

Liability of Legal Persons for Corruption Offences



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For more information on the subject of the publication, please contact:
Economic Crime and Cooperation Division
Action against Crime Department
Directorate General Human Rights and Rule of Law
Council of Europe
Email: contact.econcrime@coe.int

Contributors:
Tilman Hoppe, Martin Polaine, Georgi Rupchev,
Mark Livschitz, Dr Constantino Grasso, Bright
Line Law, and Hughes Hubbard & Reed LLP

www.coe.int/econcrime

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1. Foreword

The publication before you reflects a growing trend worldwide in the last 15 years towards holding legal entities criminally or administratively accountable for economic crime. From the first big cases of corporate prosecution for economic crimes, such as the Siemens, BAE Systems, and Daimler AG, to more recent examples of cross-jurisdictional investigations and prosecutions of Erricson, MTS, Skansen, Deutsche Bank, and Societe Generale for suspected involvement in corruption and money-laundering, among other offences, liability of legal entities is steadily gaining equal footing to individual liability internationally. This does not come as a surprise, bearing in mind the roles played by many multinational companies in bribing foreign officials or laundering the proceeds of crime.

This publication has been tailored to serve a dual purpose. One is to provide policy makers and practitioners with an overview of the concept of corporate liability and enforcement approaches taken by different jurisdictions. To that end, the publication also refers to relevant international standards inviting states to introduce similar mechanisms into their respective systems. From this aspect, this publication can also be used as a training manual, as well as a resource on standards and comparative practices in the domain. The second is to inform future efforts on codification and revision of rules on liability of legal entities in member and non-member States by providing model legal provisions and accompanying explanatory notes. The suggested model legal provisions could be used as a baseline by jurisdictions which are yet to introduce rules in this area.

The knowledge contained herein is a result of multidisciplinary efforts taken by the Council of Europe from 2013 to 2018 in supporting Eastern Partnership and Western Balkan countries to address the roles played by legal entities in different economic crime schemes. It represents a compilation of contributions from subject matter experts and practitioners from different jurisdictions, including Tilman Hoppe, Mark Livschitz, Georgi Rupchev, Martin Polaine and Dr. Constantino Grasso, as well as principals and attorneys from internationally acclaimed law firms Bright Line Law and Hughes Hubbard & Reed LLP.

It is our hope that the information presented in the following pages will be a valuable tool for all interested in the topic of liability of legal entities for economic crimes, those creating policy and compliance solutions, and those considering how to best investigate and prosecute involvement of legal entities in specific criminal schemes.

2. The importance of corporate liability

Liability of natural persons has existed for thousands of years. In comparison, the concept of legal persons has only been recognised in certain jurisdictions since the 19th century. With the emergence of legal persons, it soon became clear that liability of natural persons alone was not sufficient and that liability for legal persons would also require regulation.

The criminal liability of legal persons is therefore particularly valuable in the realm of corruption, where unfettered bribery can be a **profitable** business for corporations. Estimates suggest that the return on bribes is, on average, ten times the amount of the bribe,¹ while reports indicate that approximately 15% of corporations worldwide think it is **justified** to bribe under certain circumstances.²

2.1. Case exercise 1: Greek settlement

Background

The Siemens bribery scandal in Greece concerned a series of state contracts entered into between Siemens AG and Greek government officials during the early 2000s.

By paying substantial sums to government officials, Siemens allegedly managed to win a series of prestigious deals including security contracts for the 2004 Summer Olympic Games, a contract for the Athens subway and in relation to other purchases by OTE in the 1990s. According to press reports, Siemens company officials earmarked more than €12 million for Greece's main political parties between 1998 and 2005.³ Greece had claimed that bribes paid by Siemens to the various Greek governments from the late 1990s to 2007 had cost taxpayers close to €2 billion.

About 100 people, including former executives in Siemens AG's Greek unit and OTE, testified to the Athens prosecutor's office during the two-year investigation which lasted until 2008. Several businessmen and stockbrokers suspected of acting as middle men for the payouts have also given testimony in court.

In 2008, the prosecutor could only file non-individual charges against "all responsible". These types of charges allow authorities to open a wide-ranging investigation where anyone considered a suspect is automatically charged.

The former Minister for Transport and Communications during the PASOK administration in 1998 admitted in May 2010 to a parliamentary inquiry committee that the sum of 200,000 German marks was deposited in 1998 in a Swiss bank account from Siemens during his administration, allegedly for funding his election campaign.

However, until 2012, no individual bribery wrongdoing has been proved by Siemens, by Greek government officials, or by anyone else.

In August 2012, the Greek finance ministry and Siemens signed a €330 million settlement.⁴ At the time, the Greek prime minister was in Berlin asking the Chancellor for "time to breathe" on the bail-out deadlines for the Greek debt crisis.

Under the terms of the settlement, the German group has agreed to write-off €80m it is owed by the Greek state and guarantee a further €250m of investment in the country. Siemens will pay €90m over five years to fund Greece government infrastructure, from medical equipment to university research programmes. It has also pledged to invest €100m in Greece during 2012 "to ensure the continued presence and activity of the company, which currently employs more than 600 employees". In addition, the company has agreed

1. The Economist (2 June 2012), *You get who you pay for*, www.economist.com, accessed 28 October 2019.

2. Idem.

3. Deutsche Welle (2 July 2008), *Siemens Hit by Corruption Charges in Greece, Norway*, www.dw.de, accessed 28 October 2019.

4. Siemens AG (5 April 2012), *Siemens and the Hellenic Republic reach a settlement agreement and mark a new beginning*, www.siemens.com, accessed 28 October 2019.

to “build a new plant in Greece with a budget of over €60 million, which will lead to the employment of over 700 people.”⁵

Questions

- a. What are the advantages and disadvantages of non-criminal (administrative and civil) and criminal liability of legal persons in this case?
- b. What can non-criminal and criminal liability of legal persons not remedy in this case?
- c. Are you in favour of the settlement, or not?

2.2. Pros and cons

Civil liability of corporations, such as torts, exists in all jurisdictions of the world. Administrative liability of enterprises for failure to fulfil their obligations towards State and municipalities is also relatively well known, especially in Central and Eastern European countries.⁶ By contrast, **criminal liability** of legal persons is a relatively newer concept not yet recognised in several Council of Europe member States. The main arguments for the necessity of complementing the liability of natural persons with the liability of legal persons are:

- ▶ Corporations often tend to be involved in bribery either deliberately, or by tolerating a culture of corruption; as such, they should be liable by the simple reason that **justice** requires so.
- ▶ It may be **unfair** to apportion blame to one specific individual when a complex, diffuse decision-making structure is involved.
- ▶ Corruption as a social phenomenon cannot be **prevented** if it is not tackled at one of its sources: corporate profit corrupting the state.
- ▶ Prevention at a corporation-level can be more **effective**: they tend to think more rationally about the economic risks of an offence than individuals do. Such risks can be considerable: American firms facing bribery-enforcement action lose on average 9% of their market value.⁷
- ▶ Corporate liability provides an **incentive** for legal persons to install anti-corruption measures.
- ▶ Corporations “are frequent **vehicles** for the payment of bribes and are readily adaptable to the purpose. The use of elaborate financial structures and accounting techniques to conceal the nature of transactions is commonplace.”⁸
- ▶ **Confiscation** of proceeds from corruption is facilitated if one includes corporate liability.⁹
- ▶ Sanctions imposed under the liability of legal persons regime can generate substantial source of funding for the public **budget**; the general public, which in the end is the victim of corruption, thus receives some redress for the offence.
- ▶ As bribes are not tax-deductible, the liability of a legal person for a bribe will regularly entail additional **tax** revenue for the state following a bribery investigation.
- ▶ As there is often **no plaintiff** in such cases, there is no cause or sufficient evidence to make a civil claim for the overall economic damage from acts of bribery. **Civil liability** for damages would therefore not be enough. A competitor would have to prove that without the bribe he would have won the contract and the state that awarded the contract to the bribing company would have to prove that it would have awarded the contract to another bidder if it had not been for the bribe. The situation is even more complicated when competitors colluded with the bribing company in order to benefit from subcontracts with the bribing company.
- ▶ **Evidence** investigated for liability of legal persons is often useful for establishing liability of natural persons; often such evidence would not be available had there not been a proceeding against the legal person.

5. The Telegraph (27 August 2012), *Debt crisis: Greek government signs €330m settlement with Siemens*, www.telegraph.co.uk, accessed 28 October 2019.

6. See for example the Bulgarian *Law on Administrative Offences and Sanctions* of 1969, Art. 83.

7. The Economist (2 June 2012), *You get who you pay for*, www.economist.com, accessed 28 October 2019.

8. OECD (6 June 2003), *Bulgaria: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.27, www.oecd.org, accessed 28 October 2019.

9. *Idem*. p.27: “The usefulness of confiscation in cases of foreign bribery is severely undermined, in the view of the lead examiners, by the absence of liability of legal persons.” Additionally, a follow up report on Bulgaria from 2013 noted that it was in the process of amending its laws to include liability of legal persons in foreign bribery cases: OECD (May 2013), *Bulgaria: Follow-up to the Phase 3 Report & Recommendations*, pp. 3-4, 10-13.

On the other hand, the most commonly used arguments against criminal liability of legal persons are the following:

- ▶ Only a **natural** person can be criminally liable because the connection between an offence and an abstract legal fiction cannot exist in terms of culpability (“*nulla poena sine culpa*”). This notion is particularly strong in countries that moved toward market economy recently.
- ▶ The **criminal justice** system is designed around a human being (safeguards around pre-trial detention, DNA-tests, etc.).
- ▶ The leading sanction of criminal law, **imprisonment**, could not apply to a legal person.
- ▶ The legal person and its honest owners and shareholders are also often a **victim** of the corruption; an offence committed by the actions of a few within the company can damage the company’s reputation and shareholder value.
- ▶ Prosecuting legal persons may be easier than natural persons, which in turn may lead to **neglecting** the prosecution of natural persons.

Without going into weighing the pros and the cons, it can be said that liability of legal persons can be a useful addition to the tools available to individual jurisdictions to fight corruption and other forms of economic and other crimes, without negating the basic postulate of individual liability for crimes.

2.3. Success stories

From 2008 to 2016, the United States collected US\$4.7 billion from corporations involved in 10 biggest foreign bribery cases in this time period.¹⁰ The trend continued in 2017 and 2018, with the conclusion of several large cases. The largest concluded Foreign Corrupt Practices Act (FCPA)-related enforcement actions up to September 2018 are listed below, in order of size (including total penalties and disgorgements):

1. Petroleo Brasileiro SA – Petrobras, Brazil: \$1.78 billion in 2018.
2. Telia Company AB, Sweden: \$965 million in 2017.
3. Siemens AG, Germany: US\$800 million in 2008.
4. VimpelCom, Holland: \$795 million in 2016.
5. Alstom, France: US\$772 million in 2014.
6. Societe Generale SA, France: \$585 million in 2018.
7. KBR/Halliburton, United States: US\$579 million in 2009.
8. Teva Pharmaceutical, Israel: \$519 million in 2016.
9. Keppel Offshore & Marine Ltd, Singapore: \$422 million in 2017.
10. Och-Ziff, United States: \$412 million in 2016.

A charge levied by the United States Department of Justice (DOJ) on the European engineering giant Siemens AG in 2008 set the trend for high penalty fines for organisations charged of involvement in bribery. The fine of \$800 million marked a twenty-fold increase from the largest previous FCPA fine of \$44 million, levied against Baker Hughes, Inc. in relation to alleged bribes against government officials in Kazakhstan. According to court documents, Siemens AG, which was established in Germany, had falsified its corporate books from the 1990s and made use of the German regulatory system, which did not prohibit bribes paid abroad and moreover treated them as a basis for tax deductions. Siemens continued with the practice of bribing foreign officials for the following decade. When pleading guilty to violations of the FCPA, it agreed to pay a \$450 million fine to the DOJ, combined with a further \$350 million fine for the “disgorgement” (payments) of profits to the United States Securities and Exchange Commission (SEC). To date, the total fine of \$800 million paid by Siemens is the largest FCPA monetary sanction levied on a single company. Furthermore, in 2008, Siemens agreed to pay an additional €395 million (US\$540 million) fine in Germany. With other additions, the overall fine paid by Siemens in the United States and Germany amounted to \$1.6 billion.¹¹ In addition, Siemens had to pay €850 million in fees for lawyers and accountants.¹²

10. Cassin R. (2016), *The FCPA’s Top Ten*, www.fcpablog.com, accessed 28 October 2019; Cassin R. (2018), *Petrobras smashes the top ten list (and we explain why)*, www.fcpablog.com, accessed 28 October 2019.

11. New York Times (15 December 2008), *Siemens to Pay \$1.34 Billion in Fines*, www.nytimes.com, accessed 28 October 2019.

12. The Guardian (16 December 2008), *Record US fine ends Siemens bribery scandal*, www.guardian.co.uk, accessed 28 October 2019.

The Siemens deal prompted a series of new bribery investigations across the world, with conglomerates increasingly being asked to pay larger fines than those seen before the Siemens case. In 2014, French railway giant Alstom was found guilty of paying tens of millions of dollars in bribes to win \$4 billion in projects from state-owned organisations in countries including Indonesia, Saudi Arabia and Taiwan. After profiting almost \$300 million from the scheme, Alstom were found to have continued their wrongdoing by falsifying their books and records to hide the payments. They subsequently agreed to reform their compliance system and pay \$772 million to end the investigation.

Similarly, US firm KBR and British firm BAE Systems have also been charged hefty sums of \$579 million and \$400 million for bribery offences, respectively. KBR were charged after paying government officials in Nigeria to win engineering, procurement and construction contracts worth more than \$6 billion, while BAE Systems were caught making false statements about FCPA compliance in connection with weapon sales. The trend continues more or less unabated. In 2012 alone, the United States collected US\$138 million from corporations and the figure includes only cases of bribery abroad.¹³

Likewise, other countries have imposed large fines as well. In 2011, a French court ordered the French defence electronics group Thales, along with the French government, to pay a record fine of €630 million (US\$920 million) for bribes in the 1991 sale of six frigates to Taiwan for US\$2.8 billion.¹⁴ The size of the fine is among the highest fines ever paid in the United States.

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

13. U.S. SEC, *SEC Enforcement Actions: FCPA Cases*, www.sec.gov, accessed 28 October 2019.

14. Defense Industry Daily (17 April 2014), *Taiwan's Frigate Corruption Investigation: Can they Collect?*, www.defenseindustrydaily.com, accessed 28 October 2019.

3. Concepts of liability

The principle that corporations cannot commit crimes (*"societas delinquere non potest"*) used to be universally accepted. This began to change initially in some common law systems. Today, the age-old debate has shifted from questions of whether legal entities can or should bear criminal responsibility, and instead is focused on questions of how to define and regulate such responsibility.¹⁵

Generally speaking, there are two ways of establishing liability of the company: either by imputing liability of the legal person based on the personal liability of its staff, or by drawing on a faulty aspect of the legal person itself.

3.1. Imputation

The imputation model derives the liability of the legal person from the personal liability of a natural person working for the company. There are two different approaches for drawing a line from the corrupt natural person to the legal person: either the natural person is seen as the "alter ego" of the company; or the company is seen as the master which is responsible for the acts of the servant (the natural person).

3.3.1. Management as the "alter ego" of the company

Overview	
Principle	The act by the head of the company is an act of the company itself.
Advantage	The company is at fault when the head is at fault.
Disadvantages	Limited to acts by the head Need to prove individual fault, otherwise company not responsible.

For example, the Georgian Criminal Code uses this concept in Article 107.1 para. 2 and 3:

"A legal entity shall be brought under criminal liability for the crime provided under this Code that is committed on behalf of or through (by using) or/and for the benefit of the legal entity, by a responsible person.

The responsible person under Paragraph 2 of this article is a person authorised to manage, represent or/and make decisions on its behalf or/and a member of the supervisory, control or audit body of the legal entity."

The personal liability of management is not limited to intentional involvement in the corruption offence itself, but might also come from a lack of supervision. The Slovenian "Liability of Legal Persons for Criminal Offences Act" bases corporate liability, in its Article 4 No. 4, from the lack of supervision by management: "A legal person shall be liable for a criminal offence committed by the perpetrator in the name of, on behalf of or in favour of the legal person: [...] 4. if its management or supervisory bodies have omitted obligatory supervision of the legality of the actions of employees subordinate to them."¹⁶

3.3.2. Master-servant liability

Overview	
Principle	Master (legal person) responsible for his servant (staff).
Advantage	The company is at fault when the employee is at fault.
Disadvantages	Need to prove individual fault, otherwise company not responsible.

15. UNCAC (2012), *Legislative Guide*, No. 316, p.108, www.unodc.org, accessed 28 October 2019.

16. Slovenian *Liability of Legal Persons for Criminal Offences Act* 1999 (as amended in 2004), www.unodc.org, accessed 28 October 2019.

The most prominent example of the master-servant liability is the United States FCPA of 1977.¹⁷ It includes: “any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer [of securities].”

3.2. Objective Attribution

Overview	
Principle	Lack of prevention creates liability for bribe.
Advantage	No need to prove individual fault.
Disadvantages	Might favour neglecting individual fault. Anonymous criminal liability. Need to prove lack of prevention by company.

The Penal Code of Finland provides an example of objective attribution in Chapter 9, Section 2, para. 1: “A corporation may be sentenced to a corporate fine [...] if the care and diligence necessary for the prevention of the offence has not been observed in the operations of the corporation.”¹⁸

The line between objective liability and imputation due to the lack of supervision by management (see above at 3.1.1) can be very fine; in essence, legislation not attaching the lack of prevention measures to any individual in the company would be allocated to the objective model; otherwise, the legislation would follow the imputation model.

3.3. International conventions

All Conventions with a European or global reach include liability of legal persons for corruption offences as an explicit standard.

The liability of legal persons is addressed in various international conventions. This manual highlights the following four in the most detail:

- ▶ (1) the EU’s Second Protocol to the Convention on the Protection of the European Communities’ Financial Interests (1997);
- ▶ (2) the OECD’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), supplemented by the OECD Working Group on Bribery’s Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009);
- ▶ (3) the Council of Europe’s Criminal Law Convention on Corruption (1999); and
- ▶ (4) the UN Convention Against Corruption (2005).

A systematic comparison is provided in the table below. The relevant extracts are found in Annex 9. Although the focus of this manual is on the liability of legal persons, other similarities and/or differences between the Conventions should also be noted, for instance whether they proscribe both domestic and foreign bribery, target private and public sectors, target active and passive bribery, and/or proscribe payments with specific purposes only.

17. United States *Foreign Corrupt Practices Act of 1977*, www.justice.gov (in English, Azeri, Romanian, Russian, and other languages), accessed 28 October 2019.

18. Finnish *Criminal Code of 1889* (as amended by Law no. 927/2012), www.finlex.fi, accessed 28 October 2019.

3.4. Systematic comparison of international instruments

Convention	EU Second Protocol (July 1997)	OECD Foreign Bribery Convention (December 1997)	Council of Europe Criminal Law Convention on Corruption (1999)	UN Convention against Corruption (2005)
Relevant Article	Article 3. Liability of legal persons	Article 2. Responsibility of Legal Persons	Article 18. Corporate liability	Article 26. Liability of legal persons
Corruption offence(s)	Fraud, active corruption and money laundering.	Bribery of a foreign public official. [Accounting offences as per Article 8 are indirectly included]	Criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention.	Participation in the offences established in accordance with this Convention [bribery, embezzlement of public funds, trading in influence, abuse of functions, illicit enrichment, and money-laundering obstructing justice; offences are partly optional].
Bases for Imputation of liability	Committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on: <ul style="list-style-type: none"> ▶ a power of representation of the legal person, or ▶ an authority to take decisions on behalf of the legal person, or ▶ an authority to exercise control within the legal person, as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud.		Committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on: <ul style="list-style-type: none"> ▶ a power of representation of the legal person; or ▶ an authority to take decisions on behalf of the legal person; or ▶ an authority to exercise control within the legal person; as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences.	
Objective liability concept	2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of a fraud or an act of active corruption or money laundering for the benefit of that legal person by a person under its authority.		2. Apart from the cases already provided for in paragraph 1, each Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.	

Undefined liability concept		To establish the liability of legal persons.		<p>1. [...] to establish the liability of legal persons [...]</p> <p>2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.</p>
Liability of natural persons	3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money laundering.		3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offences mentioned in paragraph 1.	3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.
Definition of "Legal person"	<p>Article 1.</p> <p>[...]</p> <p>(d) 'legal person` shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations; [...]</p>		<p>Article 1.</p> <p>[...]</p> <p>d "legal person" shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations.</p>	
Sanctions	<p>Article 4. Sanctions for legal persons</p> <p>1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3 (1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:</p> <p>(a) exclusion from entitlement to public benefits or aid;</p> <p>(b) temporary or permanent disqualification from the practice of commercial activities;</p> <p>(c) placing under judicial supervision;</p> <p>(d) a judicial winding-up order.</p> <p>2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3 (2) is punishable by effective, proportionate and dissuasive sanctions or measures.</p>	<p>Article 3. Sanctions</p> <p>2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.</p>	<p>Article 19. Sanctions and measures</p> <p>1. Having regard to the serious nature of the criminal offences established in accordance with this Convention, each Party shall provide, in respect of those criminal offences established in accordance with Articles 2 to 14, effective, proportionate and dissuasive sanctions and measures, including, when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition.</p> <p>2. Each Party shall ensure that legal persons held liable in accordance with Article 18, paragraphs 1 and 2, shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.</p>	4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

Beyond these instruments, only the Conventions of the African Union (AU) and the Organisation of American States (OAS) do not pick up on the liability of legal persons, although the position in relation to the African Union may be changing following the agreement of the Malabo Protocol (not yet in force) which is highlighted in the Annex. It should also be noted that States Parties to regional conventions which do not pick up on the liability of legal persons may, however, also be party to global conventions (such as UNCAC) which do include a provision on such liability.

The Council of Europe Criminal Law Convention on Corruption of 1999 establishes liability of legal persons in its Article 18 and initially follows the “alter ego” principle in its para. 1:

“1 Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences [...], committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- a power of representation of the legal person; or
- an authority to take decisions on behalf of the legal person; or
- an authority to exercise control within the legal person;

as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences.”

However, paragraph 2 the Convention reaches out to a more objective (or “failure to prevent”) standard establishing the lack of supervision or control as a ground for liability:

“2 Apart from the cases already provided for in paragraph 1, each Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.”

The master-servant liability is a concept that would go beyond the requirements of the Council of Europe Convention (and all other international standards) as it criminalises actions by all employees.

The two Conventions by the European Union on corruption¹⁹ do not make explicit references to the liability of legal persons. However, the 1995 Convention on the protection of the European Communities’ financial interests is complemented by a (Second) Protocol which establishes “Liability of legal persons” in Article 3.²⁰ The wording is almost identical to the Council of Europe Criminal Law Convention on Corruption and thus combines imputation liability with objective (or “failure to prevent”) liability.²¹ Similar clauses are found in “Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector”,²² though this was non-enforceable.²³

As seen in the comparative overview above, all other Conventions establishing liability for legal persons (OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the UN Convention against Corruption) do not allude to a specific liability concept, but simply demand parties “to establish the liability of legal persons”.

19. *Convention on the protection of the European Communities’ financial interests* (1995), <http://eur-lex.europa.eu>, accessed 28 October 2019; *Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union* (1997), <http://eur-lex.europa.eu>, accessed 28 October 2019.

20. *Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities’ financial interests – Joint Declaration on Article 13 (2) – Commission Declaration on Article 7*, <http://eur-lex.europa.eu>, accessed 28 October 2019.

21. <http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm>, accessed 28 October 2019.

22. *Council Framework Decision 2003/568/JHA*, <http://eur-lex.europa.eu>, accessed 28 October 2019.

23. See Article 34 of the Treaty on the European Union (repealed by the Lisbon Treaty): “2. The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may: [...] (b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect [...]”

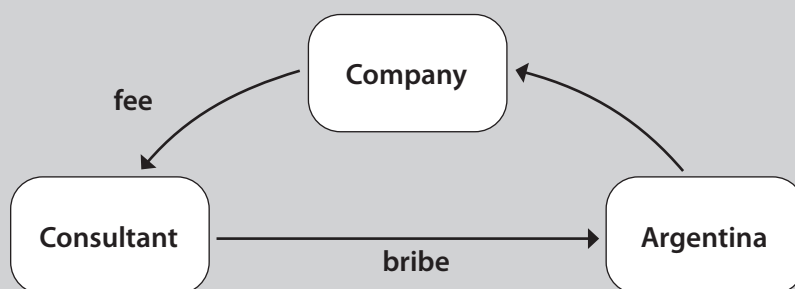
3.5. Case exercise 2: Siemens bribery cases

3.5.1. Argentinian identity cards

Background

Based in Buenos Aires, Siemens Argentina – a controlled subsidiary company of Siemens AG – worked on contracting and managing projects secured by its parent company in the region. Siemens Argentina participated in several government projects with Argentina’s national authorities, including a scheme for a national identity card project, which was valued at \$1 billion. After being invited to bid for the particular project, Siemens allegedly started making payments to officials from September 1998. Subsequently during the period lasting from March 2001 till January 2007, Siemens Argentina made close to \$31 million in corrupt payments towards Argentinian officials to retain the project for themselves.²⁴

These payments were primarily made through the assistance of consultants, in the form of “consulting fees” or “legal fees” – as noted in Siemens financial reports

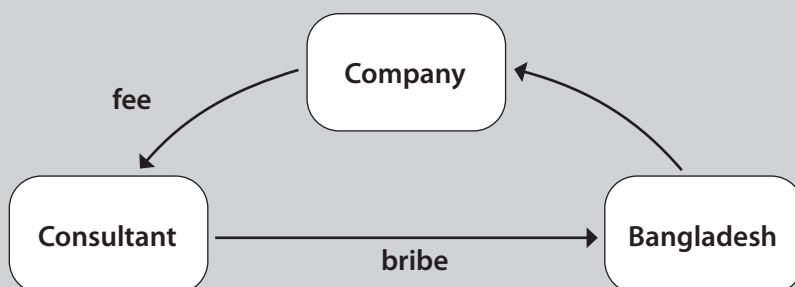


3.5.2. Bangladeshi telephone networks

Background

Like the subsidiaries described above, Siemens Bangladesh is a regional company headquartered in Dhaka, which contracts for and manages projects on behalf of its parent company, Siemens AG. Between May 2001 and August 2006, Siemens Bangladesh made a series of payments to government officials to secure business advantages in relation to a project that they had begun bidding on, which concerned the construction of a nation-wide, digital mobile telephone network. Siemens was pushing for a \$40 million contract and to outbid its competitors, it hired a Bangladesh consultant with links to the Prime Minister’s son to increase their chance. Payments were again made through the form of consultants, which were classified simply as “commissions” and “business consulting fees” on its books and records.

Siemens Bangladesh later pleaded guilty to one count of conspiracy for violating the books and records provisions of the FCPA. It also later pleaded guilty to violating the anti-bribery provisions set out by the FCPA, admitting to paying close to \$5.3 million during the course of the corruption case. Arafat Rahman, the son of the former Prime Minister Khaleda Zia, was later formally charged with laundering almost \$2 million in corrupt payments, including a total of \$180,000 from Siemens.²⁵



24. Cadwalder, Wickersham & Taft (2008), Siemens—Potential Interplay of FCPA Charges and Mandatory Debarment under the Public Procurement (accessed 11 May 2016).

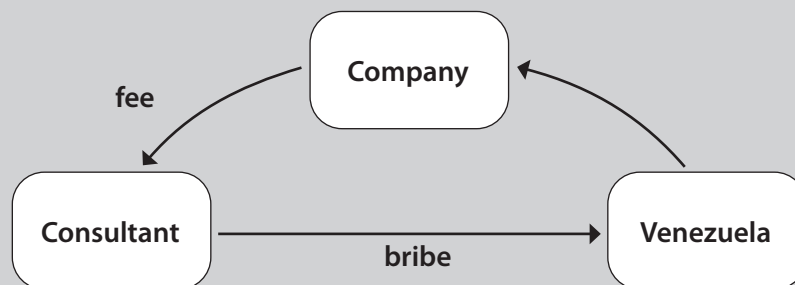
25. Idem.

3.5.3. Venezuelan metro

Background²⁶

Between 2001 and 2007, Siemens Transportation Systems and Siemens S.A., a regional company in Venezuela, paid an estimated US\$16.7 million in bribes to Venezuelan government officials in connection with the construction of metro transit systems in the cities of Valencia and Maracaibo, Venezuela. The two projects, Metro Valencia and Metro Maracaibo, generated approximately US\$642 million in revenue to Siemens.

One of the sources from which the bribes were stemming is the following: in 2002 and 2003, the head of a department of Siemens Transportation Systems entered into a sham agreement with a Dubai-based business consultant to supply the Metro Maracaibo Project with approximately US\$2.6 million in workshop equipment. The equipment was actually supplied by another supplier, and the business consultant did not supply any goods under the contract (as was secretly intended). After the business consultant came under suspicion in a separate investigation in Italy, the CFO of the division of Siemens Transportation Systems (who was until then unaware of the scheme) was ordered to terminate the contract. However, the head of the department arranged the assignment of the contract to another Dubai-based business consultant that continued the sham workshop equipment arrangement.



Questions

- Which physical and legal persons are liable for what in the cases under the different concepts outlined above?
- What would a prosecutor/plaintiff have to introduce as evidence under the different models in order to establish liability of the legal person?

26. Note: The facts of this exercise are taken almost literally from original complaint and prosecution documents concerning the Siemens case, but have been slightly modified for didactical purposes. One must bear in mind that the facts present the case as stated by the prosecutors and are neither formally confirmed by Siemens or a court decision in all aspects and details.

4. Approaches to liability

The issue of liability of the legal person is a crucial, and yet often complex one. In all jurisdictions, the criminal law evolved as the response of society and the state to the actions of individuals. In the modern world, and in relation to corruption cases, however, it is very often the legal person, the corporation, which drives, and benefits from, corrupt activity. No anti-corruption strategy will succeed unless the enforcement component makes provision for the liability of legal persons. The same is true whether the strategy in question targets public sector corruption alone, or both public and private sector corruption.

Article 26 of UNCAC, as one would expect from an international instrument in this regard, does not seek to get States Parties to change the entire basis of their domestic laws, but rather requires them to establish liability for corruption (in both public and private sectors) on the basis of a functional equivalence with the approach taken in relevant domestic law. UNCAC therefore refers to the liability of legal persons as being either criminal, civil or administrative, subject to the legal principles of the State Party. However, that principle of functional equivalence only applies where a state already has criminal, civil or administrative liability for legal person. Interestingly some states (e.g. Japan, Republic of Korea) recognise liability of a legal person in respect of foreign bribery, but do not recognise liability in cases of domestic bribery.

For those states that do not recognise any form of liability of legal person, or where the laws provide for legal liability, but the attribution test remains unclear, UNCAC nevertheless requires one of the three forms of liability to be introduced:

- i. Promising, offering or giving a bribe by a company.
- ii. Directing, or authorising by parent company of a bribe to be paid by a domestic subsidiary.
- iii. Directing, or authorising by a company that a bribe be paid by a foreign subsidiary (this will, in turn, require consideration of the responsibility, if any, of a parent company for the activities of a subsidiary and the relevant test to be deployed.).

4.1. Criminal Liability

The approach to criminalisation will primarily depend on two main factors:

- i. The type of legal system involved (common law jurisdictions will have a different approach to countries with a Roman law or Napoleonic code background);
- ii. The jurisdictional basis being claimed in relation to corruption offences themselves.

It is important for practitioners to have a basic understanding of the ways in which states have addressed criminal liability, as corruption and bribery cases will invariably involve mutual legal assistance requests (of a general nature, and/or relating to asset recovery), extradition, and issues of concurrent jurisdiction.

4.1.1. Common law approaches

United Kingdom

The United Kingdom's Bribery Act 2010 (which was passed to bring UK corruption offences in conformity with international standards, including the OECD Anti-Bribery Convention) does not expressly mention liability for legal persons. Bribery offences include situations where a person bribes foreign public officials or intends to induce or reward the improper performance of another person's usual functions (including both public and private persons).

The word "person" in legislation is, unless a contrary intention can be identified, to be construed (by the Interpretation Act 1978) as including not only natural persons but also "a body of persons corporate or unincorporated". Though unincorporated bodies, such as trusts, are capable of committing a criminal offence in the UK, it is particularly difficult to prosecute such entities. In essence, it must be proved that each person who is a party to, or a member of, the unincorporated body is guilty of the criminal offence.

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

Of more importance to the present discussion is the position with corporations. The difficulty faced by the UK, and the common law generally, is the difficulty in attributing criminal acts to a legal person. The concept of criminal liability for a corporation grew up in the nineteenth century at a time when it was relatively straightforward to identify who in fact ran a company. In the UK, where an offence involves a mental element such as intent, a finding of liability in relation to a legal person depends on identifying someone in a corporation with an appropriate level of authority who can be said to possess the state of mind of the corporation: in other words, the so called “directing” or “controlling” mind.

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

However, a more recent attribution test, and perhaps one more akin to the contemporary realities of corporate life, is that of the Privy Council case of *Meridian Global Funds Management Asia Limited v Securities Commission* [1995] 2 AC 500, which involved an appeal from New Zealand. There it was held that the test should depend on the purpose of the statutory provisions that created the relevant offence rather than simply a search for a directing mind. It envisaged a broader test, one which sought to identify the purpose of the offence. The question in *Meridian* was whether the company had breached securities laws by failing to disclose its shareholdings in another company. Under the relevant legislation, the regulator had to prove that the company “knew” it was a “substantial security holder” in another company. The share purchases at issue were made by investment managers who were not members of the board, but who obviously acted on the company’s behalf. The question was whether their knowledge should be attributed to the company. The Judicial Committee of the Privy Council (JCPC) held that the investment managers’ knowledge should indeed be attributed to the company for the specific purpose of its disclosure obligations. Lord Hoffmann reasoned that the statutory purpose was prompt disclosures and that it was therefore appropriate to treat the knowledge of those in charge of the company’s market dealings as sufficient for this purpose. It should be noted, however, that the *Meridian* case related to securities law disclosure (regulatory offences) not to crime in the conventional sense.

English cases since *Meridian* have tended to default to the earlier test in *Tesco Supermarkets*, rather than fully engage in statutory construction in light of the factual context in a manner similar to *Meridian*. In *R v St Regis Paper Co Ltd*, for example, the Court of Appeal declined to attribute to the company the dishonest intentions of a “technical manager” who had made false entries in records which environmental legislation required the company to keep.²⁷ At trial, the judge ruled that since the technical manager was entrusted with managing waste disposals, his dishonesty should be identified with that of the company, following which the company itself was convicted by a jury. This conviction was overturned by a unanimous Court of Appeal, which favoured the test set in *Tesco Supermarkets* and held that the trial judge erred by allowing the technical manager’s intentions to be attributed to the company. Although the Court of Appeal referred to the statutory provision and the factual context, it concluded that there was no basis to depart from the “directing mind and will” test. It is difficult to reconcile the different results in *St Regis Paper* and *Meridian*, considering the technical manager in *St Regis Paper* was the individual with the relevant responsibility in the company, just as the investment managers had the relevant responsibility in *Meridian*.

Another example of English law’s restrictive approach to corporate criminal liability in practice is found in the context of the common law offence of gross negligence manslaughter: *AG’s Reference (No 2 of 1999)* – which involved the criminal prosecution of a rail company following a fatal collision.²⁸ The Court of Appeal considered

27. *R v Regis Paper Co Ltd* [2011] EWCA Crim 2527, [2012] 1 Cr App Rep 177; and see also [2012] EWCA Crim 1847 (refusing leave to appeal to the Supreme Court).

28. Attorney-General’s Reference (No 2 of 1999) [2000] QB 796; [2000] 3 All ER 182, per Rose LJ.

Lord Hoffmann's reasoning in *Meridian* but held that statutory offences did not govern the common law and "unless an identified individual's conduct, characterisable as gross criminal negligence, could be attributed to the company the company is not, in the present state of the common law, liable for manslaughter." Another significant aspect of the court's decision was to reject a submission that corporate liability could result from the aggregation of fault by different individuals.

Whichever test is preferred, the traditional English common law stance does not permit corporate intent to be created or assumed merely by aggregating the states of mind of more than one person within the company. Even with the *Meridian* test, one individual has to be the company for the purpose of the mental element. In essence, the criminal liability of a legal person depends on proving both the culpable act/omission and the required mental element by individuals within the company, even though a criminal conviction of any particular individual is not a prerequisite.

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

In addition to the criminal responsibility of legal entities, under the Bribery Act 2010, the UK has taken the innovative step of holding commercial organisations to account for failing to prevent bribery. Given its significance as a new measure to fight corruption and hold corporate to account, it is one that other states may wish to consider adopting.

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

The offence has wide jurisdiction, as it includes a UK commercial organisation (incorporated or acting as a partnership in the UK carries on business in the UK or elsewhere), any other body corporate/partnership (wherever incorporated) which carries on a business, or part of a business, in any part of the UK. There is no requirement for the prohibited conduct to have been committed in the UK, or even to have a close connection to the UK.²⁹ The company will be held liable where someone associated with the organisation is found to have bribed another person with the intention of obtaining or retaining business or an advantage in the conduct of business. Such persons 'associated' with the organisation could include employees, agents, sub-contractors and joint-venture arrangements (amongst others). The bribery could take place anywhere in the world. The penalties for failing to comply with the Bribery Act include unlimited fines.

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

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

²⁹ Ministry of Justice, The Bribery Act 2010, Circular 2011/05 (Ministry of Justice, 2011), para. 22.

Following the Guidelines' principles would still not provide a complete defence to corporations – it remains the responsibility of the legal person to ensure that its conduct is regulated, and, where malpractice is uncovered, to self-report to the Serious Fraud Office (SFO). The practice of self-reporting had developed prior to the Bribery Act 2010 and the SFO had already issued guidelines on self-reporting by businesses who uncover bribery.

The “failure to prevent” model has since been expanded to other offences. The Criminal Finances Act 2017 recently introduced criminal offences of failing to prevent both domestic and overseas tax evasion. The UK government is also consulting on whether to extend the failure to prevent model to other economic crimes, such as money laundering, false accounting and fraud.

Other countries may also adopt a form of the “failure to prevent” model in relation to corporate liability for corruption offences. Ireland has passed the Criminal Justice (Corruption Offences) Act 2018, pursuant to which a body corporate will be liable for the actions of a director, manager, secretary, employee, agent or subsidiary who commits a corruption offence with the intent of obtaining or retaining business or another advantage for the business, unless the company can demonstrate that it took “all reasonable steps and exercised all due diligence in seeking to avoid the commission of the offence.” The Australian government is also legislating to introduce a corporate offence of failing to prevent foreign bribery.

UK case example of self-referral

Before the Bribery Act 2010 came into force, in 2009 Mabey & Johnson (as it then was), a British construction and bridge-building company, became the first company to be prosecuted in the UK for corrupt practices in overseas contracts and also for breaching a United Nations embargo on trade with Iraq.³⁰ In 2008, following a self-referral to the Serious Fraud Office, the company admitted to corrupt practices in a number of jurisdictions, namely, Angola, Bangladesh, Ghana, Jamaica, Madagascar and Mozambique. In negotiations with the SFO, the company agreed to plead guilty to the Jamaica and Ghana offences and to the UN sanctions breaches, and agreed that it would be subject to financial penalties and an independent monitoring regime reporting to the SFO. The court imposed financial penalties, a confiscation order, and costs against the company. It also ordered reparations to be paid by the company to the UN and to the governments of Jamaica and Ghana.³¹ In total the financial penalty amounted to approximately £6.6 million.

The former directors of Mabey & Johnson were later sentenced for providing kickbacks to the Iraqi government by inflating contract prices for the supply of bridges and disguising illegal payments through Jordanian banks.³² Then in 2012, the holding company Mabey Engineering (Holdings) Limited agreed to pay back dividends it had received, as a shareholder, as a result of the corruption, paying a further penalty of some £130,000. After this, the SFO issued a press release stating that it “intends to use the civil recovery process to pursue investors who have benefited from illegal activity. Where issues arise, we will be much less sympathetic to institutional investors whose due diligence has clearly been lax in this respect.”

Canada

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

However, in 2002, the Government of Canada accepted the findings of a Standing Committee and decided to introduce legislation on legal liability. That initiative is now reflected in Bill C 45, an Act to amend the federal Criminal Code (Criminal Liability of Organisations), which came into force on the 31st of March 2004. It established new rules for attributing to organisations, including corporations, criminal liability. In essence, it

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

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

32. Available at www.worldbank.org, accessed 29 November 2018.

criminalises on the basis that: when a senior person with policy or operational authority commits an offence personally, or has the necessary intent and directs the affairs of the corporation in order that lower level employees carry out the illegal act, or fails to take action to stop criminal conduct of which he or she is aware or wilfully blind, then criminal liability will be attributed to the corporation. Under this new provision, a senior officer has a positive obligation to “take all reasonable measures to stop [a representative of the organization who they know is about to be a party to the offence] from being a party to the offence.”

New Zealand and Australia

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

In Australia, the Criminal Code includes relatively clear criteria based on which conduct is considered to have been authorised or permitted by the legal person. At time of writing, legislation to introduce a “failure to prevent” as a further basis for corporate liability is currently before Parliament.³³

Those wrestling with trying to create a test of attribution to the legal person might do well to consider alternative approaches. One might, for instance, ask whether domestic law allows for what is essentially vicarious liability for criminal offences to be created, i.e. a much more direct model of attribution to the legal person which does not depend upon the knowledge of the most senior individuals within the company. Such an approach best describes the liability of legal persons in the USA and the Republic of Korea.

4.1.2. “Strict” Liability approach

United States of America (USA)

Under U.S. law, companies are considered to be legal persons capable of committing crimes. The principle of *respondeat superior* makes companies generally responsible for the actions of its employees and agents under their control.³⁴ Under this principle, a company can be held liable for misconduct by its directors, officers, employees or agents who are acting within the scope of their employment with the intention, at least in part, of benefitting the company.³⁵ There is general agreement among U.S. courts that the knowledge of and acts of directors and officers of a corporation are imputed to the corporation.³⁶ Otherwise, the courts tend to consider the degree of control that a company has over its employees and agents when determining whether to impute liability to the corporation.³⁷ There is no requirement for any imputed “mental element” by the “mind” of the company and it is therefore irrelevant whether the conduct has been allowed, condoned, or even condemned by the management at a particular level.

