



BETTER POLICIES FOR BETTER LIVES

# The OECD Anti-Bribery Convention: Standards and Practice on Corporate Liability

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The views expressed in this presentation do not necessarily represent those of the OECD member countries or States Parties to the OECD Anti-Bribery Convention.




## Outline

- 1. In Principle...**
  - OECD Convention
- 2. In Theory...**
  - Vicarious liability
  - Failure to prevent
- 3. In Practice...**
  - Korea
  - Australia
  - Chile



## In Principle: OECD Convention

- **OECD Convention + related instruments:**
  - + Commentaries to the Convention
  - + 2009 Recommendation on Further Combating Bribery (inc. Annex I and Annex II)
  - + 2006 Recommendation on Bribery and Export Credits
  - + 2009 Recommendation on Tax Measures to Combat Bribery






In Principle: OECD Convention


- **Article 2:** Requires corporate liability
- **Commentary 20:** Criminal or administrative

	Criminal	Admin.	Criminal	Admin.
Australia	✓		Mexico	✓
Canada	✓		NZ	✓
Chile	✓		Russia	✓
Japan	✓		USA	✓
Korea	✓			



In Principle: OECD Convention

- **2009 Rec, Annex 1:**
  - Must cover: manager bribes; manager directs lower level person to bribe; and manager fails to prevent bribe.
  - Link with natural person’s proceedings





In Principle: OECD Convention

- **2009 Rec, Annex 1:**  
– Intermediaries, subsidiaries, successors

	Intermediaries	Subsidiaries	Successors
Australia	✓	✓	?
Canada	✓	✓	?
Chile	✓	?	✓
Japan	✓	✓	?
Korea	✓	✓	?



In Principle: OECD Convention

- **Article 3: Sanctions**  
– “effective, proportionate and dissuasive”

	Max. fine	Confiscation	Debarment	Suspension	Dissolution
Mexico	USD 9 mil	✗	✗	✗	✓
NZ	NZD 5mil / 3x benefit	✓	✗	✗	✗
Russia	100x bribe	✓	✗	?	?
USA	USD 2mil / 2x benefit	✓	✓	✓	✗







### In Principle: OECD Convention

- **Additional considerations:**
  - Cover SOEs
  - Territorial vs. nationality jurisdiction (Art. 4)
  - Defences and mitigating factors



### In Theory: Models of Implementation

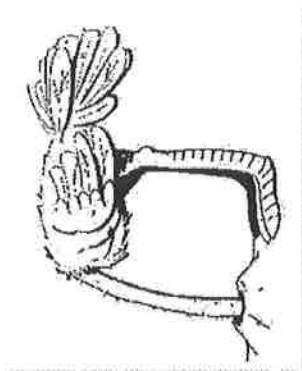
- **Model 1: Vicarious liability**
  - Offence committed by an employee, acting in their duties, to benefit the company?





### In Theory: Models of Implementation

- **Model 2: Failure to prevent**
  - Company allowed offence to occur through corporate culture or lack of prevention policies?



### In Practice: Korea

- Stand-alone legislation
- Criminal liability
- Requirements:
  - Representative commits FB “in relation to its business”
- No liability if LP paid “due attention” or exercised “proper supervision” to prevent offence





### In Practice: Australia

- General criminal liability
- Requirements:
  - Representative commits offence while acting within scope of authority
  - Mgmt expressly or impliedly authorised or permitted offence OR “corporate culture” encouraged, tolerated or failed to prevent offence
- Due diligence defence



### In Practice: Chile

- Criminal liability
- Requirements:
  - Offence committed “directly and immediately” in interest or for benefit of company
  - Offence resulted from breach of company’s direction and supervision
- No offence if company had an “offence prevention model”


- Model can be certified





### Conclusion

- Look at Convention and other instruments
  - Ensure CL for acts of employees/agents at all levels
  - Autonomous liability
  - Intermediaries, subsidiaries, and successors
  - Cover SOEs!
- Need carrot and stick – what effect will compliance programmes have?
  - Guidance for companies



### Thank you

