Programmatic Cooperation Framework for
Armenia, Azerbaijan, Georgia, Republic of Moldova, Ukraine and Belarus

Funded by the European Union and the Council of Europe

EUROPEAN UNION

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Implemented by the Council of Europe

CoE/EU Eastern Partnership Programmatic Co-operation Framework (PCF)

"Fight against Corruption and Fostering Good Governance/Fight against Money-Laundering"

(EaP-2)

Activity 12: "Liability of legal persons" (April 2016)

Legislative Toolkit on Liability of Legal Persons

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ECCU-PCF-REG 4/2016

This Technical Paper has been prepared within the framework of the CoE/EU PCF: Project "Fight against Corruption and Fostering Good Governance/Fight against money-laundering", financed by the European Union and the Council of Europe. The paper has been prepared taking into account international standards and comparative good practices, as well as comments received from practitioners from the Eastern Partnership Region.

The views expressed herein can in no way be taken to reflect the official position of the European Union and/or the Council of Europe.

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Content

1. INTRODUCTION: THE NEED FOR A LEGISLATIVE TOOLKIT

The last five years have seen an abundance of **comparative literature** on criminal liability of legal persons being published, such as:

- Gobert J. (2011), European Developments in Corporate Criminal Liability, 384 pages;
- Vermeulen G. and others (2012), Liability of Legal Persons for Offences in the EU, 199 pages;
- Council of Europe (2013), Liability of Legal Persons, Training manual, 110 pages;
- Brodowski D. and others (2014), Regulating Corporate Criminal Liability, 376 pages;
- OECD/ACN (2015), Liability of Legal Persons, Thematic Study, 72 pages.

Thus, one could ask the question, why there should be a "Legislative Toolkit" as yet another publication on this issue? Above mentioned studies are useful and rich comparative academic resources. However, they only discuss liability of legal persons in separate aspects, without providing a concrete, coherent, and all-inclusive **regulatory model** to legislators and policy makers. This leaves legal drafters without answers to the following questions:

- What do I hope to achieve by introducing or expanding liability of legal persons?
- What do I need for a regulation to be **comprehensive and effective**?
- How could I **word** a statutory provision regulating liability of legal persons, and what could an **ideal statute** look like?
- Where do I fit in the provisions into my own substantive or **procedural** law?

In addition, many comparative publications leave out aspects of liability of legal persons that are essential for legislators and policy makers, as for example:

- Under what circumstances does substantive law apply in **international** cases?
- Which courts have **jurisdiction** in international cases?
- Are legal persons liable for **affiliated** companies?
- Do legal persons have the **right** to remain **silent**?
- To what extent are shareholders or directors **personally liable** for fines against the legal person?

In fact, it is often such questions where legislations show **loopholes**. As there is a prohibition against reasoning by analogy (to the defendant's detriment) in criminal law, loopholes can pose a particular risk. It should also be mentioned that the Fourth Anti-Money Laundering Directive[1] of 2015 has brought about new standards for liability of legal persons in cases of money laundering, which one needs to take into account.

This legislative toolkit aims to provide guidance to answering all above questions, in particular for practitioners from **countries in transition**. Obviously, one size does not fit all and drafting laws is more complicated than just picking out a few provisions from a toolkit. However, what other

[1] *Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing*, available at http://eur-lex.europa.eu, accessed 31 January 2016.

starting point is there for drafting a regulation if not a model law or a toolkit illustrating possible options?

This toolkit takes the following approach:

- **Regulatory guidelines** provide a starting point to users of the toolkit for their own draft law. The regulatory guidelines are designed as a maximum or ideal solution. They offer several options whenever appropriate. Obviously, this is not a prescriptive proposition. Rather, it is an attempt to illustrate concretely how one can formulate a law on liability of legal persons.
- For each provision, **commentaries** clarify the rationale; illustrate the necessity of regulation with case examples; and point out what to pay attention to. The commentaries also reference international standards and examples from national regulations, without doubling the efforts of existing comparative literature.

It is obvious that this legislative toolkit, including its regulatory guidelines, cannot replace a process of careful legal drafting: each national draft law will need **tailoring** to the needs, terminology, and legal framework of the given country. It is also important that practitioners from any country will translate the toolkit's terminology and procedural thinking into their own system. For example, probation, suspended sentences, deferred prosecution agreements, or bail, might mean very different things in many countries. However, it is hoped that with this legislative toolkit **drafting** of laws for liability of legal persons will become much easier. At the same time, it is hoped that this legislative toolkit can serve as a checklist for assessing whether any country did regulate all issues contained in this toolkit, and if it did not do so, whether this was a conscious choice based on sufficient grounds. In any case, comprehensive codification of all aspects of liability of legal persons is required under international standards.[2]

[2] OECD (December 2013), *Ireland: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 2a, available at www.oecd.org, accessed 31 January 2016.

2. TOOLKIT AND COMMENTARIES

Chapter I: Liability

Preliminary note: administrative or criminal?

There are three forms of liability of legal persons: civil, administrative, and criminal. Usually countries combine civil liability with either administrative or criminal liability. Whereas civil liability serves in particular to compensate the victim for any damages, administrative or criminal liability adds the aspect of public sanctions. The majority of countries in Europe follow the concept of criminal liability, while some countries impose sanctions on legal persons only under an administrative regime (Bulgaria, Germany, Greece, Italy and the Russian Federation).[3] The aimed-at advantages of criminal liability are summarised as follows:[4]

- The dissuasive and deterrent effect of criminal convictions;
- Longer statutes of limitation under criminal law;
- Well established procedural guarantees for the defendant/legal person;
- The availability of special investigative techniques and other means of evidence;
- The expertise of criminal court judges on corruption offences triggering liability;
- Better opportunities for international legal cooperation.

In principle, legal provisions on administrative liability could be formulated in a way to be as effective as criminal liability when it comes to the first three bullet points. With regard to the last three bullet points, there are probably some legal and factual limits.

This legal toolkit is worded in a way that it could be incorporated both as a concept of administrative or as a concept of criminal liability. Similarly, it can be incorporated both as a stand-alone law, as is the case for example in Austria, or integrated into various provisions of the criminal and criminal procedure code, as is the case in Switzerland.

Article 1 – Scope: legal persons; offences

(1) *[Legal persons]* **"Legal person" shall mean**

(a) *[National laws]* **any entity having such status under the law [to be defined: company law etc.], except for States or other public bodies in the exercise of State authority and for public international organisations;**

(b) *[State owned corporations]* **any entity under paragraph a that is fully or partially owned by the State and that is operating for profit;**

(c) *[Enterprises without personality]* **any business entity having only partial, or no, legal personality;**

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[3] Rupchev G. (2015), *Comparative Analysis of the Liability of Legal Persons (Corporate Liability) for Criminal Offences of Corruption*, Council of Europe PRECOP-Project (also available in *Russian*), available at www.coe.int, accessed 31 January 2016.

