

**OECD Anti-Corruption Network  
for Eastern Europe and Central Asia**

# **Liability of Legal Persons for Corruption in Eastern Europe and Central Asia**



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## **About the Anti-Corruption Network for Eastern Europe and Central Asia**

Established in 1998, the main objective of the Anti-Corruption Network for Eastern Europe and Central Asia (ACN) is to support its member countries in their efforts to prevent and fight corruption. It provides a regional forum for the promotion of anti-corruption activities, the exchange of information, elaboration of best practices and donor coordination via regional meetings and seminars, peer-learning programmes, and thematic projects. ACN also serves as the home for the Istanbul Anti-Corruption Action Plan. Find out more at [www.oecd.org/corruption/acn/](http://www.oecd.org/corruption/acn/).

## **About the thematic studies on Criminalisation of corruption and law-enforcement in Eastern Europe and Central Asia**

The ACN Work Programme for 2013-2015 included a thematic cross-country study (review) on the criminalisation of corruption and effective law enforcement. The first topic selected for the thematic study was the liability of legal persons for corruption. Other thematic studies will concern foreign bribery and international co-operation in corruption cases. The objectives of the studies are (1) to analyse the state of play in the relevant area, in order to identify common problems and best practices (in particular, by using case studies from selected countries) and to develop regional recommendations; and (2) to identify capacity-building and training needs for the law enforcement authorities and the judiciary.

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## Foreword

This cross-country report analyses the legislation on liability of legal persons for corruption and its enforcement in Eastern Europe and Central Asia. While the report focuses on twenty five countries participating in the Anti-Corruption Network for Eastern Europe and Central Asia (ACN), it also includes examples from OECD countries. The report is based on data provided by the ACN governments in the form of questionnaires. It also reflects the discussions and examples of good practiced that were presented during the meetings of the ACN law-enforcement network in 2014. Additional research was conducted to enrich the report with the data for the OECD countries. The majority of the report was prepared in 2014.

The purpose of this report is to review trends in introducing and enforcing liability of legal persons for corruption, and to highlight national practices that may be promoted as good practice. It serves as a valuable reference point for legal reforms and reviews in this region, as well as for other parts of the world.

The report is prepared as part of the OECD Anti-Corruption Network for Eastern Europe and Central Asia Work Programme for 2013–2015. It is one of three cross-country studies within the programme: prevention of corruption in the public sector, law enforcement and criminalisation of corruption, and business integrity.



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## Acronyms

ACN	OECD Anti-Corruption Network for Eastern Europe and Central Asia
FATF	OECD Financial Action Task Force
GRECO	Group of States against Corruption
IAP	Istanbul Anti-Corruption Action Plan
LAOS	Law on Administrative Offences and Sanctions of Bulgaria
MLA	Mutual Legal Assistance
OECD	Organisation for Economic Co-operation and Development
UNCAC	United Nations Convention against Corruption
WGB	OECD Working Group on Bribery in International Business Transactions



## About the thematic study

Criminal prosecution is the key tool for tackling corruption. While preventing corruption has become an important focus in international and national policy-making, criminal prosecution remains essential for curbing corruption. The mere existence of effective criminal law instruments to detect, investigate, prosecute and adjudicate corruption-related offences serves as powerful deterrent to malfeasance. But ensuring that criminal sanctions will be imposed on violators is a crucial element of anti-corruption policy for any country determined to combat corruption.

Many issues related to criminal law responses to corruption have been well studied at the national and international level. However, there are certain areas that pose problems for policy-makers, law enforcement practitioners, judges, academics and other stakeholders. By adhering to various international anti-corruption instruments (*e.g.* UNCAC, Council of Europe conventions, OECD Anti-Corruption Convention), the countries of Eastern Europe and Central Asia have committed themselves to introduce in their law and practice a number of corruption-related offences and legal frameworks needed to investigate and prosecute corruption.

The countries in the region have made numerous reforms related to the criminalisation of corruption, but conservative legal traditions and practical difficulties often impede full compliance and effective enforcement. In many cases, offences introduced in the law are not enforced for various reasons such as the lack of political will, insufficient guidance and training, and poor resources. In addition, corruption schemes are becoming more sophisticated and often involve commission of criminal acts in multiple jurisdictions. This makes practical enforcement of criminal legislation more challenging for law enforcement and prosecution agencies.

On 10 December 2012, ministers, heads of anti-corruption agencies and other high-level officials from the member countries of the Anti-Corruption Network for Eastern Europe and Central Asia (“ACN”) adopted a Statement at the High-Level Meeting on “Reinforcing Political Will to Fight Corruption in Eastern Europe and Central Asia”. In this Statement, they committed, among other items, to:

- “Bring anti-corruption legislation in full compliance with international standards to equip [their] law enforcement systems with modern legislation necessary for the effective fight against the corruption crimes;”
- “Build capacity of law enforcement and criminal justice bodies to detect, investigate and prosecute corruption using modern investigative means such as financial investigations [...]”;
- “Enforce anti-corruption legislation and ensure that corrupt behaviour is punished with effective, proportionate and dissuasive sanctions without any regard to the political, economic or social standing of persons committing those crimes”; and
- “Strengthen integrity of the judiciary and build capacity of courts to adjudicate corruption crimes without bias and using modern anti-corruption legislation.”<sup>1</sup>

Responding to these policy decisions, the ACN Steering Group at its meeting on 11 December 2012 adopted the new ACN Work Programme for 2013-2015,<sup>2</sup> which included a thematic cross-country study (review) on the criminalisation of corruption and effective law enforcement.

The first topic selected for thematic study is the liability of legal persons for corruption. Future thematic studies will concern foreign bribery and international co-operation in corruption cases.

The objectives of this study are (1) to analyse the state of play in the relevant area, in order to identify common problems and best practices (by using case studies from selected countries) and develop regional recommendations; and (2) to identify capacity-building and training needs for the law enforcement authorities and judiciary.

This study was prepared by Mr. Margus Kurm (OECD consultant, Estonia) and co-ordinated by Mr. Dmytro Kotlyar (OECD/ACN Secretariat). The study was reviewed and edited by Mr. Brooks Hickman (Anti-Corruption Division, OECD). The study is based on desk research of public materials and information provided by the ACN governments, in particular responses to the thematic questionnaire and follow-up questions. In order to verify the information and validate the findings, the draft study was presented to the Advisory Group (composed of representatives from selected governments on a voluntary basis) in September 2014 and was discussed during a meeting of the OECD/ACN Law Enforcement Network held on 10-11 December 2014 in Paris. The study was finalised on the basis of these discussions and after taking into account the final round of comments from the ACN countries between January and March 2015. At the ACN plenary meeting in March 2015, the study was approved for publication under the authority of the OECD.

The findings of the study indicate areas where the expertise and capacity of both public officials and institutions need to be strengthened. Depending on available funds, technical peer-learning seminars may be organised to provide training to law enforcement practitioners, judges, policy-makers and to promote the use of best practices on selected topics.

## Introduction

Today's economy, both at the national and international level, is mainly driven by legal persons. It is not self-employed entrepreneurs, but mostly commercial entities that compete for public procurement contracts, apply for different licences and contest government authorities' regulations or determinations in various supervision procedures. Large corporations, often having global operations, typically dominate transportation, construction, telecommunication, mining, energy, production of chemicals, and many other sectors of the economy. Therefore, it is a reality that high-level corruption in most cases serves the interests of legal persons. In such a world, it is not adequate for the criminal law to only reach the wrongdoing of natural persons. Punishing only natural persons, even the top managers of a legal entity, is not a sufficient deterrent for corporations willing to break the rules. Furthermore, complex governance structures and collective decision-making processes in corporate entities make it difficult to uncover and prosecute such offences. Perpetrators and instigators can hide behind the corporate veil to evade liability.

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

- Article 3 of the Second Protocol to the EU Convention on the Protection of the Financial Interests of the European Communities (1997)<sup>3</sup>;
- Articles 2 and 3 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)<sup>4</sup>;
- Article 18 of the Council of Europe Criminal Law Convention on Corruption (1999)<sup>5</sup>;
- Article 26 of the United Nations Convention against Corruption (2003)<sup>6</sup>.

*See Annex 1 for provisions on corporate liability in these international instruments.*

# 1. Criminal versus administrative liability

## 1.1. Terminological and historical background

### *Clarification of terms*

The term “administrative liability” can be used in two senses. It can indicate punitive liability for administrative offences, but it also refers to administrative sanctions which can be applied in addition to criminal punishment (such as debarment from public procurement, etc.). This chapter considers the first meaning of administrative punitive liability. Issues concerning the second meaning of additional non-punitive sanctions will be discussed in Section 5.1.4 below.

The concept of administrative punitive liability first evolved in German law, which at the beginning of 20<sup>th</sup> century started to develop a clear theoretical distinction between crimes (*Straftaten*) and administrative offences (*Ordnungswidrigkeiten*). Under this approach, crimes are considered to be attacks against the fundamental values of society, while administrative offences are morally more neutral as they are seen as acts that contravene laws and governmental regulations. The principle of culpability (*Shuldprinzip*) is strictly followed only for criminal offences.<sup>7</sup> The distinction is not only substantive, but also has procedural consequences. The government has considerably more powers for detecting and proving crimes than for pursuing administrative offences. This doctrine was later adopted by many European and other countries. Therefore, the separation of criminal law and administrative punitive law has long been the legal tradition in many ACN countries.

### *Development of corporate criminal liability*

Corporate criminal liability was invented in the common law world. By the 19<sup>th</sup> century, two different concepts had begun to develop: vicarious liability in the United States and identification theory in the United Kingdom. In both jurisdictions, corporate liability was first implemented for statutory offences and was only later extended to *mens rea* offences as well.<sup>8</sup> The Netherlands became the first civil law country to share in these developments, when it introduced corporate criminal liability into its penal law in 1950.<sup>9</sup> Other countries on the continent continued to follow the principle of *societas delinquere non potest*, which rejects the idea that a legal person can commit or be held liable for a crime. At the same time, administrative punitive liability was broadly in use.

The situation has changed dramatically during the last three decades. Nowadays, most European countries (and many other jurisdictions around the world) have embraced the concept of corporate criminal liability. Despite the general trend, a number of jurisdictions still resist the idea that corporations can commit crimes and use administrative punitive law to sanction corporate malfeasance. However, in many of these countries, legal entities can be sanctioned not only for administrative offences, but also for crimes committed by their managers (or even employees) in certain cases. As these cases are similar to those that constitute the basis of the criminal liability in the systems with corporate criminal liability, this new type of administrative liability is not substantively different. The main difference between the two approaches lies in the theoretical debate over whether a legal entity is able to act consciously and responsibly, and thus, commit a crime. In practice, the difference is procedural.

There is also another group of jurisdictions that only authorize the sanctioning of legal persons, without addressing the question whether a corporation itself can be guilty of committing crime. As the sanctions are found in the criminal law, the system is usually called quasi-criminal liability. Again, the system does not create real substantive differences in the premise of liability, but it has theoretical and also procedural differences with a criminal approach.

To conclude, there are four systems of corporate punitive liability available:

- 1) Criminal liability;

- 2) Quasi-criminal liability;
- 3) Administrative punitive liability for criminal offences;
- 4) Administrative punitive liability for administrative offences.

Only the fourth system cannot be considered as a fully adequate form of corporate liability, because some international conventions require that bribery and other corruption offences must be punished as criminal offences. As discussed in Chapter 2, the other three systems can be functionally equivalent and can, in principle, meet all the existing international standards.

International standards on corporate liability for corruption offences generally do not require establishing one specific type of liability. On the contrary, anti-corruption treaties either explicitly in the text (e.g. UNCAC) or in the explanatory materials often clarify that the states may opt to establish criminal, administrative or civil liability. However, whatever option is chosen, legal persons must be subject to effective, proportionate and dissuasive sanctions. The latter requirement affects the choice of the liability type adopted in the national system. As will be shown below, criminal or quasi-criminal liability is often recognised as the most suitable legal construction for holding legal persons accountable for corruption, with administrative liability being an accepted alternative. None of the countries in the region rely on civil liability to hold companies liable.

## 1.2. The state of play in ACN countries

So far 17 ACN member states have included corporate liability for corruption offences into their legal system in one way or another. (See Table 1 below). Of these 17 countries, 12 have followed the leading trend and adopted criminal liability. Bulgaria and Russia have adopted administrative punitive liability, whereas the regulation in Azerbaijan, Latvia and Ukraine can be classified as quasi-criminal.<sup>10</sup>

In Bulgaria, the responsibility of legal persons has been regulated by the Law on Administrative Offences and Sanctions (“LAOS”), which also contains the relevant procedural rules. According to LAOS, a property sanction shall be imposed on a legal person that has enriched or would enrich itself through a crime listed in the law as well as any crime committed under the orders of, or to implement a decision of, an organized criminal group.<sup>11</sup> The case against a legal person has to be initiated by the prosecutor and heard by the administrative court.<sup>12</sup> In October 2013, the Bulgarian Council of Ministers approved and submitted to the National Parliament a draft Law on Amendments and Supplements to LAOS. Once adopted, this draft law would complement the list of crimes to which the corporate liability applies and would elaborate the relevant procedure.

Russian law establishes administrative responsibility of legal persons for corruption offences under Article 14 of Federal Law on Countering Corruption (No. 273-FZ, adopted on 25 December 2008) and in Article 19.28 of the Code of Administrative Offences, which defines a specific active bribery offence committed on behalf or in the interests of a legal person.<sup>13</sup> The prosecutor institutes cases against legal persons and participates in the administrative court proceedings. The cases are conducted under the general rules set down for administrative offences.<sup>14</sup>

In Latvia, the basis for the liability of legal persons is established in a special chapter of the general part of the Criminal Law. Instead of punishments, the law imposes “coercive measures” on a legal person for the crimes listed in the Criminal Law when they are committed in the interests of the legal person, on its behalf, or as a result of insufficient supervision or control.<sup>15</sup> There are special rules in the Criminal Procedure Law which have to be followed when the prosecutor develops a case against a legal person.<sup>16</sup> As both the basis for liability and the applicable procedure have been regulated by criminal law provisions, the system should be classified as quasi-criminal. A similar system was adopted in Azerbaijan, where “criminal law measures” may be applied to a legal person when a crime

has been committed on its behalf or in its interests.<sup>17</sup> The respective procedure is going to be regulated in the law of criminal procedure.<sup>18</sup>

The newest regulation of corporate liability in the region can be found in Ukraine. In April 2014, after five years of working through the legislative process in the parliament, amendments to the Criminal Code came into force and established grounds for applying criminal law measures to legal persons. Special procedural rules were also introduced in the Criminal Procedure Code by the same amendments.

**Table 1. Systems of corporate liability in ACN countries**

<b>Criminal liability</b>	<b>Administrative punitive liability</b>	<b>Quasi-criminal liability</b>
Albania Bosnia and Herzegovina Croatia Estonia Georgia Lithuania FYR of Macedonia <sup>19</sup> Moldova Montenegro Romania Serbia Slovenia	Bulgaria Russia	Azerbaijan Latvia Ukraine
<b>12</b>	<b>2</b>	<b>3</b>

*See also Annex 2 for information on corporate liability systems in some other countries that are parties to the OECD Anti-Bribery Convention.*

### **1.3. Evaluating effectiveness – procedural aspects**

It is generally accepted that criminal proceedings are a more effective way of proving someone's guilt than administrative proceedings. The advantages of criminal proceedings lie in the following:

- Larger set of investigative tools and coercive measures;
- Better opportunities for mutual legal assistance;
- Longer statute of limitations periods.

#### ***Investigative tools***

The main advantage of criminal proceedings as compared with other legal procedures lies in the larger set of investigative techniques and coercive measures that are authorized in the criminal context. Special tools, such as searches and seizures, the interception of communications, pre-trial detention, etc., have traditionally been available only for detecting and proving crimes. However, in the context of corporate liability, the situation is considerably different. Imposing an administrative punishment (or a quasi-criminal coercive measure) on a corporation for a criminal offence usually means that the criminal offence has been detected and proven, i.e. that the criminal procedure with all its powers have been carried out. Thus, all the measures that can be used to prove the perpetrator's guilt can be indirectly used to prove the liability of the legal person, too.

Successful prosecutions of international wrongdoing, like the *Siemens* and *MAN* cases in Germany, prove that strong cases against legal persons can also be built in countries having systems of administrative or quasi-criminal liability.<sup>20</sup> The *GAMA* case in Latvia may be included in this list. In 2013, the public prosecutor imposed a monetary fine in the amount of EUR 1.210.688 on GAMA Holding, a company with wide-ranging international operations<sup>21</sup>, for trading in influence. Latvian authorities succeeded in proving that the company's regional representative offered an undue



advantage of 3.4% of the total contract amount (approximately EUR 11 million) to a ‘consultant’ in order to ensure that the consultant would exert his influence on the officials of Latvenergo, the state-owned electric utility company. By using internal information obtained illegally, GAMA Holding prepared a tailor-made tender and won a public procurement contract for reconstruction works at a power plant. As the evidence collected through special investigation techniques was so convincing, both the company GAMA Holding and its regional representative confessed and significantly cooperated with the investigation. Moreover, GAMA Holding and Latvenergo amended the agreement to reduce the price of the reconstruction project at the power plant by 3.4%.

Thus, in most cases, all necessary evidence against a legal person can be collected during the criminal proceedings previously conducted against the human perpetrator. However, the advantage of criminal proceedings may become evident in cases where the investigation against natural perpetrator cannot be initiated or completed. In the Russian Federation, for example, when the legal person is investigated alone and separately, it has to be done in the framework of administrative proceedings, which means that covert and coercive measures are not available.<sup>22</sup> A similar problem exists in Bulgaria. On the one hand, the law states that the procedure for sanctioning a legal person shall be initiated even when the criminal proceedings against the natural person perpetrator may not be initiated or were abandoned on legal grounds, but on the other hand, the law does not provide any possibility to use special investigative techniques or coercive measures outside the criminal procedure.<sup>23</sup>

The availability of effective investigative tools also seems to be a problem in countries with quasi-criminal liability systems. In Latvia, for instance, a legal person can be subjected to a separate proceeding in order to ascertain if there is a basis for sanctioning it,<sup>24</sup> but in such case investigative tools like interception of communications and undercover agents are not available.<sup>25</sup>

### ***Mutual legal assistance***

There are number of international instruments regulating mutual legal assistance (“MLA”) in criminal matters, but only few treaties deal with MLA in administrative matters.<sup>26</sup> In the field of administrative law, the current international law is by no means sufficient to enable effective co-operation between States. Thus, administrative proceedings may be inadequate for cases with an international dimension. Typically, all necessary MLA can probably be obtained while the natural person perpetrator is being investigated. But again, a problem may arise in those cases where the legal person has to be investigated and tried separately. Likewise, international co-operation may only be needed after the criminal investigation against the natural person has concluded, for example, during the court proceedings.

To make effective international co-operation available in all corporate cases, countries using the system of administrative liability need special national legislation. In Germany and Italy, for instance, the availability of MLA in criminal matters is also extended to procedures for sanctioning legal entities.<sup>27</sup> The absence of similar national legislation, as is currently the situation in Russia and Bulgaria, may significantly complicate the investigation of international companies.

### ***Statute of limitations periods***

Another traditional difference between administrative and criminal liability is that criminal offences used to enjoy considerably longer limitations periods. In addition to having a statute of limitations some countries impose deadlines for investigations. For example, in Russia, an administrative investigation has to be completed within one month.<sup>28</sup> This term, which can be prolonged for another month, is also applicable to the proceedings for sanctioning legal persons. It is obvious that in such a short period of time it is very challenging to complete an investigation, which means that in practice the proceedings against legal persons depend highly on the results of the investigation conducted against natural persons.

### ***Competent court***

There is one more issue that has to be considered when designing a system of corporate administrative liability. That is the question of the competent court. Since the liability for criminal offences is at stake, it is reasonable to argue that criminal courts are better suited to try such cases. The advantage of criminal court becomes apparent in those cases where a legal person is tried before the natural perpetrator, which means that the perpetration of the crime has not yet been established by any other court. In such a case, the most crucial debate may concern matters having a criminal law or criminal procedure character. It is therefore reasonable to believe that criminal court judges are most competent to hear cases brought against legal persons. Their better substantive competence is probably the main reason why Germany and Italy, the jurisdictions that have traditionally resisted criminal liability of legal persons, have given criminal courts the power to conduct administrative proceedings for sanctioning legal persons.<sup>29</sup>

It is also important to point out that Bulgaria, which has been sanctioning legal persons for crimes since 2005, is now taking steps to change the law in this respect. In place of the administrative court, the draft Law on Amendments and Supplements to LAOS would designate the district court of the company's registered office to act as a first instance court and the appellate court as a second instance court.<sup>30</sup>

### ***Procedural guarantees***

In addition to effectiveness, the sanctioning procedure has to be evaluated also from the perspective of the rule of law. As criminal sanctions usually have serious negative impacts on convicted persons, the imposition of criminal sanctions is accompanied by certain procedural guarantees, such as the presumption of innocence, the right to present a defence, the guarantee against self-incrimination, etc. Comparable guarantees are not always present in an administrative proceeding, as its impact is not considered to be as harmful. Hence, if a State wants to sanction legal persons only through administrative law, it has to make procedural guarantees obligatory in administrative proceedings as well, at least in cases where legal persons are punished for criminal offences. Otherwise, the system may fall short of the requirements set by the European Court of Human Rights or another applicable human rights mechanism.<sup>31</sup>

## **1.4. Evaluating effectiveness – deterrence aspects**

A conviction for a crime is not just a punishment, but also a stigma that may seriously harm a person's status and relationships in the community. Administrative liability has little, if any similar effect. It is therefore generally accepted that criminal liability provides stronger deterrence than administrative liability. The stigmatising effect of a criminal conviction is sometimes even more feared than the punishment itself.

However, in the context of corporate liability, the force of this assumption is not so obvious. As mentioned above, administrative sanctions can also be imposed on corporations for offences prescribed by criminal law. It may be reasonably argued that the nature of the offence makes much more sense for the public at large than the legal affiliation or ("title") of the punishment. Therefore, since the offences in question have traditionally been criminal offenses (bribery among them), the resulting public condemnation may not depend on whether the punishment has been imposed through administrative or criminal proceedings. It even seems that the public condemnation anyway typically falls on the human perpetrators, while corporations tend to keep the confidence of their customers and partners.

The *Land Exchange* case, in Estonia, shows that business corporations are much more resistant to criminal penalties than natural persons. As discussed in Section 5.1.1 below, a prominent construction company succeeded to maintain its position on the market during the period of economic crisis despite the fact that it was investigated, tried and finally convicted of bribing an incumbent Member of the Government.<sup>32</sup> By contrast, the convicted former minister's reputation was tarnished and he was

forced to withdraw from politics. Moreover, the political party that he led, which held 13% of the seats in the parliament at the time of the crime, ceased to exist even before the case ended. Thus, it is reasonable to believe that the severity of punishment is much more important for corporations than the type of liability imposed on them.

