



PRECOP-RF

Protection of the Rights of Entrepreneurs in the Russian Federation from Corrupt Practices

Technical Paper:

Comparative analysis of criminal law, procedures and practices concerning liability of entrepreneurs

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Disclaimer:

This technical report has been commissioned by the PRECOP-RF project team and was prepared by an expert. The views expressed herein are those of the expert and can in no way be taken to reflect the official opinion of the European Union and/or of the Council of Europe.

Abbreviations

ANAC	National Anticorruption Authority of Italy [<i>Autorità Nazionale Anticorruzione</i>]
CCP	Code of Criminal Procedure
CEO	Chief Executive Officer
CoE	Council of Europe
DPA	Deferred Prosecution Agreements
DoJ	US Department of Justice
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
NPA	Non-Prosecution Agreement
OECD	Organisation for Economic Cooperation and Development
OSCE	Organisation for Security and Co-operation in Europe
SEC	Securities and Exchanges Commission
StAR	Stolen Asset Recovery Initiative
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
UOS	Special Operational Units [<i>unità operative special</i>]

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1 EXECUTIVE SUMMARY

This paper aims to introduce some of the trends that exist, both at the regulatory and operational level, relating to the investigation and trial of entrepreneurs. In particular, the analysis will present a comparison of the application of the criminal law on a sample of Member States of the Council of Europe, including a view on recent tendencies and solutions utilised to tackle economic crime. Special attention is devoted to preventive measures in the context of criminal prosecution of entrepreneurs as alternative to arrest. It is generally understood that the paucity in management and complexity of investigations has led to creative solutions for criminal investigators that has departed from the classical assumption that *societas delinquere non potest*¹. Corporate criminal liability seems to have become an acceptable principle, which is here to stay and prosper.

Following the analysis of the Court of Human Rights case-law, one cannot deny that entrepreneurs remain an easy target for abusive investigators. Unfair, lengthy and unjustified limitations of liberty persist, with little possibility for change. Holistic reforms seem to be necessary to solve this problematic situation in an effective way.

2 INTRODUCTION

Entrepreneur is a person who organises and manages any enterprise, especially a business, usually with considerable initiative and risk².

Economic crime is an umbrella term for a number of crimes associated with industry and commerce and other organised activities in the private or public sector³. It consists of profit motivated, illegal activities conducted within or arising out of an economic activity that is in itself legal or is purported to be so. Examples of economic crime are tax evasion, breaches of competition legislation, corruption, bankruptcy crime, breach of trust, fraud and embezzlement, breaches of accounting rules, illegal copying of software, abuse of state support schemes, fishery crime, insider dealing and currency manipulation. Serious profit motivated crime generally gives rise to a need for money laundering of the proceeds. Money laundering, a predicate offense, is often carried out through companies or financial institutions where proceeds are concealed by other persons. Such activities are therefore generally regarded as a separate form of economic crime.

Usually, only a fraction of economic crime is detected and reported. It is therefore impossible to give a reliable estimate of the actual scale of economic crime. Certain features of economic crime, particularly the low risk of detection, indicate that the dark figures (unrecorded crime) are large compared with the figures for other categories of crime. Most economic crimes have no individual victim, in the traditional sense, who discovers and reports the act. Economic crimes are against a community, not a specific person, or group of people. There is a dispersion of negative consequences, rather than a definite damage to single person/s. The fact that economic crime takes place in ostensibly lawful activities also contributes to the low risk of detection. The perpetrators are often persons with considerable resources and high positions. They have plausibly lawful reasons for carrying out large transactions and for conducting extensive travel and meetings. Their activities therefore do not initially give rise to suspicion. There are rarely any witnesses to the criminal activities. Evidence often lies concealed in documents or computer systems. The dark figures are also a consequence of the fact that some detected offences are not reported and are therefore not recorded. Factors that may have significance for whether possible criminal offences are reported include perceptions concerning police efficiency, the potential for repairing the damage without external assistance and the belief that it may be detrimental to the reputation of the enterprise or organisation if it becomes common knowledge that economic crime has taken place.

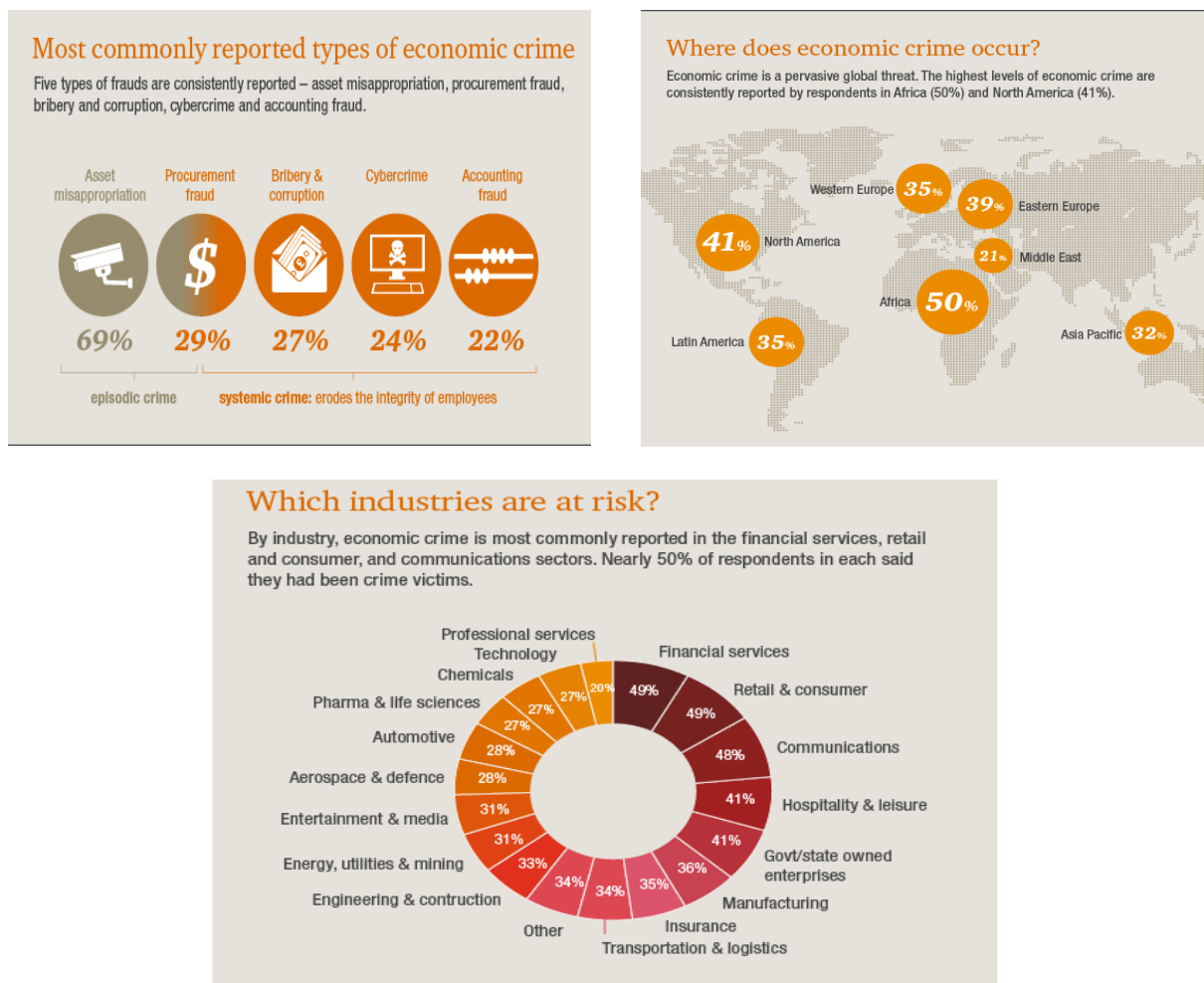
¹ Undertakings are unable to commit a criminal action and so only physical individuals have the ability to infringe criminal law.

² French: literally, one who undertakes (some task), equivalent to *entreprendre* (to undertake)

³The *Norwegian Government's Action Plan for Combating Economic Crime*, available at www.regjeringen.no/

The complexity increases partly as a result of greater use of information technology and sophisticated company structures. In pace with increases in globalisation of the economy and society in general, economic crime is also becoming more international. In their pursuit of increased profit, criminal persons, groups and networks make contact with each other across national borders. Criminal activities are thus channelled to areas with high profitability and low risk of detection. This applies particularly to money laundering. The proceeds of criminal activities are most effectively laundered internationally. It takes, for example, only a few seconds to transfer such proceeds to the bank account of a nominee company in another country. The authority of the police is restricted to its own country and it can take a long time to trace the proceeds. Tracing such amounts abroad is dependent on cooperation with the authorities of the country concerned, which can be complicated and costly as well as time-consuming, a fact that the criminals are aware of and exploit to the full in the most serious cases. Moreover, experience indicates that the boundaries between economic crime and other categories of crime are somewhat blurred.

Below we present some of the findings of the Global economic crime survey (2014)⁴ carried out by Price Waterhouse Coopers:



Source: Price Waterhouse Coopers (2014), *Global Economic Crime Survey*

Financial crimes are crimes against property, involving the unlawful conversion of the ownership of property (belonging to one person) to one's own personal use and benefit. Financial crimes may involve fraud; theft; scams; bribery; embezzlement; identity theft; money laundering; and forgery and

⁴ Price Waterhouse Coopers (2014), *Global Economic Crime Survey* is available at www.pwc.com/

counterfeiting, including the production of counterfeit money and consumer goods. Financial crimes may be carried out by individuals, corporations, or by organised crime groups.

In particular, within the entrepreneurial community, the very high-ranked officials appear to be the most prone to economic crime. According to some national statistics⁵ on employment for example, the share of all kinds of managers in the total population is about 5.9% and the share of CEOs (Chiefs Executive Officer within this population is about 8% (i.e. 0.5% of the population). In contrast, an overwhelming majority of people convicted of white-collar crime cite their current position to be CEOs or other top managers (43%) when appearing in court, see the Table below. In fact, when all individuals in a top management position are grouped (board, CEO, owner/founders), they amount to 45%, 28% being middle managers and only 16% are professionals with no management duties.

Main Role in crime by types of offenders

Formal position at trial	Number	%
Chairman/ Board member	16	7.2
CEO	36	16.2
Owner/Founder	48	21.6
Middle manager	24	10.8
Accounting/finance professional	15	6.8
Other internal professional	23	10.4
External consultant (e.g. investment advisor)	30	13.5
Lawyer	5	2.3
Public official	8	3.6
Unemployed	17	7.6
Total	222	100

Source: Price Waterhouse Coopers (2014), Global Economic Crime Survey

On the other hand victims of economic or financial crimes may include individuals, corporations, governments and entire economies.

⁵ Jan Ketil Arnulf and Petter Gottschalk (2012) *Principals, Agents and Entrepreneurs in White-Collar Crime: An Empirical Typology of White-Collar Criminals in a National Sample*, this article was published in Journal of Strategic Management Education, Vol. 8, No 3, 2012, pp. 1 – 22, available at <http://brage.bibsys.no/>

3 CRIMINAL LIABILITY TODAY

Today's economy, both at the national and international level, is mainly driven by legal persons⁶. It is not self-employed entrepreneurs, but mostly commercial entities that compete for public procurement contracts, apply for different licences and contest government authorities' regulations or determinations in various supervision procedures. Therefore, it is a reality that high-level corruption in most cases serves the interests of legal persons. In such a world, it is not adequate for the criminal law to only reach the wrongdoing of natural persons. Punishing only natural persons, even the top managers of a legal entity, is not a sufficient deterrent for corporations willing to break the rules.

Furthermore, complex governance structures and collective decision-making processes in corporate entities make it difficult to uncover and prosecute such offences. Perpetrators and instigators can hide behind the corporate veil to evade liability. Legislators have responded rather creatively to this obstacle. Instead of increasing punishment (in terms of higher fines, tougher and longer limitation of liberty) for the most serious tier of offences, in order to strengthen deterrence lawmakers have opted for a range of simplified procedures, characterised by simplification and de-formalisation (from criminal to quasi-criminal, or administrative process) to target the lower, non-grave tier of offences (see table below). Indeed, decriminalisation of sanctions and procedures on the economic crime environment has been a steady trend in the recent past. Reducing formalities has been a sort of mantra for many prosecutors and administrative entities in the past three decades.

The liability of legal persons for corruption offences is a well-established international standard included in the provisions of international anti-corruption instruments, among others:

- Second Protocol to the EU Convention on the Protection of the Financial Interests of the European Communities (1997);
- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997);
- Council of Europe Criminal Law Convention on Corruption (1999); and
- United Nations Convention against Corruption (2003).

Corporate criminal liability was invented in the common law world. By the 19th century, two different concepts had begun to develop: vicarious liability in the United States and identification theory in the United Kingdom. In both jurisdictions, corporate liability was first implemented for statutory offences and was only later extended to *mens rea* offences as well. The situation has changed dramatically during the last three decades. Nowadays, most European countries (and many other jurisdictions around the world) have embraced the concept of corporate criminal liability (*societas delinquere potest*). Despite the general trend, a number of jurisdictions still resist the idea that corporations can commit crimes and use administrative punitive law to sanction corporate malfeasance. However, in many of these countries, legal entities can be sanctioned not only for administrative offences, but also for crimes committed by their managers (or even employees) in certain cases. As these cases are similar to those that constitute the basis of the criminal liability in the systems with corporate criminal liability, this new type of administrative liability is not substantively different. The main difference between the two approaches lies in the theoretical debate over whether a legal entity is able to act consciously and responsibly and thus, commit a crime. In practice, the difference is procedural.

International standards on corporate liability for corruption offences generally do not require establishing one specific type of liability. On the contrary, anti-corruption treaties either explicitly in the text (e.g. UNCAC) or in the explanatory materials often clarify that the states may opt to establish criminal, administrative or civil liability. However, whatever option is chosen, legal persons must be subject to effective, proportionate and dissuasive sanctions. The latter requirement affects the choice of the liability type adopted in the national system. As will be shown below, criminal or quasi-criminal liability is often recognised as the most suitable legal construction for holding legal persons

⁶ OECD (2015), *Liability of Legal Persons for Corruption in Eastern Europe and Central Asia*, available at www.oecd.org/

accountable for corruption, with administrative liability being an accepted alternative.

Country overview of the approach taken to regulate the liability of legal persons

Criminal liability	Administrative punitive liability	Quasi-criminal liability
Albania Bosnia and Herzegovina Croatia Estonia Lithuania "The former Yugoslav Republic of Macedonia" Moldova Montenegro Romania Serbia Slovenia	Bulgaria Russian Federation	Azerbaijan Latvia Ukraine
12	2	3

Source: OECD (2015)⁷

Nevertheless, strong criticism to corporate criminal liability still exists. An enforcement system maximises total social welfare when it employs two different mechanisms for two different types of corporate offenses⁸. The private sector should enforce legal rules where the probability that victims will detect corporate violations is close to unity; the public sector should enforce rules where the probability of detection is significantly below unity by means of civil, not criminal, proceedings and levies. The monetary charges for breaches under both private and public systems should produce expected costs to potential corporate violators equal to the social damage of the offenses. When social damage determines the expected costs to corporations from violating society's legal rules, private and public-civil enforcement of the rules exploits the rational nature of corporate decisions and minimises the total social costs of corporate offenses.

For example, in UK deferred prosecution agreements (DPAs) are becoming a powerful tool with which to hold corporations to account⁹. Used by American prosecutors in the corporate context since the 1990s, DPAs recognise some of the problems inherent to prosecuting corporations. For the state, such proceedings are likely to be fraught with difficulty. They are lengthy, complex and carry a significant litigation risk. A conviction may also cause collateral damage, harming innocent employees and shareholders and shaking wider market confidence. For corporates, a criminal trial poses the risk of conviction and disbarment from public contracts, as well as reputational harm. DPAs recognise that in some (but not all) instances of corporate offending, a consensual resolution will be more appropriate.

