The liability of legal persons for foreign bribery*

1. Introduction.

The liability of legal persons for foreign bribery and related economic offences is a key feature of the emerging legal infrastructure for the global economy. Without it, governments face a losing battle in the fight against foreign bribery and other complex economic crimes.

The term “legal person” refers to an organisation – generally, a corporation or some other entity, as specified in law – that has legal rights and is subject to obligations, including the obligation to respect laws prohibiting foreign bribery (in the case of the Parties that have implemented Article 2 of the Anti-Bribery Convention). The liability of legal persons (“LP liability”) means that these organisations can be held responsible for foreign bribery instead of, or along with, the natural person(s) involved in the offence. Specifically, the organisation can be subject to investigation, judicial or administrative proceedings (or, in some countries, out-of-court settlement arrangements), and ultimately sanctions if it is held responsible for the offence.

LP liability is important because it casts legal persons as subjects of the law enforcement process. At its most basic level, LP liability ensures that legal persons can be held liable for wrongdoing in addition to, or independently from, any natural persons – such as officers, employees or agents – who were involved in the offence.

Liability frameworks attempt to establish additional incentives designed to encourage companies to prevent wrongdoing, to detect potential offences by policing themselves, their business partners as well as other third parties, and to resolve allegations of wrongdoing by cooperating with law enforcement authorities. In this way, legal persons may become indispensable – if perhaps not always enthusiastic – partners with law enforcement authorities. Finally, any legal framework for LP liability must adhere to widely accepted legal norms such as due process, transparency, consistency and predictability.

In 2009, the OECD Council adopted the 2009 Recommendation on Further Combating Bribery. Annex I of the Recommendation provides that LP liability systems should not “restrict the liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted”⁴. It also provides guidance on the “approaches” that the Convention Parties should take to attribute liability for foreign bribery to a legal person based on the acts of a natural person or persons².

LP liability is a crucial element in the architecture of law enforcement targeting unlawful activity in business organisations, including the offence of foreign bribery. As noted above, its importance is recognised in Articles 2 and 3 of the Convention, which obligate the 41 Parties to establish LP liability in accordance with their legal principles and to ensure that legal persons are subject to “effective, proportionate and dissuasive criminal penalties” or (if criminal responsibility is not applicable to legal persons under a Party’s legal system) equivalent “non-criminal sanctions, including monetary sanctions” for foreign bribery.

This section maps the international legal landscape for LP liability based on the roughly 200 reports that the WGB prepared during its first three phases of monitoring.

The purpose of this mapping is to provide a comparative overview of the 41 Convention Parties’ LP liability laws. This section does not attempt to draw policy conclusions or make recommendations from this mapping exercise. When relevant, however, it does report the WGB’s conclusions.

The mapping methodology applies a standardised data collection procedure to each of the 41 Parties. This procedure involved performing key-word searches of the WGB reports, reading the relevant texts, and collecting data concerning LP liability characteristics identified primarily from

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² Ibid.
provisions in the Convention and the 2009 Recommendation. This produced a total of about 2624 data points characterising the WGB’s coverage of the 41 Parties’ LP liability systems.

The Convention requires each Party to establish a system for holding legal persons liable for foreign bribery. Given the variety of legal traditions, however, the Convention does not require Parties to establish criminal liability when “under the legal system of a Party, criminal responsibility is not applicable to legal persons”3. This section explores the various systems that the Parties have enacted to hold legal persons liable for foreign bribery.

The nature of liability of legal persons is divided in the 41 Parties. It uses two categories: criminal liability and non-criminal liability4. Criminal liability is used here to describe systems where an LP is held liable for the offence of committing bribery as a matter of criminal law. A non-criminal system is one that does not impose liability as a criminal matter, but can hold a legal person responsible for foreign bribery (i) under an “administrative” system (e.g., Brazil, Bulgaria, Colombia, Germany, Greece, Italy, Mexico, Poland, Russian Federation, and Turkey), (ii) by imposing criminal law sanctions, sometimes known as “coercive measures”, under the criminal code even though the legal person, technically, cannot be liable for a criminal offence (e.g., Colombia, Latvia, and Sweden), or (iii) under a “civil” action brought by a governmental authority (e.g., United States). Twenty-seven countries (66%) are reported to have only criminal liability and 11 countries (27%) have some form of non-criminal liability. At least two countries (5%), Mexico and the United States, have both criminal and non-criminal liability.

In contrast, only one Party has not yet established an LP liability regime for foreign bribery. Argentina remains unable to hold legal persons liability for foreign bribery... In the meantime, criminal corporate liability has been established for several other offences but not for foreign bribery5.

For its part, Sweden has an arrangement to impose “corporate fines”, which is closely linked to enforcement actions against individuals. In this regard, the WGB found: “Under Swedish law, only natural persons can commit crimes. However, a kind of quasi-criminal liability is applied to an ‘entrepreneur’ for a ‘crime committed in the exercise of business activities’”.

### 2. Types of legal persons covered.

This section documents the types of entities covered by the Parties’ LP liability systems. An excessively narrow definition of “legal person” could open up possibilities for entities to escape liability for foreign bribery by choosing organisational forms not covered by a Party’s laws prohibiting foreign bribery. Furthermore, the WGB has been concerned with ensuring that state-owned enterprises are covered and can be held liable under each Party’s foreign bribery law.

There are three main dimensions concerning the type of legal entities covered by a LP liability regime. These are whether it covers: (1) incorporated or unincorporated entities; (2) private or state-owned entities; and (3) not-for-profit or for-profit entities.