## Conclusions

From the procedural point of view, it can be concluded that criminal liability of legal persons is *a priori* more effective than administrative or quasi-criminal liability. However, in practice, the latter regimes can work as well. Administrative proceedings have weaknesses in comparison with criminal proceedings, but these weaknesses can be compensated with special regulations. If a State wants to make its non-criminal liability as effective as criminal liability, it has to at least ensure, that effective investigative tools and mutual legal assistance will be available in all cases, including those where the investigation against natural person is not possible for legal or factual reasons. Sufficient statute of limitations periods and investigation deadlines are also necessary.

International organisations increasingly tend to prefer criminal liability for legal persons. It has been observed, for example, that monitoring bodies, such as the OECD WGB, will “give those countries favouring non-criminal liability a far more thorough screening” than other countries’ regimes, as “corporate liability might not be pursued with the same rigour” in non-criminal contexts.<sup>33</sup> Furthermore, some international instruments permit administrative corporate liability only when criminal liability cannot be imposed on a legal person under a country’s legal principles.<sup>34</sup> It may be assumed, therefore, that the pressure towards criminal liability in public international law will only grow in the years ahead.

## 2. Models of corporate liability

### 2.1. Historical background

#### *The United Kingdom and the identification theory*

As mentioned in Section 1.1 above, corporate criminal liability arose from case law almost simultaneously in two common law countries – in England and in the United States. The early English law denied that a corporation could either commit a crime or answer for it. In the middle of the nineteenth century, this understanding started to crumble. Firstly, the idea of corporate responsibility found its expression within the framework of vicarious liability. Under this doctrine, not found in civil law countries, one person (usually an employer) is responsible for the crimes of another (his employee). In 1842, the railway company was convicted for disobeying the statutory order to remove a bridge which it had erected over a road.<sup>35</sup> Four years later, the effect of that decision was expanded from nonfeasance to misfeasance. Another railway company had destroyed the highway while constructing its own bridge in violation of the statutory requirements for building.<sup>36</sup> In those cases, it was considered that the statutory duties lay not only with the human employers, but corporations as well.

About one hundred years later, the development of the corporate criminal liability in English law moved from the stage of vicarious liability to the stage of direct liability. In 1944, it was confirmed in three cases<sup>37</sup> that a corporation may be held liable for acts of its employees which would not certainly render liable a human employer (principal) in the same situation. The gist of those decisions was that the acts (including the state of mind) of corporation's leaders were identified with the acts of corporation itself. This kind of legal identification allowed the corporate liability to be extended beyond statutory offences to all offences, including those demanding *mens rea*. The identification theory (also called *alter ego* theory) has been directing the application of the corporate criminal liability in United Kingdom ever since. Moreover, the theory has had a significant influence on the development of the doctrine of liability for legal persons around the world.

#### *The United States and the respondeat superior doctrine*

The American evolution of corporate criminal liability started almost at the same time and in a similar way as the English one. In the middle of the nineteenth century, surmounting the common law objections courts began to punish corporations, first, for omission and public nuisances and, later, also for regulatory misdeeds not requiring any *mens rea* element.<sup>38</sup> This evolution was inspired by the tort law doctrine of *respondeat superior*: the principle that an individual is civilly liable for the acts of his agents.<sup>39</sup> Thus, the early American doctrine of corporate liability, just as the English doctrine, had a vicarious character and was confined to crimes not requiring proof of the mental element.

The situation changed in the very beginning of the twentieth century. In the landmark *New York Central & Hudson River Railroad Company* case<sup>40</sup>, the U.S. Supreme Court was confronted with a statute reflecting a clear legislative intent to impose vicarious liability for a crime that included a *mens rea* requirement. Namely, the Elkins Act (1903) had specifically provided that acts and omissions of an officer functioning within the scope of his employment were to be considered those of the corporation employing him. Rejecting the traditional common law doctrine refusing corporate liability, the Court not only upheld that specific statute, but proclaimed the need for corporate liability in emphatic terms.<sup>41</sup> The Court argued that if only natural persons were subject to criminal law, “many offences might go unpunished”.<sup>42</sup>

That decision did not remain without companions. On the contrary, the lower courts rapidly expanded the liability of legal persons to also include common law crimes the *respondeat superior* doctrine. Under this doctrine, now deeply rooted in federal criminal law, a corporation may be held liable for

the acts of any of its agents who commit a crime within the scope of employment and with the intent to benefit the corporation.<sup>43</sup> It should be emphasised that the phrase “any of its agents” is interpreted broadly. Under the U.S. approach, in contrast to the English *alter ego* concept, the position of the wrongdoer in the company’s hierarchy is irrelevant. When the conditions for *respondeat superior* are met, “the corporation may be criminally bound by the acts of subordinate, even menial, employees.”<sup>44</sup>

### *Later developments*

Both original theories have their pros and cons. The identification theory sets more or less clear boundaries for the criminal law, which is important for the rule of law. We must remember that the rules of criminal law must not only protect persons (either human or corporate) *via* criminal law, but also *against* it. On the other hand, it is clearly too narrow to correspond with today’s organisational realities. Corporations are highly complex structures with collective decision-making processes, in which many persons other than the most senior officers are involved. Therefore, when corporate crime occurs it is often very difficult to identify the individual wrongdoer. The larger the company, the more likely it can avoid liability under the identification theory.<sup>45</sup>

The American system of corporate liability avoids this criticism, but has other serious problems. As the company can be punished for the crimes of its lower-level employee even though the employee acted *ultra vires* and the company had done everything in its power to prevent its employees or agents from acting illegally, the company has practically no way to defend itself. Moreover, a large corporation cannot finally stop committing crimes, as it is impossible to control the conduct and the thinking of every single employee. Thus, criminal responsibility of corporations is, to some extent, a matter of occasion which is neither fair nor has an appropriate deterrence effect.<sup>46</sup>

The paradoxical result that one theory is too narrow to be effective while the other is too broad to be fair has induced academics and legislators to look for a third way. Two alternative approaches have appeared. First, the identification theory has been expanded so that the liability of legal person can also be triggered by the management’s failure to supervise its employees. This has been the approach of international organisations. The OECD Good Practice Guidance, for example, requires that a legal person must be held liable also when a “person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics and compliance programmes or measures.”<sup>47</sup> A similar principle is laid down in Article 18 of the Council of Europe Criminal Law Convention on Corruption.

The other alternative to the original, derivative doctrines is based on the belief that corporate acts and fault are not the same as acts and fault of any human being. Such theories attempt to separate corporate liability from the liability of natural persons and by defining it instead by organisational terms. The Netherlands can be seen as a pioneer in this field. In 1976, the Dutch legislature changed section 51 of the Penal Code to state explicitly and simply that all offences can be committed by natural and legal persons. The new legislation was based on the idea that a corporation is an independent entity and can commit crimes by itself. With this change, the Dutch courts and scholars were tasked to give substance to the concepts of corporate act and fault. This task was fulfilled with the help of civil law doctrine which evaluates behaviour in the light of the social context in which it occurs. It does not say precisely which persons’ acts are the acts of corporation, but lets the matter depend on circumstances. In other words, an act committed by a natural person can be seen as an act of a corporation when justified by the relevant social context.<sup>48</sup> Hence, the Dutch law started to move, “somewhat tentatively and incompletely, to organisational criteria for corporate liability.”<sup>49</sup>

For now, the organisational (also called a “holistic” or “objective”) approach has found many followers around the world. A good example here is the new Swiss Criminal Code, which entered into force in 2003. Regarding serious economic offences (including corruption), this law states that an enterprise shall be punished independently of any individual, if the enterprise failed to take all

reasonable and necessary organisational measures to prevent such an offence.<sup>50</sup> Another good example is Australia, which used to follow the identification theory, but changed its law and doctrine substantially in 2001. Under the new legislation, a legal person is also liable for crimes committed by any employee acting within the actual or apparent scope of his or her employment if the company expressly, tacitly or impliedly authorised or permitted the offence. Authorisation or permission may manifest themselves in the corporate culture which directed, encouraged, tolerated or led to the offence; and even in failure to create and maintain a culture of compliance.<sup>51</sup>

From a theoretical perspective, the organisational model seems to offer a “right” alternative to the two original approaches. It is a good idea to punish a legal person only when and because the legal person as such is at fault. The question is how the corporate culture can be detected in practice. A corporation acting improperly may have two cultures, one on paper to show to state authorities when necessary and another one in real life. The question arises especially in relation to intentional crimes such as bribery. Bribing is not an accident that coincidentally happens, but is a well-prepared and secretly executed action. If internal rules and regulations can insulate a company from prosecution, then making them up is just another thing to add to the checklist while planning the crime. Proving that the culture on paper is not the “real” culture of the company can be as difficult as proving the involvement of management in the crime. Therefore, there is reason to doubt that, in practice, the organisational model can be considerably more effective than the *alter ego* model.

## 2.2. Models of liability in ACN countries

As shown above, there are four basic models of corporate liability:

- 1) The **Identification model** where the liability of a legal person can be triggered only by the offence committed by its controlling officer, i.e. the person belonging to company’s top management or having representative powers;
- 2) The **Expanded identification model** where the liability of a legal person can also be triggered by management’s failure to supervise its employees (‘lack of supervision rule’);
- 3) The **Vicarious liability model** where the liability of a legal person can be triggered by an offence of any employee acting within the scope of his employment and with the intent to benefit the corporation;
- 4) The **Organisational model** where the liability of a legal person is established through deficiencies in its corporate culture.

Among the 17 ACN countries examined, all four models are represented. The vast majority of States (14) use some version of the identification model. (See Table 2 below). Nine of them – Azerbaijan, Bosnia and Herzegovina, Georgia, Latvia, Lithuania, the FYR of Macedonia, Slovenia, Serbia and Ukraine – have explicitly established in their law that lack of supervision by the management can trigger the corporate liability as well. The Russian and Bulgarian systems of administrative punitive liability follow the vicarious liability model, and Romania is the only country where the corporate liability has been developed in the light of the organisational model.

Table 2. Models of corporate liability in ACN countries

Identification model	Expanded identification model	Vicarious model	Organisational
Albania Croatia Estonia Moldova Montenegro	Azerbaijan Bosnia and Herzegovina Georgia Latvia Lithuania FYR of Macedonia Serbia Slovenia Ukraine	Bulgaria Russia	Romania
5	9	2	1

## 2.3. The persons who can trigger corporate liability

### 2.3.1. Liability for the acts of a responsible person

#### *Definition of “responsible person”*

In those countries that follow some sort of identification model, the scope of corporate liability is largely determined by the definition of the responsible person (or controlling officer). The more agents that are covered by the definition, the more flexible (and effective) the implementation can be. Overall, two types of definition can be found – **institutional** and **functional**. The first defines the responsible person through membership in a corporate board or other management bodies; the latter focuses on the responsibilities of the agent. There is also a third way, which combines the institutional and functional criteria.<sup>52</sup>

The functional definition (and the combined) has to be considered more effective than the purely institutional definition. As the functional definition does not depend on formal appointments, it can be better adjusted with the actual operation of the company in question. Most of the countries that use the functional definition have declared that the formal character of the relationship between the company and the agent is not relevant as far as the agent performs the task mentioned in the definition.<sup>53</sup> In addition, the functional definition can be more suitable for foreign companies that may have different managerial and supervisory structures. The *GAMA* case in Latvia (see Section 1.3 above) proves the last argument. The person who triggered the company’s liability in that case was the regional representative who did not belong to any of the management or supervisory bodies of the company.

A good functional definition can be found in the law of Montenegro, which defines the responsible person as follows:

Responsible person means a natural person entrusted with certain duties in a legal entity, a person authorized to act on behalf of the legal entity and a person who can be reasonably assumed to be authorized to act on behalf of the legal entity. A natural person acting on behalf of the legal entity as a shareholder shall also be considered a responsible person.<sup>54</sup>

Two virtues have to be pointed out here. First, it is directly mentioned that shareholders acting on behalf of the legal person shall be considered responsible persons. Experience in many ACN countries has shown that owners and major shareholders are often involved in the managing process, even when they do not belong to managerial or supervisory bodies of the company. The other advantage of the definition is that it defines the responsible person from an external point of view. The responsible person is also a person who can be *reasonably assumed* to be the company’s representative. The

possibility to use an external standpoint to evaluate the status of the agent makes it considerably more difficult for a company involved in wrongdoing to hide its actual leaders.

Hence, the scope of responsible persons committing acts for which a legal entity may be held criminally liable contains not only persons performing senior management tasks, but also any person entrusted with any authority to act on behalf of the legal person. In other words, there is no difference in the legal consequences based on the seniority of the natural persons involved: all persons authorized to act as responsible persons within the legal entity may engage the liability of the legal entity.

### ***The acts of a responsible person***

Besides having a clear and flexible definition of a “responsible person”, attention must be paid which acts by the responsible person will trigger the legal person’s liability. It goes without saying that corporate liability follows if a responsible person personally fulfils the elements of the crime (*e.g.* offers or promises a bribe, gives it, etc.). But, in addition to that, corporate liability should be triggered also when a responsible person orders, influences or aids an employee to commit a crime. In most countries, this result is achieved by general rules and concepts, such as conspiracy, aiding and abetting, proxy perpetration, etc. An alternative solution can be found in Slovenian law, which defines the involvement of the responsible person by managerial terms. According to the Slovenian law, an offence of any person can trigger the corporate liability if: (1) the committed criminal offence means carrying out an unlawful resolution, order or endorsement of legal person’s management or supervisory bodies, or (2) the legal person’s management or supervisory bodies influenced the perpetrator or enabled him/her to commit the criminal offence.<sup>55</sup>

Slovenian law goes even further, stating that an offence can be imputed to the legal person also if the legal person “has at its disposal unlawfully obtained property benefit or uses objects obtained through a criminal offence.”<sup>56</sup> This means, in essence, that management’s post-factum acceptance of the crime can create corporate liability. This rule, together with acceptance of lack of supervision rule, indicates that Slovenia has enriched its “identification model” with the ideas of the organisational approach. In so doing, Slovenia has generated an original model that manages to be, in some respect, more effective than identification models usually are.

Post-factum misbehaviour can trigger corporate liability in the FYR of Macedonia as well. According to its law, the legal person is liable for an offence perpetrated by its employee or representative if the management or supervisory body concealed or failed to report the offence prior to the initiation of the criminal investigation against the perpetrator.<sup>57</sup> This rule, however, is valid only with regard to an offence resulting in significant proceeds or in significant damage<sup>58</sup> to a third party.

The scope of definition and the acts of the responsible person is particularly important in those countries that do not accept a lack of supervision rule for imposing liability on a legal person. In this respect, the most challenging are the situations in Estonia and Croatia.

Estonian law is very brief in stating simply that “a legal person shall be held responsible for an act which is committed in the interests of the legal person by its body, a member thereof, or by its senior official or competent representative.”<sup>59</sup> As the law does not give any definition of a “competent representative”, the extent of corporate liability it entails must be clarified by case law. So far, the courts have applied this concept to employees who have “acted under the order or with approval of a senior official” and to “mid-level managers who are in a certain field entitled to make independent decisions and so direct the will of the legal person”.<sup>60</sup>

The legal framework in Croatia is comparable. According to the definition given by the law, the responsible person is “a natural person in charge of the operations of the legal person or entrusted with the tasks from the scope of operation of the legal person.”<sup>61</sup> As confirmed by the Croatian authorities, the definition does not include all employees, but only those who have the power of representation, decision-making and supervision.<sup>62</sup>



Despite the relatively simple legislation, both countries have a considerably rich practice in implementation. In the period of 2010-2013, Estonia prosecuted 200 legal persons out of which 27 were charged with bribery. The latter is the highest figure among ACN countries. (See the comparative data in Section 4.2 below). In Croatia from 2010 to 2012, 12 legal persons have been indicted in cases in which the investigation had been conducted by the Office of the Suppression of Corruption and Organised Crime.

Moreover, both states have succeeded in detecting and prosecuting high-level corruption. In the *Land Exchange* case the leading construction company in Estonia, AS Merko Ehitus<sup>63</sup>, was convicted of bribing the Minister of the Environment as well as the Director General of the Land Board and was punished by a fine of EUR 798 000.<sup>64</sup> By means of a complicated corruption scheme, the company acquired 37 plots of public land with a total value of EUR 12 million and intended to acquire 9 more worth EUR 7.2 million. Within the same case, an affiliate of AS Merko Ehitus was fined of EUR 127 823 for bribing another minister in order to get advantages in the public procurement of the ministry's new office building.

In the *Fimi Media* case, the former prime minister of the Republic of Croatia and his political party were convicted by the first instance court of embezzlement of public funds and money collected as donations for the party. The defendant, while serving as prime minister influenced representatives of public institutions and exclusively or partially state-owned companies to hire company Fimi Media d.o.o. for the supply of goods and services, regardless of the conditions. Through this scheme, Fimi Media d.o.o. acquired in total EUR 4.5 million which was later divided between the defendant, his companions and his political party. The court of first instance sentenced the former prime minister to prison for nine years, imposed a fine of EUR 667 000 on the political party and sanctioned Fimi Media d.o.o. with compulsory dissolution. In addition to that case, in Croatia, there is a pending trial against a pharmaceutical company that allegedly bribed 337 physicians and pharmacists all over the country in order to achieve higher sale of medicine from its offer (called the *Hippocrates* case). These cases, although not yet finally decided by the court, prove that the law enforcement system is working.

The case studies show that, so far, Estonia has not needed a broader definition of “responsible person” or the lack of supervision rule to prosecute legal persons for bribery. In all cases where the bribe has been given in the interest of a legal person, high level management or even the owners have been involved. In the *Land Exchange* case, for example, the realization of the corruption scheme was directed by the chairman of the company's council, the man who once founded the company and who, at the time of the crime, was its leading shareholder. In Estonia, even big companies are greatly controlled by the owners (or major shareholders), and it is very unlikely that a lower level agent would dare to take illegal actions on his or her own initiative. Employees may be involved as perpetrators, but managers or even owners are almost always the masterminds. In addition, as it relates to high-level corruption, the involvement of responsible persons is even more likely, because big businessmen have much better access to the politicians and top officials than ordinary employees. However, problems may arise in relation with large transnational companies, which have much more complicated management arrangements and where the shareholders' input is not so direct and personal. It is therefore reasonable to believe that, in the long run, Estonian practitioners would benefit from a broader definition of “responsible person” as well as the adoption of a “lack of supervision” rule.

### **2.3.2. Liability for the failure to supervise**

As mentioned above, most ACN countries have accepted a failure to supervise as a ground for corporate liability. The “lack of supervision” rule is laid down in line with international instruments, such as the Council of Europe's Criminal Law Convention on Corruption,<sup>65</sup> the OECD's Good Practice Guidance<sup>66</sup>, etc. The main technical difference is that some laws define the rule through the responsible person,<sup>67</sup> while others speak directly about managerial and supervisory bodies.<sup>68</sup> According to the Serbian law, for example, the liability of legal person “shall also exist where the lack

of supervision or control by the responsible person allowed the commission of crime for the benefit of that legal person by a natural person operating under the supervision and control of the responsible person.” An analogous example can be found in the law of the FYR of Macedonia, which establishes that the legal entity is responsible for a criminal act committed by its employee or representative, if “the commitment of the act has occurred because of omission of the obligatory supervision of the governing body, the managing body or the supervisory body.” In addition, and this is exceptional, the law of the FYR of Macedonia states that legal entity is also responsible when corporate bodies failed to prevent the criminal act of the employee or the representative.<sup>69</sup>

Unfortunately, none of the countries has successfully applied the lack of supervision rule, and therefore it is not possible to explore how this can be established in practice. However, the authorities of several countries pointed out in their answers to the questionnaire that it is not enough to show the absence of due diligence in the company; instead, a causal link between the responsible person’s omission and the crime committed by the subordinate must be proven.<sup>70</sup>

### **2.3.3. Liability for the action of a related person**

The Russian and Bulgarian systems of administrative punitive liability can be considered to be based on vicarious liability. Russian law does not define the specific persons whose acts can trigger a legal person’s liability except that the offence must be committed “on behalf or in the interest” of the legal person.<sup>71</sup> Thus, theoretically, the crime of every employee can be imputed to the legal person. However, according to the OECD’s examiners, the majority of the cases that have been prosecuted since the adoption of the relevant provisions relate to situations where the owner or the manager of the legal person triggered liability.<sup>72</sup>

Bulgarian law is more concrete. It states explicitly that a legal person shall be sanctioned for the crime committed by an employee, to whom the legal person has assigned a certain task, when the crime was committed during or in connection with the performance of this task. The law does not take account of the reasons that prompted the employee to commit the crime.<sup>73</sup>

### **2.3.4. Liability through the concept of corporate fault**

Romania is the only ACN country where the corporate liability doctrine has been developed in the light of the organisational approach. The law does not determine the specific persons whose acts will trigger the liability of a legal entity, but it requires that their “deeds have to be committed in the form of the guilt provided by the penal law”<sup>74</sup>. What constitutes the guilt of the legal person is not specified in the law, but according to the doctrine, the guilt should be attributed in two steps, not only to the natural person, but also to the legal person (its organs) who instigated, authorized, tolerated the criminal behavior, did not control or supervise its employees, did not ensure a proper internal organization or a proper integrity policy.<sup>75</sup>

The question whether the liability of a legal person can be triggered by the action of a person without any official link to the legal person was addressed in the *M.R.* case, where two companies were convicted of money laundering and complicity to bribe taking and were punished with a fine and dissolution. Mr. M.R. was the director of the State Agency for the Environment Protection in county V and had the authority to grant environment authorizations to companies operating in the region. Mr. M.R. exerted constant pressure over these companies, and conditioned the issuance of authorizations on the receipt of bribes. Any company seeking an environment authorization was instructed to conclude consultancy or other kind of service contracts with one of the two companies controlled by the defendant Mr. M.R., either the company MM or the company CW. In total, EUR 400,000 of illegal money was collected into the bank accounts of these two companies.

The issue presented in the case was that 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. Therefore, the *mens rea* of these companies cannot be found with the companies’ legal managers, but instead with the *de facto* manager, which was Mr. M.R. This case shows that the Romanian model has enough flexibility to react to atypical cases and, therefore, has the capability to become an effective tool to control corporations that break the law. This case is also an example where liability was imposed on the beneficial owner of the company.

## 2.4. Connection between the legal person and its agent’s misbehaviour

### *The interest criterion*

All the models of corporate liability seek to make a distinction between crimes serving the private goals of the perpetrator and crimes intended to further the company’s business. No model makes the legal person responsible for offences committed by responsible persons purely in their private interests. The kind of connection between the corporation and its agent’s behaviour must be defined by the law and proven in practice. Most commonly, this connection is established by the *interest criterion*, which means that the acts of a representative can be attributed to the legal person only if they have been committed, at least in part, in the interest of the legal person. Some ACN countries also use this criterion to link an agent’s misbehaviour with the corporation’s activities. The standard formulations currently in use for this criterion are: “on behalf of”, “in the name of”, “in the interest of”, “for the benefit of”, “for the sake of”, and “in favour of”.

