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Project to strengthen anti-corruption and anti-money laundering systems in the Czech Republic

Technical paper:
Challenges of implementation of Liability of Legal Persons

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1 EXECUTIVE SUMMARY

The issue of liability of legal persons is an important and in many ways complex task for contemporary societies. In the current economic and social environment, legal persons play an important role by undertaking a wide array of activities. In cases, activities carried out by legal persons or those acting on behalf or for the interest of the legal persons are contrary to the law. Such situations have become a challenge for the modern world, as until recently, most legislation had developed detailed standards for holding individuals (natural persons) responsible for their actions, but had provided scarce regulation regarding the activities of legal persons. The challenge becomes even greater when dealing with multinational corporations.

This technical paper was prepared within the project to "Strengthen the anti-corruption and anti-money laundering systems in the Czech Republic" (ACAMOL –CZ). The paper provides an overview of the challenges in the implementation of the criminal liability for legal persons, describes the different approaches to criminalisation taken by various countries, some common difficulties in the imputation/attribution of liability of legal persons, and also discusses the challenges of investigation.

The document was prepared as a support paper for the discussions that took place at a workshop organised in Prague on 26 January 2016. The set of conclusions/recommendations presented in chapter 4 of this document were developed based on the discussions that took place at the workshop.

2 CHALLENGES IN THE IMPLEMENTATION OF CRIMINAL LIABILITY FOR LEGAL PERSONS

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

2.1 Differences in approach to criminalisation

Given the increasingly transnational nature of corruption and related crimes, it is important to have a familiarity with the different approaches of states to legal person liability. In particular, those making requests to other jurisdictions, whether for evidence via mutual legal assistance (MLA) or information and intelligence via administrative (informal) assistance, will find that having such an understanding is a pre-requisite in ensuring effective and practical co-operation. Similarly, any case involving an extradition request or consideration of concurrent jurisdiction will require a similar awareness.

There are, essentially, four broad systems of legal person liability:

i. Criminal;
ii. Quasi-criminal;
iii. Administrative (for crimes);
iv. Administrative (for administrative violations).

However, only the first three meet the international standard.[1]

The approach of a state to criminalisation may be further sub-divided and will depend on two main factors:

i. The type of legal system involved (common law states displaying a different approach to those states with a civil law or Roman law tradition);
ii. The basis of jurisdiction being claimed in relation to corruption offences themselves.

Each system has its own advantages and challenges; whilst some challenges are common across some or all of the systems.

The following should be borne in mind by the Czech Republic when looking to identify lessons to be learnt from elsewhere:

i. Having investigative tools available is fundamental to implementation. Criminal, rather than administrative proceedings are at an advantage in that regard. Coercive actions such as search

[1] See table of instruments annexed hereto.

and seizure, surveillance, interception of communications and undercover deployment are typically only available in criminal cases.

However, in those states with administrative liability, there has usually been a criminal investigation carried out. In such circumstances, the product of such investigative means will be able to be used as part of the proof against the legal person. An example is the Siemens case in Germany. It should be noted, though, that if a criminal investigation against the natural person has not taken place or has not yielded evidence, it may mean that an investigation against the legal person does not have covert or coercive means available to it. Both the Russian Federation and Bulgaria have encountered this difficulty. By its very nature, a quasi-criminal approach may encounter similar difficulties.

ii. Mutual legal assistance (MLA) is, by its nature, international co-operation in criminal matters. Administrative proceedings, therefore, present difficulties, although UNCAC does seek to open the door to the provision of assistance in civil and administrative proceedings (Article 43(1)). If a Czech prosecutor is seeking assistance from a state with administrative liability, it should be that evidence will be obtainable on the basis of judicial process; certainly in Germany and Italy (with specific laws to ensure availability of MLA in respect of legal persons) there should be no difficulty; however, the absence of such legislation in Bulgaria and the Russian Federation is likely to present difficulties there.

As to requests made by states with administrative liability, in most cases a request will be made during the judicial stage where a natural person is under investigation and so no obstacles should be encountered. However, where the legal person is being investigated separately or where criminal proceedings against the natural person have concluded, problems are likely to arise; save, again, where the law has specifically addressed this, as in the German and Italian examples.

iii. An investigation of a legal person may be lengthy. Consequently, a state that has a limitation period (for investigations and/or prosecution) must ensure that these are long enough to ensure adequate investigative opportunities.

iv. The available sanctioning must be effective, proportionate and dissuasive. Although reputation will be important to most corporates, the reality is that the stigma of conviction is not as effective as a means of deterrent in the case of a legal person.

Many legal persons will be resilient to the effects of the financial penalties that are available in many jurisdictions. To meet the challenge, therefore, it is important that debarment from bidding, dissolution/suspension and (in appropriate sectors) professional exclusion are considered.

v. Many states have encountered difficulties of definition and interpretation. For instance: where liability depends upon the act of a natural person (i.e. imputation, attribution and the quasi-criminal), effective implementation may be thwarted if the categories or parameters of such individuals are drawn too narrowly. Similarly, where there is a requirement to show a

connection between the legal person and the act or misconduct of a natural person (i.e. "for the benefit of"; "on behalf of"; or, "in favour of"), there may not be detailed explanation or interpretation in the law itself, requiring instead that a court read the phrase in a natural and ordinary way. That may cause difficulties of certainty and consistency.

vi. The liability of the legal person should be autonomous. This consideration has two distinct strands: The conviction of the natural person should not be a requirement for legal person liability, and the legal person should be capable of being investigated and tried in separate proceedings. Additionally, the liability of the legal person must not preclude a natural person being proceeded against for the same crime. The second aspect here is perhaps best described as procedural autonomy.