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3 Commentaries to the Anti-Bribery Convention, comment 20; see also Anti-Bribery Convention, art. 3.
4 This column does not count arrangements available in some countries that allow private parties to pursue others for damages relating to foreign bribery. For example, Norway’s Civil Liability Act provides the following: “any person who has suffered damage as a consequence of corruption can claim compensation from anybody who by intent or negligence is responsible for the corrupt act(s) or for complicity thereto. Norway Phase 3 para. 47.
5 Argentina Phase 3 para. 49.
The findings are as follows:

- **Legal status.** Under Article 2 of the Convention, each Party is obligated to “take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official”\(^6\). Strictly speaking, legal persons are juridical entities that the law recognises as having rights and obligations separate from their members or owners\(^7\).

- **Incorporated.** All 40 Parties with LP liability for foreign bribery cover incorporated entities.

- **Unincorporated legal entities.** The WGB has identified eight countries (20%) that do not cover unincorporated legal entities. These countries are Bulgaria, Colombia, Ireland, Japan, Korea, Luxembourg, Mexico and Slovenia. Fifteen countries (37%) definitely include at least some unincorporated entities within the scope of their LP liability regimes for the foreign bribery offence. For the remaining 17 countries (41%), no conclusion could be drawn from the WGB Phase 1-3 monitoring reports.

- **State-owned enterprises.** Unsurprisingly, each Party that has adopted LP liability for foreign bribery will apply it to private entities. In addition, the vast majority of the Parties – 34 countries (83%) – will also apply their foreign bribery laws to state-owned enterprises at least under certain circumstances\(^8\).

- **Not-for-profit entities.** Once again, the Parties that have either adopted or attempted to adopt LP liability regimes will apply them to commercial or for-profit legal entities. In addition, at least 32 countries (78%) will, in specific circumstances, also apply their laws against foreign bribery to not-for-profit entities. Of these, some countries, such as Switzerland and the United Kingdom, will only impose liability on a non-profit if the bribery occurs in the performance of commercial acts or if the non-profit engages in business activities. For the remaining 7 countries (17%), the applicability of foreign bribery laws to non-profit entities could not be determined from the WGB reports.

**3. Standard of liability for legal persons.**

The standard of liability for legal persons helps to clarify how a legal person can be held liable for an unlawful act. This section examines two dimensions of this topic by first examining

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\(^6\) Neither the Anti-Bribery Convention nor the Commentaries define the term “legal person”, so one commentator has said that the Parties must refer to their “legal principles” to determine the types of legal entities that must be covered to satisfy their obligation under Article 2. See M. Pieth, *The Responsibility of Legal Persons*, in *The OECD Convention on Bribery: A Commentary* (2d ed. M. Pieth, L.A. Low & N. Bonucci eds., 2014) page 226 (“The term ‘legal person’ is not defined in the OECD Convention. The understanding is that this term refers back to the law of the state Parties.”). The WGB examines the extent to which the scope of each Party’s domestic law covers legal entities under Article 1 and Article 2. In the process, it may make recommendations to ensure that each Party fully implements the obligations of the Anti-Bribery Convention.

\(^7\) *Black’s Law Dictionary* (7th ed., 1999) defines “artificial person” (including related terms such as a “juristic person” or a “legal person”) as: “An entity, such as a corporation, created by law and given certain legal rights and duties of a human being; a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being”.

\(^8\) See M. Pieth, *The Responsibility of Legal Persons*, in *The OECD Convention on Bribery: A Commentary* (2d ed. M. Pieth, L.A. Low & N. Bonucci eds., 2014) page 227 (“The nature of ‘state-owned’ or ‘state-controlled enterprises differs from one state to the next, but the WGB has insisted that such bodies be covered by the state Parties’ definitions of ‘legal persons’.”).
who can trigger liability of a legal person and then considering the circumstances when liability may be attributed to the legal person. For the first question we can show how the Parties address the standards contained in the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials. For the second question, it is set forth the various conditions that must be met before a legal person can be held responsible for a given natural person’s act. Finally, we can see that an effective compliance programme constitutes a legal defence or would otherwise preclude liability for foreign bribery under the Parties’ LP liability regimes.

We considered who exactly can trigger the liability of a legal person and have shown the various conditions that the Parties use to determine when a legal person will be held liable for the acts of such persons. Though the Parties’ formulations of these conditions vary considerably, they can be grouped into five main categories: (1) in relation to the legal person’s activity; (2) in the legal person’s name or on its behalf; (3) within the scope of the natural person’s particular duties or authority; (4) for the legal person’s benefit or interest; (5) as a result of a failure to supervise. In addition, some countries have “other” provisions for attributing the acts of a given natural person to a legal person.

This variation in the conditions required to attribute liability to a legal person is compounded in two ways. First, countries often have multiple conditions that must be met before liability can be imposed on legal persons. Some countries treat these conditions as alternative grounds for imposing liability on a legal person, while other countries take a cumulative approach requiring that all the relevant conditions must be satisfied in order to hold a legal person liable. To take an example of the former approach, a legal person in Latvia will be liable for an offence committed either (1) “in the interests or for the benefit of” the legal person or (2) where the offence was made possible “as a result of a lack of supervision or control”9 in Latvia Phase 2 paras. 211, 219.

In contrast, Chile takes a cumulative approach as it will only hold a legal person liable for an offence that was committed both (1) “directly and immediately” in the legal person’s “interest or … benefit” and (2) in violation of “the legal person’s direction and supervisory functions”10.

A second complexity is that some countries impose different conditions as a function of the level of authority or role that the natural person offender has in relation to the legal person. At least ten Parties (24%) have conditions that depend on whether or not the natural person who engages in bribery has managerial authority within the legal person11. In contrast, 29 Parties (71%) appear to apply the same conditions to attribute the acts of any relevant natural person to the legal person, without regard to the level of authority that the relevant person has12.

