or agrees to give, an improper advantage with the intention of influencing the recipient in the performance of his duties or functions;

A person acts corruptly if he receives, asks for or agrees to receive, an improper advantage with the intention that it will influence him in the performance of his duties or functions.”

Is the above an attractive and workable formulation? It retains a transactional approach, but departs from the agent/principal or breach of trust concept. Some would certainly argue that an offence drafted in this way will be capable of encompassing a much wider field of activity, including, for instance, within the private sector, corruption by business chiefs and the receiving of bribes which have indeed been sanctioned by the agent/principal. On the face of it, it also seems to have the attraction of making the definition of corruption less complex.

Each jurisdiction considering such an approach has to ask it self whether corruption ought to be confined, as an offence, to the activity which is essentially the subversion of loyalty to a principal, whether the latter happens to be the public or an individual, such as an employer. One is forced to ask the question “what is corruption?” Is the essence of corrupt activity “cheating” on the person or the entity whom you should be safeguarding or is it the wider notion of criminalising those activities within business, commerce and government which are morally reprehensible to the extent that they should be criminalised, but are not presently capable of being reflected by other existing offences?

I am conscious that this is a question which partly strays beyond the topic of bribery of public officials, but it is of relevance if, for instance, a generic offence covering both public and private corruption is being considered. To take one example, posed as a question by the Joint Parliamentary Committee in the UK: what of the situation where the owner of one business gives money to the owner of another in order to induce him not to tender for a particular contract?

Should that be corruption or should that be reflected by an anti competition offence (such as the criminal offence of bid rigging under the Enterprise Act of 2002 in the UK, which would be applicable in this example)?

Does the Joint Committee's proposal cause substantive problems of definition, however? Some of my concerns will be obvious: the use of the word "improper" for instance. Others may not be quite so apparent: what of bribes through an intermediary in order to influence someone else to do something? That will not be covered here. If a bribe was given to the wife of a public official in order to influence her husband to give a contract, on this definition it would be neither possible to prosecute the wife as the recipient of the bribe, nor her husband for awarding the contract! Further, one would have to prove that the recipient receives, asks for, or agrees to receive the advantage with the intention that it would influence him in the performance of his duties or functions. Such a construction will leave it open to a recipient to claim that he received the advantage, but that he did not intend it to influence him in any way and is therefore not guilty of the offence. Such a result is obviously undesirable and falls short of international expectations.

Defences

Article 30(9)

"Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved for domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law."

[There are of course general defences which a defendant may rely on when facing an allegation of domestic or foreign bribery. These may relate to defences which go to state of mind or to showing that money only changed hands because of blackmail, not because of bribery. These answers to charges have, of course a proper place and do not offend against the UNCAC.]

However, what is capable of undermining the thrust of both the UNCAC and the OECD Convention is any defence which strikes at the matters addressed in Commentary 7 to the OECD Convention, namely: “it is also an offence irrespective of, inter alia, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage”.

A striking example of a defence which risks undermining the UNCAC, both in relation to domestic and foreign bribery, is that of *concussione* in Italian law. Under the Italian criminal provisions, an individual is not guilty of bribery if a public official abuses his functions or power and obliges or induces that individual to unduly give or promise money or other assets either to the official or to a third party. Instead, the official himself is guilty of *concussione* (Article 317 of the Criminal Code), whilst the payer is regarded as a victim and potential witness.

One can, of course, see the rationale in domestic cases for such a provision. If one is trying to eradicate corrupt officials, then the prospect of being able to call as a witness the payer who is, indeed, in many senses a victim, will be an attractive one. However, as corruption moves into an increasingly sophisticated context, the defence of *concussione*, with its threshold set much lower than duress or extortion as many jurisdictions will understand those phrases, becomes somewhat concerning.

The concept of *concussione* is further complicated by the notion of *concussione ambientale*, which was developed by Italian jurisprudence in the 1990s. This form of *concussione* occurs when an individual is in a place or an environment which leads him to believe that he must provide a public official with an advantage, either to avoid harm or to obtain something to which he is entitled. Compelled by the environment itself and without any express demands from the official, the individual then obliges. It seems that in such circumstances the defence is capable of being run and of succeeding even when there is no solicitation by an official.