Federal statute 18 U.S.C. §201 expressly criminalises corruption of U.S. federal public officials.³⁸ This statute prohibits bribery of public officials, which includes giving, offering or promising “anything of value to any public official or person who has been selected to be a public official” with the intent to influence an official act.³⁹ A public official is guilty of bribery if he or she “demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in the performance of any official act.”⁴⁰ The statute also criminalises giving or offering anything of value to a public official “for or because of” an official act performed or to be performed by the public official, without the requirement that the thing of value is intended to influence the official’s act.⁴¹

33. Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017

34. *Wilson v. United States*, 989 F.2d 953, 958 (8th Cir. 1993).

35. *United States v. 7326 Highway 45 N.*, 965 F.2d 311, 316 (7th Cir. 1992).

36. *In re Hellenic, Inc.*, 252 F.3d 391, 395-6 (5th Cir. 2001).

37. *In re Hellenic, Inc.*, 252 F.3d 391, 395-6 (5th Cir. 2001).

38. 18 U.S.C. § 201.

39. 18 U.S.C. § 201 (b)(1).

40. 18 U.S.C. § 201 (b)(2).

41. 18 U.S.C. § 201 (c).

The other main anti-corruption law in the United States is the U.S. Foreign Corrupt Practices Act (“FCPA”), which was enacted in 1977 in an effort to put an end to bribery of foreign officials. The FCPA contains two main categories of provisions: the anti-bribery provisions and the accounting provisions.

The FCPA’s anti-bribery provisions prohibit individuals and companies from bribing foreign government officials to obtain or retain business. These provisions apply to: (i) “issuers”, meaning any company with a class of securities listed on a national securities exchange in the U.S.;⁴² (ii) “domestic concerns”, meaning an individual who is a citizen, national, or resident of the U.S., or any business entity organised under the laws of the U.S. or having its principal place of business in the U.S.;⁴³ and (iii) foreign nationals or companies that engage in any act in furtherance of a corrupt payment while in U.S. territory.⁴⁴

The FCPA’s accounting provisions require “issuers” to make and keep adequate books and records and to devise and maintain adequate internal accounting controls. To keep adequate books and records means that issuers must keep books, records, and accounts that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the issuer’s assets.⁴⁵ Issuers must also devise and maintain an adequate system of internal accounting controls that provide reasonable assurances that transactions are executed in accordance with management’s authorization and recorded as necessary.⁴⁶

In the past ten or so years the US has enjoyed a level of success in bringing corporates to account under the FCPA’s ‘anti-bribery’ and ‘books and records’ provisions⁴⁷ by both the US Department of Justice (DOJ) and the US Securities & Exchange Commission (SEC) through a combinations of measures: plea to underlying criminal conduct (invariably counts under the ‘books and records’ provisions), deferred prosecution agreement (DPA) by both US DOJ and SEC (this was an innovative step for US SEC in relation to companies under the FCPA), independent monitors, financial penalties and disgorgement of profit.

This model of enforcement has been highlighted by the OECD Bribery Working Group⁴⁸ as one of the good practices developed within the U.S.; it has also had the benefit of coaxing corporations to implement vigorous compliance programmes to eliminate the risk of bribery.

The two notable early cases which paved the way for future cases of multi-jurisdictional settlements against corporates are:

(i) **Siemens AG**: In December 2008, Siemens reached plea agreements with the US Department of Justice (DOJ), US Securities & Exchange Commission (SEC)⁴⁹ and the Munich Prosecutor’s Office.

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

The US DOJ preferred four separate indictments relating to Siemens AG, Siemens SA (Argentina), Siemens Bangladesh Ltd and Siemens SA (Venezuela).⁵⁰ The US SEC brought a civil action against Siemens AG⁵¹ which included allegations related to the bribery of foreign officials in connection with the same projects as the US DOJ against Siemens S.A. Argentina, Siemens Bangladesh Limited and Siemens S.A. Venezuela. Additionally, the SEC’s disposition related to allegations of corruption in Vietnam, Israel, Mexico, Nigeria, China and Russia.

Siemens AG pleaded to two counts of violating the books and records and internal controls provisions of the Foreign Corrupt Practices Act (FCPA) 1977, Siemens Argentina pleaded to one count of conspiracy to

42. 15 U.S.C. § 78dd-1.

43. 15 U.S.C. § 78dd-2.

44. 15 U.S.C. § 78dd-3.

45. Section 13(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78m(b)(2)(A).

46. Section 13(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78m(b)(2)(B).

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

48. OECD *website*.

49. Case: 1 :08-cv-02167, United States District Court for the District of Columbia.

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

51. Case no. 08cv2167 – US SEC v Siemens AG (civil action).

violate the FCPA, whilst Siemens Bangladesh Ltd and Siemens SA (Venezuela) pleaded to a count of violating the anti-bribery and books and records provisions of the FCPA.

Siemens was ordered to pay a fine of \$448.5million, whilst Siemens Argentina, Venezuela and Bangladesh were each ordered to pay \$500,000 in fines (resulting in the total financial penalty of \$450 million) and \$350 million in disgorgement of profits to settle the SEC's charges.⁵²

In Germany, the company agreed to pay a fine of €395million in connection to charges relating to a corporate failure to supervise its offices and employees and another €201million in relation to a similar investigation relating to Siemens' former Communications Group. The total amount paid to authorities in Germany in connection with these legal proceedings to €596 million.⁵³

The total financial penalties imposed for both US and German proceedings amount to approximately \$1.6billion.⁵⁴ In addition to the financial penalties, Siemens was required to retain an independent compliance monitor for 4 years.⁵⁵

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

The company was investigated by the National Authority for Investigation and Prosecution of Economic and Environmental Crime ("Økokrim"). On June 29, 2004, Økokrim issued penalty notices to Statoil in the amount of approximately \$3 million, and to the Senior Executive in the amount of approximately \$30,000, charging them with violating Norway's trading-in-influence statute.⁵⁶ Statoil and the Senior Executive agreed to pay the penalties without admitting or denying the violations.

In the US, Statoil entered into a Deferred Prosecution Agreement (DPA) in October 2006 (filed on 13 October 2006) with the US DOJ, Criminal Division, Fraud Section, and the United States Attorney's Office for the Southern District of New York. The Criminal Information⁵⁷ lodged with the US District Court contained two counts against Statoil, ASA. Count 1 of the Information alleges a violation of the FCPA (anti-bribery provisions)⁵⁸ and Count 2 relates to falsifying books and records.⁵⁹

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

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

The US settlements included a monetary component consisting of a fine of \$10.5 million⁶⁰ and the confiscation of benefits gained by the violations of the FCPA payments (disgorgement) of \$10.5 million. As Statoil had also paid a criminal fine of approximately \$3 million⁶¹ under the penalty notice ("*forelegg*") issued by Norwegian authorities (Økokrim), the Norwegian fine was deducted from the US fine making a total penalty of \$7.5million⁶² In relation to the SEC proceedings, Statoil agreed a disgorgement of \$10.5million.⁶³ The DPA was discharged on 18 November 2009⁶⁴ after Statoil fulfilled all the obligations set out in the terms of the DPA.

52. Transcript of the Plea Hearing & Sentence, US District Court for the District of Columbia, 15 December 2008

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

54. US DOJ Press Statement of 15 December 2008.

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

56. Article 276(c) of the Norwegian Criminal Code.

57. Case 06 Crim 960.

58. Title 15, United States Code, Section 78dd-1(a).

59. Title 15, United States Code, Sections 78m(b) (2) (A), 78m(b) (5) and 78ff.

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

61. NOK20,000,000 (see paragraph 19, idem).

62. Paragraph 19, idem.

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

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

4.1.3. Civil Law approaches

4.1.3.1. Vicarious liability approach

Republic of Korea

The Republic of Korea's approach is, in essence, vicarious liability. Article 4 of the Foreign Bribery Prevention Act in International Business Transactions (FBPA) provides: "In the event that a representative, agent, employee or other individual working for a legal person has committed the offence as set out in Article 3.1 in relation to its business, the legal person shall also be subject to a fine of up to 1 billion won in addition to the imposition of sanctions on the actual performer... if the legal person has paid due attention or exercised proper supervision to prevent the offence against this act, it shall not be subject to the above sanctions."

This provision, however, raises the question as to what amounts to "due attention" or "proper supervision"? At the OECD Phase 3 follow-up stage, the Republic of Korea explained that when it comes to determining whether due diligence or proper supervision was exercised, one of the important factors is the specific measures the legal persons had taken in order to prevent foreign bribery, i.e. whether corporate regulations or codes of conduct for employees stipulating the prohibition of bribery are posted on the company's website, whether an employment contract or collective agreement contains a provision banning bribery, whether employees had signed a letter of commitment banning bribery, etc.

Another aspect of the above provision is that it is unclear whether the natural person has to be prosecuted and/or convicted for the legal person to be liable. At the OECD Phase 2 review, the lead examiners were informed that the natural person who is the perpetrator must be identified but, if he is not processed, the court is able to make a finding of fact that he bribed a foreign public official. In the event that the natural person is processed under the Act, then the legal person may only be found guilty if the natural person perpetrator is convicted and sanctioned.

4.1.3.2. "Strict" Liability approach and Lack of Supervision

In countries such as Portugal and Spain, the approach is different according to whether the acts were committed by managers and other leading personnel, or by non-managerial personnel reporting to them.

Portugal

Under Portuguese law, corporate criminal liability is independent from individual liability.⁶⁵ Article 11 of the Portuguese Penal Code establishes under which terms and for which crimes companies may be held criminally liable.

According to Article 11(2)(a), strict liability may be imposed on companies when the criminal conduct is undertaken by company's managers on the company's behalf and in pursuit of its interests.

A company may also be held liable for lack of supervision under Article 11(2)(b) of the Penal Code. Pursuant to this provision, companies are responsible for offences committed by personnel acting under the authority of employees in "leading positions" (whether formally or *de facto*)⁶⁶ as a result of the violation of the latter's duties of supervision or control.

It should be noted that the Portuguese Civil Code also imposes strict liability on companies in cases where their employees or agents cause damages through an unlawful act committed in the scope of their work, regardless of whether the employee or agent acted against the company's instructions.⁶⁷

Spain

Companies can only be held criminally liable in Spain for offences expressly established in the Spanish Criminal Code. In 2010, corporate criminal liability was introduced for the first time in the Spanish Criminal Code through Organic Law 5/2010 of 22 June 2010, and is currently set out in Article 31bis of the Code.

65. Article 11(7) of the Penal Code.

66. Patrícia Bernardes, Grupos Societários: Critérios Atributivos de Responsabilidade Penal à Sociedade-Dominante e/ou à Sociedade-Dominada (Feb. 2017).

67. Portuguese Civil Code, Article 500(1), (2).

In particular, Article 31bis provides that companies may be held strictly liable for offences committed by the company's legal proxies, directors, or managers when the act was committed on behalf of the company and within its indirect and direct duty.

The company may also be held liable for a lack of supervision where offences have been committed by individuals subject to the authority of the company's management, if those offences were committed within the context of the company's activities and operations, on its behalf and for its direct or indirect benefit when the company has breached its duties of supervision, monitoring and control.

4.1.3.3. "Imputed or Deemed" Liability

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

Finland

Criminal liability of legal persons was introduced in 1995 and required that a person belonging to the management of the legal person must have been either an accomplice or allowed, authorised or directed the offence. However, following an amendment to the Penal Code in 2001, liability was extended to include a natural person exercising a *de facto* management function, regardless of whether that natural person was formally a part of the management.

France

Since 1994, the Criminal Code in France has allowed a judge, in respect of active bribery as well as other prescribed offences, to assign criminal responsibility to legal persons. The French Code also allows for the prosecution of a natural person or persons.

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

- i. A delegation or sub-delegation of power to an employee or subordinate is sufficient for the employee or subordinate to be treated as a representative of the legal person for the purposes of criminal law.
- ii. "Legal Person" includes not only commercial companies but also not-for-profit entities (such as trade associations) and also legal persons established by public law, such as local authorities, semi-public companies and public institutions.
- iii. France does not, to date, appear to recognise a concept of 'successor liability,' meaning that the disappearance of a corporate entity may result in the absence of a basis for legal liability.
- iv. A bribe has to be on behalf of the legal person.
- v. If an employee or insubordinate does not have a delegated authority, it seems uncertain whether there is still a basis for liability: for instance, would it require an employee to have acted on the orders, or with the authorisation, of a company representative? Alternatively, will knowledge of the bribe of someone with delegated authority in that particular area be sufficient?
- vi. The identification of a natural person is not a necessity so long as the representative or body that committed a fault is identified.

On December 9, 2016, France enacted the law No. 2016-1691 entitled "Transparency, the Fight against Corruption and the Modernization of the Economy" (known as "Sapin 2"), which, among other aspects, (i) requires companies of a certain size⁶⁸ to adopt and implement anti-corruption compliance programs and (ii) creates the *Agence Française Anticorruption* (French Anticorruption Agency, or "AFA") in charge of ensuring that it is adhered to. While it does not change the standard of criminal liability for legal entities, it creates an administrative liability for certain companies for failing to have in place an adequate anti-corruption compliance program. Under the French regime, corporations of a certain size must establish and implement an adequate anti-corruption program that can be assessed by the French Anticorruption Agency. If the AFA determines

68. This applies to (i) corporations established under French law with at least 500 employees and with a revenue of over 100 million euros, and (ii) corporations established under French law that are part of a group with a total of at least 500 employees, where the parent company is headquartered in France, and the group has a consolidated turnover above 100 million euros. These obligations also apply to state-owned companies and to the subsidiaries of entities subject to Sapin II requirements.

that no proper compliance program is in place, an administrative sanction can be imposed on both the legal entity and its representatives, even if no corruption ever took place.⁶⁹

Sapin 2 constitutes a novel approach to preventing bribery compared to the United States' or even the United Kingdom's regime (which use corporate compliance programs as elements to be considered in the company's defense) and could lead other states to consider adopting a similar approach.

4.2. Administrative liability

Some states, for example, Brazil, Germany and Italy, have introduced/retained administrative liability.

Brazil

Generally speaking, under Brazilian law, companies are not subject to criminal punishment. However, the Federal Constitution and federal statutes provide for exceptions to this general rule, including in the context of crimes against the economic and financial order,⁷⁰ environmental crimes,⁷¹ and tax, economic and consumer-related crimes.⁷²

With respect to corruption, in August 2013, Law No. 12,846/13, the Clean Companies Act (CCA), imposed administrative and civil liability on legal entities for corrupt or fraudulent conduct for the first time in Brazil. The statute has been in effect since January 2014. Under the CCA, companies for which wrongdoing has been committed are subject to strict liability under civil and administrative legislation. The statute expressly provides that corporate liability is independent of whether the company's officers or any other individuals are prosecuted for the same facts.⁷³

Aside from the CCA, entities that engage in bribery may be exposed to administrative sanctions under more general provisions. For example, Law No. 8,666/93 (on federal procurement procedures) sets out the punishment of companies that commit illegal acts that either impair the purposes of a public tender or otherwise suggest that the entity is not suitable to enter into contracts with the government.⁷⁴

Germany

In Germany, under the Administrative Offences Act, a fine may be imposed on the legal person in the course of criminal proceedings against the natural person.

However, if a natural person is not prosecuted because he or she cannot be identified, or has died, it is then possible to sanction the legal person in separate proceedings. The liability of the legal person is regarded as an "incidental consequence" of an offence committed by the natural person, and it appears that it is, in fact, very unusual to proceed against the legal person where proceedings have not been initiated against the natural person.

Sizeable regulatory proceedings have been initiated against various German companies arising from corruption charges, including: Siemens AG received a penalty of €201 million in 2007; MAN AG received a penalty of €151 million in 2009; Credit Suisse received a penalty of €150 million in 2011; Ferrostaal AG received a penalty of more than €140 million in 2012; and UBS AG received a penalty of €300 million in 2014.

Germany has given consideration to introducing a criminal corporate liability regime, both at the Federal and regional level. At the Federal level, the former Coalition Agreement stated that consideration should be given to introducing criminal corporate liability for multinational companies, but this did not materialise into

69. The Sanctions Committee of the French Anticorruption Agency may impose fines on individuals of up to 200,000 Euros, and on legal entities of up to 1 million Euros. Such sanction may be made public.

70. Article 173§5, which states: "the law, without prejudice to the individual liability of the directors, shall provide for the liability of legal persons, imposing sanctions compatible with their nature for offenses to the economic and financial order and welfare."

71. Article 225§3 of the Constitution determines that "acts and activities deemed harmful to the environment shall subject the offenders, individuals or entities, to criminal and administrative sanctions, irrespective of their obligation to pay damages." This provision was implemented by Law No. 9,605/98, which regulates the administrative and criminal protection of the environment, and establishes fines, the restriction of rights (such as the interruption of activities and the debarment from, or limitation of, tax and credit benefits), and community service as sanctions applicable to entities. A number of scholars argued that the law was unconstitutional because it provides for the criminal liability of legal persons. However, it remains in force.

72. Law No. 8,137/90, which defines tax, economic, and consumer-related crimes, brings forth several provisions imposing criminal liability on entities for their illegal acts, such as those related to abuse of economic power and unfair competition.

73. Law No. 12,846/13, Articles 2-3.

74. Law No. 8,666/93, Article 88(II-III); OECD, Directorate for Financial & Enterprise Affairs, Working Group on Bribery in International Business Transactions, Brazil: Phase 1 – Review of Implementation of the Convention and 1997 Recommendation 11 (Aug. 31, 2004).

a formal proposal. At the regional level, the former government of North Rhine-Westphalia presented a draft bill, but it has since been withdrawn.⁷⁵ The OECD Working group expressed concern that there is insufficient enforcement against legal persons in Germany.

Italy

Legislative Decree No. 231 of June 8, 2001, "*Disciplina della responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalità giuridica, a norma dell'articolo 11 della legge 29 settembre 2000, n. 300*" ("Law 231/2001"), provides that, where certain offences are committed in the interest of a corporation or for its benefit by natural persons acting as its legal representatives, including directors (whether formally or *de facto*) or employees, the corporation may also be held liable for the offence. Corporate liability may only arise on the basis of the commission of offences expressly enumerated by the law, including, but not limited to, crimes against public administrations (including corruption and embezzlement),⁷⁶ offences committed by criminal organisations,⁷⁷ and the dissemination of false company information.⁷⁸

No corporate liability can arise where the crimes are committed exclusively in the interest or for the benefit of the natural person or third parties.⁷⁹ Attempts to commit an offence covered by Law 231/2001 could also trigger corporate liability, provided that the individual committing the offence is convicted of criminal attempt. However, in such a case, no liability will attach if the crime was not completed because the corporation intentionally acted to prevent the individual from completing it.⁸⁰ Companies may also avoid liability under certain conditions (see below at 5.5.3).

Penalties imposed on the basis of corporate liability under Law 231/2001 include financial penalties, exclusion from public tender processes, confiscation of the proceeds of crime, and publication of the judgment.⁸¹ Criminal courts have jurisdiction to hear cases of potential corporate criminal liability.⁸²

4.3. Analysis of approaches (criminal versus administrative)

The different approaches taken by the country examples above highlight some of the central difficulties in models of attribution to the legal person: does one look to the post actually held by the person? Is a *de facto* management function sufficient? Is the nature of the function exercised by the natural person (along with any delegated authority) the determining factor, regardless of the *de jure* or *de facto* management post held?

The OECD Working Group on Bribery in International Business Transactions has provided the following Guidance for corporate liability:

- a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.
- b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.⁸³

However, neither the OECD guidance nor UNCAC require any particular form of liability over another. Criminal liability of legal persons is accepted by the vast majority of the CoE Member States, including by a number of countries where the principle that corporations cannot commit crimes (*societas delinquere non potest*) used to be the dominant perspective. An OECD Stocktaking Report published in December 2016 found that 27 out of 41 States Parties to the OECD Foreign Bribery Convention provided for the criminal liability of legal persons.⁸⁴

75. OECD *Phase 4 Review of Germany* (June 2018), paras 212-213.

76. Law 231/2001, Article 25.

77. Law 231/2001, Article 24-ter.

78. Law 231/2001, Article 55-ter.

79. Law 231/2001, Article 5.

80. Law 231/2001, Article 26.

81. Law 231/2001, Articles 9-19.

82. Law 231/2001, Article 36.

83. *Good Practice Guidance* on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (2009).

84. OECD, *The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report* (2016), p. 21.

The UNODC's 2017 assessment of UNCAC found that "[m]ore than two thirds of States parties have established some form of criminal liability of legal persons for corruption offences."⁸⁵ That said, reviewing experts have accepted that the precise form of liability is a matter of national choice and systems with effective administrative sanctions have been found to be in full compliance with the requirements set forth in article 26 UNCAC.⁸⁶

Notwithstanding the feasibility of an administrative approach, the overall preference for 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 actively bribing a foreign public official when a party's legal system provides for this possibility. International initiatives related to money laundering include FATF Recommendation 3 and its Interpretative Note which in paragraph 7, subparagraph (c), states that: "Criminal liability, and, where that is not possible, civil or administrative liability, should apply to legal persons..."⁸⁷

In addition, criminal liability can have more of a deterrent effect than administrative liability and that the criminal proceedings can be 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 a legal person should be held liable for criminal offences are connected with: (1) a stronger dissuasive and deterrent effect from criminal convictions; (2) the broader set of investigative instruments and coercive measures; (3) competent courts; (d) longer prescription periods; and, (e) better opportunities for international legal cooperation, including mutual legal assistance. In the following section, these will be dealt with in turn.

i. Dissuasive and deterrent effect of criminal convictions

In addition to its punitive effect, criminal convictions are also a stigma that may seriously damage the status, reputation and relationships of the concerned person. Administrative liability does not always have such an effect and can therefore be less dissuasive than criminal liability. In corporate liability cases, the companies may fear the stigmatising effect of the criminal conviction (as it usually entails long-term reputational consequences) more than the actual punishment or sanction imposed.

ii. Use of special investigative techniques

In jurisdictions with administrative corporate liability, sanctions are usually imposed on a legal person only after the criminal offence has been detected and sufficient evidence has been presented and proven during criminal proceedings against the physical perpetrator(s). In other words, the liability of the legal person is only triggered on the basis of evidence collected during criminal proceedings that have already been conducted against a natural person. In such a case, special investigative techniques and other means of proof that are permitted only in the criminal proceedings, such as the interception of communications, undercover agents, searches, seizures, etc., could be indirectly used to uncover evidential material that may demonstrate the liability of the legal person.

However, there can be an advantage to using criminal (but not administrative) proceedings for triggering corporate liability, particularly when the natural person is not, or cannot be, investigated and prosecuted. For example, where the investigation against the physical perpetrator(s) cannot be initiated or completed, the use of special investigative techniques against a legal person would be problematic in the countries with administrative liability as well as countries with quasi-criminal liability systems. Thus, for instance, in Bulgaria, when the legal person is investigated separately, it must be carried out in the framework of administrative proceedings, which would mean that criminal investigative techniques are not available. Similarly, in Latvia, a jurisdiction with corporate quasi-criminal liability, if proceedings against legal persons are instituted separate from an investigation of a natural person, then it is not possible to use criminal investigative tools.

iii. Consideration of the criminal law matters by criminal court judges

Another advantage of instituting criminal proceedings to establish the liability of legal persons for crimes is linked to the competence, skills and special knowledge of the judges who would hear the cases. Criminal courts, in view of their substantive competence in criminal law matters, are usually in a better position to try cases where the perpetration of the corresponding criminal offence by a natural person should be established, for instance, in circumstances where proceedings are initiated against the legal person before the physical perpetrator, and therefore the commission of the crime by the physical perpetrator has not yet been established. Because of this reason, in Germany and Italy there are criminal courts which are empowered to conduct

85. UNODC, *The State of implementation of the UN Convention against Corruption* (2017), p. 87.

86. UNODC, *The State of implementation of the UN Convention against Corruption* (2017), p. 90.

87. *FATF Recommendations 2012*, p. 32

administrative proceedings against legal persons involved in criminal activity. Bulgaria was also considering the possibility to entrust the criminal courts with cases involving legal persons accused of criminal offences under the Law on Administrative Offences and Sanctions.⁸⁸

iv. Longer prescription periods under criminal law

The longer prescription periods (statute of limitations) applied for criminal offences could be also considered as an argument in favour of the use of criminal proceedings for legal persons. In the traditionally short prescription periods provided for in administrative procedures, it could be highly problematic to successfully complete investigations against a corporate entity, and the possibility to sanction the legal person would therefore depend to a large 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) have been mentioned as a subject of concern for the OECD Working Group on Bribery.⁸⁹

v. Broader opportunities for international legal cooperation, including mutual legal assistance

Generally speaking, international law does not provide for adequate co-operation tools in administrative law matters. On the contrary, there are number of international multilateral conventions and bilateral treaties relating to mutual legal assistance in criminal matters. As such, international instruments relevant to the field of administrative law tend not to facilitate effective co-operation between states in corruption cases involving legal persons. In particular, issues relating to the lack of adequate tools for international cooperation can arise in cases where a legal person is investigated and prosecuted independently from the physical perpetrator.

Some countries, such as Germany and Italy, have attempted to address this problematic aspect of the corporate administrative liability system by providing, in their respective domestic legislation, for the possibility to use instruments normally used for mutual legal assistance in criminal matters in proceedings concerning crimes committed by legal persons. However, in other jurisdictions, this deficiency remains. For instance, in the Russian Federation and Bulgaria, instruments for mutual legal assistance in criminal matters are not able to be used in administrative proceedings against legal persons.

In view of the above, there are strong arguments in favour of the view that procedural mechanisms developed and used in the criminal justice systems of various can be significantly more effective in establishing corporate liability than comparable systems of establishing administrative liability of legal persons. However, it may be possible to compensate for some of the weaknesses of the administrative procedure, for example by ensuring that special investigative techniques are available, that prescription periods and statutes of limitation do not impede proper and thorough investigations, and that instruments normally used for mutual legal assistance in criminal matters (or adequate substitutes) are capable of being used in proceedings against legal persons.

88. OECD, *Liability of Legal Persons for Corruption in Eastern Europe and Central Asia*, 2015

89. OECD, *Phase 2 Report on Implementing the OECD Anti-Bribery Convention in the Russian Federation*, October 2013

5. Elements of liability

As observed by the UNODC in its recent review of the UN Convention against Corruption, however, “[t]here are no clearly consolidated principles among States parties for the attribution of criminal liability to legal persons.”⁹⁰ In general terms, however, liability of legal persons for corruption offences will broadly consist of the following elements in any legal system:

1. A legal person,
2. A natural person connected to the legal person,
3. A corruption offence committed by the connected natural person,
4. A link between the offence and the legal person,
5. Fault by the legal person.

These five elements exist for civil, criminal or administrative liability, although the parameters of each may differ. For instance, the applicable sanctions tend to differ the most between civil, administrative and criminal liability (see chapter 6 below). The following sections explore each of these five elements in turn.

5.1. Legal person

The Council of Europe Criminal Law Convention on Corruption (1999) and the EU Second Protocol to the Convention on the Protection of the European Communities’ Financial Interests (1997) are the only international standards defining “legal persons” (besides the non-binding European Union Framework Decision). Article 1 (d) of the Council of Europe Convention reads as follows:

“‘legal person’ shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations.”

The Explanatory Report to the Convention provides some clarification in Commentary 31:

“The term ‘legal person’ appears in Article 18 (Corporate liability). Again, the Convention does not provide an autonomous definition, but refers back to national laws. Littera d. of Article 1 thus permits States to use their own definition of “legal person”, whether such definition is contained in company law or in criminal law. For the purpose of active corruption offences however, it expressly excludes from the scope of the definition the State or other public bodies exercising State authority, such as ministries or local government bodies as well as public international organisations such as the Council of Europe. The exception refers to the different levels of government: State, Regional or Local entities exercising public powers. The reason is that the responsibilities of public entities are subject to specific regulations or agreements/treaties, and in the case of public international organisations, are usually embodied in administrative law. It is not aimed at excluding the responsibility of public enterprises. A contracting State may, however, go further as to allow the imposition of criminal law or administrative law sanctions on public bodies as well. It goes without saying that this provision does not restrict, in any manner, the responsibility of individuals employed by the different State organs for passive corruption offences under Articles 3 to 6 and 9 to 12 of the present Convention.”

In essence, for the purposes of the Convention, this means that a state cannot fall below its own standard of what constitutes a legal person. If the following entities are considered legal persons according to national law, then they must be included:

- ▶ Single owner business,
- ▶ Associations,
- ▶ Trust funds,
- ▶ Partnerships,
- ▶ State-owned or -controlled companies, and
- ▶ Enterprises established by public law.

90. UNODC, *The State of implementation of the UN Convention against Corruption* (2017), p. 88.

Certainly, States can go beyond the requirement and can, for example, include single owner businesses into the criminal liability of legal persons, even if those businesses would generally not be considered legal persons in the national law. For example, the Swiss Criminal Code does not draw the liability from the term of legal person, but from the term of an “enterprise”, thus including “companies without legal personality” and “sole proprietorships” (Article 102). The UK’s “failure to prevent” offence in the Bribery Act 2010 targets any “relevant commercial organisation”, which includes bodies corporate and partnerships, while the underlying bribery offences apply to any “person”.⁹¹

As a rare exception, the Estonian Penal Code clarifies in Section 37 that “legal persons with passive legal capacity are capable of guilt” (passive legal capacity meaning the legal existence of the legal person as opposed to active legal capacity, which is normally understood as the right to enter contracts and to sue in court).

The Georgian Criminal Code (Article 107.1 para. 1) uses the following definition: “For the purposes of this Code, a legal entity means a commercial or non-commercial legal entity (or an assignee thereto).”

The Moldovan Penal Code subjects all “legal entities” to criminal liability, “except for public authorities” (Article 21 para. 3).

In the European Union, only 4 out of 27 Member States strictly restrict liability of legal persons to private entities (thus exempting all public entities).⁹² As such, though it is not yet the case, the European standard could be pointing towards accepting that public entities can be held liable in a manner similar to private legal persons. An EU-funded comparative study on liability of legal persons in Member States came to the following recommendation:

“In the current EU policy with respect to the liability of legal persons for offences, public legal persons are not included in the scope. Considering that a lot of Member States include one or more types of public legal persons within the scope of their national liability approach, the EU can consider to extend its scope accordingly.”⁹³

The Working Group on Bribery of the OECD has insisted that public entities that can engage in contracts are covered by liability.⁹⁴ The OECD’s Stocktaking Report found that the vast majority (83%) of States Parties to the OECD Foreign Bribery Convention applied their foreign bribery laws to state-owned enterprises, at least under certain circumstances.⁹⁵ However, often certain conditions apply, such as for example in Spain, where state-owned corporations that pursue public policy objectives cannot be held criminally liable.⁹⁶

5.2. Natural person offender connected to the legal person

A computer cannot commit bribery, as it has no will of its own. Other than in relation to “failure to prevent” models of liability, bribery and other corruption offences are the act of a natural person. The question is what relationship a natural person must have with a legal person for the legal person to be responsible. Four segments (or levels) of staff can be distinguished:

- ▶ **Directing mind:** Only acts by members of the leadership can lead to corporate liability. This is the most exclusive model.
- ▶ **Senior management:** Under this concept, acts by employees with substantial decision or control power can trigger corporate liability.
- ▶ **Employee:** This approach would include acts by all employees of the company.
- ▶ **Agents and third parties:** The widest approach would be to include agents acting on behalf of the company and even third parties like independent consultants. The United States Foreign Corrupt Practices Act of 1977 (“FCPA”) follows this approach by including “any officer, director, employee, or agent”.⁹⁷

The Council of Europe Criminal Law Convention on Corruption follows a combined approach. It initially draws on acts by the senior management, defined by:

- a power of representation of the legal person; or
- an authority to take decisions on behalf of the legal person; or
- an authority to exercise control within the legal person;”

91. Swiss *Criminal Code SR 311.0 of 1 January 2013*, www.admin.ch, accessed 28 October 2019.

92. Vermeulen G. and others (2012), *Liability of Legal Persons for Offences in the EU*, p. 44/chapter 2.2.2.2 “Private versus public”.

93. *Idem*, p. 139, recommendation 4.

94. Pieth M./Low L./Cullen P. (2007), *OECD Convention on Bribery: A Commentary*, Art. 4 No. 3.4.

95. OECD, *The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report*, 9 December 2016, p. 34.

96. *Idem*.

97. § 78dd-1 (a).

However, the Convention also includes acts by employees if the senior management failed to supervise adequately by establishing liability: “where the lack of supervision or control by [...] [senior management] has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.”

The UN and OECD conventions provide no specifics on the seniority of staff for which legal person liability should be triggered. However, an OECD Stocktaking Report on Legal Person Liability found that at least 71% of States Parties to the OECD Convention on Foreign Bribery could hold companies liable if an officer or other manager fails to prevent the offence “through a failure to supervise ... or ... a failure to implement adequate controls.”⁹⁸ In some countries, however, national legislation requires employees to have acted within the field assigned to them or within the scope of their duties.

The question of triggering legal person liability based on crimes committed by subcontractors (agents) can be controversial and difficult to establish in many jurisdictions. An EU-funded comparative study on liability of legal persons in Member States noted a case where a legal person argued that it could not be held liable because the natural persons responsible for certain criminal acts were employed by one of its subcontractors, not directly by the legal person itself. The study wondered whether “[i]t should therefore be looked into whether or not it is desirable to criminalise the situations linked to e.g. subcontracting.”⁹⁹

5.3. Corruption offence committed by a natural person

The corruption offence is the starting point of corporate liability. As a corruption offence can only be committed by a natural person (or persons), further elements of corporate liability (link to the legal person, seniority of staff, and corporate fault) must be established in order to attribute the corruption offence to a legal person.

5.3.1. Types of corruption offences

The various international conventions require liability of legal persons for all prescribed corruption offences. If certain offences are optional, as, for example, illicit enrichment under Article 20 UN Convention against Corruption or trading in influence under Article 12 of the Council of Europe Criminal Law Convention on Corruption, a country is obliged to introduce liability of legal persons once it has opted for the particular offence. States retain discretion to determine the form of liability (criminal, civil or administrative).

For example, with regard to the Polish law GRECO found, “that the provision relating to active trading in influence (Article 230a of the Penal Code) has not been included in the list of offences under Article 16 of the Law on Liability of Collective Entities. Therefore, the [GRECO Evaluation Team] recommends to amend the Law on Liability of Collective Entities for Acts Prohibited under Penalty in order to include all relevant corruption offences which may lead to the establishment of corporate liability.”¹⁰⁰

Similarly, in Italy, GRECO recommended “that corporate liability be extended to cover offences of active bribery in the private sector.”¹⁰¹

However, it can be argued that certain corruption offences included in the UN Convention against Corruption have limited practical relevance for legal persons, such as illicit enrichment, whereas others only have limited symbolic value, for example, abuse of office. The main issues concern public and private bribery, and in particular, active bribery of foreign public officials.

5.3.2. *Actus reus* and *mens rea*

General principles of criminal law mean that for a corruption offence such as bribery, there must be proof of both an action and a corresponding mental element (“*actus reus*” and “*mens rea*”). The *actus reus* could, for example, consist of a scenario whereby money is transferred from an account controlled by a legal person to the account of a public official prior to the awarding of a state contract by this official to the legal person. Absent a persuasive alternative explanation, it would be possible to infer from this circumstantial evidence that the natural person acting had the necessary intent, the *mens rea*, to bribe the public official, and was not merely acting negligently.

98. OECD, *The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report* (2016), p. 47.

99. Vermeulen G. and others, *supra*, p. 102 and p. 140, recommendation 9.

100. GRECO (2004), *Second Evaluation Round. Evaluation Report on Poland*, para. 55, www.coe.int/greco, accessed 28 October 2019. See also GRECO (2006), *Compliance Report on Poland*, paras 39-40, noting that Polish law had been amended.

101. GRECO (2009), *Joint First and Second Evaluation Round. Evaluation Report on Italy*, para. 183, www.coe.int/greco, accessed 28 October 2019. See also GRECO (2013), *Addendum to the Compliance Report on Italy*, paras 58-62, noting that Italian law had been amended.

5.3.3. Act of an individual natural person

Generally, natural persons working for the legal person will be identified as a result of the corruption investigation due to either testimony by the recipient of the bribe, a confession by the bribe-giver, or simply the fact that the money used for a bribe can be traced back to the natural person who ordered the bribe to be given.

However, issues arise in cases where the legal person can be liable when the distinct natural person cannot be accurately identified, but it is nevertheless clear that someone from inside (or linked to) the legal person has committed the offence. National legislation differs on this question, with four general models being evident:

- ▶ **Strict identification:** in Slovenia for example, “the identification of the offender is the prerequisite for establishing all factual ingredients of a crime and for establishing that harm has not occurred by accident, for example. [...] [Hence, a] legal person cannot be held liable when the offender has not been identified”.¹⁰²
- ▶ **Conditional identification:** in Switzerland, the legal person can still be liable even if “the individual perpetrator of an offence cannot be identified”, if this lack of identification is “because of the company’s organisational shortcomings” (Article 102 Criminal Code).¹⁰³ In all other cases, identification would be necessary.
- ▶ **Anonymous approximation:** in Germany, for example, it is sufficient if the court can establish with certainty that the offence was committed by someone within the circle of relevant company people, even if the individual identity of the perpetrator is not clear.¹⁰⁴ Some Swiss academics also favour this approach under the label of “general delinquency”.¹⁰⁵ The Georgian Criminal Code explicitly detaches the corporate liability from the distinct natural person: “The legal entity shall be subject to criminal liability also when a crime is committed on behalf of or through (by using) or/and for the benefit of the legal entity irrespective of whether the individual committing the crime has been identified or not.”¹⁰⁶
- ▶ **Aggregated act or intent:** under this concept, the offence does not need to be committed in one act by one person. It is sufficient if several persons within the company are together responsible for all elements of the crime, even if none of them would fulfil all of the elements on his or her own. For example, one employee signs a consultancy contract with a business negotiator, not knowing that the negotiator regularly uses part of his fee for bribing his counterparts in a government ministry. Another employee knows about the practices of the negotiator, but does not know that his company is currently engaging with this consultant. In this case, two different natural persons fulfil the *actus reus*. This theory – as far as can be seen – has only been suggested by academics and has yet to be used in legislation.

The strict identification concept imposes the highest burden upon prosecutors for establishing liability. Nonetheless, all of the above concepts, including the strict identification concept, seem to comply with **international standards** as none of the monitoring groups for the Council of Europe Conventions or the OECD Convention contested any of the national standards for identifying natural persons.

5.3.4. Conviction

Neither the wording of the Council of Europe Conventions, nor the legislation of most states, requires the conviction of an individual for a corruption offence as a prerequisite for corporate liability.

The OECD’s 2009 Recommendation indicated that States Parties should not restrict legal person liability to cases where natural persons are prosecuted or convicted.¹⁰⁷ This followed the monitoring reports for compliance with the OECD Convention, which expressed doubts as to whether states would be compliant when requiring a conviction prior to prosecuting a corporation.

In regard to Mexico, the report noted that “a legal person cannot be criminally sanctioned where the natural person who committed the bribery offence cannot be convicted. This raises doubts whether the standard of effective, proportionate and dissuasive sanctions has been met.”¹⁰⁸

102. GRECO (2003), *Second Evaluation Round. Evaluation Report on Slovenia*, para. 56, www.coe.int/greco, accessed 28 October 2019.

103. GRECO (2008), *Joint First and Second Evaluation Rounds, Evaluation Report on Switzerland*, para. 165, www.coe.int/greco, accessed 28 October 2019.

104. GRECO (2005), *Second Evaluation Round. Evaluation Report on Germany*, para. 55, www.coe.int/greco, accessed 28 October 2019; see also GRECO (2004), *Second Evaluation Round. Evaluation Report on the United Kingdom*, para. 105, www.coe.int/greco, accessed 28 October 2019.

105. See, for example, Macaluso A. (2004), *La responsabilité pénale de l’entreprise*, Zurich, N 729 f.

106. Article 107-1 No. 4 Criminal Code Georgia.

107. OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I, Good Practice, Article 2 of the OECD Convention: Responsibility of Legal Persons.

108. OECD (2000), *Mexico, Phase 1 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p. 24, www.oecd.org, accessed 28 October 2019. See also OECD (2018), *Mexico, Phase 4 Report*, para. 110, noting that Mexico had changed its legislation so that a legal person can now be prosecuted regardless of whether a natural person is prosecuted for the same offence.

In Poland, the Working Group expressed concern about “the requirement, in most cases, of a prior conviction of the natural person [...]”¹⁰⁹ However, GRECO found the same Polish regulation to be “non-conflicting with the provisions of Article 18 of the Criminal Law Convention on Corruption”,¹¹⁰ while also noting that Recommendation No. R (88) 18 of the Committee of Ministers concerning Liability of Enterprises sets a standard where legal persons shall be liable “whether a natural person who committed the acts or omissions constituting the offence can be identified or not.” Thus, GRECO determined that by restricting legal person liability in such a manner, the Polish law was not in compliance with the relevant standard of the Recommendation No. R (88) 18 of the Committee of Ministers concerning Liability of Enterprises.¹¹¹ Number I.2. of the Recommendation’s standard.

5.4. Link between the offence and the legal person

An employee of a car company might bribe a teacher in order for his child to receive a better grade in school. The car company should not be held liable for such crimes that they clearly have nothing to do with. Consequently, liability should arise only if there is a sufficient connection between the crime and the legal person.

Only the Council of Europe Criminal Law Convention on Corruption and the EU Second Protocol expressly define the relation between the corrupt act and the legal person. Generally speaking, one can distinguish three degrees of relationship between the employee and the legal person:

- ▶ The Council of Europe Criminal Law Convention on Corruption limits liability to offences “committed for their [legal persons] benefit”.
- ▶ Some national laws set the threshold somewhat lower and require an act only to be “in the name”, “on behalf” or “in the interest” of the legal person.
- ▶ Some countries include any act that was committed “in the course of operations” or only “related to the business”.

The “relation” concept leads to the widest application of corporate liability, whereas the “benefit” concept is the most exclusive one:

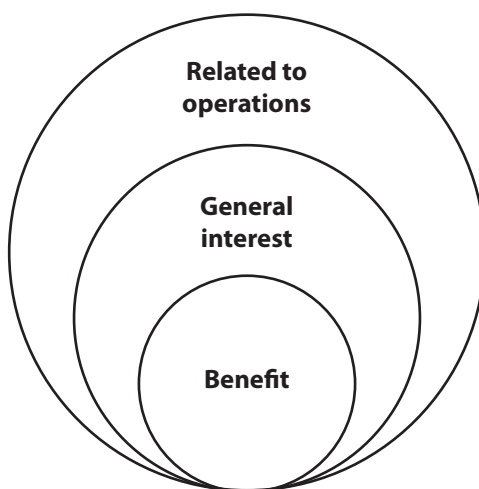


Figure 1: Comparing the scope of concepts linking the underlying act with the legal person.