A further consideration in building effective implementation is to ensure that a legal person may be prosecuted even where no natural person has been identified. In other words, this would enable proceedings to take place where it can be proved that the crime was committed by an individual or individuals for the benefit of the natural person, but it cannot be shown who was responsible. This is effective in circumstances where, for instance, a board of directors, or some of its members, have behaved criminally, but individual involvement cannot be ascertained. As an example, the laws of both Georgia and Latvia provide for this.

vii. A frequent and important problem is that of how to proceed against a legal person's successor entity where, for instance, the legal person has been subject to a corporate reorganisation. Good practice dictates that such restructuring, and even a merger, should not defeat the liability that would otherwise be brought to bear. The most effective way of achieving is to ensure that the law includes preventive measures. These might include suspending the ability to dissolve, liquidate or merge once criminal proceedings have been initiated. In addition, measures that ensure assets will not be reduced or siphoned off may also be considered.

2.2 Common law approach to liability of legal person

In considering the common law model, focus will be placed on the UK and Canada.

2.2.1 United Kingdom (UK)

In the UK, the Bribery Act 2010 (which was passed to bring the UK corruption offences in line with international standards and in order to comply with the OECD Anti-Bribery Convention) does not expressly mention liability for legal persons. The word "person" in legislation is construed (by the Interpretation Act 1978) as including not only natural persons but also "a body of persons corporate or unincorporated".

The difficulty faced by the UK, and the common law generally, is the difficulty in attributing criminal acts to a legal person at common law. The concept of criminal liability for a corporation grew up in the nineteenth century when it was relatively straightforward to identify who, in fact, ran a company. Unfortunately, with few changes, the nineteenth century test remains the one still in place today. In the UK, where an offence requires proof of a mental element such as intent, a finding of liability in relation to a legal person depends on identifying someone in a corporation with an appropriate level of authority who can be said to possess the state of mind of the corporation: in other words, the "directing" or "controlling" mind.

The traditional test of who was the controlling mind, was the so-called 'identification theory'. That worked on the basis that certain officers within a corporation are the embodiment of it when it acts in the course of its business. The acts and states of mind of such company officers are deemed to be those of the company. The leading case is that of *Tesco Supermarkets Limited v Nattrass* [1972] AC 153 which restricts such liability to the acts of "the board of directors, the managing director, and perhaps other superior managers of the company who carry out functions of management, and speak and act as the company". Thus, on the basis of this test, one needs to consider, inter alia, the constitution of the company, its memorandum or articles of association, the actions of directors in general meetings etc and the extent, if any, of delegation.

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

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

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

In addition to the criminal responsibility of legal entities, the UK has taken the innovative step of holding commercial organisations to account, under the Bribery Act 2010, for failing to prevent bribery. This provision has significance for prosecutors and law enforcement globally, as it has an extremely wide jurisdictional reach and could result in requests to other states which will attract challenge before local courts.

The offence of 'failing to prevent bribery' is set out in section 7 of the Act and creates a strict liability offence of 'failing to prevent bribery' even if there was no corrupt intent. This is designed to make legal persons, whether they are large or small, culpable for bribery committed on their behalf, be it by their directors, senior managers or anyone else in a position to make or receive a bribe in exchange for an advantage to that business. The only defence will be for a company to show that it had in place "adequate procedures" to prevent bribery and corruption.

As indicated, the offence has wide reach, as it includes a UK commercial organisation (incorporated or acting as a partnership in the UK carries on business in the UK or elsewhere), any other body

corporate/partnership (wherever incorporated) which carries on a business, or part of a business, in any part of the UK. The company will be held liable where someone associated with the organisation is found to have bribed another person with the intention of obtaining or retaining business or an advantage in the conduct of business. Such persons 'associated' with the organisation could include employees, agents, sub-contractors and joint-venture arrangements (amongst others). The bribery could take place anywhere in the world.

The offence has altered the corporate landscape, and one that was heavily debated in the UK prior to the entering into force of the Act on 1 July 2011. Following consultations with the commercial sector, civil society organisations such as TI (UK), and other relevant stakeholders, the Government issued a set of guidelines of best practice on what would amount to 'adequate procedures'. The Guidelines are founded on 6 main principles:

1. Proportionate procedures (relates to the nature, scale and complexity of the activities)
2. Top-level commitment (to prevent bribery and foster a culture within the organisation of non-tolerance to bribery)
3. Risk assessment (company must assess the nature and extent of its exposure to potential external and internal risks, such as country, sectoral, transaction, business opportunity and business partnership risks. Therefore, for those companies engaged in high risk industries such as defence and aerospace, extractive industries and construction and/or operating in countries low down on the corruption index, the onus would be higher
4. Due diligence (who will perform services on behalf of the organisation)
5. Communication, including training (ensure that the bribery prevention policies and procedures are embedded and understood throughout the organisation)
6. Monitoring and review (companies will need to put in place systems to monitor and evaluate the effectiveness of their bribery prevention procedures and adapt, where necessary)

Counter-intuitively, those principles also serve to highlight to prosecutors and investigators generally, those key aspects of corporate governance, structure and organisation which should be the subject of investigation in a criminal inquiry and which will often provide evidential leads.

The Bribery Act also introduces an enhanced individual liability in section 14, and is aimed at individuals who are senior officers of a body corporate and who consent or connive in a substantive bribery offence committed by the legal person (i.e. the body corporate itself). This would, for instance, catch the company director whose involvement is not sufficient to render him/her liable under ordinary principles of liability, but who has, by action or inaction, facilitated the commission of the substantive crime.

An illustration of :

- Self-reporting;
- Financial settlement;
- Monitoring.

In 2009, the engineering corporate, Mabey & Johnson, became the first company to be prosecuted in

the UK for corrupt practices in overseas contracts and also for breaching a United Nations embargo on trade with Iraq[2]. In 2008, following a self-referral to the Serious Fraud Office, the company admitted to corrupt practices in a number of jurisdictions, namely, Angola, Bangladesh, Ghana, Jamaica, Madagascar and Mozambique. In negotiations with the SFO, the company agreed to plead guilty to the Jamaica and Ghana offences and to the UN sanctions breaches, and agreed that it would be subject to financial penalties and an independent monitoring regime reporting to the SFO. The court imposed financial penalties, a confiscation order, and costs against the company. It also ordered reparations to be paid by the company to the UN and to the governments of Jamaica and Ghana[3]. In total the financial penalty amounted to approximately £6.6 million.