For the domestic offence, it is problematic, but for the foreign bribery offence it appears manifestly to run contrary to Commentary 7. It is entirely acceptable for a court to weigh in the balance the pressure the persuasion exerted by an official over the active briber and there may be circumstances where the sanction against the briber should be reduced accordingly; however the extinguishing of criminal liability at such a low threshold is, if adopted, capable of undermining the very process of criminalisation.

However, the Italian example is not an isolated one. For instance, Chile has a defence of “necessity” which seems capable of being drawn widely, whilst Bulgaria has a defence of blackmail, the extent of which seems, at present, uncertain.

In relation to the Bulgarian example, pursuant to Article 306 of the Bulgarian Penal Code a person who is given a bribe shall not be punished if he has been blackmailed by the official and if he has informed the authorities without delay and voluntarily. It has to be accepted that the latter element has a limiting effect on the ambit of the defence. However, given that the crime of blackmail proper would mean that no offence of bribery had been committed (since the attempt to bribe would not be present) one has to question whether the notion of “blackmail” as envisaged by Article 306 is wide and presents the same difficulties as concussion.

There will be occasions when cooperating defendant programs etc are valuable, particularly in relation to the detection and prosecution of domestic bribery. However, care must be taken in relation to providing an absolute defence to those who voluntarily come forward.

By way of example, the Slovenia bribery offence contained in Article 268 is such that, in the event that the public official solicited the bribe, the briber can escape conviction if he reports the act to the Slovenian authorities. Domestically the argument for “effective regret” is a powerful one; very often the mischief to the confronted is that of the passive bribery offence committed by an official. However, in relation to the foreign bribery setting such policy considerations lose their force. It may well be that the passive party, the public official, will never in fact be brought before a court. In addition, in relation to the foreign bribery offence, it must be remembered that such a defence is not within the contemplation of Article 1 of the OECD Convention.

4. Liability of Legal Persons

Article 26

- 1) Each State Party shall adopt such measures as may be necessary, consistent with its principles, as to establish the liability of legal persons for participation in the offences established in accordance with this Convention.
- 2) Subject to the legal principles of the State Party, the liability of the legal persons may be criminal, civil or administrative.
- 3) Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.
- 4) Each State Party shall, in particular, ensure that legal persons held liable in accordance with this Article are subject to effect, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

The issue of liability of the legal person is a crucial, and yet vexed one. In all jurisdictions, the criminal law evolved as the response of society and the state to the actions of individuals. In the modern world, and in relation to corruption cases, however, it is very often the legal person, the corporation, which drives, and benefits from, corrupt activity. No anti-corruption strategy will succeed unless the enforcement component makes provision for the liability of legal persons.

Article 26, as one would expect from an international instrument in this regard, does not seek to get parties to change the whole basis of their domestic laws, but rather requires them to establish liability for corruption on the basis of a functional equivalence with the approach in existing

domestic law. However, that principle of functional equivalence only applies where a State already has criminal, civil or administrative liability for legal person. To be compliant with the UNCAC, one of the three forms of liability must be introduced.

The approach to criminalisation will depend on more than one factor: the type of legal system involved (common law jurisdictions displaying a different approach to those countries with a Roman law or Napoleonic code background), and the type of jurisdiction being claimed in relation to corruption offences themselves (be it on a nationality or territorial basis).

What activities does one want to criminalise?

- i) Promising, offering or giving a bribe by a company.
- ii) Directing, or authorising by parent company of a bribe to be paid by a domestic subsidiary.
- iii) Directing, or authorising by a company that a bribe be paid by a foreign subsidiary. (What is the responsibility of a parent company for the activities of a subsidiary? Subject to a due diligence test?)

It will be seen from the above that any question of the liability of the legal person also involves consideration of many of the issues we have touched on already: Jurisdiction, complicity and participation, and responsibility for the acts of an agent.

It is perhaps instructive to examine some of the ways in which countries have addressed criminal liability.