[4] See OECD/ACN (2015), *Liability of Legal Persons, Thematic Study*, pages 9 following, available at www.oecd.org, accessed 31 January 2016.

(d) *[Foreign entities]* **any foreign legal person having such status under the jurisdiction in which it was established and being comparable to a legal person as defined under paragraph 1a-c.**

(2) *[Offences]* **Liability under these legislative guidelines applies to the following offences (to the extent existent domestically), including involvement as accessory or instigator: abuse of functions, false accounting, active bribery, embezzlement of public funds, fraud, illicit enrichment, money-laundering, obstructing justice, and trading in influence.**

(3) *[Special laws]* **Liability under these legislative guidelines applies also to violations of supplementary penal provisions outside the Criminal Code.**

Paragraph 1:
International standards do not provide strict guidance as to what a legal person is. The UNCAC and OECD-Convention both remain fully silent on this issue. The Council of Europe Criminal Law Convention on Corruption and the EU Second Protocol define it as in paragraph 1a of Article 1 (see Annex 2). The Explanatory Report to the Convention provides some clarification in Commentary 31:

> *"[...] Littera d. of Article 1 thus permits States to use their own definition of 'legal person', whether such definition is contained in company law or in criminal law. For the purpose of active corruption offences however, it expressly excludes from the scope of the definition the State or other public bodies exercising State authority, such as ministries or local government bodies as well as public international organisations such as the Council of Europe. [...] A contracting State may, however, go further as to allow the imposition of criminal law or administrative law sanctions on public bodies as well. [...]"*[5]

However, company or criminal law is in most cases not fully clear as to whether certain entities have **legal personality**. This concerns private trade businesses without full legal personality, conglomerates of affiliated legal persons, single owner businesses, trust funds, or partnerships. Similarly, it is often not clear at first sight whether state-owned or -controlled companies, or enterprises established by public law are "public bodies" and thus exempt from liability.

The international trend points clearly towards including as many entities as possible and only leaving not-for profit **public entities** such as the State, municipalities, or public foundations out. The Working Group on Bribery of the OECD has insisted that public entities which can engage in contracts are covered by liability.[6] For example, the Working Group recommended in one case to "amend the Penal Code to ensure that State-owned and State-controlled enterprises can also be held liable for bribery".[7] Limited exceptions may apply, such as for example in Spain, where state-owned corporations that pursue public policy objectives cannot be held criminally liable.[8]

In the **European Union**, only 4 out of 27 Member States strictly limit liability of legal persons to private entities (thus exempting all public entities).[9] It can therefore be said that the European

[5] *Explanatory Report*, available at www.coe.int, accessed 31 January 2016.

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

[7] OECD (December 2012), *Spain: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 3a, available at www.oecd.org, accessed 31 January 2016.

[8] Pieth M., idem.

[9] Vermeulen G. and others (2012), *Liability of Legal Persons for Offences in the EU*, p.44/chapter 2.2.2.2 "Private versus public".

practice points toward the inclusion of public entities into liability of legal persons. A EU-funded comparative study on liability of legal persons in member states comes to the following recommendation:

> *"In the current EU policy with respect to the liability of legal persons for offences, public legal persons are not included in the scope. Considering that a lot of member states include one or more types of public legal persons within the scope of their national liability approach, the EU can consider to extend its scope accordingly."*[10]

As for **private law** entities, the OECD Working Group has insisted for the law to "expressly provide for the liability of unincorporated legal persons",[11] or to "take all possible measures to ensure that mailbox companies are considered legal entities [...] and that cases of foreign bribery involving mailbox companies can be effectively investigated, prosecuted and sanctioned".[12]

Country examples reflecting the all-inclusive international trend are Estonia, Montenegro, or Switzerland. The Swiss Criminal Code[13] does not draw the liability from the term of legal person, but from the term of an "enterprise", thus including "companies **without** legal personality" and "sole proprietorships" (Article 102). In this context, one has to keep the economic significance of sole proprietorships in mind, also related to corruption risks. For example, in Germany, sole proprietorships constituted 68.8% of all businesses performing services and deliveries worth 557 billion € in 2011.[14] The Estonian Penal Code clarifies in Section 37 that "legal persons with **passive legal capacity** are capable of guilt" (passive legal capacity meaning the legal existence of the legal person as opposed to active legal capacity, which is normally understood as the right to enter contracts and to sue in court). In Montenegro,

> *"legal entity means a company, a foreign company and foreign company branch, a public enterprise, a public institution, or domestic and foreign nongovernmental 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."*[15]

One might be tempted to exclude entities from certain sectors from the definition of legal person, because of their special status, such as non-governmental organisations, media companies, or political parties. However, it is rather preferable to include them into the liability scheme, and to consider higher thresholds or exemptions when it comes to certain sanctions such as liquidation. In order to allow the prosecution to maintain best possible flexibility, e.g. whether to prosecute a joint venture, its members, or all of them, it is advisable to extend the scope of liability to entities with no legal personality.

Many if not most criminal codes define the term legal person only in relation to domestic legal entities (if at all). This leaves corporate lawyers, prosecutors, and courts with the question, if and

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[10] Idem, p.139, recommendation 4.

[11] OECD (December 2013), *Ireland: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 2b, available at www.oecd.org, accessed 31 January 2016.

[12] OECD (December 2012), *Netherlands: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 13a, available at www.oecd.org, accessed 31 January 2016.

[13] Swiss *Criminal Code SR 311.0 as amended 1 January 2015*, available at www.admin.ch, accessed 31 January 2016.

[14] Federal Agency for Statistics, VAT-statistics 2011, series 14, chapter 8.1.

[15] Montenegro, *Law on Criminal Liability of Legal Entities*, Article 4.1, available at www.gov.me, accessed 31 January 2016.

under what circumstances **foreign legal persons** fall under this term. Paragraph 1 (d) should avoid any ambiguity in this regard. It follows jurisprudence which German upper courts, among others, have established when applying the term "legal person" to foreign entities.[16] Prosecutors can produce evidence on this element for example by obtaining statements from the foreign company register. However, one should keep in mind in this context that many legal systems recognise legal persons even before they are registered, or without any registering foreseen at all. Statements from a foreign company register are thus not the only evidence relevant in this context.