Each of these concepts will be dealt with in turn.

109. OECD (2001), *Poland, Phase 1 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, www.oecd.org, accessed 28 October 2019. See also OECD (2015), *Poland, Follow-Up to the Phase 3 Report & Recommendations*, p. 8, finding a lack of concrete progress on this issue.

110. GRECO (2003), *Second Evaluation Round. Evaluation Report on Poland*, para. 56, www.coe.int/greco, accessed 28 October 2019.

111. NB: the Recommendation is not covered by the evaluation remit of GRECO; hence, GRECO is not in a position to make assessments based on the Recommendation’s standards; see Annex 9.2 below.

5.4.1. Benefit

Under this concept, the act needs to be for the sake of a benefit for the company, but the company in question does not need to actually benefit from the act.

Examples:

- ▶ An employee negotiates a contract with government officials and during the negotiations offers them a bribe if the company wins the contract. The company does not know whether the bribe was decisive or not in winning the contract. Still, the bribe is intended for the benefit of the company, even if the company did not ultimately win the contract.
- ▶ An employee of a pharmaceutical company bribes an official at the health ministry to prevent competitors from entering the market. The company need not directly benefit from the act, as it would still benefit indirectly from reduced competition.

The wording of the Council of Europe Criminal Law Convention on Corruption follows this approach by establishing liability for acts committed for the “benefit” of the company. However, the Explanatory Report also makes reference to the “general interest” concept, by stating “that the offence must have been committed for the benefit or on behalf of the legal person.”¹¹²

5.4.2. General interest (Acts on behalf of a legal person)

Under this requirement, the act needs to be in the interest or on behalf of the company, but the legal person does not necessarily need to benefit from it.

Example:

- ▶ A company employee pays a small speed payment to the state telephone company so that the new company office will have phone lines quickly installed.
- ▶ A company employee pays a bribe so the company will be admitted as an official sponsor for an annual state event (this example could also be considered as benefiting the company because of the achieved advertising value).

There is probably no direct economic benefit to the company in the first example. However, the interest of the company is still served by having landline phones installed quickly.

5.4.3. Related to operations

Under this approach, the act does not need to be in the interest or to the benefit of the company, but instead needs to relate to the operations of the company.

Examples:

- ▶ During a contract negotiation with government officials, a company employee offers the officials a bribe so that they can get him VIP tickets to the famous Bolshoi Theatre through state-channels.
- ▶ A company employee negotiates a contract with state officials about the order of 10 aircraft. He bribes the officials to include a non-binding option for the state to order 5 further aircraft in the future. The reason for the bribe is the following: the personal annual bonus of the company employee is calculated in such a way that it is higher if contracts include such non-binding options. It is assumed that the officials or the state have no intention to ever call upon this option, and the actual interest of the company in such a “dead” option is likely to be low as it only loses money on the bonus payments to the employee. As such, though the company is unlikely to benefit from the inclusion of the provision in the contract, the opportunity for the employee and state officials to engage in corrupt activity only emerged as a result of the business relationship between the company and the state.

5.5. Attributing fault to the legal person

As a general principle, the legal person may only be held liable for offences committed by a natural person if fault attributable to the legal person can be proven. As explained earlier, a legal person, as an artificial personhood, is incapable of having intentions, and therefore has no *mens rea*. Nevertheless, decisions that are made on behalf of the legal person by persons directing or controlling the legal person may be attributed to it. As

112. Commentary 86, *Explanatory Report*, www.conventions.coe.int, accessed 28 October 2019.

such, depending on the applicable legislation, misconduct, including corruption offences, by a legal person's directors, employees or acts may be imputed to the legal person under certain circumstances.

5.5.1. Types

There are three basic models of fault, which mirror the concepts of liability (see above Chapter 3):

- ▶ **Objective fault:** the legal person is liable if it is shown to lack organisational regulations, an ethical corporate culture, and credible compliance efforts. The doctrine of "objective fault" is not grounded on personal fault; rather, a legal person may be liable on the basis of its corporate structure. It is a reflection of the negligent (or intentional) failure of the whole organisation and is concerned with "the focus on whether a 'responsible person' was negligent, rather than on the collective failure of the company to ensure that adequate anti-bribery procedures were in place."¹¹³
- ▶ **Lack of supervision:** the legal person is liable if one of its employees with relevant power failed to supervise subordinates properly. Whereas the doctrine of "objective fault" is "impersonal" because it does not require personal fault, the doctrine of "lack of supervision" necessitates it. In fact, the doctrine of lack of supervision requires that there be, at a minimum, two people at fault within the company: the fault of the subordinate offender, and the fault of the supervisor.
- ▶ **Strict liability:** the legal person is liable because the fault of the natural person will be imputed automatically to the legal person. Under this doctrine, there is no additional corporate fault apart from the fault deriving from the corrupt employee him/herself. In other words, the only "fault" of the legal person may simply be that they employed the offender. Under the criminal code of Kosovo*, for example, "a legal person is liable for the criminal offence of the responsible person, who has committed a criminal offence, acting on behalf of the legal person within his or her authorizations, with the purpose to gain a benefit or has caused damages for that legal person. The liability of the legal person exists even when the actions of the legal person were in contradiction with the business policies or the orders of the legal person."¹¹⁴
- ▶ However, other jurisdictions do not impute liability for unauthorised behaviour by natural persons. For example, the Portuguese Criminal Code states that the "liability of legal persons and equivalent entities is excluded when the actor has acted against the orders or express instructions of the person responsible."¹¹⁵

All three models are in line with the Council of Europe Criminal Law Convention on Corruption, which itself suggests different modes of fault. The Convention applies strict liability in Article 18 para. 1 for offences committed by senior management, and supervision liability in Article 18 para. 2. The Convention does not expressly refer to objective fault; however, as this standard of fault goes beyond the requirements of lack of supervision, it is to be considered compliant with the Convention.

A notable gap may emerge in certain legislative systems that do not adequately cover different modes of fault. For instance, the exclusion for unauthorised behaviour in Portugal, which generally implemented a strict liability model, can create an absence of liability for lack of supervision that does not comport with GRECO's definition of fault. In its review of Portugal, GRECO noted that there is "no specific legislation to cover cases where corruption could have resulted from lack of management supervision."¹¹⁶

All three models have their advantages and disadvantages.

- ▶ Objective fault:
 - **Pro:** As legal persons may be held liable for not having implemented effective bribery prevention mechanisms, legal persons will be motivated to install such mechanisms and ensure they are effective.
 - **Con:** Collecting enough evidence to demonstrate sufficient prevention mechanisms and presenting that information in court when prosecuting a large international corporation may be burdensome. One way to overcome this inconvenience may be a shift in the burden of proof.

113. United Kingdom (2009), *Government Response to the conclusions and recommendations of the Joint Committee Report on the Draft Bribery Bill*, p.7, www.official-documents.gov.uk, accessed 28 October 2019.

114. Under UNSCR 1244/99; Article 40(1), Criminal Code of the Republic of Kosovo.

115. Article 11 para. 6 Criminal Code Portugal; see OECD (2009), *Portugal: Phase 2 Follow-up Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.29, www.oecd.org, accessed 28 October 2019. See also OECD (2013), *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Portugal*, para. 51, noting that the Portuguese defence of acting against express orders or instructions is vaguely defined.

116. GRECO (2005), *Second Evaluation Round. Evaluation Report on Portugal, Strasbourg*, para. 73, www.coe.int/greco, accessed 28 October 2019. See also GRECO (2008), *Second Evaluation Round. Compliance Report on Portugal*, p. 14, finding that legislation had been enacted to cover cases where an offence was committed by an individual who should have been supervised.

- ▶ Lack of supervision:
 - **Pro:** As legal persons may be held liable for not having proper oversight to prevent or mitigate corruption offences, the legal persons will be motivated to implement sufficient oversight mechanisms.
 - **Con:** Supervision alone might not be enough to prevent and mitigate the bribery risks, and a legal person would therefore need to implement other prevention mechanisms. Lack of supervision might also be hard to prove in court.
- ▶ Strict liability:
 - **Pro:** Strict liability can strongly incentivise legal persons to implement effective preventive measures, since the legal person will automatically be held liable for bribery offences committed by natural persons working within it. The burden of proof is merely whether the natural person, as an employee or agent of the company, committed the offence; as such, prosecution may be easily won. Introducing a system of strict liability similar to those seen in several EU Member States can significantly lower the evidentiary requirements and thus reduce the burden of proof during prosecution.¹¹⁷
 - **Con:** The doctrine is quite far-reaching and may even punish companies that have state-of-the-art prevention programmes. Strict liability also generally applies to the legal person when an employee disobeys a direct or concrete order not to engage in bribery (however, additional circumstances may be taken into consideration to mitigate the severity of any sanctions applied on the company).

5.5.2. An Effective Compliance Programme as a Defence

Regardless of the type of fault to which the legal person is subject, or whether it is subject to criminal or administrative regulations, authorities will scrutinise what type of corporate culture and what kind of supervision a legal person needs to implement.

With respect to a company's possible objective and supervision fault, in cases where legal persons may be held responsible for a lack of supervision, the company may avoid liability if it can prove that it had implemented proper preventive measures for corruption.

While some States allow legal persons to prove that they have installed sufficient prevention mechanisms to combat corruption and bribery, in legal systems under which legal persons may be subject to strict liability, even the best anticorruption mechanisms do not necessarily prevent liability. Nevertheless, the implementation of an effective compliance program can mitigate possible sentences of a convicted legal person.

Corporate anti-corruption compliance programmes were initially set by the United States and have been embraced by other countries. According to the United States Department of Justice, the essential keystones of a compliance programme include the following:¹¹⁸

- 1. Commitment from Senior Management** and a clearly articulated policy against corruption: compliance and ethical rules must start at the top. Prosecutors thus evaluate whether senior management has clearly articulated company standards, communicated them in unambiguous terms, adhered to them scrupulously, and disseminated them throughout the organisation.
- 2. Code of Conduct, Compliance Policies and Procedures:** prosecutors will also consider whether a company has policies and procedures that outline responsibilities for compliance within the company, detail proper internal controls, auditing practices, and documentation policies, and set forth disciplinary procedures. Effective policies and procedures require an in-depth understanding of the company's business model, including its products and services, third-party agents, customers, government interactions, and industry and geographical risks.
- 3. Oversight, Autonomy and Resources:** a legal person should assign responsibility for the oversight and implementation of a company's compliance programme to one or more specific senior executives. Those individuals must have appropriate authority within the organisation, adequate autonomy from management and sufficient resources to ensure that the company's compliance programme is effectively implemented. Adequate autonomy generally includes direct access to an organisation's governing authority, such as the board of directors and committees of the board of directors (e.g. the audit committee).

117. Vermeulen G. and others (2012), Liability of Legal Persons for Offences in the EU, p.139, recommendation 5.

118. U.S. Department of Justice/U.S. Securities and Exchange Commission (2012), *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, pp. 57 f., www.justice.gov, accessed 28 October 2019.

4. **Risk Assessment:** one-size-fits-all compliance programmes are generally ill-conceived and ineffective because resources are inevitably spread too thin, with too much focus on low-risk markets and transactions to the detriment of high-risk areas. Factors to consider, for instance, include risks presented by: the country and industry sector, the business opportunity, potential business partners, level of involvement with governments, amount of government regulation and oversight, and exposure to customs and immigration in conducting business affairs. It is decisive whether and to what degree a company analyses and addresses the particular risks it faces.
5. **Training and Continuing Advice:** such measures will help ensure that the compliance programme is understood and followed appropriately at all levels of the company.
6. **Incentives and Disciplinary Measures:** many companies have found that publicising disciplinary actions internally, where appropriate under local law, can have an important deterrent effect, demonstrating that unethical and unlawful actions have swift and sure consequences. Incentives can take many forms such as personnel evaluations and promotions, rewards for improving and developing a company's compliance programme, and rewards for ethics and compliance leadership.
7. **Third-Party Due Diligence and Payments:** third parties, including agents, consultants, and distributors, are commonly used to conceal the payment of bribes to public officials. As part of risk-based due diligence, companies should understand the qualifications and associations of its third-party partners, including its business reputation, and relationship, if any, with foreign officials. Companies should also have an understanding of the role of, and need for, the third party and ensure that the contract terms specifically describe the services to be performed. Additional considerations include payment terms and how those payment terms compare to typical terms in that industry and country. Furthermore, companies should undertake some form of on-going monitoring of third-party relationships.
8. **Confidential Reporting and Internal Investigation:** an effective compliance programme should include a mechanism for an organisation's employees and others to report suspected or actual misconduct or violations of the company's policies on a confidential basis and without fear of retaliation. Companies may employ, for example, anonymous hotlines or ombudsmen. Reporting needs to be followed-up by effective investigations.
9. **Continuous Improvement (Periodic Testing and Review):** a company's business changes over time, as do the environments in which it operates, the nature of its customers, the laws that govern its actions, and the standards of its industry. In addition, compliance programmes that do not just exist on paper but are followed in practice will inevitably uncover compliance weaknesses and require enhancements.
10. **Mergers and Acquisitions (Pre-Acquisition Due Diligence and Post-Acquisition Integration):** for example, an acquiring company should uncover any possible corruption at the company which is being acquired as part of due diligence, ensure that the corruption was voluntarily disclosed to the government, cooperate with the investigation, and promptly incorporate the acquired company into its compliance programme and internal controls.

One should keep in mind that large multinational corporations do business abroad, but smaller size businesses do so as well. While the compliance programmes detailed above require resources and expertise that a large corporation might "easily" afford, such resources might be quite challenging to smaller companies.¹¹⁹

5.5.3. Specific Requirements under Select Jurisdictions

Where a strict (or almost strict) liability approach is followed, certain countries have established guidelines to determine whether the sanction could be mitigated.

United States

When resolving an FCPA enforcement action against a company, the US Department of Justice ("DOJ") and the US Securities and Exchange Commission ("SEC") take into consideration whether the company had a compliance program in place during the time the alleged bribery took place, and, if so, whether the program is well designed, applied, and effective.¹²⁰ The DOJ and SEC have issued a joint *Resource Guide to the FCPA*, which outlines the "hallmarks" of an effective compliance program in the eyes of US authorities¹²¹ (see above Section 5.5.2).

119. See Nickerson K. (2011), *What the U.S. Government can do to assist U.S. companies with respect to transnational corruption*, www.commerce.gov, accessed 28 October 2019.

120. FCPA Resource Guide (Nov. 2012), p. 56.

121. FCPA Resource Guide (Nov. 2012), pp. 56-62.

Brazil

Under Brazilian law, enforcement authorities must take into account whether companies accused of wrongdoing have maintained and effectively implemented codes of ethics, audits, whistle-blower procedures and internal control systems.¹²² With respect to internal control systems, Brazilian Decree No. 8.420/15 sets out the required characteristics of an effective compliance program.¹²³ These characteristics are again similar to the keystones referred to above. Authorities are required to weigh certain factors when assessing a company's compliance program, such as a company's size and structure as well as the risks its activities present.¹²⁴ Depending on their assessment, the authorities can apply a discount to the fine up to 4%.

Spain

Article 31bis of the Spanish Criminal Code sets out both the criminal liability that may be attributed to a company and the requirements for an organisational and management model under which companies may be shielded from liability. To be shielded from liability stemming from offenses committed on behalf of or in the name of a company, Spanish authorities will look to whether companies that are potentially liable for misconduct have adopted and effectively executed prior to the commission of the offence such a model, including suitable measures of oversight and control to prevent such offences or reduce the risk of committing them. Companies will similarly be exempted from liability for offenses that have been committed by employees in the course of their employment at the company if the management of the company has implemented an effective compliance model that includes monitoring and control mechanisms prior to the commission of an offence or if the monitoring of the compliance program has been commended to an autonomous, independent body.

In particular, under Spanish law,¹²⁵ the organisational and management models must:

- ▶ Identify the activities through which criminal offences may be committed;
- ▶ Establish protocols or procedures specifying the process for reaching a common consensus, the adoption of decisions and the execution thereof;
- ▶ Implement financial resource management models to prevent the commission of the criminal offences that must be prevented;
- ▶ Impose the obligation to report to the body responsible for oversight of the compliance and prevention model any risks and breaches;
- ▶ Establish a disciplinary system that appropriately penalises a breach of measures established by the model;
- ▶ Perform periodic verifications of the model and any potential modification thereof should any significant violations of the provisions arise or where so required in the event of changes in the company, the supervisory structure or the activity undertaken.

According to the second paragraph of Article 31bis, the compliance model must be monitored by a body that is independent from management and which has adequate financial autonomy from top management. However, the Spanish Criminal Code provides that small companies may delegate this responsibility to top management. While it does not determine the management or composition of the monitoring body, the Spanish Criminal Code lays out some requirements. Of the most importance is the monitoring body's independence, demonstrated through sufficient financial and human resources to it and its hierarchical position within the company's organisational structure.

The monitoring body is also tasked with the following responsibilities:

- ▶ Receiving notices of infringement of the compliance model;
- ▶ Establishing monitoring protocols and periodic controls;
- ▶ Periodically communicating on compliance; and
- ▶ Updating all models and protocols with respect to any new legislation or changes within the company's structure or activities.¹²⁶

122. Law No. 12,846/13, Article 7(VIII).

123. Decree No. 8.420/15, Article 42.

124. Decree No. 8.420/15, Article 42§1. Those factors include the following: (1) number of employees; (2) complexity of the internal structure and number of departments, directorates and sectors; (3) use of third parties as consultants or commercial representatives; (4) sector or industry; (5) countries in which the company operates, directly or indirectly; (6) level of interaction with the public sector and the relevance of permits, licenses, and other governmental authorizations in the company's operations; (7) number and location of affiliated companies; and (8) whether the company qualifies as a "micro" or "small" enterprise.

125. Spanish Criminal Code, Article 31bis §5.

126. Spanish Criminal Code, Article 31bis§2

For listed companies in Spain, the *Good Listed Companies' Governance Code*, prepared by the Spanish Securities & Exchange Commission, includes an obligation on companies to put an internal department in charge of control and risk management. This department should be supervised by a specialised commission of the Board of Directors, such as an Audit Committee, and is entrusted with the following tasks:

- ▶ Ensuring that the control and risk management systems perform well and that the company identifies, manages and analyses significant risks;
- ▶ Participating in the elaboration of risk strategies and the management of these strategies; and
- ▶ Supervising the control risk management systems, which should appropriately mitigate any risks the company faces.

Portugal

In Portugal, strict liability applies to the acts of managers, while lack of supervision or control must be proven for misconduct by other personnel. However, a company will be fully shielded from corporate liability in all cases where the offense was committed against its *express* orders or instructions.¹²⁷ Certain scholars have argued that this shield applies when the company has established specific compliance rules and procedures in relation to which the relevant employees received training.¹²⁸

In the absence of specific provisions regarding the relevance of compliance programs, other scholars and practitioners have argued that Article 72(1) of the Penal Code allows courts to weigh the existence of compliance rules and procedures. Under that provision, penalties may be decreased when the circumstances mitigate the unlawfulness of the conduct, the fault of the offender, or the need for the original penalty.¹²⁹

Italy

In Italy, where legal entities are subject to administrative liability, companies may be able to avoid liability under Law 231/2001 on a case-by-case basis if the following cumulative conditions are met:

- a. Prior to the commission of the offense, the company adopted, implemented and regularly updated a corporate compliance program (generally referred to as "organisational model") for the prevention of crimes of the same nature as those committed;¹³⁰
- b. Prior to the commission of the offense, the company had vested an internal body (so-called *Organismo di Vigilanza*) with independent powers to supervise the implementation of the organisational model to ensure compliance with its provisions;
- c. The *Organismo di Vigilanza* did not fail to perform its supervising powers; and
- d. If committed by senior managers of the company (such as directors and top managers), the offense was committed through fraudulent evasion of the organisational model.¹³¹

Law 231/2001 sets forth specific requirements that organisational models must meet in order to shield corporations from liability. Specifically, an organisational model must:

- ▶ Identify the activities which may give rise to crimes (or facilitate their commission), and establish corporate procedures aimed at governing them);
- ▶ Establish procedures for managing corporate financial resources;
- ▶ Establish reporting duties towards the *Organismo di Vigilanza*;
- ▶ Put in place at least two whistleblowing mechanisms allowing employees to report illegal practices without disclosing their identity, as well as a prohibition on adopting retaliatory measures against whistleblowers; and
- ▶ Set forth disciplinary measures aimed at sanctioning non-compliance with the organisational model.

As Law 231/2001 does not provide detailed guidance with respect to the content of organisational models, companies may structure them according to guidelines issued by trade unions or industry associations, provided that these guidelines are filed with and approved by the Ministry of Justice. All major Italian unions and industry associations have issued guidelines as to the requirements of organisational models and filed them

127. Article 11(6) of the Penal Code.

128. Teresa Quintela de Brito, "Relevância dos mecanismos de "compliance" na responsabilização penal das pessoas colectivas e dos seus dirigentes" in *Anatomia do crime* (Coimbra : Almedina 2014), p. 80.

129. *Idem*.

130. See paragraph C. below.

131. Law 231/2001, Article 6.

with the Ministry of Justice, each of which provides a detailed description of the requirements that companies need to meet in order to shield corporations from administrative liability. They essentially correspond to keystones 2, 3, 5, 6 (with respect to disciplinary measures), 7 and 8. In terms of whistleblowing, the Italian regime also creates a duty to report.

While companies have no affirmative obligation to implement such an organisational model, if a corporation is exposed to administrative liability, the fact that the corporate directors have not adopted an organisational model may provide grounds for a derivative suit against the directors by the company's shareholder. Moreover, an increasing number of public authorities have begun to require companies to adopt models under Law 231/2001 as a condition to participate in public tenders.

United Kingdom

Under Section 7(2) of the UK Bribery Act, the only defence for the company is to prove that it had adequate procedures in place at the time the misconduct occurred. This is a full defence to a Section 7 charge for a company to prove that, even though an employee or agent engaged in bribery, the company had adequate procedures in place to prevent persons associated with it from paying, offering or giving bribes. The standard of proof for the defendant company is a balance of probabilities.

The 2010 UK Bribery Act, described above in Chapter 4, sets out guidance on how to implement an effective compliance program through six overarching principles. These principles are not prescriptive nor a one-size-fits-all program. Indeed, the guidance makes reference to the difference in resources for a large multinational company and those for a small or medium company; it states that certain procedures may not be applicable to small companies given their circumstances.¹³²

Nevertheless, UK courts take into consideration all the facts and circumstances of a particular prosecution, and the measures a company has taken to create an effective compliance program may allow it to prove that it has put into place adequate procedures to prevent bribery and therefore defend itself from liability.

Similar to the United States, the six guiding principles set out by the UK Ministry of Justice correspond to the keystones described above.

France

In France, the Sapin 2 law requires certain legal entities to set up a program which follows eight pillars essentially corresponding to the ten keystones referred to above. The French Anticorruption Agency has published very detailed guidance on how to establish and implement each of these keystones and has begun to conduct controls on companies through regular audits launched since the end of 2017.¹³³

Setting up and implementing an adequate anti-corruption program avoids legal entities subject to the Sapin 2 compliance obligations with administrative liability in the event of a control by the Agency. However, they remain liable from a criminal standpoint in case of corruption. At best, French prosecutors may take the program into account as a mitigating factor during their negotiations of a settlement with the legal entity.

5.6. Excursus: affiliated companies

Often legal persons are part of affiliated companies. In most configurations, one enterprise controls another enterprise in one way or another. The most obvious example is the parent-subsidiary relationship. Other forms include one company controlling another one through formal agreements on control or on transfer of loss and profits. Control can also take place as a *de facto* control if both companies are managed by the same persons, or if one company is economically fully dependent on the other. The question then arises as to which legal person can be held liable: the controlled company, the controlling one, or both. This question is still fairly new, and there is sometimes no, or only limited, jurisprudence available in several jurisdictions.

It is worth noting, however, that the OECD's 2009 Recommendation provided that the States Parties should ensure that legal persons could not avoid liability for bribery committed "using intermediaries, including related

132. UK Ministry of Justice, The Bribery Act 2010 – Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (see section 9 of the Bribery Act 2010), March 2011.

133. Agence Française Anticorruption (2017), *French Anti-Corruption Agency guidelines to help private and public sector entities prevent and detect corruption, influence peddling, extortion by public officials, unlawful taking of interest, misappropriation of public funds and favouritism*, accessed 28 October 2019.

legal persons.”¹³⁴ The OECD’s 2016 Stocktaking Report found that 78% of States Parties could, at least under some conditions, hold companies liable for the unlawful acts of related intermediaries.¹³⁵ Similar points can also be made in relation to unrelated intermediaries such as third-party agents, consultants or contractors.

In cases of bribery at the controlled company, it is always necessary to look at the possibility of the controlling company being (concurrently) liable. There are various forms of establishing this liability:

- ▶ **Direct liability:** the controlling company participated directly in the bribery of the controlled company. For example, the controlled company participated by either instigating the misconduct or by approving payments used as a bribe to a third-party. In such cases, the controlling company will be directly liable either for the acts of its senior management, its employees, or for a lack of supervision (c/f Article 18 Council of Europe Criminal Law Convention on Corruption).

- ▶ The German Act on Regulatory Offences, for example, explicitly includes controlling companies into legal liability:

“Section 30, Regulatory Fine Imposed on Legal Persons and on Associations of Persons

(1) Where someone acting [...]

5. as another person responsible on behalf of the management of the operation or enterprise forming part of a legal person [...], also covering supervision of the conduct of business or other exercise of controlling powers in a managerial position, has committed a criminal offence or a regulatory offence [...] a regulatory fine may be imposed on such [legal] person or association.”¹³⁶

- ▶ In this section, it is generally accepted that “another person” can also be senior management of a controlling company (for example a parent-company) which is involved in a bribery scheme at the controlled company (for example, a subsidiary).¹³⁷

- ▶ **Agent liability:** this concept follows the rationale of the master-servant liability. The controlling company is responsible for acts of the controlled company as its agent. An agency relationship can be established by formal and actual elements of general control and control in the context of the specific transaction.

- ▶ For example, the authorities in the United States brought an administrative action against a parent for bribes paid by the president of its indirect, wholly owned subsidiary. In that matter, the subsidiary’s president reported directly to the CEO of the parent company, and the company routinely identified the president as a member of its senior management in its annual reports. Additionally, the parent’s legal department approved the retention of the third-party agent through whom the bribes were arranged despite a lack of documented due diligence and an agency agreement that violated corporate policy; also, an official of the parent approved one of the payments to the third-party agent.¹³⁸

- ▶ **One enterprise liability:** under this doctrine, the owner of several legal persons is regarded itself as one enterprise encompassing and making use of all legal persons. Thus, any bribery within this one enterprise renders it liable either by imputation or by lack of supervision as if the bribery happened not in a separate legal person but within one enterprise. However, for such liability it is necessary that the national law draws liability on the term of “enterprise” and not on the term of “legal persons”.

- ▶ In the Swiss Criminal Code for example, the offence “is attributed to the undertaking” (a synonym for “enterprise”).¹³⁹ If several companies are combined under a holding company, the holding company can be viewed as one single enterprise comprising all companies. In such cases, an offence taking place in one of the companies can be viewed as having taken place in one enterprise: the holding company.¹⁴⁰

All three models are very similar: there is one company controlling another one, a lack of control, and/or some involvement in the bribery transaction which renders the controlling company liable. It is also possible for liability to stretch further. For example, the UK’s Bribery Act 2010 includes liability for the acts of any “associated

134. OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I, Part C, accessed 26 November 2018.

135. OECD, *The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report* (2016), p. 79.

136. German *Act on Regulatory Offences* [Gesetz über Ordnungswidrigkeiten – OWiG] as amended in 2009, www.gesetze-im-internet.de, accessed 28 October 2019.

137. Rogall K. (2006), Commentary on the Act on Regulatory Offences [Karlsruher Kommentar zum OWiG] (3rd edition), § 30, para. 70a, pointing out that the “whole set of problems is yet little clarified and needs further examination”.

138. U.S. Department of Justice/U.S. Securities and Exchange Commission (2012), *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, pp.27 f., www.justice.gov, accessed 28 October 2019.

139. Swiss *Criminal Code SR 311.0 of 1 January 2013*, www.admin.ch, accessed 28 October 2019.

140. See Livschitz M. (2007), *Liability of Legal Persons for Corruption – A Swiss Perspective*, Proceedings of the OECD/ACN-Seminar “Criminalisation Of Corruption”, p.7, www.oecd.org, accessed 28 October 2019.

person” who “performs services” for the legal person, and that the “capacity in which [the associated person] performs services for or on behalf of [the legal person] does not matter.

Even if an affiliated or even non-affiliated company is not liable for an offence committed by another legal person, it might still benefit from the corruption. In such cases it is possible that the benefit is forfeited at the non-liable company (see below at 5.1.3).

5.6.1. Implementation in Select Jurisdictions

5.6.1.1. Common law approaches

United Kingdom

According to the Companies Act 2006, a parent corporation is generally not held liable for the actions of its subsidiary or an affiliate, since they have separate legal personalities.¹⁴¹ English courts may disregard the separate legal personalities of a parent company and its subsidiary under the theory of lifting the corporate veil. Nevertheless, the English Supreme Court has considered that it will only lift the corporate veil in cases of fraud when there is no other legal method to achieve an equivalent result and the claimant cannot establish any alternative way of identifying the company to provide a remedy.¹⁴²

With respect to bribery offences, parent companies may be held liable for the offences of their subsidiaries. As described above, a company may be held liable under section 7 of the UK Bribery Act for failing to prevent bribery if an associated person bribes another person to obtain or retain business. Section 8 of the UK Bribery Act includes subsidiaries within its definition of a company’s “associated person”.¹⁴³ As such, a parent company can be held liable when a subsidiary commits an act of bribery in the context of performing services for the parent company.

United States of America

Under U.S. corporate law generally, a parent corporation is insulated from liability for the actions of its subsidiaries.¹⁴⁴ Corporations enjoy corporate limited liability, including in relation to other entities in the same group of companies. However, it is possible to “pierce the corporate veil” and to hold a parent company liable for the actions of its subsidiary when, *inter alia*, the corporate form would be misused to accomplish certain wrongful purposes, notably fraud, on the parent company’s behalf.¹⁴⁵ The corporate veil may be pierced if it can be demonstrated that the relationship between the parent and the subsidiary was such that the subsidiary is an agent of the parent, and the subsidiary’s employees are agents of the parent corporation.¹⁴⁶

In the context of FCPA enforcement, the DOJ and SEC use the principles of parent-subsidiary liability to hold companies liable for FCPA violations by their subsidiaries. A parent company can be held liable for bribes paid by its subsidiary on two main grounds. First, a parent company could be held directly liable if it participated sufficiently in the activity, either by directing its subsidiary to engage in the misconduct or by participating in the bribery scheme.¹⁴⁷ Second, a parent company could be held liable if the subsidiary is found to be an agent of the parent company. Since the fundamental characteristic of agency is control, the DOJ and SEC evaluate the parent company’s level of control over the subsidiary to determine whether the subsidiary is an agent of the parent.¹⁴⁸

5.6.1.2. Civil law approaches

Brazil

The Clean Companies Act (“CCA”) imposes liability on parent, subsidiary and affiliated companies as well as on consortium and joint venture partners in the scope of common projects. However, such liability is limited to the payment of fines and damages, and does not encompass other sanctions.¹⁴⁹

141. See Crown Prosecution Service, *Corporate Prosecutions*, available at www.cps.gov.uk.

142. See *Prest v Petrodel Resources Ltd* [2013] UKSC 34.

143. Bribery Act 2010, Section 8(3).

144. *United States v. Best Foods*, 524 U.S. 51, 61 (1998).

145. *United States v. Best Foods*, 524 U.S. 51, 63 (1998).

146. *United States v. Johns-Manville Corporation*, 231 F. Supp. 69, 6980 (E.D. Pa. 1964).

147. FCPA Resource Guide (Nov. 2012), p. 27.

148. FCPA Resource Guide (Nov. 2012), p. 27.

149. Law No. 12.846/13, Article 452.

Italy

Although Italian law does not expressly address the issue of criminal liability of affiliated companies, this issue has been repeatedly addressed by Italian courts. Notably, the Italian Supreme Court has held that holding (or affiliate) companies cannot be held automatically liable if another company of the group has faced liability under Law 231/2001. Indeed, liability may arise only if the crime was committed in the “direct and specific” interest of the holding (or affiliate) company, or when the directors or employees that committed the crime represented both entities.¹⁵⁰

Portugal

The Portuguese Penal Code only expressly addresses the issue of successor liability, and not the question of whether companies may be held liable for offences committed by affiliated entities. However, certain scholars have argued that the law allows for the prosecution of companies that had control over the form, execution and result of the conduct, and failed to exercise its power to impede it.¹⁵¹

Spain

The Spanish Criminal Code does not contain provisions extending the criminal liability of a subsidiary or affiliated company to a parent or affiliated company. As such, as a general rule under Spanish corporate law, a parent company will not be held liable for the offences committed by its subsidiary. However, two exceptions exist to this rule.

First, corporate criminal liability may be attributed to a parent company when the parent company is the representative or manager of the subsidiary in which the offence has been committed and the parent company has benefitted from the offence.¹⁵²

Second, under Article 31bis of the Spanish Criminal Code, a parent company could also be held criminally liable as the author of crimes committed by the directors, managers or representatives of its subsidiary if the parent company breached a contractual or legal obligation to prevent the commission of a crime.¹⁵³

In addition, the Spanish Criminal Code addresses the issue of successor liability. Article 130.2 of the Spanish Criminal Code stipulates that transformation, mergers, absorption or demergers of legal entities will not extinguish their criminal liability. Therefore, criminal liability will be transferred to the newly constituted entity or entities into which the original entity was transformed, merged, absorbed or demerged. In addition, a concealed or only apparent dissolution of the company will not extinguish its criminal liability.¹⁵⁴

France

Under French law, the parent company can be held liable for its own participation in the misconduct because it committed the crime itself or attempted to, or because it acted as co-author. In the latter case, the parent company could be liable in several circumstances: (i) as co-author *per se* if all elements of the crime can be found for both the parent and its subsidiary, (ii) as an accomplice if the parent aided or abetted its subsidiary, or instigated it to commit the misconduct, or (iii) as holding the proceeds of the crime.

5.7. Case exercise 3: Energetica

Background

Company profile

Energetica is a corporation in one of the Council of Europe member States (member State A). It traces its origins to 1847 and for over 160 years has been one of the most successful conglomerate companies in Europe. Currently, Energetica is one of the world’s largest providers of energy and energy sources (electricity, gas, oil). The Company also manufactures energy control systems, energy equipment and energy networks. In 2008, Energetica employed approximately 428,200 people and operated in approximately 190 countries

150. Italian Supreme Court, Judgment No. 52316 of September 27, 2016.

151. Patricia Bernades, Grupos Societários: Critérios Atributivos de Responsabilidade penal à Sociedade- Dominante e/ou à Sociedade-Dominada (Feb. 2017).

152. Order of the General Public Prosecutor, 1 June 2011.

153. Spanish Criminal Code, Article 31bis.

154. Spanish Criminal Code, Article 130.2.

worldwide. Energetica reported net revenue of \$16.5 billion and net income of \$8.9 billion for its fiscal year ended 30 September 2008.

In accordance with local law, Energetica has a Supervisory Board and a Managing Board. The Supervisory Board is generally comparable to the board of directors of a corporation in the United States in that it oversees management but with less oversight power under local law. The Managing Board generally performs the duties and responsibilities of senior management of a corporation in the United States and includes the Company's Chief Executive Officer ("CEO") and Chief Financial Officer ("CFO").

Prior to a recent reorganisation, Energetica operated through a complex array of business groups and regional companies. The business groups are divisions within Energetica and are not separate legal entities. The regional companies are wholly- or partly-owned subsidiaries of Energetica. Energetica itself is fully owned by the Council of Europe Member State A, and a special law governs its public control. For example, under the special law, a majority of government officials have to sit on its Managing Board in order to control the corporation with respect to its vital public importance as it delivers more than 95% of the energy needed by the country's households and industries.

The gas pipeline in Member State B

In 2002, Energetica channelled a bribe of €15 million to several government ministers in Council of Europe member States A and B. The bribe was meant to facilitate the construction of a gas pipeline from member State A to member State B, which would provide B and other European countries with comparatively cheap gas resources and would help European countries in the diversification of their energy sources.

The same year, Energetica also bribed an arbitrator in member State C who was deciding in a formal arbitration procedure between Energetica and a steel company on the delivery of pipes to Energetica for the pipeline. The arbitrator was a private consultant working occasionally as arbitrator in international arbitration cases.

The prosecution could only establish that the money for the bribes stemmed from subsidiaries of Energetica but could not pinpoint any individual physical person committing the bribery offence. The ministers accepting the bribes used their right to remain silent but were convicted of accepting a bribe. The arbitrator made partial use of his right to remain silent and only stated that Energetica would have won the case anyway and that this should have been obvious to Energetica from an analysis of the facts and law. Nevertheless, the arbitrator was convicted of accepting a bribe.

Corporate culture

On 15 April 1999, the very day member State A ratified the OECD anti-bribery convention, the then-CEO of Energetica "expressed his concern at the number of criminal and other investigations into members of the Company," further noting that "[a]s the Board could possibly be held responsible for various offences, it was important to take protective measures."

In mid-2000, the legal department of Energetica forwarded a memorandum to the Supervisory Board Chairman and CFO identifying certain off-books accounts. The memorandum made it clear that Energetica's accounts had to be maintained "in harmony with the principles of orderly accounting. Otherwise sanctions are likely to be made under criminal law." However, the off-books accounts continued to exist for years to come.

In April 2000, the Management Board rejected a proposal by the Company's General Counsel to create a Company-wide list of business consultants and a committee to review these relationships. Although Energetica issued various principles and recommendations regarding business consultants, Energetica had no mandatory and comprehensive Company-wide rules in place governing the use of business consultants until June of 2005.

In the autumn of 2003, Energetica's outside auditor, KPMG, identified €4.12 million in cash that was brought to non-member State Country Y by employees of an Energetica division (COM) and flagged the payments for review. A compliance attorney at the Company conducted a one-day investigation of the payments and wrote a report indicating that COM employees admitted that it was not an isolated event and warned of numerous possible violations of law. Though the compliance report was reviewed in November 2003 by Energetica's then-CFO, no disciplinary action was taken, no further investigative work was conducted, and the report was not provided to or discussed with the Management Board as a whole or the Company's audit committee.

During that time, Energetica implemented certain improvements to its compliance programme. These included an anti-bribery speech delivered by the then-CFO to high-level business managers in summer 2004 and the establishment of a Corporate Compliance Office in October 2004. In addition, the Company issued

policies over bank accounts, including requirements relating to the initiation and use of Company accounts and authorisations regarding cash. However, it was not until one year later, in June 2005, that the Company issued mandatory rules governing the use of business consultants, for example, prohibiting success fees and requiring compliance officers to sign off on business consulting agreements. While these measures appear to have been partially effective, improper payments continued at least until November 2006.

The Corporate Compliance Office included both defending the Company, and preventing compliance breaches. The Corporate Compliance Office comprised a Chief Compliance Officer and up to six full-time lawyers until 2007. Until 2007, there was no mandatory training on compliance with international bribery regulations.

Questions

What would you object in response to the following pleas made by counsel for the defence in a criminal trial against Energetica in member State A? Assume that the national legislation on corruption and liability of legal persons matches the Council of Europe Criminal Law Convention on Corruption and its Protocol.

- a. Energetica is a public entity with a vital public function not only for A but also for other European countries. It is thus not subject to criminal liability.
- b. There is no evidence of an offence committed by a natural person, let alone a conviction, and there is no individualisation of such natural person. Even if an employee of Energetica had committed bribery, it might well have been only a low-level worker.
- c. The bribery of a (private) foreign arbitrator is not an offence leading to liability of legal persons under the Convention.
- d. The bribery of the arbitrator was not to the benefit of the legal person as it was obvious that it would have won the case anyways. It is the act of some errant employee (if it was at all an employee of Energetica).
- e. Money being traced back to Energetica does not establish fault by itself.
- f. Energetica is not liable for acts done by its subsidiaries.

5.8. Case exercise 4: Umbrella Company

Background

Umbrella Company is a manufacturer of pharmaceutical products registered in the United Kingdom. Its American Depository Receipts were traded on the Nasdaq National Market from 1988 to 2010 and are currently traded on the New York Stock Exchange. Umbrella Company has subsidiaries around the world, including Umbrella USA and Umbrella Spain.

In 2005, Umbrella Company began manufacturing an expensive new drug that its headquarters wanted to distribute widely in the marketplace. To promote sales of the new drug in the USA, two managers from Umbrella USA met with a US government official ("Government Official") in Washington D.C. who was involved in the selection of pharmaceutical products for the US government's national healthcare system. Government Official owns a company, Repackage USA, which manufactures, distributes, and re-packages pharmaceutical products in the USA. Following this meeting, Umbrella USA management paid bribes to Government Official intending to influence the official to use his authority to increase sales of Umbrella Company's drugs in the USA. The bribes were paid through inflated profit margins that Repackage USA earned by repackaging and distributing Umbrella Company's products in the USA.

Meanwhile, Umbrella Spain also sought to increase sales of Umbrella Company's new drug in Spain. To do so, employees of Umbrella Spain paid bribes to doctors employed in hospitals run by the Spanish government. Umbrella Company executives in Germany became aware of the bribes paid to Spanish doctors in 2010 and subsequently put in place new anti-corruption policies and procedures within its Spanish subsidiary. However, the Umbrella Company executives knew that these policies and procedures were insufficient to detect continuing bribes to government-employed doctors in Spain.

Questions

Assume that the legislation of these countries on corruption and liability of legal persons matches the Council of Europe Criminal Law Convention on Corruption and Protocol.

- a. What are the offences for which Umbrella Company and its affiliates may be held liable?
- b. What are the grounds for holding Umbrella Company's British mother company liable for the activities of its affiliates in the USA and Spain?
- c. Under these facts, would Umbrella Company be held liable, or would only the employees involved be liable?
- d. What steps could Umbrella Company take to avoid future liability?

6. Sanctions

Criminal, administrative, and civil liability are all built up from more or less similar elements: an offence, a legal person, a link between the offence and the legal person, and fault. However, the consequences of liability vary in the different national jurisdictions. Some countries have all three forms of sanctions – criminal, administrative and civil – whereas some only have administrative or civil.