I turn first to consider the common law model, first by focusing on the UK and then on Canada. None of the corruption offences in UK law expressly mention liability for legal persons. However, mention of the word “person” in legislation is construed (by the Interpretation Act 1978) as including not only natural persons but also “a body of persons corporate or unincorporated”. An unincorporated body, such as a trust, is capable of committing a criminal offence in the UK, but it is particularly difficult to prosecute such an entity. In essence, it must

be proved that each person who is party to, or a member of, the unincorporated body is guilty of the criminal offence. In relation to bribery of a foreign official, however, it should be noted that the changes made by the 2001 Act, referred to previously, do not apply to unincorporated bodies.

Of more importance to the present discussion is the position with corporations. The difficulty faced by the UK, which other jurisdictions would do well to avoid, is the difficulty in attributing criminal acts to a legal person at common law. The concept of criminal liability for a corporation grew up in the nineteenth century when, of course, when it was relatively straightforward to identify who in fact ran a company. Unfortunately, with a few additional glosses and in the interim, the nineteenth century test remains the one still in place today. In the UK, where an offence involves a mental element such as intent, a finding of liability in relation to a legal person depends on identifying someone in a corporation with an appropriate level of authority who can be said to possess the state of mind of the corporation: in other words, “the so called “directing” or “controlling” mind. The traditional test of who was the controlling mind, was the so-called ‘identification theory’. That worked on the basis that certain officers within a corporation are the embodiment of it when it acts in the course of its business. The acts and states of mind of such company officers are deemed to be those of the company. The leading case is that of Tesco Supermarkets Limited v Nattrass [1972] AC 153 which restricts such liability to the acts of “the board of directors, the managing director, and perhaps other superior managers of the company who carry out functions of management, and speak and act as the company”. Thus, on the basis of this test, one needs to consider, inter alia, the constitution of the company, its memorandum or articles of association, the actions of directors in general meetings etc and the extent, if any, of delegation.

However, a more recent attribution test, and perhaps one more akin to the realities of corporate life, is that of the Privy Council case of Meridian Global Funds Management Asia Limited v Securities Commission [1995] 2 AC 500. There it was held that the test should depend on the purpose of the provisions that create the relevant offence rather than simply a search for a directing mind. It envisaged a boarder test, one which sought to identify the purpose of the offence. But, the Meridian case related to securities law disclosure not to crime in the conventional sense; what impact does it therefore have on the wider issue of attribution?

Whichever of the above two tests is preferred, the traditional common law stance does not permit the creation of a corporate intent by aggregating the states of mind of more than one person within the company. Even on the Meridian test, one individual has to be the company for the purpose of the mental element. In essence, the criminal liability of a legal person depends on proving both the culpable act/omission and the required mental element by a single person within the company, even though a criminal conviction of that particular individual is not a prerequisite.

The traditional common law approach to liability creates another difficulty in relation to anticorruption enforcement: in the event of a wholly owned foreign subsidiary of a UK parent company paying a bribe, the parent company will, of course, only be liable if it can be shown to have directed or authorised the bribe. Moreover, on the principle of attribution just discussed, any such direction or authorisation will have to be shown to have been carried out by the controlling or directing mind.

Canada, in contrast to the UK, has already taken legislative steps to move away from, the tradition ‘identification theory’. Previously, Canada had been subject to the same restrictions described above. The Supreme Court of Canada case of Canadian Dreg and Dock Co v The Queen [1985] 1 SCR 662, had formulated attribution to a company on the basis of the “directing mind” or “ego” of the corporation. The court in that case had provided that the “directing mind” could be located in the board of directors, the managing director, the superintendent, the manager or anyone else to whom the board of directors has delegated the governing executive authority of the corporation.

However in 2002, the Government of Canada accepted the findings of a Standing Committee and decided to introduce legislation on legal liability. That initiative is now reflected in Bill C 45, an Act to amend the Criminal Code (Criminal Liability of Organisations), which came into force on March 31st 2004. It established new rules for attributing to organisations, including corporations, criminal liability. In essence, it criminalises on the basis that: when a senior person with policy or operational authority commits an offence personally, or has the necessary intent and directs the affairs of the corporation in order that lower level employees carry out the illegal act, or fails

to take action to stop criminal conduct of which he or she is aware or wilfully blind, then criminal liability will be attributed to the corporation.