2.2.2 Canada

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

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

2.2.3 New Zealand

Canada is not the only common law state to have sought a workable reformulation of the test of attribution. New Zealand has also moved away from the strict identification theory as generally understood. In New Zealand, although criminal responsibility of a corporation still depends upon assigning responsibility on the basis of a culpable act and of the requisite state of mind of a representative of the corporation, the position of that representative does not have be to that of a "directing mind". Rather, the test is whether the director or employee of the corporation had actual authority within it in relation to the area of the alleged conduct. In essence, does the natural person in question have real control on behalf of the legal person, over the activities which relate to the alleged offence? (For the avoidance of doubt, the position in New Zealand remains the common law one that

[2]At the time it was also under investigation for making payments to the then Iraqi government in 2001/2002 for contracts to supply bridges bought by Iraq with revenue controlled by the UN under the "oil-for-food" programme. Two directors, Charles Forsyth and David Mabey were convicted at Southwark Crown Court on 10 February 2011 of making illegal payments to Iraq in breach of UN sanctions. On 23 February 2011 both men were sentenced to 21 months imprisonment and 8 months' imprisonment respectively and disqualified from acting as company director for 5 years' and 2 years', respectively, SFO Press Releases 10 February and 23 February 2011.

[3] Fines: Ghana £750,000, Jamaica £750,000, Iraq £2 million; Confiscation order £1.1million; Reparations - Ghana £658,000 Jamaica £139,000 Iraq £618,000 (total reparations £1,413,611); Costs to the SFO £350,000 and first year monitoring cost up to £250,000 – SFO Press Release, 25 September 2009, and transcript of sentencing remarks by HH Judge Rivlin

the conviction of the natural person is not needed as a pre-condition to the prosecution of the legal person).

2.3 The 'vicarious liability' model

2.3.1 United States of America (USA)

Given the wide jurisdiction taken by the US, particularly in corruption and financial crime prosecutions, practitioners and judges should become familiar with the relevant provisions under US law. In the US (unlike in common law systems), a company is criminally liable for the acts of its directors, officials or employees, whenever they act within the scope of their duties and for the benefit of the company. Importantly, these elements are interpreted broadly to the extent that an argument cannot be advanced on behalf of a company that the act of giving or authorising a bribe is itself outside the scope of duties when the company is the beneficiary of the unlawful conduct.

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

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

Two notable early cases that paved the way for current US approach:

(i) Siemens AG: In December 2008, Siemens reached plea agreements with the US Department of Justice (DOJ), US Securities & Exchange Commission (SEC) [4] and the Munich Prosecutor's Office.

Matters came to light in 2006 when law enforcement officials in Germany executed a number of search warrants at the offices of Siemens and the homes of its senior executives. Following the search by the German law enforcement agencies, Siemens voluntarily disclosed its activities to US Department of Justice (DOJ) and US SEC, and provided full co-operation to law enforcement in both Germany and the US.

The US DOJ preferred four separate indictments relating to Siemens AG, Siemens SA (Argentina), Siemens Bangladesh Ltd and Siemens SA (Venezuela)[5]. In addition, the US SEC brought a civil

[4] Case: 1 :08-cv-02167, United States District Court for the District of Columbia

[5] (i) Case no. 08cr367 – US v Siemens AG (pleaded to 2 counts (i) violating internal control provisions of FCPA (ii) violating the books and records provisions of the FCPA); sentenced to pay a fine of $448,500,000 and ordered to pay a special assessment fee of $800; (2) Case no. 08cr 368 – US v Siemens S.A (Argentina) – pleaded guilty to one count of conspiracy to violate the books and records provisions of the FCPA; ordered to pay a fine of $500,000 and will be ordered to pay a special assessment fee of $400; (3) Case no. 08cr 369 – US v Siemens Bangladesh Ltd – pleaded guilty to one count of conspiracy to violate the anti-bribery provisions and the books and records provisions; ordered to pay a fine of $500,000 and also be ordered to pay a special assessment fee of $400; (4) Case no. 08cr 370 – US v Siemens S.A (Venezuela) – pleaded guilty to one count of conspiracy to violate the anti-bribery provisions and the books and records provisions; ordered to pay a fine of $500,000 and be ordered to pay a special assessment fee also of $400

action against Siemens AG[6] which included allegations related to the bribery of foreign officials in connection with the same projects as the US DOJ against Siemens S.A. Argentina, Siemens Bangladesh Limited and Siemens S.A. Venezuela, but in addition, the SEC's disposition related to allegations of corruption in Vietnam, Israel, Mexico, Nigeria, China and Russia.

Siemens AG pleaded to two counts of violating the books and records and internal controls provisions of the Foreign Corrupt Practices Act (FCPA) 1977; Siemens Argentina pleaded to one count of conspiracy to violate FCPA; whilst Siemens Bangladesh Ltd and Siemens SA (Venezuela) pleaded to a count of violating the anti-bribery and books and records provisions of the FCPA.

Siemens was ordered to pay a fine of $448.5million, whilst Siemens Argentina, Venezuela and Bangladesh were each ordered to pay $500,000 in fines (total financial penalty was $450million) and $350million in disgorgement of profits to settle the SEC's charges[7].

In Germany, the company agreed to pay a fine of €395million in relation to charges relating to a corporate failure to supervise its offices and employees and another €201million in relation to a similar investigation relating to Siemens' former Communications Group. The total amount paid to authorities in Germany in connection with these legal proceedings to €596million[8].

The total financial penalties imposed for both US and Germany proceedings amount to approximately $1.6billion[9]. In addition to the financial penalties, Siemens was required to retain an independent compliance monitor programme for 4 years. [10]

(ii) Statoil: an international Norwegian energy company, with operations in 34 countries was also held accountable both in Norway and the US following media disclosure of corruption.

The company was investigated by the National Authority for Investigation and Prosecution of Economic and Environmental Crime ("Økokrim"). On June 29, 2004, Økokrim issued penalty notices to Statoil in the amount of approximately $3 million, and to the Senior Executive in the amount of approximately $30,000, charging them with violating Norway's trading-in-influence statute[11]. Statoil and the Senior Executive agreed to pay the penalties without admitting or denying the violations.