In most ACN countries, the phrases referring to the company’s interest (or benefit, etc.) are not explained in the legislation. However, authorities of all states argued that these concepts have to be interpreted in a general sense and confirmed that the benefit received by or intended for the legal person must not necessarily be pecuniary.<sup>76</sup> The same is true about the harm (or damage) caused by the corporate activities.<sup>77</sup> It is also worth mentioning that no state demands as a general rule that the benefit must be actually received or that an actual damage must occur before liability can be applied.<sup>78</sup> Instead, this requirement is only found in the FYR of Macedonia’s law in connection with the lack of supervision rule.<sup>79</sup>

### *Benefit intended for an affiliated entity*

An important question which has to be asked when evaluating a corporate liability regime is how it deals with affiliated business groups. In an effective regime, a company bribing for the benefit of its subsidiary or parent company should at least trigger liability for at least one, if not both, companies. The authorities of many ACN states supposed that in their country at least the bribing company would be liable in such a case.<sup>80</sup> However, in most cases, the opinion was based on general legal principles, as the laws do not directly regulate the situation where a crime is committed for the benefit of an associated company, or even, a third party. A notable positive exception here is the law of Croatia, which establishes explicitly that a legal person shall be punished for the crime of a responsible person if “the legal person benefited from or should benefit from illegal proceeds for itself or another person.”<sup>81</sup>

### *Acting within one’s responsibilities*

In most ACN countries, the interest criterion is the sole consideration when deciding whether an agent’s offence can be imputed to the legal person. However, two countries, Serbia and Montenegro, additionally require that the responsible person must act within his or her responsibilities.<sup>82</sup> According to Serbian law, “a legal person shall be held accountable for criminal offences that have been committed for the benefit of the legal person by a responsible person within the remit, that is, the

powers thereof.”<sup>83</sup> Similarly, the law of Montenegro provides that “a legal entity shall be liable for a criminal offence of a responsible person who acted within his or her authorities on behalf of the legal entity with the intention to obtain any gain for the legal entity.”<sup>84</sup> It is clear that this kind of rule considerably restricts the scope of activity that, in a particular case, can trigger corporate liability. Problems may especially arise in connection with large companies, where the fields of responsibilities are often allocated to specific members of the managing bodies.

### ***“Acting on behalf of”***

Acting on behalf of (or in the name of) the legal person is a widespread criterion for linking the agent’s misdeeds with the company’s business. However, as regards to bribery, this criterion does not provide much added value.<sup>85</sup> Bribery is a deal from which both parties expect to benefit. Thus, bribing on behalf of the company is usually bribing for its benefit as well. Nevertheless, this criterion, if prescribed as an alternative to the interest criterion, may help to go after the company which bribes for the benefit of another company. If acting on behalf of the legal person is an independent ground for the liability and this is proven in a particular case, the question of who benefited from the crime does not matter in that case anymore. Thus, countries which accept the “acting on behalf” criterion<sup>86</sup> have, at least theoretically, one more weapon to use in the struggle to hold business conglomerates accountable for any unlawful activity.

It should be underlined that the “acting on behalf” criterion can have added value only if it is stated as an independent alternative to the interest criterion. Conditioning conviction on proving both of these criteria are satisfied in one case would unreasonably complicate the system. If a company benefits from the crime, it should not matter whether the perpetrator acted on behalf of that company or another one.

### ***Other connecting criteria***

In addition to these widespread criteria, some countries employ some more original ones as well. According to the law of the FYR of Macedonia, for instance, an offence committed by a responsible person can also be imputed to a legal person if it were committed “at the legal person’s expense”.<sup>87</sup> This means that an act must also be considered an act of a legal person when the legal person bears the legal or material consequences of that act, for example, when the company’s money is used for bribery. Again, as this criterion is an independent alternative, the question of beneficiary is not necessarily relevant in a given case. A similar criterion is used in Bosnia and Herzegovina and in Georgia as well.<sup>88</sup>

Another criterion is available in Romania. Together with “in the interest of” and “on behalf of”, Romanian law includes the phrase “in the carrying out of the activity object.”<sup>89</sup> This criterion represents a rather loose connection between the agent’s act and the company’s business, and can therefore be especially valuable in cases where the crime has been committed by a low-level agent and/or for the benefit of a third party.

Finally, two other rather original criteria should be pointed out. Croatian law establishes corporate liability for crimes that “violate any of the duties of the legal person.”<sup>90</sup> In Bulgaria, legal persons are liable for all crimes committed “under orders of, or for implementation of, a decision of an organized criminal group.”<sup>91</sup>

## **2.5. Autonomous liability**

The autonomous nature of corporate liability can be analysed at two levels. First, it should be asked whether the conviction of a human perpetrator is an obligatory prerequisite for corporate liability. If the answer is negative, the question of procedural autonomy can additionally be raised. This second aspect concerns whether the legal person and the perpetrator can be investigated and tried independently in two different proceedings.

### 2.5.1. Autonomy vis-à-vis the human perpetrator

It is generally accepted that the liability of a legal person must not exclude a natural person's liability for the same crime, and vice-versa: sanctioning an individual should not exclude charges against a corporation. In an effective regime, an additional principle should also be true: the responsibility of an individual perpetrator must not be a prerequisite for corporate liability. This rule has quietly become a standard of international law and is currently recognized in some way by most corporate liability regimes. It is difficult, if not impossible, to comply with international commitments to maintain effective sanctions against legal persons, when corporate liability is dependent on the successful prosecution of the natural perpetrator.

The OECD Good Practice Guidance<sup>92</sup> states that the liability of legal persons should not be restricted to cases where the natural persons who perpetrate offences are prosecuted or convicted. According to the OECD Working Group on Bribery's monitoring reports, "a regime that requires the conviction and punishment of a natural person 'fails to address increasingly complex corporate structures, which are often characterised by decentralised decision-making.'"<sup>93</sup> Such a requirement also directly contravenes, or misinterprets, Article 26, paragraph 3, of the UNCAC. Back in 1988, the Council of Europe's Committee of Ministers in its Recommendation to Member States concerning the liability of enterprises with legal personality provided that such enterprises should be held liable, whether a natural person who committed the acts or omission constituting the offence can be identified or not.<sup>94</sup> Similarly in its evaluations, GRECO was concerned about "the fact that a physical perpetrator has to be identified first, as in large corporations the sheer potential for persons being responsible for only a fraction of the completed offence as well as collective decision-making processes could make it impossible to identify with certainty a particular natural person as a suspect and/or prosecute him/her."<sup>95</sup>

However, the rule may have two substantially different applications. Some regimes presume that the natural person who perpetrated the offence is identified, but not convicted and punished; others do not even require the identification of the perpetrator.<sup>96</sup> The latter approach also permits making corporations liable in cases where the investigation establishes that a crime has been committed in the interest of the corporation, but is not able to ascertain the full course of events. This could occur, for instance, where the criminal decision was made by the management board and it remains unclear which members participated in the decision. However, the benefit of this approach lies not only in making the investigators' work easier; it also can adapt to large corporations, in which as a result of their complex structure and delegation of powers, policies or decisions are often the product of several individuals acting collectively. Therefore, it may happen that no human being would qualify as a perpetrator when analysing a particular case from the perspective of criminal law. A regime that allows the prosecution of a corporation even where no individual offender is identified will naturally be much more effective in such situations.

The best example in this context is the doctrine developed by the federal courts of the United States. Since the corporation is perceived as an aggregation of its agents, it is not necessary to identify the particular wrongdoer. The prosecution only has to show that some person within the company must have committed the crime. Though the law on this point is not clear, some corporations have been convicted of certain crimes requiring a given mental state, even though no single agent had the requisite knowledge to satisfy that element. In those cases, various individuals within the company were found to have collectively possessed all the elements of required knowledge, and such aggregate knowledge was attributed to the company.<sup>97</sup>

Almost all of the ACN countries declare in one way or another that corporate liability is independent of the liability of the perpetrator.<sup>98</sup> However, only Georgia and Latvia follow the second approach described above. According to Georgian law, "a legal person shall be imposed criminal liability also in the case when a criminal offence is committed on behalf of the legal person or by means of a legal

person and/or in its favour, whether a person having committed a criminal offence is identified or not.”<sup>99</sup> In Latvia, a separate proceeding against a legal person can be initiated “if the circumstances have been determined that do not allow ascertaining or holding criminally liable a concrete natural person.”<sup>100</sup> Although Latvian authorities assert that these situations include cases where offence is committed “by secret vote”<sup>101</sup>, the authors of this Study believe that this wording would also cover any other case where the fault is found to be anonymous or collective. (See the U.S. doctrine discussed above). Fully autonomous liability should be possible also in Romania, because under the organisational model corporate liability is not linked to the responsibility of any person.<sup>102</sup>

The laws of other ACN countries are more likely to require – in one way or another – the identification of the individual perpetrator. A legal person is declared to be liable even if the individual perpetrator “s not criminally liable” (Bosnia and Herzegovina, Bulgaria, the FYR of Macedonia),<sup>103</sup> “has not been convicted” (Montenegro, Russia),<sup>104</sup> “is not guilty” or acted “under the force or threat by legal person” (Slovenia).<sup>105</sup> All these provisions refer to the presumption that the responsible person is identified and, at least to some extent, investigated. Otherwise, it would not be possible to conclude the lack of grounds for “liability”, “conviction”, or “guiltiness”.

In Serbia, Azerbaijan and Croatia, the principle of autonomy is established through procedural rules. According to Serbian law, a legal person shall be held accountable “even though criminal proceedings against the responsible person have been discontinued or the act of indictment refused”.<sup>106</sup> Likewise, the law in Azerbaijan establishes that the “termination of criminal prosecution in respect of the physical person shall not prevent application of the criminal law measure to the legal person.”<sup>107</sup> In Croatia, the law provides an exceptional possibility of initiating and conducting the proceeding against the legal person “if no criminal proceedings may be initiated or conducted against the responsible person for legal or any other reasons whatsoever.”<sup>108</sup>

While it is not directly stated in the new provisions on corporate liability in the Ukrainian Criminal Code, it is clear that corporate liability is linked to that of the “authorised person” who committed the offence. The very model used (“measures of a criminal nature”) presumes that such measures are secondary to individual liability (but see the example of Bulgaria discussed below). This model requires the “commission of the crime” by the authorised person on behalf and in the interests of the legal entity. According to Article 96<sup>10</sup> of the Criminal Code, the court, when applying such measures to a legal entity, must take into account, *inter alia*, the gravity of the crime committed and the degree of the perpetrator’s criminal intent. According to Article 214, paragraph 8, of the Criminal Procedure Code proceedings with regard to the legal entity are carried out simultaneously with the proceedings concerning natural person. Finally, under Article 284, paragraph 3, of the Criminal Procedure Code, proceedings with regard to the legal entity should be closed if criminal proceedings against the natural person have been closed or relevant person was acquitted.<sup>109</sup>

### 2.5.2 Procedural autonomy

The principle of autonomous liability has also a procedural aspect. This is the question whether the legal person can be tried and convicted regardless of what decision has been taken or will be taken with respect to the individual perpetrator. An affirmative answer to that question will provide the corporate liability regime with more flexibility, which is especially important in complex cases. As every individual has a right to present a defence, the more defendants an investigation includes the more time-consuming it is. Investigations seeking to crack complex corruption schemes always face the risk of encountering difficulties with the statute of limitations, especially as these schemes can last for extended periods of time, include multiple persons or companies, and/or cross international borders. For instance, in the *Land Exchange* case (see Section 2.3.1 above), which lasted almost nine years, the Estonian Supreme Court exempted one natural person from liability and mitigated the punishment of another because the length of the process violated the “reasonable time” criterion. 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.

As it relates to the ACN countries, two basic approaches can be found. In most ACN countries, the separation of proceedings is allowed by the law, but only as an exception to the general rule requiring a joint investigation and a single judgement. For example, Article 35 of the Serbian Law on the Liability of Legal Entities for Criminal Offences provides:

The criminal proceedings shall be, as a rule, instituted and conducted jointly against a legal entity and the responsible person, and a single sentence shall be passed.

Should it not be possible to institute and conduct criminal proceedings against the responsible person, due to the existence of reasons specified by law, the proceedings may be instituted and conducted against the legal entity alone.<sup>110</sup>

More detailed is the regulation in Bulgaria, where amnesty, expiration, death and permanent mental disorder are exhaustively listed in law as grounds for the separation. Likewise, in Latvia the relevant provision reads as follows:

A person directing the proceedings with the decision may separate the proceedings for the application of coercive measures to the legal person in separate records in the following cases:

- 1) Criminal proceedings against a natural person are terminated for non-exonerating reasons;
- 2) If the circumstances have been determined that do not allow to ascertain or hold criminally liable a concrete natural person, or the transfer of the criminal case to court is not possible in the near future (in a reasonable term) due to objective reasons;
- 3) In the interests of solving in timely manner criminal-legal relations with a natural person who has rights to defence;
- 4) It is requested by a legal person's representative.<sup>111</sup>

The other countries do not provide either a general or a specific rule in their laws. In Estonia, for example, both the Penal Code as well as the Criminal Procedure Code are silent with respect to the question when, or if at all, a corporation can be prosecuted separately from the individual perpetrator.<sup>112</sup> However, Estonian authorities confirmed that there had been at least one criminal investigation where at a certain stage special investigative techniques had been authorised by the court that only concerned a suspected legal person.

In connection with the last issue, an important clarification must be made. It has been argued that it is logically impossible to conduct investigative measures directly with regard to a legal person, since a corporate body as such is not capable to speak, think or act.<sup>113</sup> This might be true regarding some traditional investigative measures, but this is certainly not true with respect to special investigative techniques. For instance, the office of a suspected company can be placed under surveillance, the telephones registered in the name of the company can be wire-tapped, mail addressed to the company can be secretly opened, and last but not least, an undercover agent can obviously only infiltrate a corporation or another association of natural persons. Thus, it is physically possible to use special investigative techniques directly and only against a legal person, if only the law allows it. Almost all the ACN countries stated in their answers to the questionnaire that all effective investigative measures could be used autonomously with regard to legal persons.<sup>114</sup>

## 3. The scope of corporate liability

### 3.1. Covered entities

#### *Entities without legal personality*

In most jurisdictions, the term “legal person” is defined by civil or commercial law, and criminal law uses the same definition for determining the scope of corporate liability. ACN countries follow the same approach: corporate liability applies only to entities which are considered legal persons, whereas the relevant definition is given by another branch of the law. However, Montenegro takes a different approach. The Law on Criminal Liability of Legal Entities itself provides the list of entities which are the subject to corporate liability. Article 4.1 of the Law reads as follows:

legal entity means a company, a foreign company and foreign company branch, a public enterprise, a public institution, or domestic and foreign nongovernmental organizations, an investment fund, any other fund (except for a fund exercising solely public powers), a sports organization, a political party, as well as any other association or organization that continuously or occasionally gains or acquires assets and disposes with them within the framework of their operations.

The end of the definition clearly indicates that the term “legal entity”, for the purposes of criminal law, is wider than the general concept of “legal person”. The scope of corporate liability also exceeds the scope of “legal persons” in Latvia. Although there is no specific criminal law definition of “legal entity,” the Latvian law explicitly states that coercive measures may be applied not only to legal persons but also to partnerships, i.e. an unincorporated entity without a legal personality.<sup>115</sup>

Such legal entities or associations have the legal capacity to perform legal actions, even though they lack the formal status of a legal person. As they thus can participate in or be used for corrupt dealings, they should also be covered by the provisions on corporate liability.

#### *Public law entities*

In many jurisdictions, the criminal law does not apply necessarily to all categories of legal persons. Most commonly, the State, its sub-divisions, and other public authorities are immune from criminal liability. This approach prevails also among ACN countries, as almost all of them declare in their laws that the State, autonomous provinces, municipalities, and other public authorities are not covered by corporate liability. In several countries, international organisations<sup>116</sup> or legal persons performing public functions<sup>117</sup> are added to this list. In Croatia and the FYR of Macedonia, the exemption regarding local governments covers only offences committed within their scope of its authority. If an offence is committed in excess of their authority, the local government and its units are responsible as any other legal person. The law of Montenegro provides the same principle in more general terms: “A legal entity vested with public powers shall not be liable for a criminal offence committed in the performance of such powers.”<sup>118</sup>

Rather different is the law in Georgia. According to Article 107<sup>1</sup>, paragraph 1, of the Georgian Criminal Code, criminal liability applies to commercial and non-commercial legal entities and their legal successors. Future case law must clarify whether this provision would allow the central government of the State to be pursued in court.



### ***Private law entities***

The definition of legal person and its classification differs from one state to another. However, in all the ACN states, a distinction is made in some way between:

- For-profit entities (companies) and non-profit organisations.
- Private companies and companies owned by the State or local governments.
- Domestic and foreign companies.

It could be highlighted that all the ACN countries, except Serbia, have expanded corporate liability to commercial companies that are owned or controlled by the State, an autonomous province or a local government. The same is true for foreign companies<sup>119</sup> and non-profit organisations. The *GAMA* case in Latvia (see Section 1.3 above) shows that foreign companies can be successfully investigated in practice. In that case, a large company with international operations was sanctioned, along with its regional representative who was a Turkish citizen. The *Fimi Media* case in Croatia (see Section 2.3.1 above) shows the importance of including non-profit organisations. In that case, a political party has been prosecuted for embezzling public funds and money collected as donations. Political parties have been prosecuted and convicted also in Estonia and Lithuania.<sup>120</sup>

### ***Successor entities following the reorganisation of a legal person***

Another important issue that must be kept in mind when designing a corporate liability regime is how it handles reorganisations of a legal entity. In an effective corporate liability system, corporate transactions, such as merging one company with another company, or spinning off one part of the company as a new entity, should not enable an entity to avoid its responsibility. Romanian law provides a good example of how a bad-faith reorganisation can be avoided. Specifically, Romanian law authorizes the imposition of the following preventive measures on a legal person during the investigation and trial:

- Suspension of the dissolution or liquidation of the legal person;
- Suspension of the merger or the splitting of the legal person;
- Prohibition of specific asset transactions that might reduce the legal person's assets;
- Prohibition on concluding certain legal acts;
- Prohibition on carrying out certain activities, such as those that gave rise to the original offence.<sup>121</sup>

The need for such measures can be analysed on the example of the *Land Exchange* case where a large construction company was convicted of bribery and punished by a fine of EUR 798 000. (See Section 2.3.1 above). In Estonia, where the case originated, the law is silent regarding the effect of a reorganisation of a legal person under investigation. In the *Land Exchange* case, the investigation became public in October 2006 when a search of AS Merko Ehitus company's headquarters was conducted. In March 2008, the management decided to restructure the company to separate the economic activities and the criminal investigation. Two new companies, AS Merko Ehitus and AS Järvevana, were founded. All economic activities and most of the assets were transferred to AS Merko Ehitus, while AS Järvevana acquired EUR 17.5 million (a sum greater than the maximum fine allowed under the law) to cover the fines or other costs arising from the criminal case. As both companies remained listed on stock market, it is very likely that AS Järvevana became the first ever criminal dossier listed on the bourse. In 2008 the "new" AS Merko Ehitus tried to take part in a public procurement, but its tender was rejected. The company successfully challenged the decision. The Administrative Court held that the company created by the restructuring was a new company that had the right to participate in public procurement. The criminal case came to an end in June 2014 when AS Järvevana was finally convicted by the judgement of the Criminal Law Chamber of the Supreme Court.

What did the (original) AS Merko Ehitus achieve through this reorganisation? It could not avoid the main punishment: a fine of EUR 798 000. This money was taken out of business already in 2008. Nor was the company able to whitewash its trademark, because the criminal case was still associated with the Merko name. However, it preserved the right to participate in public procurement which, in the long run, is probably more important than the one-time monetary punishment. It is also very likely that the reorganisation had a stabilizing effect: after the reorganization shareholders, investors, and customers could be sure that the eventual fine would not affect the assets of the restructured company.

### **3.2. Covered offences**

Another issue that differentiates corporate liability regimes is whether the liability is specific or general, i.e. whether such liability is restricted to identified offences or for any offence. The general liability approach is prevalent in common law world, while civil law countries have historically tended to prefer specific liability approaches.<sup>122</sup> Although the latter approach prevails in most ACN countries, in five states – Bosnia and Herzegovina, Croatia, Montenegro, Romania and Serbia – corporate liability can arise for all offences specified in the penal code. Rather unique is the law in Bulgaria. As a general rule, corporations are liable only for a limited number of crimes, but a legal person can be liable for any crime that is committed under the orders of, or to implement a decision of, an organized criminal group.<sup>123</sup>

As it relates to countries following the specific liability approach, the number of offences that can be imputed to legal persons differs from one country to another. In Ukraine and Bulgaria, for example, the number is relatively small, while in Lithuania, by contrast, a legal person can be held liable for every second crime. However, all ACN countries recognise corporate liability in respect of bribery and other corruption offences, such as trafficking in influence, money laundering, etc. In only two ACN countries, the FYR of Macedonia and Slovenia, is a reservation made exempting liability for passive bribery; the FYR of Macedonia also does not impose liability on a legal person for trafficking in influence.<sup>124</sup>

## 4. Corporate liability in practice

### 4.1. General practice

A law becomes law in the courtroom, until then it is merely words on paper. Therefore, this study cannot do without a small statistical analysis of how corporate liability has been implemented in practice. The absolute numbers are not directly comparable, as the different corporate liability regimes have been in force for different periods of time; the countries also vary in size and regional structure. However, some generalisations and conclusion can be still made.

Leaving aside the states where the corporate liability regime is brand new (Azerbaijan and Ukraine), the ACN countries can be divided into three groups. In the first group, the sentencing of legal persons has become, or is becoming, a regular part of judicial practice (Estonia, Lithuania, Montenegro, Romania, and Slovenia); the second group of countries has some experience (Bulgaria and Serbia); and the third group has just launched the practice (Georgia and Latvia). (See Table 3 below).<sup>125</sup> It is not only the number of indictments, but also the fact that a number of legal persons have been acquitted by the court that suggests that corporate liability has become an accepted norm. The acquittals show that prosecutors are ready to take risks. This is normally not done in a new and unknown environment.

**Table 3. Legal persons prosecuted between 2010 and 2013**

Country	Indictments	Convictions	Acquittals	Population in millions	Corporate liability since
Bulgaria <sup>126</sup>	38	n/a	n/a	7.42	2005
Estonia	200	246	17	1.33	2002
Georgia	2	2	0	4.93	2006
Latvia	11	n/a	0	2.24	2005
Lithuania	316	178	21	3.33	2002
Montenegro <sup>127</sup>	81	50	n/a	0.63	2007
Romania	463	n/a	n/a	21.43	2006
Serbia	30	n/a	n/a	7.38	2008
Slovenia	533	82	19	2.03	1999
<b>Total</b>	<b>1674</b>	<b>558</b>	<b>57</b>		

\*N/A – data not available.

It is not easy to explain why some countries have more actively applied their corporate liability regimes than others. Some correlation can be found between the number of cases and the length of time that the corporate liability regime has been in force. Estonia, Lithuania and Slovenia, which have seen large numbers of cases, were also the first states in the region to adopt the concept of corporate criminal liability early in this century, with Slovenia having already embraced it in 1999. However, in Montenegro, whose law was only adopted in 2006, there were 81 indictments during the relevant time. This is a high figure after considering that the country is considerably smaller than the others. By contrast, in Latvia, only 11 indictments have been issued between the years 2010 and 2013, although the law has been in force since 2005. The size of the country, surprisingly, seems to be another important factor. The authorities of smaller states seem to adapt to new laws faster. One possible explanation may be that authorities are more easily manageable in a small country (less discussion, fewer people to train, etc.).