In 12 countries13 (29%) the existence of internal “compliance systems” can preclude liability for foreign bribery as a matter of law in at least some circumstances. In some countries, a compliance system could negate an element of the offence that the prosecution must prove to establish the liability of a legal person. For example, in Chile, prosecutors “must prove that

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9 Latvia Phase 2 paras. 211, 219.
10 Chile Phase 3 paras. 38, 50.
11 These are Austria, Bulgaria, Canada, Czech Republic, Finland, Germany, Greece, Hungary, Portugal and Turkey.
12 It should be noted, however, that this number may simply reflect the fact that it is not yet clear how a legal person would be held liable for an offence committed by a lower-level employee given the absence of case law in some jurisdictions.
13 Australia, Chile, Czech Republic, Greece, Italy, Korea, Netherlands, Portugal, Spain, Switzerland and the United Kingdom.
a company failed to properly design and implement an offence prevention model. In other

countries, the legal person can use a compliance system to establish a defence. For example,
Australia’s Code Section 12.3(3) provides that certain methods for establishing a legal person’s
fault will not apply “if the body corporate proves that it exercised due diligence to prevent the
conduct, or the authorisation or permission”.

As discussed in the context of mitigating factors, even if countries do not permit compliance sys-
tems to preclude the liability of legal persons, compliance systems can still be considered as a miti-
gating factor when imposing sanctions for foreign bribery and other offences. These arrangements
are potentially important tools for promoting effective compliance with the law within legal persons.

3.1. Liability for unrelated intermediaries

The 2009 Recommendation, in accordance with Article 1 of the Convention and the prin-
ciple of functional equivalence, also commits the Parties to ensure that legal persons cannot
avoid responsibility for foreign bribery by using “intermediaries”, which includes unrelated
intermediaries. Such unrelated intermediaries could include third-party agents, consultants or
contractors. We can show whether and how the Parties can hold legal persons liable for the
acts of unaffiliated business partners or other third parties and that at least 31 countries (76%)
have laws that would allow them to hold companies liable for the unlawful acts of unrelated
intermediaries under certain conditions.

As with liability for related intermediaries, the WGB reports did not always contain infor-
mation about the specific grounds on which a legal person could be held liable for the acts
of its business partners. The most common reason identified by the WGB for holding a legal
person liable for an offence committed by an unrelated entity or thirdparty agent is that the
legal person in fact participated in, or directed, the unlawful act.

Based on WGB findings and supplemental information provided by the Parties, this was
true in 27 countries (66%). There was not enough information to make a determination for 13
countries (32%). In contrast, according to the same sources, at least 15 countries (37%) would
impose liability on a legal person using a theory not tied to complicity.

Agency principles provided the second most frequent ground for imposing liability on a
legal person for the acts of its unrelated business partners. At least seven countries (17%) can
hold a legal person liable for bribery committed by a third party authorised to act on the legal
person’s behalf. These are Denmark, Estonia, Iceland, Korea, Slovenia, Turkey and the United
States. Except for complicity or agency principles, none of the other surveyed theories of li-
ability appeared in more than 10% of the Parties’ company liability regimes.

14 Chile Phase 3 para. 50.
15 For nine countries (22%), there was not enough information to make a clear determination. At the same time,
however, the WGB has not yet expressly found that any country cannot hold a legal person liable for the acts of its
business partners in at least some circumstances.
16 This was also the case for LP liability for related intermediaries, which is unsurprising as Article 1(2) of the
Convention requires Parties to criminalise “complicity”, including “incitement, aiding and abetting, or authorisation
of bribery” generally without regard to the whether the other party is a related or unrelated entity or partner.
17 It was not possible to make a definitive assessment of a legal person’s liability for a thirdparty agent in 33 coun-
tries (80%).
At least 10 countries (24%) can hold a legal person liable on a theory other than complicity or agency. For example, the WGB found that at least one country, Portugal, can impose liability on a legal person that ratifies or approves the unlawful conduct of an unrelated intermediary after the fact. One other country, Canada, provided supplemental information indicating that it can also hold an LP liable on this basis. Examples of other techniques for holding legal persons liable for the unlawful acts of their business partners, include:

- **Associated persons.** The Section 7 of the United Kingdom’s Bribery Act 2010 makes certain companies liable for the acts of any “associated” person who “performs services” for them.

- **Consortium or Joint Venture Members.** Brazil’s corporate liability regime holds companies that are members of a consortium liable for the unlawful acts committed by other consortium member “within the scope of their respective consortium agreement.” As with its rules for attributing liability within corporate groups, Brazil limits liability for consortium members to “applicable fines” and the “full compensation” for damages caused. Poland has a similar provision holding a legal person liable for the acts of its joint venture partners, provided that the legal person had “knowledge” of the act or “consents” to it.

- **Negligence offence.** Parties have widely different approaches to determining whether the requisite “fault” or “intent” (often referred to as *dol* in civil law traditions or as the *mens rea* element in the common law world) has been established within the company-intermediary relationship. Some countries have attempted to side-step the difficulty of proving intent by holding legal persons liable for negligence. For example, Sweden has enacted a “negligent financing” offence, whereby a legal person can be sanctioned for providing money in a “grossly negligent” manner to an intermediary who then uses it for bribery.