Paragraph 2:
Paragraph 2 consolidates the definition of all four major standards by the Council of Europe, EU, OECD, and the UN. The EU Second Protocol adds **fraud** to the enumeration by the Council of Europe Criminal Law Convention. Liability of legal persons under the OECD Convention explicitly only relates to foreign bribery. However, Article 8 of the Convention calls for sanctioning **accounting** offences. The OECD Working Group thus requires countries to "ensure that both natural and legal persons can be held liable for false accounting".[17]

The UNCAC adds embezzlement and obstruction of justice as offences, and as non-mandatory offences abuse of functions and illicit enrichment. It is hard to imagine, though, how a legal person could be liable for **illicit enrichment** (of a public official). A possible example could be where a public official sits on the board of a state-owned company and accumulates inexplicable wealth, which could have only come from the company. It is interesting to note, though, that illicit enrichment is in some countries not only an offence natural persons (usually public officials), can commit, but also legal persons. Lithuania,[18] for example, has introduced illicit enrichment in 2010 as an offence which legal persons could genuinely commit:

> *Article 189-1. Unjust Enrichment*
>
> *1. A person who holds by the right of ownership the property whose value exceeds 500 MSLs [500 minimum subsistence levels ≈ 18,000 €], while being aware or having to be and likely to be aware that such property could not have been acquired with legitimate income, shall be punished by a fine or by arrest or by a custodial sentence for a term of up to four years. [...]*
>
> *3. A legal entity shall also be held liable for the acts provided for in this Article.*

Obviously liability of legal persons is usually not limited to corruption **offences**, but has a much wider circle of application to include compliance with financial regulations, environmental standards and other issues, and may include "corporate homicide"[19]. There are basically two approaches: Some criminal or administrative codes apply liability of legal persons under a general clause to any offence which by its nature can be committed by legal person. Other laws specifically list for each criminal offence whether liability of legal persons applies. In Lithuania, for example, the offence of murder can only be committed by natural persons, whereas legal persons can be explicitly liable for negligent homicide.[20]

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[16] Court of Appeals Celle, decision of 30 November 2001, 322 Ss 217/01.

[17] OECD (October 2014), *Brazil: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 11a, available at www.oecd.org, accessed 31 January 2016.

[18] Lithuania, Law no. VIII-1968 (*Criminal Code*), available at www3.lrs.lt, accessed 31 January 2016.

[19] See for example the United Kingdom "*Corporate Manslaughter and Corporate Homicide Act 2007*", available at www.legislation.gov.uk, accessed 31 January 2016.

[20] Lithuania, ibid, sections 129-132.

Paragraph 3:
Paragraph 3 is a reminder that there are corruption offences, where liability of legal persons can become also relevant. This includes in particular violations of public procurement rules, or of political finance restrictions.[21] Usually, the liability of legal persons in these areas is defined in these special laws themselves and might follow its own rules. For example, political parties are usually strictly liable for violations of political finance rules, disregarding any liability of a natural person. Another option may be for special laws to refer to the rules of liability contained in the criminal code.

Article 2 – Liability for personal failures

(1) A legal person is liable for the offences defined in Article 1:

(a) *[Offences by management]* **committed for its benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:**

i. a power of representation of the legal person; or

ii. an authority to take decisions on behalf of the legal person; or

iii. an authority to exercise control within the legal person;

(b) *[Failure of supervision]* **or made possible by a lack of supervision or control by a natural person as defined in paragraph 1a under the legal person's authority and committed for its benefit; or**

(c) *[Offences by agents]* **committed for its benefit by any natural person, acting as its officer, employee, or agent.**

(2) Liability under paragraph 1

(a) *[Beneficial ownership]* **may also be triggered by natural persons who exercise the ultimate legal or effective control over the legal person;**

(b) *[Autonomous corporate liability]* **does not depend on identification or liability of a concrete natural person;**

(c) *[Autonomous personal liability]* **does not exclude liability of a natural person.**

Paragraph 1
When comparing internationally, one can find four concepts of liability of legal persons:

1. For the acts of a responsible person such as a manager (also called alter ego liability)
2. For the failure to supervise
3. For the action of a related person (also called strict liability)
4. For corporate fault (also called objective fault)

[21] See for example the Fimi Media Case in Croatia, OECD/ACN, ibid, p.21.

The first three concepts require a fault by a **natural person** and **impute** this fault to the legal person, either because of the position of the natural person (concept 1), because of its supervisory position (concept 2), or because of its relation to the legal person (concept 3). It is thus a form of vicarious liability. The fourth concept is independent of any wrongdoing by a natural person and simply punishes the legal person for the **objective failure** to prevent the corruption offence. In international standards and in national laws one can find combinations of above concepts, mostly of the first two concepts, whereas concept 3 and 4 each are usually separate alternatives to concepts 1 and 2. In view of the abundant explanations available on these concepts, these commentaries abstain from doubling these efforts.[22]

This legislative toolkit combines all four concepts, with the first three embodied in Article 2 and the fourth concept of corporate fault embodied in Article 3. The combination of all four concepts allows for **effective prosecutions**: under each concept, the prosecution has to produce different evidence: for concepts 1 to 3, it has to prove a specific wrongdoing by a natural person. Under concept 4, the prosecution "only" has to show that the company did not have sufficient prevention mechanisms in place. Thus by combining all four concepts, the prosecution can either select the concept best supported by the available evidence, or even try the case based on all four concepts in case one or several lines of evidence fail throughout the trial. In addition, each liability concept has its own preventive effect on legal persons. Thus adding up all four concepts provides the most comprehensive incentive for legal persons to prevent corruption offences within their spheres.

Obviously, some of the concepts can **overlap** in certain cases. For example, concept 1 and 3 apply, where a manager commits a corruption offence him/herself. Similarly, concept 2 and 4 can apply, where the management failed to establish control mechanisms preventing corruption.

Paragraph 1a and 1b are exact copies of the wordings in the Council of Europe Criminal Law Convention, the EU Second Protocol, as well as in the Fourth EU Anti-Money Laundering Directive. Paragraph 1 c is a concept found mostly in common law countries; its wording is taken from United States law.[23] The wording "for the **benefit** of the legal person" is somewhat ambiguous: Corruption offences actually damage the company. If detected, the proceeds are subject to forfeiture, in addition there are fines and other sanctions, let alone the reputational damage. However, "benefit" is used in this context only under the assumption of an intended benefit assumed the legal person will not get caught. An alternative wording avoiding this ambiguity would be "committed within its activities".[24]

For paragraph 1a one has to keep in mind that management cannot only commit the offence through active involvement, but also through **omission**. Most criminal codes impose on natural persons the duty to act in certain situations of risk, where the natural person has a loyalty obligation towards another person. A legal person doing business in a corruption prone environment is such a risk, while at the same time management has a duty to prevent harm from the legal person. Therefore, management failing to establish a prevention system within the legal person can in and of itself be a corruption offence by failing to act. A statement by a manager that he/she did not expect any corruption to occur and would not have accepted it is simply not

[22] For further details see the publications listed above in the Introduction.