In the US, Statoil entered into a Deferred Prosecution Agreement (DPA) in October 2006 (filed on 13 October 2006) with the US DOJ, Criminal Division, Fraud Section, and the United States Attorney's Office for the Southern District of New York. The Criminal Information[12] lodged with the US District Court contained two counts against Statoil, ASA. Count 1 of the Information alleges a violation of the FCPA (bribery)[13] and Count 2 relates to falsifying books and records[14].

[6] Case no. 08cv2167 – US SEC v Siemens AG (civil action)

[7] Transcript of the Plea Hearing & Sentence, US District Court for the District of Columbia, 15 December 2008

[8] Siemens Annual Report issued on 3 December 2009 (section 30 of the Consolidated Financial Statements, page 179 – 181.

[9] US DOJ Press Statement of 15 December 2008

[10] Siemens also agreed to pay US$100 million to agreed anti-corruption organizations over a period of not more than 15 years.

[11] Article 276(c) of the Norwegian Criminal Code

[12] Case 06 Crim 960

[13] Title 15, United States Code, Section 78dd-1(a)

As part of the settlement agreement Statoil had to agree to the following underlying conduct:

1. Statoil agreed that they had paid bribes to an Iranian public servant in June 2002 and January 2003, with the aim of securing contracts for Statoil in the development of stages 6, 7 & 8 of the South Pars oil and gas field in Iran.
2. Statoil agreed that bribes were paid to secure other contracts in the country, and to get hold of confidential information.
3. Statoil agrees that they had used wrong accounting procedures in order to hide the bribes from their records.
4. The settlement also stipulated that no Statoil employee or representative for the company could make any statements to the media that contradicts the verdict for the following three years.

The Settlements included a monetary component consisting of a fine of US$ 10.5 million[15] and the confiscation of benefits gained by the violations of the FCPA payments ("disgorgement") of US$10.5 million. As Statoil had also paid a criminal fine of approximately US$ 3 million[16] under the penalty notice ("*forelegg*") issued by Norwegian authorities (*Økokrim*), the Norwegian fine was deducted from the US fine making a total penalty of $7.5million[17] In relation to the SEC proceedings Statoil agreed a disgorgement of $10.5million[18]. The DPA was discharged on 18 November 2009[19] after Statoil had fulfilled all the obligations set out in the terms of the DPA.

In relation to foreign bribery, it should be noted that the FCPA 1977 takes the principle further, and also imposes criminal liability on legal persons for foreign bribery committed by third parties acting as agents. In the past few years the US has enjoyed a level of success in bringing corporates to account under the FCPA 'books and records' provisions[20] by both the US Department of Justice (DOJ) and the US Securities & Exchange Commission (SEC) through a combinations of measures: plea to underlying criminal conduct (invariably counts under the 'books and records' provisions), deferred prosecution agreement (DPA) by both US DOJ and SEC (this was an innovative step for US SEC in relation to companies under the FCPA), independent monitors, financial penalties and disgorgement of profit.

[14] Title 15, United States Code, Sections 78m(b) (2) (A), 78m(b) (5) and 78ff

[15] Paragraph 19 of the Deferred Prosecution Agreement between Statoil ASA and the US DOJ, Fraud section and US State Attorney's Office for the Southern District of New York

[16] NOK20,000,000 (see paragraph 19, ibid)

[17] Paragraph 19, ibid

[18] Paragraph VII (iii) of the Administrative Proceeding, File No. 3-12453

[19] US DOJ Press Statement of 19 November 2009 *'The Department of Justice has received the final report of the compliance consultant and determined that Statoil has fully complied with all of its obligations under the deferred prosecution agreement, including the obligation to adopt the compliance-related recommendations of the compliance consultant. Accordingly, on Nov. 18, 2009, the Department filed a motion with the court to dismiss with prejudice the criminal information against Statoil. Yesterday, in federal court in Manhattan, U.S. District Judge Richard J. Holwell granted that motion and dismissed the charges.'*

[20] A key provision of the US FCPA and reflected in both the OECD Anti-Bribery Convention and CoE Criminal Law Convention on Corruption to cover 'off the books' payment or a disguised commission.

This model of enforcement has been highlighted by the OECD Bribery Working Group[21] as an example of good practice developed within the U.S.; it has also had the benefit of coaxing corporates to implement vigorous compliance programmes to eliminate the risk of bribery.

2.4 'Imputed or Deemed' Liability

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

An example is the Criminal Code in France which allows a judge, in respect of active bribery as well as other prescribed offences, to assign criminal responsibility to legal persons. At the same time the French provision does not preclude the prosecution of a natural person or persons.

From the OECD Phase 2 evaluation of France, the underlying principles in relation to France's approach can be stated thus:

i. A delegation or sub-delegation of power to an employee or subordinate is sufficient for the employee or subordinate to be treated as a representative of the legal person for the purposes of criminal liability (query, also, whether de facto delegation will suffice?).
ii. "Legal Person" includes not only commercial companies but also not-for-profit entities such as trade associations and also public law legal persons such as local authorities, semi-public companies and public institutions.
iii. A legal person might be able to avoid the imputation of criminal liability by allowing itself to be taken over.
iv. The bribe has to be on behalf of the legal person. What, therefore, of the position when, for instance, a legal person has an internal policy of refusing to offer bribes?
v. If an employee or insubordinate does not have a delegated authority, it seems uncertain whether there is still a basis for liability: for instance, would an employee have to have acted on the orders, or with the authorisation of, a company representative? Alternatively, will knowledge of the bribe of someone with delegated authority in that particular area be sufficient?
vi. A natural person will have committed the bribery offence. He/she will be identified.