4. **Successor liability.**

In a corporate law context, when a legal person merges with or acquires another entity, the successor or acquiring legal person can, in certain circumstances, assume the predecessor entity’s liabilities. Successor liability in the context of foreign bribery refers to whether and under what conditions LP liability for the offence is affected by changes in company identity and ownership. Without it, a legal person may avoid liability by reorganising or otherwise altering its corporate identity. In some legal systems, however, successor liability is viewed as prob-

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18 See Portugal Phase 3 para. 33.
19 Brazil Phase 3 page 84 (reproducing Article 4(2) of Brazil’s Law 12,846 of 1 August 2013).
20 Poland Phase 3 para. 46 & page 59.
21 For example, in Latvia, it is necessary *inter alia* to prove that a legal person had knowledge of the bribery to hold it liable for the acts of the intermediary. See Latvia Phase 2 para. 195. In contrast, in Canada intention or knowledge (including “wilful blindness”) would establish the necessary *mens rea* required for the offence. Canada Phase 1 page 4.
22 See Sweden Phase 3 para. 24 (“The new negligent financing of bribery provision makes it criminal for a commercial organisation to provide financial or other assets to anyone representing it in a certain matter and which thereby through gross negligence furthers the offences of giving a bribe, gross giving of a bribe or trading in influence in that matter.”).
23 See Russian Federation Phase 2 para. 253 (“Under the CAO, companies cannot artificially escape sanctions by way of a merger to become a new legal entity.”).
lematic in the criminal law context because it is viewed as conflicting with the fundamental notion that no one can be punished for the act of another

Although the issue has not been fully explored in the WGB reports, some of the Parties’ legal frameworks and practices concerning successor liability deserve special attention:

- **Comprehensive statutory frameworks.** In some countries, the legislature has clearly adopted a set of provisions that comprehensively address successor liability. In Chile, for example, Article 18 of Law 20,393 on the liability of legal persons sets forth rules for how liability for specified criminal offences should be transferred in “case of voluntary or mutually agreed transformation, merger, absorption, division or dissolution of the legal person” that originally committed the offence. Thus, in “cases of transformation, merger or absorption of a legal person, the resulting legal person shall be responsible for the total quantum” of any fine imposed.

Other countries, such as the United States rely on well-established jurisprudence or other legal principles to ensure successor liability.

- **Limits on sanctions.** Brazil limits the type sanctions that may be imposed on successor companies to the payment of fines and compensation for damage. Brazil also limits the fine that can be imposed on the successor entity to an amount “within the limit of the transferred assets” received from the legal person that originally created the liability. The WGB expressed concern that limiting the ability to confiscate the profits of foreign bribery from successor companies “deprives the administration of one of the most serious deterrents to foreign bribery.”

- **Mechanisms to prevent the extinction of a legal person.** It should also be noted that the WGB has also identified some techniques that countries can use to prevent corporate reorganisations that would allow a legal person to escape liability or sanctions. These tech-

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24 See, e.g., French Penal Code Article 121-1 ("Nul n’est responsable pénalement que de son propre fait."). Applying this principle, the Cour de Cassation overturned a lower court decision holding a legal person that subsequently acquired another entity liable for involuntary homicide on the grounds that the lower court ignored the fact that the merger had extinguished the existence of the acquiring entity, as it had merged into the acquired entity. See Cour de Cassation, Chambre criminelle, (Pourvoi 02-86376), available at www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007069654 ("Attendu que, pour déclarer la société Acetex Chimie, coupable d’homicide involontaire, après avoir constaté qu’elle avait absorbé la société Pardies Acétiques postérieurement à l’accident, la cour d’appel énonce qu’elle a ‘ainsi continué sa personnalité juridique’; Mais attendu qu’en prononçant ainsi, alors que l’absorption avait fait perdre son existence juridique à la société absorbée, la juridiction du second degré a méconnu le texte susvisé et le principe ci-dessus rappelé, …. CASSE et ANNULE l’arrêt susvisé de la cour d’appel de Pau, en date du 28 août 2002, mais en ses seules dispositions ayant déclaré la société Acetex Chimie coupable du délit d’homicide involontaire, toutes autres dispositions étant expressément maintenues.").

25 Chile Phase 3 page 71 (reproducing Article 18 of Law 20,393).

26 Chile Phase 3 page 71 (reproducing Article 18 of Law 20,393).

27 Brazil Phase 3 page 84 (reproducing Article 4 of Law 12,846 of 1 August 2013).


29 Brazil Phase 3 para. 38.

30 Brazil Phase 3 para. 63.
niques could be used even where “successor liability” is not possible as a matter of legal doctrine. For instance, under Belgium’s 1999 Act establishing LP liability, a judge may, after finding “serious indications of guilt on the part of a legal person”, impose a provisional measure to suspend “any proceedings to dissolve or wind up the legal entity” or block any transfers of assets that “could result in the legal entity becoming insolvent”\(^31\). Similarly, the WGB observed that Slovenia could prevent legal persons that have been convicted of certain offences (including foreign bribery) to evade an exclusion from public procurement by conducting a corporate transformation that would result in removing the “convicted legal person from a court register”\(^32\).

5. Jurisdiction over legal persons.

The Convention expressly addresses two elements of jurisdiction: territorial and nationality jurisdiction. It is shown in a table which provides an overview of the coverage of jurisdiction in WGB reports. Before entering into a discussion of this table, it is worth recalling the earlier overview of the coverage of jurisdiction in the WGB reports which is available in the WGB’s 2006 Mid-Term Study of the Phase 2 Reports\(^33\). The Mid-Term Study identifies salient issues, many of which remain relevant today. These are presented in Box 3.