The international **conventions** do not necessarily require criminal sanctions, but allow countries to opt between “**criminal or non-criminal** sanctions, including monetary sanctions”¹⁵⁵ or “criminal or non-criminal fines and [...] other penalties”¹⁵⁶. However, under GRECO recommendations, it is not sufficient if liability consists only of **civil** tort liability allowing victims to sue legal persons for damages.¹⁵⁷

The EU Second Protocol, the EU Framework Decision, and the Council of Europe Recommendation No. R(88)18 in its Appendix, list examples of **non-financial** sanctions such as “(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; or (d) a judicial winding-up order.”¹⁵⁸

An EU-funded comparative study on liability of legal persons in member States has pointed out the further need to “[...] develop a clear and transparent standard set of suggested sanctions for legal persons.”¹⁵⁹

EU Directive 2018/1673 on Combating Money Laundering by Criminal Law provides, in Article 8, a menu of possible sanctions to ensure that a legal person is “punishable by effective, proportionate and dissuasive sanction, which shall include criminal or non-criminal fines.” It provides an illustrative list of further sanctions including: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent exclusion from access to public funding, including tender procedures, grants and concessions; (c) temporary or permanent disqualification from the practice of commercial activities; (d) placing under judicial supervision; (e) a judicial winding up order; or (f) temporary or permanent closure of establishments which have been used for committing the offence.

There is a risk, in particular with high-profile and/or large-scale cases, that concerns may be raised that extraneous and potentially irrelevant factors might have undue influence on the approach taken, including in relation to the appropriate sanction. It is important that the decisions taken are, and are seen to be, independent and scrupulously fair. Two examples illustrate the dilemmas that are sometimes posed.

First, in 2006 the UK’s Serious Fraud Office decided to discontinue an investigation of alleged bribery involving BAE Systems Plc and the Kingdom of Saudi Arabia. The decision followed a statement by the UK’s Ambassador to Saudi Arabia suggested that pursuing the investigation meant that “British lives on British streets were at risk.” The House of Lords upheld the SFO’s decision to discontinue the investigation on that basis.¹⁶⁰

Second, an unofficial US Congressional report examining HSBC’s involvement in money laundering and the Decision of the US Department of Justice not to prosecute HSBC, instead imposing a fine of \$1.9 billion, led to representatives from British authorities noting that the criminal prosecution of the bank could lead to “very serious implications for financial and economic stability” and even another “global financial disaster”. Republican members of the US Congressional Committee concluded that British involvement appeared to have “hampered the US government’s investigations and influenced the DoJ’s decision not to prosecute HSBC.”¹⁶¹

155. CoE-, OECD-, UNCAC-Conventions, see Annex 9.1.

156. See Annex 9.1.

157. See GRECO (2007), *Joint First and Second Evaluation Rounds. Evaluation Report on the Ukraine*, para. 223-225, 235, www.coe.int/greco, accessed 28 October 2019. See also GRECO (2014), *Fourth Addendum to the Compliance Report on the Ukraine*, paras 14-16, noting that the Ukraine had changed the categorisation of bribery from an administrative offence to a criminal offence.

158. See below Annex 9.2.

159. Vermeulen G. and others (2012), *Liability of Legal Persons for Offences in the EU*, p. 139, recommendation 7.

160. R (on the application of Corner House Research and others) v Director of the Serious Fraud Office [2008] UKHL 60.

161. US Congress (2016), *Too Big to Jail: Inside the Obama Justice Department’s Decision Not to Hold Wall Street Accountable*, available at www.financialservices.house.gov, accessed 28 October 2019.

Whatever the range of sanctions adopted, in their entirety they need to be “effective, proportionate and dissuasive” according to the uniform words of international conventions. It could be the case that sanctions can be effective, proportionate and dissuasive by tailoring the appropriate sanction to the circumstances, including the size of the company involved. For example, the XYZ (ie anonymised) UK prosecution under the Bribery Act, the sanction ultimately imposed was significantly less than what the courts would otherwise have imposed, because the company was a modestly-resourced SME for which a higher fine, although warranted, would have forced insolvency, contrary to the public interest.¹⁶²

The following summarises a range of the main forms of sanctions which are available internationally. There are countries, such as the United States, which have probably made use of the full range of sanctions listed.¹⁶³

6.1. Financial

The wording of Article 19 para. 2 of the Council of Europe Criminal Law Convention on Corruption indicates already that financial sanctions are obligatory for legal persons: “Each Party shall ensure that legal persons [...] shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.”

The Explanatory Report to the Convention further emphasises this interpretation: “Paragraph 2 compels Contracting Parties to provide for the possibility of imposing monetary sanctions of a certain level to legal persons held liable of a corruption offence.”¹⁶⁴

6.1.1. Fines

Fines can be criminal, administrative, or even civil in nature, as some jurisdictions allow for civil fines.¹⁶⁵ Fines should be set at the appropriate level in order to be effective, proportionate and dissuasive, and should therefore take into account various factors in determining the level to be applied in a particular case. Additionally, to comply with international standards, capping a maximum fine for legal persons at a certain level, for instance €1 million, would not be sufficient according to GRECO or OECD monitoring.

In Germany, the maximum standard administrative fine for legal persons can be increased by taking into account the economic advantage of the corruption offence: “The regulatory fine shall exceed the financial benefit that the perpetrator has obtained from commission of the regulatory offence. If the statutory maximum does not suffice for that purpose, it may be exceeded.”¹⁶⁶

Although Germany has increased the maximum fine to €10 million, concerns remain that this is set at too low a level to be sufficiently dissuasive for larger businesses. The 2018 Coalition Agreement indicates that the German government is considering increasing the maximum punitive fine to 10% of a company’s turnover.¹⁶⁷ However, provided that the fine is combined with an efficient regime for confiscating economic advantages gained by corruption, lower levels of fine might be sufficient.

In the Siemens corruption case in 2007 discussed above, Germany imposed a record €201 million administrative fine.¹⁶⁸ The OECD monitoring group recommended Germany to “take measures to ensure the effectiveness of the liability of legal persons which could include [...] further increasing the maximum levels of monetary sanctions.”¹⁶⁹

162. OECD (2018), *UK Phase 4 Report*, para. 162.

163. See for further details: U.S. Department of Justice/U.S. Securities and Exchange Commission (2012), *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, pp. 86 f., www.justice.gov, accessed 28 October 2019; however, for the issue of criminal register see GRECO (2008), *Second Evaluation Round. Compliance Report on the United States of America*, para. 27, www.coe.int/greco, accessed 28 October 2019.

164. Commentary 91, *Explanatory Report*, www.conventions.coe.int, accessed 28 October 2019.

165. U.S. Department of Justice/U.S. Securities and Exchange Commission (2012), *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, p. 57 f., www.justice.gov, accessed 28 October 2019.

166. § 17 German *Act on Regulatory Offences* [Gesetz über Ordnungswidrigkeiten – OWiG] as amended in 2009, www.gesetze-im-internet.de, accessed 28 October 2019.

167. OECD, Germany (2018): *Phase 4 Report*, p. 69

168. The Guardian (16 December 2008), *Record US fine ends Siemens bribery scandal*, www.guardian.co.uk, accessed 28 October 2019.

169. OECD, Germany (2011): *Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions*, Recommendation 7: “Take measures to ensure the effectiveness of the liability of legal persons which could include [...] further increasing the maximum levels of monetary sanctions”, www.oecd.org, accessed 28 October 2019. See also OECD, Germany (2013), *Follow-up to the Phase 3 Report & Recommendations*, pp. 11-12, finding that Germany had raised the maximum fine from 1 million Euros to 10 million Euros.

In Poland, Article 10 of the Polish Law on Liability of Legal Persons prescribes a bundle of financial and social factors to assess the level of any fine: “When adjudicating the fine, imposing the bans or pronouncing the ruling in public the court shall consider in particular weight of irregularities in electing or supervising mentioned in art. 5, the size of the advantages obtained or possible to obtain by the collective entity, its financial situation and social consequences of the penalty and an influence of punishment on further functioning of the collective entity.”¹⁷⁰

At the same time, Article 7 caps the fine in relation to the company’s revenues:

“1. A collective entity shall be sentenced to a fine between 1000 and 20.000 000 PLN but no more than up to 10% of the revenue generated in the tax year when the offence which is a ground for the collective entity’s liability was committed.

2. The revenue referred to in point 1 shall be assessed on the basis of the financial report written out by the collective entity or on the basis of the summation of entries in the financial books [...]”¹⁷¹

The Swiss Criminal Code summarises the assessment of a fine as follows:

“The court assesses the fine in particular in accordance with the seriousness of the offence, the seriousness of the organisational inadequacies and of the loss or damage caused, and based on the economic ability of the undertaking to pay the fine.”¹⁷²

6.1.2. Forfeiture from the legal person

“Asset forfeiture” generally means the permanent loss of property for failure to comply with the law.¹⁷³ In some countries there are two types of forfeiture available: civil and criminal forfeiture. A civil forfeiture is intended to confiscate property used or acquired in violation of the law; a criminal forfeiture is imposed on a wrongdoer as part of his or her punishment following a conviction. The procedures involved in these two types of forfeiture are very different, but the results are the same; rights, title and interest of the property are transferred to the state.

Many jurisdictions allow for the forfeiture of so-called “substitute assets” where the assets associated with the underlying crime are not within the jurisdiction of the court or cannot otherwise be found.

In the context of corruption, forfeiture aims at the economic advantage that the legal person derived from the corrupt act. Such an economic advantage could be from a government contract awarded because of a bribe; or, in the case of private-to-private bribery, a contract with conditions favouring one of the companies that bribed an employee of the other company. The OECD Convention obliges States Parties to ensure that “the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.”

Some countries subject legal persons to the general rules of criminal, administrative or civil forfeiture.¹⁷⁴ In other countries, such as Poland, there are special rules for legal persons. Article 8 of Poland’s Law on Liability of Legal Persons:¹⁷⁵

“Art. 8. 1. The collective entity is further decreed the forfeiture of:

- 1) the objects coming, even indirectly, from the prohibited act, or objects used or designated for use as the tools of perpetrating the prohibited act;
- 2) the financial gains originating, even indirectly, from the prohibited act;
- 3) the amount equivalent to the objects or financial benefit coming, even indirectly, from the prohibited act.

2. The forfeiture specified in paragraph 1 above shall not be decreed, if the object, financial benefit, or amount equivalent thereto are due for restitution to another entitled entity.”

170. *Act of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty*, www.oecd.org (English), accessed 28 October 2019.

171. *Idem*.

172. Swiss *Criminal Code SR 311.0 of 1 January 2013*, www.admin.ch, accessed 28 October 2019.

173. The definition and its following explanations are taken from: Basel Institute of Governance (2007), *Asset Forfeiture*, http://pustakahpi.kemlu.go.id, accessed 28 October 2019.

174. As is the case in Germany, where the general confiscation rule of § 29a OWiG applies to legal persons as well (§ 30 para. 5 OWiG); German *Act on Regulatory Offences* [Gesetz über Ordnungswidrigkeiten – OWiG] as amended in 2009, www.gesetze-im-internet.de, accessed 28 October 2019.

175. *Act of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty*, www.oecd.org (English), accessed 28 October 2019.

Sometimes, forfeiture even applies when the offender does not belong to the group of senior management necessary for triggering liability of the legal person.¹⁷⁶

The estimated value of the gained asset is normally calculated in terms of its gross value. This means that the bribe paid (and related expenses) are not deducted from the value of the gained asset. A case in Germany where a real estate developer had gained a building permit through bribing a public official illustrates this aspect. The real estate developer built several buildings on the land and then sold the buildings. The German courts calculated the assets gained by determining the sale price of the land (after receiving the building permit), subtracting acquisition expenditures for buying and developing the land, leading to a total of about €3 million; the bribes of €0.1 million were not included in the acquisition costs.¹⁷⁷

Where a contract has just been awarded, but not yet carried out, the estimated profit is the gained asset to be forfeited. In another case from Germany, a construction company bribed a publicly owned company for a contract for building a waste incineration plant. A German court calculated the gained asset as the profit from the contract. This calculation may also include assets to be gained, such as any follow-up assignments the construction company undertakes for maintaining the plant in the future or non-tangible assets gained such as the increased reputation of the company by having been awarded such a prestigious contract.¹⁷⁸

6.1.3. Forfeiture by a third party

Many jurisdictions allow for forfeiture of assets belonging to, or in the possession of, third parties, even when the primary offender is outside the control of the third party and acts in its interest only on a factual basis or without legal foundation. In some jurisdictions, it might not be necessary for the third party to be aware of the offender's act if it can be demonstrated that the third party benefitted from the offence. For instance, a consultant for a company is – without knowledge of the company – subcontracting another consultant who bribes a public official during a procurement procedure. As a result of the bribe, the company is awarded the contract. Even if the company fulfilled all its supervision and compliance obligations it would still be liable under German forfeiture regulations and the assets gained from the awarding of the contract could be forfeited.¹⁷⁹

6.1.4. Damages

The main parties who can claim damages from the bribing company for the tort related to the bribery are competitors, shareholders, and the state. All jurisdictions, however, recognise concurrent liability for criminal and administrative sanctions on the one hand, and the civil liability for damages on the other.

Some jurisdictions have laws that specifically point to this concurrent liability, such as Article 6 of the Polish Law on Liability of Legal Persons: "Neither the existence nor non-existence of liability of the collective entity under the principles set forth in this Act shall exclude civil liability for the inflicted damage, administrative liability, or personal legal responsibility of the perpetrator of the prohibited act."¹⁸⁰

6.2. Non-financial remedies

Whenever the sanction applied in a particular case does not oblige the legal person (or a related third party) to provide a financial payment to the state in the form of a fine or the forfeit of assets, it is considered as a non-financial sanction. However, though there may not be an immediate financial cost extracted by the sanction, all non-financial sanctions will ultimately have a financial or economic effect on the company. This is most obvious when a legal person is debarred (prohibited) from receiving public funding or excluded from participating in public procurement procedures. In many cases, however, merely entering a conviction in the company register will probably harm the company's economic status and hamper its ability to conduct economic activity.

176. Germany: Forfeiture under § 29a OWiG applies to any "offender" acting for "another [natural or legal] person", German *Act on Regulatory Offences* [Gesetz über Ordnungswidrigkeiten – OWiG] as amended in 2009, www.gesetze-im-internet.de, accessed 28 October 2019.

177. German Supreme Court, *judgment no. 5 StR 138/01 of 21 March 2002*, www.hrr-strafrecht.de (German), accessed 28 October 2019.

178. German Supreme Court, *judgment no. 5 StR 119/05 of 2 December 2005*, www.hrr-strafrecht.de (German), accessed 28 October 2019.

179. § 29a para. 2 German *Act on Regulatory Offences* [Gesetz über Ordnungswidrigkeiten – OWiG] as amended in 2009, www.gesetze-im-internet.de, accessed 28 October 2019; case example after German Supreme Court, *judgment no. 5 StR 119/05 of 2 December 2005*, www.hrr-strafrecht.de (German), accessed 28 October 2019.

180. *Act of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty*, www.oecd.org (English), accessed 28 October 2019.

6.2.1. Exclusion from public subsidies and grants

Debarment from public funding can be an effective and dissuasive form of sanction, depriving legal persons from accessing any form of funds from state institutions. It is used, for example, in the Portuguese Criminal Code:

“Article 90.I Ineligibility to grants, subsidies or incentives

The deprivation of the right to subsidies, grants or incentives granted by the State and other public bodies shall apply to corporate or similar entities for a period of one to five years.”

A similar, but more detailed regulation is found in the Czech Republic:

“Section 22 Prohibition to Receive Endowments (Grants) and Subsidies

(1) The court may impose the punishment of prohibition to receive endowments (grants) and subsidies to a legal person for one year to 20 years, if the legal person has committed the criminal act in connection to submitting an application or dealing with applications for endowment, subsidy, refundable financial subsidy or contribution or in connection to their provision or use, and/or in connection to provision or use of any other state aid.

(2) The punishment of prohibition to receive endowments (grants) and subsidies as a separate punishment may be imposed only if the court deems it not necessary, due to the nature and seriousness of the committed criminal act, to impose other type of punishment.

(3) Throughout the period of the execution of the punishment and in accordance to the extent defined by the court, the punishment of prohibition to receive endowments (grants) and subsidies consists in prohibition for a legal person to apply for whatever endowments, subsidies, refundable financial subsidies, contributions or any other state aid according to other legal regulations, as well as prohibition to receive any such endowments, subsidies, refundable financial subsidies, contributions or any other state aid.”

6.2.2. Disqualification from public contracts

Additionally, there are several ways in which a corruption conviction can exclude a legal person from public procurement:

- ▶ The most direct way is an all-out “ban on applying for public procurement contracts” (for instance, Article 9 para. 1 no. 4 of the Polish Law on Liability of Legal Persons).¹⁸¹
- ▶ In Germany, there exists several regional corruption registers for procurement purposes. State entities have to report on corrupt businesses, which are registered centrally. All public procurers are obliged to consult the register before awarding contracts above a certain value.¹⁸²
- ▶ In Lithuania, the Law on Public Procurement requires a public procurer to appraise the vendor’s reliability. A legal entity can be deemed unreliable if it, or one of its employees, has been convicted of corruption offences. Information on corruption convictions are taken from the company register. Pursuant to Article 11 of the Act on Preventing Corruption, a legal person’s conviction for corruption crimes are submitted to the company register. The same applies when a legal entity’s employee or authorised representative is convicted for engaging in corruption while acting in favour or on behalf of the legal entity.¹⁸³

GRECO has indicated that “exclusion from public tendering procedures for a specified period” can be part of an important “additional penalty”.¹⁸⁴ Furthermore, an EU-funded comparative study on liability of legal persons in Member States has pointed out the need to: “...rephrase the suggested ‘exclusion from entitlement to public benefits or aid’ in a way to clearly encompass the exclusion from participation in a public tender procedure in its scope”.¹⁸⁵

6.2.3. Annulment of procurement decisions

As part of civil litigation brought by honest competitors, procurement decisions manipulated through corruption can be contested in court. If successful, this can include the annulment of the procurement decision

181. Idem.

182. Ministry of Zoning Berlin, Corruption Register (*Korruptionsregister*), www.stadtentwicklung.berlin.de (German), accessed 28 October 2019.

183. Rimkus V. (2007), *Responsibility of Legal Persons for Corruption in Lithuania*, Proceedings of the OECD/ACN-Seminar “Criminalisation Of Corruption”, p.36, www.oecd.org, accessed 28 October 2019.

184. GRECO (2008), *Joint First and Second Evaluation Rounds. Evaluation Report on Switzerland*, para. 179, www.coe.int/greco, accessed 28 October 2019.

185. Vermeulen G. and others (2012), *Liability of Legal Persons for Offences in the EU*, p.139, recommendation 6.

favouring the corrupt competitor. A key example is the European Union Remedies Directive, which requires Member States to ensure that procurement laws include provision for powers to:

“(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned [...];

(b) either set aside or ensure the setting aside of decisions taken unlawfully [...]”¹⁸⁶

6.2.4. Debarment by development banks

Development banks are financing projects all over the world with billions of US\$ in funds. For many national and multinational companies these banks are substantial sources of business. All major multilateral development banks, such as the World Bank, exclude corrupt companies from entering into contracts financed by the Bank, rendering them ineligible to be awarded a World Bank-financed contract for the period indicated as a result of a sanction placed on the legal person under the Bank’s anti-fraud and anti-corruption policies.¹⁸⁷

Furthermore, the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank Group, and the World Bank Group entered into an agreement in 2010 which stipulates that entities debarred by one development bank will be sanctioned for the same misconduct by other signatory development banks. This cross-debarment agreement means that if a company is debarred by one bank, it is debarred by all.¹⁸⁸ For multinational companies this international debarment can represent a significant threat to their economic interests and is therefore likely to have a strong preventive and dissuasive effect on certain corrupt practices.

In April 2018, the International Monetary Fund’s Executive Board approved a new Framework for Enhanced Engagement on Governance which is “designed to promote more systematic, effective, candid, and even-handed engagement with member countries regarding governance vulnerabilities, including corruption, that are judged to be macroeconomically critical.” The IMF’s assessment of AML/CFT Requirements state that “measures should be in place to prevent the legal persons and arrangements from being used for criminal purposes, to make them sufficiently transparent, and to ensure that accurate and up-to-date basic and beneficial ownership information is available on a timely basis.”¹⁸⁹

Sometimes, the debarment from international aid is also foreseen by national laws, for example in Poland whereby “the collective entity can be penalised with: [...] the ban on using the aid provided by the international organisations the Republic of Poland holds membership in”.¹⁹⁰

6.2.5. Loss of export privileges

In case a company has become liable for bribery or corruption offences, certain jurisdictions have put in place provisions foreseeing the suspension or revocation of export privileges. For example, in the United States, the Arms Export Control Act (AECA), 22 U.S.C. § 2751, and the International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 120, provide for the suspension, revocation, amendment, or denial of an arms export license if an applicant has been indicted or convicted for violating the Foreign Corrupt Practices Act (FCPA).¹⁹¹

6.2.6. Ban of activities

Additionally, certain countries foresee a ban on some of the companies’ regular business activities for a specified period of time. For corruption offences, such a sanction is possible where a legal person has repeatedly and persistently bribed public officials leading to a systemic danger of this company doing further business in this sector.

186. *Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts* (89/665/EEC), <http://eur-lex.europa.eu>, accessed 28 October 2019.

187. The World Bank, *Public Procurement*, www.worldbankgroup.org, accessed 28 October 2019.

188. See www.crossdebarment.org/, accessed 28 October 2019.

189. IMF Policy Paper (April 2018), *Review of 1997 Guidance Note on Governance – a Proposed Framework for Enhanced Fund Engagement*, p. 29

190. Art. 9. 1. *Act of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty*, www.oecd.org (English), accessed 28 October 2019.

191. U.S. Department of Justice/U.S. Securities and Exchange Commission (2012), *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, p. 71, www.justice.gov, accessed 28 October 2019.

Poland, for example, provides for the suspension of certain business activities, though it does provide some limitation if it is determined that such a ban would lead to disproportionate and/or collateral consequences such as bankruptcy or layoffs. Article 9 of the Law on Liability of Legal Persons states that:

“The collective entity can be penalised with:

1) the ban on promoting or advertising the business activities it conducts, the products it manufactures or sells, the services it renders, or the benefits it grants;

[...]

5) the ban on pursuing the indicated prime or incidental business activities;

[...]

2. The bans listed in paragraph 1.1-5 are imposed for any period between 1 and 5 years, and are adjudicated in years.

3. The ban referred to in paragraph 1.5 shall not be imposed, if it could lead to bankruptcy or liquidation of the collective entity, or layoffs [...].¹⁹²

6.2.7. Supervision

The EU Second Protocol and the European Union Framework Decision lists as an optional sanction is “judicial supervision”, which requires the legal person to provide periodic updates to a court-appointed representative on the legal person’s activity to ensure the sanctioned person is in fully compliance with relevant laws and standards.¹⁹³

Article 90(E) of the Portuguese Criminal Code allows for this option: Where a fine is less than 600 day-fines the court may replace the sentence with judicial supervision, whereby it orders the supervision of a legal person’s activities by a court-appointed judicial representative, who reports on that body’s activity every six months, or whenever he or she considers necessary. The representative has no judicial or management powers in the legal person. If the legal person fails to live up to the standard imposed by the court, the supervision is revoked and the sentence imposed.

Additionally, in certain jurisdictions such as the United States, “corporate monitoring” can also be part of a plea bargain with prosecutors and may lead to the appointment of an independent third-party corporate monitor rather than a judicial appointee. He or she assesses and monitors a company’s adherence to the compliance requirements of an agreement that was designed to reduce the risk of recurrence of the company’s misconduct.¹⁹⁴ It is also possible to allow the company to engage in self-monitoring, typically in cases where the company has made a voluntary disclosure, has been fully cooperative, and has demonstrated a genuine commitment to reform.¹⁹⁵ The UK has made arrangements for monitoring and compliance, for examples in the 2017 Deferred Prosecution Agreement with Rolls-Royce, discussed in more detail in section 6.3 below.

6.2.8. Probation and bail

Probation and bail are mechanisms of criminal enforcement usually associated with natural persons. However, Article 90.D of the Portuguese Criminal Code, for example, also applies these measures to legal persons:

“Good conduct bail

1 If the legal entity ordered to pay a fine not exceeding 600 day-fines, the court may replace the fine with a bail of good conduct between €1,000 and €1,000,000, for a term of one to five years.

2 It shall be declared forfeited to the State if the legal entity commits a similar offense during the term of good conduct.

3 The bail can be paid by deposit, pledge, mortgage, bank guarantee or security. [...].”

192. *Act of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty*, www.oecd.org (English), accessed 28 October 2019.

193. See Annex 9.1.

194. U.S. Department of Justice/U.S. Securities and Exchange Commission (2012), *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, pp.71 f., www.justice.gov, accessed 28 October 2019.

195. Idem.

6.2.9. Liquidation

Liquidation is to a legal person what the death penalty is to a natural person. The EU Second Protocol and the EU Framework Decision lists liquidation (“judicial winding-up order”) as one option of sanction.¹⁹⁶ Nonetheless, many jurisdictions, such as Germany, do not foresee it as a sanction due to the far-reaching consequences of a social, labour and economic nature. The OECD Working Group on Bribery has expressed the view that the severity of dissolution “might make it a disproportionate and unrealistic sanction except in the most egregious cases.”¹⁹⁷

Many jurisdictions still include this sanction, as for example, the Criminal Code of Lithuania foresees “Liquidation of a Legal Entity” in its Article 53:

“When imposing the penalty of liquidation of a legal entity, a court shall order the legal entity to terminate, within the time limit laid down by the court, the entire economic, commercial, financial or professional activity and to close all divisions of the legal entity.”

There has not, however, been any case so far where such a sanction has been made and courts would impose this sanction only in situations when a legal entity systematically commits or assists in the commission of crimes.¹⁹⁸ The Portuguese legislator has put such explicit requirements into Article 90.F of the Criminal Code: “The penalty of dissolution is ordered by the court when the legal entity has been created for the exclusive or predominant objective of committing crimes [...] or when the repeated commission of such crimes shows that the legal entity is exclusively or predominantly used for such purposes by someone occupying a leading position.”

In addition to the “death sentence” of liquidation, the Portuguese legislation provides grounds to apply what is effectively a partial or temporary liquidation. Article 90.L foresees temporary closure of a certain business (“*estabelecimento*”) of a legal person “for a period of three months to five years when the offence was committed within the respective activity.” Only if the fine exceeds 600 day-fines, “the court may order the definitive closure”. The business can be reopened if, after the stated period of time, “it becomes reasonable to assume that the legal person will not commit new offences”. The Criminal Code tries to cushion the social effects of the temporary closure: “The closure of the establishment is neither just cause for the dismissal of workers nor grounds for suspension or reduction of payment of their salaries.”

6.2.10. Public register

Public accessibility of information on which companies have been convicted of corruption offences is an important feature of a sanctioning system. As there are several sources where convictions can be registered, including the criminal register, company register court decision register, and privately-held databases, GRECO “recommends to consider means for tracking information about legal persons convicted of corruption offences”¹⁹⁹

Access to such information is important for public procurement procedures, public funding of activities, and for possible business partners of legal persons, and as fragmented databases can slow down information retrieval. GRECO has often recommended such a central register of companies found guilty of corruption, for example the one found in Italy,²⁰⁰ noting that such registers can serve a useful purpose similar to criminal records for physical persons.²⁰¹

When jurisdictions provided only a combination of sources and some of that information was only accessible to law enforcement agencies or for a fee, GRECO was reluctant to accept this as being sufficient: “[I]n the USA, records of convictions of legal persons are publicly accessible through the jurisdiction where the conviction took place. Furthermore, legal persons who are also public companies are required to include any convictions in their reports to the Securities Exchange Commission. These reports are available on-line through the EDGAR system for free. In addition, there are commercial databases containing information on federal, state and local convictions as well as pre-conviction records. One such business model is designed to provide access to the database as part of a subscription which is generally used for multiple research projects. Another business model is designed to provide reports to individual requestors for a fee. In addition, the law enforcement community in the USA has a non-public data source which includes conviction information.”²⁰²

196. See Annex 9.1.

197. OECD, *The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report* (2016), p. 132.

198. Rimkus V. (2007), *Responsibility of Legal Persons for Corruption in Lithuania*, Proceedings of the OECD/ACN-Seminar “Criminalisation Of Corruption”, p.32, www.oecd.org, accessed 28 October 2019.

199. GRECO, *Second Evaluation Round. Evaluation Report on the United States of America*, para. 191, www.coe.int/greco, accessed 28 October 2019.

200. *Joint First and Second Evaluation Round. Evaluation Report on Italy*, para. 184, www.coe.int/greco, accessed 28 October 2019.

201. GRECO (2005), *Second Evaluation Round. Evaluation Report on the Sweden*, para. 88, www.coe.int/greco, accessed 28 October 2019.

202. *Idem*. However, the GET did not “find it necessary to pursue the issue raised in this recommendation any further”.

6.2.11. Publication of judgement

Several jurisdictions are required to announce the publication of the judgment to the general public. The purpose of such a regulation is similar to the practice of publically registering a natural person's criminal conviction. For instance, in Lithuania, Article 43, para. 2 of the Criminal Code, states that "Having imposed a penalty upon a legal entity, a court may also decide to announce this judgement in the media."

During the evaluation of Serbia, GRECO concluded that the adoption of legislation introducing a set of sanctions including "publication of the conviction judgment" was in line with Article 19 Council of Europe Criminal Law Convention on Corruption.²⁰³

6.3. Case exercise 4: Moscow traffic control

Background

From 2004 to 2006, Siemens I&S and 000 Siemens, a regional company in Russia, paid approximately US\$741,419 in bribes to government officials in connection with a World Bank-funded project for the design and installation of a US\$27 million traffic control system in Moscow called the "Moscow Third Ring Project" (the system was installed at internal material and service costs of US\$17 million). First, Siemens paid money to its business consultant who simultaneously worked as a technical consultant for the Moscow Project Implementation Unit (the "MPIU"), a quasi-governmental unit that ran the Moscow Third Ring project. The MPIU hired the technical consultant at Siemens' recommendation. From 2004 to 2006, Siemens paid approximately US\$313,000 to three entities associated with the technical consultant, with at least US\$141,419 of the payment in exchange for favourable treatment in the tendering process. The technical consultant used his position at the MPIU to create tender specifications favourable to Siemens, to provide tender documents to Siemens before their official publication, to evaluate project bids in a way that ensured Siemens would win the contract, and to assist during the implementation phase of the project.

Second, Siemens colluded with a competitor who agreed to inflate its project bid to ensure Siemens won the project. In return, Siemens hired the competitor at an inflated rate of approximately \$800,000. Siemens also hired two of the competitor's former consortium members to become subcontractors to Siemens on the project (Subcontractor A and Subcontractor B). Siemens paid Subcontractor A approximately US\$1.3 million for a sham traffic study and approximately US\$1.4 million to Subcontractor B for other alleged services. In fact, both subcontractors were used to funnel at least US\$600,000 of the US\$741,419 described above to senior officials of the MPN.

Questions

- Please assess the minimum fine for above offences so that it would forfeit the economic advantage. What would be the economic disadvantage of Siemens if it had to pay this fine?
- What sanctions would you choose as a legislator in general (disregarding the above case)?
- If all the sanctions listed in this handbook were available, what sanctions would you apply as a judge in the Moscow case and against whom?

6.4. Case exercise 5: Award-worthy investigation?

At Siemens, Bribery Was Just a Line Item

The New York Times (20 December 2008)

Reinhard S. was half asleep in bed when his doorbell rang here early one morning in 2006.²⁰⁴ Still in his pajamas, he peeked out of his bedroom window, hurried downstairs and flung open the front door. Standing before him in the cool, crisp dark were six German police officers and a prosecutor. They held a warrant for his arrest. At that moment, Mr. S., a stout, graying former accountant for Siemens A.G., the German engineering giant, knew that his secret life had ended. "I know what this is about," Mr. S. told the officers

203. GRECO (2010), *Joint First and Second Evaluation Rounds, Addendum to the Compliance Report on the Republic of Serbia*, para. 61-62, www.coe.int/greco, accessed 28 October 2019.

204. The New York Times (20 December 2008), *At Siemens, Bribery Was Just a Line Item*, www.nytimes.com, accessed 28 October 2019.

crowded around his door. "I have been expecting you." A former mid-level executive at Siemens, he was one of several people who arranged a torrent of payments that eventually streamed to well-placed officials around the globe, from Vietnam to Venezuela and from Italy to Israel.

After World War II, Siemens had difficulty competing for business in many Western countries and responded by seeking business opportunities in certain less developed countries where corrupt business practices were common.

During the pre-1999 period, bribery at Siemens was largely unregulated. German law did not prohibit foreign bribery and allowed tax deductions for bribes paid in foreign countries. Siemens was not yet listed on the NYSE and therefore was not subject to US regulation. Undeterred by foreign laws that prohibited bribery, Siemens put several payment mechanisms in place, including the use of cash and off-books accounts, to make payments as necessary to win business.

The term "*Nützliche Aufwendungen*" ("NA") or "useful expenditures" was a commonly used tax law term and was listed on Siemens' cost calculation sheets to denote payments to third parties, including illicit payments to foreign officials. Though as a rule Siemens required two signatures on all major documents in accordance with an internal control known as the "four-eyes" principle, many exceptions to the rule were made to ensure quick access to cash to make illicit payments.

Over time, Siemens developed a network of payment mechanisms designed to funnel money through third parties in a way that obscured the purpose and ultimate recipient of the funds. On at least one project, bribes to high ranking government officials were arranged personally by a member of the *Vorstand*. The success of Siemens' bribery system was maintained by lax internal controls over corruption related activities and an acceptance of such activities by members of senior management and the compliance, internal audit, legal and finance departments.

Between 12 March 2001 and 30 September 2007, Siemens made thousands of separate payments to third parties in ways that obscured the purpose for, and the ultimate recipients of, the money. At least 4,283 of those payments, totalling approximately US\$1.4 billion, were used to bribe government officials in return for business to Siemens around the world. Among the projects on which Siemens paid bribes were:

- ▶ metro transit lines in Venezuela;
- ▶ metro trains and signalling devices in China;
- ▶ power plants in Israel;
- ▶ high voltage transmission lines in China;
- ▶ mobile telephone networks in Bangladesh;
- ▶ telecommunications projects in Nigeria;
- ▶ national identity cards in Argentina;
- ▶ medical devices in China;
- ▶ medical devices in Vietnam;
- ▶ medical devices in Russia;
- ▶ traffic control systems in Russia;
- ▶ refineries in Mexico;
- ▶ mobile networks in Vietnam; and
- ▶ sales of power stations and equipment to Iraq under the United Nations Oil for Food Programme.

Siemens earned over \$1.1 billion in profits on these fourteen categories of transactions that comprised 332 individual projects or individual sales.

For internally investigating and following up on the bribery scandal, Siemens paid about €550 Million in legal fees and auditing costs.²⁰⁵

The award

In October 2009, several employees of the U.S. Department of Justice (DOJ) were presented with the Attorney General's Award for Distinguished Service for outstanding performance in the investigation and

205. Note: The facts of this exercise are taken almost literally from original complaint and prosecution documents concerning the Siemens case but are slightly modified for didactical purposes. One must bear in mind that the facts present the case as stated by the prosecutors and are neither formally confirmed by Siemens or a court decision in all aspects and details.

prosecution of Siemens AG.²⁰⁶ The webpage “FCPA Professor” questioned this award with the following headline and article:

“Was the DOJ’s [Department of Justice] FCPA Enforcement Action against Siemens Award-Worthy? [...]”

The total criminal penalty was \$450 million (a \$448.5 million fine against Siemens and a \$500,000 fine against each of the three subsidiaries).

In agreeing to fines and penalties below the maximum \$2.7 billion available under the advisory U.S. Sentencing Guidelines, the DOJ [...] specifically noted, among other things, the company’s “extraordinary” cooperation in connection with its investigation (and the investigations of foreign law enforcement agencies), the “unprecedented” scope of the company’s internal investigation which included virtually all aspects of its worldwide operations, and the significant remedial measures the company has undertaken.

With that background out of the way, and before returning to the ultimate question, is it really accurate for the DOJ to say that it “uncovered evidence of hundreds of millions of dollars of corrupt payments in dozens of countries spanning several decades, and in virtually every Siemens operating group and region?”

Use of the self-congratulatory term “uncovered” would seem a bit distorted given that the DOJ itself noted that “the resolution of the U.S. criminal investigation of Siemens AG and its subsidiaries reflects, in large part, the actions of Siemens AG and its audit committee in disclosing potential FCPA violations to the Department after the Munich Public Prosecutor’s Office initiated searches of multiple Siemens AG offices and homes of Siemens AG employees.” [...]

Whether DOJ “uncovered” Siemens conduct or not is beside the point. The question remains – was the DOJ’s FCPA enforcement action against Siemens award-worthy?

An initial reaction is most likely – “why of course, handing down the largest ever criminal penalty under the FCPA is indeed award-worthy and a good day for FCPA enforcement.”

But, is agreeing to a \$450 million criminal penalty when the advisory U.S. Sentencing Guidelines set forth a penalty range of \$1.35 – \$2.7 billion based on the alleged conduct award-worthy? [...]. Is agreeing to a criminal penalty approximately 33% of the amount available under the guidelines (on the low end) and approximately 16% of the amount available (on the high end) “advanc[ing] the interests of justice on behalf of the American people?” If the answer is yes, what then does this say about the guidelines’ formula for calculating criminal fines?

But, regardless of the guidelines, is agreeing to a \$450 million criminal penalty when, per the DOJ, Siemens’ corrupt or questionable payments totalled \$1.36 billion award-worthy? Is agreeing to a criminal penalty approximately 33% of the amount of the actual improper or questionable payments “advanc[ing] the interests of justice on behalf of the American people?”

But, is agreeing to a \$500,000 fine based on allegations of making over \$31 million in corrupt payments in exchange for favourable business treatment in connection with a \$1 billion project in Argentina award-worthy? Is agreeing to a criminal penalty approximately 2% of the amount of the actual corrupt payments “advanc[ing] the interests of justice on behalf of the American people?”

But, is agreeing to a \$500,000 fine based on allegations of making over \$18 million in corrupt payments in exchange for favourable business treatment in connection with two major metropolitan mass transit projects in Venezuela award-worthy? Is agreeing to a criminal penalty approximately 3% of the amount of the actual corrupt payments “advanc[ing] the interests of justice on behalf of the American people?”

But, is agreeing to a \$500,000 fine based on allegations of making over \$5 million in corrupt payments in exchange for favourable treatment during the bidding process on a mobile telephone project in Bangladesh award-worthy? Is agreeing to a criminal penalty approximately 10% of the amount of the actual corrupt payments “advanc[ing] the interests of justice on behalf of the American people?”

What do you think?

206. U.S. Department of Justice (21 October 2009), *Attorney General Holder Recognizes Department Employees and Others for Their Service at Annual Awards Ceremony*, <http://www.justice.gov>, accessed 28 October 2019.

7. Procedural Aspects

7.1. Jurisdiction

7.1.1. Criminal and administrative trials

In cross-border transactions, the following questions arise:

- ▶ Can a legal person be held criminally liable in the country where the bribe occurred?
- ▶ Can a legal person be held criminally liable in its country of residence for acts committed abroad?

Whereas the first question can largely be answered in the affirmative given the discussion outlined above, the answer to the second question is somewhat more complex.

Territoriality

As a universal principle of jurisdiction, states have criminal and administrative jurisdiction over offences committed in their territory. If a representative of a legal person from country A bribes an official in country B, criminal and administrative offences of country B apply. The UN Convention against Corruption (Article 42 para. 1 a), the OECD (Article 4 para. 1) and the Council of Europe Criminal Law Convention on Corruption (Article 17 para. 1 a) also apply the territoriality principle.

Special regulations on jurisdiction in cases of liability of legal persons are not common, but some laws do attempt to clarify this question, such as the one in the Czech Republic:

“Section 2

(1) Liability to punishment of an act committed on the territory of the Czech Republic by a legal person which has a registered office in the Czech Republic or its establishment or branch is placed on the territory of Czech Republic or at least conducts its activities here or owns property here, shall always be considered under the law of the Czech Republic.

(2) A criminal act shall be considered as having been committed on the territory of the Czech Republic, if a legal person acted:

- a) wholly or partly on the territory of the Czech Republic, even if the violation of, or threat to, an interest protected under Criminal Code resulted, or was to result, completely or partly abroad; or
- b) abroad, if the violation of, or threat to, an interest protected under Criminal Code occurred or had to occur, even if only in part, on the territory of the Czech Republic.

(3) As for complicity/participation Section 4 Paragraph 3 and 4 of the Criminal Code shall similarly apply.

Section 3

Liability to punishment of an act committed abroad by a legal person with registered office in the Czech Republic shall also be considered under the law of the Czech Republic.”²⁰⁷

Nationality

The UN Convention against Corruption, the OECD Convention, and the Council of Europe Criminal Law Convention on Corruption all foresee jurisdiction in cases of “active nationality”, for instance, where a national has committed an offence (Article 42 para. 2 b, Article 4 para. 2, Article 17 para. 1 b). The decisive question in this context is whether the jurisdiction depends on the nationality of the natural person representing the legal person, or on the nationality of the legal person itself.

207. § 31 para. 1 Act No. 418/2011 on Criminal Liability of Legal Persons and the Proceedings against Them [ZÁKON ze dne 27. října 2011 o trestní odpovědnosti právnických osob a řízení proti nim].