Some further assistance is provided by the following:

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

(ii) Norway introduced criminal liability for legal persons in 1991, which has been increasingly used to hold companies to account in relation to foreign bribery[22]. In principle, Norwegian law does not

[21] http://www.oecd.org/document/33/0,3746,en_21571361_44315115_46223073_1_1_1_1,00.html

[22] The OECD Phase 3 Review of Norway (June 2011) praised the efforts of Økokrim in the investigation and prosecution of companies involved in foreign bribery: http://www.oecd.org/document/24/0,3746,en_2649_37447_1933144_1_1_1_37447,00.html

require the involvement of a leading person within the company or enterprise; thus liability may be triggered by the acts of a single employee who is not part of the management structure.

However, it is governed by a special set of discretionary criteria. Section 48a(1) of the Penal Code provides that when a penal provision is contravened by a person who has acted on behalf of an enterprise, the enterprise may be liable to a penalty: "This applies even if no individual person may be punished for the contravention." In deciding whether the legal person will be liable for a penalty, the court will consider:

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

2.5 Quasi-criminal liability

This approach has been followed by Azerbaijan, Latvia and Ukraine and involves the application of criminal law measures to legal persons. Thus, when one of a category of natural persons (e.g. employees, corporate directors, or corporate representatives) commits the substantive criminal offence for the benefit of the legal person, punitive measures may then be applied against the legal person itself. However, there is no imputation or attribution of the crime itself.

2.6 Administrative liability

Some states, for example, Bulgaria, Germany, Italy and the Russian Federation have introduced or retained administrative liability.

In Germany, under the Administrative Offences Act, a fine may be imposed on the legal person in the course of criminal proceedings against the natural person. However, if a natural person is not prosecuted because he cannot be identified, or has died, it is then possible to sanction the legal person in separate proceedings. The liability of the legal person is regarded as an "incidental consequence" of an offence committed by the natural person, and it appears that it is, in fact, very unusual to proceed against the legal person where the natural person has not been proceeded against.

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

The Italian decree imposes liability on the legal person for offences committed by two categories of natural person:

(i) those in senior positions, and

(ii) those subject to the management or control of those in (i).

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

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

2.7 Some common difficulties in imputation/attribution

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

The OECD Working Group on Bribery in International Business Transactions has provided the following guidance[23] for corporate liability:

(a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.

(b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

[23] Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (2009): http://www.oecd.org/dataoecd/11/40/44176910.pdf

3 MEETING THE CHALLENGES OF INVESTIGATION

3.1 Reactive Investigations

The traditional approach to investigating corporate corruption and other economic or financial crimes was to pursue reactive investigations. As the name suggests, such an investigation involves the piecing together of strands of information/evidence after an alleged offence has taken place. In relation to legal person cases, this often involves reliance on financial transactions, analysis of financial transactions through forensic accountancy, asset tracing and the interviewing of witnesses. Of course, those involved are often unwilling to provide an account of what occurred. The investigation and any subsequent prosecution may, therefore, be denied any direct evidence and reliance may need to be placed on indirect methods of proof, such as financial and asset transactions.

When we speak of direct and indirect methods of proof, we have in mind the distinction between direct and indirect (or 'circumstantial') evidence.

Direct evidence is that which, if believed, proves the existence of a particular fact without the need of any inference or presumption being required. Indirect evidence relates to a fact or matter that by reason and experience, is so closely associated with the fact to be proved that the fact to be proved may be inferred from the existence of what is circumstantial (i.e. indirect).

Indirect evidence is, of course, adduced in the full range of criminal cases. However, it is of particular importance in a corporate corruption or economic crime case, where there may be little or no direct material proving a transaction or the involvement of the parties to it. An understanding of the legality and value of piecing together stands of indirect evidence is especially valuable.

In reactive investigations, there are essential good practices that should be followed when dealing with evidence gathering at the location of the legal person itself. These may be summarised thus:

- Secure all available relevant hard-copy documents and quarantine them in a secure environment. These documents should include (but not be limited to) relevant correspondence, contracts, financial documents, internal documents, board minutes and supporting documents where appropriate.
- It is extremely important that all documents identified as potentially relevant are isolated and remain secure throughout the investigation, while minimising any adverse impact on the business's operational requirements.
- Ensure that any normal document destruction programme is ceased insofar as it relates to historic documents that could be relevant to the investigation.
- Secure any relevant electronic material; for example, laptops, electronic devices and hard drives, which could contain relevant material. In the interests of maintaining business continuity, it may be necessary to image the respective devices to preserve the integrity of the data.
- Ensure that back-up tapes or hard drives are secured in relation to the corporate network and e-mail servers.

- Secure and isolate any company BlackBerrys or mobile phones (if any) likely to contain relevant evidential material, and SIM cards if necessary. In particular, obtain any mobile phone records for individuals involved in the relevant conduct.

Of course, the above presuppose that there is a legal basis (and that necessary authorisation has been obtained) for each action.

3.1.1 Witnesses

One of the most compelling pieces of testimony in a corporate case, but equally one of the most dangerous to all sides, is that from the individual who was within, for example, a corrupt company or unit, or who was part of the corrupt criminal network.

In the case of the former, this is the so-called 'whistleblower' and, in many jurisdictions, a specific legislative framework exists for whistleblowers, providing employment, anti-discrimination and other protection. The evidential risk here is obvious: is he or she a credible witness or has his/her evidence been distorted or even fabricated through frustration, resentment or in the hope of some other reward? Equally, is he or she simply providing evidence because of some form of inducement?

In respect of the latter, the risks associated with the evidence of the criminal participant who denounces or co-operates are, if anything, even more stark. The same concerns arise, principally those of inducement and credibility, but this time set against a background of risk to life, manipulation of the process and, very often, a history of past and present criminality and related personal and lifetime character issues.

Depending on the jurisdiction concerned, such a criminal associate or accomplice, perhaps faced with overwhelming evidence, may turn 'state's evidence' or the equivalent and elect to give evidence against others. No particular difficulties of procedure generally arise here.