Table 11 provides an overview of the coverage of jurisdiction over legal persons in the WGB monitoring reports. The overview is presented in four columns, which are grouped under two broad categories: (1) jurisdiction over offences committed at least in part inside the Party’s territory\(^34\); and (2) jurisdiction for offences committed entirely outside the Party’s territory. Within each category, two columns display the WGB’s findings concerning each Party’s territorial and extra-territorial coverage of domestic and foreign legal persons. For the purposes of Table 11, the definition of foreign and domestic legal persons is that adopted in the law of each Party. It should be noted that the fourth column of Table 11, which covers foreign bribery offences committed by foreign legal persons entirely outside the territory of the Party, is not covered expressly in the Convention. This information is included, however, because the WGB has identified some Parties as having LP liability frameworks that nevertheless could cover this circumstance.

Some of the key findings in relation to jurisdiction are:

• All the Parties to the Convention (except Argentina) establish some form of territorial jurisdiction over legal persons for the offence of foreign bribery. In some Parties, this jurisdiction is a collateral effect of having jurisdiction over the acts of a natural person who commits foreign bribery in its territory.
• At least 23 Parties (56%) are able, in at least some circumstances, to assert jurisdiction over foreign companies that commit foreign bribery in their territory. One country – Colombia –

\(^31\) Belgium Phase 2 para. 88.
\(^32\) Slovenia Phase 3 para. 158.
\(^34\) At least some WGB countries will also assert jurisdiction over offences committed on board airplanes or vessels registered in their country. For the purposes of this section and Table 11, this jurisdiction is assimilated to territorial jurisdiction.
reported to the Secretariat that its Superintendency of Corporations cannot sanction foreign legal persons for acts committed on its territory. For the other Parties, it could not be determined from the WGB reports whether such jurisdiction exists over foreign legal persons.

• At least 23 Parties (56%) can hold a domestic legal person liable for foreign bribery committed entirely abroad. In line with the WGB’s 2006 Mid-Term Study of Phase 2 Reports, the Phase 3 evaluations have indicated that some Parties still cannot assert jurisdiction over a domestic legal person for an offence committed abroad unless the Party also has jurisdiction over the natural person who actually committed the offence.

In several cases, the Party may not be able to assert jurisdiction over the legal person unless the natural person who committed the act was a national (e.g. Austria, Bulgaria, Chile, Estonia, Germany, Italy, Latvia, Japan and Sweden). For 16 Parties (39%), no determination was made in the WGB reports.

• At least 8 Parties (20%) seemingly can hold a foreign legal person liable for foreign bribery committed entirely abroad, provided that some condition links the foreign legal person to the country for purpose of applying its foreign bribery offence.

Mailbox companies in the Netherlands are also identified as a source of concern. The Phase 3 report for the Netherlands describes varying views within the Netherlands’ legal profession about whether it has effective jurisdiction over mailbox companies. The report also states that the Netherlands’ approach to “mailbox companies appears to be a potentially significant loophole in the Dutch framework” and urges it “to take all necessary measures to ensure that such companies are considered legal entities under the Dutch Criminal Code, and can be effectively prosecuted and sanctioned.”

Finally, although the Convention does not create obligations for Parties to assert jurisdiction over acts of foreign legal persons for offences that take place entirely outside its territory, the WGB has identified some interesting arrangements among the Parties for asserting such jurisdiction. These include:

• **Universal jurisdiction.** According to Iceland authorities, Iceland asserts universal jurisdiction for foreign bribery offences falling under the Anti-Bribery Convention. Likewise, the Phase 3 report for Norway states: “Norway has extremely broad jurisdiction over foreign bribery offences, and could, in theory, prosecute any person committing a foreign bribery offence, regardless whether the offence was committed in Norway, and regardless whether the person involved is a Norwegian national. In practice, Norway explained that the universal jurisdiction was in fact rarely relied on, and only used in exceptional cases (twice between 1975 and 2004, and never in corruption cases). At any rate, this broad jurisdiction allows Norway to exercise both territorial and nationality jurisdiction over foreign bribery offences.” Estonia reports that it might be able to exercise universal jurisdiction over bribery offenses punishable by a “binding international agreement”, but in the absence of case law supporting this theory, the WGB has not been able to reach a definitive conclusion.

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55 Netherlands Phase 3 paras. 90-93.
56 Netherlands Phase 3 para. 95.
57 Netherlands Phase 3 page 33 (Commentary).
58 Iceland Phase 2 pages 30-31.
59 Norway Phase 3 para. 65; see also Norway Phase 2 para. 107.
60 Estonia Phase 3 para. 161.
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- **Foreign legal person conducts business in, or owns property, in the territory.** The Czech Republic can assert jurisdiction over a foreign legal person for acts committed outside of its territory when that legal person “conducts … activities … or owns property” inside the Czech Republic. Similarly, the United Kingdom can apply its Section 7 offence under the Bribery Act to any “commercial organisation” that “carries on a business, or part of a business” inside the United Kingdom. In such a case, the foreign legal person would be liable for the acts of any “associated person” even if the associated person commits the offence outside of the United Kingdom.

- **Foreign legal person committed offence for the benefit of a domestic legal person.** The Czech Republic can assert jurisdiction over a foreign legal person for acts committed outside of its territory when the “criminal act was committed for the benefit of a Czech legal person.”

- **Foreign legal person is closely connected to a domestic legal person or natural person.** Greek authorities maintain that Greek law would apply to a foreign subsidiary having a “sufficient connection” with a parent company located in Greece. Israeli authorities believed that they could likely assert jurisdiction over a foreign legal person, “if the crime was committed by an Israeli citizen or resident who was the controlling owner of the legal person.”

