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PRECOP-RF

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

Technical Paper on
Comparative analysis of the Liability of Legal Persons (Corporate Liability) for Criminal Offences of Corruption

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Abbreviations

ACN	Anti-Corruption Network for Eastern Europe and Central Asia
CC	Criminal Code
CEO	Chief Executive Officer (most senior officer in (non) profit organization)
CoE	Council of Europe
CPC	Criminal Procedure Code
EU	European Union
FATF	Financial Action Task Force
GRECO	CoE Group of States against Corruption
OECD	Organisation for Economic Cooperation and Development
OWiG	Law on Administrative Offences in Germany
RiStBV	Guidelines on Criminal Proceedings and Imposition of Fines in Germany
UN	United Nations
UNCAC	United Nations Convention against Corruption

Table of Content

1 EXECUTIVE SUMMARY

This technical paper has been drafted within the framework of the Joint EU/CoE project on Protection of the Rights of Entrepreneurs in the Russian Federation against Corrupt Practices (PRECOP-RF). It is developed as a comparative analysis of the European counties' systems of liability of legal persons (corporate liability) for criminal offences, with focus on corruption criminal offences.

The comparative analysis uses different sources of information, mainly the explanatory documents on respective Council of Europe, UN and OECD anticorruption instruments, evaluation reports of the Group of States against Corruption (GRECO) and the OECD Working Group on Bribery, as well as some other analyses and studies prepared under Council of Europe and OECD projects, such as the OECD Anti-Corruption Network for Eastern Europe and Central Asia (ACN).

Section 3 of the analysis provides a brief historical overview of the concepts of liability of legal persons for crimes and the relevant developments aimed at improving different aspects of the original concepts.

Section 4 deals with the standards of liability of legal persons which are established by the international conventions and other instruments adopted within the Council of Europe (CoE), United Nations (UN), Organisation for Economic Co-operation and Development (OECD) and European Union (EU), including the CoE Criminal Law Convention on Corruption, UN Convention against Corruption and OECD Convention on Bribery of Foreign Public Officials (all three of them are ratified by the Russian Federation). In particular, section 4 describes the international standards with respect to the definition of legal person, the conditions for establishing corporate liability, the link between proceedings against legal and natural persons, and the sanctions.

Sections 5 and 6 contain information and analysis of the corporate liability's systems established by some member states of the Council Europe, respectively countries which have introduced corporate criminal liability (section 5) and countries which rely on corporate administrative liability (section 6). The countries' examples are selected in a way to represent the biggest civil law jurisdictions[1] (e.g. France, Germany and Italy), two other effective Western-European jurisdictions (the Netherlands and Belgium) and also some jurisdictions of Central and Eastern Europe which have legal systems and traditions similar to the Russian Federation (Bulgaria, Latvia and Poland). In addition, these two sections provide some examples of successful prosecutions, out-of-court settlements and court judgments on serious cases of legal persons involved in corruption, as well as the sanctions imposed.

Last section 7 provides brief analysis of substantive and procedural advantages and disadvantages of using criminal or administrative liability of legal persons for crimes and refers to the possible ways to address the deficiencies of the administrative liability models.

[1] Civil law, civilian law or Roman law is a legal system originating in Europe, whose core principles are codified into a referable system which serves as the primary source of law. The civil law systems can be contrasted with common law systems whose intellectual framework comes from judge-made decisional law which gives precedential authority to prior court decisions on the principle that it is unfair to treat similar facts differently on different occasions (doctrine of judicial precedent).

2 INTRODUCTION

For some time the legal persons are at the centre of the national and world economy. Usually the commercial companies are awarded the biggest public procurement contracts and drive the most important sectors of the economy. In this context it is reality that the most serious economic and also corruption crimes are committed by, through or under the cover of legal persons, such as companies, corporations and non-profit organizations.

The law-enforcement and judicial practice reveals that the complex corporate structures can effectively hide the true ownership of companies, clients or specific transactions related to serious crimes, including the corrupt acts. The sophisticated decision-making processes, which may involve multiple levels of taking decisions, makes difficult the identification and prosecution of the physical perpetrators. On the other hand, when the individual criminals are prosecuted and sentenced, it may be unfair to punish just one specific individual when a complex, diffuse decision-making structure is involved in the commission of a criminal offence. In addition, even if a manager who is the physical perpetrator of the offence is arrested and prosecuted, the corporate corrupt practices often continue because the legal persons as such are not deterred by individual sanctions.

Because of the above situation it seems not adequate for the criminal law to continue to be focused only on the criminal conduct and punishment of the natural persons. Consequently, starting in the last decade of the 20th century the international instruments and national legislations increasingly complement the liability of natural persons with specific provisions on corporate liability.

National legal systems in Europe remain to some extent diverse with respect to the type of liability of legal persons for crimes, with most countries resorting to criminal penalties against legal persons (such as fines, forfeiture of property or deprivation of legal rights), whereas others employ non-criminal or quasi-criminal measures (which in practice are similar to the above mentioned criminal penalties). The latter group of countries, including Russia, defend the principle that corporations cannot commit crimes and maintain concerns about the attribution of intent and guilt to the legal persons.

However, the theoretical debate on the corporate criminal liability seems to be artificial because of the growing involvement of legal persons in economic and corruption criminal offences, and especially in the light of so many examples of European civil law countries which have introduced and successfully implement criminal liability of legal persons for crimes.

3 CONCEPTS OF LIABILITY OF LEGAL PERSONS FOR CRIMINAL OFFENCES AND IT'S DEVELOPMENT

The liability of legal persons for crimes (corporate criminal liability) was developed by the case law in England and the United States - two common law countries.

Identification theory

In the middle of the 19th century in England under the doctrine of vicarious liability it was considered that one person was responsible for the criminal offences committed by another person. Thus, in the English case law, it was accepted that the legal duties lay not only with the physical employers, but corporations as well. In 20th century in England the vicarious liability moved into the concept of direct liability. Under the latter theory the acts of heads of the company were identified with the acts of the company itself, i.e. the company was considered to be at fault when the head was at fault. Since then the identification theory (also known as alter ego theory – the natural person is seen as the "alter ego"[2] of the company) has been implemented in order to engage the criminal liability of corporations in United Kingdom and further influenced the development of the liability of legal persons in other countries and in the international instruments. From contemporary perspective the disadvantage of the identification theory is that, because of the complex decision-making process and structure of the corporations, the persons involved in the criminal offence could be not managers or other persons in leading position in the company and, in addition, it is quite difficult to identify the physical perpetrator of the offence.

Master-servant liability

In the meantime, in the United States the liability of legal persons was implemented on the basis of the vicarious theory through the tort (*delict*) law doctrine of *respondent superior*[3]: an employer (i.e. company) is responsible for the actions of any of its employees (i.e. agents) performed within the course of their employment and with the intent to benefit the company. Under this doctrine implemented in the United States (also called the master-servant liability), the position of the employee in the company is irrelevant. Such a rule is also known as strict liability. The disadvantage of the master-servant liability is that the company would be punished even in a case where the low level employee has acted ultra vires[4] and the company has done everything to prevent illegal acts of its employees.

Lack of supervision liability

In order to address the shortcomings of the above "original" models of corporate criminal liability some European jurisdictions have followed different approaches while establishing their systems of liability of legal persons for crimes. Thus, the identification theory has been extended in a way to trigger the liability of the company also in a case where the manager has failed to prevent the subordinated employee from committing an offence (e.g. bribing a public official). This principle is reflected in Art.18 of the CoE Criminal Law Convention which requires establishing corporate liability also where the lack of supervision or control by a company manager has made possible the commission of a corruption offence for the benefit of that company by an employee under his/her authority ("lack of supervision" theory).

Objective liability

The most advanced approach is based on the understanding that the corporate liability should be defined by organisational characteristics and that it should be separated from the liability of physical perpetrators. Under the "organisational" theory, also called "objective" theory, the legal person could be liable because of lack of adequate preventive mechanisms, corporate culture and compliance

[2] An *alter ego* (Latin, "the other I") is a second self, which is believed to be distinct from a person's normal or original personality.

[3] Latin: "let the master answer"

[4] Latin phrase meaning "beyond the powers"

efforts. In the legal systems based on the objective theory there is no need to prove the individual fault and thus they could be considered as favouring the neglect of the personal responsibility of the physical perpetrators. Another disadvantage of the objective model could be the need to prove the lack of adequate prevention culture within the company. Such a need would be a challenge in the case of large corporations which always could provide enough examples of their anti-corruption programmes, codes of conduct, trainings and other preventive efforts. In view of the above, in practice the objective liability could be less effective than the identification (alter ego) model.

Currently in Europe we could find examples of all above-mentioned models of corporate liability introduced in the criminal or administrative law of the respective countries. Description of some of the most typical examples will be provided further in the technical paper (see section 5 and 6 below).