2.

Canada is not the only OECD country to have sought a workable reformulation of the test of attribution. New Zealand has also moved away from the strict identification theory generally understood.

In New Zealand, although criminal responsibility of a corporation still depends upon assigning responsibility on the basis of a culpable act and of the requisite state of mind of a representative of the corporation, the position of that representative does not have to be that of a “directing mind”. Rather, the test is whether the director or employee of the corporation had actual authority within it in relation to the area of the alleged conduct. In essence, does the natural person in question have real control on behalf of the legal person, over the activities which relate to the alleged offence? (For the avoidance of doubt, the position in New Zealand remains the common law one that the conviction of the natural person is not needed as a pre-condition to the prosecution of the legal person).

Those wrestling with trying to create a test of attribution might do well to consider alternative approaches. One might, for instance, ask whether domestic law allows for what is essentially criminal vicarious liability to be created. Such an approach best describes the liability of legal persons in the USA.

There, a company is criminally liable for the acts of its directors, officials or employees, whenever they act within the scope of their duties and for the benefit of the company. Importantly, these elements are interpreted broadly to the extent that an argument cannot be

advanced on behalf of a company that the act of giving or authorising a bribe is itself outside the scope of duties when the company is the beneficiary of the unlawful conduct.

In a real sense, indeed, the basis for legal person liability in the USA is almost strict, since there is no requirement for any imputed “mental element” by the “mind” of the company. Thus it is irrelevant whether the conduct has been allowed, condoned, or even condemned(!) by the management at a particular level.

The liability described is applicable not just to domestic bribery and offences under the Foreign Corrupt Practices Act 1977, but generally. In relation to preventive measures, however, the advantage of this approach is obvious: companies will react to the legal threat by introducing stringent due diligence practices.

In relation to foreign bribery, it should be noted that the Foreign Corrupt Practices Act 1977 takes the principle further, and also imposes criminal liability on legal persons for foreign bribery committed by third parties acting as agents. Again, due diligence safeguards result.

The Republic of Korea has adopted a similar approach, creating what is in essence a vicarious liability. Article 4 of the FBPA provides:

“In the event that a representative, agent, employee or other individual working for a legal person has committed the offence as set out in Article 3.1 in relation to its business, the legal person shall also be subject to a fine of up to 1 billion won in addition to the imposition of sanctions on the actual performer... if the legal person has paid due attention or exercise proper supervision to prevent the offence against this act, it shall not be subject to the above sanctions.”

The above provision does, however, beg the question as to what amounts to due attention or proper supervision? In addition, it is on the surface unclear whether the natural person has to be prosecuted and/or convicted for the legal person to be liable. However, at the OECD Phase 2 review, the lead examiners were informed that the natural person who is the perpetrator must be

identified but, if he is not proceeded against, the court is able to make a finding of fact that he bribed a foreign public official. However, in the event that the natural person is proceeded against under the Act, then the legal person may only be found guilty if the natural person perpetrator is himself convicted and sanctioned.

Some jurisdictions have chosen to criminalise on the basis of an imputed or deemed liability, rather than on the basis that the legal person itself has committed the offence.

Thus, since 1994, the Criminal Code in France has allowed a judge, in respect of active bribery as well as other prescribed offences, to assign criminal responsibility to legal persons. At the same time the French provision does not preclude the prosecution of a natural person or persons.

From the OECD Phase 2 evaluation of France and from reports to the Foreign Bribery Group by French colleagues, I have tried to glean some of the underlying principles in relation to France's approach:

- i) A delegation or sub-delegation of power to an employee or subordinate is sufficient for the employee or subordinate to be treated as a representative of the legal person for the purposes of criminal liability (query, also, whether de facto delegation will suffice?).
- ii) "Legal Person" includes not only commercial companies but also not for profit entities such as trade associations and also public law legal persons such as local authorities, semi-public companies and public institutions.
- iii) A legal person might be able to avoid the imputation of criminal liability by allowing itself to be taken over.
- iv) The bribe has to be on behalf of the legal person. What, therefore, of the position when, for instance, a legal person has an internal policy of refusing to offer bribes?