In civil law states, the criminal associate will typically be examined by the prosecutor or by the court, will admit to his part in the crime and will set out his evidence. In some European jurisdictions, such as Italy, Hungary and parts of the Western Balkans, there may be the opportunity for the person to rely on 'effective regret' or similar (e.g. *concussione*, in Italy). The result in those states may be that he is a witness, but is not prosecuted for his part in the corrupt transaction. However, best practice and, for OECD Convention states, convention compliance dictates that effective regret, or similar, should not defeat a prosecution. Indeed, it is of note, and entirely appropriate, that in the Czech Republic, effective regret is not available in a corruption case. It should also be noted that some jurisdictions require corroboration of an accomplice's evidence, or, at least, for the court to warn itself as to the dangers of an uncorroborated accomplice.

The question of what is the most appropriate manner in which to handle a co-operating defendant or co-operating criminal associate where he is implicated in serious criminality and where he is also able to give evidence about serious crime, has been the source of much debate in many states. There are various approaches, each of which may be justified. A central issue is often: should such a person be given immunity from prosecution in the light of his co-operation, and, if not, what sort of reduction in sentence should he get.

3.1.2 Witness Protection

The interests of justice require that vulnerable witnesses, both child and adult, are afforded as much protection as possible to enable them to give evidence in a way which:

i. maintains the quality of that evidence; and
ii. minimises the trauma suffered.

There is also a need for risk assessment to take place and for such protective measures as are necessary to be put in place (sometimes for an indefinite period).

Equally, justice requires that measures to protect vulnerable witnesses do not deprive the defendant of his right to a fair trial, and that any restriction on the principle of open justice must be fully justified.

3.1.3 Financial Investigations

Financial evidence will invariably be of significance in legal person cases. Sometimes an investigator may be able to link specific financial transactions directly to the criminal conduct that is being alleged; however, even when financial transactions cannot be directly linked, evidence of asset movement, of property purchases, or of unexplained wealth may, in itself or with other evidence, give rise to the inference that the asset or wealth concerned came from an illicit source.

Financial investigations arise in a number of different situations and must be handled accordingly. Such an investigation might:

- Relate to a financial crime (e.g. money laundering);
- Concern an acquisitive crime, such as bribery/corruption;
- Involve freezing and confiscation applications;
- Include cash seizures;
- Rely on financial information in order to identify a suspect.

Within the context of bribery and corruption, it is usually the first four, but, of course, it may include any of the above. It should be borne in mind that, in some states, the financial investigation sits outside the main criminal investigation as a separate legal process, whilst in others, it may be either a component of the main investigation or a distinct process.

Irrespective of the practice adopted, when devising a legal person investigative strategy, law enforcement agencies should consider what type of financial information is appropriate to the investigation; for example, the assets, lifestyle and expenditure of underlying and associated natural persons will, almost certainly be a central plank of any investigation. Indeed, it is those features around which the whole prosecution case is likely to be based.

A generic plan for a financial investigation is unhelpful, as different cases will give rise to different demands and different avenues of enquiry. However, the techniques and approaches that should be considered for deployment are:

- Background checks on natural persons;
- Companies record/registry checks on legal persons;

- Interviews with witnesses/sources;
- Banking/financial records;
- Telephone billing/communication records & data;
- Ancillary records/evidence of 'lifestyle' spending, travelling etc;
- Government agency records (including border entry, licensing applications etc);
- Real property records/registers;
- Covert monitoring of accounts/transactions;
- Special investigative means and general covert methodology, including covert searches, electronic surveillance/wiretap and undercover agent deployment.

When an enquiry is required in another state, each of the above techniques are capable of being deployed through either administrative assistance or MLA (which of the two routes will depend on the nature of the request, whether it is for intelligence or evidence, whether coercive powers are required, and on the general principles for seeking assistance set out earlier in this manual).

As to the type of evidence in respect of a legal person that might emerge, the following are typical:

- Circumstantial evidence;
- Financial & document audit trails;
- Assets such that there is an unlikelihood of legitimate origin;
- Unusual or inexplicable business dealings (e.g. a 'bad deal' / losing money);
- Unusual business structures (including shell companies);
- Evidence of the role of agents/intermediaries whose conduct/business structure/lack of relevant expertise is itself questionable;
- Physical contamination of cash;
- False identities, addresses and documentation.

A useful source of financial information that is sometimes overlooked when investigating the legal person is that of financial analysis/forensic accountancy. These have played a significant role in financial/asset recovery investigations in many jurisdictions, and should not be overlooked in any investigative strategy in the Czech Republic. A forensic accountant or analyst is able to examine and interrogate the financial data arising from an investigation for the following purposes:

- Tracing transactions back to the money or asset;
- Tracing in both directions;
- Analysing international money flows;
- Conducting a full analytical review;
- Identifying unexplained turnover & consultancy fees;
- Linking related parties;
- Focusing on likely areas of misstatement;
- Explaining accounting standards;
- Providing recognition of income;
- Reviewing balance sheet, profit & loss account;

- Sampling of statistical data to identify likely frauds.

3.2 Proactive investigations

Opportunities to gather evidence will often not be forthcoming by the use of traditional investigation skills. Effective law enforcement and prosecution into companies increasingly requires the ability to conduct proactive investigations (i.e. intelligence-led), which usually involve the deployment of specialist techniques such as undercover agents, human sources, intrusive surveillance, etc.; however, it must be emphasised any such deployment must be weighed against human rights laws in order to control what can, potentially be, a powerful investigative tool. As already mentioned, it must be considered whether an investigation against a legal person alone will permit the use of such means. However, ideally it should do and, in any event, there is likely to be a natural person/persons also under investigation. Of course, whether in respect of a legal or natural person, such means or techniques of gathering evidence and/or information will involve a breach of the right to a private life, and must be justified by those carrying out/authorising the operation.

The deployment of specialist techniques is not to be engaged in without a full review and assessment of the risks involved. This, of course, is true for any investigation, either reactive or proactive, but it is particularly relevant when considering proactive covert investigations.

Any investigative strategy must be aware that there are risks involved to the agency managing the case, to those taking part in the deployment (undercover officers or human sources), to the eventual prosecution case, to the rights of the subject under investigation, and whether the deployment may jeopardise other evidence gathering activities. Investigators must be fully aware of the risks associated with these techniques and should only consider using or authorising them as a means of last resort rather than as a primary or necessarily the best method to achieve the outcome desired. In short, if a traditional evidence gathering method is available, it should be considered first.