4 ANALYSIS OF STANDARDS OF LIABILITY OF LEGAL PERSONS FOR CORRUPTION AND OTHER CRIMINAL OFFENCES SET BY INTERNATIONAL CONVENTIONS

International instruments

The establishment of liability of legal persons (corporate liability) for corruption and other criminal offences is a mandatory requirement of number of international conventions, including:

- the Council of Europe Criminal Law Convention on Corruption of 1999 - Article 18 (hereafter, the CoE Criminal Law Convention);
- the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime and on the Financing of Terrorism of 2005 – Article 10 (CoE Convention on Money Laundering);
- the United Nations Convention against Corruption of 2003 - Article 26 (UNCAC);
- the United Nations Convention against Transnational Organised Crime of 2000 – Article 10 (hereafter, the UN Convention on Organised Crime);
- the Organisation for Economic Co-operation and Development's (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997 - Articles 2 and 3 (hereafter, the OECD Convention); and
- the Second Protocol to the Convention on the Protection of the European Communities' Financial Interests of 1997 - Article 3 (hereafter, the EU Second Protocol).
- The Russian Federation has ratified the CoE Criminal Law Convention (04.10.2006), UNCAC (09.05.2006), UN Convention on Organised Crime (26.05.2004) and OECD Convention (17.02.2012).

In addition to the above mentioned international conventions, the Recommendation R(88) 18 of the Committee of Ministers to Member States of the Council of Europe concerning the Liability of Enterprises having Legal Personality for Offences Committed in the Exercise of their Activities (hereafter, the CoE Recommendation R(88) 18) also provides for standards in the field of corporate liability.

The above mentioned anti-corruption international instruments have provided for some general rules of liability of legal persons for corruption offences. In particular, they deal with the definition of legal person, the conditions for establishing liability, the link between proceedings against legal and natural persons, and the sanctions.

Nature of the liability of legal persons for criminal offences

The international conventions do not impose an obligation to establish criminal liability of legal persons for the respective crimes if that is inconsistent with the state's fundamental legal principles. The liability of legal persons may be criminal, civil or administrative in nature. The reason for such flexible standard concerning the form of liability is the traditional concept, accepted in the most part of jurisdictions, that corporations cannot commit criminal offences ("*societas delinquere non potest*"). However, following the example of the common law systems, number of states recently introduced criminal liability of legal persons in their legislation in order to address the problem of participation of corporations in economic, corruption and other specific offences.

Definition of legal person

The international conventions do not provide for an autonomous definition of legal person but refer to the national law, including criminal and company laws. However, the CoE Criminal Law Convention explicitly excludes from the scope of the definition the States or other public bodies in the exercise of State authority (such as ministries or local government bodies) as well as public international organizations (Art.1, "d" of the CoE Criminal Law Convention). The reason is that the responsibilities of public entities and public international organizations are subject to specific regulations or agreements and treaties. However, the exception for state and public bodies cannot be extended to public enterprises, i.e. state-owned and state-controlled enterprises should be liable for criminal offences.

Conditions for establishing liability of legal persons for criminal offences

Under the international standards the legal persons should be held responsible for crimes if the following conditions are met: the offence must have been committed for the benefit or on behalf of the legal person and the physical perpetrator of the offence must be a person who has a leading position within the legal person (Art.18, para.1 of CoE Criminal Law Convention; Art.3, para.1 of the Second Protocol). In addition, the liability must be established where the lack of supervision or control within the legal person has made it possible to commit offence (Art.18, para.2 of CoE Criminal Law Convention; Art.3, para.2 of the EU Second Protocol).

Connection between the criminal offence and the legal person (for the benefit of the legal person)

Under the international standards the liability should arise only if there is some connection between the criminal offence and the legal person. For this reason the liability is imposed against a corporation only if the crime was committed for the benefit of the legal person. The purpose of such requirement is to avoid sanctioning a legal person when a physical person commits criminal offence in his own interest or even against the interest of the corporation.

Leading position of the natural person who commits the criminal offence

The other condition for establishing corporate liability is related to the position of the physical perpetrator within the legal person. In particular, the international standards require the involvement of a person who holds a position of sufficient seniority within the legal person, i.e. "person who has a leading position" (identification theory). The CoE Criminal Law Convention (Art.18, para.1) provides three situations where the leading position is assumed to exist. It describes the persons who have a leading position as persons who have the power: (a) to represent the legal person; (b) to take decisions on behalf of the legal person; or (c) to exercise control within the legal person. In any case the position should demonstrate that the natural person is legally or in practice able to engage the liability of the legal person.

Some jurisdictions, including the Russian Federation, go beyond the above standard by adopting a form of vicarious liability. Under the latter, the legal person is liable for the unlawful acts of its agents or employees when they act (a) within the scope of their duties, and (b) for the benefit of the legal person. In this case the responsibility can be triggered by the acts of any officer or employee of the legal person in spite of his/her position in the hierarchy of the legal person.

Parties to the OECD Convention are required to meet the standard of corporate liability for foreign bribery as specified in the 2009 Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions. In Annex I (B) to the above-mentioned Recommendation (Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions) it is provided that member countries' systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should take one of the following approaches:

a) the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons; or
b) the approach is functionally equivalent to the foregoing even though it is only triggered by acts of persons with the highest level managerial authority, because the following cases are covered:
    - a person with the highest level managerial authority offers, promises or gives a bribe to a foreign public official;
    - a person with the highest level managerial authority directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official; and
    - a person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her

or through a failure to implement adequate internal controls, ethics and compliance programmes or measures[5].

Annex I.C of the 2009 Anti-Bribery Recommendation further states that a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to commit foreign bribery.

Lack of supervision or control/ due diligence

The CoE Convention (art.18, para.2) and the EU Second Protocol (Art.3, para.2) provide for obligation to extend corporate liability to cases where lack of supervision within the legal person makes it possible to commit the criminal offence. The standard is aimed at holding legal persons liable for the omission by persons in a leading position to exercise supervision over the acts committed by subordinate persons acting on behalf of a legal person.

In some countries the *due diligence* on behalf of the legal person in supervising and controlling its agents and employees is used as a complete defence in case of commission of a crime, i.e. the legal person is completely released from liability if it has taken the appropriate preventive measures to deter its employees from committing crimes (Italy). In addition, the CoE Recommendation R(88) 18 provides that "the enterprise should be exonerated from liability where its management is not implicated in the offence and has taken all necessary steps to prevent its commission". In France the due diligence could not be used as a complete defence but only as a mitigating circumstance.

Sanctions and confiscation

Under the common international standard, the legal persons should be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions (Art.19, para.2 of the CoE Criminal Law Convention, Art.26, para.4 of the UNCAC, Art.10, para.4 of the UN Convention on Organised Crime, Art.3, para.2 of OECD Convention, Art.4 of the EU Second Protocol). In principle, the international conventions do not give detailed provisions regarding the types of corporate sanctions. Thus the countries need to create a system of sanctions that is in conformity with their national legal systems.

However the EU Second Protocol provides for more detailed regulation of the sanctions for legal persons (Art.4, para.1). Besides the above general provision on the effective, proportionate and dissuasive criminal or non-criminal sanctions, including fines, it stipulates that the national system of corporate sanctions may include: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) placing under judicial supervision; (d) a judicial winding-up order.

The most detailed regulation of the possible corporate sanctions and measures and of the guidelines for their application is provided by Section II "Sanctions" from the Appendix to the CoE Recommendation R(88) 18. The relevant sanctions and measures may be taken alone or in combination, with or without suspending effect, as main or as subsidiary measures. When determining what sanctions or measures to apply in a given case, in particular those of a pecuniary nature, account should be taken of the economic benefit the enterprise derived from its illegal activities. Where this is necessary for preventing the continuance of an offence or the commission of further offences, or for securing the enforcement of a sanction or measure, the competent authority should consider the application of interim measures. To enable the competent authority to take its decision with full knowledge of any sanctions or measures previously imposed against the enterprise, consideration should be given to their inclusion in the criminal records or to establishment of a register in which all such sanctions or measures are recorded (on the latter issues the GRECO has addressed recommendations to number of its member states).

[5] *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, 26 November 2009, page 10, available at www.oecd.org/

In determining whether the sanctions against legal persons are in compliance with the OECD Convention, the OECD Working Group on Bribery looks at factors such as the size of the company involved in the offence. The explanatory documents on the UNCAC[6] and OECD Convention[7] also deal in relatively detailed manner with the issue of the sanctions for legal persons.

Link between proceedings against legal and natural persons

In general, there are two aspects of the problem of link between proceedings against natural and legal persons which are addressed by the international standards and which could be established as rules:

- the liability of legal person does not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the crime, i.e. the corporate liability does not exclude individual liability of the physical perpetrator (mandatory requirement established by the CoE Criminal Law Convention, UNCAC and EU Second Protocol); and
- the legal person should be liable even where a natural person who committed the crime cannot be identified or prosecuted (optional requirement).

The corporate liability does not exclude individual liability of the perpetrator

The rule under which the establishment of corporate liability should be without prejudice to the criminal liability of the physical perpetrator is established explicitly as a standard by the CoE Criminal Law Convention (Art.18, para.3), UNCAC (Art.26, para.3), UN Convention on Organised Crime (Art.10, para.3) and EU Second Protocol (Art.3, para.3), and is recognized by the OECD Working Group on Bribery. With regard to this issue, the Explanatory Report on the CoE Criminal Law Convention[8] clarifies that, in a concrete case, different spheres of liability may be established at the same time, for example the responsibility of an organ etc. separately from the liability of the legal person as a whole. Individual liability may be combined with any of these categories of liability.