6. **Nationality of legal persons.**

Table 12 shows the criteria used by Parties to determine the nationality of a legal person. Of the 41 Convention Parties, at least 16 countries (39%) will consider any legal person incorporated or formed in accordance with their laws to have their nationality. At least eight countries (20%) will look to the legal person’s headquarters or seat of operations to determine its nationality, and at least another three countries (7%) will look at either the place of incorporation or the seat. Only 1 country, Brazil, restricts the application of its nationality jurisdiction to legal persons that are both incorporated in and headquartered in the country’s territory.

Finally, at least 11 countries (27%) will assert nationality jurisdiction over legal entities based on “other” factors, primarily whether the company is “registered” under the country’s laws or has a “registered office” on its territory. Depending on the country, these other factors may be exclusive or operate alongside the place of incorporation or the seat of the company.

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41 Czech Republic Phase 3 page 64.
42 UK Bribery Act (2010), sections 7 and 12
43 Czech Republic Phase 3 para. 51.
44 Greece Phase 3bis paras. 58-59.
46 Although the Netherlands primarily looks to the place of incorporation, Dutch courts might also look at the “seat” of operations for at least certain types of companies. One criminal court refused to apply Netherlands law to a Dutch “mailbox” company incorporated in the Netherlands but having its real operations abroad. See Netherlands Phase 3 page 5 (“The Working Group questions in particular the Netherlands’ ability and proactivity in initiating proceedings against companies which are incorporated in the Netherlands but pursue their activities entirely from abroad (‘mailbox companies’).”); see also Netherlands Phase 3 paras. 13, 40-42 (expressing concern that a court decision might have “create[d] a significant jurisdictional loophole in the Netherlands’ ability to prosecute foreign bribery committed by ‘mailbox companies’”).

The comparative overview of sanctions regimes for legal persons provided in Table 13 underscores the diversity of rules and practices in this area. Sanctions for legal persons vary in terms of size, and the availability of different types of sanctions. These include fines, confiscation or disgorgement, debarment from public procurement, or other forms of public advantage, and other penalties (e.g. dissolution and publication of sentence). Sanctions also vary in the degree to which they permit consideration of mitigating factors.

**Fines.** Though all of the Parties other than Argentina can impose fines for foreign bribery, their methods for calculating fines vary considerably. Many countries provide maximum and/or minimum thresholds on the amount of fine that can be imposed.

- **Maximum thresholds.** Thirty-three countries (80%) have a fixed maximum, whether this amount is expressed as a fixed sum or as a multiple of the benefit received, damage caused, a “fine unit”, or the minimum wage. For instance, the fine in Hungary will be an amount up to three times the benefit of the offence, while in Israel it will be up to four times the benefit. Other countries define the maximum fine either as a fixed monetary amount or as a certain number of fine units with a certain maximum value for each fine unit. Of these fines that can be determined **ex ante**, without knowing the value of the bribe, the proceeds of bribery, or other variables dependent on the factual circumstances of the offence, the Czech Republic has the highest maximum fine for legal persons: the equivalent to EUR 54 million\(^{47}\). Often these maximum fines appear small, relative to the potential benefits from foreign bribery, as 10 Parties (24%) appear to have maximum fines that are set at amounts less than EUR 1 million (e.g. Finland’s maximum fine is EUR 850 000). That said, these fines typically may be cumulated with other sanctions so they cannot be evaluated in isolation. In contrast, seven countries (17%) have no cap whatsoever on the maximum fine for a foreign bribery offence.

- **Minimum thresholds.** At the other end of the fine range, only 18 countries (44%) have a fixed minimum fine set above an amount equivalent to EUR 1 000. A further seven Parties (17%) have a fixed minimum fine that is less than the equivalent of EUR 1 000. Fourteen countries (34%) have no minimum threshold at all.

**Confiscation.** Article 3(3) of the Convention obliges Parties to ensure that “the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.”

According to WGB reports, at least some form of confiscation is available against legal persons in all Parties except for possibly Mexico and Greece\(^{48}\). In Phase 3, the WGB questioned

\(^{47}\) For the sake of comparison, the currencies of the Parties were equalised in Euros using the exchange rate of 19 August 2016.

\(^{48}\) See Mexico Phase 3 para. 37; see also Greece Phase 3bis paras. 74-77. However, Mexico has informed the Secretariat that, following the June 2016 reforms introducing criminal liability for legal persons, Article 422 of the National Code of Criminal Procedure now permits the imposition of confiscation on legal persons. The WGB will have the opportunity to examine application of this provision for foreign bribery during the Phase 4 evaluation. On the other hand, even when some confiscation is permitted, some Parties do not have the ability to confiscate both the bribe and the proceeds of bribery. See e.g., Japan Phase 3 paras. 49 (reporting that “the bribe given to a foreign public official can be
whether Spain’s confiscation regime applies to legal persons, given the absence of any express reference to legal persons in the confiscation provisions and the lack of case law applying confiscation to legal persons in practice. Spain has subsequently informed the Secretariat that its “confiscation regime has … been revised and a more comprehensive regulation has been adopted …. to increase the effectiveness of confiscation”. The WGB will have the opportunity to examine its application in practice during Phase 4. Confiscation is the only mechanism available for sanctioning legal persons in the Slovak Republic. Confiscation in the Slovak Republic is closely connected to prosecutions of natural persons under criminal law, as Slovak law “only establishes the possibility to confiscate a sum of money or a property from a legal person … where a natural person is responsible for a crime. Under current Slovak law, the focus thus remains on the natural person involved in a foreign bribery offence as the only responsibility that has to be demonstrated is the liability of this natural person”.

As with fines, confiscation measures can take multiple forms and be subject to conditions on the type of benefits or assets that can be confiscated and on when confiscation is possible once an illicit benefit has been transferred to a third party, commingled with lawful property, or otherwise transformed. These dimensions of confiscation regimes are not dealt with in this mapping, but may nevertheless merit further consideration by the WGB.