Where a corporation is suspected of economic wrongdoing, the prosecutor will decide whether a DPA is appropriate, by reference to criteria set out in a recently published Code of Practice. If so, a prosecution will be deferred in return for the corporate signing up to terms which may include an admission of liability, the payment of financial penalties, restitution to victims, the removal of culpable board members or the appointment of corporate monitors.

In 2004, France passed a new legislation¹⁰ which contains strong measures against suspects of organised crimes. While the law was presented to target only "*la grande criminalité*" (the grave offences), this definition remained insufficiently clear, while police and prosecutors obtained

⁷ OECD (2015) *Liability of Legal Persons for Corruption in Eastern Europe and Central Asia*, available at www.oecd.org/

⁸ John T. Byam, *The Economic Inefficiency of Corporate Criminal Liability*, available at <http://scholarlycommons.law.northwestern.edu/>

⁹ Hannah Laming and Nicholas Querée (2014), *A sea change in the prosecution of corporate economic crime?* available at www.financierworldwide.com/

¹⁰ Perben II law (9 March 2004)

expanded powers. As a whole, the measures increased the police's resources, their repressive capabilities and the legal means they can use to detain suspects. As part of the procedure that defines organised crime by means of an offense catalogue, special judicial panels have been established and special investigative measures allowed. Existing investigative measures have been expanded and new measures introduced. Opposition to the new measures was very strong both from judges and lawyers' associations, and the opposition parties in the Parliament, who appealed to the Constitutional Council to annul it. In a 3 March 2004 ruling, the Council did criticise two provisions: the definition of organised crime and the American-style plea-bargaining. After the law was passed in February, thousands of lawyers had held an unprecedented one-day strike to protest against the violations of personal freedom and the politicisation of the judiciary system. The Perben law was intended to combat organised crime, but it is surprisingly silent on financial and economic crimes¹¹. Surprisingly, the fight against organised crime led to the introduction of a procedure for (moderately) serious offenses¹². The catalogue of offenses is considered by some to be inconsistent and includes offenses that do not constitute organised crime. Instead, it covers ordinary, moderately-serious to serious offenses that are punishable with a maximum sentence of at least ten years imprisonment. The adoption of this catalogue of offenses thus seems to serve as a pretext to submit a series of offenses to a special criminal procedure, equipped with expanded and invasive investigative measures. The reason for introducing special judicial panels is expedition of proceedings by means of centralisation and specialisation. In addition, the consolidation of connected offenses prevents unnecessary procedural duplication. The range of possible interim measures has been extended. Seizure for the purposes of establishing evidence may be extended to become preventive seizure. The judicial authorities may order surety, which is compatible with other preventive measures and may be accompanied by the placement of the accused under court supervision, thus ensuring that the accused will be present at the proceedings and that the victims will be compensated, while opening up the possibility of eventual confiscation. One of the primary aims was to introduce new and effective investigative measures into police investigations and to justify them by means of a heightened requirement of judicial authorisation. Due to the existing double role of the liberty and custody judge [*Juge des libertés et de la détention*] however, this has not happened. Furthermore, the introduction of the special criminal procedure led only to marginal improvements in the position of the accused; these are, however, outweighed by reductions of the suspects' rights¹³.

¹¹ Christine Schier (2004), *Sexual offenders will have police records, but economic criminals are spared*. Neo-Cons' Perben Law liberties, available at <http://larouchepub.com/>

¹² Dr. Peggy Pfützner, LL.M., *Organized Crime in French Criminal Procedure*, available at www.mpicc.de/

¹³ Dr. Peggy Pfützner, LL.M., above.

4 LEGISLATIVE AND ENFORCEMENT PRACTICES REGARDING THE MEASURES TAKEN AGAINST ENTREPRENEURS FOR ECONOMIC CRIMES

The EU member states are required to work towards the creation of an EU criminal policy, as to ensure the effective implementation of EU policies¹⁴.

In particular, EU member states have been called to establish definitions of offences cover rules on jurisdictions and establish sanctions (which should be effective, proportional and dissuasive). First of all, measures can be adopted concerning a list of ten particularly areas of crime with a cross-border dimension (the so-called “Euro crimes”). Among these, at least three (money laundering, corruption, counterfeiting of means of payment) are classic economic crimes¹⁵. More specifically, the EU's rules on financial market behaviour are a case in point where criminal law could be a useful additional tool to ensure effective enforcement. As the financial crisis has shown, financial market rules are not always respected and applied sufficiently. This can seriously undermine confidence in the financial sector. Greater convergence between legal regimes in the Member States, including in criminal law, can help to prevent the risk of improper functioning of financial markets and assist the development of a level playing field within the internal market¹⁶.

What is the possible content of EU minimum rules on criminal law? The definition of the offences, i.e. the description of conduct considered to be criminal, always covers the conduct of the main perpetrator but also in most cases ancillary conduct such as instigating, aiding and abetting. Generally, EU legislation covers offences committed by natural persons as well as by legal persons such as companies or associations. However, in existing legislation, Member States have always been left with the choice concerning the type of liability of legal persons for the commission of criminal offences, as the concept of criminal liability of legal persons does not exist in all national legal orders. Furthermore, EU legislation can cover rules on jurisdiction, as well as other aspects that are considered part of the definition as necessary elements for the effective application of the legal provision. Regarding sanctions, EU criminal law can require Member States to take effective, proportionate and dissuasive criminal sanctions for a specific conduct:

- a) Effectiveness requires that the sanction is suitable to achieve the desired goal, i.e. observance of the rules;
- b) Proportionality requires that the sanction must be commensurate with the gravity of the conduct and its effects and must not exceed what is necessary to achieve the aim; and
- c) Dissuasiveness requires that the sanctions constitute an adequate deterrent for potential future perpetrators. Sometimes, EU criminal law determines more specifically, which types and/or levels of sanctions are to be made applicable¹⁷.

¹⁴ EU Commission (2011), *Towards An EU Criminal Policy: Ensuring The Effective Implementation of EU Policies Through Criminal Law*, Communication From The Commission of 20 September 2011 Com(2011) 573 Final, available at <http://ec.europa.eu/>

¹⁵ See the Framework Decisions and Directive cited above, in footnote 3. Several of those Framework Decisions will be reassessed in the light of the Lisbon Treaty in the coming years, including Framework Decision 2000/383, as amended by Framework Decision 2001/888, in 2012.

¹⁶ See 'Communication on reinforcing sanctioning regimes in the financial sector', COM (2010) 716 of 8 December 2010

¹⁷ Not all sectors are the same and not all actors have equal interest and behaviour. Striking the right balance between effectiveness and fairness for sanctions is a truly difficult task. Nevertheless, there are principles to be followed, elements to be considered, consequences to bear in mind and limits to respect. Effective implementation of rules comes with the perception of required and correct measures of reprimand. The seriousness and character of the breach of law must be taken into account. For certain unlawful acts considered particularly grave, an administrative sanction may not be a sufficiently strong response. On the same line, criminal law sanctions may be chosen when it is considered important to stress strong disapproval in order to ensure deterrence. The entering of convictions in criminal records can have a particular deterrent character. At the same time, criminal proceedings provide often for stronger protection of the rights of the accused, reflecting the seriousness of the charge. The efficiency of the sanction system must be considered, as well as the extent to which and the reasons why existing sanctions do not achieve the desired enforcement level. The type of sanction that is considered to be the most appropriate to reach the global objective of being effective, proportionate and dissuasive should be chosen. An administrative sanction can often be decided and executed without delay and lengthy and resource demanding procedures can thereby be avoided. Administrative sanctions may for this reason be considered in areas where, for example, the offence is not particularly severe or occurs in large numbers as well as in areas where administrative sanctions and procedures are suitable and effective for other reasons (e.g. complex economic assessments). In many cases, administrative law also

Provisions concerning confiscation can also be included. It is not the primary goal of an EU-wide approximation to increase the respective sanction levels applicable in the Member States but rather to reduce the degree of variation between the national systems and to ensure that the requirements of “effective, proportionate and dissuasive” sanctions are indeed met in all Member States. This push towards harmonisation and especially effectiveness has played a very important role for the establishment or strengthening of corporate criminal liability in many EU member States.

A clear example of serious economic offence is grand corruption. There is not yet a widely accepted definition of grand corruption, but experts and organisations working on the issue emphasise that grand corruption differs from ordinary corruption not only due to its scale but also due to its effect and nature. This crime involves acts committed by individuals at a high level of government or executives in the private sector who have a significant impact on society by distorting policies or the functioning of the state, enabling leaders to benefit at the expense of the public good. The fact that it involves widespread and systemic acts of corruption committed by high-level officials who are/were in charge of decision making in the country (such as presidents, governors and prime ministers) and that it usually involves complex mechanisms to hide and launder the proceeds of corruption in several foreign jurisdictions make it difficult to investigate and build the necessary evidence to ensure the punishment of those involved. Fighting grand corruption is extremely challenging, and progress so far has been very limited. In countries where corruption is endemic, state capacity is rather weak and the rule of law is often not respected. Law enforcement agencies and the judiciary often lack autonomy, technical capacity and funds to pursue investigations, prosecute and sanction the corrupt. The political elite frequently benefits from this lack of enforcement and has little incentive or political will to provide for effective mechanisms to investigate and punish corrupt individuals¹⁸.

Fighting grand corruption requires a set of measures at the domestic level, where corruption takes place, and abroad, where stolen assets are often located¹⁹. These measures range from the adoption of mechanisms and reforms to support prevention and detection of corruption, such as transparent public financial management systems and strong anti-money laundering rules, to the enforcement of laws and punishment of public officials, companies and senior executives involved in grand corruption schemes. It also requires measures to find and recover stolen assets. Measures that have been partially successful in addressing this issue are those undertaken to overcome the challenges encountered in the fight against grand corruption. They include the establishment of specialised anti-corruption units, the use of alternative legal instruments to recover assets and seek damages, and public interest litigations, among others. Civil forfeiture may be particularly advantageous in grand corruption cases as it helps to overcome many of the challenges encountered when trying to locate, seize and recover stolen assets. Firstly, as a criminal conviction is not a precedent condition, the confiscation of assets through civil forfeiture cannot be frustrated by immunities, the inability to extradite the high-level officials involved or in the event of the death of the official. Secondly, it allows for confiscation where difficulties have been encountered in trying to mount a criminal prosecution because of political or high-level interference in the criminal justice system²⁰.

4.1 European Commission

Given the rather intrusive and pervasive power of the European Union (EU) institutions vis-à-vis entrepreneurs operating within the EU single market, in areas falling under the exclusive competences of the EU²¹, it is worth describing the rules covering the investigation of such situations. The EU

provides for a broader range of possible sanctions, from fines and suspension of licenses to exclusion from entitlement to public benefits, which can be tailored to the specific situation. In many cases, administrative sanctions may therefore be sufficient or even more effective than criminal sanctions.

¹⁸ Pavletic, I. (2009). *The Political Economy of Asset Recovery Processes*. International Centre for Asset Recovery Working Paper 7, Basel Institute on Governance.

¹⁹ Maira Martini (2015), *Fighting Grand Corruption: Challenges and Successes*, Transparency International, available at www.transparency.org/

²⁰ Council of Europe (2013), *Impact Study on Civil Forfeiture*, available at www.coe.int/

²¹ Article 3 of the Treaty on the Functioning of the European Union.

Commission has the power to impose fines of up to 1% of a company's total turnover for the preceding business year for²²:

- Intentionally or negligently supplying incorrect or misleading information in response to an information request (whether following a simple request or a formal, binding Commission decision);
- Failing to provide information within the timescale set out in a decision;
- Refusing to submit to an inspection ordered by decision; and
- Providing incomplete documents, providing incorrect or misleading answers to questions asked or breaking a seal affixed by the Commission (whether or not the inspection has been ordered by decision or under an authorisation).

Periodic penalties of up to 5% of average daily turnover can also be imposed for continued failure to:

- Supply complete or correct information in response to an information request by decision; and
- Submit to an inspection ordered by decision.

To perform its role of enforcing Articles 101 and 102 of the Treaty on the Functioning of the European Union (the EU rules prohibiting restrictive agreements and abuse of dominance), the European Commission has the power to request information from all undertakings (whether or not they are themselves suspected of infringing the rules) and to carry out investigations at their premises. In particular, it has powers to ask (by written request) any person for any document or information (or categories of documents) that it considers relates to any matter relevant to its investigation. The Commission also has the power to interview any person who consents, for the purpose of collecting information. In addition, it has wide powers of inspection (to conduct dawn raids). For example, it can:

- Enter business premises (including vehicles) and domestic premises, if these are used by the business or documents relating to the business are kept there;
- Examine the company's books and other business records;
- Take copies of, or extracts from, the books and business records;
- Seal any business premises and books or records during an investigation (normally for no more than 72 hours); and
- Ask for oral explanations on-the-spot about facts and documents.

To apply and enforce Articles 101 and 102, the Commission has the power to require production of all necessary information and to undertake all necessary inspections of companies. However, it may only inspect premises other than business premises if it has a reasonable suspicion that books or other records related to the business, which may be relevant to prove a serious violation of Article 101 or Article 102, are kept at those premises. In particular, the Commission uses its dawn raid powers in relation to suspected cartels.

The Commission may request information by a simple request or a formal decision. A formal decision (taken by the Commission as a whole) will set a fixed time limit and compliance is mandatory and subject to the imposition of fines. Similarly, a dawn raid of business premises may be conducted under an "authorisation" (issued without the approval of the full Commission) or under a formal decision. In the case of an authorisation, a firm may refuse voluntarily to submit to an investigation. However, any such refusal is likely to result in the adoption of a formal decision, so imposing a duty to co-operate on the firm. An inspection of non-business premises can only be conducted under a decision.

Commission officials conducting an investigation will usually be assisted by officials from the relevant national competition authorities. The Commission may ask these authorities to conduct the investigation on its behalf. Where a company refuses to comply with an inspection ordered by a decision, the Member State must provide the necessary assistance to allow the Commission to obtain access to the premises, including obtaining a warrant.

²² *Investigations and dawn raids by the European Commission: a quick guide*, available at <http://uk.practicallaw.com/>

Companies should put in place procedures for handling investigations. In particular, companies should:

- Check whether the inspection is being conducted under an authorisation or warrant. Examine and take copies of relevant documents in order to determine the scope of the investigation;
- Contact lawyers and ask the Commission officials to wait until they arrive. The Commission does not have to wait and will be unlikely to do so if one of the company's in-house lawyers is available. Ensure that the Commission officials are accompanied at all times;
- Check any documents requested by the Commission to ensure they are within the scope of the investigation and to determine whether they are covered by legal privilege or are commercially confidential;
- Mark confidential documents as such and withhold privileged documents. Take a note of all files and documents examined by the Commission and retain copies of all documents copied or taken by the Commission. Take notes of any oral explanations given and of any areas of dispute with the Commission officials (for example, relating to legal privilege);
- After the dawn raid, hold follow-up meetings to decide what further steps should be taken, such as whether further explanations or documents should be provided to the Commission and potentially (if there appears to be evidence of infringement) whether a leniency application should be made.

4.2 Italy

Under Italian criminal law, directors and officers may be personally prosecuted for bankruptcy crimes committed prior to or during the bankruptcy procedure²³. It is worth noticing that many of the bankrupt crimes envisaged for the bankrupt entrepreneur are also applicable to the company's directors and officers (i.e. fraudulent bankruptcy acts, straight bankruptcy, abusive recourse to credit, denounce of non-existing credits).

Article 223, paragraph 1, of Italian Criminal Law (n. 267/1942, revised by law n. 80/2005, also known as the Italian bankruptcy law), envisaging the so called fraudulent²⁴ bankruptcy, sets forth that directors and officers of bankrupt companies are punished with imprisonment from three to ten years if they have committed one of the facts provided for by Article 216 (which targets the entrepreneur's fraudulent bankruptcy), and listed herein below:

- 1) diversion, concealment, dissimulation, destruction or dissipation of all or part of the company's assets as well as either the registration or acknowledgment of non-existent liabilities for the purpose of harming creditors;
- 2) removal, destruction or falsification, in whole or in part, with the intent of obtaining an undue profit or of harming the company's creditors, the company's books and other accounting records or keeping them as to make it impossible to reconstruct the entrepreneur's assets and business transactions²⁵.