The legal person can be liable even where a natural person who committed the crime cannot be identified, prosecuted or convicted

The OECD Working Group on Bribery has also accepted that it is important that the proceedings against legal persons do not require the identification, prosecution or conviction of a natural person. The above-mentioned Annex I (B) to the 2009 Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions provides that member countries' systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should not restrict the liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted. The reasons for this approach are the following: first, it may not be possible to prosecute the natural person who has committed the crime, e.g. because he/she has escaped or died; second, the complex and diffuse process of corporate decision-making may make it difficult or even impossible to identify specific individuals involved in the crime; third, proceedings against the legal person alone may constitute fair alternative to prosecuting an employee who may have committed offence under strong corporate pressure. Notwithstanding the above arguments, the CoE Criminal Law Convention and UNCAC are silent on the standard under which the proceedings against legal person must take place whether the physical perpetrator can be identified or not. In addition, the GRECO, within its second evaluation round, does not address consistently this issue. In any case, it is recognised that the automatic preclusion of the proceedings against a legal person in all cases, where the proceedings against a natural person cannot be commenced or are terminated, seriously undermines the effectiveness of the corporate liability.

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[6]United Nations, *Legislative guide for the implementation of the United Nations Convention against Corruption*, New York, 2006 , para.338, page 113, available at www.unodc.org/

[7] OECD, *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, para.24, available www.oecd.org/

[8] Council of Europe, *Explanatory Report to the Criminal Law Convention on Corruption*, para.88, available at http://conventions.coe.int/

5 CRIMINAL LIABILITY OF LEGAL PERSONS FOR CORRUPTION OFFENCES IN THE COUNCIL OF EUROPE MEMBER STATES

Examples of successful investigations and prosecution of legal persons

The criminal liability of legal persons (corporate criminal liability) for criminal offences was originally established in the common law countries on the basis of the identification (*alter ego*) theory in the United Kingdom and on the basis of master-servant model (vicarious liability) in the United States. By the end of XXth and in the beginning of XXIst century number of European civil law countries introduced the corporate criminal liability in spite of the theoretical dispute whether a legal person is able to act consciously and commit a crime. Most of the countries from Central and Eastern Europe also accepted the concept of criminal liability of legal persons. Thus, today the corporate criminal or quasi-criminal liability (the latter usually employs not criminal penalties but measures) is established in the following member states of the Council of Europe: Albania, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Hungary, Iceland, Ireland, Latvia, the Netherlands, Norway, Poland, Portugal, Lithuania, Luxemburg, FYR Macedonia, Moldova, Montenegro, Romania, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and United Kingdom.

The Netherlands

The Netherlands was the first civil law country in Europe which introduced corporate criminal liability in 1950 into its Economic Offences Act [*Wet economische delicten*]. In 1976 the corporate criminal liability was adopted as a general rule in the Criminal Code of the Netherlands. Article 51 of the Criminal Code provides that, if an offence is committed by a legal person, "criminal proceedings may be instituted and the punishments and other measures provided for by the law may be implemented where appropriate against (a) the legal person, or (b) those who ordered the commission of the offence, and those who were in control of such unlawful behaviour, or (c) the persons mentioned under (a) and (b) together."

Initially Dutch jurisprudence required the act of the physical perpetrator to trigger the liability of the legal person. Until 2003, it was required that (i) the legal person perpetrates the illegal act through a natural person with the power to direct its activities, or (ii) the legal person perpetrates the illegal act through a natural person with no directive powers, but within the sphere of normal activity of the legal person, and for its benefits. However, in 2003 the Dutch Supreme Court [*Hoge Raad*] ruled that it is possible to establish liability of the legal person autonomously, i.e. without the need to identify the natural person. The main criterion introduced by the Supreme Court was "whether the conduct took place or was carried out in the spirit of the legal entity." The latter situation could occur in the following four circumstances: a) an act or omission by someone who is employed by or works for the legal entity; b) the act is part of the normal business processes of the legal person; c) the act was useful for the legal person in the business conducted by the legal person, or; d) the legal person could make a judgment whether or not the conduct should take place and such or similar behaviour was, according to the actual state of affairs by the legal person, accepted or used to be accepted (acceptance is meant as not fulfilling the care which reasonably can be expected of a legal person in view of preventing corrupt conduct). Thus, currently it is not necessary to identify the natural person to impose criminal liability on the legal person. The decision of the Dutch Supreme Court of 2003 also provided that corporation can be held liable if it has been able but did not prevent the corrupt act of its employee. Corporation could escape liability if it had established effective internal controls, ethics and compliance rules and that it did all in its power to prevent the act. These factors would be considered by the judge when the indictment is filed. There are no set standards in the law for assessing a corporation's efforts to prevent the commission of the offence. The understanding of the

Dutch practitioners is that the courts should have a certain degree of discretion to assess liability, which also promotes the evolution of jurisprudence[9].

Following recommendations made by the OECD Working Group on Bribery and GRECO, the Netherlands adopted amendments to the Criminal Code which significantly increased the level of sanctions against legal persons (entered into force on 1st January 2015). Thus, currently the judge has the possibility to impose a fine up to 10% of the annual turnover of the company, instead of the former maximum fine of the sixth category in Art.23 of the Dutch Criminal Code (maximum 810.000 EUR). Fines can also be cumulated with confiscation measures. There is currently no possibility for the courts to impose debarment or other disqualification sanctions on legal persons. Public agencies may discretionarily exclude companies convicted of bribery from publicly funded contracts and export credits support. If companies are already benefiting from such public advantages, these may also be withdrawn.

In the Netherlands the public prosecutors have discretionary power to choose who to prosecute, which depends on the circumstances of the case. The possibility of bankruptcy or loss of jobs, as well as the imposition of special conditional measures, such as "probationary periods" involving relevant remedial actions are considered as reasons for not prosecuting the legal person. If the company violates the terms of probation or commit an offence again, it will be prosecuted for that offence, as well as for the offence for which it was conditionally dismissed.

In 2008 the Netherlands introduced a punitive order (the so-called [*strafbeschikking*]) as form of out-of-court settlement. The Public Prosecution Service is allowed to impose this punishment for a number of frequently occurring offences without court intervention. An important part of the misdemeanours are therefore nowadays settled with a punitive order. Below there is brief information on three such out-of-court settlements in foreign bribery cases in Netherlands (Ballast Nedam, KPMG and SBM Offshore cases)[10].

Corporate liability cases in the Netherlands:

<u>Klimop case:</u>

There have been several prosecutions for domestic corruption offences, including one prosecution of legal persons involved in the largest case of real estate fraud in the Netherlands (the „Klimop case"). 12 million EUR in fines and 15 million EUR in confiscation were imposed on Dutch companies involved in this case. In addition, 135 million EUR were adjudicated to be paid to fraud victims.

<u>Ballast Nedam case:</u>

By the end of December 2012, the Public Prosecution Service reached an out-of-court settlement with the large Dutch constructing and engineering company Ballast Nedam. The case concerned payments to local agents working in the Middle East, from 1996 until 2003. Ballast Nedam accepted an out-of court settlement of in total 17,5 million EUR. Ballast Nedam also strenghtened its compliancy policy by introducing new guidelines in order to safeguard the integrity of the company.

<u>KPMG case:</u>

At the end of 2013 the Public Prosecution Service reached a second out-of-court settlement in a foreign bribery case, with auditing firm KPMG. This KPMG-case was a spin-off of the Ballast Nedam case. The criminal investigation focused on the role of the auditor in making it possible to disguise payments to foreign agents by Ballast Nedam. The audit carried out by KPMG was deliberately

[9] OECD, *Phase 3 Report of the Working Group on the Netherland's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, December 2012, available at www.oecd.org/

[10] OECD, *Follow-up to the Phase 3 Report on the Netherlands*, May 2015, available at www.oecd.org/

conducted in a manner that payments made by Ballast Nedam to foreign agents and the associated parallel administration were disguised. The Public Prosecution Service considered this to be a serious offence, given the key role of the auditor in safeguarding financial accountability. KPMG has cooperated, with full disclosure, with the Public Prosecution Service and has indicated that it regrets the state of affairs surrounding the controls of Ballast Nedam. The persons responsible for this are no longer working at KPMG. Partly due to this case, KPMG further strengthened its compliance policy and procedures. These measures are being monitored by the Netherlands Authority for Financial Markets, the AFM. As part of the out-of-court settlement KPMG has paid a total of 7 million EUR. This amount is made up of a 3.5 million EUR fine and 3.5 million EUR as a confiscation measure.