The GRECO Evaluation Reports do not provide analysis or recommendations on this question. In most states there is often little practical experience, let alone case law.²⁰⁸ However, because the Conventions require liability of legal persons it seems logical to treat legal persons analogously to natural persons for matters of jurisdiction. Hence, any offence committed by a representative is considered an offence by the legal person. Consequently, an offence committed by an employee of a company registered in Germany is an offence by a German national, no matter what nationality the employee. Several national laws follow this approach, for example the Netherlands: "There is no case law indicating whether nationality jurisdiction can be established over legal persons. However, it is the view of the Dutch authorities that a legal person can have nationality, and that a legal person incorporated under Dutch law would have Dutch nationality. In addition, the academic literature indicates that a legal person can be subject to nationality jurisdiction pursuant to article 5 of the Penal Code."²⁰⁹

The US has made it clear through an amendment to the FCPA in 1998 that the nationality principle applies to US companies: "[T]he OECD Convention calls on parties to assert nationality jurisdiction when consistent with national legal and constitutional principles. Accordingly, the Act amends the FCPA to provide for jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States. This exercise of jurisdiction over U.S. businesses and nationals for unlawful conduct abroad is consistent with U.S. legal and constitutional principles and is essential to protect U.S. interests abroad."²¹⁰

Residence

Some countries extend the notion of "nationality" to residence.²¹¹ For example:

A German employee of a company registered in Netherlands (for tax purposes) bribes an official in Hungary. As a matter of fact, though, the company's offices and directors have always been located in Prague. Under the (residence-extended) nationality principle, Czech courts would have jurisdiction on the criminal liability of the company, in addition to German courts (under the simple nationality principle). The same would be true if the company had only property located in Prague.²¹²

Protective jurisdiction

The UN Convention against Corruption also applies the protective jurisdiction over acts that affect the sovereign itself without regard to where or by whom the act is committed.²¹³ According to the Convention, countries may wish to rely on this principle of jurisdiction when they might be faced with loopholes stemming from application of the territoriality and nationality principles. In that sense:

"They may consider that an offence is committed against the State Party when the State itself, that is, its institutions, public entities and public corporations, is affected. Thus, States Parties may regard that offences which affect their citizens are not covered by this provision, but are rather covered by article 42 (2) (a).

On the other hand, a State Party may consider that an offence has been committed against itself when one of its public officials has been affected. However, that would require that the public official has been affected in his or her specific role or function representing the State."²¹⁴

Other forms

Some countries have introduced other forms of making a company liable under their jurisdiction. For example, the US FCPA triggers liability not only for companies that are registered in the US, but also for (foreign) companies that are listed on a national securities exchange in the United States.²¹⁵

Conventions

The international conventions do not address specifically the issue of the jurisdiction to be established with regard to the liability of legal persons, but do with regard to corruption offences in general.

208. Pieth and others (2007), *OECD Convention on Bribery: A Commentary*, Art. 4 No. 3.4.

209. OECD (2001), *Netherlands, Phase 1 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p. 19, www.oecd.org, accessed 28 October 2019.

210. United States Senate (30 July 2008), *Senate Report* No. 105-277 at 2, www.justice.gov, accessed 28 October 2019.

211. Pieth and others, *supra*, Art. 4 No. 3.4.

212. See above at footnote 149.

213. Murphy S. (2006), *Principles of International Law*, p. 245.

214. UNODC, *Technical Guide to the United Nations Convention against Corruption*, New York, 2009

215. See for further details: U.S. Department of Justice/U.S. Securities and Exchange Commission (2012), *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, pp.57 f., www.justice.gov, accessed 28 October 2019.

Extraneous factors

When determining jurisdiction, national authorities might consider some rather political factors. With respect to this issue, Art. 5 of the OECD Convention states: "Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."

7.1.2. Private litigation

Competitors might suffer damage from corrupt companies playing foul in procurement procedures. The jurisdiction in such cases follows these principles:

- ▶ Generally, proceedings can only be brought at the courts of the defendant (*actor sequitur forum rei*). For legal persons these are the courts in the country of registration.
- ▶ As corruption offences regularly constitute a tort, the jurisdiction of *forum delicti* applies, in other words, the courts of the country where the bribery took place are competent.

7.2. International legal cooperation

International legal cooperation is an important means of dealing with matters related to the liability of legal persons. In many cases, either before or after a determination of liability of a legal person has been made, certain key questions are likely to emerge concerning international legal cooperation:

- ▶ Do states (have to) notify each other if a legal person from one state committed a corruption offence in another state?
- ▶ Would a state without criminal liability for legal persons (be obliged to) provide mutual legal assistance to a foreign state concerning one of its domestic legal persons?
- ▶ Would a state without criminal liability for legal persons (be obliged to) enforce a foreign conviction against one of its domestic legal persons?

The 2017 review of UNCAC confirmed that the majority of States parties could, in principle, grant assistance in relation to offences for which legal persons could be held liable, though only a small percentage of states provided examples of actual cases in a corruption-related context.²¹⁶

For parties to the Council of Europe Criminal Law Convention on Corruption, Article 25 para. 1 also generally supports favourable answers to the above questions:

"The Parties shall co-operate with each other, in accordance with the provisions of relevant international instruments on international co-operation in criminal matters, or arrangements agreed on the basis of uniform or reciprocal legislation, and in accordance with their national law, to the widest extent possible for the purposes of investigations and proceedings concerning criminal offences established in accordance with this Convention."

Furthermore, Articles 26-31 of the Convention facilitates information exchange and mutual legal assistance. Even though the Explanatory Report to the Convention does not touch on this point, these Articles can implicitly cover legal persons, as the Articles contain no indication to the contrary.

However, on the matter of enforcing convictions, the Council of Europe conventions on international cooperation are still rather focused on natural persons, such as the Convention on the Transfer of Sentenced Persons.²¹⁷ On the other hand, the European Union's instruments on international legal cooperation take up the specifics of legal persons in more detail and explicitly include convictions of legal persons in their coverage:

- ▶ Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.²¹⁸
- ▶ Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.²¹⁹

216. UNODC, *The State of implementation of the UN Convention against Corruption* (2017), p. 225.

217. *Convention on the Transfer of Sentenced Persons* (March 1983), <http://conventions.coe.int/Treaty/en/Treaties/Html/112.htm>, accessed 28 October 2019.

218. <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32005F0214>, accessed 28 October 2019.

219. <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006F0783>, accessed 28 October 2019.

- ▶ EU Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation orders provides that a freezing order issued against a legal person shall be executed even where the executing State does not recognise the principle of criminal liability of legal persons.²²⁰

However, a recent EU-funded comparative study on liability of legal persons in Member States came to the following recommendation regarding the extension of mutual recognition:

“The current instrumentarium regulating the mutual recognition of sentences and governing their cross-border execution is largely focused on the sanctions typically imposed against natural persons. A comprehensive and consistent policy with respect to the liability of legal persons would need to contain instruments regulating the mutual recognition of the sanctions typically imposed against legal persons.”²²¹

This recommendation is certainly true beyond the European Union and for all Council of Europe member States as well.

As a pre-requisite of international cooperation, the following two further recommendations should also be noted:

“Recommendation 13 – Introduce the obligation to keep records

Analysis has revealed that not all member States keep (complete and comprehensive) records in relation to the liability of legal persons for offence. With a view to extending the information exchange with respect to the liability of legal persons for offences in the EU, the first step would be to introduce an obligation to keep records in order to be able to provide information upon request.

Recommendation 14 – Introduce exchange and storage obligations

Analogous to the exchange and storage obligations that have been introduced with respect to the criminal records of natural persons, similar exchange and storage obligations should be introduced with respect to the liability (criminal or other) of legal persons for offences. It would significantly facilitate the taking account of prior convictions in the course of criminal or noncriminal procedures.”²²²

7.3. Double jeopardy (“*Ne bis in idem*”)

The Latin phrase “*ne bis in idem*” translates as “not twice in the same [matter]”. This legal doctrine forbids legal action twice for the same underlying conduct. It is valid both in civil and criminal litigation, but in terms of human rights, its application in criminal proceedings is much more important.

In common law jurisdictions, the principle of *ne bis in idem* runs under the label of “double jeopardy”. It is enshrined, *inter alia*, in Article 4 “Right not to be tried or punished twice” of Protocol 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.²²³

In the realm of legal persons, double jeopardy issues could be argued in the following three groups:

- ▶ Both, natural and legal person are punished for the same bribery;
- ▶ The legal person is punished with administrative and criminal sanctions;
- ▶ Within one business entity (for example Siemens group), different legal persons (for example holding and local subsidiary) get punished for the same bribery.

7.3.1. Natural and legal person

As stated above (4.3.4), liability of the natural person and the legal person involved in the same corruption offence operate independently of each other. This does not violate the principle of *ne bis in idem*. Both subjects are different entities and have contributed different wrongs to the one offence: the natural person has shown personal fault, whereas the legal person has, for example, failed to prevent the natural person from committing the offence.

Therefore, as a general principle applicable not only in Europe,²²⁴ liability of legal persons does not exclude liability of natural persons, and vice versa. Many countries include this principle explicitly in their legislation, such as Article 20 para. 4 of the Criminal Code of Lithuania: “Criminal liability of a legal entity shall not release

220. <http://data.consilium.europa.eu/doc/document/PE-38-2018-INIT/en/pdf>, Article 23(2), accessed 28 November 2018.

221. Vermeulen G. and others (2012), Liability of Legal Persons for Offences in the EU, p. 141.

222. Idem.

223. <http://conventions.coe.int/Treaty/en/Treaties/Html/117.htm>.

224. See Art. 18 para. 3 Council of Europe Convention and Art. 26 para. 3 UNCAC.

from criminal liability a natural person who has committed, organised, instigated or assisted in commission of the criminal act.”²²⁵

However, courts have sometimes found it not so easy in practice to assess the proper relation of natural and legal persons in an offence, seeing them as one offender of the same offence, or as accomplices. In Estonia, for instance “some courts of first instance have been of the opinion that the *ne bis in idem* principle precludes liability of the natural person if the legal person has already been convicted. Some courts have insisted that the act of the natural person and the act of the legal person should be assessed as complicity. The Supreme Court has ruled that, since the liability of a legal person is a derivative liability, the two separate persons have two separate liabilities for the same act and the *ne bis in idem* principle and the rules of complicity do not apply. Even in the case of a single-shareholder company, where the single shareholder is the only official and the sole member of the body of the company, the court decided that both the natural person (the shareholder) and the legal person should be held responsible.”²²⁶

German courts have argued similarly as the Estonian Supreme Court. According to Court of Appeal decisions, proceedings against a legal person and against its representatives do not violate principle of *ne bis in idem*.²²⁷ The proceeding against the natural person can follow the proceeding against the legal person. However, for determining the sanction against the natural person it has to be taken into account whether the natural person (for example, as shareholder) has already suffered an economic loss through the sanction against the legal person.²²⁸

The independence of the liability of the physical person from the liability of the legal person also means that the legal person would still be liable if the physical person would be exempt from any punishment for some reason (such as, for instance, effective regret). The automatic preclusion of proceedings against a legal person in such a case would undermine the effectiveness of corporate liability and would not meet international standards.²²⁹ Indeed the EU’s 2018 Directive on Combating Money Laundering by Criminal Law stipulates that the liability of legal persons “shall not preclude criminal proceedings from being brought against natural persons who are the perpetrators, inciters or accessories” of the relevant offences.²³⁰

7.3.2. Administrative and criminal sanctions

Sometimes, administrative and criminal sanctions apply concurrently. If both sanctions address different wrongs, they can both apply without violating the principle of *ne bis in idem*. This is the case in Germany where both sanctions address different wrongs: criminal liability deals with natural persons, whereas administrative liability deals with legal persons. In Spain, on the other hand, criminal and administrative sanctions function as different levels applied for the same wrongful act. Hence, the criminal penalty takes precedence over the administrative sanction.²³¹

7.3.3. One business – different entities

National and international corporate structures often assemble different legal entities within one business entity. Often, all legal entities are structured in several layers under the umbrella of one holding company. Could several legal entities be held accountable for one bribery offence committed within this whole business entity? Or, would this amount to double punishment? Little, if any, jurisprudence is available to answer this question. One of the reasons for such scarcity of dogmatic guidance is that procedures against large holding structures most often end with a settlement rather than with a judgement.

Despite the lack of jurisprudence, there are two main perspectives:

- ▶ Business entity: it would be punished twice if more than one legal person of this business would be held liable.
- ▶ Separate entities: each entity has its own responsibility and thus, like accomplices, each of them can be liable if each of them is involved in the same offence.

225. Lithuania, *Criminal Code*, <https://ec.europa.eu>, accessed 28 October 2019.

226. Ginter J., *Criminal Liability of Legal Persons in Estonia*, Juridical International XVI/2009, 151 (155), <http://www.juridicainternational.eu>, accessed 28 October 2019, citing Decision of the Civil Law Chamber of the Supreme Court (CLCSCd) 3-1-1-7-04.

227. Court of Appeal Hamm, decision 5 Ss OWi 19/73 of 27 April 1973 (not available online).

228. Court of Appeal Frankfurt am Main, *decision no. 1 Ss 63/11 of 25 January 2012*, <http://openjur.de>, accessed 28 October 2019.

229. OECD (2011), *Bulgaria, Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.14, www.oecd.org, accessed 28 October 2019.

230. *EU Directive 2018/1673 on Combating Money Laundering by Criminal Law*, Article 7(3).

231. Vermeulen G. and others (2012), *Liability of Legal Persons for Offences in the EU*, p. 37.

A middle way between these positions would be to require a distinct, particular wrong in each of the legal entities for allowing their separate prosecution. So if the same organisational flaw pervades the whole business entity, *ne bis in idem* would prohibit prosecuting more than one legal entity within the business.

7.4. Procedural safeguards

The most important procedural safeguard for legal persons during a criminal or a quasi-criminal administrative trial would, similarly to a natural person, be the right to remain silent and to not incriminate itself.

In the context of (non-criminal) competition law, the European Court of Justice has ruled that: “in general, the laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings.” However, the Court also held “the need to safeguard the rights of the defence [...] to be a fundamental principle of the Community legal order”. Thus, the state must “not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.”²³²

The decision only applies to the implementation of European Union law, and it recognised that the rights flowing from the presumption of innocence do not accrue to legal persons in the same way as they do to natural persons. The decision recognises the discretion of the EU Member States to determine whether they want to grant a right to remain silent; and, more concretely, how any such right would apply to the legal person as distinct from the natural person(s) answering questions on the legal person’s behalf. The German Constitutional Court, for instance, has denied such a right as being part of the constitutional framework: “The protection from self-incrimination is in the interest of human dignity. An obligation to self-incriminate would lead an individual into an unbearable personal dilemma. Legal persons would not be able to experience such a dilemma.”²³³

It is also notable that a 2016 EU Directive on strengthening certain aspects of the presumption of innocence specifically excludes legal persons from its scope, stating that it would be “premature” to legislate at Union level on this issue.²³⁴

The Austrian²³⁵ and the Polish Law on the other hand, enshrine the right to remain silent:

“The court may question the representative of the collective entity in the capacity of a witness. The person may refuse giving explanations.”²³⁶

There is a further question, on which national systems may differ, as to whether any right against self-incrimination, should it apply to the legal person, would also entitle the legal person to resist an order to disclose documents to investigating authorities.

7.5. Trial tactics: natural and legal persons

Should natural and legal persons be tried one after another, and if so, which one first? Or, should they instead be tried in the same proceeding?

Most national laws leave this question up to the discretion of prosecutors and to general procedural rules. Under the Model Criminal Code, developed by several international organisations, a legal person and a natural person “may be jointly charged in one indictment.”²³⁷ For instance, the Czech law makes joint proceedings the rule, but allows for exceptions: “The accused legal entity and the accused natural person accused are tried jointly if their crimes are linked, unless there are important reasons.”²³⁸

232. European Court of Justice, *Orkem v Commission of the European Communities, Case 374/87, Judgment of 18 October 1989*, <http://eur-lex.europa.eu>, accessed 28 October 2019.

233. German Constitutional Court, *decision no. 1 BvR 2172/96 of 26 February 1997*, www.servat.unibe.ch (German), accessed 28 October 2019.

234. *EU Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings* (9 March 2016), accessed 28 October 2019.

235. § 17 Federal Law on the Responsibility of Legal Persons for Criminal Offences of 2005 [*Bundesgesetz über die Verantwortlichkeit von Verbänden für Straftaten (Verbandsverantwortlichkeitsgesetz – VbVG)*], www.internet4jurists.at, accessed 28 October 2019.

236. Article 21a para. 1 *Act of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty*, www.oecd.org (English), accessed 28 October 2019.

237. ICHR/OHCHR/UNODC (2007), *Model Criminal Code*, www.usip.org, accessed 28 October 2019.

238. § 31 para. 1 Act No. 418/2011 on Criminal Liability of Legal Persons and the Proceedings against Them [*ZÁKON ze dne 27. října 2011 o trestní odpovědnosti právnických osob a řízení proti nim*], <http://portal.gov.cz> (Czech), accessed 28 October 2019.

Sometimes it may be favourable to have separate trials with the initial action being made against the legal person. Legal persons will tend to co-operate with the proceedings in order to gain a lenient sentence. This might allow for the collection of comprehensive evidence and will make it easier to build a case against the natural persons, subject of course to their independent rights against self-incrimination. However, such an approach must not abuse the usual safeguards to which natural persons are entitled. There is a risk that adopting a staged approach could leave the subsequent prosecution of the natural person(s) vulnerable to challenge as an abuse of the court process. The view might therefore be taken that the preferable approach is to hold a joint trial of the legal and natural persons.

7.6. Case exercise 6: Offshore Limited

“Offshore Limited” is registered in the Romanian trade register of Bucharest. Its offices are located in Amsterdam. This is also the place where all management decisions are taken. Offshore Limited is the 100% owner of Venture B.V., a company registered in the Netherlands, and shares the same offices with Offshore Limited in Amsterdam. Venture B.V. is a one-man company consisting of one director, and coordinates all its business decisions for approval by Offshore Limited. The director, of Venture B.V., Ms. Smith, is caught bribing a minister in Hungary to win a contract for Venture B.V. to build a new highway to the Austrian border.

Ms. Smith (a British national) is tried in London for foreign bribery and sentenced to a fine of €50,000. Venture B.V. is tried as a legal person in a Hungarian criminal court for bribery and sentenced to a 10 year ban from procurement and a probation period of 2 years pending liquidation.

Romanian prosecutors have long waited for a chance to bring justice against Offshore Limited, notorious for its bribery activities. They bring criminal action against Offshore Limited in a Bucharest court and seek a fine reflecting the size of the economic advantage that Offshore Limited would have gained (indirectly) through the contract. Prosecutors have summoned all directors of Offshore Limited as witnesses to the trial to provide information on what they knew in advance about the bribe paid by Venture B.V.

The defence counsel for Offshore Limited files a motion with the court raising the following objections:

- a. The Bucharest court has no international jurisdiction in that case: the act of bribe-giving was done by a UK citizen outside of Romania, thus Art. 309 Criminal Code does not apply.
- b. The fine to Offshore Limited would mean double punishment as the crime has already been adjudicated in England and Hungary.
- c. Under case law of the European Court of Justice, the directors would have the right to remain silent and could not be summoned as witnesses.

What would your response be, as prosecutor, to the above objections?

Excerpts from the Criminal Code of Romania:

Art. 10

(1) Criminal Law shall apply to offences committed on Romanian territory.

Art. 11

Criminal law shall apply to offences perpetrated outside Romanian borders, by a Romanian citizen or by a person without citizenship which resides in Romania, if the act is provided as an offence also by the criminal law of the country of perpetration.

Art. 12

(1) Criminal law shall apply to offences committed outside Romanian territory by a foreign citizen or by a person without citizenship which resides in Romania, against national security or the security of the Romanian State, against a Romanian citizen or against a Romanian legal entity, if the Romanian law provides the penalty of life detention or severe detention. [...]

Art. 45

(1) A legal entity, except for the State, the public authorities and the public institutions, shall be criminally liable, in cases provided in the law, for offences committed on behalf or in the interest of the legal entity, by its bodies or representatives.

(2) Criminal liability for legal entities shall not exclude the criminal liability of natural persons who partook in the commission of that same act.

Art. 154

(1) A person who, at the date of offence commission, had acquired Romanian citizenship is a Romanian citizen.

(2) A foreign citizen is a person who, at the date of offence commission had not acquired Romanian citizenship or had no citizenship regardless of whether he/she was domiciling in Romania or abroad.

Art. 309

(1) The act of promising, offering or giving, either directly or indirectly, money or other benefits to a public servant or to an employee, for him/herself or for another, in order to perform, not to perform or to delay the accomplishment of an act with regard to his/her service duties or in order to perform an act that is contrary to these duties, shall be punished by strict imprisonment from one to 5 years. [...]

Art. 313

Legal entities shall be sanctioned for the offences provided in Art. 309 and Art. 312.

7.7. Case exercise 7: Transactions abroad

- 1) A merchandise manager based in Romania is invited by a potential business partner from Poland to visit a production unit in Warsaw, with the intention of starting a joint venture. While in Poland, the merchandise manager is treated to lavish events and is accommodated at a five star hotel. He is also taken on a series of non-business related trips around the region by the potential business partner. It is made clear to him that if he recommends the proposed joint venture to his company, he can expect such further great hospitality on a regular basis.

If he accepts the offer, is the Romanian merchandise manager breaking the law? If so, in which jurisdiction?

- 2) The manager of a car production company based in the UK makes a payment to a municipal officer in the Slovak Republic to obtain planning permission for the construction of a new manufacturing factory which would not otherwise have been granted. Through the move, the manager hopes to better his company's economic benefits by utilising cheaper labourers and by providing opportunities for the Slovakian public. To conceal the bribe, the payment transits through the Slovak official's American bank account.

In which jurisdictions and for what crimes will the manager and the company be liable for his actions?

- 3) An American pharmaceutical company has a subsidiary organisation in the Czech Republic that has historically had difficulties obtaining permits and government approvals for the widespread distribution of their products throughout Bulgaria.

The subsidiary is then approached by a Bulgarian consultancy firm which has good influence and contacts at various state agencies and proposes its services – of bribery – for a 15% commission on sales of medication in Bulgaria.

Which parties will be held liable for the alleged wrongdoing and why?

7.8. Internal and external investigations

Once a corruption allegation or suspicion arises internally, the legal person has the following options:

- ▶ Not react at all and hope that the suspicion will not catch further attention internally and eventually get leaked to law enforcement authorities;
- ▶ Conduct an internal investigation in order to find out what happened and make decisions on an informed basis. Should the investigation confirm any suspicion, voluntary disclosure to law enforcement authorities and cooperation is the only option for a company wishing to advocate for a lesser sentence.

If prosecutors learn about a corruption suspicion, they essentially have the following two options:

- ▶ Conduct their own investigation without support of an internal investigation by the legal person;
- ▶ Seek cooperation with the legal person conducting an internal investigation.

The following case study of Siemens shows that prosecutors in effect depend on cooperation with the legal person, unless the business is small and does not have a complex structure.

7.8.1. Internal investigation

7.8.1.1. Reasons for an internal investigation

Internal investigations can show that the legal person was willing to cooperate and disclose the corruption offence to the authorities. Depending on the legal system, this can exempt the company from liability or mitigate sentencing, contributing to a lesser sanction.

An imminent or on-going investigation by prosecutors is no argument against an internal investigation, even if the legal system does not foresee any incentive for cooperation: Management may consider conducting its own “investigation” into the alleged misconduct. By doing this, it can direct the process strategically as opposed to only reacting to enforcement actions.

In addition to the inherent benefit for the company to run an internal investigation, it can also be obliged to do so by legislation or other governing regulation. For example, corporate law can oblige decision-making bodies of a corporation to investigate suspicions in order to protect the company’s assets from damages. If companies are supervised by a financial market regulator, regulatory rules may require the company to investigate if red flags signal compliance-shortcomings. In some jurisdictions, case law may impose the duty on the decision-making bodies of the corporation to suspend and investigate suspicious activity or else they run the risk of being held liable for committing the relevant offence through omission (e.g. under the *respondeat superior* doctrine). In France, for instance, the Sapin 2 law requires companies with more than 50 employees to set up a whistleblowing system and to investigate the alerts received.

The internal investigation can also mitigate the reputational damage by showing willingness to “clean up” misconduct. It can further inform the management on possible defence strategies for any criminal procedure. It can also inform management on the possible size of criminal sanctions and civil claims allowing management to make provisions and set aside respective funds.

Companies may also be interested in conducting internal investigations from the standpoint of increasing business efficiency. Numerous research has proven that companies fare better if they establish a culture of integrity. One simple thought illustrates this effect: Any bribe paid is money lost. If the bribe is added to production costs, it makes the product less attractive. Acquiring business through bribery also reduces the incentives for employees for constant innovation in order to offer the best product (instead of the most corrupt one). Money lost for bribery is money the company cannot spend on quality and research. In fact, practice shows that often the majority of employees welcome internal investigations as a culture of integrity creates fairer chances of success within the company for everybody. In corrupt business, the least innovative and productive people often receive the biggest bonuses as they bring the company the most money (at least from a short term perspective). So even if the bribe is “financed” by the public budget through a kick-back scheme, it will still harm the company’s quality and innovativeness in the long run.

An additional purpose of an internal investigation though is to obtain evidence that management can use in court. This concerns not only criminal trials, but also civil law suits, such as for damages by competitors or labour disputes after the legal person dismisses an offender.

Evidence can only be used in court, if management obtained it legally. For example: Can internal investigators go through private emails on a work computer? Would it be legal if investigators tracked the movements of an employee in his/her private life? Therefore, management needs a formalised process so it can argue in court that it stayed within the legal limits and did not use any disproportionate means. The following section outlines such a formalised process which will significantly enhance the chances of management for a court admitting the results as evidence.

7.8.1.2. Steps of internal investigation

a. Legal privilege

In many jurisdictions, communications between a lawyer and his/her client are confidential (“attorney-client privilege”). Law enforcement authorities are therefore prohibited from collecting evidence of this communication, such as through means of discovery, and cannot use the communications in court unless the client waives the privilege. The purpose of this privilege is to encourage clients to openly share information with their lawyers, and to let lawyers provide effective representation.

If attorney-client privilege applies in the respective jurisdiction, it is recommended that an outside lawyer supervise the internal investigation (if domestic law requires an outside lawyer to be involved for the privilege to apply). The company can decide later on whether it wants to keep the results of the investigation privileged, or whether it wants to disclose them to law enforcement.

Attorney-client privilege in the United Kingdom has recently been examined by English courts in the case of internal investigations. Over the past fifteen years, the trend in English courts has been to limit attorney-client privilege, especially when invoked under the auspices of privilege due to anticipated litigation. However, a recent case, reversed on appeal by the England and Wales Court of Appeal on 5 September 2018, demonstrates that English courts may extend privilege to the case of Serious Fraud Office (SFO) criminal prosecutions. In 2017, the High Court in London held that interview notes, made by a company Eurasian Natural Resources Corp Ltd's ("ENRC") external law firm as part of an internal investigation into allegations of corruption, were not protected by attorney-client privilege.⁹³²³⁹ While the company argued that the documents were protected under the English doctrine of litigation privilege, or documents prepared when a dispute is in progress or contemplated, the Court disagreed. As the company was not under investigation by the SFO during the time the interview notes were created, there was no privilege. However, the England and Wales Court of Appeal made a distinction in its ruling on documents prepared in anticipation of SFO criminal investigations and overturned the High Court's decision. The Court considered that any work product created after ENRC received a letter from the SFO about contemplated criminal prosecution was covered under attorney-client privilege. Further, the Court ruled that documents prepared by ENRC's forensic accountants were also covered by this privilege, as they comprised part of the work product brought into existence to resist or avoid proceedings.

b. Investigative hypothesis

The investigation needs an investigative hypothesis: If the allegations were true, which possible offences would this constitute? Only if the possible offences are known, can one determine which actions are proportionate.

c. Scoping

Scoping is not a process of collecting evidence, but of mapping the investigation. It determines who in effect is the "custodian of evidence" needed. It relies in particular on the following sources:

- ▶ Organisational documents
 - Organisational charts, job descriptions;
 - Internal control systems: if the legal person has such a system, it can provide information on the business processes within the legal person;
 - Other documents on business processes.
- ▶ Scoping interviews: These interviews are not about corruption allegations, but about the way the legal person conducts its business: Where are emails stored? Where are documents filed? Who does backups and where are they kept? Who approves transactions along with the sales manager? Who stores the documentation? Ultimately, interviews "follow the supervision trail" – who supervises what within the company and how?

Scoping is the most efficient way of determining where investigators will eventually find essential evidence. It is also the proportionate way of proceeding, instead of seizing all data and all documents.

d. Investigative plan

The plan outlines the result of the scoping process. It lists all targeted evidence and the custodians of such evidence. It also documents in writing – that legal boundaries of the investigation and the proportionality of the measures taken were considered. By this, the management can make its case that it obtained the evidence legally. Among the further issues to be considered are:

- ▶ **Interviews:** Interviews are often an integral part of the investigation, as individuals who are interviewed may be able to give first-hand accounts of the events, supply necessary documents to understand the facts, and can also indicate whether further interviews of the same person or others are necessary. It is recommended that the team conducting the internal investigation read all available documentation prior to conducting interviews, as this will inform the type of questions posed. The purpose of any interview is to have an interviewee be as forthcoming as possible and to give a first hand, personal account of the circumstances. To increase the potential that this will be achieved, the interviews should be scheduled in a confidential manner so that interviewees do not "agree" on a story that is not reflective of the circumstances.
 - **Prior to any interview:** The preparation of the interview requires a clear understanding of what information or documents will be requested during the interview. Before any interview, an interview

239. [2017] EWHC 1017 (QB); see Corruption Watch, A long time coming: SFO's tough stance on privilege vindicated by UK court (18 May 2017).

outline should be prepared to facilitate a thorough review. A list of interview questions should also be prepared in advance. These questions should guide the person conducting the interview and should not be viewed as a script.

- **During the interview:** The beginning of the interview sets the tone for the rest of the interview. It is therefore advised to make an introduction, including providing the reason for the interview and any confidentiality, so that the interviewee be put more at ease and is aware of what is to follow. The interviewer should ask questions from the list of questions, but be prepared to deviate from the questions if the interview brings to light any new information or issues that require further inquiry. It is recommended that there be two interviewers present during the interview: one to ask the questions, and another to take notes of what was said. These notes should later be transformed into a written memorandum detailing what was discussed. It should be noted that not all interviewees are forthcoming, and some may be aggressive. The interviewer should anticipate all types of outcomes, and always remain professional and courteous during interview.
- **Closing the interview:** Special care should be given to closing the interview to protect any further interaction with the interviewee. The interviewers should ensure that the person interviewed remains available and open to any future comments or information that may aid the investigation. When the interview concludes, the interviewer should ask the person interviewed to help make the investigation as thorough and successful as possible. To do so, the interviewer should ask whether there was any information that they did not discuss during the interview and whether there are any other persons to interview or documents to review that would be useful to understanding the circumstances of the allegations. The interviewer should then express gratitude and give the interviewee his or her contact details in the event more information becomes available.
- **Following the interview:** Following the interview, the interviewers should create a memorandum recounting what was said in the interview. This should be done as soon as possible after the interview takes place to ensure that all important information is retained.
- ▶ **Digital forensics:** Usually, courts will give more weight to forensic evidence. This is done by specialised tools using hashing algorithms. Larger accounting firms are able to provide this service. Employees often do not know that, even once data is deleted, hashing algorithms can be recovered. In the below described Siemens case, some employees deleted emails and files right after they learned about the imminent collection of evidence. However, the accounting firm that conducted the internal investigation was able to restore the deleted data and was also indirectly made aware of emails that were considered important (the deleted ones).
- ▶ **Personal data:** Depending on the applicable law and on the company policy, employers will have restricted access to an employee's data. For example, under German law, companies may allow personal use of emails. In this case, the employer becomes – legally – a provider of telecommunications services for the employee. If the employer accesses the emails it can be criminally liable for violating telecommunications secrecy, unless exceptions apply.
- ▶ **Special investigative techniques:** Monitoring emails, spyware, secret video-surveillance, life-style monitoring, searching of cars, etc. – whether such measures are legal will depend on the applicable legislation and on the circumstances of the case (gravity of offence). Comprehensive monitoring of a suspect's conduct by means such as spyware or live monitoring of all email correspondence (thus, creating an extensive personality profile) will however be rarely, if at all, permissible in any European jurisdiction.
- ▶ **Cross-border** investigations have to keep in mind that various legal systems are involved with employees possibly enjoying differing labour or data protection rights.

The investigative plan should be a living document. It should include certain elements to ensure that the investigation runs smoothly, in particular: (i) the alleged facts and behaviour that gave rise to the investigation; (ii) the law(s) or relevant company policies and procedures that have been breached; (iii) which employees have been suspected of misconduct; and (iv) any broader issues or questions that the investigation may eventually touch upon, such as theft, inappropriate behaviour, or fraud. It is often easiest to create a chronology of events when narrating the alleged facts and behaviour; this chronology should include dates, meetings, places and calls or conversations. Investigators will update it as the investigation goes on, and new possible offences or evidence may arise.

e. Avoiding “panic”

Collection of evidence can easily create rumours, myths, or even panic among employees. Even employees who usually act in good faith will not know whether they have done something wrong or whether evidence

will (unjustly) incriminate them. In this regard, partial amnesty should also be considered depending on the gravity and scope of the potential misconduct (see above case study).

f. Collecting evidence

Investigators will have to secure and collect the evidence. Securing entails measures such as ordering all employees to refrain from destroying any information, even if practiced and/or required under regular business procedures.

g. Closing meeting

This is an opportunity for investigators to present the results of the investigation (usually also in form of a written report) to management. They normally suggest how to respond to the results and remediate any uncovered shortcomings. In addition, depending on the overall manner in which the investigation was conducted, the report can also be used to discuss selected aspects, including remedial measures, with the investigated individuals, particularly in cases where such individuals are potentially facing serious disciplinary sanctions and/or likely to be removed from their relevant positions.

h. Taking Disciplinary Action

Once the investigators have presented the findings of the investigation, management should determine whether and what type of disciplinary action (if any) is appropriate. Management should memorialise the actions taken to address any sanctions that have been given to employees to address the misconduct. The investigators' final report should recognise and take into account any such disciplinary actions taken by management.

7.8.2. Case study: Internal Investigations

Siemens' Internal Investigation

The press statement of Siemens of 25 December 2008 shows how the company began a wide-scale internal investigation, conducted by American law firm Debevoise & Plimpton LLP, in reaction to allegations of corruption:

"Just over two years ago, in November 2006, offices of Siemens Aktiengesellschaft were raided by the Munich prosecutor, following allegations that the Company had made corrupt payments. Shortly after the Munich prosecutor's raid, on 29 November 2006, the then-Chairman of the Siemens AG Audit Committee promptly convened a meeting in Düsseldorf with the Chairman of the Supervisory Board, the Company's CFO, its Chief Compliance Officer, its Head of Corporate Finance Reporting & Taxes and two of the Company's outside auditors from KPMG Deutsche Treuhand-Gesellschaft Aktiengesellschaft Wirtschaftsprüfungsgesellschaft. Siemens needed to find out the truth about the allegations of corruption. At that meeting, all of the participants recognised that an internal investigation would be required.

At the outset, it was also clear that Siemens' internal investigation would take place at the same time that the Munich prosecutor was conducting a criminal investigation, and the United States Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") likely would begin their own investigations, quite apart from on-going proceedings against the Company in other jurisdictions, such as Liechtenstein, Austria and Switzerland. The Company decided to cooperate fully with the investigating authorities. [...]

An internal investigation typically involves investigators combing through documents, examining financial and accounting records, interviewing witnesses and attempting to pull together fragmentary information until, like a puzzle, the pieces fall into place and the picture becomes reasonably clear.

In these respects, the Siemens investigation was no different from most other company investigations. However, Siemens' size and complexity presented unique challenges. In FY 2006, Siemens' revenue exceeded €87 billion. The Company employed some 475,000 people and conducted business in 190 countries. The Company's products and services ranged from design and construction of some of the world's most sophisticated power plants and trains to manufacture and sale of light bulbs. [...]

The investigation included:

- ▶ 1,750 interviews with Siemens employees and other individuals;
- ▶ 800 informational briefings with employees to obtain background information;
- ▶ 82 million documents electronically searched to identify potentially relevant material;

- ▶ 14 million documents reviewed;
- ▶ 38 million financial transactions analysed; and
- ▶ 10 million bank records reviewed.”

Unlike in criminal trials, employees involved in the bribery scheme had no right to remain silent, but were in fact obliged under German labour law to fully cooperate with this (private) investigation, irrespective of whether cooperation would lead to self-incrimination, to disciplinary sanctions, or even to a criminal investigation.

Different parties may have differing interests and dilemmas during internal investigations:

The **employer** (legal person) will want to:

- ▶ avoid damages, economic loss, and any threat to the existence of the company;
- ▶ show full cooperation with and support to law enforcement; and
- ▶ know what happened in order to ensure compliance and eliminate compromised employees.

The **employee** faces the:

- ▶ risk of disciplinary sanctions all the way up to dismissal if he/she does not provide information;
- ▶ risk of disciplinary sanctions all the way up to dismissal if he/she provides information;
- ▶ risk of damaging the company if giving out information and if not giving out information.

The **prosecutor** may:

- ▶ get less information if there are no internal investigations, because employees have the right to remain silent;
- ▶ want internal investigations to be fully coordinated with prosecutor’s office as otherwise the tactic of the criminal investigation might be harmed.

A **judge** may need to decide of the admissibility of testimony and other evidence from internal investigations because:

- ▶ such evidence might violate the ban on self-incrimination or privacy rights of the employee;
- ▶ the dilemma the employee was facing during the internal investigation amounts to coercion;
- ▶ interviews conducted by lawyers on behalf of the company might violate the lawyers-client privilege.

Under German law, there seemed to be consensus amongst academics that the testimony would be admissible in criminal trials. However, a few questions remain which could possibly be regulated by the legislator: should interviewees have the right to a protocol that they sign? Should disclosure to foreign law enforcement agencies be regulated, for examples, [in] cases where sanctions under foreign law are much harsher than domestic ones?

Facing this dilemma, Siemens granted an amnesty to its employees and covered the costs of any lawyer they wanted to hire for the internal investigations:

“Perhaps the most important step that Siemens took to help ensure the success of the internal investigation was to establish, in October 2007, an amnesty programme for current and former employees. Such a programme appears to be unique in modern German business history and was only implemented thanks to strong support from the Committee and current senior management.

Generally, the programme was designed to protect employees or former employees who were fully cooperative with the investigation. The programme provided that qualifying current and former employees would not face civil damages claims or, in the case of current employees, involuntary termination. The Company reserved the right to impose lesser disciplinary sanctions. The amnesty program exempted certain senior managers from its scope, including members of the Siemens AG Vorstand, members of the group executive managements and regional company CEOs and CFOs.

The program aimed, for reasons of fairness, to accommodate those individuals who, in contrast to certain decision-makers, may have been pressured to participate in potentially improper activities. In April 2008, the Company went even further, and created a “leniency” program, which provided for individualised disciplinary determinations for employees significant to the Debevoise investigation, including senior management excluded by the original amnesty program.

The amnesty and leniency programmes were successful. Numerous individuals came forward who had not been interviewed previously. Others sought amnesty and provided truthful information after having lied in pre-amnesty interviews. Still others provided information that opened up entirely new areas for investigation.

All told, more than 171 Siemens employees applied for amnesty or leniency pursuant to these initiatives. The Company offers its sincere thanks to these employees for having the courage to discuss sometimes difficult issues and for helping the Company learn from the past in order to avoid similar problems in the future. [...]

The Company also took steps to make sure that the conduct of the investigation was fair to Siemens employees. All interviewees were provided the opportunity to conduct interviews in their native language. Siemens supplied professional foreign-language interpreters whenever requested. Independent external counsels retained and paid for by Siemens were made available to assist current and former employees with the interview process and accompany them to interviews. In addition, interviewees could opt to pay for and be accompanied by their own lawyers. Where possible, interviews and informational briefings were scheduled days or weeks in advance in recognition of other demands on employees' time.

Debevoise regularly consulted with and sought necessary approvals from the Siemens Works Council regarding the mandate and conduct of the investigation, including processes for conducting interviews, and for collecting, reviewing and securing documents and data. In cooperation with Debevoise, Siemens entered into shop agreements (Betriebsvereinbarungen) with labour representatives that reflected the processes agreed upon.²⁴⁰

7.8.3. External investigation

Internal investigations have certain limits – they cannot make use of certain powers restricted to law enforcement. For instance, internal investigations can usually only establish that money went to a third party, such as a slush fund held in a foreign bank by a mailbox company. Law enforcement authorities can, however, determine whether the slush fund was used by employees for private purposes (embezzlement) or whether the mailbox company was an intermediary to a public official (bribery). For this, law enforcement investigators have capacities and access to special powers and expertise, such as financial intelligence units (FIUs), informal and formal international cooperation mechanisms, and the ability to conduct searches and seizure, with appropriate legal justification.

In case a legal person cooperates with prosecutors, they will have to keep in mind to what extent they can use the evidence produced by the internal investigation. Many (if not most) jurisdictions allow judges to consider any evidence within due discretion. In these jurisdictions, prosecutors can in principle present the evidence in court, which was collected legally during internal investigations (and to some extent even if it was collected illegally). Some jurisdictions may – as a general rule – only admit evidence that was collected by prosecutors and law enforcement authorities. In these jurisdictions, prosecutors will have to review which additional steps they will have to take to “formalise” the evidence (formally seizing documents and data, repeating key interviews as formal witness questionings, etc.). Ideally, prosecutors and internal investigators coordinate their efforts from the beginning, so prosecutors will have to add minimal effort in order to “formalise” the evidence produced by the internal investigation. However, in principle, similar legal limits apply to both an internal and external investigation (privacy rights of the suspects, proportionality of measures, etc). The same is true if prosecutors conduct the entire investigation within the company on their own. In this case, steps (a) to (f) applicable to internal investigations will apply mutatis mutandis to an external criminal investigation.

7.9. Corporate settlement agreements

Over the course of the last decade, the practice of using “corporate settlement agreements” to deal with corporate crime issues has become increasingly common. Settlement procedures have been used in virtually all areas of corporate criminal wrongdoing including antitrust, fraud, domestic bribery, tax evasion, environmental violations as well as foreign corruption cases.²⁴¹ In that regard, the term “settlement” refers to a wide range of legal tools, also known as “non-trial resolutions,” that consist in an agreement between a company and a prosecuting authority aimed at resolving corporate criminal matters without a full court proceeding.

A recent study from the OECD has focuses on the increasing use of non-trial resolutions among Parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.²⁴² The research has highlighted how, according to the information stored in the OECD database of concluded

240. Siemens, Press statement, 25 December 2008 (not available online).

241. Alexander C. and Cohen M., (2015), “The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements,” 52 American Criminal Law Review, p. 537.

242. OECD (2019), *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention*, www.oecd.org, accessed 17 December 2019.

foreign bribery cases, from 1999 to 2019 the 44 Parties to the Convention have successfully concluded 890 foreign bribery resolutions, of which 695 were concluded through non-trial resolutions (i.e. 78% of concluded resolutions).²⁴³

Although non-trial resolution systems adopted in different jurisdictions share certain features, these legal tools often vary in their legal and procedural approaches. The study conducted by the OECD has offered a systematization of these legal instruments dividing them among the following six categories.