Directors and officers are also subject to criminal liability in case they remove, destroy or falsify the company's books or other accounting records in the course of bankruptcy proceedings. In addition to the above, directors and officers are forbidden from paying some of the creditors or by creating fictitious titles of preference, for the purpose of favouring some creditors and of harming others²⁶.

The penalty provided for by Article 216, paragraph 1, applies to the above mentioned individuals in case they have caused by fraud or by the effects of fraudulent transactions the bankruptcy of the

²³ Prof. Alberto Piergrosi, *The Criminal Liability of Directors and Officers in Insolvency Proceedings under Italian Law*, available at <http://iiiiglobal.org/>

²⁴ Under Italian law, criminal liability is generally individual (Article 27 of Italian Constitution). Exceptions apply in respect of Italian Decree 231/2001 concerning criminal liability of the companies for crimes committed by its officers/employees, when such crimes are committed to the benefit of the company.

²⁵ These samples of misconduct are called "fraudulent bankruptcy on assets".

²⁶ The so called "preferential bankruptcy".

company. An essential precondition of the criminal liability of directors and officers in fraudulent bankruptcy, apart from the existence of a connection between the acts carried out by these individual and the reduction of creditors' interest [*actus reus*], is the so called "*dolo generico*" (generic fraud, *mens rea*). The above mentioned "*dolo generico*" consists in the "conscious will to give to the company's assets a different destination from the company's corporate purposes and to carry out activities able to harm the creditors of the company"²⁷. In case of preferential bankruptcy, the psychological element of this crime is represented by the so called "*dolo specifico*" (specific fraud), i.e. the pursuing of the result envisaged by the relevant provisions of law (favouring some creditors and harming others).

The straight bankruptcy can be charged to directors and officers that have committed this crime both with fraud [*dolo*] and with negligence [*colpa*]. The civil liability of directors and officers, as above outlined, is a contractual liability (towards the company) or an extra-contractual one (towards creditors and third parties). These types of liabilities are established by law for the purpose of protecting the integrity of the legal relationships existing among the above individuals, the company and the company's creditors. On the contrary, the criminal liabilities of directors and officers are envisaged for the purpose of ensuring the regular unfolding of the bankruptcy procedure and, according to a minor case law approach, with the aim to safeguard the recovery of value from debtors' assets in favour of creditors, to protect the public interest of the market to obtaining correct information on companies' assets and enhancing the control of corporate governance.

A number of corporate crimes²⁸ also entail the company's "administrative/criminal" responsibility pursuant to Legislative Decree No. 231, dated 8 June 2001. Inspired by the 1997 OECD Convention on fighting bribery of foreign government officials, Italian decree 231/2001 has introduced a regulatory framework for administrative/criminal liability of companies in case of crimes committed, in Italy or abroad, in the interest or to the benefit of the company, by its directors and/or employees. In the event of a criminal offence committed by such persons, a trial against him/her will take place, as well as a trial against the company (represented, before the Criminal Court, by its legal representative).

The sanctions for the company in case of violation of decree provisions are:

- pecuniary sanctions (which may be extremely severe);
- injunctive sanctions (such as, amongst others, prohibition of the exercise of the business activity, suspension or revocation of the authorisations, licenses or concessions, prohibition to negotiate with public administrations, exclusion of facilities, loans, contributions, prohibition to advertise goods or services); and
- confiscation and publication of the Court decision.

The above sanctions may also be applied as a protective measure during the investigation period, with the serious consequence of paralysing the company's activities. Since 231/2001 sanctions are triggered by criminal violations, no insurance coverage may be possible to avoid any consequence of the lack of compliance.

Additional example of preventive measures is given by the Italian law 114/2014, established *ad hoc* for the 2015 world exposition, taking place in Milan. This bill was explicitly passed to deter and counter corrupt activities in public procurement linked to this remarkably vast and highly publicised event. The President of ANAC (*Autorità Nazionale Anticorruzione* – National Anticorruption

²⁷ Italian Court of Cassation, Sec. VI, 6 October 1999 No. 12897.

²⁸ Corporate crimes that may result in a criminal liability for the company are:

1. False corporate communications (2621 e 2622 Civil code);
2. False Information in prospectuses (2623 Civil Code);
3. False information in reporting or in communications of the auditing firms (2624 Civil Code);
4. Obstructing/Impeding controls (2625 Civil Code);
5. Fictitious formation of corporate capital (2632 Civil Code);
6. Undue restitution of equity contributions (2626 Civil code); and
7. Illegal distribution of profits or reserves (2627 Civil code).

Authority of Italy) was assigned with functions of supervision and guarantee of the fairness and transparency of the procurement procedures. Among the special powers for prevention of corruption, there are:

- power of “recommendations”: The recommendations submitted in accordance with the powers referred to in article 19(7) of Law Decree 90/2014 contain instructions for the contracting authority EXPO 2015 S.p.A on the proper management of tendering procedures connected to the staging of the event;
- power to limit the use of the best offer [*offerta economicamente più vantaggiosa*] in case of awards of standardised goods and services;
- power to avoid granting the awarding committee too much discretion in terms of awards on the basis of multiple criteria;
- the possibility for the President of ANAC to request the Prefect:
 - to order the renewal of the corporate bodies of companies involved with criminal activities, by replacing the individual(s) involved; or alternatively, when the company does not comply;
 - to appoint an extraordinary commissioner to run the company and ensure the full implementation of the obligations under the procurement contract;
- also, as part of this assignment in July 2014 ANAC established a special operational unit (UOS) to monitor the projects of the EXPO 2015.

The main element of this architecture is early, preventive controls. The establishment of ex-ante control mechanisms seems adequate for the enforcement of additional integrity measures, necessary to be addressed in the current development stage of the project, and after the recent events. This approach is thought to be useful mainly in specific contexts, such as EXPO 2015, that have already been affected by instances of corruption which have not only contaminated existing tenders, but also threatened to undermine future contracting procedures.

To be effective, *ex-ante* controls of documents concerning the award and performance of public contracts for works, services and supplies of goods, by an entity separate from the contracting authority, must focus on individual, specific cases with a “high risk of corruption”. For these reasons, using this control system in specific cases, as per article 19 of Law Decree 90/2014, by establishing a UOS within ANAC, must be viewed in itself as responding to multiple public-interest objectives:

- it enables the creation of an innovative system of *ex-ante* third-party controls on the legality of tender documents;
- it strengthens and safeguards the probity and transparency of the award procedures used;
- it could potentially function as a way to dissuade future instances of corruption, given the explicit checks on the propriety of each procedural step in the tenders; and
- it helps to restore confidence among operators in the relevant market about the transparency and probity of award procedures and the subsequent management of tenders.

However, it is worth noting that the *ex-ante* control of documents concerning award procedures could exacerbate the time it takes to complete tenders. The entities responsible for assessing risk must ensure that the *ex-ante* control clearly identifies the best ways to ensure control effectiveness, without having an excessive effect on the swiftness and efficiency of the administration of the tender. The establishment of a threshold by ANAC for the exercise of the prior control mechanism is a good step forward to balance the efficiency of the process. It is recommended that the threshold level should be periodically assessed vis-à-vis the achieved results and the expectations of end users.

4.3 United Kingdom

Companies can be held criminally liable for a wide range of offences, including health and safety offences, corporate manslaughter and those more commonly encountered in business contexts such as fraud, bribery, false accounting etc. A company will normally only be criminally liable where the commission of the offence can be attributed to someone who, at the material time, was at or close to

board level²⁹. The fact that a company can be held liable for a criminal offence does not preclude the prosecution of the individual or individuals involved in committing the offence, and in fact allows the net to be cast even wider in terms of individual responsibility. There are a number of situations in which, where an offence is committed by a company and it is proved to have been committed with the ‘consent or connivance’ of a director, manager or other senior person, that person is also guilty of the offence. Examples of such provisions are to be found in many statutes creating criminal offences, including the Theft Act 1968, the Fraud Act 2006 and, more recently, the Bribery Act 2010. The rationale behind them is to enable the prosecution and punishment not only of the corporate entity but, where sufficiently culpable, those who control it. In other words, they provide a means of holding to account those who are complicit in offences committed by companies. So, under section 14 of the Bribery Act, where an offence under sections 1 (bribing another person), 2 (receiving bribes) or 6 (bribery of foreign public officials) of the Act is committed by a company and that offence is proved to have been committed with the consent or connivance of a senior officer of the company, the senior officer as well as the company will be guilty of the offence. This provision only applies to the substantive offences under the Bribery Act – there can be no individual director liability in respect of the corporate offence of failing to prevent bribery. Under this and similar provisions in other statutes, the corporate entity and the senior person who consented or connived are both guilty of the main offence, i.e. there is no separate offence of ‘consent or connivance’³⁰. There is in fact no requirement that the company itself be prosecuted, provided the offence can be proved against it. Any prosecution of the relevant senior person would have to establish, to the satisfaction of a jury, that the company had committed the offence in question. There are also a number of statutes creating criminal offences that extend the ‘consents or connives’ provision to include an offence committed by the body corporate that is attributable to any neglect on the part of the individual director or senior person³¹.

With enforcement agencies scrutinising corporate conduct more than ever before, in-house lawyers need to understand the potential impact of the criminal law not only on corporate entities but also on their senior management. However, despite detailed consideration by the criminal courts in the course of relatively recent cases, there remains a troubling lack of clarity around what conduct is capable of amounting to ‘consent’, ‘connivance’ or ‘neglect’.

4.4 Norway

Since the early 2000, Norway has been adopting a number of strong measures against economic crimes³². In particular, measures have focused on area such as a) Resources and organisation (meaning the restructuring national authorities and cooperation among themselves; b) Competence-building measures (including in the police and courts); c) Research; d) Sanctions against economic crime (penalties versus administrative sanctions, increased use of proceeds-oriented measures); e) Increasing the efficiency of international cooperation; f) Statutory amendments and h) Measures against money laundering and financing of terrorism. In addition, specific measures have been put in place relating to special categories of crime, among which corruption and bankruptcy crime.

Most bankruptcies take place in distributive trades, real estate, business and hiring services, the building and construction trade and the hotel and catering trade. Operation of commercial activities, particularly innovative commercial activities, often involves risk. Some companies fail, resulting in bankruptcy, without this involving any criminal activity. On the other hand, bankruptcies sometimes

²⁹ Elly Proudlock, Chavi Keeney Nana (2013), *Consent and connivance: the criminal liability of directors and senior officers* (by 2013, available at www.inhouselawyer.co.uk/)

³⁰ A relatively recent example is *Director of The Serious Fraud Office v Mabey Engineering (Holdings) Ltd* [2012], where the engineering group Mabey & Johnson pleaded guilty to breaching UN sanctions by paying kickbacks to Saddam Hussein’s regime and three senior executives were subsequently convicted of the same offences on the basis of their consent or connivance.

³¹ An example is s37 of the Health and Safety at Work Act (HSWA) 1974, which applies to all the criminal offences created by the Act (the vast majority of which, since January 2009, carry a prison sentence of up to two years). This broader basis for imposing liability is not, however, limited to health and safety matters. Similar provisions affect offences under statutes as wide-ranging as the Trade Descriptions Act 1968, the Companies Act 2006 and the Private Security Industry Act 2001, many of which carry significant custodial sentences.

³² The *Norwegian Government’s Action Plan for Combating Economic Crime* is available at www.regjeringen.no/

also conceal economic crime. Investigations have shown that managers of bankrupt estates detect potential crimes in somewhere between one-half and two-thirds of instituted bankruptcy proceedings. Some of these offences may be a consequence of the fact that a business has been kept going far too long. However, in many cases, they involve profit-motivated crimes. In connection with management of bankrupt estates, various forms of economic crime are detected.

According to current practice, it is simple to circumvent the rules concerning the disqualification period following bankruptcy. One problem is that the executive trustee often does not have sufficient resources to conduct the disqualification case in court. As a result of this, disqualification is only imposed in cases where there is money in the estate or where the insolvent debtor does not protest. Another problem is that an insolvent debtor has often founded a company immediately prior to the bankruptcy, and continues to function in this company after being imposed a period of disqualification. Pursuant to current legislation, it is possible to deprive the debtor of positions that he or she already holds. However, this rarely happens in practice. A natural goal should be to establish legislation that distinguishes as far as possible between “honest” and “dishonest” bankruptcies.

Crime involving unfair competition and cartels among commercial undertakings is an extremely serious and damaging activity. Such criminal activities result in weakening of competition, increased prices and less competitive tenders. They enable companies to operate inefficiently. Unnecessarily high costs are imposed on the individual links in the chain of distribution and society as a whole suffers a reduction in efficiency. In recent years, companies in Norway have been heavily fined for cartel activities. The main challenge in combating cartels consists of detecting the serious cases and ensuring that sanctions are in proportion to the extremely large profits that such infringements normally result in. The Competition Act, which entered into force in 2004, provides for two measures. Firstly, the rules concerning leniency may result in detection of more cases³³. In several other countries, such systems have proved extremely effective in putting an end to cartels. The other measure involves giving the Norwegian Competition Authority the power to impose administrative sanctions. Rules concerning sentencing in cartel cases are particularly important because such cases often result in profits of a magnitude that, for various reasons, it has been difficult to take sufficiently into consideration in Norwegian confiscation and sentencing practice.

In the most serious cases, penalties should still be imposed. In these cases, confiscation will be the only instrument for depriving offenders of the proceeds of cartel activities. Claims concerning infringement fees cannot be included as civil legal claims in criminal proceedings.

4.5 Sweden

The provisions on corporate fine were imposed in Sweden in 1986³⁴. Corporate fine was in the beginning imposed on entrepreneurs for serious crimes committed in the course of trade. The crime had to involve a serious breach of the special obligations associated with the operations or otherwise of a serious nature. The offences in question were not enumerated. On the other hand, all crimes could in principle lead to corporate criminal liability. The sanction was motivated by the existing system of sanctions which was inadequate when it came to tackling economic criminality. According to the critics there was hardly any proportion between the sentence imposed on the individual and the economic interests that may be at stake for a company.

The reform of 2005 aimed at making it easier to prosecute and convict a legal person to a corporate fine. The former requirement that the crime must have involved a serious breach of the special obligations arising from business operations or otherwise be of a serious nature was abolished. The only restriction is that corporate fine shall not be imposed for crimes for which only a fine is prescribed. The requirement that the trader has not done what is reasonably required for the prevention of crime was supplemented with a provision according to which it is enough for a

³³ Leniency entails that a cartel participant is promised immunity from penalties and other sanctions on certain conditions if he discloses information to the Norwegian Competition Authority concerning the cartel he has participated in.

³⁴ For the entire article, see Dr. Ari-Matti Nuutila (2012), *Corporate Criminal Liability in Sweden – On The Way To An Alternative Criminal Liability In Summary Procedure*, available at www.sites.google.com/site/arimattinuutila/

corporate fine when the crime was committed by a person in a leading position or a person who otherwise had a special responsibility for overseeing or control of the business.

The new strategy put forward proposals aimed at streamlining the system with corporate criminal liability and increasing the practical use of a corporate fine for violations in business. Corporate criminal liability is general in nature and can be applied to nearly all offences. This sanction should be incentive for an entrepreneur to organise activities in a manner that prevents violations, which would also be of significance in terms of fair competition in the market. For some less serious crime in business the corporate criminal liability was made primary in relation to individual responsibility.

The penalty range of a corporate fine was adjusted from 10.000 – 3 million to 5.000 – 10 million Swedish crowns. The new latitude is approximately 550 – 1.1 million Euros. In Sweden, the entrepreneur's responsibility is to some extent primary in relation to individual responsibility in the case of negligent breach of the business regulations where fines would be appropriate punishment for an individual offender. If the crime is committed by negligence and it is not likely to entail a sanction other than a fine, the individual offender may be prosecuted only if prosecution is warranted in the general interest.