**Debarment.** Debarment typically refers to the collateral action or sanction by which a natural or legal person can be suspended from enjoying public advantages or participating in public procurement process for a certain period of time after having been convicted of committing an offence (although some countries employing a lower threshold can debar entities even without a formal conviction). Some Parties have also linked conviction for foreign bribery to the loss of other public benefits, such as tax incentives or investment credits. Construed in this broad sense, “debarment” is a common sanction for legal persons: 33 Parties (80%) provide for some form of debarment, while only 5 countries (12%) clearly do not.

In some cases, debarment is mandatory when a company is found to have engaged in foreign bribery (e.g. in the Netherlands debarment for public procurement is mandatory, with

confiscated”, but the “benefit obtained” cannot be confiscated); Russian Federation Phase 2 para. 282 (reporting that “Article 19.28 CAO provides for the confiscation of the bribe” but finding that, due to lack of other provisions, prosecutors “cannot confiscate the proceeds of foreign bribery by legal persons”). Under Article 3(3), countries without confiscation can still comply with the Convention if they can impose “monetary sanctions of comparable effect”. As a disclaimer, please note that the finding that a given confiscation regime exists does not imply that the Working Group on Bribery would consider it adequate to meet the standards under the Anti-Bribery Convention.

49 See Spain Phase 3 paras. 80-81 & page 34 (Commentary).
50 In the Slovak Republic, the amount confiscated varies depending on whether the confiscation is of (i) property gained through crime or the proceeds of crime or (ii) a sum of money. There is no limit on the amount of property that can be confiscated, provided that its illicit origins can be established. In contrast, an order of confiscation for a monetary sum must be for an amount between EUR 800 and EUR 1 660 000. Under Slovak law, a court cannot order the confiscation of money if it has already ordered the confiscation of property for that offence. See Slovak Republic Phase 3 page 57.
51 Slovak Republic Phase 3 para. 43.
52 According to the WGB reports and country information provided to the Secretariat, Brazil, Bulgaria, New Zealand, the Russian Federation and Switzerland do not include debarment as a sanction. Article 5(2) of Colombia’s Law 1778 of 2016, which was adopted after the WGB’s Phase 2 evaluation, provides for debarment directly against legal persons. Mexico and the Slovak Republic have likewise reported adopting new laws that provide for debarment of legal persons for foreign bribery.
some exceptions). In others, information about unlawful activity is supposed to be taken into account in decision processes relating to the allocation of public advantages.

Thus, seen from this perspective, the decision to debar a legal person may have a punitive effect on the company, but it also aims to protect the integrity of public spending. An example of this can be found in the WGB’s evaluation of the United Kingdom, which states: “A UK public contracting authority must permanently exclude an economic operator from public procurement contracts if the authority knows that the economic operator (or its directors or representatives) has been convicted of offences relating to corruption, bribery, fraud or money laundering. The UK considers exclusion (known as debarment in some jurisdictions) not as a sanction but as protection of the procurement process”53.

**Dissolution.** In at least 12 countries (29%), the law permits the dissolution of a legal person either as a sanction for, or as a consequence of a conviction for, foreign bribery: Belgium, Brazil, Chile, Czech Republic, Germany, Hungary, Latvia, Luxembourg, Mexico, Norway, Portugal, and the Slovak Republic. While dissolution is admittedly a draconian sanction, the WGB has expressed concern that its very severity might make it a disproportionate and unrealistic sanction except in the most egregious cases of foreign bribery by legal persons54.

**Other sanctions.** Twenty-four Parties (59%) provide for various types of other sanctions. Examples include: (1) oversight of the legal person’s operations and compliance efforts either by the judiciary or by a court-appointed corporate monitor (found in at least six countries,110 or 15%); (2) prohibition on advertising the business (e.g. Poland); and (3) orders for the publication of sentence (e.g. Belgium, Brazil, Canada, Czech Republic, France, Poland and Portugal). In another interesting example, defendants in three foreign bribery cases in the United Kingdom were required to make payments to the country of the bribed official in addition to other financial penalties.

**8. Mitigating factors for sanctions.**

Some Parties provide for mitigating factors that will be considered when determining the degree to which a legal person will be punished for foreign bribery. Table 14 provides data on selected mitigating factors found in the Parties’ LP liability systems.

These mitigating factors include: (i) the existence and effectiveness of compliance systems,111 (ii) self-reporting a violation to the authorities,112 at least under certain conditions; and (iii) cooperation with investigations55. These mitigating factors are a key part of the incentive system that encourages companies to play a role in the law enforcement process. While providing for mitigating factors may be an effective way of creating incentives for effective compliance, cooperation, and voluntary disclosure, the use of mitigating factors without clear criteria or instructions could render the sanctioning process less transparent.

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53 United Kingdom Phase 3 para. 207.
54 See, e.g., Colombia Phase 1 para. 54 (observing that the actual use of Colombia’s sanction of “suspension or dissolution of the legal person” is “improbable, or at the very least, very limited” and warning that its use could be “considered inappropriate and disproportionate to the act committed”).
55 At least 11 Parties (27%) will give credit for cooperating with an investigation, such as providing documents or identifying wrongdoers. These include Australia, Austria, Brazil, Canada, Colombia, Denmark, Estonia, Germany, Iceland, Israel, Portugal, Spain, the United Kingdom, and the United States.
Table 15 presents comparative information on whether, in each Party to the Anti-Bribery Convention, it is possible to resolve foreign bribery cases involving legal persons using settlements. It shows: (1) whether settlement is possible; (2) whether settlement arrangements can result in a conviction; and (3) whether settlements can be concluded without a conviction. Here the term “settlement” is used broadly to describe all agreements to either resolve or defer the prosecution of, a foreign bribery case involving a legal person. Various terms are used in the WGB reports to describe these settlements or agreements, which signals that they may have important differences in their conditions and effects.