The non-trial resolution systems under Category 1 result in the termination of an investigation without prosecution subject to the imposition of sanction and/or confiscation. They correspond, for instance, to the “Declination with Disgorgement” and “Non-Prosecution Agreement (NPA)” adopted by the United States or the “Diversion” and “Withdrawal from prosecution due to cooperation” utilized in Austria.²⁴⁴

The legal tools that fall within Category 2 consist of a suspension, deferral or withdrawal of prosecution, subject to the fulfilment of specific conditions. The “Deferred Prosecution Agreement (DPA)” is the most relevant non-trial resolution system included in this category. Unlike the agreements related to the first category, under this scheme charges are normally filed. Among others, the most relevant examples of such agreements are the DPAs adopted in the United States and the United Kingdom, as well as the “Convention Judiciaire d’Interêt Public (CJIP)” that has been recently introduced in France.²⁴⁵

Category 3 includes resolutions resulting in a final decision that does not amount to a criminal conviction but are mainly civil or administrative in nature. Such a form of resolution is, for instance, represented by the “Administrative Resolution” used in Germany where corporate criminal liability cannot be imposed due to legal restraints.²⁴⁶

Category 4 encompasses the non-trial resolution systems that result in a conviction but are not contingent on an admission or finding of guilt. They correspond, for instance, to the Italian “Patteggiamento,” which is used within criminal proceedings and is comparable to a conviction but does not imply any formal admission of the facts or recognition of guilt.²⁴⁷

Plea agreements, which require the defendant’s admission of guilt and amount to a conviction, are included in Category 5. Although plea agreements represent the classic way of resolving criminal law cases, there are significant distinctions in how they operate in each given jurisdiction.²⁴⁸

Finally, the last category encompasses all the “Mixed Systems,” which belong at the same time to more than one of the above-mentioned categories. The “Leniency Agreements” available in Brazil are emblematic of such a type of non-trial resolutions.²⁴⁹

Among the various types of non-trial resolutions, this part of the work will have a special focus on “Deferred Prosecution Agreements (DPAs).” Such a choice is based on a series of factors. Firstly, and most importantly, compared to other resolution procedures, DPAs not only represent a more recent innovation but are also characterised by having a contractual nature designed to be framed in a criminal procedural context, which makes them an extremely adaptable legal solution. Moreover, from the current trend, it emerges that the DPA-type of non-trial resolutions is the model whose adoption is proliferating among the globe whereas the use of other solutions including the NPA model²⁵⁰ is commonly rooted within national borders. As a matter of fact, several countries (i.e., Brazil, France, the United Kingdom and the United States) have already introduced DPA-like resolutions and others (e.g., Australia, Canada, and Switzerland) are currently considering adopting a DPA scheme to resolve cases of criminal corporate liability, especially where related to foreign bribery.²⁵¹

243. *Idem*, p.19.

244. *Idem*, p.46.

245. *Idem*, p.49.

246. *Idem*, p.53.

247. *Idem*, p.54.

248. *Idem*, p.56.

249. *Idem*, p.59.

250. Typically in the United States, while DPAs represent around 45% of non-trial resolutions, NPAs represent some 55% of them. For instance, in 2018 the US Department of Justice entered into at least 24 agreements, of which 13 were NPAs and 11 were DPAs. See Gibson Dunn (2019), *2018 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements*, www.gibsondunn.com, accessed 19 December 2019.

251. OECD (2019), *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention*, www.oecd.org, accessed 20 December 2019, p.34.

7.9.1. Deferred Prosecution Agreements: Overview

“Deferred Prosecution Agreements (DPAs)” can be defined as a form of pre-trial settlement agreements, which represent a way of imposing terms of probation upon a corporation without a conviction. Through these legal instruments, it is possible to divert from the ordinary course of justice and deal with corporate crimes without resorting to traditional criminal trials. In other words, in a DPA, the prosecutor agrees not to pursue a criminal conviction of a firm, imposing a series of conditions such as pecuniary sanctions as well as measures aimed at governing the firm’s future behavior such as the adoption of a corporate compliance program.²⁵²

Under a DPA, prosecutors start investigating corporate crime and bring charges but then agree to hold them in abeyance pending the company’s successful completion of certain provisos included in the agreement for a set period of time, which is usually three-year long. In a typical DPA scheme, the prosecuting authority and the allegedly criminal corporation enter into an agreement through which the latter acknowledges that the alleged facts have happened and agrees to take concerted actions, as specified in the terms of the agreement, to remedy the harm caused and prevent further offending. Consequently, if the legal person complies with the conditions of the agreement, criminal charges that have already been filed against it shall be dismissed. On the contrary, where the legal entity breaches the terms of the agreement, the prosecutor can prosecute the indictment, using the offender’s admissions about the facts against the same legal entity.²⁵³

The rationale behind the introduction of DPAs is that, in contrast to the inflexibility of a common criminal process, DPAs allow prosecuting authorities and corporations to cooperate in order to produce satisfactory and creative solutions for remedying structural corporate problems and set companies on the road of good corporate citizenship. In particular, differently from the deterrent and retributive purposes of corporate criminal liability, these deferral solutions allow minimizing the negative externalities associated with attaching criminal liability to the corporation and at the same time to enhance the business model and culture of the involved firm through the implementation of corporate compliance programs.

As regards its structure, a DPA traditionally is formed of two main documents: the first one includes the statement of facts, and the second one the terms of the agreement.

The “Statement of Facts” is a document in which the parties describe in detail the alleged facts and acknowledge that they occurred. Although also the Statement of Facts is negotiated and, as such, it does not include a version of the facts that has been ascertained by a judicial authority, it serves a fundamental role in determining the occurrence of the alleged offense and in limiting the scope of the agreement. Typically, the corporation is not required to admit liability. However, it is reasonable to assume that the acknowledgment provided in relation to certain facts (such as the absence of a proper compliance program, or the involvement of some key employees in the misconduct) might easily amount to an indirect admission of liability.²⁵⁴

The second document includes the terms of the agreement and specifies the expiry date of the DPA, which represents the period of time the accused legal entity has at its disposal to comply with the former. The terms that are typically included in the agreements are the following ones:

- a. The payment of a financial penalty;
- b. The compensation of victims of the alleged offense;
- c. The disgorgement of any profits made by the company from the alleged offense;
- b. The implementation of compliance solutions to avoid the further occurrence of similar criminal conducts;
- c. Co-operation for the entire duration of the agreement in any further investigation related to the alleged offense;
- d. The payment of any reasonable costs of the prosecutions;

However, due to its inherent contractual nature, traditionally there is not a fixed list of provisos to be accepted in order to enter into a DPA. As a result, through a DPA it is possible to require the corporation to adopt any other concerted form of remedial action to remediate the specific damages caused to the society through the criminal conduct or to prevent the perpetration of further offenses. Such a characteristic makes DPAs an incredibly flexible and adaptable legal instrument as opposed to the ones commonly available within the traditional criminal law trial.

252. Arlen J. and Kahan M. (2017), *Corporate Governance Regulation through Nonprosecution*, 84 *The University of Chicago Law Review*, 323, p.325.

253. Greenblum B. M. (2005), “What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements,” 105[6] *Columbia Law Review*, 1863, p.1864.

254. Grasso C. (2016), “Peaks and troughs of the English deferred prosecution agreement: the lesson learned from the DPA between the SFO and ICBC SB Plc,” 5 *Journal of Business Law*, 388, p.396.

7.9.2. Deferred Prosecution Agreements – Potential Advantages

The implementation of DPAs in a legal system brings major advantages not only for the involved corporations, the prosecutors, but they may be advantageous also to the government and the society at large.

The prosecution, committal for trial, and conviction can have dramatic consequences on the business operations of the involved firms and, in the worst scenario, can lead to bankruptcy and company dissolution. The collapse of Takata Corporation is a glaring example of such a potential outcome. In 2017, it emerged that Takata, a maker of vehicle safety equipment, produced defective airbags that exploded and claimed the lives of at least 22 innocent people. As a result, the US Department of Justice charged three executives of the company with wire fraud and conspiracy. The firm agreed to plead guilty to wire fraud and to pay 1 billion in penalties including the restitution of \$975 million and a fine of \$25 million. Takata also had to recall millions of airbags. Hugely affected by the proceeding and with its reputation in tatters, the company filed for bankruptcy protection in June 2017, and the viable activities were sold to Key Safety Systems (KSS), which is a Chinese owned American rival company.²⁵⁵

On the contrary, through a DPA corporations, which are usually pilloried by the press in case of a public trial, may safeguard their reputation and avoid the potentially fatal consequences of criminal proceedings. At the same time, although under a DPAs legal entities have to comply with several conditions, which usually include a heavy penalty, the gain the considerable advantage consisting in “trading” the inherent uncertainty of the outcomes of a criminal proceeding with the certainty of the concerted terms of the DPA, which being negotiated could be assumed to be implicitly bearable for the firm.

Another major advantage for corporations is that, differently from a conviction for serious crimes like corruption, DPAs do not result in mandatory debarment from entering into public contracts. Blacklisting measures are one of the most effective weapons to fight against corporate crime. This has been confirmed by the adoption of the Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014.²⁵⁶ The Directive provides that public contracts should not be awarded to economic operators that have participated in a criminal organization or have been found guilty of corruption, fraud to the detriment of the Union's financial interests, terrorist offenses, money laundering or terrorist financing. It also states that the non-payment of taxes or social security contributions should lead to mandatory exclusion at the level of the Union. For the firms that rely on offering their services or products to public administrations, this can easily become a question of life or death. The cases of Rolls Royce²⁵⁷ in the United Kingdom and AgustaWestland²⁵⁸ in Italy are emblematic of such an advantage.

DPAs offer significant advantages to prosecutors as well. From their perspective, the benefits include the certainty of a “success” whereas the outcome of a trial could be uncertain especially in complex cases of transnational corporate crime where there could be a considerable risk of an acquittal at trial.²⁵⁹ Similarly, where prosecutors enter into an agreement with a legal entity, they do not even have to conduct a “full” investigation. It has not to be surprising that, commonly, investigators receive evidential material from the same investigated firm. Taking into consideration that offering a settlement solution instead of a regular criminal proceeding is matter of prosecutorial discretion, which means that only the prosecuting authorities might take the decision whether or not it is appropriate to offer a DPA instead of pursuing the full prosecution of the alleged conduct, it can clearly be the interest of the investigated company to self-disclose and offer to the prosecutors the outcomes of its internal investigations. At the same time, internal investigations are generally viewed favourably by law enforcement authorities in that they may provide information in a timely way, whereas the authorities might face serious challenges gathering it through their own efforts. As a matter of fact, corporate criminal investigations are extremely complex and they require a vast amount of public resources. This issue may be further complicated by the circumstance that transnational corporations may have subsidiaries scattered all over the world so that gathering all evidential documents in different jurisdictions can represent an impossible task for the national law enforcement authorities. Moreover, public investigators may not have sufficient expertise to assess complex business operations, whereas firms understand their own businesses, and are best placed to

255. Mokhtari C. (2019), *Death from the inside: An analysis of the murderous business strategy of Takata corporation*, <https://corporatesocialresponsibilityblog.com>, accessed 17 December 2019.

256. *Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance*, available at <http://eur-lex.europa.eu>, accessed 18 December 2019.

257. SFO (2014), *Rolls-Royce PLC*, www.sfo.gov.uk, accessed 18 December 2019.

258. CIPFA (2016), *When good laws aren't implemented*, www.cipfa.org, accessed 18 December 2019.

259. King C. and Lord N. (2018), *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements*, Palgrave, p.12.

examine what has happened when problems arise. It is emblematic that the UK DPAs Code of Practice expressly includes among the factors that the prosecutor may take into account when deciding whether to enter into a DPA the “the totality of information that [the corporation] provides to the prosecutor.”²⁶⁰

DPAs appear advantageous also to governments or even for society at large. Besides the fact that lowering the costs of the investigation may save a significant amount of taxpayers’ money, it has to be highlighted that holding legal entities accountable through criminal liability may entail significant additional costs for the society in that innocent parties can incur substantial damages as a result of the prosecution. For instance, innocent stakeholders can be adversely affected by a sharp decline in share price, employees that have nothing to do with the corporate misconduct can become redundant, and the business activities of suppliers and creditors can also face adverse consequences. Moreover, the criminal proceeding can also affect competition especially in highly concentrated markets with damaging consequences for the related customers or for the public administration where the prosecuted company is a strategic provider of services or products. Thanks to their contractual nature, DPAs could be helpful in avoiding or mitigating the adverse collateral consequences commonly related to ordinary prosecution.

Finally, due to their contractual nature, DPAs are a very flexible and adaptable legal instrument and, in contrast to the inflexibility of a common criminal process, they allow prosecuting authorities and corporations to cooperate in order to produce satisfactory and creative solutions for remedying structural corporate problems and set companies on the road of good corporate citizenship. In particular, the possibility to include in the term of the agreement any not previously specified additional concerted form of remedial action may lead to creative measures that could be imposed by means of a DPA, such as obliging a company to create a certain number of new positions of employment over a determined period of time; requiring a medical institution to offer free health care up to an established amount in value; obligating a commercial organization to endow a research project or an academic chair (e.g., in anti-corruption).

For instance, it is possible to mention the DPA signed in June 2005 between the United States Attorney’s Office for the District of New Jersey and Bristol-Myers Squibb Company – a Fortune 100 pharmaceutical company and a major New Jersey employer. The company, which manufactures pharmaceutical products and distributes them through a distribution channel of wholesalers, was accused of perpetrating a fraudulent earnings management scheme involving, inter alia, the so-called “channel stuffing” practice. This practice refers to the use of financial incentives to inflate the company’s sales and earnings figures by deliberately sending wholesalers more pharmaceutical products than they are able to sell to the public. Indeed, by means of this DPA, Bristol-Myers’ corporate governance was reformed in order to minimize the risk that the fraudulent practices perpetrated in 2000 and 2001 would be repeated. In the case at issue, such an objective was pursued through the establishment of the position of a non-executive Chairman, a solution that should provide maximum board involvement in and accountability for Bristol-Myers’ business decisions.²⁶¹

7.9.3. Deferred Prosecution Agreements – Potential Disadvantages

Besides the advantages, the introduction of DPAs in any given jurisdiction may also generate potential disadvantages. The first one can be related to the growing tendency to resolve corporate crime cases using this legal instrument. The significant advantages that DPAs offer to both prosecuting authorities and legal entities would naturally generate a tendency towards the adoption of the agreement even in cases where their adoption could be questionable in terms of justice, fairness and equality (for instance where there are occurrences of recidivism and repeat corporate offenders).²⁶²

Another significant risk is related to the latent loss of focus on individual liability. The introduction of DPAs, which represent an easy way to solve complex corporate crime cases, may divert the attention of the prosecution authorities (and of the media) away from the investigations of the involved natural persons. Also, the fact that in order to enter in successful DPA the prosecuting authorities do not have to conduct a “full” investigation aggravates such a situation. Without a “full” investigation, it is highly unlikely that prosecutors may gather sufficient evidence to prove the intentional involvement of corporate executives in the criminal conduct beyond any reasonable doubt. It is emblematic that in a case of rampant and long-lasting corporate bribery like the Rolls-Royce one, the English prosecutors have shut down the investigation into which

260. CPS (2013), *Deferred Prosecution Agreements Code of Practice*, www.cps.gov.uk, accessed 18 December 2019.

261. Christie C. J. and Robert H. M. (2006), “Push down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement between the US Attorney for the District of New Jersey and the Bristol-Myers Squibb Co.”, 43 *American Criminal Law Review*, 1043, p.1051.

262. See in that regard, Garrett B. L. (2014), *Too Big to Jail: How Prosecutors Compromise with Corporations*, Harvard University Press.

executives were responsible for the corrupt payments.²⁶³ This represents a critical issue because, as it has been highlighted in the U.S. Department of Justice’s Yates Memorandum, one of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.²⁶⁴

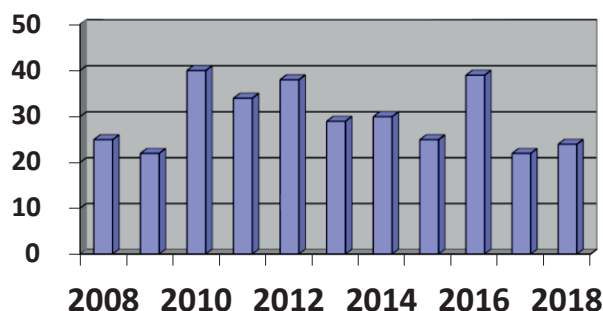
Finally, prosecuting authorities may tend to impose DPAs in order to raise cash, generating in such a way a conflict of interest, which is potentially irreconcilable with the degree of independence and fairness the administration of criminal justice requires. The “Google Settlement” case of 2012, which was related to Google acceptance of advertisements from Canadian pharmacies that sold drugs to consumers in the U.S. illegally, appears illustrative of such a situation. On that occasion, a significant share of the settlement, about \$230 million, was being distributed to Rhode Island’s police departments, the attorney general’s office and National Guard. The funding was used to buy a building, as well as new squad cars, tasers, rifles, a police station and replenish the police pensions funds.²⁶⁵

7.9.4. International Examples – United States

The use of pre-trial settlement agreements can be traced back to the early 1990s in the United States where DPAs emerged directly from prosecutorial practice. As it is demonstrated in the chart below, after more than twenty years of usage in the U.S. legal system, settlement procedures have proven to be a commonly used legal instrument. In particular, over the course of the last 10 years, American authorities have entered into more than 300 settlement agreements²⁶⁶ with corporations.²⁶⁷

It has to be highlighted that in the United States prosecutors have three options to resolve criminal cases through means other than conviction: Declination with Disgorgement; Non-Prosecution Agreements (NPAs); and Deferred Prosecution Agreements (DPAs).

**DPAs/NPAs in the United States
2008/2018**



The Declination with Disgorgement is a legal solution specifically applicable in corporate foreign bribery cases “due to the unique issues presented in [foreign corruption] matters, including their inherently international character and other factors” as provided for in the FCPA Corporate Enforcement Policy, which was lastly updated in March 2019.²⁶⁸ Under such a scheme, the U.S. Department of Justice may decline a case, provided that the company disgorges the profits it obtained through the misconduct, where the firm has been involved in a foreign bribery case but it has voluntarily self-disclosed the misconduct, fully cooperated with the authorities, and timely and appropriately remediated. This where aggravating circumstances involving the seriousness of the offense or the nature of the offender are absent.

Under a Non-Prosecution Agreement (NPA), the U.S. Department of Justice maintains the right to file charges but refrains from doing so to allow the company to demonstrate its good conduct during the term of the agreement. As a result, unlike a DPA, an NPA is not filed with a court but is instead maintained by the parties.

263. The Guardian (2019), *Campaigners condemn closure of Rolls-Royce bribery inquiry*, www.theguardian.com, accessed 19 December 2019.

264. DOJ (2015), *Individual Accountability for Corporate Wrongdoing*, www.justice.gov, accessed 19 December 2019.

265. ABC6 (2012), *RI Gets 230 Million of Google Settlement*, www.abc6.com, accessed 19 December 2019.

266. This figure includes both corporate non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs) and does not include the settlement agreements of 2015 related to the DOJ Tax Swiss Bank Program.

267. Gibson Dunn (2019), *2018 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements*, www.gibsondunn.com, accessed 19 December 2019.

268. DOJ (2019), 9-47.120 – *FCPA Corporate Enforcement Policy*, www.justice.gov, accessed 20 December 2019.

The requirements of an NPA are similar to those of a DPA, and generally require a waiver of the statute of limitations, ongoing cooperation, admission of the material facts, and compliance and remediation commitments, in addition to payment of a monetary penalty. If the company complies with the agreement throughout its term, the U.S. Department of Justice will not file criminal charges.²⁶⁹

The use of settlement agreements has radically transformed U.S. enforcement practice in the area of corporate crime. Settlement agreements also appear to be partially responsible for the apparent increase in firms' willingness to investigate and cooperate by providing their investigations to enforcement authorities.²⁷⁰ Such a success story has played its role in exporting this form of pre-trial negotiations in other countries.

7.9.5. International Examples – England and Wales

Schedule 17 to the Crime and Courts Act 2013 introduced Deferred Prosecution Agreements (DPAs) into the English legal system.²⁷¹ The implementation of DPAs in the English legal system can be attributed to two closely related main reasons: first, the mounting pressure that was brought to bear on the authorities to conduct successful investigations against corporations involved in criminal activities, and, secondly, the circumstance that, in the absence of any formal legal framework, the judiciary demonstrated considerable reluctance to be governed by the agreements of the parties.²⁷²

Under Schedule 17 of the Crime and Courts Act 2013, legal entities have no right to be invited to negotiate a DPA as its adoption is a matter for the prosecutor's discretion. As specified by the Code of Practice: "A DPA is a discretionary tool created by the Act to provide a way of responding to alleged criminal conduct. The prosecutor may invite [a firm] to enter into negotiations to agree on a DPA as an alternative to prosecution."²⁷³

The content of an English DPA is laid down by s.5 of the Schedule, which provides for two mandatory elements that any DPA must include: a statement of facts relating to the alleged offenses, and the specification of the expiry date of the DPA. Section 5(3) of the Schedule sets out a list of possible terms that a DPA may impose. In particular, the section provides that: "The requirements that a DPA may impose on [the corporation] include, but are not limited to, the following requirements—

- (a) to pay to the prosecutor a financial penalty;
- (b) to compensate victims of the alleged offence;
- (c) to donate money to a charity or other third party;
- (d) to disgorge any profits made by P from the alleged offence;
- (e) to implement a compliance programme or make changes to an existing compliance programme relating to P's policies or to the training of P's employees or both;
- (f) to co-operate in any investigation related to the alleged offence;
- (g) to pay any reasonable costs of the prosecutor in relation to the alleged offence or the DPA."²⁷⁴

The use of the word "may" clearly denotes that the list has an illustrative nature. Although the absence of a mandatory list of contents may better correspond to the contractual nature of the legal instrument and safeguard its inherent flexibility, a matter of concern appears to arise from it. At the very least, the disgorgement of profits should have been listed as mandatory content for every DPA. As a matter of fact, in any fair justice system, the law has to be enforced in a way that crime does not pay and lawbreakers do not benefit from their criminal actions.²⁷⁵

Differently from the U.S., the English legislation provides for a formal judicial control to be exercised over the DPA procedure.²⁷⁶ The involvement of the judiciary has placed in two distinct phases, i.e. after the commencement of negotiations between a prosecutor and a firm but before the terms of the DPA are agreed, and when a prosecutor and a firm have agreed with the terms of a DPA. The intervention of the court aims at ascertaining

269. OECD (2019), *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention*, www.oecd.org, accessed 20 December 2019, p.47.

270. Arlen J. (2018), *Corporate Criminal Enforcement in the United States: Using Negotiated Settlements to Turn Corporate Criminals Into Corporate Cops*, <https://papers.ssrn.com/>, accessed 20 December 2019, p.5.

271. Crime and Courts Act 2013 (c.22), Sch.17 (CCA 2013 Sch.17).

272. Grasso C. (2016), "Peaks and troughs of the English deferred prosecution agreement: the lesson learned from the DPA between the SFO and ICBC SB Plc," 5 *Journal of Business Law*, 388, p.389.

273. CPS (2013), *Deferred Prosecution Agreements Code of Practice*, www.cps.gov.uk, accessed 18 December 2019.

274. Crime and Courts Act 2013 (c.22), Sch.17, s.5(3).

275. Grasso C. (2016), "Peaks and troughs of the English deferred prosecution agreement: the lesson learned from the DPA between the SFO and ICBC SB Plc," 5 *Journal of Business Law*, 388, p.397.

276. Crime and Courts Act 2013 (c.22), Sch.17, ss.7 and 8.

that the agreement imposes terms that are fair, reasonable and proportionate and that diverting from the course of ordinary justice in the case at issue can be considered in the interest of justice. Although the first objective does not raise particular theoretical and practical issues, the concept of the “interest of justice” is not clarified in the Crime and Courts Act and appears still to be characterized by a degree of vagueness.

Since its enactment, Schedule 17 of the Crime and Courts Act 2013 has been used by the English Serious Fraud Office, which is a prosecuting authority specialized in investigating complex cases of corporate fraud and bribery, to successfully enter into five DPAs.²⁷⁷ Taking into consideration the U.K.’s continued failure to address deficiencies in prosecuting cases of corporate crime especially for foreign bribery,²⁷⁸ this seems to be a significant reversal. However, it has to be highlighted that such an outcome appears to be not only the result of the adoption of the DPA but also of the introduction of the offense of “failure of commercial organisations to prevent bribery,”²⁷⁹ which has significantly eased the prosecutors’ task of investigating corporate corruption cases. The offense has introduced a new form of corporate liability for omission that does not require knowledge, intention or recklessness and occurs when the commercial organization has failed to prevent conduct that would amount to active or passive bribery.²⁸⁰

7.9.6. International Examples – France

The Convention Judiciaire d’Interet Public (CJIP), which literally means “Judicial Public Interest Agreement,” has been introduced into the French legal system through the law Sapin II (law n°2016-1691) on 9 December 2016.²⁸¹ Under the new Article 41-1-2 of the French Criminal Code, the prosecutor can offer the legal entity being questioned on charges of corruption or other offenses the option to enter into a CJIP, which will put an end to criminal proceedings.

The new piece of legislation, which aims at improving transparency, fighting corruption and modernizing the economy, has introduced substantial changes to French anti-corruption and transparency laws, in line with international efforts.²⁸² Among other things, the Law mandates French companies subject to its provisions to implement certain anti-corruption policies and procedures, training programs, whistleblower processes, risk-mapping, monitoring procedures and accounting controls to detect and prevent corrupt conduct.²⁸³

From the French perspective, the introduction of corporate settlement procedures was necessary not only because, in the majority of transnational corruption cases, sanctions are now applied to companies via a non-trial resolution mechanisms but also because this transactional justice enables public authorities to reconcile two objectives: sanctioning with severity and without delays companies committing such offenses while allowing their business to continue.²⁸⁴

In order to benefit from the settlement procedure, the company must fulfill the following conditions:

- ▶ Pay a disgorgement of the profits derived from the offenses;
- ▶ Pay a criminal fine, proportionate to the amount gained from the offense and capped at a maximum of 30% of the average annual turnover calculated over the three previous fiscal years;
- ▶ Set up a compliance program, under the control of the French Anti-Corruption Agency, for a maximum period of three years.
- ▶ Pay compensation, within a year, for the damage caused to the victims of the offense, if identifiable.
- ▶ Bear the costs of the procedure, including fees, for the assistance of its legal and financial counsel.

Similarly to DPAs, the CJIP does not require a declaration of guilt, nor does it entail the debarment of the legal person from national public contracts.²⁸⁵

277. SFO (2019), *Deferred Prosecution Agreements*, www.sfo.gov.uk, accessed 20 December 2019.

278. Up to early 2000s, only one company was ever been prosecuted for bribery since the UK adopted bribery legislation in 1906 and the conviction was overturned on appeal. OECD (2008), *United Kingdom: Phase 2bis – Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, www.oecd.org, accessed 20 December 2019.

279. Bribery Act 2010 (c.23) s.7.

280. Alldrige P. (2012), “The U.K. Bribery Act: ‘The Caffeinated Younger Sibling of the FCPA’”, 73 *Ohio State Law Journal*, 1181, 1202.

281. Legifrance (2016), *LOI n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*, www.legifrance.gouv.fr, accessed 20 December 2019.

282. d’Ambrosio L. (2019), “L’implication des acteurs privés dans la lutte contre la corruption : un bilan en demi-teinte de la loi Sapin 2”, *Revue de science criminelle et de droit pénal comparé*, p.205

283. Foreign Corrupt Practices Act Clearinghouse, *New French Anti-Corruption Law*, <http://fcpa.stanford.edu/>, accessed 20 December 2019.

284. AFA (2019), *Guidelines on the Implementation of the Convention Judiciaire d’Interet Public*, www.agence-francaise-anticorruption.gouv.fr, accessed 20 December 2019.

285. *Idem*, p.4.

As regards the procedural aspects of the CJIP, the option for a settlement agreement can be proposed by the Public Prosecutor prior to the commencement of public prosecution. Then, if an agreement is reached between the company and the Public Prosecutor, the settlement agreement must be validated by the President of the French Civil court (“Tribunal de Grande Instance”).

Under the new law, the judge who approved the CJIP must state his reasons for doing so in a public decision confirming the regularity of the procedures as well as the proportionality of the fine and of the proposed measures in relation to the magnitude of the violations. If the agreement is not validated, the company withdraws, or if the obligations set out in the agreement are violated, the public prosecution will go ahead.

The settlement decision is published on the French Anti-Corruption Agency’s website (Agence Française Anticorruption or AFA), together with the settlement agreement and the amount of the fine.

8. Legislative Toolkit

This legislative toolkit offers a starting point for drafting liability of legal entities regulation. The language of provisions included below is primarily illustrative in character, providing for potential options to take. It does not replace a process of careful legal drafting for each jurisdiction, taking into consideration the needs, terminology, and legal framework of the given country. It is also important that practitioners from any country adapt the offered terminology and procedural thinking to their own systems.

This toolkit takes the following approach:

- ▶ **Regulatory guidelines** provide a starting point to users of the toolkit for their own draft law. They offer several options whenever appropriate. Naturally, this is not a prescriptive proposition but is rather an attempt to illustrate how one can formulate a law on liability of legal persons.
- ▶ For each provision, **commentaries** clarify the rationale; illustrate the necessity of regulation with case examples; and point out what to pay attention to. The commentaries also reference international standards and examples from national regulations, without doubling the efforts of existing comparative literature.

Regardless of the precise contours of the laws at issue, in order for legislation to be effective – even the best legislation – it needs to be enforced. This requires adequate resources, financial intelligence, cooperation between different agencies (domestically and internationally), as well as experienced and dedicated staff.

8.1. Chapter I: Liability

8.1.1. Preliminary note: administrative or criminal?

There are three forms of liability of legal persons: civil, administrative, and criminal. Usually countries combine civil liability with either administrative or criminal liability.

This legal toolkit is worded in a way that it could be incorporated both as a concept of administrative or as a concept of criminal liability. Similarly, it can be incorporated both as a stand-alone law, as is the case for example in Austria, or integrated into various provisions of the criminal and criminal procedure code, as is the case in Switzerland.

8.1.2. Article 1 – Scope: legal persons; offences

(1) *[Legal persons]* “Legal person” shall mean:

- ▶ (a) *[National laws]* any entity having such status under the law [to be defined: company law etc.], except for States or other public bodies in the exercise of State authority and for public international organisations;
- ▶ (b) *[State owned corporations]* any entity under paragraph a that is fully or partially owned by the State and that is operating for profit;
- ▶ (c) *[Enterprises without personality]* any business entity having only partial, or no, legal personality;
- ▶ (d) *[Foreign entities]* any foreign legal person having such status under the jurisdiction in which it was established and being comparable to a legal person as defined under paragraph 1a-c.

(2) *[Offences]* Liability under these legislative guidelines applies to the following offences (to the extent existent domestically), including involvement as accessory or instigator: abuse of functions, false accounting, active bribery, embezzlement of public funds, fraud, illicit enrichment, money-laundering, obstructing justice, and trading in influence.

(3) *[Special laws]* Liability under these legislative guidelines applies also to violations of supplementary penal provisions outside the Criminal Code.

Paragraph 1

International standards do not provide strict guidance as to what a legal person is. The UNCAC and OECD-Convention both remain fully silent on this issue. The Council of Europe Criminal Law Convention on Corruption and the EU Second Protocol define it as in paragraph 1a of Article 1 (see Annex 2). The Explanatory Report to the Convention provides some clarification in Commentary 31: “[...] Littera d. of Article 1 thus permits States to use their own definition of ‘legal person’, whether such definition is contained in company law or in criminal law. For the purpose of active corruption offences however, it expressly excludes from the scope of the definition the State or other public bodies exercising State authority, such as ministries or local government bodies as well as public international organisations such as the Council of Europe. [...] A contracting State may, however, go further as to allow the imposition of criminal law or administrative law sanctions on public bodies as well. [...]”²⁸⁶

However, company or criminal law is in most cases not fully clear as to whether certain entities have legal personality. This concerns private trade businesses without full legal personality, conglomerates of affiliated legal persons, single owner businesses, trust funds, or partnerships. Similarly, it is often not clear at first sight whether state-owned or -controlled companies, or enterprises established by public law are “public bodies” and thus exempt from liability.

The international trend points clearly towards including as many entities as possible and only leaving not-for profit public entities such as the State, municipalities, or public foundations out. The Working Group on Bribery of the OECD has insisted that public entities which can engage in contracts are covered by liability.²⁸⁷ For example, the Working Group recommended in one case to “amend the Penal Code to ensure that State-owned and State-controlled enterprises can also be held liable for bribery.”²⁸⁸ Limited exceptions may apply, such as for example in Spain, where state-owned corporations that pursue public policy objectives cannot be held criminally liable.²⁸⁹

In the European Union, only 4 out of 28 Member States strictly limit liability of legal persons to private entities (thus exempting all public entities).²⁹⁰ It can therefore be said that the European practice points toward the inclusion of public entities into liability of legal persons. A EU-funded comparative study on liability of legal persons in member states comes to the following recommendation: “In the current EU policy with respect to the liability of legal persons for offences, public legal persons are not included in the scope. Considering that a lot of Member States include one or more types of public legal persons within the scope of their national liability approach, the EU can consider to extend its scope accordingly.”²⁹¹

As for private law entities, the OECD Working Group has insisted for the law to “expressly provide for the liability of unincorporated legal persons”²⁹² or to “take all possible measures to ensure that mailbox companies are considered legal entities [...] and that cases of foreign bribery involving mailbox companies can be effectively investigated, prosecuted and sanctioned”²⁹³

Country examples reflecting the all-inclusive international trend are Estonia, Montenegro, or Switzerland. The Swiss Criminal Code does not draw the liability from the term of legal person, but from the term of an “enterprise”, thus including “companies **without** legal personality” and “sole proprietorships” (Article 102).²⁹⁴ In this context, one has to keep the economic significance of sole proprietorships in mind, also related to corruption risks. For example, in Germany, sole proprietorships constituted 68.8% of all businesses performing services and deliveries worth €557 billion in 2011.²⁹⁵ The Estonian Penal Code clarifies in Section 37 that “legal persons with passive legal capacity are capable of guilt” (passive legal capacity meaning the legal existence of the legal person as opposed to active legal capacity, which is normally understood as the right to enter contracts

286. *Explanatory Report*, available at www.coe.int, accessed 28 October 2019.

287. Pieth M./Low L./Cullen P. (2007), OECD Convention on Bribery: A Commentary, Art. 4 No. 3.4.

288. OECD (December 2012), *Spain: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 3a, available at www.oecd.org, accessed 28 October 2019; see also OECD (March 2015), Spain: Follow-Up to the Phase 3 Report & Recommendations (noting that Spain has introduced this form of liability).

289. Pieth M., *idem*.

290. Vermeulen G. and others (2012), Liability of Legal Persons for Offences in the EU, p. 44/chapter 2.2.2.2 “Private versus public”.

291. *Idem*, p. 139, recommendation 4.

292. OECD (December 2013), *Ireland: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 2b, available at www.oecd.org, accessed 28 October 2019.

293. OECD (December 2012), *Netherlands: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 13a, available at www.oecd.org, accessed 28 October 2019.

294. Swiss *Criminal Code SR 311.0 as amended 1 January 2015*, available at www.admin.ch, accessed 28 October 2019.

295. Federal Agency for Statistics, VAT-statistics 2011, series 14, chapter 8.1.

and to sue in court). In Montenegro, “legal entity means a company, a foreign company and foreign company branch, a public enterprise, a public institution, or domestic and foreign nongovernmental organisations, an investment fund, any other fund (except for a fund exercising solely public powers), a sports organisation, a political party, as well as any other association or organisation that continuously or occasionally gains or acquires assets and disposes with them within the framework of their operations.”²⁹⁶

One might be tempted to exclude entities from certain sectors from the definition of legal person, because of their special status, such as non-governmental organisations, media companies, or political parties. However, it is rather preferable to include them into the liability scheme, and to consider higher thresholds or exemptions when it comes to certain sanctions such as liquidation. In order to allow the prosecution to maintain the highest degree of flexibility, e.g. whether to prosecute a joint venture, its members, or all of them, it is advisable to extend the scope of liability to entities with no legal personality.

Many if not most criminal codes define the term legal person only in relation to domestic legal entities (if at all). This leaves corporate lawyers, prosecutors, and courts with the question, if and under what circumstances foreign legal persons fall under this term. Paragraph 1 (d) should avoid any ambiguity in this regard. It follows jurisprudence which German upper courts, among others, have established when applying the term “legal person” to foreign entities.²⁹⁷ Prosecutors can produce evidence on this element for example by obtaining statements from the foreign company register. However, one should keep in mind in this context that many legal systems recognise legal persons even before they are registered, or without any registering foreseen at all. Statements from a foreign company register are thus not the only evidence relevant in this context.

Paragraph 2

Paragraph 2 consolidates the definition of all four major standards by the Council of Europe, EU, OECD, and the UN. The EU Second Protocol adds fraud to the enumeration by the Council of Europe Criminal Law Convention on Corruption. Liability of legal persons under the OECD Convention explicitly only relates to foreign bribery. However, Article 8 of the Convention goes further and calls for the sanctioning of **accounting** offences. The OECD Working Group thus requires countries to “ensure that both natural and legal persons can be held liable for false accounting”.²⁹⁸

The UNCAC adds embezzlement and obstruction of justice as offences, and (as non-mandatory offences) abuse of functions and illicit enrichment. It is hard to imagine, though, how a legal person could be liable for illicit enrichment (of a public official). A possible example could be where a public official sits on the board of a state-owned company and accumulates inexplicable wealth, which could have only come from the company. It is interesting to note, though, that illicit enrichment is in some countries not only an offence for natural persons (usually public officials), but also legal persons. Lithuania,²⁹⁹ for example, introduced illicit enrichment into its criminal code in 2010 as an offence which legal persons could genuinely commit:

“1. A person who holds by the right of ownership the property whose value exceeds 500 MSLs [500 minimum subsistence levels ≈ 18,000 €], while being aware or having to be and likely to be aware that such property could not have been acquired with legitimate income, shall be punished by a fine or by arrest or by a custodial sentence for a term of up to four years. [...]

3. A legal entity shall also be held liable for the acts provided for in this Article.”

Naturally, liability of legal persons is usually not limited to corruption offences, but has a much wider circle of application that includes matters such as compliance with financial regulations, environmental standards, among other issues, and may include “corporate homicide”.³⁰⁰ As mentioned in relation to corruption offences, there are basically two approaches taken by states. While some criminal or administrative codes apply liability of legal persons under a general clause to any offence which by its nature can be committed by legal person, other laws specifically list whether liability of legal persons applies for each criminal offence. In Lithuania, for example, the offence of murder can only be committed by natural persons, whereas legal persons can be explicitly liable for negligent homicide.³⁰¹

296. Montenegro, *Law on Criminal Liability of Legal Entities*, Article 4.1, available at www.gov.me, accessed 28 October 2019.

297. Court of Appeals Celle, decision of 30 November 2001, 322 Ss 217/01.

298. OECD (October 2014), *Brazil: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 11a, available at www.oecd.org, accessed 28 October 2019.

299. Lithuania, Article 189-1, Law no. VIII-1968 (*Criminal Code*), available at www3.lrs.lt, accessed 28 October 2019.

300. See for example the United Kingdom “*Corporate Manslaughter and Corporate Homicide Act 2007*”, available at www.legislation.gov.uk, accessed 28 October 2019.

301. Lithuania, *idem*, sections 129-132.

Paragraph 3

Paragraph 3 is a reminder that there are corruption offences, where liability of legal persons can become also relevant. This includes, in particular, violations of public procurement rules, or of political finance restrictions.³⁰² Usually, the liability of legal persons in these areas is defined in these special laws themselves and might follow its own rules. For example, political parties are usually strictly liable for violations of political finance rules, disregarding any liability of a natural person. Another option may be for special laws to refer to the rules of liability contained in the criminal code.

8.1.3. Article 2 – Liability for personal failures

(1) A legal person is liable for the offences defined in Article 1:

- ▶ (a) [*Offences by management*] committed for its benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:
 - i. a power of representation of the legal person; or
 - ii. an authority to take decisions on behalf of the legal person; or
 - iii. an authority to exercise control within the legal person;
- ▶ (b) [*Failure of supervision*] or made possible by a lack of supervision or control by a natural person as defined in paragraph 1a under the legal person's authority and committed for its benefit; or
- ▶ (c) [*Offences by agents*] committed for its benefit by any natural person, acting as its officer, employee, or agent.

(2) Liability under paragraph 1

- ▶ (a) [*Beneficial ownership*] may also be triggered by natural persons who exercise the ultimate legal or effective control over the legal person;
- ▶ (b) [*Autonomous corporate liability*] does not depend on identification or liability of a concrete natural person;
- ▶ (c) [*Autonomous personal liability*] does not exclude liability of a natural person.

Paragraph 1

When comparing internationally, one can find four concepts of liability of legal persons:

1. For the acts of a responsible person such as a manager (also called alter ego liability)
2. For the failure to supervise
3. For the action of a related person (also called strict liability)
4. For corporate fault (also called objective fault)

The first three concepts require a fault by a natural person and impute this fault to the legal person, either because of the position of the natural person (concept 1), because of its supervisory position (concept 2), or because of its relation to the legal person (concept 3). It is thus a form of vicarious liability. The fourth concept is independent of any wrongdoing by a natural person and simply punishes the legal person for the objective failure to prevent the corruption offence. In international standards and in national laws one can find combinations of above concepts, mostly of the first two concepts, whereas concept 3 and 4 each are usually separate alternatives to concepts 1 and 2.

This legislative toolkit combines all four concepts, with the first three embodied in Article 2 and the fourth concept of corporate fault embodied in Article 3. The combination of all four concepts allows for effective prosecutions: under each concept, the prosecution has to produce different evidence: for concepts 1 to 3, it has to prove a specific wrongdoing by a natural person. Under concept 4, the prosecution “only” has to show that the company did not have sufficient prevention mechanisms in place. Thus by combining all four concepts, the prosecution can either select the concept best supported by the available evidence, or even try the case based on all four concepts in case one or several lines of evidence fail throughout the trial. In addition, each liability concept has its own preventive effect on legal persons. Thus adding up all four concepts provides the most comprehensive incentive for legal persons to prevent corruption offences within their spheres.

The concepts can overlap in certain cases. For example, concept 1 and 3 apply, where a manager commits a corruption offence him/herself. Similarly, concept 2 and 4 can apply, where the management failed to establish control mechanisms preventing corruption.