SBM Offshore case:

In November 2014 the Public Prosecution Service also reached an out-of-court settlement with SBM Offshore. This is a Dutch-based global group of companies selling systems and services to the offshore oil and gas industry. SBM made an early self-report in 2012 to both the US and Dutch public prosecutors, stating that they started their own internal investigation. In May 2014 the company filed a formal criminal complaint against itself. SBM Offshore fully cooperated with the Public Prosecution Service in the following investigation by the law enforcement authorities. The settlement, which is the largest one in the history of the Netherlands, relates to, among others, foreign bribery in Equatorial Guinea, Angola and Brazil in the period from 2007 through 2011.The out-of-court settlement consists of a payment by SBM Offshore of 240 million USD (a 40 million USD fine and a 200 USD million confiscation measure). The company also enhanced its anti-corruption compliance program and related internal controls. The Public Prosecution Service issued an extensive press release about this settlement.

France

France introduced criminal liability of legal persons for crimes in 1994. Under the French Criminal Code corporate criminal liability was initially applied to a limited number of offences. Since 31 December 2005 the liability of legal persons has been extended to all offences (Law No 2004-204 of 9 March 2004).

Legal persons, with the exception of the State, are criminally liable for the offences committed on their behalf by their organs or representatives. In theory, a corporate entity can commit any offence except for offences which, by their very nature, can only be committed by natural persons. The scope of criminal liability of legal persons, as defined by Art.121-1 of the Criminal Code, includes all public or private legal persons, whether or not profit making, French or foreign, with the exception of the State. Local public authorities and their associations incur criminal liability only for offences committed in the course of their activities which may be exercised through public service delegation (e.g. concession). Other legal persons, including public entities, nationalised enterprises, professional associations, are criminally liable in respect of all their activities. Private legal persons include civil and commercial companies, associations, including religious congregations, foundations, trade unions and political parties.

There are two conditions for assigning criminal responsibility to legal persons:

1. First, the offence must have been committed by one or more natural persons constituting either a body or a representative of the legal person. Thus the responsibility of the corporation is indirect, or derived, insofar as offences must have been committed by natural persons. According to the French case law, the organs or representatives that can invoke the liability of legal persons are the board of directors, the company's legal representative, the CEO, a deputy CEO, a manager or a specially authorised agent. It is not necessary for the representative to have been convicted of the offence of which the legal person is accused. In principle, the physical perpetrator of the intentional offence should be identified but the identification could be done by any means, including on the basis of presumption;

2. Second, the offence must have been committed on behalf of the legal person. An officer who acts in the name of the legal person or in its interest is considered as acting on behalf of the legal person. A corporation will not be convicted if it is able to demonstrate that the offence was not committed on its behalf. For example, a legal person cannot be convicted of offences committed by its representatives if they have acted in their own interest. However, this does not apply if the offence was committed in the course of a legal person's business for its benefit. A corporation may be criminally liable even if it did not benefit from the criminal activity.

The offence may be committed through a positive act or through a failure to act, in particular when the offence committed by a subordinate employee was made possible because of absence of control.
The criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act. On the other hand, a corporate liability for an offence does not automatically result in liability for its managers or officers.

The maximum amount of a fine applicable to legal persons is five times that which is applicable to natural persons by the law sanctioning the offence. Where this is an offence for which no provision is made for a fine to be paid by natural persons, the fine incurred by legal persons is 1,000,000 EUR (Art.131-38 CC). In addition to the fine, the corporate sanctions provided for active bribery and trading in influence of domestic public officials are: prohibition to exercise, directly or indirectly, one or more social or professional activity (in the course of which or on the occasion of the performance of which the offence was committed), either permanently or for a maximum period of five years; placement under judicial supervision for a maximum period of five years; permanent closure or closure for up to five years of the establishment, or one or more of the establishments, of the enterprise that was used to commit the offences in question; disqualification from public tenders, either permanently or for a maximum period of five years; prohibition, either permanently or for a maximum period of five years, to make a public appeal for funds; prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition to use payment cards, for a maximum period of five years; confiscation; and publication of the judgment (Art.433-25 CC). The corporate sanctions for bribery of foreign public officials are similar to those imposed for domestic bribery (Art.435-6 CC).

When imposing the sanctions, courts take into account the amount of profit realised, the damage caused and the financial circumstances of the legal person. The existence of adequate compliance procedures and control may be also taken into account by the courts in considering the sanctions. If the corporation co-operates with the prosecutor or with the investigating magistrate, the judge can take also such co-operation into consideration. In principle, the courts consider whether the negligence or fault was part of the business operations and organisation of the corporation in order to attribute criminal liability to it.

In France both individuals and the legal persons can be convicted on the basis of the same facts. The decision to prosecute an individual or a legal person rests with the public prosecutor.

Safran case in France:

On 5th September 2012 the aerospace and defence group Safran (formerly Sagem[11]) was found guilty by the Court [Tribunal Correctionnel] in Paris of bribing Nigerian public officials. It was proved that the company has paid bribes of between 22,000 and 36,000 EUR between 2000 and 2003 to win a 214 million USD contract for producing 70 million ID cards.

The company was fined 500,000 EUR for bribing foreign public officials. The penalty which was imposed on Safran corresponds to two-thirds of the maximum available penalty for the offence (750,000 EUR). There were no additional penalties or confiscation in this case.

[11] The contract was awarded to SAGEM before the merger with SNECMA (SAGEM and SNECMA became Safran).

The public prosecutor had originally sought dismissal of the charges against Safran (30%-owned by the French State). With respect to the corporation, the prosecutor apparently relied on an interpretation of Article 121-2 of the Criminal Code (introduced in 1994), which governs the criminal responsibility of legal persons and provides that they can be held criminally responsible for the acts of its "organs or representatives" when done "for the benefit" of the legal person. On the appeal, the public prosecutor took the position that these elements were not satisfied and did not request a specific sentence against the company in question, leaving this determination to the court. On the other hand, the prosecutor argued that there was sufficient evidence to convict two individual officers and requested a suspended sentence of 15 to 18 months' imprisonment and a fine of 15,000 EUR for each individual.

In spite of the initial opinion of the public prosecutor, the French court concluded that there was evidence of a payment and evidence that the contract was let to Safran, and on this basis decided that the corrupt acts of the Safran's officers invoked the criminal liability of the company. Finally, the court sentenced the company to a fine but acquitted the two individuals. One individual in the case was acquitted because at the time of the offence he was an engineer and did not have the power to involve the company himself and had acted exclusively on the account of the company in the context of the company's defined commercial policy. The other acquitted individual was a director and therefore more senior in the corporate hierarchy than the first. He was acquitted because he did not act of his own accord but for the sole benefit of the company and did not have sufficiently autonomous decision-making powers to incur personal liability. Even though the court found, in announcing acquittal of the two individuals, that they had undeniably facilitated the award of the contract by acting on behalf of the company as part of a general, organised and coherent framework for paying commissions to intermediaries[12].

Concerning the sanction imposed on Safran, the OECD Working Group on Bribery considered that it is questionable whether the sentence imposed at first instance is effective, proportionate and dissuasive in accordance with Article 3 of the OECD Convention, given that it was not accompanied by additional penalties nor were the proceeds of the crime in question confiscated (the benefits of the offence therefore being left to its perpetrators).

The Safran case has tested the resolve of the French judiciary to pursue not only individuals but also companies for foreign bribery. Prior to the Safran decision, only three minor convictions for foreign bribery have been handed down since the adoption of France's foreign bribery law in June 2000 (compare to 42 for Germany).

Belgium

Belgium introduced criminal liability of legal persons in 1999. Under Art.5 of the Criminal Code (introduced by Art.2 of the Act of 4/5/99) legal persons are criminally liable for offences that are intrinsically connected with the attainment of their purpose or the defence of their interests, or for offences that concrete evidence shows to have been committed on their behalf.
Failure to exercise supervision within the legal person, and thus facilitating the commission of the offence, can be sanctioned. There is thus a moral element to the responsibility of a legal person (in French [*personne morale*]. It has to be shown either that the offence was the consequence of a deliberate decision taken by the legal person or that the latter displayed negligence, thus encouraging the offence. An offence may have been made possible by defective internal organisational arrangements, inadequate security measures or unreasonable financial restrictions. The courts reach their decision on the basis of the legal person's actions, the material facts relating to the conduct of its employees and agents, the risks and the measures taken.[13]

[12]OECD (October 2012), *Phase 3 Report on France by the Working Group on Bribery*, paragraph 61, available at www.oecd.org/

[13] GRECO (December 2004), *Second Round Evaluation Report on Belgium*, paragraph 54, available at www.coe.int/

The corporate criminal liability may be applied to public law legal persons, private law legal persons such as commercial companies and associations, and certain entities that do not have legal personality but are assimilated to legal persons.

A corporate entity can commit any offence, except those for which only physical persons could be held liable. The law does not identify the persons or entities through whose acts the legal person can be held liable - all that is required is a link between the offence and the enterprise. There is no need to identify the physical person who committed the offence on behalf of the legal person in order to prosecute the latter.