In the course of the study, the countries were asked whether the law enforcement officers and judiciary were trained following the introduction of corporate liability. All states, except Georgia, gave affirmative answers to that question and provided a full overview of the training exercises that have been organised for investigators and prosecutors, as well as for judges. In almost all the countries, instructional materials, such as commentaries, official guidelines, and academic writings are also available. This suggests that trainings and guidelines are not the most important factors for

encouraging policemen and prosecutors to go after legal persons. It is reasonable to believe that there must be some external factor which forces people to change their beliefs and habits, or in the words of the Romanian authorities, to overcome the prosecutors' reflex to identify, investigate and prosecute natural persons.<sup>128</sup> A more detailed study of high-enforcement countries will be needed to identify precisely which factors have encouraged active implementation in those countries.

## 4.2. Prosecuting bribery

The general figures indicate that the level of implementation varies from country to country, but in the end it can be concluded that the corporate liability in ACN region does not exist only on paper. But, unfortunately, the same cannot be said in connection with corruption offences – bribery in particular. In this respect, the situation is also discouraging even in countries where the big picture looks good. (See Table 4 below). Only in Estonia, is the number of legal persons prosecuted for bribery comparable with general figures for corporate prosecutions. There, one quarter of the companies indicted between the years 2010 and 2013 faced bribery charges. For comparison, in Slovenia, only three legal persons out of 533 (i.e. 0.6%) were indicted for bribery. In Lithuania and Romania, the respective percentages were 2.2% and 3%. These figures clearly show that the application of the corporate liability regime in the field of corruption is rather episodic.

**Table 4. Legal persons prosecuted for bribery between 2010 and 2013**<sup>129</sup>

Country	Indictments	Convictions	Acquittals
Bosnia and Herzegovina	0	0	0
Croatia	1	0	0
Estonia	27	16	3
Latvia	2	1	0
Lithuania	7	7	0
Romania <sup>130</sup>	14	1	0
Serbia	1	0	0
Slovenia	3	0	0
<b>Total</b>	<b>55</b>	<b>25</b>	<b>3</b>

The inability to identify and prosecute corporate bribers could be understood if the overall capacity of detecting corruption were low. But this is not the case. As seen in Table 5 below, the number of natural persons convicted of bribery is impressively high in many countries in the region. Thus, there must be some “irrational” reasons why the investigators and prosecutors who are responsible for combating corruption cannot cope with corporate bribers. This study, based primarily on desk research, was not able to identify these reasons.

**Table 5. Natural persons prosecuted for bribery between 2010 and 2013**

Country	Indictments	Convictions	Acquittals
Bosnia and Herzegovina	27	17	6
Estonia	206	263	13
Latvia	603	222	0
Lithuania	2469	2064	29
Romania	1742	1071	108
Slovenia	140	56	24

## 5. Sanctioning

International law does not prescribe the list of sanctions that must be established with regard to legal persons. Only fines and confiscation of the proceeds of the crime (or a monetary sanction with comparable effect) are mentioned as obligatory sanctions in (1) the OECD Convention, (2) the Council of Europe Criminal Law Convention and (3) the UNCAC.<sup>131</sup> The same is true about sentencing principles: the conventions take no position on which factors related to the crime or its perpetrator should determine the severity of the punishment. There is only a general requirement that the sanctions must be effective, proportionate and dissuasive.

### 5.1. Sanctions

Different jurisdictions have different classification of sanctions. Some countries distinguish between principal punishments and complementary punishments; others set apart punishments and security measures. Thus, the same sanction, e.g. disbarment from public procurement, may be considered a punishment in one country (Romania), a security measure in another (Croatia) and an administrative sanction in a third country (Estonia). Furthermore, those countries which have a quasi-criminal system of corporate liability do not reference punishments, but rather coercive measures or measures having a criminal law nature. Therefore, this study addresses each sanction by focusing on the content and without paying much attention to the different classifications and designations.

#### 5.1.1. Fine

##### *Amounts of the fine in law*

There are two substantially different ways in which corporate liability regimes determine the amount of the fine that can be imposed under the law. In a closed system, the minimum and maximum fine, or at least the latter, is determined by a fixed sum of money or a formula on the basis of which the sum can be calculated (e.g. multiplication of the minimum monthly wage). In an open system, the amount of the fine is set upon one or several factors relating to the particular crime (e.g. the benefit gained) or the defendant (e.g. the company's turnover). Most ACN countries use a closed system where the law fixes both the minimum and maximum fine. The minimum fine ranges from EUR 38 (Lithuania) to EUR 100,000 (Montenegro) and maximum from EUR 21,000 (Moldova) to EUR 32 million (Latvia). (See Table 6 below).

However, several countries have successfully combined the principles of both systems or even use them simultaneously in connection with various crimes. Azerbaijan, Bulgaria, the FYR of Macedonia, Montenegro, Slovenia and Ukraine distinguish between crimes that result in a property benefit or material damage and crimes that either cause harms that do not affect property interests or harms whose value cannot be ascertained. In the first case, the fine depends on the amount of the benefit gained or damage caused, while the punishment for the latter crimes is determined by a fixed sum of money. The harshest of these laws can be found in Slovenia where corporate bribery is punishable by a fine up to 200 times the amount of the material benefit obtained. In most serious cases, the entire property of the corporation can be confiscated in place of a fine (in Ukraine – but not with regard to corruption offences).<sup>132</sup> Somewhat similar is the Russian law, which uses a multiplier of the bribe for determining the upper limit of the fine and a monetary threshold for fixing the lower limit. An interesting point in the law is that not only the actual penalty, but also the multiplier itself grows together with the amount of the bribe. The following are the fines prescribed by Russian law:

- 1) For bribes less than EUR 13,900 (RUB 1 million) – a fine up to 3 times the amount of bribe, but not less than EUR 13,900;

- 2) For bribes from EUR 13,900 to 277,000 (RUB 20 million) – a fine up to 30 times the amount of bribe, but not less than EUR 277,000;
- 3) For bribes of more than EUR 277,000 – a fine up to 100 times the amount of bribe, but not less than EUR 1,390,000 (RUB 100 million).<sup>133</sup>

In Georgia, the lower limit is also determined by a fixed sum of money (EUR 44,000), but the law does not determine a maximum fine, neither provides any instructions on how the maximum should be calculated by the court.<sup>134</sup>

**Table 6. Corporate fines prescribed for corruption offences in ACN countries**

Country	Minimum (EUR)	Maximum (EUR)		Alternative minimum	Alternative maximum
Albania	2 150	360 000			
Azerbaijan	52 000	156 000	Or	the value of the illicit benefit obtained or damage inflicted	5 times the value of the illicit benefit obtained or damage inflicted
Bosnia and Herzegovina	2 550	2 550 000			
Bulgaria	2 600	51 000	Or	Not less than the value of the benefit obtained	EUR 510 000
Croatia	650	1 965 000			
Estonia	4 000	16 000 000			
Georgia	44 000	-			
Latvia <sup>135</sup>	3 200	32 000 000			
Lithuania	38	1 900 000			
FYR of Macedonia	1 620	972 500	But		Not more than 10 times the value of the illicit benefit or damage
Moldova	525	21 000			
Montenegro	100 000	5 000 000	Or	20 times the value of the illicit benefit or damage	100 times the value of the illicit benefit or damage
Romania	4000	334 000			
Russian Federation	13 900	-		3 times the value of the bribe	100 times the value of the bribe
Serbia	9 000	4 400 000			
Slovenia	10 000	1 000 000	Or	-	200 times the value of the illicit benefit or damage
Ukraine <sup>136</sup>	4 250	64 000	Or		2 times the value of the illicit benefit (The fixed minimum and maximum fines are only used when the benefit was not received or not quantifiable)

### ***Effectiveness, proportionality and dissuasiveness***

Monetary sanctions have always been the main remedy for punishing corporations, and, as mentioned above, it is also the only punishment prescribed by international law instruments. Thus, it is reasonable to say that the effectiveness, proportionality and dissuasiveness of the sanctioning framework depend greatly on the question of whether the amounts of the fine are considered sufficient.

In this respect, at least two comparisons can be made. First, fines prescribed for corruption offences can be compared with sanctioning options for other white-collar crimes. As corruption is considered to be a serious offence, the associated penalties must be at the same level as penalties for such crimes as fraud, embezzlement, tax evasion, etc. The second comparison can be made with standards established by GRECO, UNCAC and the OECD WGB. Although none of these organisations has promulgated a universal norm of sufficiency, some landmarks still exist. The OECD WGB has repeatedly stated in its evaluation reports that monetary sanctions should be sufficiently severe to have an impact on large multinational corporations. From this perspective, the OECD WGB found that the maximum fines of EUR 1 million in Germany and Italy, EUR 1.6 million in Slovakia and EUR 2.7 million in Japan were insufficient; whereas it considered that the maximum fines of EUR 16 million in Estonia and EUR 10 million in Belgium were sufficient.<sup>137</sup>

ACN countries can in general pass the first test. However, in most countries the law establishes only a general range of corporate fines that applies to all crimes. No special guidelines exist for calculating the fine for a particular crime. This means that in these countries only the comparison of actual implementation of the law makes sense. In contrast, the laws in Slovenia, the FYR of Macedonia<sup>138</sup> and Croatia<sup>139</sup> are more specifically tailored. In these countries, the amounts of corporate fines have been linked to the punishments applicable to natural persons who commit the same crime; and as bribery, money laundering and other corruption crimes are punishable by imprisonment, the corporate fines for these crimes also reach the upper end of the punishment scale. In Slovenia, for example, the maximum corporate fine can be imposed in cases where a natural person would be sentenced to more than three years of imprisonment.<sup>140</sup> This provision could potentially apply to bribery and money laundering, as they are punishable, respectively, by imprisonment from one to five years and up to five years.<sup>141</sup>

When it comes to the second test, however, most ACN countries would not comply with the standard set by the OECD WGB. Indeed, several of them fall far below it. However, those ACN countries having an alternative calculation for the maximum fine based on the amount of the benefit obtained through the crime (or some other external factor) are in a better position. If the upper limit has been left open, any amount is possible. With regard to Azerbaijan, the OECD Istanbul Anti-Corruption Action Plan plenary meeting stated in its monitoring report that, in theory, fines which can be calculated on the basis of the damage or obtained income and go up to 5 times of their value could establish an effective and dissuasive deterrent.<sup>142</sup>

### *Amounts of the fine in practice*

The deterrent effect of criminal sanctions cannot only be achieved through legislative actions; the actual implementation of laws is just as important. In this respect, even the ACN countries where the law is sufficiently severe can be criticised. Even the highest fines ever imposed on legal persons remain considerably behind the maximums provided by the countries' laws. As regards to the offence of bribery, the sentencing practice is notably lax. (See Tables 7 and 8 immediately below).

**Table 7. Maximum fines ever applied to a legal person for a criminal offence**

Country	Maximum in law (EUR)	Maximum applied (EUR) <sup>143</sup>	Ratio %
Croatia	1 965 000	667 000	34.0
Estonia	16 000 000	798 000	5.0
Latvia <sup>144</sup>	2 849 000	1 210 688	42.5
Lithuania	1 900 000	150 725	7.9
Slovenia	1 000 000 or 200 times the value of the illicit benefit	100 000	10.0

**Table 8. Maximum fines applied to a legal person for bribery**

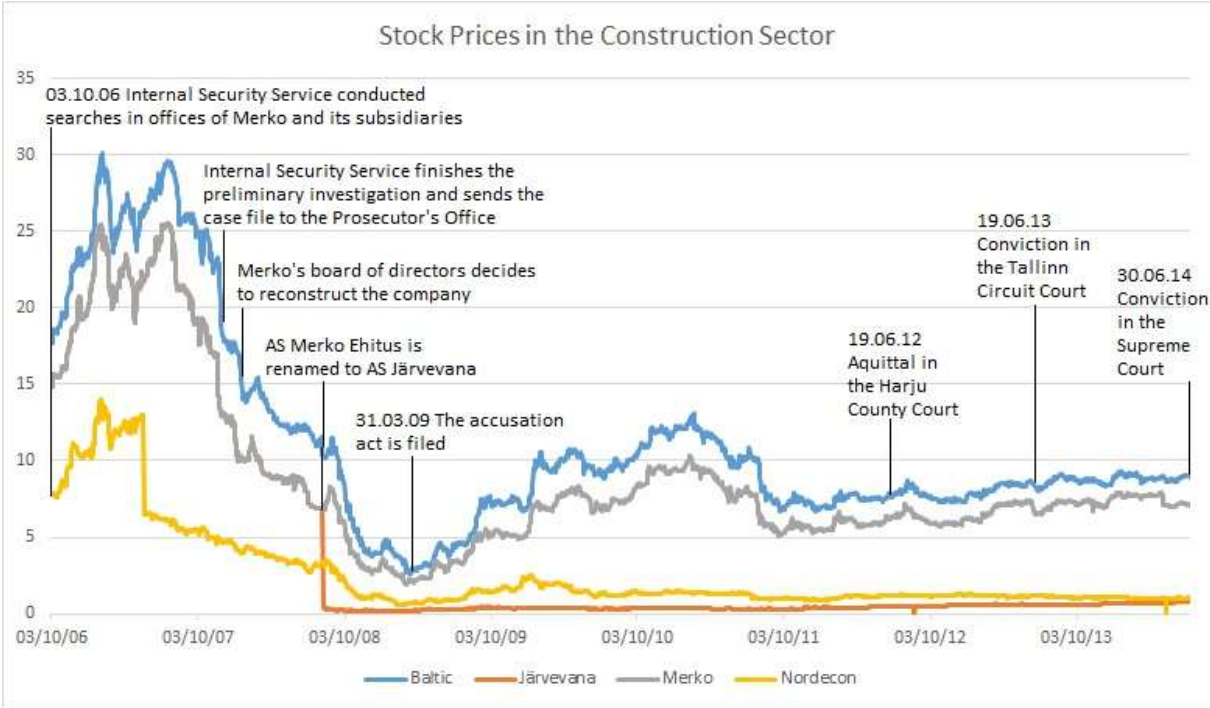
Country	Maximum in law (EUR)	Maximum applied (EUR)	Ratio %
Estonia	16 000 000	798 000	5.0
Latvia	32 000 000	6 400	0.02
Lithuania	1 900 000	22 610	1.2
Romania <sup>145</sup>	134 000	35 000	26.1

The highest fine ever applied in Estonia was imposed on AS Järvevana (which was spun off from the original AS Merko Ehitus company) after it was convicted in the *Land Exchange* case. (See Sections 2.3.1 and 3.1 above). It has to be pointed out that while the land exchange transactions were investigated by the Internal Security Service, another case was opened against the “new” AS Merko Ehitus that remained after the original company reorganized. This case proceeded faster, and the company was finally convicted in 2012, together with six other firms, of bribing Tallinn City Government officials in the *Parbus* case. The new AS Merko Ehitus was punished with a fine of EUR 300 000, and the other legal persons in that case received fines ranging from EUR 50 000 to EUR 200 000.

Right after the final judgement in the *Land Exchange* case, the Estonian Ministry of Justice conducted a survey in order to ascertain how the criminal proceedings and punishments affected the economic indicators of the companies concerned.<sup>146</sup> With regard to AS Merko Ehitus, the overall conclusion of the survey is that if the impact of the case, if any, was only short-term. In the long run, the company maintained its position as a leading company in the construction market. The company's revenue (sales) figures, profit and stock price followed the general trends of the market throughout the period of investigations and trials. (See Figure 1 below).



Figure 1. Changes in the AS Merko companies' stock prices on the Nasdaq OMX Baltic



The graph is based on data from the Nasdaq OMX Baltic<sup>147</sup> stock exchange market. The graph describes the fluctuation of the stock prices of AS Merko Ehitus and AS Järvevana<sup>148</sup> during the land exchange scandal. The data from the days when neither of the abovementioned stocks were exchanged were excluded. The stock price of Nordecon AS<sup>149</sup> and the stock market index for the Baltic construction and materials sector<sup>150</sup> are presented for comparison. To ensure better comparability, the stock prices of AS Merko Ehitus, AS Järvevana and Nordecon AS are presented in euros and the Baltic stock market index has been divided by a hundred. A short timeline is included for context.

The starting point of the graph is 3 October 2006, when the Estonian Internal Security Service conducted searches of the Estonian Land Board and the headquarters of the involved companies. This was the first time that the public learned about AS Merko Ehitus’s possible involvement in the land-exchange scandal through the media. One can see from the graph that although suspicions arose, the company’s share price continued its upward trend with the rest of the stock market, in accordance with overall economic growth. The growth continued until 2007, when the stock market dropped rapidly, due to the international financial crisis, which developed into a worldwide economic recession by September 2008. The share price of AS Merko Ehitus started to recover in the second half of 2009. That was also when investors’ optimism concerning the world market started to improve. Hence, it can be concluded that during the mentioned period, AS Merko Ehitus’s share price was primarily influenced by general market conditions and the global financial crisis. The criminal investigation and court verdicts did not have strong effect on the investors’ assessment of the company’s prospects. The effects of the economic crisis are also clearly noticeable in the revenue (sales) and net profit figures. Both revenue and net profit decreased after 2007 because of the global economic crisis and started to recover in line with the overall stabilization in the end of 2009.

Leaving aside the twists and turns of the global markets, the *Land Exchange* case can be analysed also from a common-sense point of view. Taking into account the facts that the bribe-takers were an incumbent minister and a director general of a governmental agency, that the briber was one of the country’s largest companies, and that the corruption scheme lasted for years and brought in millions of euros to the company and hundreds of thousands to the defendants, the offence can undoubtedly be classified as top-level corruption. However, the resulting corporate punishment only corresponded to

5% of the maximum punishment. If this is the punishment for such an egregious example of corruption, it is hard to imagine what a legal person must do to receive a punishment even remotely close to the maximum sanction permitted under the law. Somewhat similar is the situation with the *GAMA* case in Latvia, in which a legal person received the largest monetary fine ever imposed in that country's history. (See Section 1.3 above). Taken in isolation, EUR 1.2 million is a big sum of money, but begins to shrink when compared with the company's economic position and the value of the contract it had obtained. *GAMA Holding* is a multinational company having total assets of EUR approximately 590 billion;<sup>151</sup> and the monetary value of the construction contract the company acquired, at least partly through the unfair actions, amounted to EUR 323.5 million. In comparison with these figures, the EUR 1.2 million does not seem to be sufficiently dissuasive.

In view of these examples, the importance of the OECD WGB standard, which requires that monetary sanctions should be high enough to be able to influence large corporations, becomes visible. A small country's legislative as well as judicial practice concerning sanctions of legal entities should not be calibrated solely with the prospects of average domestic companies, but should also take responsibility for discouraging the biggest domestic entities and those coming from overseas.

### 5.1.2. Confiscation

#### *Levels of confiscation*

The amounts of any fine, especially in practice, should be reviewed in relation with the confiscation of the property related to the crime. If a country has a robust confiscation regime, the level of the maximum fine could be lower. Several types of confiscation can be distinguished in theory:

- 1) Confiscation of the instrumentalities used or intended to be used to commit a crime (*e.g.* a murder weapon, narcotics, but also a bribe);
- 2) Confiscation of the proceeds derived from or obtained through the crime;
- 3) Extended confiscation, which allows the confiscation of a convicted person's property when its legal origin cannot be proven. Unlike the previous type, this form of confiscation does not require proof that the assets subject to confiscation were actually acquired through the crime for which the owner was convicted.
- 4) Civil confiscation, which allows the confiscation of any property whose legal origin cannot be proven. Unlike the three previous types, civil confiscation can be applied even if the owner of the property has not been convicted of any crime.

The first kind of confiscation is recognised in almost all jurisdictions. It is not primarily intended as a punitive sanction, but rather as a measure for preventing the individual from committing a similar crime again or, more generally, protecting society (*e.g.* by keeping dangerous weapons off the street). In several countries, therefore, the procedural law regulates the confiscation of the instrumentalities of crime. However, in certain cases, including bribery, the deprivation of the instrument used in commission of crime can have a punitive effect as well. For example, if the money earned by hard work is used for bribing, the loss of that money may be as burdensome as the fine.

The confiscation of the proceeds of crime, which is also almost universally in use, does not really have a punitive effect either as it only restores the situation that existed before the crime was committed. Therefore, it is first and foremost the availability of extended confiscation and civil confiscation that can be seen as constituting an effective confiscation regime that can complement, or to some extent even compensate for, low fines. Similar to extended and civil confiscation is the specific offence of illicit enrichment: a significant increase in a person's assets that cannot reasonably be explained in relation to the person's lawful income. Here, as in case of extended and civil confiscation, the illegal origin of the property is assumed due to the certain facts (*e.g.* the disproportionality between the value

of the property in a person's possession and his or her lawful income). Thus, the burden of proof to rebut this assumption is placed on the owner, and the court will make inferences from the accused's failure to explain the origin of the assets at issue.

There are two more issues that have to be considered when evaluating the rules of confiscation. First, in an effective confiscation regime, the value-based confiscation should be possible in cases where the proceeds of the crime have been hidden, spent or transferred into possession of a *bona fide* third party (i.e., "value confiscation"). The other characteristic of an effective confiscation regulation is the possibility of confiscating assets that have been transferred to a third person, at least in the case when that third person acquired the property either free of charge or at a price significantly below the market value.

### ***Confiscation of the proceeds of crime***

Most ACN countries have adopted the confiscation of instrumentalities and proceeds of crime as either a mandatory or optional sanction. In general, no restriction is made with regard to legal persons or crimes of corruption. A good example of a forfeiture rule which covers value confiscation as well as the confiscation of property acquired by a third party can be found in the law of Montenegro. Article 36 of the Law on Criminal Liability of Legal Entities reads as follows:

- (1) Money, things of value and any other material gain obtained through a criminal offence shall be seized from the legal entity; where such a seizure is not possible, the legal entity shall be obliged to pay for the monetary value of the obtained material gain.
- (2) Material gain obtained by a criminal offence shall also be seized from the persons to whom it has been transferred without compensation or for compensation that obviously does not correspond to its actual value.
- (3) Any material gain obtained in favour of other persons through a criminal offence shall be seized.

The law of the FYR of Macedonia also provides a special rule for cases where the suspected company has ceased to exist before the confiscation. In such a case, the legal successors or, if there are no successors, the founders of the legal entity will be obliged to jointly pay an amount corresponding to the obtained property gain.<sup>152</sup>

### ***Extended forms of confiscation***

The extended confiscation of corporate assets is available in Estonia, Moldova, Montenegro, Romania and Lithuania, civil confiscation is available in Slovenia, and the corporate offence of illicit enrichment exists in Lithuania and Moldova.<sup>153</sup>

According to the recently enacted Article 83<sup>2</sup>, paragraph 2<sup>1</sup>, of the Estonian Penal Code, the court may confiscate part or all of the assets belonging to a legal person at the time of its conviction, if the nature of the criminal offence gives reason to presume that the legal person's principal activity was aimed at committing offences and the assets have been acquired through the commission of a criminal offence. Confiscation is not applied to assets that the person demonstrates were acquired with lawful funds.