To give but one example, in 2009 the Swedish Economic Crime Authority [*Ekobrottsmyndigheten*]³⁵ demanded 189 million Swedish crowns (equal to 20,8 million Euros) of corporate fines and forfeiture. The amount for the year 2010 was less than ten million Euros. Most of the cases concern environmental crimes, work safety offences, book keeping offences, tax fraud and bankruptcy crimes, but also violations of food and restaurant legislation, animal welfare offences, alcohol and cigarettes offences, lottery offences and professional road traffic violations³⁶. Also traditional crimes such as fraud have led to corporate criminal liability. In practice it is nowadays easier to establish the requirements of a corporate fine than those of individual criminal responsibility. This has led the police and the prosecutors to investigate the offence only so far that it is possible to convict the legal person to a corporate fine and leave the investigation of individual criminal responsibility aside. With an order of summary penalty of maximum 500.000 Swedish crowns to the corporation, the prosecutor can avoid a long and time consuming criminal procedure in the Court of law.

4.6 Czech Republic

The Czech Parliament adopted legislation on criminal liability of legal persons, which is a totally new concept in the Czech law. The Act has been effective since 1 January 2012. Czech criminal law was formerly based on a principle of individual criminal liability; which meant that the collective guilt was prohibited. The Act on criminal liability of legal persons now changes this principle. The Czech Republic had been the last country of European Union countries, which had not embodied the liability of companies in its legal system.

The Act applies to all legal persons, with the exception of the State, and its self-governing territories (such as municipalities and districts) when exercising public powers.

Every legal person is only a legal fiction, which means in this context that the actual legal person is liable for crimes that were committed by individuals in certain positions in the company within the scope of the company's business. The Act uses the term "imputation" of criminal behaviour; i.e. certain crimes committed by individuals acting on behalf of the company or for its interest, are imputed to the company.

Such individuals are:

- 1) a statutory body or a member of a statutory body of the company (i.e. an executive or a member of the board) or other person entitled to act on behalf of a legal person;

³⁵ *Swedish Economic Crime Authority* is available at www.ekobrottsmyndigheten.se/

³⁶ Corporate criminal liability in Sweden – on the way to an alternative criminal liability in summary procedure, by Dr. Ari-Matti Nuutila

- 2) individuals who are in leading or supervisory positions in the legal person (other than described in section a. above);
- 3) individuals who have actual influential power over a legal person; and
- 4) employees of the company in some cases.

The Act names individually 79 types of crime – mostly economic crimes, crimes against property and crimes against the environment. There are seven types of punishment mentioned in the Act, namely: dissolution of a company, confiscating of property of a company by the Czech Republic, a fine, confiscating of movables by the Czech Republic, ban on particular activity of the company, ban on public orders and ban on grants, and publication of the sentence in public media.

4.7 Hungary and Poland

The recent legal reforms in Hungary and Poland have moved away from the traditional principle of *societas delinquere non potest*³⁷ and recognise now some sort of criminal liability for legal persons³⁸.

Hungary and Poland have adopted specific legislation to address this sort of liability. However, all of these efforts are only very recent and thus practice is so far limited³⁹.

Direct criminal liability of legal persons is excluded as it is always required that a natural person's criminal responsibility is engaged and that this natural person is affiliated to the legal person and acts on its behalf [*culpa in vigilando*]. In addition, some countries accept the possibility of cumulative liability. The Polish Act on Liability of Collective Entities provides that under certain circumstances criminal liability of certain natural persons within the corporation adds to the criminal liability of the legal person. In addition, criminal liability does not exclude civil or administrative liability. In Hungary the role of quasi-penal law, i.e., the so-called system of petty offences⁴⁰, is remarkably important. However, the petty offence procedure obviously has a lower degree of independence than a judicial procedure and thus its degree of impartiality could be questioned. Administrative penal sanctions are mainly fines, but in Hungary additional coercive measures may be taken, e.g., custody. In most countries administrative penal sanctions are not recorded in a person's criminal record. However, in Poland if the penalty imposed by the criminal petty offence system consists of imprisonment, this is recorded in the criminal record of the convicted. On the other hand, although it stays in his/her criminal record, it does not constitute a ground for applying the aggravating circumstance of recidivism.

4.8 Serbia

According to the criminal code of Serbia⁴¹, a business entity is an enterprise or other legal person engaged in a business activity, as well as an entrepreneur. A legal person that, in addition to its primary activity, also conducts a business activity, shall be deemed a business entity only when engaging in that activity. In particular, the criminal code of Serbia sanctions offences against economic interests⁴².

³⁷ Undertakings are unable to commit a criminal action and so only physical individuals have the ability to infringe criminal law.

³⁸ See the *Criminal Penalties in EU Member States' Environmental Law* - Study II, DG Environment, EU Commission, available at <http://ec.europa.eu/>

³⁹ Table on legal texts providing for criminal responsibility of legal persons:

- Hungary Act 2001 of CIV on the Criminal Legal Measures for Legal Persons (24 December 2001)
- Lithuania Criminal Code (OJ No. 89-2741, 2000) - entered into force in May 2003
- Poland Act on Liability of Collective Entities (OJ No 197, item 1661, 28 October 2002)

⁴⁰ Petty offence is a branch of administrative law which is intended to ensure a quicker punishment of those offences that are certainly harmful to the environment, but are not as dangerous as those specified in the Criminal Codes. The same administrative authorities that implement and enforce administrative environmental law handle the simplified petty-offence procedure, which nevertheless shares some procedural guarantees of criminal trials.

⁴¹ Article 112 (21) of the *Criminal code of the Republic of Serbia* available at www.osce.org/

⁴² An entire chapter is dedicated to offences against economic interests. Numerous crimes are listed within this section, namely: Counterfeiting Money (Article 223), Forging Securities (Article 224), Forgery and Misuse of Credit Cards (Article

Out of these, only four crimes (Abuse of Monopolistic Position, Causing False Bankruptcy, Damaging Creditors and Abuse of Authority in Economy) specifically refer to an entrepreneur, as an economic entity. Although entrepreneurs are not exempted from committing the other crimes, the four crimes listed above seem to have a particular value vis-à-vis the economic activity, which is mainly affected by actions of business-persons.

4.9 Switzerland

Between 2000 and 2006, Switzerland extended and tightened its criminal law on corruption in three stages. Inter alia, bribery of foreign public officials is now regarded as a criminal offence and that not only individuals, but also companies can be prosecuted for corruption.

As for the criminal liability in cases of corruption, it is primarily the individual ("natural person") who is liable to punishment and is prosecuted. In the case of bribing public officials either at home or abroad, individuals are sentenced to prison for a term of up to five years or fined⁴³. Bribery in the private sector results in imprisonment for up to three years or a fine⁴⁴. Criminal liability lies not only on management and staff, but also on those who otherwise act on behalf of the company. Thus to oversee that management complies with laws, statutes, regulations, and orders is a non-transferable duty of the board of directors⁴⁵. A company ("legal entity") that "has not undertaken all requisite and reasonable organisational precautions" required to prevent the bribery of public officials or persons in the private sector is subject to criminal prosecution and a fine of up to five million Swiss francs⁴⁶. This liability applies regardless whether an individual can be called to account or not⁴⁷.

4.10 Conclusions

Different countries have adopted different approaches for holding entrepreneurs liable of any criminal offences committed in the course of their entrepreneurial activity.

In some jurisdictions (Italy), the legislation for criminal liability of entrepreneurs focuses on the high ranked officials (such as directors and officers). Particular types of crime (fraudulent, preferential or straight bankruptcy) require specific elements of criminal behaviour (such as generic, specific or simple fraud, respectively). In slightly different cases (Switzerland), economic crime (as bribery of foreign public officials) is now regarded as a criminal offence not only for individuals, but also for companies. As for the criminal liability in cases of corruption, it is primarily the individual ("natural person") who is liable to punishment and is prosecuted. Criminal liability lies not only on management and staff, but also on those who otherwise act on behalf of the company. Thus to oversee that management complies with laws, statutes, regulations, and orders is a non-transferable duty of the board of directors. In addition, a company that "has not undertaken all requisite and reasonable organisational precautions" required to prevent the economic crime is subject to criminal prosecution and a fine. The liability applies regardless whether an individual can be called to account or not. A different approach can be seen in other contexts (UK), where companies can be held criminally liable for a wide range of offences, including health and safety offences. A company will normally only be criminally liable where the commission of the offence can be attributed to someone who, at the

225), Forging Value Tokens (Article 226), Making, Acquiring and Giving to Another of Means for Counterfeiting (Article 227), Issuing of Uncovered Checks and Use of Uncovered Credit Cards (Article 228), Tax Evasion (Article 229), Smuggling (Article 230), Money Laundering (Article 231), Abuse of Monopolistic Position (Article 232), Unauthorised Use of Another's Company Name (Article 233), Misfeasance in Business (Article 234), Causing Bankruptcy (Article 235), Causing False Bankruptcy (Article 236), Damaging Creditors (Article 237), Abuse of Authority in Economy (Article 238), Damaging Business Reputation and Credit Rating (Article 239), Disclosing a Business Secret (Article 240), Preventing Control (Article 241), Illegal Production (Article 242), Illegal Trade (Article 243), Deceiving Buyers (Article 244) and Forging Symbols for marking of Goods, Measures and Weights (Article 245).

⁴³ Article 322ter and Article 322septies of Swiss criminal law (StGB)

⁴⁴ Article 23 Unfair Trade Practices Act ("UWG")

⁴⁵ Article 716a, Swiss Code of Obligations - OR

⁴⁶ According to Article 102, paragraph 2, StGB

⁴⁷ *State Secretariat for Economic Affairs - SECO* available at www.seco.admin.ch/

material time, was at or close to board level. Where an offence is committed by a company and it is proved to have been committed with the ‘consent or connivance’ of a director, manager or other senior person, that person is also guilty of the offence. The rationale behind the regulations is to enable the prosecution and punishment not only of the corporate entity but, where sufficiently culpable, those who control it. Some jurisdiction (Sweden) has focused more on “corporate fines”. These are imposed to corporation when the crime was committed by a person in a leading position or a person who otherwise had a special responsibility for overseeing or control of the business. This is a component of the corporate criminal liability, which can be applied to nearly all offences within this country. As seen above, in this instance the entrepreneur’s responsibility is to some extent primary in relation to individual responsibility in the case of negligent breach of the business regulations where fines would be appropriate punishment for an individual offender. Similarly, some country (Serbia) focus their attention on sanctions on offences against economic interests. In this case, criminal regulations specifically refer to entrepreneurs, as an economic entity.

Other examples (Norway) show a rather broader, more universal approach. In particular, measures against economic crimes have focused on area such as resources and organisation, competence-building measures (including in the police and courts), research, sanctions, increasing the efficiency of international cooperation, statutory amendments, as well as measures against money laundering and financing of terrorism.

In other jurisdictions (Czech Republic, Hungary, Poland) we noticed a conditional, yet pretty radical, switch towards criminal liability of legal persons for economic crimes. In addition, since criminal liability does not exclude civil or administrative liability, some countries accept the possibility of cumulative liability. Some of these countries have opted for a system of quasi-penal law, which target petty offences. In these cases, more coercive measure, such as custody (Hungary) or imprisonment (Poland), can be imposed in addition to or substitute of the traditional administrative sanctions, such as fines. Additionally, sectorial legislations have been used in order to introduce specific crimes and procedures⁴⁸. Legislators may decide to adopt ad-hoc regulations for relevant events, at potential high-risk⁴⁹. Rules can be focused on preventive controls.

As usually, unfortunately there is no one-size-fits-all solution. Countries have adopted different approaches according to their specific economic environment, domestic criminal situation, legal tradition, available resources and analyses of feasibility. Nevertheless, the example above can surely serve as a good starting point as to inform policy-makers and law enforcement authorities in establishing or strategizing their system in countering economic crimes.

The table presented below provides an overview of the types of liability of entrepreneurs operating in the countries that were analysed above.

⁴⁸ Inspired by the 1997 OECD Convention on fighting bribery of foreign government officials, Italian decree 231/2001 has introduced a regulatory framework for administrative/criminal liability of companies in case of crimes committed, in Italy or abroad, in the interest or to the benefit of the company, by its directors and/or employees.

⁴⁹ Italian law 114/2014, established *ad hoc* for the 2015 world exposition, taking place in Milan. This bill was explicitly passed to deter and counter corrupt activities in public procurement linked to this remarkably vast and highly publicized event. The President of ANAC (*Autorità Nazionale Anticorruzione* – National Anticorruption Authority of Italy) was assigned with functions of supervision and guarantee of the fairness and transparency of the procurement procedures.

Types of liability for entrepreneurs operating in the Countries mentioned above

Country	Elements	Criminal/s	Sanction		Law	Corporate criminal liability
			Imprisonment	Alternative		
Italy	fraud, negligence	Directors, officers and employees	3-10 y	pecuniary sanctions; injunctive sanctions (prohibition of exercise business activity); confiscation	267/1942; 80/2005; 231/2001	yes
UK	consent, connivance	Director, manager or other senior persons			Theft Act 1968; Fraud Act 2006; Bribery Act 2010	yes
Sweden	trader has not done what is reasonably required for the prevention of crime was supplemented with a provision according to which it is enough for a corporate fine when the crime was committed by a person in a leading position or a person who otherwise had a special responsibility for overseeing or control of the business	trader; a person in a leading position or a person who otherwise had a special responsibility for overseeing or control of the business		5.000 – 10.000.000 SEK		yes
Czech Republic				dissolution of a company, confiscating of property of a company by the Czech Republic, a fine, confiscating of movables by the Czech Republic, ban on particular activity of the company, ban on public orders and ban on grants, and publication of the sentence in public media.	Act on criminal liability 2012	yes
Hungary				pecuniary sanctions; custody	Criminal code	yes
Poland			yes	pecuniary sanctions	act on liability of collective entities, 2002	yes
Switzerland	has not undertaken all requisite and reasonable organisational precautions" required to prevent the bribery of public officials or persons in the private sector	on management and staff, but also on those who otherwise act on behalf of the company		criminal prosecution and fine (up to 5Ml. CHF)		yes

5 ANALYSIS OF THE PREVENTIVE MEASURES IN THE CONTEXT OF CRIMINAL PROSECUTION OF ENTREPRENEURS AS ALTERNATIVE TO ARREST

Excessive use of pre-trial detention is a global problem. According to the Open Society Justice Initiative on any given day, an estimated three million people around the world are under pre-trial detention. In the course of a single year around ten million will be detained awaiting trial⁵⁰. Pre-trial detention interferes with one of the fundamental human rights, the right to liberty. Moreover, detention prior to trial may undermine the presumption of innocence⁵¹. That is why the use of pre-trial detention should be limited to exceptional cases and needs to be justified on a case-by-case basis. International human rights law prohibits arbitrary and unnecessary use of pre-trial detention. It can be justified only when it is lawful, reasonable and necessary. Article 9(3) of International Covenant on Civil and Political Rights (hereinafter ICCPR) states⁵²: It shall not be a general rule that persons awaiting trial shall be detained in custody, but release may be subject of guarantees to appear for trial, at any other stage of judicial proceedings, and, should occasion arise, for execution of the judgment. The further interpretation of the above mentioned provision by the Human Rights Committee makes it clear that pre-trial detention is an exceptional measure and shall be used only as a measure of last resort when risk of fleeing, committing another crime or intervening with the course of justice cannot be addressed by other preventive measures⁵³. Recent research by the Open Society Initiative on pre-trial detention has confirmed that the excessive and arbitrary use of pre-trial detention has devastating consequences. It affects not only detained persons, but also their families, communities, the justice system and consumes enormous amount of public resources.

5.1 Armenia

In Armenia the criminal code stipulates that: "... Arrest and the alternative preventive measure shall be executed in respect to the accused only for his commitment of a crime for which he may be imprisoned for more than a year; or there are sufficient grounds to suppose that the suspect or the accused can commit actions mentioned in the first part of the present Article". Article 137 para. 4: "(...) upon delivering an order for arrest the court decides on the admissibility of the release of the accused on bail; if the court determines pre-trial release is permissible, it shall determine the amount of the bail. Article 139 para. 2 stipulates: "Upon the settlement of the issue of the extension of the detainment period the court shall have the right to allow the release of the accused on bail and determine the amount of the bail".