Case management and the process of planning the investigation are vital at the outset to ensure effective decision-making and coordination of resources. The appointment of a Senior Investigating Officer (SIO), Investigative Prosecutor (IP) or an equivalent provides a clear lead for the operation and a point of accountability.

Good practice for the prosecutor or senior investigator is to set out the purpose and objectives for the operation/investigation; these usually are to gather evidence against a suspect and achieve a successful prosecution. It may, however, include wider objectives such as managing the political impact of a corruption investigation once it becomes overt and arrests are made, protecting the case from adverse interference during its prosecution phase or conducting spin-off investigations to engage with wider criminal networks. Once these clear objectives have been established, an investigative strategy can be developed. This identifies the strands of the investigation, a number of which may be the deployment of special investigative techniques, but not exclusively.

Developing the investigative strategy enables risks of the operation/investigation and the deployment of techniques to be assessed, which in turn helps to inform the development and implementation of the plan and coordinate activity. The investigative strategy provides a foundation for the operation and accountability for techniques contemplated and used to achieve the operational objectives.

Throughout the operation, decisions relating to the investigation as a whole, and in regard to specific deployments should be formally recorded within a 'decision or policy log'. Each decision should be signed and dated to provide accountability, and contain a rationale justifying the particular course of action taken. The decision or policy log can be referred to by the senior investigator at a later stage, possibly in subsequent legal proceedings, to explain and justify the actions of the investigating agency. For example this can be used to show what considerations were taken into account (necessity and proportionality) justifying the deployment of a specific intrusive and covert method of evidence gathering, and relate those to the suspect's right to privacy. As is often the case with corruption cases, the investigative phase can be complex and lengthy (often a number of years) and in the absence of a proper decision or policy log, it would be rather difficult, if not impossible, for the SIO/IP to explain their rationale and decisions in any subsequent proceedings. Good practice across a number of jurisdictions highlights the importance of a clearly documented decision log.

3.3 Implementing the liability provisions: Importance of asset tracing to the investigation

The tracing of assets may, in a given case, encompass the piecing together of an audit trail, the utilisation of a range of investigative and forensic tools (including court orders for production of documents or records), and identifying property as it passes through different manifestations (for instance, cash used to purchase antiques that are then sold and cars bought with the proceeds).

In the context of tracing assets that represent the proceeds of corruption or instrumentalities of financial crime, it is important to remember that a legal person, for instance, a sham or shell company, is likely to be used as a conduit for the movement of assets. In that regard, the objective should always be to identify the natural person who is the beneficial owner/has a beneficial interest in the assets in question. It is not enough simply to identify the legal person beneficiary; attention should be focused on the natural person or persons behind the legal person.

When considering tracing, particularly in the context of conducting cross-border investigations and utilising the MLA process, the investigator and prosecutor will be aware that the intention of the suspect(s) will be to 'turn' illicit proceeds into apparently legal assets, or, at least, to so disguise the movement of such proceeds that they become incapable of being traced. To bring that about, the suspect(s) will, regardless of the nature of the underlying crime, have recourse to the classic money laundering three-stage process of:

- Placement;
- Layering; &
- Integration.

In essence, those stages comprise the initial placement of illicit assets into, for instance, a financial system (perhaps through a financial institution, or through conversion into financial instruments), followed by the second stage of converting into assets of a different type or moving them to another institution (perhaps involving movement across jurisdictions and/or to a shell company); and then the final stage (integration) where the assets or proceeds are then moved or mixed into the legitimate economy, perhaps through purchase of real property, investment in business opportunities or the purchase of other financial assets.

Tracing assets is not simply an asset recovery exercise, though. By systematically following an asset trail, a fuller picture of the extent and breadth of the underlying criminality of the legal person may be obtained, along with identification of others involved, and, of course, of the victims and their loss.

A tracing investigation should ask (and seek answers to) the following, initial, questions:

- Has there been purchase of real property or high value goods?
- Are assets hidden offshore?
- Have associates / third parties been used to assist? Is there a link with other criminals?
- What 'lifestyle' evidence is there?
- Have there been, for instance, prison visits to associates?
- Have financial transfers been made?
- What do the communications patterns of those involved/suspected demonstrate? (e.g. telephone billing).

3.4 Implementation challenges for the prosecutor/investigator that are particularly likely in respect of an investigation in respect of a legal person

- Does a particular jurisdiction provide for self-reporting by a corporate? If so, does it provide an expectation of no prosecution or a lesser sanction?
- Internal investigations: If the legal person has conducted such an inquiry, will it provide the evidence obtained? Will it claim legal professional privilege/confidentiality between lawyer and client? Has it secured or destroyed evidence?
- Are there banking confidentiality issues; especially if an offshore jurisdiction/financial centre is involved?
- Are there data protection issues?

3.5 Intelligence

Whether an investigation involving a legal person is reactive or proactive (although especially in the case of the latter), intelligence is key to effective implementation.

Intelligence or information might relate to the underlying substantive crime itself (e.g. corruption or embezzlement), to consequent crimes (such as money laundering activity following the commission of the substantive/predicate offence), or to aspects of later asset activity that do not, in themselves, fully disclose a crime having been committed.

Intelligence or information is likely to arise in respect of a legal person or the associated natural person as a result of:

- Another ongoing criminal investigation;
- A financial investigation following a criminal conviction;
- A suspicious activity report;
- An incoming mutual legal assistance (MLA) request;
- Human Sources;

- Product/recordings from surveillance/interception of communications;
- Financial Profiling (Land Registry, financial institutions, utilities and telephone billing);
- Account Monitoring Order or similar (will require banks etc to provide details of specific transactions over specified period). The information can be in 'real time' e.g. ATM.
- Customer Information Order or similar.