[23] The Foreign Corrupt Practices Act 1977, United States Code Title 15, Commerce and Trade Chapter 2B – Securities Exchanges, § 78dd-1: Liability "for any officer, director, employee, or agent of such issuer [≈legal person] or any stockholder thereof acting on behalf of such issuer".

[24] See Vermeulen G. and others (2012), supra, p.56.

credible in a corruption risk environment. Thus, liability under paragraph 1b (failure of supervision) can overlap to a large extent with liability under paragraph 1a (failure to act despite duty to do so).

Paragraph 2

Paragraph 2a reflects the important role which **beneficial owners** can play for a legal person. Often it is not the formal management exercising control over a legal person, but an outside natural or legal person. Such a beneficial owner is neither part of an "organ" of the legal person nor a "supervisor" or an "agent" in the sense of paragraph 1. Paragraph 2a therefore includes beneficial owners into the circle of persons triggering liability of the legal person. This is fully justified, as it is the beneficial owner who exercises control over the legal person and usually *de facto* benefits economically from it. Some national provisions allow already for such liability triggered by the beneficial owner. An example is the following case from Romania:[25]

> *"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, liability of the companies could not be established based on the companies' legal managers. However, the court based the liability on the fault of the *de facto* manager, which was Mr. M.R.[26] The OECD Working Group has also pointed to the necessity of liability "where a bribe is paid to a foreign public official by a *de jure* or ***de facto*** manager of an enterprise".[27]

Paragraphs 2b and 2c define the liability of the involved natural and legal persons as **autonomous** from each other. This is generally accepted international standard. The Council of Europe's Committee of Ministers "Recommendation to Member States concerning the liability of enterprises with legal personality" already stated in 1988 that enterprises should be held liable, whether a natural person who committed the acts or omission constituting the offence can be **identified** or not.[28] This also refers to the identification of the supervisor under paragraph 1b. The Council of Europe Criminal Law Convention (Article 18 paragraph 3), the OECD Good Practice Guidance,[29] and Article 26 paragraph 3 of the UNCAC, also support either paragraph 2b or paragraph 2c.

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[25] OECD/ACN, ibid, p.23.

[26] Regional Court Vaslui, *Decision no. 149 of 3 July 2013*; Court of Appeal Iasi, *Decision No. 171/2014 of 8 April 2014*, available at http://juri.ro, accessed 31 January 2016.

[27] OECD (June 2011), *Luxembourg: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 2b (bold emphasis by author), available at www.oecd.org, accessed 31 January 2016.

[28] Council of Europe, Committee of Ministers, *Recommendation No. R(88)18 concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of their Activities* (adopted 20 October 1988), available at www.coe.int, accessed 31 January 2016.

[29] OECD, *Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, found at Annex I to the Recommendations of the Council for Further Combating Bribery of the Foreign Public Officials in International Business Transactions (26 November 2009), available at www.oecd.org, accessed 31 January 2016.

Article 3 – Liability for corporate failures

(1) *[Objective fault]* **A legal person is liable for the offences defined in Article 1 committed for its benefit if the care and diligence necessary for the prevention of the offence has not been observed in the operations of the corporation. Article 2 paragraph 2 (b) and (c) apply *mutatis mutandis*.**

(2) *[Guidance on compliance]* **The Ministry of Justice publishes guidance on care and diligence under paragraph 1.**

Paragraph 1

Objective liability under paragraph 1 does not require any wrongdoing by a natural person. It simply looks at the objective operations of a corporation whether they are suited for sufficient prevention of corruption offences to occur. Thus, in practice, it is very close if not identical to failure of supervision: the failure of setting up prevention mechanisms is usually a failure of supervision of a natural person. However, under international standards reflected in Article 2 paragraph 2b, it is not necessary to identify the person who failed to supervise its subordinates. As a result, supervision liability can arise from an objective lack of prevention mechanism without any natural person identified being liable for the failure. However, objective liability goes further than supervisory fault: whereas the absence of a code of conduct or a signature scheme clearly is a "lack of supervision or control", this is not necessarily the case where a company lacks an internal whistleblower mechanism. The provision in paragraph 1 is modelled after the Penal Code of Finland.[30]

Paragraph 2

Corporate lawyers need guidance as to how they can avoid liability of their employer. Prosecutors and courts also need a reference point for establishing fault under paragraph 1. To this end, for example the United Kingdom Bribery Act 2010 tasks the Secretary of State with publishing guidance on prevention procedures.[31] Paragraph 2 is modelled after this provision. Well known abroad in this context is also the "Resource Guide to the U.S. Foreign Corrupt Practices Act", which the U.S. Department of Justice and the U.S. Securities and Exchange Commission published in 2012.[32] The main prevention tools as listed by the United States Resource Guide are:

- commitment from senior management and a clearly articulated policy against corruption;
- a code of conduct and compliance policies and procedures;
- an internal oversight mechanism;
- risk assessments;
- trainings and continuing advice;
- availability of incentives and disciplinary measures;
- third-party due diligence;

[30] Finnish *Criminal Code of 1889* (as amended by Law no. 927/2012), Chapter 9, Section 2, para. 1, available at www.finlex.fi, accessed 31 January 2016: "A corporation may be sentenced to a corporate fine [...] if the care and diligence necessary for the prevention of the offence has not been observed in the operations of the corporation."

[31] United Kingdom, *Bribery Act 2010*, Section 9, available at www.legislation.gov.uk, accessed 31 January 2016.

[32] U.S. Department of Justice/U.S. Securities and Exchange Commission (2012), *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, pp.57 f., available at www.justice.gov, accessed 31 January 2016.

- availability of confidential reporting and internal investigation mechanisms;
- periodic testing and review;
- pre-acquisition due diligence and post-acquisition integration.

However, "high level commitment" and any other of the above items could remain merely pretended efforts. Therefore, in addition to above rather technical items, legal persons need to put in place an **integrity culture**. It is so to speak the cement that holds together above building blocks. An integrity culture is the result of many individuals (in a larger legal person) working to create consensus around shared values. Government guidances on prevention procedures rarely mention this integrity culture, but without it, no compliance management system will work.