In Slovenia, a special financial investigation can be launched, if a person suspected of a listed crime owns, possesses, uses or enjoys assets that are reasonably suspected (i) to be of illegal origin, (ii) to be held by or have been passed to such person's legal successors, (iii) to have been transferred to related parties without adequate consideration, or (iv) to have been commingled with the legal successor's or related person's assets. Such an investigation can be launched also against a convicted person as well as against a person against whom pre-trial or trial proceedings have been stopped due to his death, or for whom there are grounds for suspicion that he has committed a criminal offence. If the financial investigation finds sufficient evidence to conclude that property has an illegal origin, the Specialised

State Prosecutor's Office shall bring a civil suit against the owner of the suspicious property. The latter can prevail in the lawsuit by proving that the assets were not illegally obtained or, in the case of a related person, that the actual value was paid in exchange for the assets. If the owner is not able to do that the assets shall be forfeited by the civil court and become the property of the Republic of Slovenia.<sup>154</sup> It is important to point out that this regulation also applies to legal persons suspected or convicted of bribery.

Lithuania is the only ACN country where a legal person can be convicted of illicit enrichment. Article 189<sup>1</sup> of the Criminal Code defines the offence as follows:

A person who, by right of property, possesses property in the amount exceeding 500 minimum subsistence levels<sup>155</sup> and was aware, or ought to have been aware, or could have been aware, that the property could not have been acquired by means of legal proceeds, shall be punished by a fine or by arrest or by imprisonment for a term of up to four years. Such property is subject to mandatory confiscation.

A legal entity shall also be held liable for the acts provided for in this Article.

If the property's value is less than the established threshold for criminal liability, the person will be ordered to pay taxes from the assets and may be sanctioned in administrative proceedings to a fine ranging from 10% to 50% of the property's value.<sup>156</sup>

So far, none of these rules has been applied in practice. However, there were 11 financial investigations involving 55 natural persons and 75 legal persons going on in Slovenia by November 2013. Moreover, three civil lawsuits, involving sums totalling EUR 3.72 million, have been filed in court against five natural persons and two legal persons.<sup>157</sup>

### ***Confiscation as a punishment***

Some ACN countries<sup>158</sup> also recognise confiscation as a particular monetary punishment that is not in any way related to the proceeds of crime or property that was illegally obtained. In Latvia, for example, confiscation of property refers to the compulsory alienation of a person's property by the State without compensation. This sanction can be imposed on legal persons together with other coercive measures, except dissolution.<sup>159</sup> In Slovenia, similar penalties exist in addition to criminal and civil confiscation as described above. According to Article 14 of the Liability of Legal Persons for Criminal Offences Act, in more serious cases half or up to the entirety of the legal person's property may be confiscated. This punishment can also be imposed in addition to dissolution.<sup>160</sup> In Montenegro, the law provides that when a company is punished by dissolution the company's assets shall be confiscated for the benefit of the State.<sup>161</sup>

### **5.1.3. Dissolution**

Another corporate punishment widely found in ACN countries is the compulsory dissolution of legal persons.<sup>162</sup> However, in most countries, dissolution is an exceptional penalty that can only be applied under certain circumstances. Most commonly, the court can order the dissolution of a legal person if it was founded for an unlawful purpose or if its activity was entirely or predominantly used for committing crimes. Provisions to this effect can be found in the laws of Croatia, Latvia, Montenegro, Romania and Slovenia.<sup>163</sup> In Romania, dissolution is also possible when a convicted legal person fails, in bad faith, to fulfil one of the complementary penalties.<sup>164</sup> In the FYR of Macedonia, dissolution can be imposed for recidivism or even the risk of recidivism. According to Article 96-c of the Criminal Code dissolution may be imposed for serious crimes, if the manner in which the act was committed indicates that a similar act may be committed again (paragraph 7), or when a criminal act has been committed after a final verdict banning the legal entity to conduct a certain activity has been pronounced (paragraph 8).

Some laws also restrict the circle of legal entities on which the punishment of dissolution may be imposed. Political parties are protected from compulsory dissolution in Romania, the FYR of Macedonia and Croatia. Media organisations enjoy a similar immunity in Romania, as well as legal entities established by the law in the FYR of Macedonia and local and regional self-government units in Croatia.<sup>165</sup>

Although the dissolution of the legal person is a particularly severe penalty, it has been applied in certain cases. In *Fimi Media Case*, in Croatia, the company Fimi Media d.o.o., which, according to the indictment, submitted fake invoices to the state companies to collect illegal funds in favour of its hidden owners and to finance a political party, was dissolved by the judgement of the first instance court. (See Section 2.3.1 above). In *M.R. Case*, in Romania, two companies, which the person receiving the bribes had used as bribe collectors, were convicted and sentenced with the complementary penalty of dissolution. (See Section 2.3.4 above). The Court considered in its judgement that both companies “were diverted in order to commit criminal offences”. Last but not least, there are at all two legal persons that have been convicted of a crime in Georgia; both were punished with compulsory dissolution.

#### **5.1.4. Restriction of corporate rights**

Although monetary sanctions have been the main tool for disciplining corporations that break the law, a list of other measures have also been developed over the course of time. Most commonly, these measures consist of different restrictions on corporate rights that can be applied in the framework of criminal or administrative law. ACN countries have also taken these developments into account while designing their corporate liability regimes.

##### ***Restrictions available in ACN countries***

The longest list of restraint orders can be found in the law of the FYR of Macedonia. According to Article 96-b of the Criminal Code, one or more of the following auxiliary sanctions may be imposed on a convicted legal person:

- 1) A prohibition on obtaining permits, licenses, concessions, authorisations or any other right prescribed by a special law;
- 2) A prohibition on participating in public bidding procedures, the awarding of public procurement agreements and agreements for public-private partnerships;
- 3) A prohibition on establishing new legal entities;
- 4) A prohibition on using subsidies and other favourable credits;
- 5) The revocation of a permit, license, concession, authorisation or other right regulated by a special law;
- 6) The temporary or permanent prohibition on conducting certain activity.

In order to make the complete list of restraint orders available in the ACN region, the following items must be added to the options available in the FYR of Macedonia:

- 1) The development and implementation of a programme of effective, necessary and reasonable measures (Montenegro);<sup>166</sup>
- 2) The closing of a legal person’s branch office (Romania);<sup>167</sup>
- 3) Placing the legal entity under judicial surveillance (Romania);<sup>168</sup>
- 4) The prohibition of transactions with the beneficiaries of the national or local budget (Croatia);<sup>169</sup>
- 5) The prohibition of trading with securities belonging to the legal person (Slovenia).<sup>170</sup>

The ban on conducting certain business or other activity is the most widespread sanction among ACN countries. It is available in one wording or another in each of these countries, except Bulgaria, Estonia, Russia and Ukraine. Although it can be argued that a ban on conducting certain activity may also encompass a ban on seeking public funds in any form or obtaining any licences, in many countries, such as in the FYR of Macedonia, the latter constraints are established as separate sanctions. Debarment from public procurement is directly mentioned in the laws of Latvia and Romania. The prohibition on applying for state aid, credits, subsidies, etc. is specified in Croatia and Latvia, while Bosnia and Herzegovina, Croatia, Latvia, Montenegro and Slovenia can prohibit companies from obtaining licences, authorisations, etc.

### ***Conditions for imposing restrictions***

In many countries, the restriction of corporate rights cannot be applied in all cases, but only under certain circumstances. According to the law of the FYR of Macedonia, for example, the court may pronounce one or more auxiliary sentences when it determines that the legal entity has abused its activity and that there is a risk of recidivism in the future.<sup>171</sup> Furthermore, there are also special preconditions that have to be taken into consideration when imposing certain auxiliary sentences. For example, a temporary ban on conducting a certain activity, may be pronounced along with a monetary fine, if the criminal act has been committed in the course of the legal entity's activity when the sanction that would be prescribed for a natural person is imprisonment for up to three years, and the threat of committing the same or similar act again arises from the manner in which the criminal act was committed. The temporary ban may last from one to three years. A permanent ban on conducting a certain activity may be imposed along with a monetary fine when a criminal act has been committed for which the punishment for a natural person is imprisonment of at least three years, and the manner in which the act was committed presents the risk that the legal entity might commit the same or a similar act again, as in the case when a criminal act has been committed after a previous final verdict that had temporarily banned the legal entity from conducting a certain activity.<sup>172</sup>

As in the FYR of Macedonia, the laws in Croatia, Montenegro and Slovenia link the application of the ban on conducting a certain activity to either preventive purposes or recidivism.<sup>173</sup> The Croatian Act on the Responsibility of the Legal Persons uses the following language:

A ban on performance of certain activities or transactions may be imposed on the legal person on the basis of court judgement for the period of one to three years as of the moment the judgement becomes final, if further performance of certain activities or transactions would be a danger to life, health or security of persons, or hazardous to property, or economy, or if the legal person has already been punished for the same or similar criminal offence (Article 16).

A ban on obtaining licenses, authorizations, concessions or subventions as issued by national authorities or units of local and regional self-government may be imposed on the legal person in case of a threat that such obtaining of licenses, authorizations, concessions or subventions might instigate him to commit another criminal offence (Article 17).

A ban on transactions with beneficiaries of the national or local budgets may be imposed on the legal person in case of a threat that such operations might instigate him to commit another criminal offence (Article 18).

### ***Restrictions as administrative sanctions***

In some countries the aforementioned bans are not criminal sanctions, but the legal consequences of a conviction as prescribed by the acts of administrative law. In Bulgaria, for instance, according to the Public Procurement Act every tenderer should submit a declaration that it has not been convicted of certain specified crimes, including bribery. The law also forbids foreign natural or legal persons to

participate in a public procurement award procedure if they have been sentenced for bribery in their state of origin or state of registration. Furthermore, a commission, which is appointed by the contracting authority to examine, evaluate and rank the tenders, may at any time undertake due diligence with regard to the declared facts by requesting information from other institutions or persons. If the commission proves that the tenderer has submitted false information in its application documents, the tender can be excluded from the public procurement.<sup>174</sup> The Estonian Public Procurement Act similarly provides that a contracting authority will not award a public contract to a natural person or a legal person, and will exclude from a procurement process any tenderer or candidate, who has been convicted of bribery or related offences, including money laundering and tax offences.<sup>175</sup>

Similar regulations can be found in Latvia, Lithuania, Slovenia and Ukraine<sup>176</sup>, which means that the rights of legal persons convicted of corruption in these countries can be restricted both through criminal law and administrative law. The legal framework in Latvia is particularly secure. First, a legal person can be sanctioned by a restriction of rights, which, according to Article 70<sup>4</sup> of the Criminal Law, means:

The deprivation of specific rights or permits or the determination of such prohibition, which prevents a legal person from exercising certain rights, receive State support or assistance, participate in a State or local government procurement procedure, to perform a specific type of activity for a term of not less than one year and not exceeding ten years.

In addition, pursuant to Article 39 of the Latvian Public Procurement Law, the procuring entity shall exclude a candidate or tenderer from further participation in a procurement procedure and shall not review any tender already submitted, if a candidate, a tenderer or any person authorised to represent, take a decision for, or supervise the candidate or tenderer has been found guilty, in a final and binding decision not subject to appeal, of committing certain criminal offences. These include tax evasion or the evasion of equivalent payments, corruption, financial fraud, money laundering or participation in a criminal organisation. This means that the procurement commission can debar the convicted candidate even in cases where the criminal court has not imposed on the candidate the sanction of restriction of rights.

The advantage of administrative sanctioning is that such sanctions apply equally to all convicted persons; in criminal procedure, by contrast, the application of complementary punishments or security measures is discretionary and, as showed above, often depends on the presence of certain conditions.

### **5.1.5. Publication of judgement**

Another sanction which is widely used in ACN countries is the publication of the court judgement. It is available in the FYR of Macedonia, Montenegro, Romania, Serbia and Slovenia, and it can be imposed on a legal person for preventive purposes.<sup>177</sup> In Montenegro, for example, Article 31 of the Law on Criminal Liability of Legal Entities provides the sanction as follows:

- (1) The court shall pronounce the security measure of publishing the sentence if it considers it useful to make the public aware of the sentence, particularly if the sentence publication would contribute to remove a threat to human life or health or to protect the safety of trade or other general interest.
- (2) Depending on the relevance of the criminal offence and the need to inform the public, the court shall choose the media that will publish the sentence and whether the statement of reasons for the sentence would be published wholly or in the form of an extract, taking care that the manner of publication must provide information to all in the interest of whom the sentence should be published.

### **5.1.6. Civil law sanctions**

None of the ACN countries recognise the system of civil fines or punitive compensation, as found in the United States. In the context of corruption or other criminal acts, however, civil liability would include the obligation to compensate any damage caused by a crime. As a general rule, a victim's claim can be examined either by the criminal court considering the crime that injured the victim or in a separate civil procedure. Although it is rather difficult to measure the material damage caused by an act of corruption, the possibility to sue for compensation under general grounds is available in all ACN countries. Moreover, in Montenegro, there is a special provision (Article 387) in the Law on Obligations which foresees the claim for damages due to corruption.

In addition, in many countries the civil court can dissolve a legal person whose activities or objectives are contrary to the law.

## **5.2. Sentencing principles**

As mentioned above, international law does not specify which circumstances have to be taken into account while sentencing a legal person. Thus, each country can place more emphasis on factors related to the crime or the author of the crime, or whether it is necessary to establish special conditions for corporate criminals at all. On the latter question, the ACN countries fall into two categories: about half of them have special conditions for legal persons, while the others use general principles originally developed for natural persons, such as severity of the crime, confession of the crime, recidivism, conspiracy, etc. This study focus on the sentencing principles specially elaborated for sentencing legal persons.

### **5.2.1. Conditions for meting out punishment**

The most common special condition for meting punishment to a legal person is that the economic strength of the convicted legal person has to be taken into account. This is accepted by many ACN countries, and it has to be considered reasonable. A punishment must not only have a sufficient deterrent effect, but it must also be effective and proportional. In the vast majority of cases, the purpose of the punishment is not to terminate the company's activity, but to influence it to conduct its business lawfully. This goal cannot be achieved if most of the company's assets are taken away. Furthermore, the court has to take into account the possible side-effects, which may affect innocent third parties, particularly employees and shareholders.

Besides economic strength, several other conditions for corporate punishments are available in ACN countries. The most comprehensive sentencing guidelines can be found in the law of Montenegro. First, Article 14 of the Law on Criminal Liability of Legal Entities provides that "a fine shall be determined depending on the amount of the damage caused or illicit material gain obtained, and if these amounts are different the higher amount shall serve as a basis for the determination of fine." This rule is complemented by Article 16, which, by the way, includes almost all of the special sentencing principles found in ACN countries. Only the consideration of previous benevolent activity, which is a mitigating circumstance under the law of Azerbaijan, needs to be added to get the complete range. Article 16, paragraph 1, reads as follows:

The court shall mete out the fine to a legal entity within the limits prescribed by law for the criminal offence in question, bearing in mind the purpose of punishment and taking into account all the circumstances that may have influence on reducing or increasing the fine (extenuating or aggravating circumstances), and in particular:

- 1) The seriousness of a criminal offence, including endangering of general interests;
- 2) The extent of liability of the legal entity for the criminal offence committed;



- 3) The positions in the legal entity and the number of the responsible persons who committed the criminal offence;
- 4) the fact whether the responsible person has prior conviction or whether s/he violated law or another regulation;
- 5) The circumstances under which the criminal offence was committed;
- 6) The economic power and business results of the legal entity;
- 7) earlier business operations of the legal entity, including violations of laws and other regulations;
- 8) The conduct of the legal entity after the commission of the criminal offence, including the dismissal of the persons who failed to perform due supervision, disciplinary punishment and termination of employment of the responsible person who committed the criminal offence;
- 9) The relationship towards the victim of the criminal offence, including the compensation for the damages and rectifying of other harmful consequences caused by the commission of criminal offence, as well as the fact whether it was done before or after finding out that the criminal proceedings were instituted;
- 10) The taking advantage of a poor financial situation, difficult circumstances, necessity, insufficient experience, recklessness or the victim's insufficient judgement ability;
- 11) Whether the material gain obtained through the criminal offence has been returned;
- 12) Whether the legal entity has undertaken all effective, necessary and reasonable measures aimed at preventing and revealing the commission of the criminal offence;
- 13) Whether the legal entity reported the criminal offence before finding out that the criminal proceedings were initiated, whether it cooperated with the authorities competent for revealing and prosecution or it interfered with the conduct of the proceedings;
- 14) The attitude of the legal entity towards the criminal offence committed, including the confession of culpability for the criminal offence committed.

In addition, Article 17 orders the court to give particular consideration to whether the legal entity was previously convicted of a criminal offence, whether the former offence is of the same kind as the latest one and how much time has passed from the earlier conviction. If the legal entity has been convicted of criminal offences at least twice and fined more than fifty thousand euros and if the period longer than five years has not passed since when the last fine was imposed in a final and legally binding manner, the court can increase the fine up to two times the amount of the respective maximum (Article 18).

In Ukraine, according to Article 96<sup>10</sup> of the Criminal Code, when applying measures of a criminal law nature to a legal person, the court takes into account the severity of the crime committed by its authorised person, the degree of implementation of the criminal intent, the amount of damage, the nature and amount of the undue benefit that was received or could have been received by the legal person, and the measures taken by the legal person to prevent crime.

### **5.2.2. Suspended sentence**

The law of Montenegro also provides an elaborate system of suspended sentences. According to Article 24 of the Law on Criminal Liability of Legal Entities, the court may impose a fine up to a 100,000 euros against a legal entity, provided that the sentence will not be enforced if the convicted legal entity does not become liable for a new criminal offence, within the probation period specified by the court, which must not be shorter than one year or longer than three years.<sup>178</sup> The court can also order that the sentence shall be carried out if the convicted legal entity fails, within a specified period of time, to return the material gain it acquired from the criminal offence, to provide compensation for

the damage it caused by the criminal offence, or to fulfil other obligations imposed by criminal law provisions.

In addition, the court can order that any legal entity given a suspended sentence be placed under protective supervision for a particular period of time, which means that it has to fulfil one or more of the following obligations:

- 1) to develop and implement a programme of effective, necessary and reasonable measures with the aim to prevent perpetration of the criminal offence;
- 2) to establish internal controls with the aim to prevent further committing of criminal offences;
- 3) to make periodic reports on its business operations and deliver them to the authority competent for enforcing the protective supervision;
- 4) to eliminate or reduce the risk of causing further damage from the criminal offence that was committed;
- 5) to refrain from business activities which might provide an opportunity or incentive for re-offending;
- 6) to eliminate or mitigate the damage caused by the criminal offence;
- 7) to do community service for a six-month period, provided that this obligation may not endanger normal operations of the legal entity.<sup>179</sup>

### 5.2.3. Grounds for exemption from liability or punishment

#### *The “due diligence defence”*

One question that has raised a lot of dispute concerns the significance that due diligence and compliance efforts should have in corporate liability regimes where a lower-level agent can trigger liability. In most jurisdictions, the presence of a convincing compliance programme is another factor that must, or at least, may be taken into account during sentencing of a legal person.<sup>180</sup> Other countries, especially those that follow the organisational approach, attach a much greater importance to the efforts that the company has made to prevent its employees from committing crimes. In the Netherlands, Australia and Switzerland, for example, a legal person is exempted from liability if it is ascertained during the investigation or at trial that the entity had sufficient compliance rules and mechanisms and that it did everything in its power to prevent the crime.<sup>181</sup> Due diligence is also available as a defence in Japan and Korea, but in those countries it is the company’s task to prove that there were no deficiencies in its corporate culture and supervisory practices.<sup>182</sup> The onus of proof has also shifted from the government to the defendant in the practice of the United States Federal Courts.<sup>183</sup>

Some authors believe that making the absence of compliance efforts a ground for liability or offering a “due diligence defence” makes the corporate liability regime not only fair, but also more effective. They argue that this approach motivates companies to develop proper compliance programmes and, in the event of an infraction, to co-operate with authorities.<sup>184</sup> Others present more sceptical views towards the approach. They argue that it may be appropriate for traffic accidents, environmental disasters and other negligent crimes, but it is a bit unreal in the field of high-level corruption. One negligent person alone may cause a fatal accident, and it may occur also in a company that seriously cares about safety rules. However, it is highly unlikely that a low-level employee would have a chance to use millions of a company’s money to bribe a high-level public official if the company genuinely respects the rules of fair play and has no tolerance for dishonest workers. When a significant sum of money is paid for large projects, it is realistic to suppose that bribery is treated as business as usual even at the highest level of the management; therefore, the liability should not depend on the question of how high the stack of internal regulations and policy papers is.

Although theoretically disputable, OECD bodies have treated the “due diligence defence” as a good practice and even started to recommend it in a mild form.<sup>185</sup> An example of an elaborate version of the

defence model can be found in Italy, where the law provides that a legal person is not liable for an offence committed by a person holding a managing position or persons who are under their direction or supervision, if it proves that before the offence was committed:

- 1) the body's management had adopted and effectively implemented an appropriate organisational and management model to prevent offences of the kind that occurred;
- 2) the body had set up an autonomous organ to supervise, enforce and update the model;
- 3) the autonomous organ had sufficiently supervised the operation of the model; and
- 4) the natural perpetrator committed the offence by fraudulently evading the operation of the model.<sup>186</sup>

Among ACN countries, only Montenegro provides for a “due diligence defence”. According to Article 23, paragraph 3, of the Law on Criminal Liability of Legal Entities, the court may exempt a legal entity from punishment if the entity has undertaken all effective, necessary and reasonable measures aimed at preventing and revealing the commission of the criminal offence.

#### ***Other exempting circumstances***

The above-mentioned Article 23 of the law of Montenegro provides two other grounds for exempting a legal person from punishment. First, a legal entity may escape punishment if the entity reveals and reports a criminal offence before finding out that criminal proceedings have been initiated (paragraph 1). The exemption is also possible in cases when the legal entity voluntarily and immediately returns the illegally obtained material gain or rectifies the harmful consequences caused, or delivers data significant for liability of another legal entity with which it is not connected organizationally (paragraph 2). Both of these grounds are also available in the FYR of Macedonia and Slovenia, but the defence in Slovenia only arises in cases where the liability of a legal person was applied on the basis of the “lack of supervision rule.” In other cases, the voluntary reporting may result in a reduction of the sentence. Timely voluntary reporting is also a ground for exemption from punishment in Croatia<sup>187</sup> and Romania.<sup>188</sup>

### **5.3. Prosecutorial discretion**

Somewhat similar to the exemption from punishment, at least from the perspective of the defendant, is the application of prosecutorial discretion. The latter is primarily associated with the common law legal tradition, and especially with the United States, where a prosecution service is basically free to decide whether to pursue the case prepared by a law enforcement authority or not. However, different civil law countries have also invented a mechanism for eluding the full implementation of “legality principle”, which requires that every crime must be investigated and, if proven, prosecuted. In Germany, for example, prosecutors are entitled to terminate criminal proceedings on the basis of “expediency principle” (*Opportunitätsprinzip*), if they find that the guilt of the defendant is a minor nature and there is no public interest in prosecution.<sup>189</sup> Under the principles of Soviet criminal law, which long influenced the legal thinking in many ACN countries, a crime of minor significance was not a crime, even though it contained all the elements of the crime.