³⁰². See for example the Fimi Media Case in Croatia, OECD/ACN, *idem*, p.21.

Paragraph 1a and 1b are exact copies of the wordings in the Council of Europe Criminal Law Convention on Corruption, the EU Second Protocol, as well as in the Fourth EU Anti-Money Laundering Directive. Paragraph 1c is a concept found mostly in common law countries; its wording is taken from United States law.³⁰³ The wording “for the benefit of the legal person” is somewhat ambiguous: corruption offences can actually damage the company. If detected, the proceeds are subject to forfeiture, in addition there are fines and other sanctions, let alone the reputational damage. However, “benefit” is used in this context only under the assumption of an intended benefit, i.e. under the assumption that the legal person will not get caught. An alternative wording to avoid this ambiguity could be “committed within its activities”.³⁰⁴

For paragraph 1a, one has to keep in mind that management cannot only commit the offence through active involvement, but also through omission. Most criminal codes impose on natural persons the duty to act in certain situations of risk, where the natural person has a loyalty obligation towards another person. A legal person doing business in a corruption prone environment is such a risk, while at the same time management has a duty to prevent harm from the legal person. Therefore, management failing to establish a prevention system within the legal person can, in and of itself, be a corruption offence by failing to act. A statement by a manager that he/she did not expect any corruption to occur and would not have accepted it is simply not credible in a corruption risk environment. Thus, liability under paragraph 1b (failure of supervision) can overlap to a large extent with liability under paragraph 1a (failure to act despite duty to do so).

Paragraph 2

Paragraph 2a reflects the important role which beneficial owners can play for a legal person. Often it is not the formal management exercising control over a legal person, but an outside natural or legal person. Such a beneficial owner is neither part of an “organ” of the legal person nor a “supervisor” or an “agent” in the sense of paragraph 1. Paragraph 2a therefore includes beneficial owners into the circle of persons triggering liability of the legal person. This is fully justified, as it is the beneficial owner who exercises control over the legal person and usually *de facto* benefits economically from it. Some national provisions allow already for such liability triggered by the beneficial owner.

An example is the following case from Romania: “At the time of the crime Mr. M.R. had no official link with the companies MM and CW. Though he was the founder of both companies, he formally sold these companies to persons he trusted after he was appointed as a civil servant. However, the new owners and managers were only ‘straw men’ who simply executed the decisions made by Mr. M.R. The court found that these new managers could not be held criminally liable because they were labouring under a mistake of fact. They knew neither the origin of the money nor the reason why the contracts were concluded.”³⁰⁵

Therefore, liability of the companies could not be established based on the companies’ legal managers. However, the court based the liability on the fault of the *de facto* manager, which was Mr. M.R.³⁰⁶ The OECD Working Group has also pointed to the necessity of liability “where a bribe is paid to a foreign public official by a *de jure* or *de facto* manager of an enterprise”.³⁰⁷

Paragraphs 2b and 2c define the liability of the involved natural and legal persons as autonomous from each other. This is generally accepted international standard. The Council of Europe’s Committee of Ministers “Recommendation to Member States concerning the liability of enterprises with legal personality” already stated in 1988 that enterprises should be held liable, whether a natural person who committed the acts or omission constituting the offence can be identified or not.³⁰⁸ This also refers to the identification of the supervisor under paragraph 1b. The Council of Europe Criminal Law Convention on Corruption (Article 18 paragraph 3), the OECD Good Practice Guidance,³⁰⁹ and Article 26 paragraph 3 of the UNCAC, also support either paragraph 2b or paragraph 2c.

303. The Foreign Corrupt Practices Act 1977, United States Code Title 15, Commerce and Trade Chapter 2B – Securities Exchanges, § 78dd-1: Liability “for any officer, director, employee, or agent of such issuer [≈legal person] or any stockholder thereof acting on behalf of such issuer”.

304. See Vermeulen G. and others (2012), *supra*, p.56.

305. OECD/ACN, *idem*, p.23.

306. Regional Court Vaslui, Decision no. 149 of 3 July 2013; Court of Appeal Iasi, *Decision No. 171/2014 of 8 April 2014*, available at <http://juri.ro>, accessed 28 October 2019.

307. OECD (June 2011), *Luxembourg: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 2b (bold emphasis added by author), available at www.oecd.org, accessed 28 October 2019.

308. Council of Europe, Committee of Ministers, *Recommendation No. R(88)18 concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of their Activities* (adopted 20 October 1988), available at www.coe.int, accessed 28 October 2019.

309. OECD, *Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, found at Annex I to the Recommendations of the Council for Further Combating Bribery of the Foreign Public Officials in International Business Transactions (26 November 2009), available at www.oecd.org, accessed 28 October 2019.

8.1.4. Article 3 – Liability for corporate failures

(1) [Objective fault] A legal person is liable for the offences defined in Article 1 committed for its benefit if the care and diligence necessary for the prevention of the offence has not been observed in the operations of the corporation. Article 2 paragraph 2 (b) and (c) apply *mutatis mutandis*.

(2) [Guidance on compliance] The Ministry of Justice publishes guidance on care and diligence under paragraph 1.

Paragraph 1

Objective liability under paragraph 1 does not require any wrongdoing by a natural person. It simply looks at the objective operations of a corporation whether they are suited for sufficient prevention of corruption offences to occur. Thus, in practice, it is very close if not identical to failure of supervision: the failure of setting up prevention mechanisms is usually a failure of supervision of a natural person. However, under international standards reflected in Article 2 paragraph 2b, it is not necessary to identify the person who failed to supervise its subordinates. As a result, supervision liability can arise from an objective lack of prevention mechanism without any natural person identified being liable for the failure.

However, objective liability goes further than supervisory fault: whereas the absence of a code of conduct or a signature scheme clearly is a “lack of supervision or control”, this is not necessarily the case where a company lacks an internal whistleblower mechanism. The provision in paragraph 1 is modelled after the Penal Code of Finland.³¹⁰

Paragraph 2

Corporate lawyers need guidance as to how they can avoid liability of their employer. Prosecutors and courts also need a reference point for establishing fault under paragraph 1. To this end, for example, the United Kingdom Bribery Act 2010 tasks the Secretary of State with publishing guidance on prevention procedures.³¹¹ Paragraph 2 is modelled after this provision. In this context, the well-known “Resource Guide to the U.S. Foreign Corrupt Practices Act” by the U.S. Department of Justice and the U.S. Securities and Exchange Commission was published in 2012.³¹² The main prevention tools as listed by the United States Resource Guide are:

- ▶ commitment from senior management and a clearly articulated policy against corruption;
- ▶ a code of conduct and compliance policies and procedures;
- ▶ an internal oversight mechanism;
- ▶ risk assessments;
- ▶ trainings and continuing advice;
- ▶ availability of incentives and disciplinary measures;
- ▶ third-party due diligence;
- ▶ availability of confidential reporting and internal investigation mechanisms;
- ▶ periodic testing and review;
- ▶ pre-acquisition due diligence and post-acquisition integration.

However, as management could pretend to have a “high level commitment” to anti-corruption and many of the above items, in addition to these technical aspects, legal persons need to put in place and demonstrate an integrity culture. Such a structure is, so to speak, the cement that holds together the building blocks of legitimate anti-corruption efforts. An integrity culture is the result of many individuals (in a larger legal person) working to create a consensus around shared values, and implementing realistic policies to uphold those values in the day-to-day operation of the company. Government guidance on prevention procedures rarely mention this integrity culture, but without it, no compliance management system will work.

8.1.5. Article 4 – Extended liability

A legal person is liable under Articles 2 and 3:

- ▶ (a) [Affiliated legal persons] concurrently for offences committed for the benefit of an affiliated legal person under its direct or indirect control, notwithstanding whether the affiliated legal person ceased to exist after the commission of the offence; or

310. Finnish *Criminal Code of 1889* (as amended by Law no. 927/2012), Chapter 9, Section 2, para. 1, available at www.finlex.fi, accessed 28 October 2019: “A corporation may be sentenced to a corporate fine [...] if the care and diligence necessary for the prevention of the offence has not been observed in the operations of the corporation.”

311. United Kingdom, *Bribery Act 2010*, Section 9, available at www.legislation.gov.uk, accessed 28 October 2019.

312. U.S. Department of Justice/U.S. Securities and Exchange Commission (2012), *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, pp. 57 f., available at www.justice.gov, accessed 28 October 2019.

- ▶ (b) [Subcontractors] concurrently in case employees or agents of subcontractors commit the offence for the benefit of the legal person and it did not observe care and diligence regarding third parties as required under Article 3; or
- ▶ (c) [Aggregated offence] where different elements of one offence are committed by different natural persons.

Paragraph a

Paragraph a goes back to the OECD “Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions” of 2009, according to which “a legal person cannot avoid responsibility by using intermediaries, including related legal persons”.³¹³ The OECD Working Group has applied the term “related legal persons” to the following cases:

- ▶ “The liability of parent companies for acts of bribery by intermediaries, including related legal persons, such as subsidiaries abroad”;³¹⁴
- ▶ “To allow for parent companies to incur criminal liability for acts of bribery by their subsidiaries”;³¹⁵
- ▶ “When a principal offender bribes to the advantage of a subsidiary (or vice versa)”;³¹⁶
- ▶ “Where the bribe is for the benefit of a company related to the legal person from which the bribe emanated”.³¹⁷

This paragraph applies in constellations where for example a holding company controls a **subsidiary** legal person where the corruption offence occurs. The holding company could now be liable under paragraph a if:

- ▶ a manager of the holding company was directly involved in the corruption offence at the subsidiary (Article 2 paragraph 1a);
- ▶ a manager of the holding company failed to supervise the subsidiary (Article 2 paragraph 1b);
- ▶ the subsidiary acted as an agent of the holding company (Article 2 paragraph 1c);
- ▶ the holding company failed to set up and implement a compliance programme at the subsidiary (Article 3).

It should be kept in mind that the concept on affiliated companies is broader than just parent-subsidiary relations. Companies can also be affiliated in a horizontal manner, or by one company controlling another company without the controlled company being a subsidiary. National company, tax, or accounting laws usually provide a definition of affiliated companies for the purposes of provisions such as this. Legal drafters should review whether this legal definition is sufficiently comprehensive and can be used in the context of liability of legal persons. In addition, or as an alternative, one could consider using the principle of criminal liability for omission based on one’s de facto control of a source of danger, in this case a business.

Paragraph b

Paragraph b is necessary for cases as the following: The legal person subcontracts a natural person for distributing its product. The subcontractor has an employee who chooses to commit corruption for the benefit of the subcontractor and ultimately for the benefit of the legal person. Under Article 2 paragraph 1c, the legal person would strictly speaking not be liable: the subcontractor as the agent of the legal person did not commit the corruption offence. Depending on a court’s interpretation in this case, the subcontractor’s employee is not an agent of the legal person. The subcontractor might be liable as a business entity; however, the business entity is not a “natural person” triggering liability under Article 2 paragraph 1c. Paragraph b intends to close this possible loophole. However, liability cannot be without limit in this case. The legal person cannot control a subcontractor the same way it can control a subsidiary. Therefore it is only liable in case it did not conduct due diligence in selecting and monitoring its subcontractor.

313. OECD *Recommendation 2009*, available at www.oecd.org, accessed 28 October 2019.

314. OECD (March 2014), *South Africa: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 14c, available at www.oecd.org, accessed 28 October 2019.

315. OECD (October 2012), *France: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p. 24, available at www.oecd.org, accessed 28 October 2019; OECD (2014), *France: Phase 3 Written Follow-Up Report*, p. 15 (finding that France has since clarified its position and that parent companies may be liable for the actions of a delegated person, such as the director of a subsidiary).

316. OECD (December 2011), *Italy: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 13b, available at www.oecd.org, accessed 28 October 2019.

317. OECD (December 2011), *Japan: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 15b, available at www.oecd.org, accessed 28 October 2019.

For liability under Article 3, it is already rather clear that the legal person is liable for corruption offences committed by “third parties”, which includes subcontractors. Nonetheless, Article 4 paragraph b avoids any ambiguity on this question. As legal persons may try to avoid any form of liability for actions by subcontractors for which they would be held liable if performed by their own employees, removing this ambiguity through clear legislation such as this would reduce the accountability gap in such circumstances.³¹⁸

Paragraph c

Paragraph c does not so much concern the link between a corruption offence committed by a natural person and the liability of the legal person, but rather the attribution of the corruption offence solely to the legal person. There are cases where no natural person could be punished for a corruption offence, as none of the stakeholders involved individually fulfils all elements of the crime. For example, a financial officer of a company might know about a public official receiving a benefit from the company, but believing this benefit was a consultancy fee for the public official. At the same time, a project manager of the company might know that the same public official is granting the company a favourable decision in a legal grey area. Neither the financial officer nor the project manager commits a corruption offence, since both lack *mens rea* of bribing a public official. However, there may be circumstances where “taken together – in other words, if their individual knowledge were melded – such collective knowledge would suffice in terms of *mens rea* of bribing foreign officials.”³¹⁹ In other words, as no natural person have committed a corruption offence, only the legal person itself is liable for the corrupt act. Without paragraph c, the liability of the legal person could neither be triggered under Article 2 nor under Article 3, simply because of the absence of an underlying corruption offence.

There is, however, no international consensus on whether to allow such “aggregation of pockets of knowledge from a number of individual employees”.³²⁰ For example, in Switzerland, academics are still divided over this issue.³²¹ The District Court of Canton Solothurn applied the “aggregate fault” doctrine in 2011 and convicted the bank Postfinance of money laundering. A branch of the bank had paid out 4,600,000 CHF in cash based on approval of the internal anti-money laundering unit. None of the employees were liable of a criminal offence. The Court based the conviction of the legal person on the lack of sufficient internal controls.³²² Upon appeal, the bank was acquitted.³²³ The Court of Appeal stated that a legal person can only be liable if an employee committed an offence. The case is currently pending further review by the Federal Supreme Court.³²⁴

In France, courts apparently also apply aggregated fault. In the “Safran” case, the court of first instanced sentenced a 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 who 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 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. Nonetheless the court found that they had “undeniably facilitated the corruption offence by acting on behalf of the company as part of a general, organised and coherent framework for paying commissions to intermediaries”.³²⁵ The Court of Appeal overturned the conviction of the legal person, though not due to the application of the aggregated fault doctrine by the lower court, but rather as it found that the corruption offences at issue lacked the necessary illegal *quid pro quo*.³²⁶

In the United States, courts recognise the concept of aggregated *mens rea* in corporate liability. In one of the leading cases, a court of appeal decided that an organisation can be liable “if, examining the conduct of the

318. Vermeulen G. and others, *supra*, p.102 and p.140, recommendation 9.

319. Livschitz M. (2007), *Liability of Legal Persons for Corruption – A Swiss Perspective*, Proceedings of the OECD/ACN-Seminar “Criminalisation of Corruption”, p. 11, accessed 28 October 2019.

320. Wells C., *Criminal Responsibility of Legal Persons in Common Law Jurisdictions*, Paper prepared for the OECD Anti-Corruption Unit, Working Group on Bribery in International Business transactions, Paris, 4 October 2000, no. 8.3.1 available at www.coe.int, accessed 28 October 2019.

321. Livschitz M., *idem*.

322. Reuters (21 April 2011), *PostFinance fined for money laundering, to appeal*, www.reuters.com.

323. Tagesanzeiger (23 December 2015), *Post von Geldwäscherei-Vorwurf freigesprochen* [Post acquitted from money laundering charges], www.tagesanzeiger.ch.

324. Neue Zürcher Zeitung (1 February 2016), *Solothurn zieht Freispruch der Post weiter* [Solothurn appealing acquittal of Post], www.nzz.ch.

325. OECD (October 2012), *France: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, paragraph 61, available at www.oecd.org, accessed 28 October 2019.

326. Le Monde (26 March 2015), *L’incantatoire lutte contre la corruption de Christiane Taubira* (The incantatory fight against the corruption of Christiane Taubira), available at www.lemonde.fr, accessed 28 October 2019.

corporate organisation as a whole, organisation employees failed to comply with a criminal law requirement after consciously avoiding learning about that requirement³²⁷

In any case, one should be aware that the notion of additional liability under this paragraph has conceptual challenges: it introduces criminal liability of an entity even if nobody at the legal person knew about or orchestrated the crime. In terms of a natural person, this could compare to a case where somebody knew in the back of his/her mind about an element of crime, but was not aware of it when committing the offence. Depending on the criminal law of the country and depending on precise circumstances of the case, it is likely that one would only be charged of an offence of negligence. In many cases, aggregate liability can arguably stretch the basic concepts of culpability that underpin criminal law. Alternatively, in cases where no natural person can be held individually liable for a corruption offence, the liability of the legal person could be pursued for lack of internal controls or a similar lesser offence.

In practice, though, the question remains, whether there is much, if any, room of application for this concept. If an investigator follows the “trail of (lack of) supervision” thoroughly, he/she probably always finds somebody higher up in the hierarchy orchestrating or at least accepting corruption within the legal person by turning a blind eye (based on conditional intent or *dolus eventualis*). Two separate departments each fulfilling one element of a crime without the other department or management knowing about this is, in and of itself, a demonstration of a malfunctioning prevention system. Thus, the concept of aggregate fault is usually only a “crutch” or a last resort for prosecutors who failed to establish the lack of supervision for one reason or other.

8.1.6. Article 5 – Sanctions

(1) Legal persons are liable to the following sanctions available against natural persons,

- ▶ (a) [*Forfeiture at the legal person and at third parties*] regular and extended confiscation as applying against natural persons;
- ▶ (b) [*Publication of judgement*] publication of the judgement or its operative part;
- ▶ (c) [*Probation and bail*] probation and bail.

(2) The following sanctions available against natural persons apply with modifications as follows:

- ▶ (a) [*Fines*] Fines, calculated without a defined maximum amount,
 - i. by a set multiple of the economic benefit intended or obtained through the offence or a minimum amount, whichever is higher; or
 - ii. where no benefit is quantifiable, according to general rules for calculating fines.
- ▶ (b) [*Supervision*] The competent authority may order judicial supervision in addition to, or irrespective of, the imposed sanction:
 - i. whereby it orders the supervision of a legal person’s activities by an appointed independent representative, who facilitates remediating shortcomings in the legal person’s integrity culture and regularly reports on progress and compliance of the legal person with the measures foreseen by the guidance under Article 3 paragraph 2;
 - ii. the legal person may suggest candidates to act as a representative to the court;
 - iii. the representative shall have no judicial or management powers in the legal person;
 - iv. if the legal person fails to live up to the standard imposed by the competent authority, the supervision may be revoked and another sanction imposed.

(3) The following special sanctions apply to legal persons:

- ▶ (a) [*Bans and orders*] Depending on the gravity of the offence, the competent authority may order:
 - i. a ban on promoting or advertising the business activities the legal person conducts, the products it manufactures or sells, the services it renders, or the benefits it grants; or
 - ii. a ban on pursuing the indicated prime or incidental business activities; or
 - iii. requiring the legal person to cease conduct facilitating the offence and to desist from repetition of that conduct; or
 - iv. a temporary ban against a person discharging managerial responsibilities in the legal person, from exercising managerial functions in the legal entity or its affiliates; or
 - v. the withdrawal or suspension of the authorisation, where a legal person is subject to such authorisation;

327. Gruner R.S. (2015), *Corporate Criminal Liability and Prevention*, 3-29, footnote 16, quoting *United States v Bank of New England*, 821 F.2d 844 (1st Cir.), review by Supreme Court denied, 484 U.S. 842.

- ▶ **(b) [Liquidation]** In case of repeated or grave commission of offences, the competent authority can order the liquidation of the legal person.

(4) Special laws regulate the following sanctions:

- ▶ **(a)** A public register of convicted legal persons;
- ▶ **(b)** Exclusion from public funding;
- ▶ **(c)** Disqualification from public contracts;
- ▶ **(d)** Annulment of procurement decisions;
- ▶ **(e)** Loss of export privileges;
- ▶ **(f)** Debarment by international development banks.

(5) [Civil liability] Liability under this Article does not preclude civil liability including for damages.

Paragraph 1

This paragraph contains sanctions that are available to natural and legal persons and apply equally to both.³²⁸

Confiscation is a component of sanctions, which most countries with criminal and administrative liability of legal persons know. Where countries lacked this sanction, the OECD Working Group recommended to “clarify that legal persons can be subject to confiscation measures on the same basis as natural persons”.³²⁹ The EU has recently legislated in this area with a new Regulation on the Mutual Recognition of Freezing Orders and Confiscation Orders, 17 October 2018.

Publication of judgment is a sanction that is available in some countries only for legal persons, though some countries publish judgements for natural and legal persons in the same manner. It should be noted that the Fourth Anti-Money Laundering Directive explicitly foresees “a public statement which identifies the natural or legal person and the nature of the breach” as one of the available sanctions.³³⁰

Bail and **probation** are options where no particularities apply to natural and legal persons. For example, in the Netherlands, “probationary periods’ involve the imposition of remedial actions to be undertaken by the company. Should the company violate 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.”³³¹ Different legal systems vary as to whether they foresee probation, bail, and other forms of conditional sentences. Legislators thus need to tailor paragraph 1 around the particularities of each criminal code.

Paragraph 2

Paragraph 2 contains sanctions that are available to natural and legal persons, but where some particularities apply to legal persons. The calculation of fines is often modelled around natural persons. As a consequence, limits that are too low for the economic potential of legal persons tend to apply. Similarly, variables are missing that are fit for legal persons such as the annual turnover or the intended economic benefit. Thus, for fines of legal persons, models exist for calculating “effective, proportionate and dissuasive” amounts (Article 19 paragraph 1 Council of Europe Criminal Law Convention). Sufficient comparative literature exists presenting the different models.³³² The Fourth Anti-Money Laundering Directive calls for a maximum fine of at least twice the economic benefit or at least €1,000,000 for legal persons violating the Directive’s provisions.³³³ Paragraph 2a (i) is modelled after the Directive. Paragraph 2a (ii) goes back to a recommendation by the OECD Working Group to “increase the maximum penalty available against legal persons in cases where the advantage accruing to the legal person as a result of foreign bribery is not ‘property’, or if the value of the advantage cannot be ascertained”.³³⁴

GRECO and the OECD Working Group have frequently criticised provisions on calculating fines as too lenient, and recommended to “increase the fines for legal persons [...], given that they are substantially lower than

328. For an overview on possible sanctions see OECD/ACN, *idem*, chapter 5.

329. OECD (December 2012), *Spain: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 4c, available at www.oecd.org, accessed 28 October 2019.

330. Article 59 subsection 2a.

331. OECD (December 2012), *Netherlands: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.16, available at www.oecd.org, accessed 28 October 2019.

332. OECD/ACN, *idem*, chapter 5.

333. Article 59 subsection 2e.

334. OECD (March 2011), *Bulgaria: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.34, available at www.oecd.org, accessed 28 October 2019.

the fines for natural persons, and in light of the size and importance of many [...] companies, the location of their international business operations, and the business sectors in which they are involved”.³³⁵ The Working Group also spoke out against a “cap on fines of 3% of the revenues generated in the tax year of the offence [...]”. Under this provision, companies may avoid significant penalties by operating through shell entities or by shifting revenues to other tax years.”³³⁶

In any case, one should keep in mind that, in practice, fines alone are usually not dissuasive, no matter their size. Managers of most companies are not concerned so much about corruption offences being detected: it is the company paying the fine, not them (if the offence cannot be traced back to upper management). It is therefore important to combine fines with other sanctions (in particular debarment from public tenders, see below).

Some legal systems foresee clauses, according to which the judge will have to consider the economic³³⁷ or social³³⁸ consequences of a sanction, in particular of fines. International monitoring bodies have been rather critical of such clauses. Under social considerations one might want to lower a sanction in order avoid layoffs or insolvency of a legal person. However, the sanction might not be effective anymore if lowered as it might not reflect the economic advantage of the legal person anymore. In other words: a legal person that is only kept financially afloat if it will not pay the adequate price for its corruption, is not worth protecting. The OECD Working Group has thus recommended “to ensure that they [sanctions] are effective, proportionate and dissuasive, including for legal persons conducting activities having strategic or hardly replaceable significance for the national economy”.³³⁹ In this context, the Group recalled that Article 5 of the OECD Anti-Bribery Convention requires that “investigation and prosecution” of foreign bribery “shall not be influenced by considerations of national economic interest”. Where there are several options of equally effective sanctions, courts can choose socially or economically less harmful sanctions.

Supervision for a specified period of time is a sanction available for natural persons as well. Usually it goes together with a probation period. For a natural person, it goes without saying that the supervisor will not have power of attorney for the supervised person. For legal persons’ supervision, however, it is important to clarify that the supervisor has no function in any of the legal person’s organs but simply has observatory powers. In addition, it is important that the supervisor has independence both regarding the legal person and regarding the court. Allowing the legal person to submit suggestions will help the supervisor to gain acceptance within the company. Such initial trust is important for the compliance procedure to work. Supervision will cut quite deeply into the existing structures and procedures of a company. It is therefore not “just another box” to tick off on the sanction list, but a rather dissuasive and invasive sanction. Therefore, it should not be applied randomly, but only where systemic failures in the integrity culture call for a supervisor.

Paragraph 3

The bans and orders of paragraph 3a are somewhat similar to a sanction usually available for natural persons, i.e. the order suspending professional qualification. However, paragraph 3a is only directed at activities of business entities and in particular companies. Paragraphs i to ii are modelled after the Polish law.³⁴⁰ Paragraphs iii to v are taken from the Fourth Anti-Money Laundering Directive of 2015.³⁴¹ The ban in paragraph iii limits the freedoms of the respective natural person as well, and is thus only applicable if the natural person was also subject of a criminal procedure and found guilty.

335. OECD (December 2012), *Austria: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p. 18, available at www.oecd.org, accessed 28 October 2019.

336. OECD (June 2013), *Poland: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p. 23, available at www.oecd.org, accessed 28 October 2019; OECD (October 2015), *Poland: Follow-Up to the Phase 3 Report & Recommendations*, p. 8 (finding that no progress had been made).

337. See for example Czech Republic, section 14 of Act No. 418/2011 Coll., which prescribes that, in deciding on sanctions, the court shall “consider whether the legal person conducts activity in the public interest, having strategic or hardly replaceable significance for the national economy”, OECD (March 2013), *Czech Republic: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.19, available at www.oecd.org, accessed 31 January 2016; *Zákon 418/2011* (Law 418/2011), available at <http://portal.gov.cz> (Czech); OECD (March 2011), *Canada: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p. 38, available at www.oecd.org, accessed 28 October 2019: “Clarify that in investigating and prosecuting offences under the CFPOA, considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved, are never proper”.

338. Poland, *Act of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty*, available at www.oecd.org, accessed 28 October 2019.

339. OECD (March 2013), *Czech Republic: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p. 49, available at www.oecd.org, accessed 28 October 2019.

340. Section 9.1 Act of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty, *idem*.

341. *Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing*, available at <http://eur-lex.europa.eu>, accessed 28 October 2019.

Liquidation is the death penalty for legal persons. Whereas the death penalty is outlawed for natural persons in all Council of Europe member States, liquidation as the gravest sanction for legal persons is mostly available. In some countries, exceptions apply for NGOs or non-commercial activities.³⁴² It is often a concern of NGOs that the liquidation sanction could be abused against them in governance systems with oppressive tendencies. On the other hand it is important to prevent any exception for NGOs to be abused. For example, even a not-for-profit organisation repeatedly being convicted for bribery of public officials, should probably cease to exist, even if the bribery was not for commercial but only for idealistic purposes. This is even truer where the NGO is only a cover up for bribery in the economic interest of the person behind it.

Paragraph 4

The measures in paragraph 4 follow repeated recommendations by GRECO and the OECD, to “extend the disqualification [from public procurement] to legal persons”,³⁴³ “to introduce a criminal record for legal entities as soon as possible which would enable the practical application of additional sanctions of debarment from public procurement”,³⁴⁴ to ensure that “the agencies responsible for public procurement, ODA [official development assistance] and export credit and all other public subsidies, have access to this register”,³⁴⁵ and to foresee “exclusion from entitlement to public benefits or aid as a supplementary penalty”.³⁴⁶

Paragraph 5

This paragraph is included in order to ensure that criminal liability expressly does not preclude the possibility for aggrieved parties and others with a legitimate interest from seeking civil liability for damages (as well as to avoid any further unnecessary debates about criminal or civil liability in courtrooms).

8.1.7. Article 6 – Sentencing; mitigating circumstances

(1) [*Sentencing*] When determining the type and level of sanctions or measures, the competent authorities shall take into account all relevant circumstances, including where applicable:

- ▶ (a) the gravity and the duration of the breach;
- ▶ (b) the degree of responsibility of the legal person held responsible;
- ▶ (c) the financial strength of the legal person held responsible, as indicated by, for example, the total turnover of the legal person held responsible;
- ▶ (d) the benefit derived from the breach by the legal person held responsible, insofar as it can be determined;
- ▶ (e) the losses to third parties caused by the breach, insofar as they can be determined;
- ▶ (f) previous breaches by the natural or legal person held responsible;

(2) [*Mitigating circumstances*] The competent authorities may take into account the following mitigating circumstances:

- ▶ (a) the level of cooperation of the legal person held responsible with the competent authority;
- ▶ (b) whether the legal person reported the offence before it found out that the crime was detected;
- ▶ (c) the extent to which the legal person maintains a compliance programme in line with the guidance under Article 3 paragraph 2.

342. OECD/ACN, *idem*, chapter 5.1.3; see for example Romania, Criminal Code, Art. 141, Non-enforcement of the penalty of dissolution or suspension of the activity of the legal entity: “(1) The ancillary penalties provided under Art. 136 par. (3) let. a) and let. b) [dissolution] may not be enforced against public institutions, political parties, trade unions, employers’ associations, and religious organizations or organizations of the national minorities, incorporated according to law. (2) The stipulations under par. (1) shall apply to legal entities performing activities in the media.”

343. OECD (December 2014), *Argentina: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 4e, available at www.oecd.org, accessed 28 October 2019.

344. OECD (October 2013), *Belgium: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.21, available at www.oecd.org, accessed 28 October 2019; OECD (December 2017), Belgium: Phase 3 Evaluation, Additional Written Report, p. 5 (noting that Belgium had enacted legislation to ensure that all legal persons found to be criminally liable are entered onto the Central Register of Criminal Records).

345. OECD Belgium, *idem*, p. 24; OECD Bulgaria, *idem*, p. 34: “Regarding public procurement, the Working Group recommends that Bulgaria introduce a legal provision to allow debarment of legal persons from public procurement, provide guidance to the procurement bodies on due diligence, and consider maintaining a record of natural and legal persons convicted of bribery which could be consulted by contracting authorities”.

346. OECD (June 2011), *Luxembourg: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p. 105, available at www.oecd.org, accessed 31 January 2016; OECD (2013), Luxembourg: Follow-Up to the Phase 3 Report & Recommendations, p. 8 (noting the use of a criminal register for legal persons) .

Paragraph 1

In principle, sentencing guidelines for fines of legal persons are no different from sentencing guidelines for natural persons. Paragraph 1 is taken verbatim from the Fourth Anti-Money Laundering Directive where it applies equally to natural and legal persons.³⁴⁷ Countries might already have sentencing guidelines containing the criteria in paragraph 1 or even adding further criteria. Most important in the context of legal persons is paragraph 1c which tags the calculation of the sanction to the financial turnover as opposed to the revenue. Companies with major economic power often generate no or little revenue for several years in a row, even if their financial situation is by and large healthy. As a basic rule, it would therefore be ineffective to make the revenue the decisive criterion. Paragraph 1c is still open to other criteria, for cases where legal persons do not receive their wealth from turnover, but from holding assets over a long time, such as real estate trusts.

Paragraph 2

Paragraph 2a is taken verbatim from the Fourth Anti-Money Laundering Directive. The incentive of a mitigated sentence is especially important when it comes to large corporations: the evidence is hidden in the complexity of an organisation with possibly thousands of employees and billions of sets of data. Even if prosecutors have enough initial information to obtain a search warrant, they might not be able to work through the evidence within the statute of limitations. For example, when the Siemens case was investigated, the company employed some 475,000 people and conducted business in 190 countries. Given the size and complexity of the company, it was thus necessary to conduct hundreds of interviews with Siemens employees and other individuals as well as search and review millions of documents, financial transactions and bank records.³⁴⁸ Had Siemens not cooperated with the prosecutors, it is probably fair to say that the mountain of information to be sorted would have been considerably larger in scope, but resource limitations means the investigation would likely have produced a smaller or narrower picture of the situation.

Paragraph 2b concerns the concept of “effective regret”. However, it should be noted that GRECO has opposed regulations where effective regret exonerated the defendant automatically and mandatorily. Furthermore, it has expressed concern that “this tool could be misused by the bribe-giver, for example as a means of exerting pressure on the bribe-taker to obtain further advantages, or in situations where a bribery offence is reported long after it was committed, since there is no statutory time-limit”.³⁴⁹ The OECD Working Group made similar observations: “The Convention does not permit a defence based on effective regret. In cases of foreign bribery, the defence of effective regret would completely undermine the purpose of the Convention.”³⁵⁰ In order to avoid these issues, effective regret under paragraph 2b is limited to mitigating a sanction but not to exonerating the defendant. Paragraph 2b is modelled after the Montenegrin provision, which did not attract a recommendation by GRECO, as the defence was only applicable at the discretion of the court.³⁵¹

Paragraph 2c contains the defence of full compliance with corruption prevention requirements. It is particularly common in systems with strict liability (Article 2 paragraph 1c). Strict liability makes the company liable for any of its agents, even the most careful selected and supervised ones. In other words, strict liability puts the burden “rogue agents” on the company, even if it has no fault in the agent going off-limits. It thus seems only fair to allow the company to show that it did everything it could to prevent the agent to commit the corruption offence and thus receive a milder sentence.

8.1.8. Article 7 – Liability of successors and partners

(1) [Succession] In case a legal person merges, transforms, or demergers – *de iure* or by legal transaction – after the offence is committed, the liability for sanctions under Article 5 [sanctions] will rest upon the legal person(s) resulting from the reorganisation; the same applies where the same owners continue essentially the same business with another legal person.

(2) [Personal liability] To the extent partners or shareholders are personally liable for the financial obligations of the legal person they are liable for financial sanctions (Article 5 paragraph 1a [confiscation] and paragraph 2a [fines]).

347. Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, available at <http://eur-lex.europa.eu>, accessed 31 January 2016.

348. Siemens (25 December 2008), Press statement (not available online).

349. GRECO (6 April 2011), *Third Evaluation Round: Evaluation Report on the Republic of Moldova*, para. 64, available at www.coe.int/greco, accessed 28 October 2019; GRECO (9 December 2015), *Third Evaluation Round, Addendum to the Second Compliance Report on the Republic of Moldova*, para. 9 (reiterating that GRECO is “still not convinced that sufficient safeguards have been established to prevent the misuse of this defence”).

350. OECD Czech Republic, *idem*, p. 15.

351. GRECO (3 December 2010), *Third Evaluation Round, Evaluation Report on Montenegro*, para. 76, available at www.coe.int/greco, accessed 28 October 2019.

(3) [Exclusion of recourse] Notwithstanding paragraph 2, the legal person cannot take recourse against its managers or employees for financial sanctions [Article 2 paragraph 1], but only for damages and other similar consequences.

(4) [Liquidation and bankruptcy] Any natural or legal person

- ▶ (a) knowingly liquidating the legal person in order to shield it from financial sanctions; or
- ▶ (b) criminally liable for a bankruptcy offence; is liable insofar the legal person is unable to pay the financial sanctions.

Paragraph 1

A natural person may change its face, name, or gender. Nonetheless, under civil or criminal law, if a natural person does make such a change, they will still have the same legal personality and can be held liable for the same contracts or criminal offences. In contrast, legal persons can lose their legal personalities any way their owners want, through merger (two corporations forming a new one), transformation (a limited partnership transforming into a corporation), or demerger (one corporation splitting into two). As the result, there may be one, two, or more new legal personalities emerging, continuing or deriving from the original legal person. Thus, the law needs to clarify that the liability of the previous legal person will migrate to the new legal person(s). Although neither the OECD Anti-Bribery Convention nor its 2009 Recommendation explicitly cover successor liability, as many as 16 Working Group monitoring reports discuss the issue.³⁵² Several national laws contain clauses clarifying this legal succession,³⁵³ whereas many new laws of transitioning countries do not. In Germany, liability of successors was introduced in 2013. Before, companies would sometimes try to escape liability by merging with other companies.³⁵⁴ A legal draft submitted to the Upper House of Germany in 2016 limits legal succession to cases where the “successor knew or should have known at the time of succession about the predecessor’s liability” before the sanction is applied. However, sanctions already applied would always take effect against the successor.³⁵⁵

The second half of Article 7 paragraph 1 is modelled after Article 10 paragraph 2 of the Austrian Law on the Liability of Legal Persons for Criminal Offences.³⁵⁶ It targets cases where one company does not succeed another one by way of universal succession, but by way of singular succession. The essential business of one company is transferred to another company without any overall legal transformation between the two distinct legal persons. Such transfers are done through conveying essential assets such as intellectual property, customers, staff, and/or property to the other company; hence the description as “singular succession”, as each asset has to be transferred. The OECD Working Group has since commended Germany for introducing successor liability provisions into its corporate legal framework, noting that the new law covers corporate restructuring including merger and acquisition, division and dissolution.³⁵⁷

Transformations can occur by agreement, for example between shareholders of different companies. Transformations can also be the result of statutory provisions. For example, in many jurisdictions a simple partnership with the aim of establishing a company of limited liability (“Limited”) will transform *de iure* into a “Limited” once properly registered.

Paragraph 2

From the perspective of company law, it should go without saying what paragraph 2 is underlining: in legal persons with personal liability, such as partnerships, the partners are liable for the financial obligations of the legal person. However, it is important to make a clear legislative statement on this point. Otherwise, avoidable discussions will arise during trials on whether personal liability under civil company law only includes

352. OECD, *The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report*, (2016), pp. 102-103.

353. See for example Austria, *idem*, § 10; Czech Republic, *idem*, section 10 (“criminal liability of legal persons descends to all its legal successors”); Germany, § 30 subsection 2a *Act on Regulatory Offences* [Gesetz über Ordnungswidrigkeiten – OWiG] as amended in 2009, available at www.gesetze-im-internet.de, accessed 31 January 2016; Romania, Art. 151 LAW #286 of 17 July 2009 (Criminal Code).

354. E.g. the case of an international coffee producer, see German Federal Anti-Trust Agency, press release of 11 February 2014, “*Düsseldorf Higher Regional Court confirms fines against Melitta*”, available at www.bundeskartellamt.de, accessed 28 October 2019: “The Bundeskartellamt [federal anti-trust agency] assumes that this reorganisation [i.e. a merger] was carried out with the aim of avoiding liability for payment of the fines.”

355. North-Rhine Westphalia, *Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden* (Draft Law by North-Rhine Westphalia, Law on the Introduction of Criminal Liability of Enterprises and other Associations), § 2 subsection 4: “The corporate sanction will be applied against the legal successor if it knew or should have known fully or partially of the offence at the time of succession.” accessed 28 October 2019.

356. Federal Law on the Liability of Legal Persons for Criminal Offences of 2005 [*Bundesgesetz über die Verantwortlichkeit von Verbänden für Straftaten (Verbandsverantwortlichkeitsgesetz – VbVG)*], available at www.internet4jurists.at, accessed 28 October 2019.

357. OECD (2018), *Germany, Phase 4 Report on Implementing the OECD Anti-Bribery Convention*, para. 215, accessed 28 October 2019.

civil liabilities, or also criminal fines. For example, in Germany, it is difficult to find any legal doctrine on this question,³⁵⁸ even though liability of legal persons is a concept that has existed there for several decades.

A particular aspect applies to partners who were involved in the corruption offence. They could owe double for the same offence: the fine from their personal conviction as well as a share of the fine their partnership owes. This raises the procedural question of double punishment (see Article 12).

In practical terms, a partner cannot be liable for confiscation of a specific asset of a partnership: either the asset is with the partnership, or it is not. If the asset is with the partner, it would be confiscated under third party confiscation. However, paragraph 2 is important for cases of value confiscation. This concerns cases where the proceeds of a crime cannot be seized, but the value of which corresponds to such proceeds can be confiscated.³⁵⁹

Paragraph 3

This paragraph is taken more or less verbatim from the Austrian Law on the Liability of Legal Persons for Criminal Offences.³⁶⁰ The regulatory aim of this paragraph is to leave the effect of financial sanctions with the legal person. Otherwise, the possibility of a fine might not have sufficient deterrent effect on the legal person. However, it is important that the legal person can take recourse against its managers and employees for any other financial damage it has occurred. This includes damages for loss of business, loss of reputation, procedural costs, etc.³⁶¹ In practice, managers are usually covered by directors and officers insurance (“D&O insurance”).³⁶² However, D&O insurance does not cover fines from criminal offences and neither any other damage.

Paragraph 4

In many cases, owners might simply want to liquidate the legal person. As a result, it will lose its legal personality. This raises the question of who, if anybody, will be required to carry the liability for the former legal person. Similar questions arise in the context of bankruptcy of the legal person. Bankruptcy offences include various forms of diminishing the assets of a legal person in bad faith, for example by disposing or hiding assets, by recognising fictitious liabilities, or by destroying books.³⁶³ Intentional liquidation of legal persons or committing bankruptcy offences in order to shield the legal person from paying financial sanctions would or should both be torts under general civil law principles.³⁶⁴ To ensure legal certainty prior to and in cases of liquidation, paragraph 3 clarifies this question.

8.1.9. Article 8 – Applicability of domestic law

The law applying in the territory where the legal person has its registered or effective seat or where the natural person committed an offence (Article 1 paragraph 2) shall apply with respect to, the legal person’s liability under Articles 2 to 4.

This Article seeks to provide adequate means to determine relevant jurisdictional issues and thus provide a clear framework concerning the applicability of domestic law. The Council of Europe Criminal Law Convention on Corruption (Article 18) and UNCAC (Article 42) do not contain any special provision on the applicable law in cases of liability of legal persons. Similarly, the general provisions of criminal codes are often only designed around natural persons. This situation can raise numerous questions: first, what is the “offence” when it comes to liability of legal persons – the corruption offence by the natural person, or the liability link, i.e. the lack of supervision or the lack of prevention mechanisms? For example, if one only looks at the act of the natural person, the bribery, this could be committed by a foreign employee abroad. The lack of supervision might have taken place only in Country A, where a company might have its seat. Does this qualify as commission on Country A

358. The following 15 volume legal commentary (selling price: 2,300 €) on commercial law (including partnerships) contains an answer to this question, whereas many shorter commentaries do not: Staub, *Handelsgesetzbuch: HGB, Großkommentar* in 15 Bänden, 5th edition, § 128 no. 10.