The sanctions include fines of up to 10 million EUR depending on the nature of the act committed and the public official receiving the bribe. In case of conviction against a legal person, the imprisonment provided for a particular offence is automatically converted into a fine. The amount of the fine is determined according to a formula based on the number of months' imprisonment imposed - Art.41bis of the Criminal Code provides a mechanism for converting prison sentences to fines in the case of a legal person. Legal persons can also face confiscation of assets, prohibition from conducting a specific activity and/or public censure. The corporation may also be dissolved if it is found that it was set up for the purpose of committing criminal offences. Some accessory penalties, such as dissolution, temporary or permanent prohibition on conducting a business, temporary or permanent closure of one or several establishments, do not apply to public enterprises and to enterprises responsible for providing public service. Additionally, legal persons which have been convicted of specific criminal offences may be prohibited from participating in public procurement tenders.

Where determining the sanction within limits provided, the court takes into account various aggravating or mitigating factors. Aggravating circumstances taken into account include the damage caused by the offence, the profit generated and any previous criminal conduct. Mitigating circumstances include co-operation during the investigation, early acceptance of guilt as well as the compensation of the victim(s).

In principle, the legal person can avoid criminal liability by proving that it did not have any criminal intent, that it has exercised proper due diligence in the hiring or supervising of the person who committed the offence and that the offence was not the consequence of defective internal systems and controls.

The public prosecutor [*Procureur du Roi/Procureur des Konings*] is in charge of prosecuting criminal offences committed by corporate entities. More complex investigations requiring search, seizure, arrest or detention must be carried out by an investigating magistrate [*juge d'instruction/onderzoeksrechter*].

Glencore case in Belgium:

In 2013 a Belgian court convicted Dutch company Glencore Grain Rotterdam, part of the world's largest diversified commodities trader, of bribing former official of the European Union (EU) agriculture department by paying his large cell phone bills and sending him to the south of France for holiday.

Glencore was accused of paying around 20,000 EUR of phone bills for the EU official. The judge concluded that "the mobile telephone was at the same time an element to be used to facilitate the violation of professional secrets… and an advantage used to incite him to agree to commit these indiscretions". The former EU official was also provided with nights in hostess bars, trips to Thailand and bottles of champagne by another company (Glencore's co-defendant) in exchange for market-sensitive information. Glencore's co-defendant, Union Invivo, a French agricultural cooperative, is among those that gave the EU official a total of 78,000 EUR worth of dinners in restaurants and hostess bars, cases of wine and champagne and a 12,000-EUR luxury cutlery set. The confidential information obtained by the companies allowed them to put in favourable bids in tenders for European

export subsidies for cereals in 2002 and 2003.

The Glencore unit was fined for bribing the EU official in return for market-sensitive information. Other companies and individuals, including French agricultural cooperative Union Invivo, were also convicted of providing or facilitating bribes. The two companies were ordered to pay a fine of 500,000 EUR each (the maximum fine that could have been imposed in the case was 5.5 million EUR).

The court found that the French company incurred liability because "practices of bribery and breach of professional secrecy were instituted by the highest level of command." In contrast, with regard to the Dutch company, the court made a detailed analysis of the behaviour of the natural person charged and of "the question whether [his] behaviour could be considered the expression of that of the company which employed him and whether its intention was indistinguishable from [his]". The French parent company was convicted under Art.5 of the Criminal Code for the acts of its subsidiary in Belgium. However, the subsidiary company was not sanctioned "because of the lack of interest that it would have represented". A third company was acquitted of a charge of criminal association because this type of offence does not apply to legal persons[14].

The EU official himself was accused of passing on confidential information about EU export subsidy application decisions to French farming lobbyists in 2002 and 2003. He was sentenced to 40 months in jail.

Poland

Poland has introduced corporate criminal liability by the Law on the Liability of Collective Entities for Acts Forbidden under Penalty (hereafter "the Law"), which came into force in 2003. At the time of the adoption of the legislation this liability was considered to be of a sui generis nature: from the theoretical and legal point of view it was not considered a criminal liability, though it is adjudicated by a court competent for handling criminal matters in proceedings pursuant to the provisions of the Criminal Procedure Code[15].

The liability covers all corporate entities, except the State Treasury, local government entities and associations thereof. State-owned and state–controlled entities and organisations can be also held liable for criminal offences (Art.2). The Law contains list of criminal offences for which the corporate liability may be incurred, including active corruption, trading in influence, money laundering and fraud. Under Art.3 of the Law, the legal person may be liable for the criminal conduct of a natural person if the criminal conduct "did or could have given the collective entity an advantage".

Under Art.3 of the Law the criminal offences committed by the following natural persons may give rise to liability for the legal entity: (1) persons who are authorised to act in the name or on behalf of the collective entity (i.e. higher management); (2) persons who are allowed to act due to the neglect of higher management; and (3) lower-level employees acting on the consent or knowledge of higher management. In 2011, the Law was amended to add to this list "entrepreneurs (e.g. sole traders) who directly co-operate with the collective entity"[16].

The legal entity could be punished for actions of the above-mentioned persons only if: (a) the entity's bodies or representatives failed to exercise due diligence in preventing the commission of an offence by the managers or the entrepreneurs; or (b) it has failed to exercise due diligence in hiring or supervising the physical perpetrator (Art.5). The liability of the legal person depends on the liability of the person who committed the offence, i.e. the corporation can be held liable only after the person

[14] OECD (October 2013), *Phase 3 Report on Belgium by the Working Group on Bribery*, paragraphs 31, 32 and 35, available at www.oecd.org/

[15] GRECO (May 2004), *Second Round Evaluation Report on Poland*, paragraph 47, available at www.coe.int/

[16] OECD (June 2013), Phase 3 Report of the Working Group on Poland's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, available at www.oecd.org/

who committed the offence has been found guilty and sentenced. In particular, the physical perpetrator must either have been convicted or pleaded guilty, or there must have been a decision to discontinue the proceedings because "circumstances exclude prosecution of the perpetrator" (Art.4). The liability of legal persons is considered to be "secondary" or "derivative" of the criminal liability of the natural person. In practical terms, this requirement means that the Polish authorities must obtain a conviction or discontinuance of the proceedings against the natural person before proceeding against the legal person. Article 6 of the Law stipulates that the liability of a collective subject does not exclude the administrative, civil, nor individual liability of the perpetrator.

The Law provides that a legal entity may be sentenced to a fine between 1,000 PLN (around 250 EUR) and 5 million PLN (around 1.21 million EUR). In any case, the fine may not exceed 3% of the entity's revenue earned in the financial year in which the offence was committed (Art.7). Under the Law, a legal entity may be subject to: (i) a ban on promoting or advertising the business it conducts, (ii) a ban on using grants and subsidies from public funds, (iii) a ban on using aid from international organisations, (iv) a ban on applying for public procurement contracts, and (v) public pronouncement of the ruling (Art. 9). Under Art.10 the Law, when considering the sentence to be imposed on a corporate entity, the court must take into account in particular the level of benefit obtained from the offence, the corporate entity's financial situation, and the social aspects of the punishment and its influence on the further functioning of the entity.

To date the application of the Law has been weak and Poland has had no convictions of a legal person for domestic or foreign bribery[17].

Latvia

Latvia adopted amendments to the Criminal Code (CC) in 2005 to provide corporate criminal liability through the application of "coercive measures" against "private law legal persons" (Articles 12 and 70 CC). A legal person is liable when a relevant natural person (a) commits bribery "in the interests or for the benefit of the legal person", or (b) fails to exercise "supervision or control" which results in criminal offence being committed. A relevant natural person is defined under Art.70 of the Criminal Code as someone, whether acting as an individual or as a member of "the collegial institution of the relevant legal person", who (i) represents or acts on behalf of the legal person; (ii) takes decisions in the name of the legal person; or (iii) exercises control over the legal person. The prosecution has the burden of proof[18].

Article 70 of the Criminal Code provides that coercive measures may be imposed against private law legal person, including a state or a municipal capital company, as well as a partnership. State or municipal capital companies are defined by Art.1 of the Law on State and Local Government Capital Shares and Capital Companies as companies whose shares belong entirely to a State or local government.

Legal persons may be held liable for criminal offence even if the natural person who committed the crime cannot be prosecuted or convicted. Under Art.439 (3) of the Criminal Procedure Code, proceedings against a legal person generally take place within proceedings against the natural person. However, the proceedings against the legal person may be separated and continued on their own in some situations, including: (i) if the proceedings against the natural person are terminated without a conviction for "non-exonerating reasons", e.g. the natural person's death and conditional release from liability; (ii) if there are circumstances that do not allow the determination of the liability of a natural person, or if the case cannot be tried in court within a reasonable time, e.g. where the natural person has absconded, resides outside Latvia, or cannot be located; and (iii) where a legal person requests separation.

[17] *Ibid*, paragraph 55, page 20

[18] OECD (June 2014), *Phase 1 Report on Latvia by the Working Group on Bribery*, available at www.oecd.org/

In the Latvian legal system a legal person is not considered to be an 'entity' within the system of the Criminal Code. A legal person is an abstract concept and as such it – unlike a natural person – cannot have a personal attitude towards the commission of an offence, which is a necessary element for the determination of guilt. Therefore, the guilt of a natural person has to be established at first. Nevertheless, the establishment of the guilt of a natural person does not mean that there should be a conviction of a natural person in order to impose coercive measures on a legal person: as indicated by Art.439 of the Criminal Procedure Code, it is sufficient that a natural person is officially regarded as a suspect or s/he is being prosecuted[19].