#### **5.3.1. Availability in ACN countries**

In ACN countries, the principle of mandatory prosecution prevails. There are only four countries – Georgia, Estonia, Romania and Montenegro – where prosecutorial discretion is available to a considerable extent. Georgian law basically follows the common law tradition by providing simply that “while deciding upon initiation or termination of a criminal prosecution, a prosecutor shall enjoy discretionary powers which shall be governed by the public interests.”<sup>190</sup> German law has been a role model for Estonia. According to Article 202 of the Estonian Code of Criminal Procedure, if the object of criminal proceedings is an offence in the second degree,<sup>191</sup> the guilt of the suspect is of a minor

nature and there is no public interest in prosecution, the prosecutor may request that the court terminate the criminal proceedings. A confirmation by a judge is not necessary if the object of criminal proceedings is a criminal offence for which the law does not prescribe a minimum term of imprisonment or only imposes a pecuniary punishment (fine). In both cases, the suspect must agree with the decision, remedy the damage caused by the crime and pay the expenses of the investigation. Additionally, the court or the prosecutor may oblige the suspect, with his or her consent, to pay a fixed amount into the public revenues or to be used for specific purposes in the interest of the public.

Prosecutorial discretion has two more forms of expression in Estonian criminal procedure. First, under Article 203 of the Criminal Procedure Code, if the object of criminal proceedings is a criminal offence in the second degree, a prosecutor may request termination of the criminal proceedings by a court with the consent of the suspect and the victim in cases where the possible punishment would be negligible compared to the punishment, which has been or presumably will be imposed on the suspect for another criminal offence. This is a special rule for multi-recidivism which, to put it simply, would permit disregarding a theft when a murder is under consideration. The second rule regards co-operative suspects and aims to facilitate the government's activities in the fight against organised crime and other forms of serious latent criminality. Under Article 205, the State Prosecutor's Office has full discretion to terminate criminal proceedings with regard to a suspect who has significantly contributed the investigation of an important case in which the detection of the criminal offence and taking of evidence would have been precluded or especially complicated.

The new Criminal Procedure Code of Romania provides as well for prosecutorial discretion, which is applicable regardless of whether the suspect is a natural person or a legal person. Article 318 of the Criminal Procedure Code allows the prosecutor to discontinue the investigation or to end the criminal action when an offence is sanctioned by law with no more than 7 years imprisonment or a fine, if there is no public interest in pursuing the case based on the circumstances of the case, the purpose of the offender and the consequences of the offence committed. The prosecutor may then impose alternative obligations on the defendant.

In contrast to Estonia and Romania, where such discretionary powers are available only after the criminal investigation has been started and to some extent conducted, the law of Montenegro provides the possibility to exercise discretion over the institution of a criminal proceeding as well. According to Article 46 of the Law on Criminal Liability of Legal Entities, the State Prosecutor may decide not to institute criminal proceedings against a legal entity if:

- 1) the circumstances of the case indicate that instituting the proceedings would not be appropriate due to the insignificant contribution of the legal entity in committing the criminal offence;
- 2) the legal entity does not have any assets or a bankruptcy proceeding has been initiated against the legal entity; or
- 3) there are grounds that would exempt the legal person from punishment (see Section 5.2.2 above) or would reduce the fine under Article 16, paragraph 1, points 11-14 (see Section 5.2.1 above).

These discretionary powers are applicable to criminal offences punishable by a fine or imprisonment for a term of up to three years. At the later stage of proceedings, the State Prosecutor may decide to postpone prosecution for criminal offences punishable by a fine or imprisonment for a term not exceeding eight years, when she or he finds that it would not be appropriate to conduct the criminal proceedings due to the nature of the criminal offence, the circumstances under which the offence has been committed, and the previous business operations of the legal entity, if the legal entity accepts to fulfil certain obligations.<sup>192</sup>

In addition to those rather broad models, prosecutorial discretion is available to a more limited extent in Croatia, the FYR of Macedonia and Slovenia. The prosecutors in these states may decide not to

prosecute a legal person which has no property or has so little property that it would not suffice to cover the costs of the proceedings, or because bankruptcy proceedings have been initiated against the legal person.<sup>193</sup> In addition, in Slovenia, the state prosecutor may decide not to request the initiation of criminal proceedings against a legal person, if the circumstances of the case show that this would not be expedient because the legal person's participation in the criminal offence was insignificant, or because the perpetrator of the criminal offence is the sole owner of the legal person against which it would be necessary to initiate proceedings.

### 5.3.2. Advantages and risks

Prosecutorial discretion has its advantages and risk. On the one hand, it enables prosecutors to control their caseload and ensure that the necessary resources are available for more important cases. Moreover, it makes possible to shape the size of a particular case as well. In large corruption cases it may be reasonable, or in some occasions even necessary, to let “the small fish” go and focus on the principal criminal, no matter whether this is a company which maintains a band of corrupted officials or an influential functionary who exploits local businesses. In the *Hippocrates* case, for example, the Croatian authorities ascertained that a pharmaceutical company had bribed 337 physicians and pharmacists all over the country. (See Box 1 in Section 2.3.1 above). Such a case has to be split somehow before trial in order to reach to the final verdict within a reasonable time, and one possibility is to do it through discretionary powers.

On the other hand, as it is far easier for the prosecutor to terminate the case than to bring it to court for a full-scale trial, there is always a risk that discretionary powers will be overused or abused. It is not only the workload, but also, or probably even primarily, the fear that the case may collapse in the courtroom that inclines prosecutors in complicated cases to surrender to the temptation to take the money and let the defendant go. As there is not usually too much evidence in corruption cases, one cannot help if a prosecutor finds himself thinking, as the saying goes: which is better, a sparrow in your hands or a pigeon on the roof? Unfortunately, prosecutors do not live in a vacuum; they are bound to consider what the bystanders, the politicians and media included, will say if they ultimately lose the case after rejecting a settlement that would collect large sum of money.

Years ago, there was a case in Estonia where the owner and the managers of a big real estate development company were suspected of a large-scale tax evasion. When the investigation was coming to an end, the owner of the company requested the termination of the case on the basis of the expediency principle and promised to pay all taxes and interest. In addition, the company offered 50 million Estonian crowns (approx. EUR 3 million) as a monetary fine, which at that time amounted to one third of the annual budget of the entire prosecution service. However, the State Prosecutors' Office rejected the offer, because it did not want to send a message to the business community that one can avoid criminal liability simply by paying the right sum of money. After three years of trial, the court, with the consent of the prosecution, closed the case and imposed on the defendants a monetary fine of just 4 million Crowns. The prosecutors' office had to endure a lot of criticism for the miscalculation.

## Notes

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- <sup>1</sup> The ACN Statement adopted by the High Level-Meeting on “Reinforcing Political Will to Fight Corruption in Eastern Europe and Central Asia” (10 December 2012) is available at: [www.oecd.org/corruption/acn/HighLevelMeetingDecemberStatementENG.pdf](http://www.oecd.org/corruption/acn/HighLevelMeetingDecemberStatementENG.pdf).
- <sup>2</sup> The ACN Work Programme for 2013-2015 (adopted by the ACN Steering Group 11 Dec. 2012) is available at: [www.oecd.org/corruption/acn/ACNWorkProgramme2013-2015\\_EN.pdf](http://www.oecd.org/corruption/acn/ACNWorkProgramme2013-2015_EN.pdf).
- <sup>3</sup> Second Protocol of the Convention on the protection of the European Communities’ financial interests, in Official Journal of the European Communities, C 221 of 19 July 1997.
- <sup>4</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 Dec. 1997, 2802 U.N.T.S. I-49274.
- <sup>5</sup> Council of Europe Criminal Law Convention on Corruption, 27 Jan. 1999, E.T.S. no. 173.
- <sup>6</sup> United Nations Convention against Corruption, 31 Oct. 2003, U.N. Doc A/58/422.
- <sup>7</sup> The elaborate theoretical foundations of the doctrine can be found in the works of James Goldschmidt and Erik Wolf.
- <sup>8</sup> In common law systems, a distinction is made between “real” offences and offences of “strict liability”, which do not require a mental element (*mens rea*). Almost all strict liability offences have been created by statute and are therefore also known as statutory offences. To obtain a conviction under such an offence, the prosecution only needs to prove that the defendant perpetrated an act prohibited by statute or failed to carry out the statutory duty.
- <sup>9</sup> In the Netherlands, criminal liability of corporations was first introduced in the Economic Offences Act (*Wet economische delicten*), but in 1976 it was adopted as a general rule in the Penal Code.
- <sup>10</sup> In Tajikistan, the Code of Administrative Offences provides that legal persons can be liable for criminal offences (Article 31, Chapter 38). However, it does not apply to bribery or other corruption offences.
- <sup>11</sup> Article 83a, paragraph 1, of the Bulgarian Law on Administrative Offences and Sanctions.
- <sup>12</sup> Article 83b, paragraph 1, of the Bulgarian Law on Administrative Offences and Sanctions.
- <sup>13</sup> See WGB, Phase 2 Report on Implementing the OECD Anti-Bribery Convention in the Russian Federation (October 2013) (“WGB Russia Phase 2 Report”), pages 75-76.
- <sup>14</sup> See WGB Russia Phase 2 Report, pages 79-80.
- <sup>15</sup> See Chapter VIII<sup>1</sup>, Article 70<sup>1</sup>, of the Latvian Criminal Law. It should be mentioned that the law was changed considerably in 2013. Previously, the conviction of the natural perpetrator was a prerequisite for the liability of the legal person.

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- <sup>16</sup> See WGB, Phase 1 Report on Implementing the OECD Anti-Bribery Convention in Latvia (June 2014) (“WGB Latvia Phase 1 Report”), § 37, page 11.
- <sup>17</sup> See Chapter 15-2 of the Azerbaijan Criminal Code; see also ACN, Istanbul Anti-Corruption Action Plan Third Round of Monitoring Azerbaijan Monitoring Report (Sept. 2013) (“IAP Azerbaijan Round 3 Report”), page 30.
- <sup>18</sup> In Azerbaijan, liability of legal persons for criminal offences has not yet been applied in practice because the criminal law provisions have not yet been correlated with criminal procedural law provisions. The draft Enforcement Rules for Criminal Law Measures concerning Legal Persons are currently being developed.
- <sup>19</sup> In this report, “the FYR of Macedonia” refers to the Former Yugoslav Republic of Macedonia.
- <sup>20</sup> See WGB, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Germany (March 2011) (“WGB Germany Phase 3 Report”), footnote 49, pages 22-23. It is also worth mentioning that, as of 2013, Russia had a relatively high number of domestic enforcement actions involving the application of corporate liability. (See WGB Russia Phase 2 Report, § 251, page 76).
- <sup>21</sup> GAMA Holding is a multinational company of Turkish origin that among other activities develops turnkey power generation projects. As of 31 December 2013, the Group had assets totalling approximately EUR 590 million and operates in several countries in Europe, the Middle East, Africa and the C.I.S. region. See GAMA Holding website at: [www.gama.com.tr/en/gama-holding/financial-information/101](http://www.gama.com.tr/en/gama-holding/financial-information/101) (last accessed 23 April 2015).
- <sup>22</sup> See WGB Russia Phase 2 Report, §§ 266-68, pages 79-80.
- <sup>23</sup> Article 83b, paragraph 1.2, of the Bulgarian Law on Administrative Offences and Sanctions; see also Bulgaria’s answers to the questionnaire, question 10.4; and WGB, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Bulgaria (March 2011) (“WGB Bulgaria Phase 3 Report”), § 32.
- <sup>24</sup> Section 439 of the Latvian Criminal Procedure Law; see WGB, Phase 1 Report on Implementing the OECD Anti-Bribery Convention in Latvia (June 2014) (“WGB Latvia Phase 1 Report”), §§ 29 *et seq.*
- <sup>25</sup> Information provided by the Latvian authorities at the meeting of the OECD WGB on 4 June 2014.
- <sup>26</sup> For example, Article 43, paragraph 1, of the UN Convention against Corruption enables the extension of co-operation to civil and administrative proceedings.
- <sup>27</sup> See WGB, Germany: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (June 2003) (“WGB Germany Phase 2 Report”), § 116, page 31; and WGB, Italy Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Nov. 2004) (“WGB Italy Phase 2 Report”), § 103-107, pages 29-30. See also Pieth (2014), page 223-24-.

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- <sup>28</sup> Chapter 28 of the Russian Code of Administrative Offences, see WGB Russia Phase 2 Report, § 266, pages 79-80.
- <sup>29</sup> See Pieth (2014), page 223-24-.
- <sup>30</sup> See WGB, Bulgaria Follow-up to the Phase 3 Report & Recommendations (May 2013) (“WGB Bulgaria Phase 3 Follow-up Report”), page 13.
- <sup>31</sup> See Stessens (1994), footnote 52, page 504.
- <sup>32</sup> See the overview of the *Land Exchange* case in sections 2.3.1 and 3.1 below.
- <sup>33</sup> Pieth (2007), page 194; see also Pieth (2014) at 246.
- <sup>34</sup> See, for example, the Financial Action Task Force’s The Forty Recommendations (20 June 2003), at Rec. 2b. The FATF’s recommendations have been subsequently revised in 2012 and released as the FATF International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (Feb. 2012).
- <sup>35</sup> *Birmingham & Gloucester Railway Co.* (1842) 3 QB 223
- <sup>36</sup> *Gt. North of England Railway Co.* (1846) 9 QB 315
- <sup>37</sup> *Moore v. Bresler* (1944) 2 All ER 515; *R. v. ICR Haulage Ltd* (1944) KB 551; *DPP v. Kent and Sussex Contractors Ltd* (1944) 1 All ER 119
- <sup>38</sup> Wise (1994), page 384.
- <sup>39</sup> Stessens (1994), page 496.
- <sup>40</sup> *New York Central & Hudson River Railroad Company v. United States*, 212 U.S. 481 (1909)
- <sup>41</sup> Coffee (1983), page 254.
- <sup>42</sup> *New York Central & Hudson River Railroad*, 212 U.S. 481 at 494-495.
- <sup>43</sup> “Developments in the Law” (1979), *Harvard Law Review*, page 1247; see Coffee (1983), pages 253, 255.
- <sup>44</sup> *Standard Oil Co. of Texas v. United States*, 307 F.2d 120, 127 (5th Cir. 1962); see Wise (1994), page 390.
- <sup>45</sup> Stessens (1994), page 509; see also Allens Arthur Robinson (2008), pages 64-65.
- <sup>46</sup> See LaFave and Scott (1996), page 366.
- <sup>47</sup> See 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 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (26 November 2009).



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<sup>48</sup> Doelder and Tiedemann (1994), pages 291 and 300.

<sup>49</sup> Field and Jörg (1991), page 167.

<sup>50</sup> Article 100<sup>4</sup>, paragraph 2, of the Swiss Criminal Code; see also WGB, Switzerland Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Dec. 2004) (“WGB Swiss Phase 2 Report”), §§ 105-112.

<sup>51</sup> Section 12.2 and 12.3 of the Australian Commonwealth Criminal Code Act; see also WGB, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia (“WGB Australia Phase 3 Report”), §§ 18-19, page 12.

<sup>52</sup> An example of a combined definition can be found in Georgian law. Article 107<sup>1</sup>, paragraph 3, of the Criminal Code defines the responsible person as follows: “A responsible officer ... shall be a person entitled to direct, represent a legal person and take decisions on its behalf as well as a member of a supervisory, oversight or auditing body.”

<sup>53</sup> ACN countries’ answers to the questionnaire, questions 4.2, 4.3 and 4.4.

<sup>54</sup> Article 4 of the Montenegrin Law on Criminal Liability of Legal Entities; a similar definition can be found in Article 5 of the Serbian Law on the Liability of Legal Entities for Criminal Offences.

<sup>55</sup> Article 4 of the Slovenian Legal Persons’ Liability for Criminal Offences Act.

<sup>56</sup> Ibid. The law in Bosnia and Herzegovina is similar, see Article 124 of the Criminal Code.

<sup>57</sup> Article 28-a, paragraph 2, of the FYR of Macedonia’s Criminal Code.

<sup>58</sup> I.e. over 50 average monthly salaries paid in FYR of Macedonia at the time of the crime.

<sup>59</sup> Article 14(1) of the Estonian Penal Code.

<sup>60</sup> See the verdicts of the Estonian Supreme Court in cases No. 3-1-1-145-05 and No. 3-1-1-9-05 ([nc.ee](http://nc.ee)).

<sup>61</sup> Article 4 of the Croatian Act on the Responsibility of Legal Persons for Criminal Offences.

<sup>62</sup> Croatia’s answers to the questionnaire, questions 4.1, 4.2 and 4.3.

<sup>63</sup> *AS Merko Ehitus* includes *AS Merko Ehitus Eesti*, which is the leading construction company in Estonia, *SIA Merks*, which operates in Latvia, and *UAB Merko Statyba*, which operates in Lithuania, as well as several affiliates dealing with real estate development. At the end of 2012, the Group employed 915 persons and its annual turnover amounted to EUR 249.1 million [Vainman, T. (2014), page 2]. The company’s shares are listed on the Baltic stock market, *Nasdaq OMX Baltic*. For a discussion concerning how the company was reorganised during, and as a result of, the criminal investigation, see section 3.1 below.

<sup>64</sup> Until 1 January 2015, the Estonian Penal Code distinguished between a bribe given for an unlawful decision or action (Article 298) and a bribe given for lawful decision or action (Article 297).

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In this case, the company was charged with the first offence, but ultimately convicted of the latter.

<sup>65</sup> Council of Europe Criminal Law Convention on Corruption, 27 January 1999, ETS no. 173.

<sup>66</sup> 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 Foreign Public Officials in International Business Transactions (26 November 2009).

<sup>67</sup> For example, Azerbaijan, Latvia, Lithuania, Serbia, Georgia and Ukraine.

<sup>68</sup> For example, Bosnia and Herzegovina, the FYR of Macedonia and Slovenia.

<sup>69</sup> These rules only apply to offences resulting in significant proceeds or in significant damage to a third party, see Article 28-a, paragraph 2, of the FYR of Macedonia's Criminal Code.

<sup>70</sup> The FYR of Macedonia's, Serbia's and Slovenia's answers to the questionnaire, question 5.2.

<sup>71</sup> Article 19.28 of the Russian Code of Administrative Offences.

<sup>72</sup> See WGB Russia Phase 2 Report, § 259, page 78.

<sup>73</sup> Article 83a, paragraph 1(4), of the Bulgarian Law on Administrative Offences and Sanctions; Bulgaria's answers to the questionnaire, question 1.5 and 5.1.

<sup>74</sup> Article 19/1 of the Romanian Criminal Code; Romania's answers to the questionnaire, questions 1.5.

<sup>75</sup> Romania's answers to the questionnaire, questions 1.5, 3.2 and 5.2.

<sup>76</sup> The ACN countries' answers to the questionnaire, question 3.7.

<sup>77</sup> The ACN countries' answers to the questionnaire, question 3.3b.

<sup>78</sup> The ACN countries' answers to the questionnaire, questions 3.5a and 3.3.

<sup>79</sup> Article 28-a of the FYR of Macedonia's Criminal Code:

- (2) The legal entity is responsible for a criminal act committed by its employee or representative which has resulted insignificant property gain or has caused significant damage to another, if:
- the execution of a conclusion, order or other decision or approval of a governing body, a managing body or a supervisory body represents commitment of a criminal act or
  - the commitment of the act has occurred because of omission of the obligatory supervision of the governing body, the managing body or the supervisory body or
- the governing body, the managing body or the supervisory body has not prevented the criminal act or it has concealed it or it has not reported it before the criminal procedure has been initiated against the perpetrator.

<sup>80</sup> ACN countries' answers to the questionnaire, questions 3.5b and 3.8.

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- <sup>81</sup> Article 3, paragraph 1, of the Croatian Act on the Responsibility of Legal Persons for Criminal Offences.
- <sup>82</sup> This requirement should not be confused with the question whether the agent followed applicable internal regulations. This question will be discussed in connection with the grounds for exemption from liability (see Sections 5.2.2 and 5.2.3 below).
- <sup>83</sup> Article 6 of the Serbian Law on the Liability of Legal Entities for Criminal Offences.
- <sup>84</sup> Article 5 of the Montenegrin Law on Criminal Liability of Legal Entities.
- <sup>85</sup> In the Commentary on the OECD Convention, the phrases “on behalf of” and “in the name of” are even considered as alternative formulations of the interest criterion. See Pieth (2007), page 187.
- <sup>86</sup> Namely, Bosnia and Herzegovina, Georgia, Macedonia, Montenegro, Romania, Russia, and Slovenia.
- <sup>87</sup> Article 28a, paragraph 1, of the FYR of Macedonia’s Criminal Code.
- <sup>88</sup> Bosnia and Herzegovina uses the phrase “for account of”, see Article 124 of the Criminal Code. Georgia uses the phrase “by means of”, see Article 107<sup>1</sup>, paragraph 2, of the Criminal Code.
- <sup>89</sup> Article 19/1 of the Romanian Criminal Code; Romania’s answers to the questionnaire, questions 1.5.
- <sup>90</sup> Article 3, paragraph 1, of the Croatian Act on the Responsibility of Legal Persons for Criminal Offences.
- <sup>91</sup> Article 83a, paragraph 1, of the Bulgarian Law on Administrative Offences and Sanctions.
- <sup>92</sup> 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).
- <sup>93</sup> WGB, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Hungary (Mar. 2012) (“WGB Hungary Phase 3 Report”), § 21; see also WGB, Poland Phase 2 Report on the Application of the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (Jan. 2007) (“WGB Poland Phase 2 Report”), §§ 161-163.
- <sup>94</sup> 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 Oct. 1988).
- <sup>95</sup> GRECO, Addendum to the Compliance Report on Latvia, Second Evaluation Round (Feb. 2009), § 39. At the same time, GRECO’s position has been that such a situation, while unsatisfactory, does not contravene the letter of Article 18 of the Council of Europe Criminal Law Convention on Corruption.