- v) If an employee or insubordinate does not have a delegated authority, it seems uncertain whether there is still a basis for liability: for instance, would an employee have to have acted on the orders, or with the authorisation of, a company representative? Alternatively, will knowledge of the bribe of someone with delegated authority in that particular area be sufficient?

- vi) A natural person will have committed the bribery offence. He/she will be identified.

Some of the examples above highlight central difficulties in attribution: does one look to the post actually held by the person? Is a de facto management function sufficient? Is the key the nature of the function exercise by the natural person (along with any delegated authority) regardless of the de jure or de facto management post held?

Some further assistance is provided by the following:

- i) In Finland, criminal liability of legal persons was introduced in 1995, and required that a person belonging to the management must have been an accomplice or allowed, authorised or directed the offence. However, following an amendment to the Penal Code in 2001, liability was extended to include a natural person exercising a de facto management function regardless of whether that natural person was formally a part of the management.

- ii) Norway introduced criminal liability for legal persons in 1991. However, it is governed by a special set of discretionary criteria. Section 48a(1) of the Penal Code provides that when a penal provision is contravened by a person who has acted on behalf of an enterprise, the enterprise may be liable to a penalty: “This applies even if no individual person may be punished for the contravention.” Here, the Penal Code goes on to provide that the word “enterprises” includes “a

company, society or other association, one-man enterprise, foundation, and state or public activity”.

In deciding whether the legal person will be liable for a penalty, the court will consider:

- a. the preventive effect of the penalty,
- b. the seriousness of the offence,
- c. whether the enterprise could have prevented the offence by guidelines, instruction, training or control,
- d. whether the offence had been committed in order to promote the interest of the enterprise,
- e. whether the enterprise has obtained an advantage by the offence,
- f. the economic capacity of the enterprise and
- g. whether any penalty has been imposed on an individual person.

In principle, Norwegian law does not require the involvement of a leading person within the company or enterprise; thus liability may be triggered by the acts of a single employee who is not part of the management structure. However, one of the discretionary criteria is whether the enterprise could have prevented the offence by guidelines, training, control etc. Depending on the weight a particular court gives to that criterion, the level within the company where the employee who has, for instance, paid the bribe may become of some importance and may, in fact, become a determining factor.

Finally, and although outside the strict scope of a ‘criminalisation’, it must be remembered that some countries (for example, Germany and Italy) have introduced/retained administrative liability.

In Germany, under the Administrative Offences Act, a fine may be imposed on the legal person in the course of criminal proceedings against the natural person. However, if a natural person is not prosecuted because he cannot be identified, or has died, it is then possible to sanction the legal person in separate proceedings. The liability of the legal person is regarded as an “incidental consequence” (see OECD Phase II report, p30) of an offence committed by the

natural person, and it appears that it is, in fact, very unusual to proceed against the legal person where the natural person has not been proceeded against.

Similarly, in Italy, the theory of administrative liability is that it is attributed to a legal person for certain criminal offences (including bribery) committed by the natural person (Decree 231/2001).

The Italian decree imposes liability on the legal person for offences committed by two categories of natural person: (i) those in senior positions, and (ii) those subject to the management or control of those in (i).

A person is in a senior position if he/she carries out activities of representation, administration or management of the corporate body or one of its autonomous units.

However, the legal person is liable only for offences “committed in its interest and its advantage”. It will not be liable where the natural person acted exclusively in his/her own interests or for a third party (including a subsidiary?).

THE REGIME OF SANCTIONS

Article 30

(Prosecution, Adjudication and Sanctions)

1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions which take into account the gravity of that offence.
2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, where necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.