Despite the letter of the law, research shows that bail is rarely applied as a preventive measure in Armenian legal practice⁵⁴. In 2001 there were six cases registered when the preventive measure of arrest was changed to bail. In the first six months of 2003, bail was chosen only once. Out of the researched proceedings there were only two cases registered for bail, however, one of those cases was cancelled in the Court of Cassation. On 15 February 2008, during the press conference in Cassation Court of Armenia, statistical data was presented which confirms the above mentioned results. In 2007, detention as a preventive measure was applied to 2780 persons, when bail was applied to 62 persons⁵⁵. OSCE Final Report on Trial Monitoring Project in Armenia (April 2008 – July 2009)⁵⁶ also shows that the most frequently applied preventive measure was detention, which was applied in 83% of observed cases (see the Chart 1). Bail was applied only in 2% of the observed cases.

⁵⁰ Open Society Justice Initiative (2011), *The Socioeconomic Impact of Pretrial Detention*, p. 12, available at www.opensocietyfoundations.org/

⁵¹ McKay v UK, ECtHR Application no.543/03, judgment of 3 October 2006, para.42., HUDOC; see also Kudła v. Poland [GC], no. 30210/96, §§ 110, ECtHR 2000-XI.

⁵² UN General Assembly, 1966.

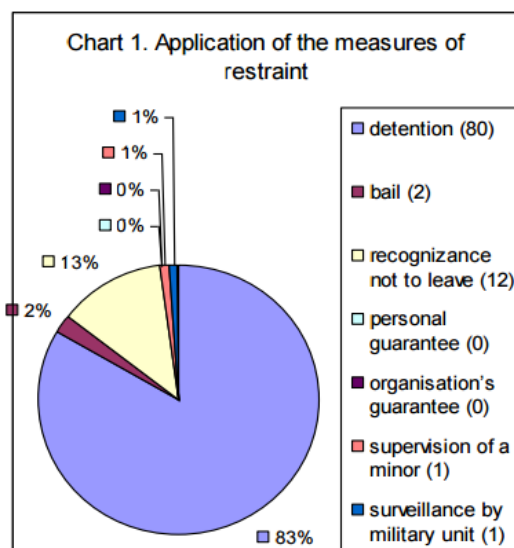
⁵³ Hugo van Alphen v. The Netherlands, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990), para. 5.8.; See also Mukong v. Cameroon, Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991, para.9.8; Hill v Spain, U.N. Doc. CCPR/C/59/D/526/1993, 2 April 1997, para. 12.3.

⁵⁴ *Bail as an alternative preventive measure in Armenia* is available at <http://law.aua.am/>

⁵⁵ Statistics provided by the Cassation Court of Armenia.

⁵⁶ *OSCE Final Report on Trial Monitoring Project in Armenia* (April 2008 – July 2009), page 20, available at www.osce.org/

Application of the measures of restraint



OSCE Final Report on Trial Monitoring Project in Armenia (April 2008 – July 2009)

Additional statistical data⁵⁷ shows that in as of 1 January 2013, 4756 persons were kept in all the penitentiary institutions of Armenia, out of which 1228 or 26% were in pre-trial detention. This percentage did not vary much over the last five years: slightly more than a quarter of the prison population are remand prisoners, waiting for their case to be concluded with a final verdict. Research of the Hungarian Helsinki Committee on the use of pre-trial detention in 16 former Soviet Union countries⁵⁸ revealed, among other things, that in all countries participating in this study (Armenia excluded), the laws require a reasoned decision in order to place someone in pre-trial detention. However, this obligation is often not observed in practice. The legal threshold for applying pre-trial detention varies strongly among analysed countries. In some, pre-trial detention may be ordered already for persons suspected of having committed an offence, which carries “a” prison sentence; in some countries the prison sentence must be more than one year, two years, four years, or five years. The Hungarian Helsinki Report sums up: “It is safe to conclude the following: Pre-trial detainees still represent a significant portion of the prison population in Central and Eastern Europe and in the countries of the former-Soviet Union: the exact percentage ranged from 10 to 40% in 2011. Alternatives to pre-trial detention are underused in the region, despite the high costs pre-trial detention represents for national budgets. It is a deeply worrying trend (...) that courts approve the motions of police officers and prosecutors to order pre-trial detention almost automatically, without assessing the individual circumstances of the case. In every country studied the ratio of these motions approved is higher than 80%, in some cases even 90% or higher.”

5.2 Poland

The code of criminal procedure (1998) lists as preventive measures, *inter alia*, detention on remand, bail and police supervision. The Code set out the margin of discretion in maintaining a specific preventive measure. Articles 213 § 1, 218 and 225 of the Code were based on the precept that detention on remand was the most extreme preventive measure and that it should not be imposed if more lenient measures were adequate. Article 213 § 1 provided: “A preventive measure [including detention on remand] shall be immediately lifted or varied, if the basis for it has ceased to exist or

⁵⁷ Council of Europe, Iuliana Carbutaru and Gerard de Jonge, *Reducing the use of custodial measures and sentences in the Republic of Armenia assessment report* available at www.coe.int/

⁵⁸ *Hungarian Helsinki Committee, Promoting the Reform of Pre-trial Detention in CEE-FSU Countries*, Introducing Good Practices (2013) available at <http://helsinki.hu/>

new circumstances have arisen which justify lifting a given measure or replacing it with a more or less severe one.” Article 225 stated that detention on remand shall not be imposed if bail or police supervision, or both of those measures, are considered adequate. Finally, Article 218 stipulated: “If there are no special reasons to the contrary, detention on remand should be quashed, in particular when: (1) it may seriously jeopardise the life or health of the accused, or (2) it would entail excessively burdensome effects for the accused or his family.” The fact that Polish Courts in the past have not been very open to alternatives to pre-trial detention has led to several critical remarks and decisions by the ECtHR because the *ultima ratio*-character of this measure was not even considered⁵⁹.

5.3 Bulgaria

The criminal code of procedure is in force since 2006. Article 63 of the new Code states:

(1) The restraining measure detention in custody shall be taken when a grounded assumption that the accused has committed a crime, which is punishable with imprisonment or other stricter punishment, and the evidence on the case indicates a real danger that the accused may abscond or commit a crime exists.

(2) Should the opposite not be found from the evidence under the case, the danger under Para 1 shall be there upon the initial disposition of detention in custody, when: a) The charge is for an offence committed repeatedly or under the conditions of a dangerous recidivism; b) The charge is for a grave malicious crime and the accused has been convicted for another grave malicious crime of general nature to imprisonment of no less than one year; c) the person has been involved as accused in a crime for which a punishment of at least ten years imprisonment or other more severe punishment is provided.

(3) Where the danger that the accused may abscond or commit another crime is over, the detention in custody shall be replaced by a lighter restraining measure or shall be cancelled.

Article 64

(4) The court shall take restraining measure detainment in custody, where the grounds of Art. 63, Para 1 appear, and if these grounds do not appear, the court shall not take restraining measure or shall take a lighter one.

5.4 Moldova

The Commentary of the Code of Criminal Procedure (CCP), edited in 2005, states the following in respect of section 191: “The first paragraph of section 191 provides for the first condition of admissibility of release under judicial control which is determined by the gravity of the offence with which the accused is charged (...) This condition [the gravity of the offence] is determined in the documents issued by the investigation body or by the prosecutor, who establish the qualification of the offence (...) The investigating judge is not empowered with assessing whether the legal qualification of the offence is correct since he does not examine the evidence on which the qualification is made (...) At the trial stage, the trial court can give a new qualification to the offence with which the accused is charged”.

5.5 Ukraine

Article 148 of the CCP, which governs the use of preventive measures, provides: “Only absent any reasons for application of a preventive measure will a defendant be released solely on a “signed promise to return.” The presumption is that a preventive measure will be applied. Despite the enactment of the law on bail in 1996, to date the statute has been little used by the prosecutors and the courts. For example, in 1997, the first full year for which statistics are available, bail was used in only 110 cases of the approximately 230,000 criminal cases heard in Ukraine⁶⁰.

⁵⁹ ECtHR case, Witold Litwa V. Poland, (Application No. 26629/95), Judgment 4 April 2000

⁶⁰ Irina Kharatyan (2010), *Bail as an alternative preventive measure in Armenia*, p.11, available at <http://law.aua.am/>

5.6 Russia

Since 1 July 2002, criminal-law matters have been governed by the CCP of the Russian Federation (Law no. 174-FZ of 18 December 2001). “Preventive measures” or “measures of restraint” include an undertaking not to leave a town or region, personal surety, bail and detention (Article 98). If necessary, the suspect or accused may be asked to give an undertaking to appear (Article 112). When deciding on a preventive measure, the competent authority is required to consider whether there are “sufficient grounds to believe” that the accused would abscond during the investigation or trial, reoffend or obstruct the establishment of the truth (Article 97). Detention may be ordered by a court if the charge carries a sentence of at least two years’ imprisonment, provided that a less restrictive preventive measure cannot be applied (Article 108 § 1).

5.7 Italy

The precautionary measures adopted during the preliminary investigations or afterwards, aim at preventing the defendant from fleeing, from committing another crime or from destroying true evidence or creating false evidence. They cannot be adopted unless there is proof that the defendant has committed a crime (*fumus commissi delicti*). The Judge competent to adopt these measures is either the Judge for the Preliminary Investigations, the Judge of the Preliminary Hearing or the Judge of the Trial, according to the phase of the proceeding they are in, when the *Pubblico Ministero* asks that the defendant's rights of movement be limited. As far as the entrepreneurs are concerned, there is a specific measure aiming at suspending or stopping their economic activity. In particular, the prosecutor may demand for the temporary interdiction from practising given professional or entrepreneurial activities

The defendant or the prosecutor can appeal against the order of the Judge before the *Tribunale della Libertà* (Court of Liberty). This court can uphold, modify or quash the Judge's order. Its decision can be appealed before the *Corte di Cassazione* (Court of Cassation). The Court of Liberty actually reviews all the evidence and must render its decision within ten days of the appeal. The *Corte di Cassazione*, on the contrary, cannot rule on merits, but only on correct procedure and correct interpretation of the law.

5.8 A special tool: Settlements

Foreign bribery remains a very serious, hideous and significant factor in the combat against corruption. The OECD Foreign Bribery Report analyses more than 400 cases worldwide involving companies or individuals from the 41 signatory countries to the OECD Anti-Bribery Convention who were involved in bribing foreign public officials⁶¹. Bribes in the analysed cases equalled 10.9% of the total transaction value on average, and 34.5% of the profits – equal to USD 13.8 million per bribe. But given the complexity and concealed nature of corrupt transactions, this is without doubt the mere tip of the iceberg⁶². Bribes are generally paid to win contracts from state-owned or controlled companies in advanced economies, rather than in the developing world, and most bribe payers and takers are from wealthy countries. Almost two-thirds of cases occurred in just four sectors⁶³. Bribes were promised, offered or given most frequently to employees of state-owned enterprises (27%), followed by customs officials (11%), health officials (7%) and defence officials (6%). In most cases, bribes were paid to obtain public procurement contracts (57%), followed by clearance of customs procedures (12%). Intermediaries were involved in three out of four foreign bribery cases. These intermediaries were agents, such as local sales and marketing agents, distributors and brokers, in 41% of cases.

The report also reveals that the time needed to conclude cases has increased over time, from around two years on average for cases concluded in 1999 to just over seven today. This may reflect the

⁶¹ OECD (2014), *Foreign Bribery Report, An Analysis of the Crime of Bribery of Foreign Public Officials*, Published on 2 December 2014, available at www.oecd.org/. The cases took place between February 1999, when the Convention came into force and June 2014.

⁶² OECD, *Scale of international bribery laid bare* by new OECD report available at www.oecd.org/

⁶³ Extractive (19%); construction (15%); transportation and storage (15%); and information and communication (10%).

increasing sophistication of bribers, the complexity for law enforcement agencies to investigate cases in several countries or that companies and individuals are less willing to settle than in the past. Governments around the world should strengthen sanctions, make settlements public and reinforce protection of whistleblowers as part of greater efforts to tackle bribery and corruption. Foreign bribery laws have seen a drastic increase in their implementation during the past decade⁶⁴. National legal frameworks for addressing foreign bribery vary considerably. The examination of national legal frameworks combating foreign bribery shows that most of them are not using full trials but rather some form of abbreviated criminal proceedings. In fact, very few cases of foreign bribery (whether against natural or legal persons) have ever gone to trial anywhere⁶⁵. In other words, shortened procedures are becoming the norm rather than the exception and this is especially true when cases involve legal persons. Different jurisdictions conduct abbreviated procedures in different ways.

Common law jurisdictions tend to prefer a negotiated process, in which the two sides—prosecution and defendant—reach a mutually acceptable agreement. This agreement is then usually presented to a judge for confirmation. The most widely used mechanism in such cases is the guilty plea. Settlements of this type, involving foreign bribery of legal persons, can be found in the United States, Canada and the United Kingdom. However, other forms have also developed. These include civil settlements in the United Kingdom, deferred and non-prosecution agreements in the United States and out-of-court restitution arrangements in Nigeria. In civil law countries, although negotiations may take place, the process tends to take the form of a proposal made by the prosecutor to the defendant to admit liability, agree to pay a specific sum of money or meet certain conditions and thus avoid a long, drawn-out procedure. While civil law practitioners would be unlikely to describe the procedures in use in their jurisdictions as “settlements,” these procedures seem to have enough in common with what happens in common law jurisdictions to justify considering them as members of the same category. For the purposes of their study, StAR⁶⁶ compiled a database of relevant cases (the StAR Database of Settlements of Foreign Bribery and Related Cases⁶⁷). It contains 395 settlements that took place in 15 different jurisdictions and relate to both natural and legal persons from 1999 through mid-2012. Of these 395 cases, 391 are from national jurisdictions and four are cases from the administrative sanctions system of the World Bank Group.

Settlements of Foreign Bribery and Related Offenses Cases, 1999 through 3 July 2012

Country jurisdiction of settlement	Total cases (no.)	Total cases (%)	Cases pertaining to	
			Individual/natural persons (no.)	Companies/legal persons (no.)
Denmark	2	0.51	0	2
Germany	42	10.63	35	7
Greece	1	0.25	0	1
Italy	11	2.78	7	4
Netherlands	8	2.03	0	8
Norway	3	0.76	1	2
Switzerland	15	3.8	1	13
United Kingdom	19	4.81	6	13

⁶⁴ According to data from the Organisation for Economic Co-operation and Development (OECD), between the 1999 advent of the OECD Anti-Bribery Convention and December 2012, there were 90 legal persons (entities) and 216 natural persons (individuals) sanctioned under criminal proceedings alone for foreign bribery, by 13 out of the 40 States Parties to the convention (see the *OECD Working Group on Bribery, Annual Report September 2013*, available at www.oecd.org/)

⁶⁵ StAR (2014), *Left out of the Bargain, Settlements in Foreign Bribery Cases and Implications for Asset Recovery* available at <http://star.worldbank.org/>

⁶⁶ The Stolen Asset Recovery Initiative (StAR) is a partnership between the World Bank Group and the United Nations Office on Drugs and Crime (UNODC) that supports international efforts to end safe havens for corrupt funds. StAR works with developing countries and financial centers to prevent the laundering of the proceeds of corruption and to facilitate more systematic and timely return of stolen assets. The Stolen Asset Recovery (StAR) Series supports the efforts of StAR and UNODC by providing practitioners with knowledge and policy tools that consolidate international good practice and wide-ranging practical experience on cutting edge issues related to anticorruption and asset recovery efforts. For more information, visit star.worldbank.org

⁶⁷ *StAR Database of Settlements of Foreign Bribery and Related Cases* is available on-line at www.worldbank.org

World Bank	4	1.01	0	4
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Data extracted from the StAR Database of Settlements of Foreign Bribery and Related Cases

Source: Left out of the Bargain (StAR, 2014)

Although the database is not exhaustive, the figures are enough to make some broad observations. First, the country with the most settlements was the United States, followed by Germany, the United Kingdom and Switzerland, in that order. StAR also finds that more than three quarters of all settlements have occurred in common law jurisdictions. However, the vast majority of the common law settlements have occurred in the United States, so the percentages are not very probative. In common law jurisdictions, settlements have taken place in Canada, Lesotho, Nigeria, the United Kingdom and the United States. In civil law jurisdictions, settlements have occurred in Costa Rica, Denmark, Germany, Greece, Italy, Japan, Kazakhstan, the Netherlands, Norway and Switzerland.