Legal persons are punishable for criminal offences by the following "coercive measures": liquidation; restriction of rights; confiscation of property; or a monetary fine of 10 – 100,000 times the minimum monthly wage (3,200 – 32 million EUR). Apart from liquidation, these sanctions may be applied cumulatively to a legal person for the same offence. In spite of the fact that the basis for liability and applicable procedure are regulated respectively by the criminal and criminal procedure law, the corporate liability in Latvia could be considered as quasi-criminal liability just because the law provides for "coercive measures" but not for criminal penalties.

GAMA case in Latvia:

In 2013, a monetary fine of 1,2 million EUR was imposed on GAMA Holding (a multinational company of Turkish origin with wide-ranging international operations) for trading in influence. The person who triggered the company's liability was the regional representative who did not belong to any of the management or supervisory bodies of the company.

In particular, Latvian authorities succeeded in proving that the company's regional representative offered an undue advantage of 3.4% of the total contract amount (approximately 11 million EUR) to a 'consultant' in order to ensure that the consultant would exert his influence on the officials of Latvenergo, the state-owned electric utility company.

By using internal information obtained illegally, GAMA Holding prepared a tailor-made tender and won a public procurement contract for reconstruction works at a power plant. As the evidence collected through special investigation techniques was so convincing, both the company GAMA Holding and its regional representative confessed and significantly cooperated with the investigation. Moreover, GAMA Holding and Latvenergo amended the agreement to reduce the price of the reconstruction project at the power plant by 3.4%.

In the GAMA case a legal person received the largest monetary fine ever imposed in Latvia (1.2 million EUR). However, the amount of the sanction does not look so impressive when compared with the company's economic position and the value of the contract it had obtained. As mentioned above, GAMA Holding is a multinational company having total assets of approximately 590 billion EUR and the monetary value of the construction contract the company acquired, at least partly through the unfair actions, amounted to 323.5 million EUR.

[19] GRECO (February 2009), *Second Evaluation Round Addendum to the Compliance Report on Latvia*, paragraph 38, available at www.coe.int/

7 ADMINISTRATIVE AND CIVIL LIABILITY OF LEGAL PERSONS FOR CORRUPTION OFFENCES IN THE COUNCIL OF EUROPE MEMBER STATES

Good Practices and Successful implementation

In principle, the system of civil fines or punitive compensation, as established in the United States, seems not to be recognised in Europe. On the other hand, civil liability of legal persons for damages caused by illegal acts of their managers or employees, such as for tort in the common law jurisdictions and *delict* in the civil law jurisdictions, exists in all European countries. In the context of corruption, such civil liability includes the obligation to compensate any damage caused by the corrupt act[20]. As a general rule, the claim of the victim can be examined either by the criminal court considering the crime that injured the victim or in separate civil proceedings. However, it seems that compensation for damages which could be obtain through the civil liability instruments would not meet the standards of the international anti-corruption conventions requiring effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions against legal persons involved in corruption.

On the other hand, administrative liability of enterprises for failure to fulfil their obligations towards State and municipalities is also relatively well known, especially in the countries of Central and Eastern Europe[21]. On the basis of this experience some of the European countries, which do not accept corporate criminal liability, have developed the concept of the administrative liability of legal persons for criminal offences. Thus, Bulgaria, Germany, Greece, Italy and Russian Federation have established administrative punitive liability of legal persons for criminal offences (corporate administrative liability).

Germany

Germany has established the liability of legal persons for criminal offences, including liability for corruption offences, under the Law on Administrative Offences of 1987 [*Ordnungswidrigkeitengesetz - "OWiG"*]. This law introduces not only administrative fines for legal persons but also sanctions for administrative offences committed by natural persons. Under Art.30 OWiG the liability of legal persons is triggered where any "responsible person", including persons of senior managerial positions, commits: i) a criminal offence including corruption; or ii) an administrative offence including a violation of supervisory duties which either violates duties of the corporate entity, or by which the corporate entity gained or was supposed to gain a "profit". In the case of criminal offences committed by non-management staff, the legal person may be held liable if at management level the management's duties of supervision have been neglected (Art.30 in conjunction with Art.130 OWiG). Under these provisions, the legal person is not made liable for the breach per se but for a natural person's intentional or negligent failure to carry out his/her supervisory duties – this failure having led to the breach. Thus, German law enables legal persons to be imputed with criminal offences committed by senior managers and by lower personnel which result from a failure by a person in leading position (manager) to discharge his/her duties of supervision. Articles 30 and 130 OWiG cover private companies as well as public enterprises (Art.130 para.2 OWiG) and legal persons established under public law. The conviction for the original criminal offence of an individual is not a condition for establishing the administrative liability of the legal person. In view of the above, it seems that the standard of corporate liability in Germany implements both the identification and the vicarious liability theories.

Following recommendations made by the GRECO and OECD Working Group on Bribery, in 2013 the OWiG was amended and the maximum amount of the administrative fine to be imposed on a legal person now is up to 10 (ten) million EUR if the crime is committed intentionally (which is always the case with bribery). The sanction is imposed where a person in a leading position commits a crime

[20] See the *Council of Europe Civil Law Convention on Corruption*, available at http://conventions.coe.int/

[21] Council of Europe (February 2014), *Liability of Legal Persons for Corruption Offences, Training manual and reference source*, available at www.coe.int/

(e.g. bribery) or commits the administrative offence of breach of supervisory duties, by failing to take the measures necessary to prevent the commission of a crime by a lower level employee. At the same time it was foreseen that the maximum fine for other administrative offences of legal persons is multiplied by ten – thus the maximum fine to be imposed on legal persons for the offence of omitting supervisory measures (Articles 130 and 30 OWiG) was increased from one million EUR to up to ten million EUR if the omission leads to a breach of duty carrying a criminal penalty. The latter sanction would apply, for example, in a case where the omission of supervisory measures by management leads to the commission of a bribery offence by staff[22].

Article 17(4) OWiG provides that the administrative fine ordered against a legal person must exceed the financial benefit gained from the offence committed. An administrative fine has two components, a punitive one and a confiscatory one (in respect of the benefit). If the financial benefit is higher than the statutory maximum fine (i.e. 10 million EUR), the total amount of the administrative fine must include an amount equal to the benefit gained (the confiscatory component of the fine), and be increased by an amount that may be a maximum of 10 million EUR (the punitive component of the fine).

In Germany, while the principle of mandatory prosecution applies to natural persons for criminal offences, the principle of discretionary prosecution applies to legal persons. This distinction stems from the administrative law basis for the liability of legal persons, which generally provides for prosecutorial discretion. A decision of a prosecutor not to prosecute the legal person is not appealable. The Guidelines on Criminal Proceedings and Imposition of Fines ([*Richtlinien für das Straf- und Bußgeldverfahren*]-hereinafter ―"RiStBV") are nationally uniform instructions binding on the public prosecutors' offices. The above-mentioned Guidelines stipulate that where the accused persons are members of a legal person's management, the public prosecutor must always examine whether imposing a fine against the legal person can be considered.

Administrative fines against legal persons for bribery are in principle imposed in the course of the criminal proceedings against natural persons (Art.444 of Code of Criminal Procedure). However, where the natural person is not prosecuted due, for example, to the exercise of prosecutorial discretion or because he/she has died or cannot be identified, it is possible to sanction the legal person in separate proceedings, which are either of a criminal nature (where a criminal offence is committed by a natural person) or of an administrative nature (in application of Art.130 OWiG).

Concerning the civil liability of legal persons, articles 31 and 278 of the German Civil Code apply whenever damages occur as a result of an act of a natural person who holds a leading or managerial position within the business concerned. The civil liability also cover cases where the "vicarious agent" [*Erfullungsgehilfe*] exploits his/her position within the business to obtain personal advantage[23].

Corporate Liability Cases in Germany:

<u>MAN case:</u>

In December 2009 the German truck maker MAN was fined by the German court for failing to prevent bribery. The fine was split equally between the company's Nutzfahrzeuge unit, which makes commercial trucks, and its turbo unit, which makes compressors and turbines. In particular, following decision of a Munich I Regional Court of 10 December 2009 pursuant to section 30 OWiG in conjunction with sections 334 and 299 CC - against the Turbo engines Unit of MAN – a fine of 75.3 million EUR was imposed (Case "Turbo engines Unit of MAN"). Also on 10 December 2009 Trucks unit of MAN was fine of 75.3 million EUR pursuant to sections 130 and 30 OWiG[24]. The MAN

[22] OECD(April 2013), *Follow-up to the Phase 3 report on Germany* pages 12-13, available at www.oecd.org/

[23] GRECO (July 2005), *Second Evaluation Round Report on Germany*, paragraph 56, available at www.coe.int/

[24] OECD (March 2011), *Phase 3 report on Germany*, footnote 49 on page 22, available at www.oecd.org/

companies did not appeal the fines, which were set at a level to recoup the pre-tax profit gained from the transactions tainted by corruption.

"This brings to an end the investigations against the companies of the MAN Group on suspicion of imputed corruption between 2002 and 2009," MAN said in a statement, adding: "This does not affect the preliminary investigations against individuals." The former chief executive of the Turbo unit was also facing criminal charges in the case.