Article 4 – Extended liability

A legal person is liable under Articles 2 and 3

(a) *[Affiliated legal persons]* **concurrently for offences committed for the benefit of an affiliated legal person under its direct or indirect control, notwithstanding whether the affiliated legal person ceased to exist after the commission of the offence; or**

(b) *[Subcontractors]* **concurrently in case employees or agents of subcontractors commit the offence for the benefit of the legal person and it did not observe care and diligence regarding third parties as required under Article 3; or**

(c) *[Aggregated offence]* **where different elements of one offence are committed by different natural persons.**

Paragraph a

Paragraph a goes back to the OECD "Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions" of 2009, according to which "a legal person cannot avoid responsibility by using intermediaries, including related legal persons".[33] The OECD Working Group has applied the term "related legal persons" to the following cases:

- "The liability of parent companies for acts of bribery by intermediaries, including related legal persons, such as subsidiaries abroad";[34]
- "To allow for parent companies to incur criminal liability for acts of bribery by their subsidiaries";[35]
- "When a principal offender bribes to the advantage of a subsidiary (or vice versa)";[36]
- "Where the bribe is for the benefit of a company related to the legal person from which the bribe emanated".[37]

[33] OECD *Recommendation 2009*, available at www.oecd.org, accessed 31 January 2016.

[34] OECD (March 2014), *South Africa: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 14c, available at www.oecd.org, accessed 31 January 2016.

[35] OECD (October 2012), *France: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.24, available at www.oecd.org, accessed 31 January 2016.

[36] OECD (December 2011), *Italy: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 13b, available at www.oecd.org, accessed 31 January 2016.

It applies in constellations where for example a holding company controls a **subsidiary** legal person, where the corruption offence occurs. The holding company could now be liable under paragraph a if:

- a manager of the holding company was directly involved in the corruption offence at the subsidiary (Article 2 paragraph 1a);
- a manager of the holding company failed to supervise the subsidiary (Article 2 paragraph 1b);
- the subsidiary acted as an agent of the holding company (Article 2 paragraph 1c);
- the holding company failed to set up and implement a compliance programme at the subsidiary (Article 3).

It should be kept in mind that the concept on affiliated companies is broader than just parent-subsidiary relations. Companies can also be affiliated in a horizontal manner, or by one company controlling another company without the controlled company being a subsidiary.[38] Usually, national **company, tax, or accounting laws** provide a definition of affiliated companies. Legal drafters should review whether this legal definition is sufficiently comprehensive and can be used in the context of liability of legal persons. In addition, or as an alternative, one could consider using the principle of criminal liability for omission based on one's de facto control of a source of danger, in this case a business.

Paragraph b

Paragraph b is necessary for cases as the following: The legal person subcontracts a natural person for distributing its product. The **subcontractor** has an employee who chooses to commit corruption for the benefit of the subcontractor and ultimately for the benefit of the legal person. Under Article 2 paragraph 1c, the legal person would strictly speaking not be liable: the subcontractor as the agent of the legal person did not commit the corruption offence. Depending on a court's interpretation in this case, the subcontractor's employee is not an agent of the legal person. The subcontractor might be liable as a business entity; however, the business entity is not a "natural person" triggering liability under Article 2 paragraph 1c. Paragraph b intends to close this possible loophole. However, liability cannot be without limit in this case. The legal person cannot control a subcontractor the same way it can control a subsidiary. Therefore it is only liable in case it did not conduct due diligence in selecting and monitoring its subcontractor.

For liability under Article 3, it is already rather clear that the legal person is liable for corruption offences committed by "third parties", which includes subcontractors. Nonetheless, Article 4 paragraph b avoids any **ambiguity** on this question. A European Union funded comparative study on liability of legal persons in member states has pointed out the that subcontractors can become a contested issue in legal proceedings: The legal person "immediately communicated it could not be held liable in any way because the persons referred to were employed by one of its subcontractors. […] It should therefore be looked into whether or not it is desirable to criminalize the situations linked to e.g. subcontracting."[39]

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[37] OECD (December 2011), *Japan: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 15b, available at www.oecd.org, accessed 31 January 2016.

[38] Wikipedia, *corporate group*, available at https://en.wikipedia.org, accessed 31 January 2016.

[39] Vermeulen G. and others, supra, p.102 and p.140, recommendation 9.

Paragraph c

Paragraph c does not concern so much establishing a link between the corruption offence of the natural person and the liability of the legal person, but only the corruption offence itself. There are cases, where **no natural person** could be punished for a corruption offence, because none of the involved stakeholders fulfils all elements of the crime. For example, a financial officer of a company might know about a public official receiving a benefit from the company, but believing this benefit was a consultancy fee for the public official. At the same time, a project manager of the company might know that the same public official is granting the company a favourable decision in a legal grey area. Neither the financial officer nor the project manager commits a corruption offence, since both lack *mens rea* of bribing a public official. However, "taken together – in other words, if their individual knowledge were melded – such collective knowledge would suffice in terms of *mens rea* of bribing foreign officials."[40] In other words, no natural person would have committed a corruption offence, but only the legal person itself. Without paragraph c, liability of the legal person could neither be triggered under Article 2 nor under Article 3 – simply because of a lack of corruption offence.

There is yet no **international consensus** on whether to allow such "aggregation of pockets of knowledge from a number of individual employees".[41] For example, in Switzerland academics are still divided over this issue.[42] The District Court of canton Solothurn applied the "aggregate fault" doctrine in 2011 and convicted the bank Postfinance of money laundering. A branch of the bank had paid out 4,600,000 CHF in cash based on approval of the internal anti-money laundering unit. None of the employees was liable of a criminal offence. The Court based the conviction of the legal person on the lack of sufficient internal controls.[43] Upon appeal, the bank was acquitted.[44] The Court of Appeal stated that a legal person can only be liable if an employee committed an offence. The case is currently pending further review by the Federal Supreme Court.[45] In France, courts apparently also apply aggregated fault. In the "Safran"-case, the court of first instanced sentenced the company to a fine but acquitted the two individuals. One individual in the case was acquitted because at the time of the offence he was an engineer and did not have the power to involve the company himself and had acted exclusively on the account of the company in the context of the company's defined commercial policy. The other was acquitted because he did not act of his own accord but for the sole benefit of the company and did not have sufficiently autonomous decision-making powers to incur personal liability. Nonetheless the court found, that they had "undeniably facilitated the corruption offence by acting on behalf of the company as part of a general, organised and coherent framework for paying commissions to intermediaries".[46] The court of appeal later on overturned the conviction on an aspect not related to aggregated fault (it found that the corruption

[40] Livschitz M. (2007), *Liability of Legal Persons for Corruption – A Swiss Perspective*, Proceedings of the OECD/ACN-Seminar "Criminalisation of Corruption", p.11, available at www.oecd.org, accessed 31 January 2016.

[41] Wells C., *Criminal Responsibility of Legal Persons in Common Law Jurisdictions*, Paper prepared for the OECD Anti-Corruption Unit, Working Group on Bribery in International Business transactions, Paris, 4 October 2000, no. 8.3.1 available at www.coe.int, accessed 31 January 2016.