As shown in Figure 10 above, 25 Parties (61%) provide for settlements to resolve matters relating to foreign bribery (and typically for matters concerning other unlawful activities). Of these, 19 countries (46%) have arrangements for settlements with legal persons that result in a conviction or plea agreement; and 14 countries (34%) have arrangements for settlements that can be concluded without conviction. Eight countries (20%) have both options.

A number of WGB reports have assessed settlement arrangements:

- **Italy.** The patteggiamento procedure, which is akin to plea-bargaining, is credited in WGB reports with boosting Italy’s enforcement efforts and effectiveness. The WGB states that the procedure has been “instrumental to the settlement and sanction of foreign bribery cases.” Patteggiamento advances two main aims: (1) avoiding the dismissal of cases because of the statute of limitations and (2) choosing the most economically viable solution against a background of complex investigations and scarce resources. According to the reports, the procedure succeeded, in a few cases, in streamlining judicial processes enough to prevent the dismissal of these cases because of the statute of limitations. It also encourages future legal compliance by providing for “the extinction of the offence if the defendant commits no other offences of the same kind during the five years following sentencing.”

- **Switzerland.** The WGB evaluates Swiss settlement procedures as follows: “Such procedures have undeniable advantages for law enforcement authorities, in that they streamline procedures and reduce costs. The use of such procedures in transnational bribery matters is not isolated to Switzerland: these procedures exist in several Parties to the Anti-Bribery Convention in various forms and have sometimes proved useful in these countries … How-

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56 See e.g., Estonia Phase 3 pages 56-57 (Recommendation 2(c)) (“Provide appropriate guidance on, inter alia, factors to be taken into account when considering whether to enter into settlement agreements and the degree of mitigation of sanctions, to ensure that pleabargaining does not impede the effective enforcement of foreign bribery”).

57 These are Brazil, Chile, Germany, Israel, Korea, the United Kingdom and the United States.

58 These include, for example, “diversion” for a settlement without conviction in Austria and “patteggiamento” for a settlement with conviction in Italy.

59 These are: Australia, Chile, Estonia, Germany, Mexico, Switzerland, United Kingdom and United States.

60 Italy Phase 3 para. 95.

61 Italy Phase 3 para. 94.
ever, the use of these procedures does raise some questions, in the absence of documents or guidelines setting out a framework for law enforcement authorities and due to the fact that the final decision is sometimes confidential …”62.

- **United States.** The United States has three types of settlement arrangements: nonprosecution agreements (NPAs), deferred-prosecution agreements (DPAs), and plea agreements (PAs). The WGB credits these settlement arrangements with boosting public enforcement efforts: “The United States strongly believes that such agreements are an efficient way to resolve foreign bribery cases. In their view, these agreements provide both appropriate punishment and flexibility to reward voluntary disclosures and co-operation. This practice has worked well in the U.S. legal system, resulting in strong enforcement and private sector compliance efforts”63.

Settlement arrangements – especially those that provide flexibility for prosecutors and judges – create discretion and therefore present the challenge of guiding this discretion so that such arrangements are used and applied appropriately, while respecting basic legal values of transparency, predictability and non-discrimination. Although the data are not presented in Table 15, the WGB reports document the use of several mechanisms designed to guide this discretion:

- **Court review and approval** of the settlement is one way to ensure that discretion is properly exercised when concluding settlements and establishing their terms.

- **Guidance/guidelines for judges and prosecutors.** Another way is to publish guidance on how settlements are to be concluded and what they are to contain. At least nine countries (22%) have issued some form of guidance on whether and how such settlements should be reached.

  **Publication of settlements.** Publication of settlements enhances the transparency of the process. WGB reports mention that settlements are or can be made public in a number of countries (e.g. Czech Republic (in anonymised form), Estonia, Netherlands, Norway, and the United States). The WGB has also encouraged countries to make these settlements public64.

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62 Switzerland Phase 3 para. 41.
63 United States Phase 3 para. 108.
64 See, e.g., Belgium Phase 3 page 60 (Recommendation 5) (“With respect to settlement, the Working Group recommends that Belgium make public, as necessary and in compliance with the relevant rules of procedure, the most important elements of settlements concluded in foreign bribery cases, in particular the main facts, the natural or legal persons sanctioned, the approved sanctions and the assets that are surrendered voluntarily”); Denmark Phase 3 page 51 (Recommendation 3(c) (“Denmark adopt a clear framework for out-of-court settlements and make public, where appropriate and in conformity with the applicable rules, as much information about settlement agreements as possible”); Italy Phase 3 pages 52-53 (Recommendation 4(e)) (“Make public, where appropriate …, certain elements of the arrangements reached through patteggiamento, such as the reasons why patteggiamento was deemed appropriate … and the terms of the arrangement, in particular, the amount agreed to be paid”); Latvia Phase 2 pages 74-75 (Recommendation 9(e)) (recommending that Latvia “make public, where appropriate and in conformity with applicable rules, available information about the settlements in foreign bribery cases, including the facts, the reason for settlement, the terms of the settlement, and any sanctions imposed”); and United Kingdom Phase 3 page 61 (Recommendation 5(c) (recommending that the UK “make public, where appropriate and in conformity with the applicable rules, as much information about settlement agreements as possible, including on the SFO’s website”).