3. Each State Party shall endeavour to ensure that any discretionary legal powers under this domestic law in relation to the prosecution of persons for offences established in accordance with this Convention are exercised to maximise the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.
4. In the case of offences established in accordance with this Convention, each state party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure conditions imposed in connection with decisions on release pending trial or appeal taken into consideration the need to ensure the presence of the defendant in subsequent criminal proceedings.
5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of person convicted of such offences.
6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind the respect for the principle of the presumption of innocence.
7. When warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal systems, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time for determined by its domestic law, of person convicted of offences established in accordance with this Convention from:
 - a) Holding public office; and
 - b) Holding office in an enterprise owned in whole or in part by the State.

8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.
9. Nothing contained in this Convention shall affect the principle of the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved for the domestic law of the State Party and as such offences shall be prosecuted and punished in accordance with that law.
10. State Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.

What level of sanctions are we looking for?

- i) Effective
- ii) Proportionate
- iii) Dissuasive
- vi) In the case of natural persons, to have available imprisonment such that effective mutual legal assistance and extradition will not be thwarted.
- v) In relation to legal persons, non-criminal sanctions to include monetary sanctions.
- vi) A bribe (or value equivalent to), the proceeds of the bribery (or property corresponding) to be subject to seizure/confiscation; or that comparable monetary sanctions are available.
- vii) Imposition of additional administrative sanctions (e.g. disqualification from tendering etc).
- viii) Should the proceeds of bribery include the profits or other benefits derived by the briber from a transaction or from any other improper advantage obtained or retained through bribery? If so, is there any limit?

There is no one level of sanctions for either natural or legal persons which is “right”. Rather, having regard to Articles 26 and 30, each party has to strike a balance between meeting international expectations and reflecting domestic law and its practice.

CRIMINALISATION OF OTHER OFFENCES UNDER THE UNCAC

Article 17

(Embezzlement, misappropriation etc of property by a public official)

Each State Party shall adopt such legislative and other measures as necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities, or any other thing of value entrusted to the public official by virtue of his/her position.

Elements of the Article 17 offence:

- Intentionally;
- Embezzling, misappropriating or diverting;
- By a public official;
- For his or her benefit or for the benefit of another person or entity;
- Any property, public or private funds or securities, or any other thing of value entrusted to the public official by virtue of his/her position.

Article 18

(Trading in influence)

Each State Parties shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Parties an undue advantage for the original instigator of the act or for any other person;
- b) The solicitation or acceptance by a public official or any other person , directly or indirectly, of an undue advantage for him/herself or another person in order that the public official or person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Parties an undue advantage.

Elements of the Article 18 offences:

- a)
 - Intentionally;
 - Promising, offering or giving;
 - To a public official or any other person;
 - Directly or indirectly;
 - Of an undue advantage;
 - In order that the public official or the person abuse his/her real of supposed influence;
 - With a view to obtaining from an administration or public authority of the State Party an undue advantage;
 - For the original instigator of the act or for any other person.
- b)
 - Intentionally;
 - Solicitation or acceptance;

- By a public official or any other person;
- Directly or indirectly;
- Of an undue advantage;
- For him/herself or for another person;
- In order that the public official or the person abuse his/her real or supposed influence;
- With a view to obtaining from an administration or public authority of the State Party an undue advantage.

Article 19

(Abuse of functions)

Each State Parties shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally the abuse of functions, or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions for the purpose of obtaining an undue advantage for him/herself or for another person or entity.

Elements of the Article 19 offence:

- Intentionally;
- Abusive of functions or position;
- In violation of laws;
- By a public official;
- In the discharge of his/her functions;
- For the purpose of obtaining undue advantage;
- For him/herself or another person or entity.

Article 20

(Illicit enrichment)

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment; that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his/her lawful income.

The remaining offences which are to be considered for criminalisation should also be noted:

Article 21

(Bribery in the private sector)

Article 22

(Embezzlement of property in the private sector)

MISCELLANEOUS CONSIDERATIONS

Statute of Limitations:

Some countries impose a limitation on the time that an investigation may take and on the time during which a case may be brought to court.

By their nature, investigations into, and prosecutions of, corruption may take a protracted time (especially if, for example, MLA requests have to be made and executed).