[42] Livschitz M., ibid.

[43] Reuters (21 April 2011), *PostFinance fined for money laundering, to appeal*, www.reuters.com.

[44] Tagesanzeiger (23 December 2015), *Post von Geldwäscherei-Vorwurf freigesprochen* [Post acquitted from money laundering charges], www.tagesanzeiger.ch.

[45] Neue Zürcher Zeitung (1 February 2016), *Solothurn zieht Freispruch der Post weiter* [Solothurn appealing acquittal of Post], www.nzz.ch.

[46] OECD (October 2012), *France: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, paragraph 61, available at www.oecd.org, accessed 31 January 2016.

offence lacked the necessary illegal *quid pro quo*).[47] In the United States, courts recognise the concept of aggregated *mens rea* in corporate liability. In one of the leading cases, a court of appeal decided that an organisation can be liable "if, examining the conduct of the corporate organization as a whole, organization employees failed to comply with a criminal law requirement after consciously avoiding learning about that requirement".[48]

In any case, one should be aware that the advantage of additional liability under this paragraph has conceptual **challenges**: it introduces criminal liability of an entity even if nobody at the legal person knew about or orchestrated the crime. In terms of a natural person this could compare to a case where somebody knew back in his/her mind about an element of crime, but was not aware of it when committing the offence. Depending on the criminal system of the country and depending on the case, one would only charge an offence of negligence. Aggregate liability is thus stretching quite far the basic concept of guilt underlying criminal law. Alternatively, one could think about punishing the legal person for lack of internal controls or some similar lesser offences.

In practice, though, the question remains, whether there is much if any room of application for this concept. If an investigator follows the "trail of (lack of) supervision" thoroughly, he/she probably always finds somebody higher up in the hierarchy orchestrating or at least accepting corruption within the legal person by turning a blind eye (conditional intent or *dolus eventualis*). Two separate departments fulfilling each one element of a crime without the other department or management knowing about this is in and of itself a malfunctioning prevention system. Thus, the concept of aggregate fault is usually only a "**crutch**" for prosecutors who failed to establish the lack of supervision for one reason or other.

Article 5 – Sanctions

(1) Legal persons are liable to sanctions available against natural persons,

- **(a)** *[Forfeiture at the legal person and at third parties]* **regular and extended confiscation as applying against natural persons;**
- **(b)** *[Publication of judgement]* **publication of the judgement or its operative part;**
- **(c)** *[Probation and bail]* **probation and bail.**

(2) The following sanctions available against natural persons apply with modifications as follows:

- **(a)** *[Fines]* **Fines, calculated without a defined maximum amount**
  - **i. by a set multiple of the economic benefit intended or obtained through the offence or a minimum amount, whichever is higher; or**
  - **ii. where no benefit is quantifiable, according to general rules for calculating fines.**

[47] Davis F.T. (April 2015), *Corporate Criminal Responsibility in France – is it out of step?*, EthicIntelligence Blog, available at www.ethic-intelligence.com, accessed 31 January 2016; Le Monde (26 March 2015), *L'incantatoire lutte contre la corruption de Christiane Taubira* (The incantatory fight against the corruption of Christiane Taubira), available at www.lemonde.fr, accessed 31 January 2016.

[48] Gruner R.S. (2015), Corporate Criminal Liability and Prevention, 3-29, footnote 16, quoting United States v Bank of New England, 821 F.2d 844 (1st Cir.), review by Supreme Court denied, 484 U.S. 842.

(b) *[Supervision]* **The competent authority may in addition to or irrespective of the imposed sanction order judicial supervision:**

i. **whereby it orders the supervision of a legal person's activities by an appointed independent representative, who facilitates remediating shortcomings in the legal person's integrity culture and regularly reports on progress and compliance of the legal person with the measures foreseen by the guidance under Article 3 paragraph 2;**

ii. **the legal person may suggest candidates of representatives to the court;**

iii. **the representative has no judicial or management powers in the legal person;**

iv. **if the legal person fails to live up to the standard imposed by the competent authority, the supervision may be revoked and another sanction imposed.**

(3) The following special sanctions apply to legal persons:

(a) *[Bans and orders]* **Depending on the gravity of the offence, the competent authority may order**

i. **a ban on promoting or advertising the business activities the legal person conducts, the products it manufactures or sells, the services it renders, or the benefits it grants; or**

ii. **a ban on pursuing the indicated prime or incidental business activities; or**

iii. **requiring the legal person to cease conduct facilitating the offence and to desist from repetition of that conduct; or**

iv. **a temporary ban against a person discharging managerial responsibilities in the legal person, from exercising managerial functions in the legal entity or its affiliates; or**

v. **the withdrawal or suspension of the authorisation, where a legal person is subject to such authorisation;**

(b) *[Liquidation]* **In case of repeated or grave commission of offences, the competent authority can order the liquidation of the legal person.**

(4) Special laws regulate the following sanctions:

(a) A public register of convicted legal persons;

(b) Exclusion from public funding;

(c) Disqualification from public contracts;

(d) Annulment of procurement decisions;

(e) Loss of export privileges;

(f) Debarment by international development banks.

(5) *[Civil liability]* **Liability under this Article does not preclude civil liability including for damages.**

Paragraph 1

This paragraph contains sanctions that are available to natural and legal persons and apply equally to both.[49] **Confiscation** is a component of sanctions, which most countries with criminal and administrative liability of legal persons know. Where countries lacked this sanction, the OECD Working Group recommended to "clarify that legal persons can be subject to confiscation measures on the same basis as natural persons".[50] **Publication** of judgment is a sanction that is available in some countries only for legal persons and in some countries for natural and legal persons in the same manner. It should be noted that the Fourth Anti-Money Laundering Directive explicitly foresees "a public statement which identifies the natural or legal person and the nature of the breach" as one of the available sanctions.[51] **Bail** and **probation** are options where no particularities apply to natural and legal persons. For example, in the Netherlands, "'probationary periods' involve the imposition of remedial actions to be undertaken by the company. Should the company violate the terms of probation or commit an offence again, it will be prosecuted for that offence, as well as for the offence for which it was conditionally dismissed."[52] Different legal systems vary as to whether they foresee probation, bail, and other forms of conditional sentences. Legislators thus need to tailor paragraph 1 around the particularities of each criminal code.