For intelligence purposes, the range of 'red flags' (reflecting aspects that may later be, in fact, formally evidenced) will include:

- Abnormal cash payments;
- Pressure exerted for payments to be made urgently or ahead of schedule;
- Payments being made through a third party state; for example, goods or services supplied to state 'A' but payment is being made, usually to a shell company in state 'B';
- An abnormally high commission percentage being paid to a particular agency (this may be split into two accounts for the same agent, often in different jurisdictions);
- Private meetings with public contractors or companies hoping to tender for contracts;
- Lavish gifts being received;
- An individual who never takes time off even if ill, or holidays, or insists on dealing with specific contractors himself or herself;
- Making unexpected or illogical decisions accepting projects or contracts;
- The unusually smooth process of cases where an individual does not have the expected level of knowledge or expertise;
- Abuse of the decision process or delegated powers in specific case;
- Agreeing contracts not favourable to the organisation concerned, either because of the terms or the time period;
- Unexplained preference for certain contractors during tendering period;
- Avoidance of independent checks on the tendering or contracting processes;
- Raising barriers around specific roles or departments which are key in the tendering or contracting processes;
- Bypassing normal tendering or contracting procedures;
- Invoices being agreed in excess of the contract without reasonable cause;
- Missing documents or records regarding meetings or decisions;
- Company procedures or guidelines not being followed;
- The payment of, or making funds available for, high value expenses or school fees (or similar) on behalf of others.

From the Lesotho Highland Water prosecutions[24] and other cases, and from the work of a range of NGOs, `red flags' may be distilled that provide a useful mechanism for indicating situations where a high risk of corruption and potential legal person liability exists. Principally, these are situations where an intermediary:

- Requests payment in cash or to a numbered account or the account of a third party;

[24] Principally, Acres International Ltd v The Crown (High Court of Lesotho, unreported, 2003)

- Requests payment in a country other than the intermediary's country of residence or the territory of the sales activity, and especially if it is a country with little banking transparency;
- Requests payment in advance or partial-payment immediately prior to a procurement decision;
- Requests reimbursement for extraordinary, ill-defined or last minute expenses;
- Has a family member in a government position, especially if the family member works in a procurement or decision-making position or is a high-ranking official in the department that is the target of the intermediary's efforts;
- Refuses to disclose owners, partners or principals;
- Uses shell or holding companies that obscure ownership without credible explanation;
- Is specifically requested by a customer;
- Is recommended by an employee with enthusiasm out of proportion to the agent's qualifications;
- Has a business that seems understaffed, ill-equipped or inconveniently located to support the proposed undertaking;
- Has little or no expertise in the industry in which she seeks to represent the company;
- Is insolvent or has significant financial difficulties;
- Is ignorant of or indifferent to the local laws and regulations governing the region in question and the intermediary's proposed activities in particular;
- Identifies a business reference who declines to respond to questions or who provides an evasive response;
- Is the subject of credible rumours or media reports of inappropriate payments.[25]

[25] This is a list that owes much to TRACE International, an NGO that specialises in working with companies and intermediaries to reduce the risks of corruption in international business transactions.

4 CONCLUSIONS

The following conclusions which can also serve as recommendations for strengthening the law on the Liability of Legal Persons in the Czech Republic were developed based on the discussions at the workshop.

- The Law on Legal Person Liability (the Law) allows for autonomy of proceedings at two levels: (i) There is not a requirement that the natural person actually be convicted before the court; (ii) The legal person is capable of being investigated and prosecuted separately. However, consideration should be given as to whether the Law allows (as it should do) for liability of the legal person even where a specific natural person has not or cannot be identified.

- The Law provides for successor liability. Consideration should be given to the introduction of preventive measures to complement this. For instance, suspension of the capability to dissolve, liquidate or merge.

- It is understood that amendments to the Law are being considered in respect of the categories of natural persons whose acts are capable of resulting in imputation to the legal person. Consideration should be given to widening the scope to include employees (even where due supervision not alleged to be missing). It can, of course, be confined to employees acting in the scope of their employment (in a broad sense). This extension would further encourage good corporate preventive practices and would be in line with the approach being taken in a range of different jurisdictions. A manager and supervisor would also have an individual liability in such a case if he/she encouraged etc. the employee's act or was part of the criminal enterprise.

- With a view to the ways in which legal person liability is progressing globally, consideration should be given to the introduction of a credible route by which a legal person may self-report. Care will need to be taken to ensure that such an option is viable and attractive to legal persons, whilst, at the same time, not undermining the principle of legality.

- With a view to future conduct of a legal person and in order to encourage best practices, a system of independent monitoring, as part of sanctioning, should be considered.

- In the event that an 'adequate procedures' requirement or defence is introduced, it is important that such procedures are sufficiently identified and described. At the same time, these will be necessarily generic in many respects to reflect the differences as between various businesses and sectors. In short, the underlying approach should be risk-based and should emphasise proportionality.

- The Czech Republic has adopted a list-based approach to establishing the crimes in respect of which legal person liability arises. A list presents difficulties in that it will need ongoing revision. Categorising by level of available sanction (as is encouraged in extradition law in respect of extradition crimes) might be a better approach.

- Liaison with legal persons and representative bodies (including training) should take place to ensure that, if an internal investigation is undertaken, it does not prejudice subsequent criminal proceedings.

- Certain investigative tools/actions are especially important in legal person cases, but present challenges. In particular, search and seizure at a business premises must be well-planned and coordinated and must secure/preserve material, whilst not unduly affecting business operations.

- Financial investigations and requests for international co-operation each present challenges in legal person cases. Accordingly, practical training and the enhancement of specialisation should be considered.

5 ANNEX I: TABLE OF INTERNATIONAL INSTRUMENTS ON LIABILITY OF LEGAL PERSONS

LIABILITY OF LEGAL PERSON		
UNCAC	**OECD Anti-Bribery Convention**	**CoE Criminal Law Convention on Corruption**
Article 26: 1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention. 2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative. 3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences. 4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.	Article 2: Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official	Article 1(d) – Use of terms: "legal person" shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations. Article 18 – Corporate liability 1 Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on: – a power of representation of the legal person; or – an authority to take decisions on behalf of the legal person; or – an authority to exercise control within the legal person; as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences. 2 Apart from the cases already provided for in paragraph 1,

		each Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority. 3 Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offences mentioned in paragraph 1.