Settlements by Type of Legal System: Civil and Common Law Jurisdictions

Jurisdiction by system	Cases (no.)	Cases (%)
Civil Law: Costa Rica, Denmark, Germany, Greece, Italy, Japan, Kazakhstan, Netherlands, Norway and Switzerland	86	21.8
Common Law: Canada, Lesotho, Nigeria, United Kingdom and United States	305	77.2
Other: World Bank	4	1
Total	395	100%

Source: Left out of the Bargain (StAR, 2014)

In France for example, the law of 6 December 2013 modifies numerous provisions of criminal law and criminal procedure, as a result of a government objective to combat more effectively economic and financial wrongdoing and, in particular, corruption. This willingness to introduce tougher measures is evidenced by harsher sanctions and enhanced means of investigation now at the disposal of the investigative services⁶⁸. From then on, measures which were in the past only applicable to organised crime, can be invoked for certain offenses of corruption and influence trafficking. The law increases the potential penalties in cases of economic and financial crime. To begin with, fines have increased dramatically: for infractions linked to moral turpitude the fines have increased six-fold⁶⁹. Specifically, the fines can now be fixed at double the amount of the undue profit for corruption infractions. This innovation, inspired by competition and financial law, removes the automaticity of limited fines. The judge, therefore, can thoroughly eliminate any financial gains made through a fraudulent act. This possibility will be an effective mechanism for corruption prevention as the calculation of whether or not the illicit profits of a corrupt act outweigh the potential fine will no longer be relevant. It should be noted that the Constitutional Council⁷⁰ censored a provision in the new measures, which would have allowed fines of up to 10% of the company's annual turnover for offenses carrying a minimum prison term of five years.⁷¹ It must be noted however that the Financial Public Prosecutor does not have exclusive jurisdiction over unethical business practices (only those of a particularly complex nature and certain forms of influence trafficking). The sharing of files and cases with other authorities, therefore, will undoubtedly cause tensions notably with the Paris Public prosecutor in charge of financial affairs. The ability to plead guilty [*Comparution sur reconnaissance préalable de culpabilité*] is a relatively new development in the French legal system. It was created in 2004 and then extended in 2011 to cover a wider range of offenses including corruption and other

⁶⁸ Bruno Quentin, *Implications of the new French Law on Combating Corruption*, available at www.ethic-intelligence.com/

⁶⁹ Fines increased from €75,000 to €500,000 or from €150,000 to €1,000,000. The fines which can be imposed on legal persons (corporations) are five times higher than those which apply to natural persons). Thus, corruption of a foreign public official by a legal person or corporation is now punishable by a five million euro fine whereas previously it was limited to €750,000.

⁷⁰ Cass. Crim., 9 November 2010, n°09-88.272.

⁷¹ The Council determined that, given the provisions of Article 8 of the Declaration of the Rights of Man and of the Citizen, the measure created the risk of a disproportional response between the penalty and the seriousness of the offense.

lapses in ethical conduct. The law of December 6, 2013 modifies the procedure. The investigation or case can be reopened if the French guilty plea negotiations break down (this failure of the negotiations no longer entails an automatic referral to a criminal court). This new law could be a way for an investigating magistrate to close a specific case more rapidly by reaching an agreement with the indicted individual and the public prosecutor. In this regard the modification resembles the Anglo-Saxon approach of negotiated agreements, but differences between the two systems remain. Firstly, the practical modalities are appreciably different. Secondly and more importantly, the actual philosophy of this new mechanism is far removed from that of other negotiated settlement options like the Deferred Prosecution Agreement (DPA) or Non-Prosecution Agreement (NPA): the judgment or sentence amounts to a penalty judgment and thus involves an admission of guilt whereas the objective of both the DPA and NPA is precisely to avoid this admission. In addition, the French guilty plea has no preventive or remedial component and does not encourage the indicted person to change his or her practices unlike the DPA and NPA which are often associated with the imposition of a monitor to ensure changes are made. It would be inaccurate therefore to view the French guilty plea as an equivalent to the American system of negotiated agreements. The contrast is undoubtedly a result of the profound differences in the foundations on which the two systems were built.

It must be noted that various jurisdictions are using not only criminal but also civil and administrative laws to prosecute foreign bribery and related offenses. The use of these provisions frequently overlaps, as is clear from the concurrent use of criminal enforcement by the U.S. Department of Justice (DOJ) and civil enforcement by the Securities and Exchange Commission (SEC) and the predominant use in Germany of criminal provisions against natural persons and administrative provisions against legal persons.

Forms of Liability in Public Legal Actions: Criminal, Civil and Administrative

	Criminal	Civil	Administrative
Possible punishments	Imprisonment Fines and other monetary penalties Asset confiscation and restitution	Fines and other monetary penalties Asset confiscation and restitution	Fines and other monetary penalties Asset confiscation and restitution Warning Revocations. Suspension of licences and permits
Source of authority	Written laws	Written laws or case law	Written laws or regulations
Burden of proof	Beyond a reasonable doubt or intimate conviction	Probability, more likely than not to have committed the infraction	Highly variable, usually lower than criminal standard
Objectives	Punish, deter, rehabilitate, restore victim's position	Punish, deter, confiscate profits derived from illegal activity, compensate for harm caused	Punish, deter, regulate activities
Enforcers	Prosecutors	Prosecutors, regulators	Regulators*
Example of enforcement agencies	US Department of Justice	US Securities and Exchange Commission	US Securities and Exchange Commission
	UK Serious Fraud Office	UK Serious Fraud Office	Financial Services Authority**

* in some countries (including Germany), prosecutors have the power to enforce administrative laws.

** in April 2013, the Financial Services Authorities became two different authorities: The Financial Conduct Authorities (www.fca.org.uk) regulates the services industry in the United Kingdom

Source: Left out of the Bargain (StAR, 2014)

Following Tables summarise typical forms and sanctions applied in settlements based on criminal offenses and settlements based on civil enforcement powers.

Settlements: Criminal Forms and Sanction

Example of forms of settlement	Example of monetary sanctions
Non-Prosecution Agreement	Criminal Fine
Deferred Prosecution Agreement	Forfeiture of criminal proceeds
Guilty Plea	Restitution
Penalty Notice	Contribution to investigations and/or prosecution costs
Summary Punishment Order	Contribution to charity (existing or newly created as part of the settlement)
	Reparations

Settlements: Civil Forms and Sanction

Example of forms of settlement	Example of monetary sanctions
Civil recovery order	Disgorgement of profits
Consent to cease-and-desist order	Prejudgement interest
Consent	Civil fine or penalty
Consent to final judgement	Asset forfeiture
Consent to permanent injunction	Debarment from future projects
Penalty notice	Payment of taxes owed
Tax settlement	

Source: Left out of the Bargain (StAR, 2014)

5.9 Conclusions

In the context of criminal prosecution of entrepreneurs, the application of preventive measures as alternative to arrest remains *de facto* and often inconsistent *vis-à-vis* the regulations in place. Despite the existence of several legal solutions, laying down conditions for its limitation and mitigation, trial detention remains a major concern around the world and in Europe in particular. There is an abundance of examples in which clearly stipulated regulations fail in practice to achieve their well-intentioned objectives. The unreasonable gap between the soundness of the legislation and the inadequacy of the enforcement thereof continues to be the main obstacle for the establishment of a solid, fair and impartial legal system. The reasons for this kind of inefficiency may be found in several points of the frameworks, such as: an unjustified discretion in the hands of law enforcement officials and judges, added to a confusion on who is the responsible entity for the case and a lack of appropriate awareness and training; some laxity in the monitoring authorities, combined with an absent follow up and sanctioning system and finally poor statistical dataset.

In addition, in order to respond to the unprecedented complexity of economic crimes and bribes in particular, States are increasingly adopting the use of settlements. Although very efficient, this instrument can be criticised under different angles. Those in favour of settlements, indicate the undoubtable efficacy of such a tool: the guilty entrepreneur, including corporations, recognizes their wrongdoing and, most importantly, they pay the fine. On the other hand though, many of the elements characterizing the procedures to reach the settlement, such as the conditions to enter such agreement, including the amount of the reparation, too often remain fully or partially unveiled to the population. This opacity impedes public scrutiny, creates uncertainty of law and lack of trust towards the judiciary in particular and the institutions as a whole. The consequence is the risk of a common sense of dual-justice: a public and hard one, for regular citizens and the other one, softer and more confidential, for the so called white collar criminals.

6 OVERVIEW OF THE EUROPEAN COURT OF HUMAN RIGHTS CASE-LAW RELATED TO THE ISSUES OF CRIMINAL LIABILITY OF ENTREPRENEURS AS WELL AS ALTERNATIVE MEASURES

Requirements of ECHR and Case Law of European Court of Human Rights Article 5 § 3 of the Convention, the relevant part of which provides: “Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.” The European Court of Human Rights provides interpretation of this article in its Case Law. In case *Litwa v Poland*⁷² the Court states: “The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained”. In case *Kaszczyńiec v. Poland* the European Court of Human Rights states: “...under Article 5 § 3 the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of ensuring his appearance at trial”. Further interpreting application of Article 5 § 3 in cases, where the national court decides on continuing detention, the Court stated: “That provision does not give the judicial authorities a choice between either bringing the accused to trial within a reasonable time or granting him provisional release – even subject to guarantees. Until conviction he must be presumed innocent and the purpose of Article 5 § 3 is essentially to require his provisional release once his continuing detention ceases to be reasonable”.⁷³

In *Jablonski v. Poland*, when the domestic courts extended the applicant’s detention beyond the statutory time-limit (three years) because he had previously inflicted injuries on himself and had thus obstructed the progress of the trial, the Court found a violation of Article 5 (3), arguing that the national courts – when they decided that the applicant should be kept in detention in order to ensure the proper conduct of the trial – failed to consider any alternative “preventive measure” such as bail or police supervision.⁷⁴

In case *Polonskiy v. Russia*, the Court noted: “The presumption is in favour of release. The second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. ... A person charged with an offence must always be released pending trial unless the State can show that there are “relevant and sufficient” reasons to justify the continued detention (see, among other authorities, *Castravet v. Moldova*, no. 23393/05, §§ 30 and 32, 13 March 2007; *McKay v. the United Kingdom [GC]*, no. 543/03, § 41, ECtHR 2006-...; *Jabłoński v. Poland*, no. 33492/96, § 83, 21 December 2000; and *Neumeister v. Austria*, 27 June 1968, § 4, Series A no. 8).⁷⁵

The national judicial authorities must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and must set them out in their decisions dismissing the applications for release.⁷⁶

In case *Lind v. Russia*, the Court noted: “The Court has frequently found a violation of Article 5 § 3 of the Convention in Russian cases where the domestic courts prolonged an applicant’s detention relying essentially on the gravity of the charges and using stereotyped formula without addressing concrete facts or considering alternative preventive measures”.⁷⁷ The Court is aware of the fact that a

⁷² *Litwa against Poland*, judgment of 4 April 2000, §78

⁷³ *Neumeister v. Austria* judgment of 27 June 1968, Series A no. 8, § 4

⁷⁴ Monica Macovei, A guide to the implementation of Art.5 of the ECtHR handbooks, No. 5; *Jablonski v. Poland*, para. 111

⁷⁵ *Polonskiy v. Russia*, 19 March 2009, para. 139

⁷⁶ *Polonskiy v. Russia*, 19 March 2009

⁷⁷ see *Belevitskiy v. Russia*, no. 72967/01, §§ 99 et seq., 1 March 2007; *Khudobin v. Russia*, no. 59696/00, §§ 103 et seq., ECtHR 2006-... (extracts); *Mamedova v. Russia*, cited above, §§ 72 et seq.; *Dolgova v. Russia*, cited above, §§ 38 et seq.; *Khudoyorov v. Russia*, cited above, §§ 172 et seq.; *Rokhlina v. Russia*, cited above, §§ 63 et seq.; *Panchenko v. Russia*, cited above, §§ 91 et seq.; and *Smirnova v. Russia*, nos. 46133/99 and 48183/99, §§ 56 et seq., ECtHR 2003-IX (extracts)

majority of the above-mentioned cases concerned longer periods of deprivation of liberty and that against that background one year may be regarded as a relatively short period spent in detention. Article 5 § 3 of the Convention, however, cannot be seen as authorising detention unconditionally provided that it lasts no longer than a certain period. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities⁷⁸. The fact that the maximum time-limit permitted by the domestic law was not exceeded is not a decisive element for the Court's assessment, either. The calculation of the domestic time-limits depended solely on the gravity of the charges which was decided upon by the prosecution and was not subject to an effective judicial review (see *Shcheglyuk*, cited above, § 43). Having regard to the above, the Court considers that by failing to address concrete facts or consider alternative "preventive measures" and by relying essentially on the gravity of the charges, the authorities prolonged the applicant's detention on grounds which, although "relevant", cannot be regarded as "sufficient". In these circumstances is not necessary to examine whether the proceedings were conducted with "special diligence". There has therefore been a violation of Article 5 § 3 of the Convention⁷⁹.

⁷⁸ see *Shishkov v. Bulgaria*, no. 38822/97, § 66, ECtHR 2003-I (extracts).

⁷⁹ *Lind v. Russia*, 02/06/2008, para. 83-86 15 Concerning compliance of National legislation with the requirements of the ECtHR, in case of *Boicenco v. Moldova*, the ECtHR held: "The Court notes that in *S.B.C. v. the United Kingdom* (no. 39360/98, 19 June 2001) it found a violation of Article 5 § 3 because the English law did not allow the right of bail to a particular category of accused.

7 ECHR SPECIFIC CASES RELATED TO ENTREPRENEURSHIP

7.1 Khodorkovskiy (no. 2) and Lebedev (no. 2) v. Russia

Application no. 11082/06 & 13772/05

Charges against two Russian business executives were brought in accordance with the law, but the hearing of their case was unfair and their placement in remote penal colonies unjustified

The case of Khodorkovskiy (no. 2) and Lebedev (no. 2) v. Russia concerned criminal proceedings which ended in a judgment of September 2005 by the Moscow City Court in which Mr Khodorkovskiy and Mr Lebedev, two former top-managers and major shareholders of a large industrial group, were found guilty of large-scale tax evasion and fraud. The applicants are Mikhail Borisovich Khodorkovskiy and Platon Leonidovich Lebedev, Russian nationals. Before their arrest the applicants were top-managers and major shareholders of a large industrial group which included Yukos Oil Company, Apatit mining enterprise, Menatep bank and a number of other large business entities. In 2003 the General Prosecutor's Office opened a criminal case which concerned allegedly fraudulent privatisation of Apatit mining enterprise in 1994. In July 2003, Mr Lebedev was arrested in connection with this case and detained on remand. In October 2003, Mr Khodorkovskiy was also arrested, charged and detained.

The trial started in June 2004 and lasted until May 2005. In the courtroom the applicants were detained in an iron cage which separated them from the public and from their lawyers. Any exchange of written documents between the applicants and their lawyers was only possible if the presiding judge reviewed the documents beforehand. The applicant's oral exchanges during the trial could be overheard by the convoy officers. At the trial the court examined dozens of witnesses for the prosecution and studied hundreds of pages of written materials.

On 16 May 2005, the applicants were found guilty on account of most of the charges and sentenced to nine years' imprisonment. In addition, they were ordered to pay to the State 17,395,449,282 Russian roubles (over 510 million euros) on account of unpaid company taxes. On 22 September 2005, the Moscow City Court upheld the lower court's judgment in the main and reduced the sentence to eight years' imprisonment. Both applicants were sent to serve their sentences in remote colonies.

*Decision of the Court*⁸⁰

- **Article 3: Conditions in the remand prison** (Mr Lebedev) no violation (unanimously)

The treatment complained of did not reach the minimum threshold of severity required for a violation of Article 3 to be found.