Paragraph 2

Paragraph 2 contains sanctions that are available to natural and legal persons, but where some particularities apply to legal persons. The calculation of **fines** is often modelled around natural persons. As a consequence, limits apply that are too low for the economic potential of legal persons. Similarly, variables are missing that are fit for legal persons such as the annual turnover or the intended economic benefit. Thus, for fines of legal persons, many models exist for calculating "effective, proportionate and dissuasive" amounts (Article 19 paragraph 1 Council of Europe Criminal Law Convention). Sufficient comparative literature exists presenting the different models.[53] The Fourth Anti-Money Laundering Directive calls for a maximum fine of at least twice the economic benefit or at least 1,000,000 € for legal persons violating the Directive's provisions.[54] Paragraph 2a (i) is modelled after the Directive. Paragraph 2a (ii) goes back to a recommendation by the OECD Working Group to "increase the maximum penalty available against legal persons in cases where the advantage accruing to the legal person as a result of foreign bribery is not 'property', or if the value of the advantage cannot be ascertained".[55]

GRECO and the OECD Working Group have frequently criticised provisions on **calculating** fines as too lenient, and recommended to "increase the fines for legal persons [...], given that they are substantially lower than the fines for natural persons, and in light of the size and importance of many [...] companies, the location of their international business operations, and the business sectors in which they are involved".[56] The Working Group also spoke out against a "cap on fines of

[49] For an overview on possible sanctions see OECD/ACN, ibid, chapter 5.

[50] OECD (December 2012), *Spain: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 4c, available at www.oecd.org, accessed 31 January 2016.

[51] Article 59 subsection 2a.

[52] OECD (December 2012), *Netherlands: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.16, available at www.oecd.org, accessed 31 January 2016.

[53] OECD/ACN, ibid, chapter 5.

[54] Article 59 subsection 2e.

[55] OECD (March 2011), *Bulgaria: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.34, available at www.oecd.org, accessed 31 January 2016.

[56] OECD (December 2012), *Austria: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.18, available at www.oecd.org, accessed 31 January 2016.

3% of the revenues generated in the tax year of the offence [...]. Under this provision, companies may avoid significant penalties by operating through shell entities or by shifting revenues to other tax years."[57]

In any case, one should keep in mind that in practice fines are usually **not dissuasive**, no matter their size. Managers of most companies are not concerned so much about corruption offences being detected: it is the company paying the fine, not them (if the offence cannot be traced back to upper management). It is therefore important to combine fines with other sanctions (in particular debarment from public tenders, see below).

Some legal systems foresee clauses, according to which the judge will have to consider the **economic**[58] or **social**[59] consequences of a sanction, in particular of fines. International monitoring bodies have been rather critical of such clauses. Under social considerations one might want to lower a sanction in order avoid layoffs or insolvency of a legal person. However, the sanction might not be effective anymore if lowered as it might not reflect the economic advantage of the legal person anymore. In other words: a legal person that is only kept financially afloat if it will not pay the adequate price for its corruption, is not worth protecting. The OECD Working Group has thus recommended "to ensure that they [sanctions] are effective, proportionate and dissuasive, including for legal persons conducting activities 'having strategic or hardly replaceable significance for the national economy'".[60] The Group reminded in this context that Article 5 of the OECD Anti-Bribery Convention which requires that "investigation and prosecution" of foreign bribery "shall not be influenced by considerations of national economic interest". Obviously, where there are several options of equally effective sanctions, courts can choose socially or economically less harmful sanctions.

Supervision for a specified period of time is a sanction available for natural persons as well. Usually it goes together with a probation period. For a natural person it goes without saying that the supervisor will not have power of attorney for the supervised person. For legal persons' supervision it is important to clarify that the supervisor has no function in any of the legal person's organs but simply has observatory powers. In addition, it is important that the supervisor has independence both regarding the legal person and regarding the court. Allowing the legal person to submit suggestions will help the supervisor gaining acceptance within the company. Such initial trust is important for the compliance procedure to work. Supervision will cut quite deeply into the existing structures and procedures of a company. It is therefore not "just another box" to tick of on

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[57] OECD (June 2013), *Poland: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.23, available at www.oecd.org, accessed 31 January 2016.

[58] See for example Czech Republic, section 14 of Act No. 418/2011 Coll., which prescribes that, in deciding on sanctions, the court shall "consider whether the legal person conducts activity in the public interest, having strategic or hardly replaceable significance for the national economy", OECD (March 2013), *Czech Republic: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.19, available at www.oecd.org, accessed 31 January 2016; *Zakon 418/2011* (Law 418/2011), available at http://portal.gov.cz (Czech); OECD (March 2011), *Canada: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.38, available at www.oecd.org, accessed 31 January 2016: "Clarify that in investigating and prosecuting offences under the CFPOA, considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved, are never proper".

[59] Poland, *Act of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty*, available at www.oecd.org, accessed 31 January 2016.

[60] OECD (March 2013), *Czech Republic: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.49, available at www.oecd.org, accessed 31 January 2016.

the sanction list, but a rather dissuasive and invasive sanction. Therefore, it should not be applied randomly, but only where systemic failures in the integrity culture call for a supervisor.

Paragraph 3

The **bans and orders** of paragraph 3a are somewhat similar to a sanction usually available for natural persons, i.e. the order suspending professional qualification. However, paragraph 3a is only directed at activities of business entities and in particular companies. Paragraphs i is to ii are modelled after the Polish law.[61] Paragraphs iii to v are taken from the Fourth Anti-Money Laundering Directive[62] of 2015. The ban in paragraph iii limits the freedoms of the respective natural person as well. It is thus only applicable if the natural person was subject of a criminal procedure and found guilty.

Liquidation is the death penalty for legal persons. Whereas the death penalty is outlawed for natural persons in all Council of Europe member states, liquidation as the gravest sanction for legal persons is mostly available. In some countries, exceptions apply for NGOs or non-commercial activities.[63] It is often a concern of NGOs that the liquidation sanction could be abused against them in governance systems with totalitarian tendencies. On the other hand it is important to prevent any exception for NGOs to be abused. For example, even a not-for profit organisation repeatedly being convicted for bribery of public officials, should probably cease to exist, even if the bribery was not for commercial but only for idealistic purposes. This is even truer, where the NGO is only a cover up for bribery in the economic interest of the person behind it.

Paragraph 4

The measures in paragraph 4 follow repeated recommendations by GRECO and the OECD, to "extend the disqualification [from public procurement] to legal persons",[64] "to introduce a criminal record for legal entities as soon as possible which would enable the practical application of additional sanctions of debarment from public procurement",[65] to ensure that "the agencies responsible for public procurement, ODA [official development assistance] and export credit and all other public subsidies, have access to this register",[66] and to foresee "exclusion from entitlement to public benefits or aid as a supplementary penalty".[67]

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[61] Section 9.1 Act of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty, idem.

[62] *Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing*, available at http://eur-lex.europa.eu, accessed 31 January 2016.