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- <sup>96</sup> For example, identifying the perpetrator is not necessary in the United States, Finland, Switzerland, or the Netherlands.
- <sup>97</sup> See Doyle, C. (2013), “Corporate Criminal Liability: An Overview of Federal Law,” Congressional Research Service, 7-5700, R43293 (30 Oct. 2013) at page 4 & n.21; see also “Developments in the Law” (1979), 92 *Harvard Law Review* at page 1248; *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738-41 (§.D. Va. 1974); Wells (1993), page 118.
- <sup>98</sup> Only Lithuanian law requires that the individual perpetrator must be convicted before the legal person can be held liable. Lithuania’s answers to the questionnaire, questions 6.1, 6.2 and 6.3.
- <sup>99</sup> Article 107<sup>1</sup>, paragraph 4, of the Georgian Criminal Code
- <sup>100</sup> Section 439, paragraph 3, point 2, of the Latvian Criminal Procedure Law
- <sup>101</sup> See WGB, Phase 1 Report on Implementing the OECD Anti-Bribery Convention in Latvia (June 2014) (“WGB Latvia Phase 1 Report”), § 37(b).
- <sup>102</sup> See Section 2.3.4 above; see also Romania’s answers to the questionnaire, questions 6.1, 6.2 and 6.3.
- <sup>103</sup> See Article 125, paragraph 1, of the Criminal Code of Bosnia and Herzegovina; Article 83a, paragraph 3, of the Bulgarian Law on Administrative Offences; Article 28b, paragraph 2, of the FYR of Macedonia’s Criminal Code
- <sup>104</sup> See Article 6 of the Montenegrin Law on Criminal Liability of Legal Entities; Article 14, paragraph 2, of the Russian Federation’s Federal Law on Countering Corruption.
- <sup>105</sup> Article 5, paragraph 1, of the Slovenian Legal Persons’ Liability for Criminal Offences Act
- <sup>106</sup> Article 7 of the Serbian Law on the Liability of Legal Entities for Criminal Offences
- <sup>107</sup> Article 99-4.4 of the Azerbaijan’s Criminal Code; see also IAP Azerbaijan Round 3 Report, page 30.
- <sup>108</sup> Article 23, paragraph 2, of the Croatian Act on the Responsibility of Legal Persons for Criminal Offences
- <sup>109</sup> See ACN, Anti-Corruption Reforms in Ukraine: Round 3 Monitoring of the Istanbul Anti-Corruption Action Plan (24 Mar. 2015) (“IAP Ukraine Round 3 Report”), at page 52.
- <sup>110</sup> Similar provisions are found in the laws of Croatia, the FYR of Macedonia, Montenegro and Slovenia. In Ukraine, article 214, paragraph 8, of the Criminal Procedure Code provides only that “proceedings concerning the legal person are conducted simultaneously with the relevant criminal proceedings in which the person was notified of the suspicion.”
- <sup>111</sup> Section 439, paragraph 3, of the Latvian Criminal Procedure Law.
- <sup>112</sup> The situation in Georgia and Romania is similar.

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<sup>113</sup> The necessity of having investigative measures that can be applied directly to a legal entity was discussed previously in Section 1.3 above.

<sup>114</sup> The ACN countries' respective answers to question 10.6 of the questionnaire.

<sup>115</sup> Article 70<sup>1</sup> of the Latvian Criminal Law.

<sup>116</sup> International organisations are exempted from criminal liability in Azerbaijan, Bulgaria, Estonia, Latvia, Lithuania, and - in relation to corruption offences - also in Ukraine.

<sup>117</sup> Legal persons performing public functions are exempted from criminal liability in Estonia, Latvia, Romania, and, in relation with corruption offences, also in Ukraine.

<sup>118</sup> Article 2, paragraph 2, of the Montenegrin Law on Criminal Liability of Legal Entities.

<sup>119</sup> In Croatia, however, corporate liability covers only those foreign legal persons which can be considered legal persons under Croatian law; in Bulgaria, the foreign legal person must be registered in the country. Bulgaria's and Croatia's answers to the questionnaire, question 2.2.

<sup>120</sup> In Estonia, a party was convicted of violating the restrictions on funding political parties, which is a specific crime (see Article 402<sup>1</sup> of the Estonian Penal Code, and the judgement of the Supreme Court No. 3-1-1-67-09).

<sup>121</sup> Romania's answers to the questionnaire, question 10.2.

<sup>122</sup> See Allens Arthur Robinson (2008), pages 74-75.

<sup>123</sup> Article 83a of the Bulgarian LAOS.

<sup>124</sup> The FYR of Macedonia's answers to the questionnaire, question 1.3.

<sup>125</sup> There are no comparable data available for Albania, Bosnia and Herzegovina, Croatia, the FYR of Macedonia, Moldova and Russia. The authorities of Bosnia and Herzegovina confirmed that no legal person has been charged with corruption offences. In Croatia, a country with a population of 4.45 million and a corporate liability regime since 2003, at least 12 legal persons have been indicted in cases where the investigation had been carried out by the Office of the Suppression of Corruption and Organised Crime. (Croatia's answers to the questionnaire, question 9.1). In the FYR of Macedonia, a country with 2.06 million people and a corporate liability regime since 2004, 495 legal persons were charged between 2008 and 2010 (see Vettori (2011), pages 44-47); however, the ACN national coordinator in FYR of Macedonia later reported that very few cases against legal persons were actually pursued in the country. The OECD WGB has recognized that the Russian Federation, a country with 140.73 million inhabitants and a corporate liability regime since 2010, has a relatively high number of domestic enforcement actions involving corporate liability. (See WGB Russia Phase 2 Report, § 251). From 2010 to the first half of 2012, 84 proceedings were initiated against legal persons for domestic bribery and over 60 legal entities were convicted. (See *ibid.* at § 278). On the basis of this information, it can be assumed that at least Croatia and Russia belong to the first group as well.

<sup>126</sup> It is not clear if the Bulgarian number covers indictments or investigations opened.

<sup>127</sup> The data for Montenegro cover the period from 2010 to 2012.

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- <sup>128</sup> Romania's answers to the questionnaire, question 9.8.
- <sup>129</sup> Bribery means promising/offering, giving, accepting, or acting as an intermediary for a bribe (graft/gratuity).
- <sup>130</sup> In Romania, the number of convictions only reflects cases in which the investigation was conducted by the National Anti-Corruption Directorate.
- <sup>131</sup> See, respectively, Article 3 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Article 19 of the Council of Europe's Criminal Law Convention on Corruption and Article 26, paragraph 4, of the UN's Convention against Corruption.
- <sup>132</sup> See Article 25 and 26 of the Legal Persons' Liability for Criminal Offences Act and Article 262 of the Criminal Code; see also Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Slovenia (June 2014) ("WGB Slovenia Phase 3 Report"), § 48, pages 20-21. In Montenegro, the maximum is 100 times (see Article 14, paragraph 2, of the Law on Criminal Liability of Legal Entities); in Azerbaijan – 5 times (see IAP Azerbaijan Round 3 Report, page 31); and in Ukraine – 2 times (see Article 96<sup>7</sup>, paragraph 1, of the Criminal Code). In Bulgaria, the economic equivalent of the illicit benefit indicates only the lower limit of the fine, whereas the maximum amount is fixed in money (see WGB Bulgaria Phase 3 Report, § 45, page 15, and Bulgaria's answers to the questionnaire, question 7.2). In the FYR of Macedonia, by contrast, the same equivalent is used as another criterion for calculating the maximum fine. There, the corporate fine must not exceed EUR 100 000 or the tenfold amount of the benefit gained or damage caused (see Article 96a, paragraph 3, of the FYR of Macedonia's Criminal Code).
- <sup>133</sup> See Article 19.28 of the Russian Federation's Code of Administrative Offences (currency exchange rate as of 19 December 2014).
- <sup>134</sup> Georgia's answers to the questionnaire, question 8.2.
- <sup>135</sup> In Latvia, the amount of fine is calculated on the basis of the minimum monthly wage; the range is from 10 times to 100 000 times.
- <sup>136</sup> In Ukraine, the amount of the fine is calculated on the basis of untaxed income of citizen (an amount equal to UAH 17 or about EUR 0.85 as of 19 December 2014); the fine can range from 5 000 times to 75 000 times this basis.
- <sup>137</sup> Pieth (2014), page 243; and OECD (2013), page 65.
- <sup>138</sup> Article 96-g of the FYR of Macedonia's Criminal Code.
- <sup>139</sup> Article 10 of the Croatian Act on the Responsibility of Legal Persons for Criminal Offences.
- <sup>140</sup> Articles 25 and 26 of the Slovenian Legal Persons' Liability for Criminal Offences Act.
- <sup>141</sup> See, respectively, Articles 262 and 245 of the Slovenian Criminal Code.
- <sup>142</sup> See IAP Azerbaijan Round 3 Report, page 31.

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- <sup>143</sup> The maximum fines have been applied for the following offences: abuse of office and official authority in Croatia (see discussion of the *Fimi Media* case in Section 2.3.1 above); for bribery in Estonia (see Section 2.3.1 above); for trading in influence in Latvia (see discussion of the *GAMA* case in Section 1.3 above); for giving bribes in Romania; and for abuse of position or trust in business activity in Slovenia.
- <sup>144</sup> At the time of the crime, the upper limit of the fine was EUR 2 849 000; currently, the maximum is EUR 32 million.
- <sup>145</sup> At the time of the case, the upper limit of the fine was EUR 134 000. Since 1 February 2014, the maximum is EUR 334 000.
- <sup>146</sup> See generally Vainman, T. (2014).
- <sup>147</sup> Nasdaq OMX Baltic data available at: <http://www.nasdaqomxbaltic.com/market/?lang=et>
- <sup>148</sup> As described in Section 3.1 above, the management of AS Merko Ehitus decided to restructure the company during the investigation by separating the economic activities and the criminal proceeding. Two new companies, AS Merko Ehitus and AS Järvevana, were founded. All economic activities and most of the assets were transferred to AS Merko Ehitus, whereas AS Järvevana acquired EUR 17.5 million (i.e. more than the maximum fine under the law) to cover the fines or other costs arising from the criminal case.
- <sup>149</sup> Nordecon AS is a construction company based in Estonia that was not involved in the land-exchange case.
- <sup>150</sup> Since AS Merko Ehitus is the largest company of the Baltic construction and materials sector along with Latvijas Tilti, it affects the industry's index to a large extent.
- <sup>151</sup> See discussion of the *GAMA* case in Section 1.3\_ above, at footnote 21.
- <sup>152</sup> Article 96-m, paragraph 2, of the FYR of Macedonia's Criminal Code.
- <sup>153</sup> In February 2015, Ukraine adopted amendments introducing criminal and civil extended confiscation of a legal person's property specifically for corruption and money laundering crimes (both requiring prior conviction of the natural person). A legal person's property is subject to confiscation if its legal origin cannot be established in court and the convicted person facilitated its acquisition.
- <sup>154</sup> See Forfeiture of Assets of Illegal Origin Act, particularly Articles 4, 10, 26, 27, and 34. See also WGB Slovenia Phase 3 Report, §§ 56 *et seq.*
- <sup>155</sup> In Lithuania, an amount of 500 minimum subsistence levels is approximately EUR 18 000.
- <sup>156</sup> See also OECD (2013), page 60.
- <sup>157</sup> See WGB Slovenia Phase 3 Report, § 57.
- <sup>158</sup> Namely, Azerbaijan, Bosnia and Herzegovina, Georgia, Latvia, Slovenia and Ukraine; however, in Ukraine the confiscation of property is only imposed in case of liquidation of the legal

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person, which is not possible with regard to corruption crimes (see Article 96<sup>8</sup> and 96<sup>9</sup> of the Criminal Code).

<sup>159</sup> Article 70<sup>2</sup> and 70<sup>5</sup> of the Latvian Criminal Law.

<sup>160</sup> See Article 15 of the Slovenian Liability of Legal Persons for Criminal Offences Act.

<sup>161</sup> Article 22, paragraph 4, of the Montenegrin Law on Criminal Liability of Legal Entities.

<sup>162</sup> For the time being, the punishment of dissolution is available in all ACN countries, except in Bulgaria and Russia. However, in Ukraine, it is not available for bribery and other corruption offences. In Estonia, the punishment of dissolution, which was introduced with corporate criminal liability in 2002, was abolished by recent amendments to the Penal Code.

<sup>163</sup> See, respectively, Articles 8 and 12, paragraph 1, of the Croatian Act on the Responsibility of the Legal Persons; Article 70<sup>3</sup> of the Latvian Criminal Law; Article 22 of the Montenegrin Law on Criminal Liability of Legal Entities; Article 139, paragraph 1, of the Romanian Criminal Code; and Article 15 of the Slovenian Liability of Legal Persons for Criminal Offences Act.

<sup>164</sup> Article 139, paragraph 2, of the Romanian Criminal Code.

<sup>165</sup> See respectively Article 141 of the Romanian Criminal Code; Article 96-c, paragraph 9, of the FYR of Macedonia's Criminal Code; Article 12, paragraph 2, of Croatian Act on the Responsibility of the Legal Persons.

<sup>166</sup> See Article 29 of the Montenegrin Law on Criminal Liability of Legal Entities.

<sup>167</sup> See Article 136 of the Romanian Criminal Code.

<sup>168</sup> Ibid.

<sup>169</sup> See Article 18 of the Croatian Act on the Responsibility of the Legal Persons.

<sup>170</sup> See Article 14, point 4, of the Slovenian Liability of Legal Persons for Criminal Offences Act.

<sup>171</sup> See Article 96-b of the FYR of Macedonia's Criminal Code.

<sup>172</sup> Article 96-c, paragraphs 4-6, of the FYR of Macedonia's Criminal Code; see also Vettori (2011), pages 31-33.

<sup>173</sup> See respectively Articles 16-18 of the Croatian Act on the Responsibility of the Legal Persons; Article 32 of the Montenegrin Law on Criminal Liability of Legal Entities; Article 20 of the Slovenian Liability of Legal Persons for Criminal Offences Act.

<sup>174</sup> See the Bulgarian Public Procurement Act, especially Articles 47, 48, 68 and 69. Similarly, applicants for export credits insurance must complete an anti-bribery declaration and the officials of the Bulgarian Export Insurance Agency will conduct due diligence when awarding insurance coverage. If they find out that the applicant has provided false information or is listed in one of the debarment lists of the World Bank Group, the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction



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and Development or the Inter-American Development Bank, the application for insurance cover shall be rejected. Bulgaria's answers to the questionnaire, question 11.2.

<sup>175</sup> See Article 38 of the Estonian Public Procurement Act.

<sup>176</sup> The Ukrainian Law on Prevention of Corruption adopted in October 2014, which entered into force at the end of April 2015, amended Article 17 of the Law on Public Procurement by banning from public procurement legal entities to which criminal law measures have been applied for corruption offences.

<sup>177</sup> See respectively Article 96-e of the FYR of Macedonia's Criminal Code; Article 31 of the Montenegrin Law on Criminal Liability of Legal Entities; Article 136 and Article 145 of the Romanian Criminal Code; Article 26 of the Serbian Law on the Liability of Legal Entities for Criminal Offences; Article 19 of the Slovenian Liability of Legal Persons for Criminal Offences Act.

<sup>178</sup> The suspended sentence is also available in FYR of Macedonia and Slovenia; see Article 96-1 of the FYR of Macedonia's Criminal Code and Article 17 of the Slovenian Liability of Legal Persons for Criminal Offences Act.

<sup>179</sup> See Articles 26 and 27 of the Montenegrin Law on Criminal Liability of Legal Entities.

<sup>180</sup> In ACN region, this factor is accepted by Latvia, Montenegro, Serbia and Ukraine.

<sup>181</sup> See See about the dispute in Robinson, pages 68-71.

<sup>182</sup> See Pieth (2014), page 223; and Allens Arthur Robinson (2008), pages 43-46; 56-57.

<sup>183</sup> Allens Arthur Robinson (2008), page 75.

<sup>184</sup> See e.g. Allens Arthur Robinson (2008), page 69.

<sup>185</sup> See e.g. ACN, Istanbul Anti-Corruption Action Plan Third Round of Monitoring Georgia Monitoring Report (Sept. 2013) ("IAP Georgia Round 3 Report"), page 30, § 2 ("Criminalisation of Corruption") (recommending consideration of creating an exception or defence to liability for "companies with effective internal controls and compliance programmes").

<sup>186</sup> Articles 6, paragraph 1, and article 7 of the Italian Legislative Decree on Administrative Liability Of Legal Persons (No. 231, adopted 8 June 2001); see also WGB, Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Italy (Dec. 2011) ("WGB Italy Phase 3 Report"), § 39.

<sup>187</sup> See respectively Article 96-j of the FYR of Macedonia's Criminal Code; Article 11 of the Slovenian Liability of Legal Persons for Criminal Offences Act; Articles 12 of the Croatian Act on the Responsibility of the Legal Persons.

<sup>188</sup> Article 290, paragraph 3, and article 292, paragraph 2, of the Romanian Criminal Code, regarding respectively bribery and trading in influence.

<sup>189</sup> Articles 153-154d of the German Criminal Procedure Code.

<sup>190</sup> Article 16 of the Georgian Criminal Procedure Code.

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<sup>191</sup> These are all crimes punishable by an imprisonment not exceeding 5 years.

<sup>192</sup> See the list of the obligations in Article 47 of the Montenegrin Law on Criminal Liability of Legal Entities.

<sup>193</sup> See respectively Articles 24 of the Croatian Act on the Responsibility of the Legal Persons; Article 509 of the FYR of Macedonia's Law on Criminal Procedure; Article 28 of the Slovenian Liability of Legal Persons for Criminal Offences Act.

## Policy recommendations

1. Establish the effective liability of legal persons for corruption offences in line with international treaties, such as the OECD Anti-Bribery Convention, the Council of Europe Criminal Law Convention on Corruption and the UN Convention against Corruption, as well as international best practice.

If the country's constitution and/or legal doctrine allows, criminal liability is preferable, as it enables the most effective investigative procedures and have the greatest deterrent effect, while also providing better fair trial guarantees for defendants.

If a country instead opts for administrative punitive liability or quasi-criminal liability, it must ensure that all investigative tools and mutual legal assistance will be available to the same degree as for criminal cases. Sufficiently long statute of limitations periods and timeframes for investigation and prosecution are also necessary.

2. Ensure the effectiveness of the corporate liability regime, by covering the actions of lower level agents. The liability model combining vicarious liability ("*respondeat superior*") with a due diligence defence is an effective tool in fighting corporate crime. It minimizes the risk that corporate liability can be evaded because of a complex corporate structure, while enabling legal persons to defend themselves. It also motivates corporations to develop proper compliance rules and corruption prevention mechanisms.

Alternatively, if the circle of agents who can trigger the corporate liability is restricted to "responsible persons" (e.g., directors, managers, etc.), the following points should be ensured:

- a) The legal person should be liable when a responsible person's lack of proper supervision made the commission of the offence possible;
- b) The definition of "responsible person" should be broad enough to cover all persons who are *de facto* authorized to act on behalf of the legal person, as well as persons who can be reasonably assumed to be authorized to act on behalf of the legal person or who are effective controllers of the legal person (such as a "shadow", a directing mind, or a beneficial owner). The definition should not be restricted to formal appointments defined by the business law or the company's statutes.

3. Ensure that a legal person can be held liable not only for offences that were committed in its interest, but also for offences that its relevant agent committed in the interest of any other entities that are associated or related to the legal person.

The interest criterion should not be accompanied by other restrictive criteria, such as the requirement that the relevant agent must, while acting in the interest of the legal person, also act *on behalf of* the legal person or *within his or her responsibilities*.

4. Guarantee the autonomous nature of corporate liability, both in substantive and procedural law. The identification or prosecution/conviction of the person who committed the crime in

the interest of the legal person (individual perpetrator) should not be a prerequisite for corporate liability, as this requirement may allow a legal person to escape unpunished in cases where the fault is found to be anonymous or collective or where the individual perpetrator could not be held liable for other reasons.

There should be no general rule requiring that the legal person and the individual perpetrator have to be investigated and tried jointly, as this unreasonably complicates the proceedings in a complex case. It should be possible to investigate, prosecute, convict and punish a legal person regardless of what procedural decision has been taken with respect to the individual perpetrator. In such separate proceedings, all investigation techniques should be available.

5. Ensure that dividing the legal person or merging it with another legal person cannot be used to avoid liability. This can be achieved either through special provisional or security measures applicable during the criminal proceeding, or through a general rule that ensures that the successor entity or the reorganised body or bodies will inherit the original legal person's liability.

6. Establish and implement proportionate and dissuasive monetary sanctions for corporate offences. It should be taken into account that only sufficiently high fines can have a deterrent effect on major companies. Consider establishing monetary fines that correlate with the amount of the undue benefit obtained if the latter is quantifiable (*e.g.* several times the amount of the bribe or benefit).

7. Establish and implement sentencing principles that are specially designed for legal persons.

Any corporate punishment should be proportionate to the size of the legal person and its economic strength.

Use a "due diligence defence" that allows the legal person to prove that it took all necessary and reasonable steps to prevent the crime. Consider establishing provisions that allow the court to defer the application of sanctions imposed on a legal person if the latter complies with organisational measures to prevent corruption as determined by the court. (The legal person is punished in this case only if it fails to implement relevant measures or if it commits a new offence).

8. Establish an advanced form of assets forfeiture – either civil confiscation or extended criminal confiscation – that allows for confiscating a convicted person's property when its legal origin cannot be proven. However, the confiscation, no matter how strict, cannot substitute for a monetary punishment that is proportionate and sufficiently dissuasive.

9. Consider providing prosecutors with some discretionary powers to give up prosecuting minor cases and/or junior defendants in complex cases. Prosecutorial discretion, if properly implemented, enables prosecutors to control the caseload and allocate the necessary resources to the most important cases, as well as to reduce the size of a given case.

10. Develop a system of statistical data collection to enable the effective monitoring of corporate liability enforcement. The effectiveness of regulations cannot be evaluated and

improved when there is no basic statistical information on detection, investigation, prosecution, trial and sanctions applied to legal persons. Such detailed statistics should be made public on regular basis.

11. Conduct studies to learn how monetary and other sanctions applied to legal persons have affected their economic position and whether they have had a deterrent effect. On the basis of such studies, evaluate if the current sanctioning system is effective, proportionate and sufficiently deterrent.

12. Take steps to raise awareness of corporate crime and the liability of legal persons among law enforcement officers, prosecutors and judges. Regular legal training should be provided to explain provisions on corporate liability and their enforcement, as well as the purpose and the added value of prosecuting legal persons. This can be done, *inter alia*, by international seminars with the participation of practitioners from different ACN and OECD countries. Trainings should be as practical as possible and target various groups of officials, such as investigators, prosecutors, and judges. Combined trainings, featuring the participation of different groups of officials, may be especially beneficial.

Governments should take effort to raise awareness about corporate liability among private sector entities and provide training (or at least training materials) for the staff of legal persons, especially those officers who are responsible for anti-corruption compliance.

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## Annex 1. Provisions on corporate liability in international legal instruments

OECD Instruments	Second Protocol to the EU Convention on the Protection of the Financial Interests of the European Communities, 1997	Council of Europe Criminal Law Convention on Corruption, 1999	United Nations Convention against Corruption, 2003
<p><b><i>Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997</i></b></p> <p><b>Article 2:</b> 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.</p> <p><b>Article 3.2:</b> 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><b><i>Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Annex to OECD Council Recommendation, 2009)</i></b></p> <p><b><i>B) Article 2 of the OECD Anti Bribery Convention: Responsibility of Legal Persons</i></b></p> <p>Member countries' systems for the liability of legal persons for the bribery of foreign public</p>	<p><b>Article 3 - Liability of legal persons</b></p> <p>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</p> <ul style="list-style-type: none"> <li>— a power of representation of the legal person, or</li> <li>— an authority to take decisions on behalf of the legal person, or</li> <li>— an authority to exercise control within the legal person,</li> </ul> <p>as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud.</p> <p>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.</p>	<p><b>Article 1.d:</b> ... "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><b>Article 18 – Corporate liability</b></p> <p>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:</p> <ul style="list-style-type: none"> <li>– a power of representation of the legal person; or</li> <li>– an authority to take decisions on behalf of the legal person; or</li> <li>– an authority to exercise control within the legal person;</li> </ul> <p>as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences.</p>	<p><b>Article 26 - Liability of legal persons</b></p> <p>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.</p> <p>2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.</p> <p>3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.</p> <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.</p>

officials in international business transactions should not restrict the liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted. Member countries' systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should take one of the following approaches:

a. the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons; or

b. the approach is functionally equivalent to the foregoing even though it is only triggered by acts of persons with the highest level managerial authority, because the following cases are covered:

\_ A person with the highest level managerial authority offers, promises or gives a bribe to a foreign public official;

\_ A person with the highest level managerial authority directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official; and

\_ A person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

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.