- **Article 3: Conditions in the courtroom** (Mr Lebedev): **violation (unanimously)**

In response to Mr Lebedev's complaint that he had been placed in a metal cage during the court hearings, the Court noted that he had been accused of non-violent crimes, had no previous criminal record and that there was no evidence that he had been predisposed to violence. His trial was covered by almost all major national and international mass media, so he had been permanently exposed to the public in such a setting. The security arrangements, given their cumulative effect, had been excessive and could reasonably have been perceived by Mr Lebedev and the public as humiliating.

- **Article 5 § 3: Length of detention on remand:** (Mr Lebedev): **violation (unanimously)**

Mr Lebedev was arrested on 2 July 2003. In Lebedev (no. 1), the Court did not find a violation of Article 5 § 3 on account of the length of his detention during the first months after his arrest. The question in the present case was whether the ensuing period of his detention until his conviction in May 2005 had been justified. The Court noted that after the end of the investigation the risk of

⁸⁰ This press release is a document produced by the Registry. Decisions, judgments and further information about the Court can be found on www.echr.coe.int.

tampering with evidence had diminished. In addition, Mr Lebedev had lost control over the company and his ability to influence its personnel was therefore reduced. The Court therefore concluded that the domestic courts had failed to conduct a genuine judicial review of the need for Mr Lebedev's continued detention.

- **Article 5 § 4: Conduct of the detention proceedings (Mr Lebedev): violation** on account of the delayed examination of the detention order of 14 December 2004, no violation on other points (unanimously)

The Court noted a certain disparity between the parties in the preparation of the proceedings in which Mr Lebedev's detention had been extended, but found that it was not incompatible with Article 5 § 4 of the Convention.

- **Article 6 § 1: Impartiality:** no violation (unanimously)

The applicants claimed that procedural decisions taken by Judge Kolesnikova during their trial had shown that she was biased. However, in the opinion of the Court, that was not sufficient to reveal that the judge had had any particular predisposition against the applicants.

- **Article 6 § 1: Fairness of the proceedings:** no violation (unanimously)

- a) *Time and facilities for the preparation of the defence:* The Court noted that Mr Lebedev had eight months and 20 days to study over 41,000 pages of his case-file and Mr Khodorkovskiy had five months and 18 days to study over 55,000 pages of his. The Court noted the complexity of the documents, the need to make notes, compare documents and discuss the case-file with lawyers. It also took account of the breaks in the schedule of working with the case-file and of uncomfortable conditions in which the applicants had had to work (impossibility to make photocopies in prison, inability of the applicants to keep copies of the documents in their cells, restrictions on receiving copies of documents from their lawyers, etc.). However, the applicants were not ordinary defendants: each of them had been assisted by a team of highly professional lawyers of great renown, all of them privately retained. Even if they were unable to study each and every document in the case file personally, that task could have been entrusted to their lawyers. The lawyers were able to make photocopies; the applicants were allowed to take notes from the case-file and keep their notebooks with them.
- b) *Lawyer-client confidentiality:* **violation** (unanimously)

The applicants claimed that the authorities did not respect confidentiality of their contacts with their lawyers, in breach of Article 6 § 1 and 3 (c). The Court criticised the authorities for searching Mr Drel's office. Mr Drel was the lawyer for both applicants in the same criminal case in which the searches had been ordered and the investigators were aware of that fact. The authorities had not explained what sort of information Mr Drel had allegedly had, how important it had been for the investigation and whether it could have been obtained by other means. At the relevant time Mr Drel was not under suspicion of any kind. Most significantly, the search in Mr Drel's office had not been authorised by a separate court warrant, as required by the law.

The Court also examined the conditions in which the applicants had been able to communicate with their lawyers in the courtroom. Judge Kolesnikova had requested the defence lawyers to show her all written documents they wished to exchange with the applicants. Furthermore, the oral consultations between the applicants and their lawyers could have been overheard by the convoy officers. During the adjournments, the lawyers had to discuss the case with their clients in the close vicinity of the prison guards. The Court concluded that the secrecy of the applicants' exchanges, both oral and written, with their lawyers had therefore been seriously impaired during the hearings.

Taking and examination of evidence: **violation** (unanimously)

The Court found in particular that the refusal of the domestic courts to hear at the trial two experts who had prepared an economic study for the prosecution was contrary to the requirements of Article 6 §§ 1 and 3 (d). Those experts had clearly been "key witnesses", since their conclusions went to the heart of some of the charges against the applicants. The defence had taken no part in the preparation

of the study and had not been able to put questions to the experts at an earlier stage. The only option available for the defence was to obtain oral questioning of “specialists” at the trial, but “specialists” had a different procedural status to “experts”, as they had no access to primary materials in the case and the court refused to consider their written opinions. Thus, the defence had been unable to challenge the opinions of experts invited by the prosecution. It had therefore perturbed the equality of arms between the parties.

In view of the above findings, the Court considered that there was no need to examine other allegations by the applicants concerning the process of administration of evidence.

- **Article 8: *Transfer to remote penal colonies*: violation** (unanimously)

The applicants complained that their transfer to the penal colonies situated in Siberia and in the Far North had made it impossible for them to see their families. The Court accepted that the situation complained of constituted an interference with the applicants’ “private and family life”. The Federal Service of Execution of Sentence (FSIN) had the power to dispatch convicts from big cities to the colonies situated in other regions to avoid overcrowding. However, for such situations the Russian Code of Execution of Sentences established a simple rule: it allowed the sending of a convict to the next closest region, but not several thousand kilometres away. A general plan establishing quotas for the distribution of convicts amongst colonies existed, but it did not describe a comprehensible method of distribution of convicts. The Court stressed that the distribution of the prison population must not remain entirely at the discretion of the administrative bodies and that the interests of the convicts in maintaining at least some family and social ties had to somehow be taken into account.

- **Article 18: *Political motivation of the prosecution*: no violation** (unanimously)

The applicants alleged that their prosecution was politically motivated. The Court recalled that the whole structure of the Convention rested on the general assumption that public authorities in the member States acted in good faith. A mere suspicion that the authorities had used their powers for ulterior purposes was not sufficient to prove a violation of Article 18; instead a very exacting standard of proof had to be applied. The Court agreed that circumstantial evidence surrounding the applicants’ arrest and trial constituted at first glance a case of politically motivated prosecution. Indeed, this opinion of the applicants’ trial had been corroborated by political figures, international organisations and courts in many European countries. Thus, the Court was prepared to admit that some government officials had their own reasons to push for the applicants’ prosecution. However, it was insufficient to conclude that the applicants would not have been convicted otherwise. None of the accusations against the applicants had concerned their political activities, the applicants were not opposition leaders or public officials and the acts they stood accused of were not directly related to their participation in political life. The accusations against the applicants had been serious and the case against them had had a “healthy core”. Thus, even if there were an element of improper motivation behind their prosecution, it did not grant immunity from answering the accusations against them. Nor did it make the prosecution illegitimate “from start to finish”, as alleged by the applicants. Ultimately, the Court stressed that the above finding did not preclude it from examining under Article 18 the subsequent proceedings concerning the applicants’ conviction in the second criminal case.

- **Article 34: *Harassment of the applicants’ lawyers* (Mr Khodorkovskiy): violation** (unanimously)

Mr Khodorkovskiy complained that, in order to prevent him from complaining to European Court of Human Rights, the authorities had harassed his lawyers. The Court observed that Mr Khodorkovskiy had submitted a very detailed and well-supported application to show notably: the negative attitude of the law-enforcement agencies vis-à-vis his legal team, especially after the end of the first trial; several attempts by the prosecution to disbar his lawyers, subjecting them to administrative and financial checks; and, the denial of two of his foreign lawyers visas, one having been expelled from Russia in a precipitated manner. The aim of such disciplinary and other measures directed against Mr Khodorkovskiy’s lawyers was far from evident and the Government was silent on those points. It was therefore natural to assume that such measures had been linked to his case before this Court. It

therefore concluded that the authorities had failed to respect their obligation under Article 34 of the Convention to not interfere with the right of individual petition to the Court.

7.2 Krejčíř v. the Czech Republic

Application 39298/04, Judgment 26 March 2009, Section V

In 2003 the applicant, a national of the Czech Republic, was arrested and questioned in the framework of proceedings against him for the fraudulent use of funds borrowed from a bank under credit contracts. In September 2003 a district court ordered his detention pending trial. He appealed to the municipal court, which dismissed his appeal in October 2003, without a hearing being held. The Constitutional Court also rejected his appeal. The district court dismissed an initial request for the applicant's release. In December 2003, the public prosecutor at the Supreme Court decided that the applicant should remain in detention in view of the seriousness of the offences he stood accused of, the parallel criminal proceedings against him, the possibility of him obtaining forged papers and absconding and the pressure already brought to bear on witnesses. The prosecutor concluded that the time-limit on pre-trial detention provided for in Article 67 b) of the Code of Criminal Procedure (CCP) did not apply to the present case. The second sentence of Article 71 § 2 of the CCP, permitting exceptions to the time-limit on pre-trial detention where there was a risk of pressure being brought to bear on witnesses, was applied. An appeal lodged by the applicant against that decision was dismissed by the Supreme Court in January 2004, without a hearing being held. The applicant also challenged a decision dismissing his second application for release. Constitutional appeals he lodged against the decisions of December 2003 and January 2004 were dismissed. The applicant was subsequently released on a decision of the public prosecutor, adopted by virtue of provisions of the CCP placing time-limits on detention. During a house search in 2005 the applicant absconded and went first to the Seychelles then to South Africa, where he was arrested. Proceedings were under way to extradite him to the Czech Republic.

- **Article 5 § 3 (a): *Lawfulness of the applicant's continued detention*: violation** (unanimously).

The applicant alleged that the decisions to keep him in detention had merely reiterated the facts mentioned in the decision ordering his detention pending trial. He also complained that the prosecutor had considered, in the reasons for his decision of December 2003, that there were grounds for applying the second sentence of Article 71 § 2 of the CCP, permitting exceptions to the time-limit on pre-trial detention where there was a risk of pressure being brought to bear on witnesses, to his case, whereas in his opinion it was for a court to order such a measure and include it in the operative part of the corresponding decision. In this case it was the first extension of the applicant's detention, after the initial three-month period that was at issue. It should be noted in this connection that the court decision of October 2003 made no reference to the application of the second sentence of Article 71 § 2 of the CCP. Indeed, it appeared to be incompatible with the guarantees of Article 5 of the Convention that a court ordering pre-trial detention should anticipate a decision whether or not to extend the measure that was to be taken three months later. Furthermore, it is not disputed that the decision to extend the applicant's detention was taken by the prosecutor, who did not present the requisite guarantees of independence. In this case the Constitutional Court had acknowledged that the CCP did not specify in what manner the non-application of the three-month time-limit provided for in the second sentence of Article 71 § 2 should be declared. Such a shortcoming in domestic law was incompatible with the need for legal certainty and foreseeability. In this context it was not without importance that the impugned provision of Article 71 § 2 of the CCP had been amended on 1 July 2004 to require a judge or a court to take such decisions in the future. Lastly, the national authorities had reached the decision that the applicant should remain in detention also for a legal reason other than that given in Article 71 § 2. However, as the continuing application of Article 67 b) of the CCP had affected the applicant's conditions of detention and the possibility of him being released subject to guarantees and in view of the paramount importance of protecting individuals against arbitrariness, the above-mentioned shortcoming in domestic law and the situation that had resulted in this case had violated the applicant's right under Article 5 § 3. That being so, it was not necessary to examine

whether the reasons given by the courts had been “relevant and sufficient” or whether the competent national authorities had displayed “special diligence” in the conduct of the proceedings.

- **Article 5 § 3 (b):** no violation (unanimously).

The applicant also complained that he had not been able to aspire to conditional release because of the application of Articles 73 and 73a of the CCP. Article 5 § 3 of the Convention obliged the domestic courts to review a person’s pre-trial detention in order to guarantee that they would be released when circumstances no longer justified their further detention. In the present case Articles 73 and 73a § 1 of the CCP combined with Article 67 b) had formed a legal barrier to the courts’ consideration of the guarantees offered by the applicant in his first two applications for release. That barrier had remained in place until the courts had decided no longer to hold against the applicant the risk, provided for in Article 67 b) du CCP, of pressure being brought to bear on witnesses. It followed, on the one hand, that the lack of judicial review only concerned the guarantees meant to replace the applicant’s pre-trial detention and, on the other, that it had been limited in time. In the light of the decisions taken by various courts throughout the impugned detention, however, it could not be said that there had been no judicial review whatsoever of the continuing existence of reasonable suspicion that the applicant had committed the offence in question, or of other grounds justifying the deprivation of his liberty. The requirements of Article 5 § 3 had therefore been respected.

- **Article 5 § 4: *Adversarial nature of the proceedings*:** **violation** (unanimously).

The applicant alleged that in its decision of October 2003 the Municipal Court had substituted its own reasoning for the superficial, illogical reasons put forward by the first-instance court but without giving him a chance to comment. He also complained that the Supreme Court, in January 2004, had based its decision on a translation of a witness statement to which the defence had not had access and had not given him an opportunity to be heard. It was not in dispute that the applicant’s appeal against the decision reached by the District Court in September 2003, following his hearing, had been examined without a hearing and without the parties being present. While in certain circumstances, particularly when the interested party had been able to appear before the court ruling on his detention in the first instance, the procedural requirements under Article 5 § 4 did not require him to appear again before the appeal courts, the particular circumstances in which the proceedings took place nevertheless had to be borne in mind to determine whether the proceedings afforded the safeguards provided for in Article 5 § 4. In this case the situation certainly appeared to be a particular one in so far as it was not disputed that the Municipal Court had knowingly considerably expanded on and concretised the grounds for the applicant’s detention which the District Court had formulated in fairly vague terms. Furthermore, the Municipal Court had requested additional documents from the prosecutor. While it was true that all these documents had been in the case file, where counsel for the defence could have consulted them, there was no way the applicant could have known in advance what specific facts the Municipal Court would rely on to place him in detention. Furthermore, the decision concerned had had at least one major effect on his detention, in so far as it had subsequently been argued that the facts mentioned in that decision justified the application of the second sentence of Article 71 § 2 of the CCP and therefore the non-application of the three-month time-limit on pre-trial detention, because of the risk of pressure being brought to bear on witnesses. Also, it was quite clear that the applicant had been unable to obtain a hearing by applying for release as such hearings were far from automatic at that time. As to the circumstances in which the decision of January 2004 was adopted, it was not disputed that the defence had not known about the impugned document until almost a month after the impugned Supreme Court decision. Lastly, in December 2003, the decision to keep the applicant in detention by virtue of Article 71 § 3 du CCP had been taken by a prosecutor, not by a court as provided for under Article 5 § 4, so the Supreme Court should have provided all the proper guarantees necessary for the type of deprivation of liberty in question; instead, it had determined the appeal without a hearing, that is, without giving the applicant a chance orally to express his views on matters essential to the review of the lawfulness of his detention, even though the previous hearing had been held not just a few weeks but several months earlier. In the particular circumstances of the case, where the decisions of September and December 2003 were concerned, there had been no judicial remedy available to the applicant which satisfied the requirements of Article 5 § 4 of the Convention.

7.3 Novruz Ismayilov v. Azerbaijan

Application no. 16794/05

The case concerned the pre-trial detention of the founder of a private bank (the Borçalı Bank) in Azerbaijan. The applicant, Novruz Binnat oğlu Ismayilov, is an Azerbaijani national who was born in 1961 and is currently serving a nine-year sentence in a prison in Baku for fraud, embezzlement and tax evasion. The charges were brought against him following a financial audit and, as a result, he was arrested in September 2004 and placed in detention for an initial period of three months. His remand in custody was then repeatedly extended until his conviction in January 2006. Relying in particular on Article 5 § 3 (entitlement to trial within a reasonable time or to release pending trial) of the European Convention on Human Rights, Mr Ismayilov alleged that the national courts had failed to sufficiently justify his pre-trial detention, noting in particular that he had always collaborated with the investigating authorities before his arrest and that no account had been taken of his personal situation (he was a permanent resident with family ties, work references and no previous criminal record). Also relying on Article 5 § 4 (right to have lawfulness of detention decided speedily by a court) of the Convention, he alleged that the judicial review of the lawfulness of his continued detention had been unfair. Notably, he complained that the hearings concerning the extension of his pre-trial detention had been held in his absence, that his lawyer had not been informed of the date and place of a hearing held in December 2004 and that the national courts had not addressed his specific arguments for release.