The MAN Turbo unit had paid bribes to win contracts, including in at least two cases to foreign government officials. The actions were carried out either with the knowledge or participation of the chief executive at the time, who retired. In the case of the truck unit, prosecutors criticized an "inadequate compliance structure" that they said enabled the payment of bribes.
In May 2009 German investigators raided 59 company sites and seven private homes in search of evidence that MAN employees and customers had been involved in bribery and tax evasion. At that time number of individual employees remained under investigation. The company cooperated with the prosecutor's office.

MAN is one of Europe's largest industrial groups, with sales in 2008 of more than 14.9 billion euros and nearly 49,000 employees. At that time Volkswagen owned nearly 30 percent of the company and the VW chairman was also chairman of MAN's supervisory board.
Several top executives have left MAN since news of the scandal broke. In December 2009 in Frankfurt trading MAN shares fell 31 cents, or 0.6 percent.

Siemens case:

The MAN investigation came in the wake of a bribery scandal at the industrial conglomerate Siemens which is also based in Munich. On 4 October 2007, the Munich I Regional Court convicted Siemens to pay a fine of 201 million EUR for bribes paid abroad by its telecommunications subsidiary, pursuant to Art.30 OWiG in conjunction with Art.334 CC (Case "Telecommunications Unit of Siemens").

Following decision of the Federal Court of Justice of 28 August 2008 and decision of the Munich I Public Prosecution office of 15 December 2008 pursuant to sections 130 and 30 OWiG, Siemens agreed to pay fine of 395 million EUR[25].

In total in 2008 Siemens agreed to pay more than 1.3 billion USD to the United States and European authorities to settle charges that it had paid an estimated 1.4 billion USD in bribes to secure huge public works contracts around the world. In addition, Siemens had to pay 850 million EUR in fees for lawyers and accountants.

Without liability of legal persons, few, if at all any, of the above fines would have been possible. In addition to the above fines for legal persons, numerous natural persons have been prosecuted for criminal offences. For example, one of the CEOs of Siemens was prosecuted and his trial ended with a payment of 175,000 EUR. Siemens successfully claimed millions of Euros of damages from him and his colleagues.

Italy

Italy has established administrative liability of legal persons for criminal offences by the Legislative Decree 231 of 2001 (hereafter "the Law"). Legal persons can be held liable in relation to specific crimes listed under Articles 24 and 25, including fraud, extortion, corruption, money laundering and obstruction of justice.

[25] Ibid

The Law provides for liability of legal persons for offences committed by two categories of principal offenders: natural persons in senior positions and natural persons subject to their management or supervision. Individuals in senior positions are described under Art.5(1): "persons carrying out activities of representation, administration or management of the body or of one of its organizational units, having financial and operating autonomy, as well as persons carrying out, even de facto, activities of management and supervision of the said body." The liability of legal persons is in principle triggered by an act of a natural person holding a managing position, but the Law also covers cases where such a natural person fails to supervise a lower level individual or fails to implement adequate internal controls, ethics and compliance programs.

Corporate liability also depends on whether the offence was committed in the interest and to the advantage of the legal person. Under Art.5, a legal person is not liable if the principal offender has acted at his/her exclusive advantage or at the advantage of a third party.

Pursuant to Art.38 of the Law the legal person and the natural person are generally be tried together. However, a conviction against the natural person who is the principal offender is not necessary in order to convict the legal person, since Art.8 of the Law stipulates that a legal person may be held liable even if the principal offender has not been identified or is not indictable (e.g. because the principal offender has escaped or died)[26]. The provisions of the Law and the Criminal Procedure Code (CPC) provide that the procedure for initiating proceedings against a legal person as well as the procedural provisions that would apply to a principal offender also apply to proceedings against legal persons. Article 8 of the Law provides for "autonomous prosecutions" of legal persons in specific cases, for example if the investigation identifies only a legal person, but not a natural person as a suspect, the proceedings may continue against the legal person only.

The fine is determined by a certain number of "quotas". Under Articles10 and 11 of the Law, the amount of a "quota" is based on the economic and pecuniary conditions of the legal person concerned and varies from 258 to 1,549 EUR. The maximum fine differs for each offence. The highest fine is about 1.5 million EUR. Bribery for official acts is punishable by a fine of up to 309,800 EUR. Bribery for acts against official duties and aggravated bribery where the offence was committed in favour of or against a party to legal proceedings are punishable by a fine of 51,600 to 929,400 EUR. Where there are aggravating circumstances or where aggravated bribery results in a wrongful conviction or involves the award of public offices, salaries, pensions or contracts with the government, a fine of 77,400 to 1,239,200 EUR may be imposed. Certain mitigating factors may reduce the fine imposed in a specific case. Thus, the fine is reduced by one-half and in any event cannot exceed 100,000 EUR where the physical perpetrator has committed the offence mainly in the interest of him/herself or a third party, or if the pecuniary damage caused is "small" (Art.12.1 of Law). A fine is reduced by between one-third and one-half if, before a trial against a legal person commences the legal person: (i) compensates any victims, takes effective steps to eliminate the consequences of the offence; or (ii) implements an appropriate organisational model to prevent similar offences in the future (Art.12.2). If both above-mentioned conditions are met, the fine is reduced by between one-half and two-thirds (Art.12.3 of the Law). In any case, regardless of the above-mentioned mitigating factors, the fine cannot be reduced to less than 10,000 EUR (Art.12.4).

In addition to the pecuniary penalties (fines), the following sanctions can be imposed on legal persons (for at least one year): (i) suspension or revocation of authorisations, licenses or concessions instrumental to the commission of the offence; (ii) prohibition on contracting with the public administration; (iii) denial of funding and subsidies (including those already granted); and (iv) prohibition on advertising (Art. 25.5 of the Law).

The Law provides for "organisational defence", i.e. defence from liability for a legal person that has put in place an organisational model aimed at preventing an offence that has nevertheless occurred.

[26] OECD (December 2011), *Phase 3 Report on Italy by the Working Group on Bribery*, paragraph 46, available at www.oecd.org/

Pursuant to Articles 6(1) and 7 of the Law, the legal person is not liable for an offence committed by persons holding a managing position or persons who are under their direction or supervision if it proves that before the offence was committed: (i) the body's management had adopted and effectively implemented an appropriate organisational and management model to prevent respective offences; (ii) the body had set up an autonomous organ to supervise, enforce and update the model; (iii) the autonomous organ had sufficiently supervised the operation of the model; and (iv) the natural perpetrator committed the offence by fraudulently evading the operation of the model. Article 6(2) describes the essential elements of an acceptable organisational model.

The data provided by the Italian authorities to the OECD Working Group on Bribery indicates that 18 legal persons have been sanctioned for foreign bribery in Italy, including 17 through plea agreements [*patteggiamento*] in the period from the entry into force of the Law to December 2010. Additional data provided by the Italian authorities shows that from 2001 to mid-June 2011, combining all offences (not just foreign bribery), 207 legal persons have been sentenced for violations covered by the Law.[27]

Bulgaria

Bulgaria established administrative liability of legal persons for criminal offences in 2005 by amending the Law on Administrative Offences and Sanctions (hereafter "the Law"). The newly adopted provisions of Articles 83a to 83f of the Law deal with both substantive and procedural law issues. The regulation adopted in 2005 addressed respective recommendations of the GRECO and OECD Working Group on Bribery.

The administrative "property sanctions" (fines) may be imposed against any type of legal person, except for the State, state bodies (e.g. ministries and state agencies), local public bodies, and public international organisations (Art.83a(5) of the Law).
The Law lists the criminal offences for which a legal person may face administrative liability (including bribery, trading in influence and money laundering). In addition to the listed criminal offences, a legal person is liable for any crime that is committed under the orders of or to implement a decision of an organized criminal group.

A legal person may be liable if it has or could have enriched itself from an offence committed by an: (a) individual authorised to formulate the will of the legal person; (b) individual representing the legal person; (c) individual elected to a control or supervisory body of the legal person, or (d) employee to whom the legal person has assigned a certain task, when the crime was committed during or in connection with the performance of this task; (e) an individual in the categories (a) to (d) above who instigates or is an accessory to the respective offence (Art.83a (1) and (2) of the Law).
As a rule, the property sanction should be imposed on the legal person irrespective of the criminal liability of the physical perpetrator of the criminal offence (Art.83a (3) of the Law). However, the commencement of proceedings against legal persons is linked to the commencement of criminal proceedings against the natural person perpetrator (Art.83b (1) of the Law). Thus, the proceedings against a legal person are initiated if an indictment has been filed against the natural person who is the perpetrator. The exceptions from this rule include some circumstances related to the physical perpetrator, e.g. amnesty, expiry of the statute of limitations, death, permanent mental disorder. In addition, the administrative court can pronounce decision for imposition of the property sanction only after the conviction sentence against physical perpetrator or a decision about above mentioned exceptions enters in force (Art.83f).