359. Article 4, *Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union*, available at <http://eur-lex.europa.eu>, accessed 28 October 2019.

360. § 11 Federal Law on the Liability of Legal Persons for Criminal Offences of 2005, *idem*.

361. See in this context for example the award of 15 Million € in damages Siemens won against one of its CEO’s: Reuters, (6 February 2015), *Ex-Siemens CFO Neuburger commits suicide*, www.reuters.com, accessed 28 October 2019.

362. *Businessdictionary*: “Personal liability insurance that provides general cover to a firm’s directors and senior executives. Paid usually by the firm, it reimburses (in part or in full) the costs resulting from law suits and judgments arising out of poor management decisions, employee dismissals, shareholder grievances, and other such acts committed in good faith. Criminal offenses are not covered under this insurance.”; available at www.businessdictionary.com.

363. See for example the bankruptcy offences in the German *Criminal Code*, section 283, available at www.gesetze-im-internet.de, accessed 28 October 2019.

364. As is the case for example under German law.

territory? Secondly, a legal person would probably not qualify as a “citizen” unless the term was defined explicitly to include legal persons. But even if a legal person could in general be seen as fitting under the term “citizen”, when would it qualify as such – when being registered with its main seat in Country A but established under foreign law or only when established under Romanian law? Furthermore: when would a legal person “reside” in Country A – does a branch or subsidiary suffice, the *de facto* seat, or is registered office in Country A necessary?

Article 8 seeks to ensure a clear answer to all of the above questions. It consolidates respective provisions as found for example in the Austrian, Czech, Romanian (updated version), and United Kingdom law,³⁶⁵ and follow recommendations of the OECD Working Group:

- ▶ To exercise jurisdiction “when the foreign bribery offence is perpetrated abroad through an intermediary who is not a Swedish national”³⁶⁶ or over “companies incorporated or headquartered in Mexico”;³⁶⁷
- ▶ “To clearly provide territorial and nationality jurisdiction”;³⁶⁸
- ▶ To apply “territorial and nationality jurisdiction concerning offences committed in whole or in part abroad, [...] whether it is committed directly or through intermediaries (including related legal persons such as foreign subsidiaries)”;³⁶⁹
- ▶ To “clarify by any appropriate means that the jurisdiction over legal persons [...] should be broadly interpreted and cover, in particular (i) companies not incorporated in Brazil if their main seat is in Brazil; and (ii) companies that have their main management and control situated in Brazil even if some part of this function is located outside of Brazil”.³⁷⁰

First and foremost, Article 8 applies the nationality principle to companies founded under domestic law (having their registered seats usually in their home country) or *de facto* residing in the country. In addition, it applies the territorial principle to the offence committed by the natural person.

It is important to keep in mind that Article 8 does not refer (only) to the legal person which is the closest to the offence committed, but also to the legal person in whose interest the offence is committed. Thus, for example, if company A resides abroad and is liable for bribery committed abroad, domestic criminal law still applies if the bribery was committed in the interest of its parent company B with a domestically registered seat. As formulated in Article 8, “legal person” is always the legal person referred to in Articles 2, 3, and 4.³⁷¹

It should be noted that some countries go further than Article 8 and even apply universal jurisdiction. For example, the “law of the Czech Republic shall apply when determining the liability to punishment” of certain money forgery and terrorism acts, “even if such criminal act has been committed abroad by a legal person with no registered office in the Czech Republic.”³⁷²

8.1.10. Article 9 – Application of general administrative/criminal law

In all other respects, general substantive provisions apply to legal persons insofar as they are not exclusively applicable to natural persons.

There are many provisions which apply to natural and legal persons equally. An example is the prohibition on retroactive application of criminal law. There is no need to double these common provisions again in a law regarding liability of legal persons. Article 9 serves this purpose. There are only a very limited number of provisions that apply exclusively to natural persons. It should be relatively clear which provisions this concerns,

365. § 12 Federal Law on the Liability of Legal Persons for Criminal Offences of 2005, *idem*; United Kingdom, *Bribery Act 2010*, Section 7 subsection 5, available at www.legislation.gov.uk (liable are: “any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom”); Czech Republic, Act No. 418/2011, *idem*, sections 2 to 5; Romania, Criminal Code, *idem*, Article 9.

366. OECD (June 2012), *Sweden: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 3b, available at www.oecd.org, accessed 28 October 2019.

367. OECD (October 2011), *Mexico: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 3c, available at www.oecd.org, accessed 28 October 2019.

368. OECD (March 2014), *Chile: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 5, available at www.oecd.org, accessed 28 October 2019.

369. OECD (March 2014), *South Africa: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 14k, available at www.oecd.org, accessed 28 October 2019.

370. OECD Brazil, *idem*, p.29.

371. The Czech law (Act 418/2011 Coll., *idem*) contains an explicit provision in this regard (section 4 subsection 2), as it follows a different regulatory wording: “The law of the Czech Republic shall also apply when determining the liability to punishment for a criminal act committed abroad by a legal person with no registered office in the Czech Republic, if the criminal act has been committed for the benefit of a legal person with registered office in the Czech Republic.”

372. Section 4 subsection 1, Act 418/2011 Coll., *idem*.

such as the sanction of imprisonment. Many national laws have a provision close in wording and content to Article 9, such as, for example, the Austrian Law on the Liability of Legal Persons for Criminal Offences.³⁷³

In the context of Article 9, it is important to keep in mind that one should be careful when considering special regulations for legal persons. A key issue concerns statutes of limitation, which have regularly been criticised by the OECD Working Group where the prescribed periods were shorter for legal persons than for natural persons.³⁷⁴

8.2. Chapter II: Procedural questions

8.2.1. Preliminary note: necessity of separate provisions?

One can distinguish roughly two models of procedural regulation: most countries remain rather silent on procedural questions, and leave it up to the courts to apply procedural law designed around natural persons in a manner analogous to legal persons. Other countries try to exhaustively regulate all procedural particularities concerning legal persons, such as how to summon a legal person, whether the legal person has a right to remain silent, etc. As such, this legislative toolkit opts for a rather exhaustive regulation in consideration of the countries where the concept of liability of legal persons is relatively new, as it is likely that complex cases will mean that the courts will already have enough to struggle with. It is preferable to have clear answers already provided for in the law instead of passing the burden of filling regulatory gaps to the courts at a later date.

8.2.2. Article 10 – Domestic jurisdiction

(1) [*Domestic legal persons*] Venue shall be deemed to be established in the court in whose district the legal person has its registered or *de facto* seat.

(2) [*Foreign legal persons*] For legal persons with a registered and *de facto* seat abroad, venue shall be deemed to be established in the court:

- ▶ (a) [*Domestic offence*] in whose district the offence was committed, if it was committed inside the territory; or
- ▶ (b) [*Foreign offence*] which is competent for foreign or stateless natural persons, if the offence was committed outside the territory.

(3) [*Connected cases*] Provisions on venue for connected cases shall remain unaffected.

Article 8 determines the international applicability of substantive criminal law. Once (and only if) this question is answered in the affirmative, Article 10 provides guidance on which domestic court is competent to decide the case. There are basically two options for venue: the place where the corruption offence took place, or the place where the legal person has its registered seat.

There are arguments for both options. The place of offence has the advantage that the same court would conduct the trial over the natural and legal person (since the natural person is usually tried at the venue of the offence).

The venue of the legal person's seat has the advantage that the same court would always be competent for offences by the same legal person. It would also be a venue easy to determine in case the legal person's corruption offence(s) took place in various locations. In addition, the prosecutor's office at the court would be closer to the legal person for collecting evidence at the legal person.

Furthermore, the exact circumstances of the offence – including the place – are often not clear in cases where legal persons are involved: was the bribe handed over at the company's premises, in a public office, or in a third place? Lastly, legal persons tend to have their seat in rather larger cities. Judges of courts in larger cities will be more likely to deal with the concept of liability of legal persons, while their colleagues in smaller courts might be rather unfamiliar with the concept.

373. *Idem*, § 14 subsection 1.

374. OECD Switzerland, *idem*, recommendation 17: "The continued application, by tribunals, of a 15-year limitation period to prosecutions of legal persons to allow an adequate period of time for the investigation and prosecution of the offence of foreign bribery"; OECD (2018) *Switzerland, Phase 4 Report*, p. 37, in which the Working Group welcomes a case law development in Switzerland to the effect that the limitation period no longer applies after the judgment at first instance, whether it is a conviction or acquittal; OECD Brazil, *idem*, recommendation 8: "Regarding the statute of limitations, the Working Group recommends that Brazil [...] (ii) clarify its ability to extend the timeframe for administrative proceedings against legal persons."; OECD Italy, recommendation 4(f): "re-evaluate the impact of the shorter base limitation period applicable to legal persons and consider aligning that period to the limitation period applicable to individuals".

For these reasons, paragraph 1 defines the seat of the legal person as the venue of default. However, should the court want to connect the case with the trial against the natural person, it may decide to do so under Article 10 paragraph 3. As for companies with a seat abroad, paragraph 2 defines the venue in an analogous manner as is usually done for natural persons. There are many variations possible for determining the venue of domestic courts. The two things legal drafters need to ensure in the end are to consider the above mentioned policy arguments and to clearly the conditions which enable authorities to determine which venue ought to be used in all potential cases. A provision merely defining the venue by the place where the offence was committed would likely not be sufficient as legal persons can also be liable in their home country for committing corruption abroad at the same time.

8.2.3. Article 11 – Autonomous procedure

The procedure against the legal person can proceed separately from or without a procedure against the natural person having committed the offence.

Article 11 is the procedural mirror provision to Article 2 paragraph 2c. Article 2 paragraph 2c decouples the liability of the legal person from the liability of the natural person. Article 11 does the same on a procedural level. It is a provision frequently found in Criminal Procedure Codes.³⁷⁵ The OECD's 2009 Recommendation for Further Combatting Foreign Bribery stated that "systems for the liability of legal persons [...] should not restrict the liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted." Monitoring reports by the OECD also seem to suggest that the procedure against the natural and legal person should not depend on each other by necessity.³⁷⁶ Such provisions may be helpful with regard to trial tactics. Legal persons are often more willing to co-operate with the prosecutors from the beginning in order to gain a lenient sentence. The legal person will provide comprehensive evidence on the corruption schemes. This may make it easier to build a case against the involved natural persons in a subsequent trial.

The procedural separation is also important where one or several natural persons protract the trial with seemingly endless motions. The court might already be fully convinced of the liability of the legal person. If the trial against the legal person was not conducted separately from the trial against the natural persons, it might risk failing because it would exceed a reasonable duration: "Permitting investigators and prosecutors to focus on the legal person and leave the individual defendants (or some of them) for another case may save some valuable time, and, thus, enhance the system's ability to bring significant cases to justice."³⁷⁷

8.2.4. Article 12 – Double punishment

(1) [*Natural and legal person*] The prohibition on double punishment (*ne bis in idem*) does not apply where a legal person and a natural person are both convicted for the same offence.

(2) [*Fines*] When assessing fines and applying confiscation measures, courts shall consider the overall economic effect on any natural person offender being a partner or shareholder in order to avoid double punishment.

(3) [*Multiple legal persons*] Paragraph 1 and 2 apply analogously where connected legal persons are liable for the same offence.

Paragraph 1

Paragraph 1 is a reflection of international standards. The Council of Europe Criminal Law Convention on Corruption, Article 18 paragraph 3, states that the "[l]iability of a legal person [...] shall **not exclude** criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offences [...]".³⁷⁸ Many countries include this principle in their legislation, such as Article 20 para. 4 of the Criminal Code of Lithuania: "Criminal liability of a legal entity shall not release from criminal liability a natural person who

375. See for example Austria, Federal Law on the Liability of Legal Persons for Criminal Offences, *idem*, § 15.

376. OECD (2000), *Mexico, Phase 1 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.24, available at www.oecd.org, accessed 28 October 2019: "Thus a legal person cannot be criminally sanctioned where the natural person who committed the bribery offence cannot be convicted. This raises doubts whether the standard of effective, proportionate and dissuasive sanctions has been met."; OECD (2018), *Mexico, Phase 4 Report on Implementing the OECD Anti-Bribery Convention*, available at www.oecd.org, accessed 28 November 2018, p.41 (finding that with regards to the autonomous criminal liability of legal persons, the previous recommendation "appears to have been fully implemented"); OECD (2001), *Poland, Phase 1 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, available www.oecd.org, accessed 28 October 2019: "The Working Group is concerned about certain features of this approach as explained in the review report, in particular the requirement, in most cases, of a prior conviction of the natural person [...]."

377. OECD/ACN, *idem*, p.28.

378. Emphasis by author; similar Art. 26 para. 3 UNCAC.

has committed, organised, instigated or assisted in commission of the criminal act.”³⁷⁹ Where this is not the case, upper courts have confirmed this principle.³⁸⁰

Paragraph 2

In some cases, the sanctioning of the legal person and the natural person offender need to be coordinated to some extent. This is necessary where the natural person fully or partially owns the legal person. In this case, the fine against the legal person punishes their owners already: they either have to provide the necessary liquidity to the legal person for paying the fine, or the value of their shares diminishes corresponding to the losses incurred by the fine. Therefore, for example, German courts of appeal have held that two different proceedings against a legal person and against its representatives are not violating the principle of *ne bis in idem*.³⁸¹ The proceeding against the natural person can follow the proceeding against the legal person. However, for determining the sanction against the natural person it has to be taken into account whether the natural person (for example, as shareholder) has already suffered an economic loss through the sanction against the legal person.³⁸² Paragraph 2 sets out this coordination of sanctions.

Paragraph 3

This paragraph addresses a problem frequently found in practice, but rarely if ever regulated by law: several connected legal persons being involved in a corruption offence. Again, this raises the question whether a sanction against one legal entity bars proceedings against the other legal entities of the conglomerate. In principle, separate legal entities are all separately liable for any involvement in a corruption scheme. For example, where two legal persons horizontally connected to a trust are involved in a bribery scheme, nothing stands in the way of sanctioning both legal persons. The situation might look different, where a holding company and its subsidiaries participated in a bribery case. Any fine to the subsidiary will hurt the holding company already economically, as it will receive equivalently lesser revenue from the subsidiary. The European Court of Justice thus held in 2015, “that, in a situation where the liability of a parent company is purely derivative of that of its subsidiary and in which no other factor individually reflects the conduct for which the parent company is held liable, the liability of that parent company cannot exceed that of its subsidiary.”³⁸³

Paragraph 3 only focuses on financial sanctions – other sanctions of publication of judgement or a procurement ban can apply to all legal entities involved.

Paragraph 3 can also have an international dimension. For example, the Director of the U.K.’s Serious Fraud Office said in an interview that the U.K. would not pursue charges against a legal person because the company had already been prosecuted in the United States: “Our law does not allow someone to be prosecuted here in relation to a set of facts if that person has been in jeopardy of a conviction in relation to those facts in another jurisdiction.”³⁸⁴ However, it should be pointed out that the prohibition on international double punishment is anything but a clear and uniform practice, and very concept of double punishment may not have an identical meaning among all the signatories to the OECD Anti-Bribery Convention.³⁸⁵ For instance, in the Siemens case, several jurisdictions pursued the company for conduct in cases, that in part, overlapped between Germany, Italy, Nigeria, and the United States.³⁸⁶

8.2.5. Article 13 – Privilege against self-incrimination

[*Natural person*] Natural persons representing the legal person as defendant have the right to remain silent if their testimony would incriminate themselves.

The European Convention on Human Rights does not contain an explicit right to remain silent. Even though, the European Court of Human Rights has held that “there can be no doubt that the right to remain silent under

379. Lithuania, Law no. VIII-1968 (*Criminal Code*), available at www3.lrs.lt, accessed 28 October 2019.

380. See for example Estonia, Ginter J., *Criminal Liability of Legal Persons in Estonia*, Juridical International XVI/2009, 151 (155), available at <http://www.juridicainternational.eu>, accessed 28 October 2019, citing a Decision of the Civil Law Chamber of the Supreme Court (CLCSCd) 3-1-1-7-04.

381. Court of Appeal Hamm, decision 5 Ss OWi 19/73 of 27 April 1973 (not available online).

382. Court of Appeal Frankfurt am Main, *decision no. 1 Ss 63/11 of 25 January 2012*, available at <http://openjur.de>, accessed 31 January 2016.

383. ECJ, Judgment of 17 September 2015, *C 597/13 P*, available at <http://curia.europa.eu> accessed 31 January 2016.

384. Dunn C. (12 March 2012), *Double Jeopardy and the New World of Antibribery Laws*, Corporate Counsel, p.7, available at www.immagic.com, accessed 28 October 2019.

385. *Idem*.

386. Anyango Oduor J. and others (2013), *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, p.61.

police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure.³⁸⁷ Article 13 is a reflection of this right.

However, for investigations against natural persons, the right to remain silent can pose quite an obstacle for investigators, as, in many instances, they will not fully know the facts and motivations in certain cases without a confession by the accused. For legal persons, however, the obstacles can be even bigger. Investigators often only know that somebody from within a legal person bribed a public official, but may not know who was involved and how the bribes were carried out, particularly if the legal person has many subsidiaries and thousands of employees. If the legal person has the right to remain silent, the investigator will not know in which of the million company documents to look for traces of the offence, and with which of the many thousand employees to start the questioning (let alone the fact that he/she would not know most names and addresses of the employees).

There is no international standard on this question. The anti-corruption conventions are silent on this issue, as are most publications. The fact that natural persons have the right to remain silent does not mean that this automatically applies to legal persons as well: not all of the Convention's Articles confer rights to legal persons. The Court adheres to a practical operation in this matter and evaluates per provision whether it can attribute any rights to corporations.³⁸⁸ As far as can be seen, the ECtHR has not yet had to deal with the question whether the right to remain silent applies to legal persons.³⁸⁹ Some scholars have pointed out that the Court applies all other fair trial rights to individuals and legal persons. Therefore, they argue, the Court will most probably also apply the right to freedom from self-incrimination equally to natural and legal persons to the extent possible.³⁹⁰

In some jurisdictions, the right to remain silent is considered to have a strongly personal component, as the German Constitutional Court underlined: "The protection from self-incrimination is in the interest of human dignity. An obligation to self-incriminate would lead an individual into an unbearable personal dilemma. Legal persons would not be able to experience such a dilemma."³⁹¹ Therefore, the German Constitutional Court excludes legal persons from the right to remain silent. As for jurisprudence outside of Europe, it should be noted that the United States Supreme Court held already in 1906 that a corporation does not enjoy the Fifth Amendment privilege against self-incrimination because of the personal nature of the right.³⁹²

However, a number of countries and courts take a different stance. From this fact alone, it cannot be excluded that a national provision in line with Article 13 of this toolkit could be found to violate Article 6 ECHR. For example, the European Court of Justice has ruled that: "in general, the laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings." However, the Court held "the need to safeguard the rights of the defence [...] to be a fundamental principle of the Community legal order". Thus, the state must "not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove."³⁹³ The ruling only has a legal effect on the implementation of European Union law, and does not as such have a general effect on the domestic law of EU Member States. As far as country examples are concerned, Austria³⁹⁴ and Poland enshrine the right to remain silent in their laws: "The court may question the representative of the collective entity in the capacity of a witness. The person may refuse giving explanations."³⁹⁵

387. ECHR, *John Murray v. the United Kingdom*, Application no. 18731/91, Judgment of 8 February 1996, para. 45, available at <http://hudoc.echr.coe.int>, accessed 28 October 2019.

388. Van den Muijsenbergh W./Rezai S. (2012), *Corporations and the European Convention on Human Rights*, Global Business & Development Law Journal, Vol. 25, p. 48, available at <http://digitalcommons.mcgeorge.edu>, accessed 31 January 2016.

389. Van Kempen P. (2010), *Human Rights and Criminal Justice Applied to Legal Persons. Protection and Liability of Private and Public Juristic Entities under the ICCPR, ECHR, ACHR and AfChHPR*, Electronic Journal of Comparative Law, vol. 14.3 (December 2010), p. 16, available at www.ejcl.org, accessed 28 October 2019.

390. Van Kempen, idem; Van den Muijsenbergh, idem, 49.

391. German Constitutional Court, *decision no. 1 BvR 2172/96 of 26 February 1997*, available at www.servat.unibe.ch (German), accessed 28 October 2019.

392. *Hale v. Henkel*, 201 U.S. 43, 75-76 (1906), available at <http://caselaw.findlaw.com>, accessed 31 January 2016: "The amendment is limited to a person who shall be compelled in any criminal case to be a witness against himself; and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. [...] Indeed, so strict is the rule that the privilege is a personal one that it has been held in some cases that counsel will not be allowed to make the objection."; see on this also: Brodowski D. and others (2014), *Regulating Corporate Criminal Liability*, p. 200.

393. European Court of Justice, *Orkem v Commission of the European Communities, Case 374/87, Judgment of 18 October 1989*, available at <http://eur-lex.europa.eu>, accessed 28 October 2019.

394. § 17 Federal Law on the Responsibility of Legal Persons for Criminal Offences of 2005, idem.

395. Article 21a para. 1 *Act of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty*, available at www.oecd.org (English), accessed 28 October 2019.

In view of the lack of a clear international guidance on the right of legal persons to remain silent, this legal toolkit does not take a specific stance on this issue; lawmakers of any country will have to decide for themselves which stance to take.

The practical value of this question is rather limited. In practice, a legal person hardly ever has an interest in remaining silent. In most cases involving otherwise legitimate business, the legal person will want to avoid fines and other damage to its reputation, and it will want to be seen as cooperative and supporting integrity. At the same time, prosecutors will encourage the legal person to cooperate, as they often do not have the resources for investigating large companies and trawling through countless pieces of evidence.

8.2.6. Article 14 – Preliminary measures

(1) [Court order] The competent court can order on proposal of the competent authorities one of the following measures for a set maximum period of time, if there are grounds to assume that the legal person is liable under Article 2, 3, and 4 and that without these measures the investigation and the implementation of sanctions would not be secured:

- ▶ (a) [Ban on liquidation] Banning the initiation or, as the case may be, suspension of the procedure to dissolve the legal person or liquidate it;
- ▶ (b) [Ban on transformation] Suspension of the legal person's merger, transformation, or demerger, or reduction in nominal capital, that began prior to the criminal investigation or during it;
- ▶ (c) [Ban on asset disposal] Banning asset disposal operations that are likely to diminish the legal person's assets or cause its insolvency;

(2) [Preliminary bail] Posting bail is foreseen as follows, with provisions on bail for natural persons applying analogously:

- ▶ (a) Bail is ordered by the court upon request of the legal person under investigation or the investigating authority;
- ▶ (b) The bail is calculated by the expected fine and procedural costs;
- ▶ (c) Once bail is posted, measures under paragraph 1 are inapplicable.

Paragraph 1

Once a legal person is subject to a corruption investigation, a "smart" owner might try to move all financial assets away from the legal person. As a consequence, the legal person will be unable to pay the fine, and its owner will have avoided or reduced the economic effect of the sanction. Even big international corporations have tried such tactics in the past.³⁹⁶ Advanced and detailed national laws therefore often contain provisions enabling prosecutors to prevent the financial resources of a legal person moving out of reach.

Paragraphs 1a to 1c all relate to different forms of hiding financial assets. At first sight, paragraph 1b might appear as being an unnecessary duplication of Article 7 paragraph 1 (legal succession in case of reorganisation). The latter ensures that the liability will continue with the new legal person. However, this legal transfer will not always suffice for ensuring the collection of a fine. For example, a domestic legal person might transform into a foreign legal person in an offshore jurisdiction where it is hard to reach for enforcing sanctions. Paragraph 1 is modelled after the Austrian³⁹⁷ and Romanian³⁹⁸ law, which both foresee preliminary measures in order to secure the collection of fines.

Paragraph 2

Measures under paragraph 1 limit the freedom of legal persons and their owners while an investigation is pending. Preliminary measures must not be disproportional. Furthermore, one needs to keep in mind that the legal person is presumed innocent until proven guilty. It is thus only fair to grant the legal person an opportunity to provide the state with a security for the financial sanction in exchange for avoiding or lifting the measures under paragraph 1.

Paragraph 2 is largely modelled after the Romanian Criminal Code, though the Romanian Criminal Code foresees posting of bail only by court order, rather than upon request of the legal person.³⁹⁹ Furthermore, posting bail does not suspend or lift the preliminary measures imposed on the legal person which could amount to

396. German Federal Anti-Trust Agency, press release of 11 February 2014, *idem*.

397. Article 20 Federal Law on the Responsibility of Legal Persons for Criminal Offences of 2005, *idem*.

398. Article 493 subsection 1 Criminal Code, *idem*.

399. Article 493 subsection 2 Criminal Code, *idem*.

a disproportionate burden upon the legal person. One might also think about preliminary measures in the context of securing evidence. For example, any liquidation or transformation of a legal person could also be relevant for impeding access to written evidence, as documents might disappear in the process of reorganisation. However, the availability of evidence is usually protected under regulations setting minimum periods for archiving company documents and under criminal sanctions against obstruction of justice.⁴⁰⁰

8.2.7. Article 15 – Legal succession

In case a legal person merges, transforms, or demergers during the proceedings, procedural acts concerning the previous legal person will continue to have legal effect concerning the legal person(s) resulting from the reorganisation.

As legal persons have the ability to change their legal personality in a way natural persons simply do not have, Article 15 is necessary for to ensure continuity in such situations. Owners of legal persons can change through merger (two corporations forming a new one), transformation (a limited partnership transforming into a corporation), or demerger (one corporation splitting into two), as discussed above in Article 7. In principle, it should be clear that procedural acts against a predecessor continue to be effective against a legal successor. However, in order to avoid any ambiguity, Article 15 stipulates that procedural acts such as service of court documents or questionings will take effect against legal successors as well. In the absence of such a provision, any legal reorganisation of a legal person would necessitate a restart of the complete proceedings.

Article 15 is modelled after section 10 of the Austrian Law on the Liability of Legal Persons for Criminal Offences. All of the mentioned legal successions pose a particular risk if the change in personality happens transnationally. Prosecutors run the risk that domestic criminal law will not continue to apply, and that the (new) legal person may be out of reach for enforcement, if, for instance, it changes its residence to an offshore location.

8.2.8. Article 16 – International cooperation

Rules on mutual legal assistance applicable to cases against natural persons will apply *mutatis mutandis* to cases against legal persons, notwithstanding whether the other state party foresees liability of legal persons.

Article 16 is an expression of the obligation for international cooperation to the widest extent possible as defined under the Council of Europe Criminal Law Convention on Corruption (Article 25) and the UNCAC (Chapter IV). Nonetheless, Article 16 is necessary for two reasons: First, it clarifies that international cooperation concerns both the offence and the offender, in this case the a legal person . Secondly, it is important where countries opt for administrative sanctions, especially as measures of mutual legal assistance might not be available for administrative procedures to the same extent as they are for criminal offences. In this case, Article 16 would ensure that the administrative liability of the legal person for the (criminal) offence is part of the international cooperation under the criminal framework. For example, in Germany, the Act on International Cooperation in Criminal Matters applies also to the administrative liability of legal persons.⁴⁰¹ However, mutual legal assistance will be limited to the means of evidence available under German law on administrative offence and will thus not extend for example to special investigative means, which are available only for certain crimes.

The OECD Working Group has recommended in numerous instances that countries should “ensure that a broad range of MLA, including search and seizure, and the tracing, seizure, and confiscation of proceeds of crime, can be provided in foreign bribery-related civil or administrative proceedings against a legal person to a foreign state whose legal system does not allow **criminal** liability of legal persons”⁴⁰².

8.2.9. Article 17 – Application of procedural law

In all other respects, administrative/criminal procedural provisions apply to legal persons insofar as they are not exclusively applicable to natural persons.

Article 17 is the mirror provision on a procedural level to what Article 9 (application of general substantive law). There are numerous provisions in procedural law which apply to legal persons equally as they do to natural

400. Article 25 UNCAC.

401. Section 1 paragraph 2 : “Criminal matters under this Act shall include proceedings resulting from an offence which under German law would constitute a regulatory offence sanctionable by a fine or which pursuant to foreign law is subject to a similar sanction, provided that a court of criminal jurisdiction determines the sentence.” *Act on International Cooperation in Criminal Matters* of 1982, available at www.gesetze-im-internet.de, accessed 28 October 2019.

402. OECD Australia, *idem*, p.13; OECD Belgium, *idem*, p.24: It is recommended “that Belgium can provide prompt and effective MLA to States whose legal systems do not have criminal liability for legal persons”.

persons. For example, most criminal procedure codes grant the defendant the last word in a trial. This provision naturally applies to legal persons as well, with its legal representative having the opportunity to address the court before it retires for deliberation. Some provisions obviously apply only to **natural persons** by virtue of their physical being, such as arrest, blood test, or DNA-analysis.

In most countries, special investigative means are available also for investigating liability of legal persons.⁴⁰³ Where special investigation means were not available, the OECD Working Group has made recommendations to introduce them for legal persons as well.⁴⁰⁴ This is necessary as often there is no concrete natural person identified as a suspect against whom the special investigative means can be directed, or the natural person is not within reach of domestic special investigative means.

Similar to Article 9, any procedural privileges for legal persons need to be taken with caution. For example, some countries contain exemptions for the prosecution of legal persons. The OECD Working Group has continuously been critical of such exemptions. For example, in the case of Slovenia, the Working Group recommended that “a legal person cannot be exempted from prosecution because of its ‘insignificant’ level of participation in the commission of the criminal offence”.⁴⁰⁵

There are other procedural issues involving legal persons, such as how a legal person is summoned or the procedural sequencing between the two defendants in a joint trial of a natural and legal person. Usually, issues such as non-prosecution and plea agreements should follow pre-existing procedural law. In any case, they are not part of this toolkit as they largely depend on the procedural particularities of any given country.

403. OECD/can, idem, p. 29.

404. OECD Bulgaria, idem, p. 34: It is recommended that “the full range of investigative tools in the Criminal Procedure Code is available in” investigations of legal persons. See also OECD, Bulgaria (May 2013), *Follow-Up to the Phase 3 Report & Recommendations*, pp. 10-12, accessed 28 October 2019, finding that the full range of criminal procedure code investigative tools are available in relation to legal persons.

405. OECD (June 2014), *Slovenia: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 2a, available at www.oecd.org, accessed 28 October 2019. See also OECD (July 2016), Slovenia: *Follow-Up to the Phase 3 Report & Recommendations*, available at www.oecd.org, accessed 28 October 2019, pp. 10-12.

9. Annex

9.1. International conventions

All Conventions with a European or global reach include liability of legal persons as an explicit mandatory standard. Only the Conventions of the African Union and the Organisation of American States do not pick up on this issue. It is worth also noting that Conventions outside the realm of corruption establish liability of legal persons, such as:

- ▶ the “Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism”⁴⁰⁶ of 2005;
- ▶ the “Council of Europe Convention on the Counterfeiting of Medical Products and Similar Crimes involving Threats to Public Health”⁴⁰⁷ of 2011; or
- ▶ the “United Nations Convention against Transnational Organized Crime”⁴⁰⁸ of 2000.

One should also mention that the Model Criminal Code developed by several international organisations also contains a provision on the liability of legal persons (Article 19).⁴⁰⁹ This provision is based on Article 10 of the previously mentioned “Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism”⁴¹⁰

9.1.1. EU Second Protocol

The two Conventions by the European Union on corruption⁴¹¹ themselves do not make explicit reference to the liability of legal persons. However, the Convention on the protection of the European Communities’ Financial Interests is complemented by a Protocol:⁴¹²

Article 1. Definitions

For the purposes of this Protocol: [...]

(d) ‘legal person` shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organizations; [...]

Article 3. Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for fraud, active corruption and money laundering committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on

- a power of representation of the legal person, or
- an authority to take decisions on behalf of the legal person, or
- an authority to exercise control within the legal person,

as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud.

406. <http://conventions.coe.int/Treaty/EN/Treaties/Html/198.htm>, accessed 28 October 2019.

407. www.conventions.coe.int/Treaty/EN/Treaties/Html/211.htm, accessed 28 October 2019.

408. www.unodc.org/unodc/treaties/CTOC/index.html#Fulltext, accessed 28 October 2019.

409. ICHR/OHCHR/UNODC (2007), *Model Criminal Code*, www.usip.org, accessed 28 October 2019.

410. Section 8 *Model Criminal Code*, idem.

411. *Convention on the protection of the European Communities’ financial interests* (1995), <http://eur-lex.europa.eu>, accessed 28 October 2019; *Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union* (1997), <http://eur-lex.europa.eu>, accessed 28 October 2019.

412. *Second Protocol, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the Protection of the European Communities’ Financial Interests – Joint Declaration on Article 13 (2) – Commission Declaration on Article 7*, <http://eur-lex.europa.eu>, accessed 28 October 2019.

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of a fraud or an act of active corruption or money laundering for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money laundering.

Article 4. Sanctions for legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3 (1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:

- (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.

2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3 (2) is punishable by effective, proportionate and dissuasive sanctions or measures.

9.1.2. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

The OECD Anti-Bribery Convention (“Convention on Combating Bribery of Foreign Public Officials in International Business Transactions”), signed on 17 December 1997, came into force on 15 February 1999.⁴¹³

Article 2. Responsibility of Legal Persons

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

9.1.3. Council of Europe Criminal Law Convention on Corruption

Council of Europe Criminal Law Convention on Corruption of 1999:⁴¹⁴

Article 18. Corporate liability

1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- a power of representation of the legal person; or
- an authority to take decisions on behalf of the legal person; or
- an authority to exercise control within the legal person;

as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences.

2. Apart from the cases already provided for in paragraph 1, each Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offences mentioned in paragraph 1.

413. <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>, accessed 28 October 2019.

414. <http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm>, accessed 28 October 2019.

Article 1

d “legal person” shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations.

Article 19. Sanctions and measures

1. Having regard to the serious nature of the criminal offences established in accordance with this Convention, each Party shall provide, in respect of those criminal offences established in accordance with Articles 2 to 14, effective, proportionate and dissuasive sanctions and measures, including, when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition.

2. Each Party shall ensure that legal persons held liable in accordance with Article 18, paragraphs 1 and 2, shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

[Note: the Council of Europe Civil Law Convention ETS 174 does not include a passage on the liability of legal persons as civil liability is already standard and is dealt with by the Criminal Law Convention.]

9.1.4. United Nations Convention against Corruption

The United Nations Convention against Corruption, adopted by the General Assembly by resolution 58/4 of 31 October 2003, entered into force on 14 December 2005.⁴¹⁵

Article 26. Liability of legal persons

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.

2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

9.1.5. Other regional provisions

Both, the “Inter-American Convention against Corruption of the Organization of American States” of 1996⁴¹⁶ and the “African Union African Convention on Preventing and Combating Corruption”⁴¹⁷ of 2003 make no explicit reference to the liability of legal persons. In June 2014, the AU Assembly of Heads of State adopted the “Malabo Protocol” on “Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.” This extends the jurisdiction of the yet to be established African Court of Justice and Human Rights, which would have jurisdiction over corruption and money laundering offences among others. The Malabo Protocol includes a provision on corporate criminal liability.

Article 46C. Corporate Criminal Liability

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.

2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.

3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.

4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.

415. <http://www.unodc.org/unodc/en/treaties/CAC/>, accessed 28 October 2019.

416. <http://www.oas.org/juridico/english/Treaties/b-58.html>, accessed 28 October 2019

417. <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>, accessed 28 October 2019.

5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.

6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.

The "Arab Convention to Fight Corruption"⁴¹⁸ was signed on 21 December 2010 and includes a provision on the liability of legal persons.

Article 5. Liability of legal persons

Each State Party shall adopt the necessary measures, in accordance with its domestic legislation, to determine the criminal, civil or administrative liability of any legal person for the offences stipulated in the present Convention, without prejudice to the criminal liability of physical persons.

9.2. Non-convention standards

9.2.1. Council of Europe Resolution (97) 24

Resolution (97) 24 On The Twenty Guiding Principles For The Fight Against Corruption, adopted by the Committee of Ministers on 6 November 1997 at the 101st session of the Committee of Ministers, refers to the following action:

[...] 5. to provide appropriate measures to prevent legal persons being used to shield corruption offences; [...]

9.2.2. Council of Europe Recommendation R (88) 18

Council of Europe Committee of Ministers Recommendation No. R (88) 18 of the Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of their Activities, adopted by the Committee of Ministers on 20 October 1988 at the 420th Meeting Of The Ministers' Deputies, refers to the following:

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe, [...]

Recommends that the governments of member states be guided in their law and practice by the principles set out in the appendix to this recommendation.

1. When this recommendation was adopted, the Representatives of the Federal Republic of Germany and of Greece, in application of Article 10.2.c of the Rules of Procedure for the meetings of the Ministers' Deputies, reserved the right of their Governments to comply with it or not.

Appendix to Recommendation No. R (88) 18

The following recommendations are designed to promote measures for rendering enterprises liable for offences committed in the exercise of their activities, beyond existing regimes of civil liability of enterprises to which these recommendations do not apply.

They apply to enterprises, whether private or public, provided they have legal personality and to the extent that they pursue economic activities.

I. Liability

1. Enterprises should be able to be made liable for offences committed in the exercise of their activities, even where the offence is alien to the purposes of the enterprise.

2. The enterprise should be so liable, whether a natural person who committed the acts or omissions constituting the offence can be identified or not.

3. To render enterprises liable, consideration should be given in particular to:

- a. applying criminal liability and sanctions to enterprises, where the nature of the offence, the degree of fault on the part of the enterprise, the consequences for society and the need to prevent further offences so require;

418. <http://star.worldbank.org/star/sites/star/files/Arab-Convention-Against-Corruption.pdf>, accessed 28 October 2019.

- b. applying other systems of liability and sanctions, for instance those imposed by administrative authorities and subject to judicial control, in particular for illicit behaviour which does not require treating the offender as a criminal.

4. The enterprise should be exonerated from liability where its management is not implicated in the offence and has taken all the necessary steps to prevent its commission.

5. The imposition of liability upon the enterprise should not exonerate from liability a natural person implicated in the offence. In particular, persons performing managerial functions should be made liable for breaches of duties which conduce to the commission of an offence.

II. Sanctions

6. In providing for the appropriate sanctions which might be imposed against enterprises, special attention should be paid to objectives other than punishment such as the prevention of further offences and the reparation of damage suffered by victims of the offence.

7. Consideration should be given to the introduction of sanctions and measures particularly suited to apply to enterprises. These may include the following:

- warning, reprimand, recognisance;
- a decision declaratory of responsibility, but no sanction;
- fine or other pecuniary sanction;
- confiscation of property which was used in the commission of the offence or represents the gains derived from the illegal activity;
- prohibition of certain activities, in particular exclusion from doing business with public authorities;
- exclusion from fiscal advantages and subsidies;
- prohibition upon advertising goods or services;
- annulment of licences;
- removal of managers;
- appointment of a provisional caretaker management by the judicial authority;
- closure of the enterprise;
- winding-up of the enterprise;
- compensation and/or restitution to the victim;
- restoration of the former state;
- publication of the decision imposing a sanction or measure.

These sanctions and measures may be taken alone or in combination, with or without suspensive effect, as main or as subsidiary orders.

8. 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, to be assessed, where necessary, by estimation.

9. 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.

10. 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 the establishment of a register in which all such sanctions or measures are recorded.

9.2.3. EU Framework Decision 2003/568/JHA

The Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector,⁴¹⁹ has almost the same wording as the Second Protocol to the EU Convention (see above at 9.1.3); the only difference is that the Second Protocol makes explicit reference to “accessories or instigators” at the end of its paragraph 1:

⁴¹⁹ <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32003F0568>, accessed 28 October 2019.

Article 1. Definitions

For the purposes of this Framework Decision:

- “legal person” means any entity having such status under the applicable national law, except for States or other public bodies acting in the exercise of State authority and for public international organisations, [...]

Article 5. Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for offences referred to in Articles 2 and 3 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- (a) a power of representation of the legal person;
- (b) an authority to take decisions on behalf of the legal person; or
- (c) an authority to exercise control within the legal person.

2. Apart from the cases provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of an offence of the type referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are involved as perpetrators, instigators or accessories in an offence of the type referred to in Articles 2 and 3.

Article 6. Penalties for legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(1) is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties such as:

- (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; or
- (d) a judicial winding-up order.

2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(2) is punishable by penalties or measures which are effective, proportionate and dissuasive.

9.2.4. EU Directive 2018/1673 on combating money laundering by criminal law

The EU Directive of 23 October 2018 on combating money laundering by criminal law specifies corruption to be a predicate offence to money laundering, and includes specific provisions on the liability of legal persons. Member States of the EU must ensure that their national laws meet these provisions by December 2020.

Article 7. Liability of legal persons

1. Member States shall take the necessary measures to ensure that legal persons can be held liable for any of the offences referred to in Article 3(1) and (5) and Article 4 committed for their benefit by any person, acting either individually or as part of an organ of the legal person and having a leading position within the legal person, based on any of the following:

- (a) a power of representation of the legal person;
- (b) an authority to take decisions on behalf of the legal person; or
- (c) an authority to exercise control within the legal person.

2. Member States shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 of this Article has made possible the commission of any of the offences referred to in Article 3(1) and (5) and Article 4 for the benefit of that legal person by a person under its authority.

3. Liability of legal persons under paragraphs 1 and 2 of this Article shall not preclude criminal proceedings from being brought against natural persons who are perpetrators, inciters or accessories in any of the offences referred to in Article 3(1) and (5) and Article 4.

Article 8. *Sanctions for legal persons*

Member States shall take the necessary measures to ensure that a legal person held liable pursuant to Article 7 is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions, such as:

- (a) exclusion from entitlement to public benefits or aid;
- (b) temporary or permanent exclusion from access to public funding, including tender procedures, grants and concessions;
- (c) temporary or permanent disqualification from the practice of commercial activities;
- (d) placing under judicial supervision;
- (e) a judicial winding-up order;
- (f) temporary or permanent closure of establishments which have been used for committing the offence.

This publication presents an overview of international standards and comparative practices in establishing and enforcing liability of legal persons for corruption offenses. Its aim is at assisting jurisdictions that are considering introducing or revising their corporate liability regimes to do so in line with the latest trends in the field.

The Economic Crime and Cooperation Division (ECCD) at the Directorate General Human Rights and Rule of Law of the Council of Europe is responsible for designing and implementing technical assistance and co-operation programmes aimed at facilitating and supporting anti-corruption, good governance and anti-money laundering reforms in the Council of Europe member states, as well as in some non-member states.

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