An adequate time period must be allowed for both the investigative and prosecutorial stages.

Prosecutorial Discretion:

Prosecutors in many countries enjoy a discretion. Part of that discretion may include a public interest test as to whether a case should be prosecuted. In relation to foreign bribery, in particular, prosecutors should not be influenced in this by considerations of national economic interest, the potential effect upon relations with another state, or the identity of the natural or legal person(s) involved.

THE ANTI-MONEY LAUNDERING PROVISIONS

UNCAC addresses money laundering in the following ways:

- It criminalises the concealment and laundering of the proceeds of corruption;
- It addresses money laundering as an offence committed in support of corrupt acts;
- In relation to international co-operation, it requires countries to undertake measures which will support the tracing, freezing, seizure and confiscation of the proceeds of corruption.

In considering the treatment of money laundering within UNCAC, it should be remembered that the Preamble states that asset recovery is “a fundamental principle of the convention...”.

The criminalisation of the laundering of the proceeds of corruption is dealt with in Article 23, which sets out a mandatory requirement. It provides that State Parties shall, in accordance with fundamental principles of domestic law, criminalise:

- The conversion or transfer of property known to be the proceeds of crime (where there is an ulterior purpose, e.g. concealment, disguising illicit origin etc);
- The concealment or disguise of the true nature of, source, location, disposition, movement or ownership of property, knowing that such properties are the proceeds of crime.
- The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

- Participation in, association with or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with Article 23.

The Article goes on to provide that the above provisions should be applied to the widest range of predicate offences.

The offence of “Concealment” is dealt with specifically in Article 24 which provides that State Parties shall consider adopting such legislative and other measures as may be necessary to criminalise the intentional concealment or continued retention of property, when such property is known to be the result of any of the criminal offences established in accordance with the UNCAC.

UNCAC goes further, however; in particular it addresses a wide range of measures aimed at preventing money laundering activity. In particular, it provides that State Parties shall:

- Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank institutions (including both natural and legal persons that provide both formal and informal services for the transition of money etc) in order to deter and detect all forms of money laundering.
- Ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money laundering have the ability to co-operate and exchange information at the national and international levels, and that the establishment of a financial intelligence unit to serve as a national centre is considered.
- Consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across borders.
- Consider implementing appropriate and feasible measure requiring financial institutions to include on forms for electronic transfer of funds accurate and meaningful information on the originator and the maintaining of such information through the payment chain.

- Establish a domestic regulatory and supervisory regime, to use as a guideline the relevant initiatives of regional, inter-regional and multilateral organisations against money laundering.
- To endeavour to develop and promote global, regional sub-regional and bilateral co-operation among judicial, law enforcement and financial regulatory authorities in order to combat money laundering.
- Recognising the importance of restraint and confiscation to money laundering provisions, UNCAC sets out (at Article 31) a number of measure which need to be taken. It provides that State Parties shall take such measures as may be necessary to enable confiscation of:
 - Proceeds of crime (and property corresponding to such proceeds) from offences established in accordance with the UNCAC;
 - Property, equipment etc used/to be used in such offences;

UNCAC also provides that State Parties shall:

- Take measures to ensure that identification, tracing, freezing or seizure of proceeds of crime/property corresponding to such proceeds for the purpose of confiscation can take place.

INTERNATIONAL CO-OPERATION

UNCAC addresses international co-operation in, essentially, four ways:

- Mutual legal assistance;
- International confiscation/forfeiture co-operation;
- Miscellaneous aspects of international co-operation;
- Extradition.

Mutual Legal Assistance

Article 46 provides that State Parties are required to provide MLA to one another in investigations, prosecutions or judicial proceedings, including the taking of evidence, executing searches or seizures, providing information, evidential items and expert evaluations. MLA shall also be provided in relation to the identifying, freezing and recovering of the proceeds of crime.

Consistent with international instruments, UNCAC encourages the widest possible assistance between State Parties, with the understanding that, for instance, dual criminality requirements be construed broadly.