The following circumstances should be proved in the framework of the proceedings before the administrative court: whether the legal person has obtained unlawful advantage; existence of connection between the perpetrator of the criminal act and the legal person; existence of connection

[27] Id., paragraph 50, page 17

between the criminal act and the advantage of the legal person exist; and what is the amount of the advantage if it is of property nature (Art.83e of the Law).

The liability of the legal person is determined in separate proceedings in the administrative courts. There is no possibility of combining the proceedings against the legal person and the physical perpetrator. The facts found by the court in the criminal proceedings (i.e. the criminal court) are binding on the administrative court that hears the proceedings under the law (Art.413 of the Criminal Procedure Code).

Pursuant to Art.83a (1) of the Law, the property sanctions against a legal person (fines) depend on the nature of the advantage that it has or would obtain as a result of the crime. If the advantage is in the nature of "property", then the legal person is punishable by a "property sanction" of up to 1 million BGN (approximately 500,000 EUR) but not less than the value of the advantage. If the advantage is not in the nature of "property" or if the value of the advantage cannot be ascertained, then the legal person is punishable by a property sanction of 5,000 to 100,000 BGN (approximately 2,500 to 50,000 EUR). The advantage is confiscated (Art.83a (4) of the Law).

Because of the above legislative deficiencies and awareness problems the implementation of the Bulgarian law on liability of legal persons for crimes is very weak. Since the entry into force of the Law in 2005, there have been no prosecutions of legal persons for domestic or foreign bribery, despite relatively high number of convictions of natural persons for domestic bribery.

8 ADVANTAGES AND DISADVANTAGES OF USING CRIMINAL OR ADMINISTRATIVE LIABILITY OF LEGAL PERSONS FOR CORRUPTION OFFENCES

Criminal liability of legal persons is a quite new concept but, in spite of this, is accepted by the vast majority of the CoE member states (see section 5 above), including by number of countries where the principle that corporations cannot commit crimes (*societas delinquere non potest*) used to be undoubtedly accepted. Today, the age-old debate on whether legal entities can bear criminal responsibility has shifted more widely to the question of how to define and regulate such responsibility.[28]

The preference for the corporate criminal liability is also reflected in some international instruments. Thus, the parties to the OECD Bribery Convention are required to establish the criminal liability of legal persons for the offence of the active bribery of a foreign public official when a party's legal system provides for this possibility[29]. International initiatives related to money-laundering include recommendation 2, subparagraph (b), of the FATF Forty Recommendations, as revised in 2003, which states: "Criminal liability, and, where that is not possible, civil or administrative liability, should apply to legal persons..."[30]

The arguments used against corporate criminal liability are related mainly to: (i) the traditional legal concept that only a natural person can be criminally liable because only between the natural person and the offence can be established culpability connection; and (ii) the design of the criminal justice system around the natural person (e.g. establishment of imprisonment as a leading criminal sanction, safeguards of pre-trial detention, etc.).

However, it seems that none of the above mentioned arguments could be a real obstacle to the introduction of criminal liability of legal persons because of the following reasons: (i) if legal persons can be administratively liable for administrative and criminal offences, they should have enough "personality" and "culpability" for being also criminally liable for criminal offences; and (ii) where corporate criminal liability is accepted, the mechanisms and instruments of the criminal justice system that could apply only to natural persons just do not apply to legal persons, whereas all other mechanisms still apply (e.g. relevant procedural rights).

In addition, it is obvious that the criminal liability has more deterrent effect that the administrative liability and that the criminal proceedings are more effective for proving someone's involvement in the criminal activity.

In particular, the advantages of the use of criminal liability and criminal procedure tools in cases where legal person should be held liable for criminal offences are connected with: (a) more dissuasive and deterrent effect of the criminal convictions; (b) the broader set of investigative instruments and coercive measures; (c) competent court; (d) longer prescription periods; (e) better opportunities for international legal cooperation, including mutual legal assistance:

(a) dissuasive and deterrent effect of the criminal convictions

In addition to its punitive effect the criminal conviction is also a stigma that may seriously damage the status and relationships of the concerned person in the society. It seems that administrative liability has not such an effect and is less dissuasive than the criminal liability. In the case of corporate liability the companies may fear more the stigmatising effect of the criminal conviction (which usually entails reputational long-term consequences) than the punishment itself. In spite of the fact that under some

[28] UN (2006), *Legislative guide for the implementation of the United Nations Convention against Corruption*, paragraph 317, New York, available at www.unodc.org/

[29] OECD (2011), *Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, paragraph 20 (Article 2), available at www.oecd.org/

[30] FATF/OECD (2010), *FATF 40 Recommendations*, available at www.fatf-gafi.org/

researches "… the public condemnation may not depend on whether the punishment has been imposed through administrative or criminal proceedings"[31], it could be asserted that in principle criminal liability provides for stronger deterrent and dissuasive effect than the administrative liability.

(b) use of special investigative techniques and other proving tools (means of proof)

In the jurisdictions of administrative corporate liability the relevant sanctions are usually imposed on a legal person only after the criminal offence's detection and proof that have taken place within the criminal proceedings against the physical perpetrator. In other words, the liability of legal persons is triggered on the basis of evidence collected during the criminal proceedings that already have been conducted against the physical perpetrator. In such a case, the special investigative techniques and other means of proof that are permitted only in the criminal proceedings (e.g. interception of communications, undercover agents, searches, seizures, etc.) could be indirectly used to prove the liability of the legal person.

However, the advantage of using criminal (but not administrative) proceedings for triggering corporate liability is obvious when the natural person is not investigated and prosecuted for some reasons. For example, where the investigation against physical perpetrator cannot be initiated or completed, the use of special investigative techniques against a legal person would be problematic in the countries with administrative or even in the countries with quasi-criminal liability systems. Thus, in the Russian Federation and Bulgaria, when the legal person is investigated separately, it has to be done in the framework of administrative proceedings, which means that criminal investigative techniques are not available.[32] It seems also that in Latvia, which is considered as a jurisdiction of corporate quasi-criminal liability, the use of criminal investigative tools is not possible if separate proceedings against legal persons are instituted[33].

(c) consideration of the criminal law matters by criminal court judges

Another advantage of instituting criminal proceedings for establishing liability of legal persons for crimes is linked to the competence, skills and special knowledge of the judges who would hear the cases. It is evident that the criminal courts, especially in view of their substantive competence in criminal law matters, are in better position to try cases where perpetration of the criminal offence should be established, e.g. if the legal person is tried before the physical perpetrator and the commission of the crime has not yet been established. Because of this reason, in Germany and Italy these are the criminal courts which are empowered to conduct administrative proceedings against legal persons involved in criminal activity. Currently Bulgaria is also considering the possibility to entrust the criminal courts with the cases of sanctioning legal persons for criminal offences under the Law on Administrative Offences and Sanctions.

(d) longer prescription periods under the criminal law

The longer prescription (statute of limitations) periods applied for criminal offences could be also considered as an argument in favour of the use of criminal proceedings for sanctioning legal persons. In the traditionally short prescription periods provided in the administrative procedure it would be a serious problem to complete successfully the investigation against a corporate entity and the possibility to sanction it would depend to high extent on the prosecution of the physical perpetrator. For example, the relatively short prescription periods for instituting and conducting administrative investigations under the Russian Code of Administrative Offences (one month with possibility of prolongation for another month) are subject of concern for the OECD Working Group on Bribery[34].

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[31] OECD (2015), *Liability of Legal Persons for Corruption in Eastern Europe and Central Asia*, page 16, available at www.oecd.org/

[32] See OECD Working Group on Bribery Phase 2 Report on Russia (paragraph 266) and Phase 3 Report on Bulgaria (paragraph 32).

[33] OECD (June 2014), *Working Group on Bribery Phase 1 Report on Latvia*, paragraph 29, available at www.oecd.org/

[34] OECD (October 2013), *Working Group on Bribery Phase 2 Report on Russia*, paragraph 266, available at www.oecd.org/

(e) better opportunities for international legal cooperation, including mutual legal assistance

For the time being the international law does not provide for adequate co-operation tools in administrative law matters[35]. On the contrary, there are number of international multilateral conventions and bilateral treaties regulating mutual legal assistance in criminal matters. Thus, it could be asserted that the international instruments in the field of administrative law do not facilitate effective co-operation between states in corruption cases involving legal persons.

Again the problem of lack of adequate tools for international cooperation would arise in the cases where the legal person is investigated and prosecuted independently from the physical perpetrator.
Germany and Italy have addressed the above deficiency of the corporate administrative liability system by providing in the domestic legislation for the possibility to use mutual legal assistance's instruments in criminal matters also in the proceedings for sanctioning legal persons for crimes.
However, it seems that in the Russian Federation and Bulgaria the mutual legal assistance in criminal matters is not available in the administrative proceedings against legal persons.

In view of the above, it could be asserted that the corporate criminal liability is more effective than the administrative liability of legal persons, especially from the procedural point of view. However, some of the weaknesses of the administrative procedure could be compensated, for example by ensuring the availability of special investigative techniques and other effective means of proof, mutual legal assistance instruments and sufficient prescription periods in the proceedings against legal persons.

[35] However, Article 43, para.1 of the UN Convention against Corruption provides for extension of co-operation to civil and administrative proceedings.