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.

#### **Article 19 – Sanctions and measures**

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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.

## Annex 2. Liability of legal persons (LP) for corruption offences in ACN and OECD countries

Country	Liability, Year of introduction /Type (Legal basis)	Liability for lack of supervision	Defence of preventive measures	Monetary sanctions	Other sanctions
<b>Albania</b>	Criminal, 2007 (Criminal Code, Law on Responsibility of Legal Persons)	-	-	Fine up to about EUR 360,000.	Dissolution; suspension or prohibition of certain activity; submission to administrative control; debarment from public procurement; exclusion from receipt or use of licences, authorisations, concessions or subsidies; publication of the judgment; confiscation.
<b>Armenia</b>	<b>Absent</b> (draft Code of Administrative Offences provides for liability of LPs)	-	-	-	-
<b>Azerbaijan</b>	Quasi-criminal, "criminal law measures", 2012 (Criminal Code)	+	-	Fine from about EUR 52,000 to EUR 156,000 or of one to five times the damage inflicted (income obtained) as a result of commission of the crime.	Confiscation; deprivation of the right to engage in certain activities; dissolution.
<b>Argentina</b>	<b>Absent</b> (draft amendments in the Criminal Code proposed in 2010)	-	-	-	-
<b>Australia</b>	Criminal (Criminal Code)	+	+ (if exercised due diligence to prevent the offence)	Not more than the greatest of the following: - a fine of AUD 11 million (EUR 9.18 million); - 3 times the value of the benefit that the LP (or its related entity) have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence, if the court can determine the value of the benefit; or - if the court cannot determine the value of that benefit, then 10% of the annual turnover of the LP during the period of 12 months prior to the	Confiscation

Country	Liability, Year of introduction /Type (Legal basis)	Liability for lack of supervision	Defence of preventive measures	Monetary sanctions	Other sanctions
				offence.	
<b>Austria</b>	Criminal (Law on the Responsibility of Associations – Verbandsverantwortlichkeitsgesetz, VbVG)	+ (LP liable for an offence committed by its staff for the benefit of the LP, if “decision-makers” have made the commission of the offence possible or significantly easier as a result of their negligence, in particular by failing to take technical, organisational or personnel measures to prevent the offence)	-	EUR 1.3 million (calculated based on daily rates which equals a 360 <sup>th</sup> of the LP’s annual profit, but not more than EUR 10,000; daily rate of EUR 10,000 for LPs with annual profit of EUR 3.6 million or more)	Exclusion from public procurement; confiscation.
<b>Belarus</b>	<b>Absent</b>	-	-	-	-
<b>Belgium</b>	Criminal, 1999 (Criminal Code)	-	-	Minimum fine - EUR 180,000; maximum fine – EUR 6.6 million.	Dissolution, a ban on engaging in an activity related to the corporate purpose, closure of one or more establishments and publication or dissemination of the judgment.
<b>Bosnia and Herzegovina</b>	Criminal (Criminal Codes)	+	-	Fine from EUR 2,550 to EUR 2.5 million	Dissolution; confiscation; debarment from public procurement; publication of the judgment.
<b>Brazil</b>	Administrative, 2014 (Corporate Liability Law)	-	-	Fine in the amount of 0.1% to 20% of the gross revenue of the legal entity. The fine “shall never be lower than the obtained advantage, when it is possible to estimate it”. However, if it is not possible to use the criteria of the value of the gross revenue of the legal entity, the fine will range from EUR 2,000 to EUR 20 million.	Publication of the condemnatory decision. Civil sanctions: (i) Loss of the assets, rights or valuables representing, directly or indirectly, the advantage or benefit gained from the infringement; (ii) Partial suspension or interdiction of its activities; (iii) Compulsory dissolution of the legal entity; and (iv) Prohibition to receive

Country	Liability, Year of introduction /Type (Legal basis)	Liability for lack of supervision	Defence of preventive measures	Monetary sanctions	Other sanctions
					incentives, subsidies, grants, donations or loans from public agencies or entities and from public financial institutions or institutions controlled by the government, for one to five years.
<b>Bulgaria</b>	Administrative, 2005 (Law on Administrative Offences and Sanctions)	-	-	If the advantage that the LP has or would obtain as a result of the crime is in the nature of "property", then fine is up to approx. EUR 510,000, but not less than the value of the advantage. If the advantage is not in the nature of "property" or if the value of the advantage cannot be ascertained, the fine is approx. EUR 2,600 to 51,000.	Confiscation
<b>Canada</b>	Criminal (Criminal Code, since 2004)	-	-	No upper limit for a fine	-
<b>Chile</b>	Criminal, 2009 (Law on Criminal Responsibility of Legal Persons for the Crimes of Money Laundering, Financing of Terrorism and Offences of Bribery)	+	+ (Not a defence but a part of offence - LP is liable if functions of "direction and supervision" have not been met if, i.e. if the LP had not adopted and implemented organization, administration and supervision models to prevent such offenses as the one committed)	Fine up to EUR 465,000.	Dissolution; a permanent or temporary prohibition from entering into acts and contracts with public administrative organs; a partial or total loss of fiscal subsidies, or an absolute prohibition from receiving such subsidies for a specified period of time; publication of an extract of the judgement; confiscation.
<b>Colombia</b>	Administrative, 2011 (Anti-Corruption Statute)	+	-	Fine from EUR 130,000 to 520,000	Suspension or dissolution
<b>Croatia</b>	Criminal, 2003 (Law on Responsibility of Legal Entities for Criminal	-	-	Fine from EUR 650 to about EUR 680,000.	Dissolution; professional bans; bans on transactions with beneficiaries of the national or

Country	Liability, Year of introduction /Type (Legal basis)	Liability for lack of supervision	Defence of preventive measures	Monetary sanctions	Other sanctions
	Offences)				local budgets; ban on obtaining licences, authorisations or concessions; publication of the judgment; confiscation.
<b>Czech Republic</b>	Criminal, 2012 (Act on Criminal Liability of Legal Persons and Proceedings against Them)	+	-	Fine from EUR 800 to EUR 58.6 million.	Debarment from public procurement, prohibition from receiving public endowments and subsidies; dissolution; prohibition of activity; publication of a judgment; confiscation.
<b>Denmark</b>	Criminal, 1996 (Criminal Code)	+	-	No upper limit	Confiscation
<b>Estonia</b>	Criminal, 2002 (Criminal Code)	-	-	Fine from 4,000 to EUR 16 million	Confiscation; debarment from public procurement
<b>Finland</b>	Criminal, 1993 (Criminal Code)	+	-	Fine from EUR 850 to 850,000.	Confiscation
<b>France</b>	Criminal, 1994 (Criminal Code)	+	-	Fine up to EUR 750,000.	A ban on engaging in a professional or corporate activity; judicial observation; closure of the company's establishments used to commit the offence(s); exclusion from public procurement; a ban on public offerings of securities; a ban on issuing cheques other than certified cheques or cheques to withdraw funds or on using payment cards; confiscation of the instrument used or intended to be used to commit the offence or of the proceeds of the offence; and the display or dissemination of the judgment. Confiscation.

Country	Liability, Year of introduction /Type (Legal basis)	Liability for lack of supervision	Defence of preventive measures	Monetary sanctions	Other sanctions
<b>Georgia</b>	Criminal, 2006 (Criminal Code)	+	-	Minimum fine of EUR 44,000, no upper limit of fine.	Dissolution; deprivation of the right to exercise an activity; confiscation of property.
<b>Germany</b>	Administrative (Administrative Offences Act)	+	-	Fine up to EUR 1 million, but not less than the financial benefit gained from the offence.	Debarment from public procurement.
<b>Greece</b>	Administrative (since April 2014 as part of the Anti-Money Laundering Law)	+	-	“Obligated” legal persons (i.e. those subject to the AML requirements) are fined EUR 50,000 to 5 million for foreign bribery committed by someone who is a member of the legal person’s organ or has the power of decision-making, control or representation. However, “non-obligated” legal persons can only be fined EUR 20,000 to 2 million for the same act. If foreign bribery results from company management’s failure to exercise supervision or control, then the fine is only EUR 10,000 to 1 million for “obligated” legal persons, and EUR 5,000 to 500,000 for “non-obligated” legal persons.	Withdrawal or suspension of a permit of operation, or prohibition from carrying out the company’s business for one month to two years, or permanently; prohibition from carrying out specific business activities, establishing branches, or increasing capital for the same period of time; and final or provisional exclusion from public grants, aids, subsidies, awarding of contracts for public works or services, procurement, advertising and tenders of the public sector or of the legal persons belonging to the public sector.
<b>Hungary</b>	Criminal, 2004 (Act on Measures Applicable to Legal Persons under Criminal Law)	+	-	Minimum fine of EUR 1,585, no upper limit of fine.	Winding up the LP; limiting the LP’s activities; debarment from public procurement. Confiscation
<b>Iceland</b>	Criminal, 1998 (Criminal Code)	-	-	No upper limit of fine.	Confiscation
<b>Ireland</b>	Criminal (not codified, common law)	-	-	No upper limit of fine.	Exclusion from public contracting. Confiscation
<b>Israel</b>	Criminal (Penal Law)	-	-	Fine up to EUR 443,000 or four times the benefit intended or obtained - whichever is higher.	Confiscation



Country	Liability, Year of introduction /Type (Legal basis)	Liability for lack of supervision	Defence of preventive measures	Monetary sanctions	Other sanctions
<b>Italy</b>	Administrative, 2001 (Legislative Decree no. 231)	+	+ (LP is not liable for an offence if it proves that before the offence was committed (i) the LP's management had adopted and effectively implemented an appropriate organisational and management model to prevent offences of the kind that occurred; (ii) the LP had set up an autonomous organ to supervise, enforce and update the model; (iii) the autonomous organ had sufficiently supervised the operation of the model; and (iv) the natural perpetrator committed the offence by fraudulently evading the operation of the model.	Fine from EUR 10,000 to EUR 1,239,200.	For at least one year: (i) suspension or revocation of authorisations, licenses or concessions instrumental to the commission of the offence; (ii) prohibition on contracting with the public administration, except to obtain the performance of a public service; (iii) denial of facilitations, funding, contributions and subsidies (including those already granted); (iv) prohibition on advertising; (v) prohibition from conducting business activities. Confiscation.
<b>Japan</b>	Criminal – only for foreign bribery (Unfair Competition Prevention Law)	-	-	Fine up to EUR 3.9 million.	-
<b>Kazakhstan</b>	<b>Absent</b>	-	-	-	-
<b>Kyrgyzstan</b>	<b>Absent</b>	-	-	-	-

Country	Liability, Year of introduction /Type (Legal basis)	Liability for lack of supervision	Defence of preventive measures	Monetary sanctions	Other sanctions
<b>Korea</b>	Criminal – only for foreign bribery (Foreign Bribery Prevention Act)	-	+ (LP is not subject to sanction if it “has paid due attention or exercised proper supervision to prevent the offence against this Act”.)	Fine up to approx. USD 1 million. The maximum fine increases to twice the profit earned from the offence if the profit exceeds approx. USD 500,000.	Debarment from procurement and officially-supported export credit.
<b>Latvia</b>	Quasi-criminal, “coercive measures applicable to legal persons”, 2005 (Criminal Code)	+ (since April 2013)	-	From 10 to 100,000 times the minimum monthly wage (in 2013: from EUR 3,200 to EUR 32 million).	Liquidation; limitation of rights; confiscation of property. Debarment from public procurement.
<b>Liechtenstein</b>	Criminal, 2010 (Criminal Code)	+	-	Corporate monetary penalty is assessed in daily rates. The number of daily rates amounts from 40 to 180 depending on the number of years of imprisonment provided for the respective act. 4The daily rate is assessed in accordance with the income situation of the legal person, taking account of its economic ability apart from the income situation. It shall be assessed at an amount that corresponds to 1/360th of the annual corporate income or that is less or more than that amount by at most one third, but at least 100 francs and at most 15,000 francs. If the legal person serves common-benefit, humanitarian, or ecclesiastic purposes or if it is otherwise not for profit, then the daily rate shall be assessed at least 4 and at most 1,000 francs.	-
<b>Lithuania</b>	Criminal (Criminal Code)	+	-	Fine from EUR 38 to EUR 1.9 million.	Restriction of operation; liquidation. Confiscation
<b>Luxembourg</b>	Criminal, 2010 (Criminal Code)	-	-	Fine up to EUR 3.75 million (fore repeat offence – 4 times the amount of fine for basic offence).	Dissolution; confiscation; disqualification from public procurement.

Country	Liability, Year of introduction /Type (Legal basis)	Liability for lack of supervision	Defence of preventive measures	Monetary sanctions	Other sanctions
<b>Mexico</b>	Quasi-criminal, 1999 – only for foreign bribery (Criminal Code)	-	-	No upper limit of fine (limited to 500 “days of fine” which equals “daily net income of whoever commits the crime”)	Suspension or dissolution.
<b>Moldova</b>	Criminal, 2003 – for a number of offences, 2012 – for corruption offences (Criminal Code)	-	-	From 500 to 20,000 of “standard units” (1 unit equals 20 Moldovan Leu or EUR 1.05; i.e. from EUR 525 to EUR 21,000).	Deprivation of the right to engage in certain activities; dissolution.
<b>Mongolia</b>	<b>Absent</b> (LPs are liable for money laundering under Article 166 <sup>1</sup> of the Criminal Code)	-	-	-	-
<b>Montenegro</b>	Criminal, 2007 (Criminal Code and Law on Criminal Liability of Legal Entities)	-	-	Fine of 20 to 50 times the amount of the damage caused or illicit material gain obtained or from EUR 100,000 to EUR 200,000 for the criminal offences punishable by imprisonment for a term of up to 10 years. Not less than 50 times the amount of the damage caused or illicit material gain obtained or not less than EUR 200,000 for the criminal offences punishable by imprisonment for a term of more than 10 years.	Dissolution; professional bans; confiscation of assets; publication of the court decision.
<b>Netherlands</b>	Criminal (Criminal Code)	+	+ (Court can release LP from liability if it had established effective internal controls, ethics and compliance rules and that it did all in its power to prevent the act)	Fine up to EUR 780,000 (fines can be accumulated for commission of several offences).	Confiscation
<b>New Zealand</b>	Criminal (Crimes Act, common law)	-	-	No upper limit	Confiscation

Country	Liability, Year of introduction /Type (Legal basis)	Liability for lack of supervision	Defence of preventive measures	Monetary sanctions	Other sanctions
<b>Norway</b>	Criminal, 1997 (Criminal Code)	+	+ (When deciding whether to sanction the LP court takes into account “whether the enterprise could by guidelines, instruction, training, control or other measures have prevented the offence”)	No upper limit	Prohibitions, deprivation of rights and professional disqualifications; debarment from public procurement; confiscation
<b>Poland</b>	Quasi-criminal, 2002 (Law on Liability of Collective Entities for Acts Prohibited under Penalty)	+	-	Fine from around EUR 242 to EUR 1.21 million (but no more than 3% of the revenue generated in the tax year when the offence which is a ground for the LP’s liability was committed).	Bans on activity; confiscation.
<b>Portugal</b>	Criminal, 1984 – only for private sector bribery and foreign bribery (Decree Law no. 28/84); 2008 – Criminal Code	+	-	Fine up to EUR 10 million.	Dissolution; judicial orders; prohibition on the exercise of an activity; prohibition on executing certain contracts or contracts with certain entities; deprivation of the right to subsidies, subventions or incentives; closing of establishment; publicity of a conviction sentence. Confiscation
<b>Romania</b>	Criminal, 2006 (Criminal Code)	+	-	Fine from EUR 4000 to EUR 334,000	Dissolution; suspension of the activity from 3 months to 3 year, or suspension of one of the activities related to the offence committed; closing of a workstation from 3 months to 3 years; ban on the participation to public procurement procedures for a period from 1 to 3 years; placement under judicial supervision; publication of the conviction decision.

Country	Liability, Year of introduction /Type (Legal basis)	Liability for lack of supervision	Defence of preventive measures	Monetary sanctions	Other sanctions
					As a safety measure, confiscation of the proceeds of crime and extended confiscation can be ordered.
<b>Russian Federation</b>	Administrative, 2011 (Code of Administrative Offences)	-	-	For bribes less than EUR 13,900 - fine up to 3 times the amount of bribe (but not less than EUR 13,900); for bribes from EUR 13,900 to 277,000 – fine up to 30 times the amount of bribe (but not less than EUR 277,000); for bribes of more than EUR 277,000 – fine up to 100 times the amount of bribe (but not less than EUR 1,390,000). No upper limit of fine.	Confiscation of bribe.
<b>Serbia</b>	Criminal, 2008 (Criminal Code, Law on the Liability of Legal Entities for Criminal Offences)	+	-	From EUR 9,000 to EUR 4.4 million.	Prohibition of certain registered activities or operations; confiscation; publication of the judgment.
<b>Slovak Republic</b>	Quasi-criminal, “protective measures” to LPs, 2010 (Criminal Code)	+	-	Confiscation of all property of the LP and forced bankruptcy or a fine from EUR 800 to EUR 1.66 million.	-
<b>Slovenia</b>	Criminal, 1999 (Legal Persons’ Liability for Criminal Offences Act)	+	-	Amount of fine depends on sanctions for the natural person under relevant offence: - in case where imprisonment up to three years is prescribed for natural person, fine from EUR 10,000 to EUR 500,000 or – if material damage was caused or property benefit was gained through criminal offence – up to 100-times the amount of damage caused or property benefit obtained; - in case where imprisonment more than three years is prescribed for natural person, fine from EUR 50,000 EUR to 1 million or – if material damage was caused or property benefit was gained through criminal offence –	Dissolution; debarment from public procurement; exclusion of from officially supported export credits (for foreign bribery).

Country	Liability, Year of introduction /Type (Legal basis)	Liability for lack of supervision	Defence of preventive measures	Monetary sanctions	Other sanctions
				up to 200-times the amount of damage caused or property benefit obtained; instead of fine confiscation of property can be applied to the legal person.	
<b>South Africa</b>	Criminal (Criminal Procedure Act, Prevention and Combating of Corrupt Activities Act)	-	-	Fine up to EUR 36,000	Confiscation
<b>Spain</b>	Criminal, 2003 (Criminal Code)	+	-	Fine from EUR 21,000 to EUR 9 million or from three to five times the profit obtained if the resulting amount is higher.	Dissolution; suspension of activities for a term that may not exceed five years; closure of its premises and establishments for a term that may not exceed five years; prohibition to carry out the activities through which it has committed, favoured or concealed the felony in the future; (5) debarment from public subsidies and aid, contracts with the public sector and tax or social security benefits and incentives, for a term that may not exceed fifteen years; judicial intervention to safeguard the rights of the workers or creditors for the time deemed necessary, which may not exceed five years. Confiscation.
<b>Sweden</b>	Quasi-criminal, "corporate fine" as "special legal effect of crime" (Criminal Code)	+	-	Fine up to EUR 1.1 million.	Confiscation.
<b>Switzerland</b>	Criminal, 2003 (Criminal Code)	+	-	Fine up to EUR 4.1 million.	Confiscation.

Country	Liability, Year of introduction /Type (Legal basis)	Liability for lack of supervision	Defence of preventive measures	Monetary sanctions	Other sanctions
<b>Tajikistan</b>	<b>Absent</b> (administrative liability of LPs is provided in the Code of Administrative Offences but not available for bribery offences)	-	-	-	-
<b>Turkmenistan</b>	<b>Absent</b>	-	-	-	-
<b>The Former Yugoslav Republic of FYR of Macedonia</b>	Criminal, 2004 (Criminal Code)	+	-	Fine from EUR 1,600 to EUR 478,500.	Temporary or permanent ban on LP to perform certain professional activities; dissolution. Confiscation.
<b>Turkey</b>	Administrative, 2009 (Code of Misdemeanours). Also “special security measures” to LPs under Criminal Code “in relation to offences committed for the benefit of such entities.”	-	-	Fine from approx. EUR 4 830 to 966 000 (in 2014).	Debarment from public procurement.
<b>Ukraine</b>	Quasi-criminal, “measures of a criminal law nature” applied to LPs, April 2014 (Criminal Code)	+	-	Fine in the amount twice the undue benefit received. If no benefit was received or if it is not quantifiable, a fine from about EUR 4,250 to about EUR 64,000 (depending on the gravity of offence)	Confiscation of proceeds and instrumentalities of corruption offences (but only in the proceedings against natural persons)
<b>United Kingdom</b>	Criminal (Bribery Act 2010)	+	+ (It is a defence for LP to prove that it had in place adequate procedures designed to prevent persons associated with the LP from undertaking bribery).	No upper limit of fine.	Confiscation (civil and criminal)

Country	Liability, Year of introduction /Type (Legal basis)	Liability for lack of supervision	Defence of preventive measures	Monetary sanctions	Other sanctions
<b>United States</b>	Criminal (common law, Foreign Corrupt Practices Act for foreign bribery, US Code)	+	-	Various fines depending on the offence. For FCPA: foreign bribery is punishable by fine of USD 2 million or twice the gross pecuniary gain or loss resulting from the offense whichever is greatest; wilful violation of other FCPA provisions (including those on books and records and/or internal controls) and wilfully and knowingly making a statement that was false or misleading with respect to a material fact is punishable by USD 25 million for legal persons (the maximum fine may be increased to twice the pecuniary gain or loss resulting from the offence). For other bribery offences: fine of USD 500,00, or twice the amount of gain or pecuniary loss caused by offence, or three times the “thing of value” offered or received as a bribe.	Prohibition to engage in illegal business, from making transaction with federal authorities; denial of licences, such as export or import licences. Civil and criminal forfeiture.
<b>Uzbekistan</b>	<b>Absent</b> (draft new Code of Administrative Offences includes liability of LPs)	-	-	-	-

Source: Replies to the OECD/ACN questionnaire used for this study; monitoring reports by the OECD/WGB, OECD/ACN, GRECO; research.





**OECD Anti-Corruption Network  
for Eastern Europe and Central Asia**

## **Liability of Legal Persons for Corruption in Eastern Europe and Central Asia**

Criminalisation of corruption, including liability of companies for corruption-related crimes, is a well-established international standard.

Covering twenty-five countries in Eastern Europe and Central Asia, this report on Liability of Legal Persons for Corruption analyses how this standard can be effectively introduced in national legislation and enforced in practice.

The report will be complemented by two other regional cross-country studies on prevention of corruption in the public sector and on business integrity.

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