- Violation of **Article 5 § 3**
- Violation of **Article 5 § 4**

7.4 Gal v. Ukraine

Application no. 6759/11

The applicant, Oleksandr Gal, is a Ukrainian national who was born in 1961 and lives in Poltava (Ukraine). The case concerned his pre-trial detention.

Mr Gal, who is an entrepreneur in the food supply sector, was arrested in November 2010 after criminal proceedings had been brought against him on suspicion of having unlawfully increased food supply prices. According to his submissions, he was initially remanded in custody for more than 72 hours – the maximum time permitted under national law – without a court decision. His pre-trial detention was subsequently extended several times by the courts, referring in particular to the gravity of the charges and a risk of interference with the investigation, until his release in March 2011. His lawyer's complaints about the alleged unlawfulness of his detention were dismissed.

Relying in particular on Article 5 §§ 1, 3 and 4 (right to liberty and security / entitlement to trial within a reasonable time or to release pending trial / right to have lawfulness of detention decided speedily by a court), Mr Gal complained that his detention had been unlawful and unreasonable; that he had not been brought promptly before a court after his arrest; and that the complaint about the unlawfulness of his detention had not been examined promptly.

- Violation of **Article 5 §§ 1 and 3** – in respect of the initial period of the Mr Gal's detention
- Violation of **Article 5 § 1** – in respect of Mr Gal's detention from 8 November through 29 December 2010 and between 5 February and 25 March 2011
- No violation of **Article 5 § 4**

7.5 Miladinov and Others v. “The former Yugoslav Republic of Macedonia”

Application nos. 46398/09, 50570/09 and 50576/09

The applicants, Dimitar Miladinov, Dimitrija Golaboski and Georgi Miladinov, are Macedonian nationals who were born in 1966, 1953 and 1961 respectively. They live in Struga and Ohrid (‘the former Yugoslav Republic of Macedonia’). The case concerned the applicants' complaints about their detention on remand on money laundering charges. In December 2008 Dimitar and Georgi Miladinov were remanded in custody and Mr Golaboski was placed under house arrest following the opening of

an investigation into crimes allegedly committed by people involved in the bankruptcy proceedings of a company. The accused included the applicants, who were private entrepreneurs at the time, as well as trustees, trial judges, lawyers, notaries and civil servants. Their initial detention, based on the reasonable suspicion that they had committed a crime and the possibility of them interfering with the investigation, was ordered until March 2009. After that, Mr Golaboski's house arrest was extended another six times and the other two applicants' detention another ten times on the basis that there was a risk of their absconding and reoffending. Ultimately, in January 2010 all three applicants were found guilty, Dimitar and Georgi Miladinov being sentenced to six and a half years' imprisonment and Mr Golaboski to two years.

Relying in particular on Article 5 §§ 3 and 4 (right to liberty and security / right to have lawfulness of detention decided speedily by a court), the applicants complained about the court orders extending their detention on remand and the proceedings for review of those orders. They alleged in particular that the courts had not given concrete and sufficient reasons for their detention; that there had been no oral hearing in the proceedings for review of their detention; and, that those proceedings had not been adversarial because the public prosecutor's written observations to the Court of Appeal in reply to their appeals against the orders to extend their detention had not been communicated to them.

- Violation of **Article 5 § 3** – on account of the lack of concrete and sufficient reasons for the applicants' detention on remand
- Violation of **Article 5 § 4** – due to the absence of an oral hearing in the proceedings for review of the applicants' detention and non-observance of the principle of equality of arms in the proceedings before the Court of Appeal

In summary, article 5 of the Convention appears to be the most sensitive and exposed to violations as far as entrepreneurship is concerned. In principle, lengthy deprivation of liberty (including detention on remand and renewals thereof) seem to be allowed, provided that the decision are supported by solid considerations, clear justifications and always giving the applicant a chance to express his/her views. Also articles 6 (Right to a fair trial) and 8 (Right to respect for private and family life) seem at stake in these kind of situations. In particular, we have seen how time and facilities for the preparation of the defence, lawyer-client confidentiality and taking and examination of evidence are critical issues to be considered when dealing with article 6 par. 1. Equality of the arms' standard demands for the defendant to be able to know and understand the chief of accusations, have appropriate conditions (time and resources) to prepare the defensive strategy and finally contest all the points (evidence, facts, expertise) s/he intends to challenge.

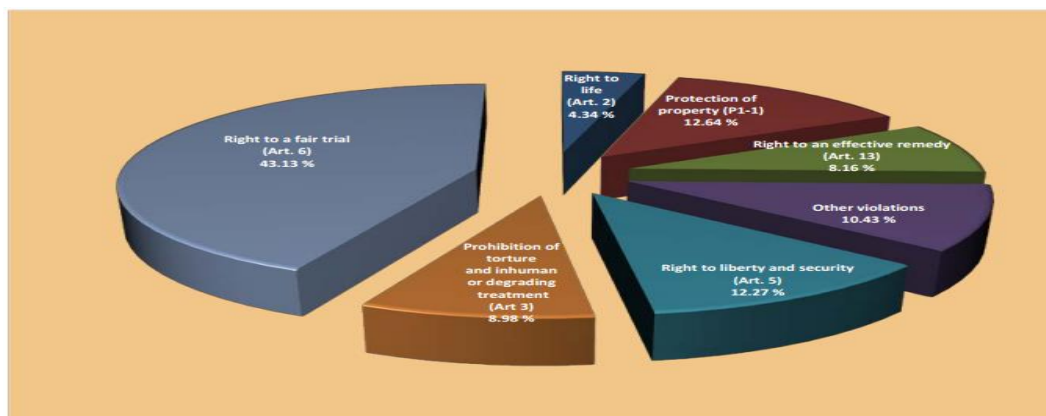
The conditions imply a serene and protected relationship with the lawyers and their experts, as well as the possibility to play at the same level and rules as does the prosecution.

Articles/Cases	Khodorkovskiy (no. 2) and Lebedev (no. 2) v. Russia (application nos. 11082/06 and 13772/05)	Krejčíř v. the Czech Republic - 39298/04, Judgment 26.3.2009 [Section V]	Novruz Ismayilov v. Azerbaijan (application no. 16794/05)	Gal v. Ukraine (no. 6759/11)	Miladinov and Others v. 'The former Yugoslav Republic of Macedonia' (nos. 46398/09, 50570/09, and 50576/09)
Article 3	Violation (conditions in the courtroom (Mr Lebedev)				
Article 5 § 1				Violation (in respect of Mr Gal's detention from 8 November through 29 December 2010 and between 5 February and 25 March 2011)	
Article 5 § 3	Violation (length of detention on remand, Mr Lebedev)	Violation (Lawfulness of the applicant's continued detention); No violation for Compatibility of certain provisions of domestic law with Article 5 § 3 of the Convention	Violation	Violation (in respect of the initial period of the Mr Gal's detention)	Violation (on account of the lack of concrete and sufficient reasons for the applicants' detention on remand)
Article 5 § 4	Violation (conduct of the detention proceedings, Mr Lebedev)	Violation (Adversarial nature of the proceedings)	Violation	No Violation	Violation (due to the absence of an oral hearing in the proceedings for review of the applicants' detention and non-observance of the principle of equality of arms in the proceedings before the Court of Appeal)
Article 6 § 1	no violation (impartiality); Violation (Lawyer-client confidentiality); Violation (Taking and examination of evidence)				
Article 8	Violation (transfer to remote penal colonies)				
Article 34	Violation (harassment of the applicants' lawyers, Mr Khodorkovskiy)				

In addition, it is interesting to notice how the breach of article 5 of the Convention stands as the 3rd most important caseload for the Court⁸¹.

⁸¹ Council of Europe (2014) *Overview 1959-2014 ECHR*, available at www.echr.coe.int/

Subject-matter of the Court's violation judgements



Violation by Article and by State

	Total number of judgments	Judgments finding a violation	Judgments finding no violation	Friendly settlements/settlements	Other judgments ¹	Right to life - deprivation of life	Lack of effective investigation	Inhuman or degrading treatment	Prohibition of torture ²	Lack of effective investigation	Prohibition of slavery/forced labour	Right to liberty and security	Right to a fair trial ³	Length of proceedings	No punishment without law	Right to respect for private and family life	Freedom of religion, conscience and belief	Freedom of assembly and association	Right to marry	Prohibition of discrimination	Protection of property	Right to education	Right to free elections	Right not to be tried or punished twice	Other Articles of the Convention			
1959-2014	Total	Total	Total	Total	Total	2	2	3	3	3	3	4	5	6	6	6	7	8	9	10	11	12	13	14	P1-1	P1-2	P1-3	P7-4
Albania	53	40	4	2	7				1	2	1			1	28	5	10	1	1			16		18				
Andorra	6	3	1	1	1									2									1					
Armenia	52	47	3		2				1	7	1			22	17		1		3	1	7		1	1	10		1	
Austria	344	245	61	24	14				1	4		1	10	90	94			16	1	34	1	14	26	4		1	4	
Azerbaijan	87	83		2	2		2	1	10	7			17	36	6	15			4	7		6		26		11		
Belgium	205	148	25	16	16	2			1	15	1		44	53	57			10		4		11	9	1				
Bosnia and Herzegovina	40	35	5						1	1			6	10	1	14	1	1				1	3	26				
Bulgaria	545	496	31	5	13	15	27	3	55	32	1		256	72	179	6		55	5	10	11	154	8	75	1	2	1	
Croatia	290	240	21	26	3	2	6		11	7			20	81	93	3		29		1	1	32	4	19			2	
Cyprus	63	52	5	3	3				1	3	1	1	4	8	35		1	7		1		11	2	4	1			
Czech Republic	214	183	14	11	6	1	1		2	2			29	66	79			19		1	1	16	2	12				
Denmark	43	14	17	11	1								1	1	8			2		1	1	2		1				
Estonia	42	34	7	1						6	1		10	10	6		4	1				6						
Finland	178	133	32	9	4								2	37	60			24		18		10		2		3		
France	935	691	144	64	36	6	3	2	25		8	2	61	263	282	1	3	40	4	31	6	34	9	30				
Georgia	60	46	11	1	2	1	3		17	9			17	11	5	1		3	2	1	1	4	4	6	1			
Germany	276	176	76	11	13				3				28	19	102	1	9	20		7	2	23	12	3				
Greece	834	744	25	20	45	4	3	1	67	6			60	124	475	10		8	12	10	5	190	13	71	3			
Hungary	363	346	8	6	3	1			12	4			30	14	253		1	13		18	6	10	3	10	3			
Iceland	15	12		3									1	4					4	2				1				
Ireland	32	21	6	1	4					1			2	5	11			5		1		7	1					
Italy	2,312	1,760	60	353	139	2	5	4	26	4			29	273	1189	13	3	145		8	3	83	5	351	1	17	1	
Latvia	100	83	13	3	1	1	2		15	10			51	16	11		1	24	3	1		4	1	1	3			
Liechtenstein	6	5	1										1	1	2					1		1						
Lithuania	104	81	16	7		3	3		6	1			19	20	27	1		13			1	2	4	12		1		
	Total	Total	Total	Total	Total	2	2	3	3	3	3	4	5	6	6	6	7	8	9	10	11	12	13	14	P1-1	P1-2	P1-3	P7-4
Luxembourg	43	32	8	3			1							12	17			4		3	1	3	1	1				
Malta	61	43	8		10	1			1				16	9	9	1	1	4		3			3	13				
Republic of Moldova	297	270	4	2	21	2	7	9	65	37			66	116	11	18		19	4	17	13	43	4	99	2			
Monaco	2	2											1	2														
Montenegro	18	17	1						1				1	3	4	4		1		2		2		4				
Netherlands	145	85	33	16	11		4	1	8				28	25	8			17		7		2	3	1				
Norway	39	27	12										1	11	2			7		5				1				
Poland	1,070	905	107	42	16	6	5	2	32	8			295	105	425	3		103	1	23	1	24	4	51				
Portugal	289	216	10	56	7								2	27	122	4		8		19		30	1	45				
Romania	1,113	1,004	34	24	51	8	27	2	151	50			104	397	114	40	3	71	1	22	5	20	27	457	3			
Russian Federation	1,604	1,503	74	13	14	244	265	46	504	132	13	1	605	655	172	64	1	131	8	26	15	368	10	501	2	3	9	
San Marino	13	9	1	2	1								1	7	2					1				1				
Serbia	115	101	8		6		2		3	4			6	25	23	26		12		6		17	2	37				
Slovak Republic	322	287	10	21	4	2	2	1	4	2			44	31	196	2		18		9		33	2	8				
Slovenia	323	304	15	3	1				19	3			6	12	256	3		8		1		262	1	2				
Spain	131	84	41	3	3				2	7			5	41	13		4	10		4		1	4	2				
Sweden	138	56	52	26	4	1		1	4	1			2	27	12	1		9		2	1	2	1	6			1	
Switzerland	152	94	50	5	3		1		1	1	2		15	31	7			22	1	14	1	1	2	4				
The former Yugoslav Republic of Macedonia*	109	99	6	3	1	1		2	1	6			14	28	59	5		2		1		9		6				
Turkey	3,095	2,733	64	204	94	121	173	29	294	184			671	801	574	60	4	89	9	248	63	261	11	641	5	8	3	
Ukraine	1,002	987	10	2	3	9	30	12	117	53			203	481	298	29	1	46	3	10	4	185	2	336	2		2	
United Kingdom	513	301	123	67	22	2	20	2	17		1	1	64	91	27		1	67	1	11	4	4	33	44	3	2	5	
Sub-total	14,877	1,257	1,072	587	435	595	123	1,513	574	27	5	2,871	4,198	5,331	336	39	1,085	59	591	165	8	1,935	232	2,898	12	67	15	283
Total																												

* This table has been generated automatically since 2012, using the conclusions in the HUDOC database.

1. Other judgments: just satisfaction, revision, preliminary objections and lack of jurisdiction.

2. Figures may include conditional violations.

3. Figures are available only from 2013.

** Some judgments concern several States.

Source: Council of Europe (2014) Overview 1959-2014 ECHR

8 MAIN CONCLUSIONS

Criminal liability linked to entrepreneurship has been changing dramatically during the past decades. In order to overcome paucity of management and complexity in prosecutions, which could have led to unsolved investigations or unpunished criminals, both prosecutors and legislators have stepped forward and limited the range of actions of corporations. As a matter of fact, originally initiated in common law jurisdictions, corporate criminal liability is nowadays a well-recognised, accepted and institutionalised principle. Nevertheless, the individuals behind the company remain directly or indirectly criminally responsible for their acts and omissions. Rather than a substitution of responsibility, we recognise a liability that is, according to specific situation, additional, supplementary or complementary to the original one. This new tool has been endorsed and enforced in all kind of different forms, ranging from the typically criminal, quasi-criminal and/or administrative liability. Each formulation has its own declinations, conditions, applicability, prerogatives, advantages and consequences.

As far as preventive measures against suspects are considered, pre-trial detention still plays an important and rather hideous role. Despite international standards and monitoring systems in place, the limitation of liberty too often results in measures that are unsubstantiated, under motivated, unfair and consequently extremely hard to challenge for the regular suspect. Well established human rights' jurisprudence has not been blind or silent face this concern. Recently and repeatedly, the European Court of Human Rights has denounced the invasion of a suspect's legitimate right to a fair defence, i.e. based on full understanding of the accusation, protected access to legal assistance and opportunity to properly and thoroughly counter any allegation. Reality shows that, additionally to the lack of adversarial nature of the proceedings, unjust accused has often times been the victim of not only illegitimate and inhumane imprisonment, but also breach in family ties, property as well as reputation.

Much still remains to be done in order to reduce and finally stop abuse of power against private entrepreneurs. A combination of strong international standards, with attentive monitoring systems in place, equipped with binding instruments, together with higher domestic awareness and responsive authorities are some of the elements of a winning strategy. This systematic, all-inclusive approach will be necessary in order to tackle the problem in an efficient and definitive fashion.