International Forfeiture Co-operation etc

In addition to Article 31 (Freezing, seizing etc, referred to above), UNCAC makes detailed provision for the recovery of property/repatriation of assets.

Article 53 (Measures for direct recovery of property) provides that:

- Each State Party shall, in accordance with domestic law, take such measures as may be necessary to permit another party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;
- Each State Party shall, in accordance with its domestic law, take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with the Convention to pay compensation or damages to another party that has been harmed by such offences;
- Each State Party shall, in accordance with its domestic law, take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognise another State Parties claim as a legitimate owner of property acquired through the commission of an offence established in accordance of this Convention.

Article 54 (Mechanisms for recovery of property through international co-operation in confiscation) provides that:

- Each State Party, in order to provide MLA pursuant to Article 55 of the Convention, with respect to property acquired through or involved in a commission of an offence established in accordance with the Convention shall, in accordance with its domestic law:
 - Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;
 - Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money laundering or such other offence as may be within its jurisdiction, or by other procedures authorised under its domestic law;
 - Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence, or in other appropriate cases.

- Each State Party, in order to provide MLA upon a request made pursuant to Article 55 shall, in accordance with its domestic law:
 - Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority or requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to a confiscation order (i.e. to permit its competent authorities to give effect to a confiscation order issued by a court of another State Party);
 - Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested Party to believe that there are sufficient grounds for taking such action

and that the property would eventually be subject to an order of confiscation for the purposes of giving effect to an order for confiscation order by a court of another State Party;

- Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

Article 55 (International co-operation for purposes of confiscation) finds that:

- A State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with the Convention for confiscation of proceeds of crime, property etc situated in its territory shall, to the greatest extent possible within its domestic legal system:
 - Submit the request to its competent authorities for the purpose of obtaining a confiscation order and, if such an order is granted, give effect to it; or
 - Submit to its competent authorities, with a view to giving effect to it to the extent requested, a confiscation order issued by a court in the territory in the requesting State Party in accordance with Articles 31 and 54, insofar as it relates to proceeds of crime, property etc situated in the territory of the requested State Party.
- Following a request made by another State Party, having jurisdiction over an offence established in accordance with the Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property etc for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request made under Article 55, by the requested State Party.
- A description of property to be confiscated, a statement of facts, and a legal admissible copy of the confiscation order shall be provided, as appropriate, by the requesting Party.

- Co-operation under Article 55 maybe refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence, or if the property is of a *de minimis* value.
- Before lifting any provisional measure taken pursuant to Article 55, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.
- Article 55 shall not be construed as prejudicing rights of bone fide third parties.

Miscellaneous

Article 37: Co-operation with law enforcement authorities.

Article 38: Co-operation between national authorities.

(Articles 37 & 38 provide for co-operation among law enforcement authorities and public officials to provide information for investigative and evidential purposes.)

Article 43 (International co-operation) provides that State Parties shall co-operate in criminal matters where appropriate and consistent with domestic legal systems and the State Parties shall consider assisting each other in investigations of proceedings in civil and administrative matters relating to corruption.

Article 48 (Law enforcement co-operation) provides that State Parties are required to co-operate closely with one another to enhance the effectiveness of law enforcement action to combat offences under the UNCAC.

Article 49 (Joint investigations) encourages State Parties to launch joint investigations into corruption offences.

Article 56 (Special Co-operation) provides that State Parties shall endeavour to take measures, without prejudice to their own investigations, to permit the forwarding of information of proceeds of offences established under the UNCAC to another State Party without prior request when such disclosure might assist the other State Party or carrying out investigations, prosecutions etc.

Article 58 (Financial intelligence unit) provides that State Parties shall co-operate with one another for the purpose of preventing and combating the transfer of proceeds of corruption offences and of promoting ways and means of recovering proceeds and, to that end, shall consider establishing a financial intelligence unit to be responsible for receiving, analysing and disseminating to competent authorities, reports of suspicious financial transactions.

Article 60 provides for training and technical assistance.

Article 61 provides for the collation, exchange and analysis of information on corruption.

The above miscellaneous provisions reflect detection improvement measures and an attempt at general capacity building.

MARTIN POLAINE