[63] OECD/ACN, ibid, chapter 5.1.3; see for example Romania, Criminal Code, Art. 141, Non-enforcement of the penalty of dissolution or suspension of the activity of the legal entity: "(1) The ancillary penalties provided under Art. 136 par. (3) let. a) and let. b) [dissolution] may not be enforced against public institutions, political parties, trade unions, employers' associations, and religious organizations or organizations of the national minorities, incorporated according to law. (2) The stipulations under par. (1) shall apply to legal entities performing activities in the media."

[64] OECD (December 2014), *Argentina: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 4e, available at www.oecd.org, accessed 31 January 2016.

[65] OECD (October 2013), *Belgium: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.21, available at www.oecd.org, accessed 31 January 2016.

[66] OECD Belgium, ibid, p.24; OECD Bulgaria, ibid, p.34: "Regarding public procurement, the Working Group recommends that Bulgaria introduce a legal provision to allow debarment of legal persons from public procurement, provide guidance to the procurement bodies on due diligence, and consider maintaining a record of natural and legal persons convicted of bribery which could be consulted by contracting authorities".

[67] OECD (June 2011), *Luxembourg: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.105, available at www.oecd.org, accessed 31 January 2016.

Paragraph 5
This paragraph should go without saying. However, it is included in order to avoid any unnecessary debates in the courtroom.

Article 6 – Sentencing; mitigating circumstances

(1) *[Sentencing]* **When determining the type and level of sanctions or measures, the competent authorities shall take into account all relevant circumstances, including where applicable:**

- **(a) the gravity and the duration of the breach;**
- **(b) the degree of responsibility of the legal person held responsible;**
- **(c) the financial strength of the legal person held responsible, as indicated for example by the total turnover of the legal person held responsible;**
- **(d) the benefit derived from the breach by the legal person held responsible, insofar as it can be determined;**
- **(e) the losses to third parties caused by the breach, insofar as they can be determined;**
- **(f) previous breaches by the natural or legal person held responsible;**

(2) *[Mitigating circumstances]* **The competent authorities may take into account the following mitigating circumstances:**

- **(a) the level of cooperation of the legal person held responsible with the competent authority;**
- **(b) whether the legal person reported the offence before it found out that the crime was detected;**
- **(c) the extent to which the legal person maintains a compliance programme in line with the guidance under Article 3 paragraph 2.**

Paragraph 1
Sentencing guidelines for fines of legal persons are in principle not different from sentencing guidelines for natural persons. Paragraph 1 is taken verbatim from the Fourth Anti-Money Laundering Directive where it applies equally to natural and legal persons. Countries often might already have sentencing guidelines containing the criteria in paragraph 1 or even adding further criteria. Most important in the context of legal persons is paragraph 1c which tags the calculation of the sanction to the financial turnover as opposed to the revenue. Companies with big economic power often generate no or little revenue for several years in a row, even if their financial situation is by and large healthy. It would thus be wrong to make the revenue the decisive criteria as a basic rule. Paragraph 1c is still open to other criteria, for cases where legal persons do not receive their wealth from turnover, but from holding assets over a long time, such as real estate trusts.

Paragraph 2
Paragraph 2a is taken verbatim from the Fourth Anti-Money Laundering Directive. The incentive of a mitigated sentence is especially important when it comes to large corporations: the evidence is hidden in the complexity of an organisation with possibly thousands of employees and billions of sets of data. Even if prosecutors would have enough initial information to obtain a search warrant, they might not be able to work through the evidence within statute of limitations. For example,

when the Siemens case was investigated, the company employed some 475,000 people and conducted business in 190 countries. It was thus necessary to conduct 1,750 interviews with Siemens employees and other individuals; conduct 800 informational briefings with employees to obtain background information; search 82 million documents electronically to identify potentially relevant material; review 14 million documents; analyse 38 million financial transactions; and review 10 million bank records.[68] Had Siemens not **cooperated** with the prosecutors, it is probably fair to say that the mountain of information to be sorted would have been multiple times bigger and the investigation would have produced only a smaller or inconclusive picture out of it.

Paragraph 2b concerns **effective regret**. GRECO has opposed regulations, where effective regret exonerated the defendant automatically and mandatorily. Furthermore, it has expressed concern that "this tool could be misused by the bribe-giver, for example as a means of exerting pressure on the bribe-taker to obtain further advantages, or in situations where a bribery offence is reported long after it was committed, since there is no statutory time-limit".[69] The OECD Working Group made similar observations: "The Convention does not permit a defence based on effective regret. In cases of foreign bribery the defence of effective regret would completely undermine the purpose of the Convention."[70] Paragraph 2b is modelled after the Montenegrin provision, which did not attract a recommendation by GRECO, as the defence was only applicable at the discretion of the court.[71] Furthermore, effective regret under paragraph 2b can only lead to mitigating a sanction but not to exonerating the defendant.

Paragraph 2c contains the defence of full **compliance** with corruption prevention requirements. It is particularly common in systems with strict liability (Article 2 paragraph 1c). Strict liability makes the company liable for any of its agents, even the most careful selected and supervised ones. In other words, strict liability puts the burden "rogue agents" on the company, even if it has no fault in the agent going off-limits. It thus seems only fair to allow the company to show that it did everything it could to prevent the agent to commit the corruption offence and thus receive a milder sentence.

Article 7 – Liability of successors and partners

(1) *[Succession]* **In case a legal person merges, transforms, or demergers – *de iure* or by legal transaction – after the offense is committed, the liability for sanctions under Article 5** *[sanctions]* **will rest upon the legal person(s) resulting from the reorganisation; the same applies where the same owners continue essentially the same business with another legal person.**

(2) *[Personal liability]* **To the extent partners or shareholders are personally liable for the financial obligations of the legal person they are liable for financial sanctions (Article 5 paragraph 1a** *[confiscation]* **and paragraph 2a** [*fines*]).

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[68] Siemens (25 December 2008), *Press statement*, available at www.siemens.com, accessed 31 January 2016.

[69] GRECO (6 April 2011), *Third Evaluation Round. Evaluation Report on the Republic of Moldova*, para. 64, available at www.coe.int/greco, accessed 31 January 2016.

[70] OECD Czech Republic, ibid, p.15.

[71] GRECO (3 December 2010), *Third Evaluation Round. Evaluation Report on the Republic of Moldova*, para. 76, available at www.coe.int/greco, accessed 31 January 2016.

(3) *[Exclusion of recourse]* **Notwithstanding paragraph 2, the legal person cannot take recourse against its managers or employees for financial sanctions** *[Article 2 paragraph 1]***, but only for damages and other similar consequences.**

(4) *[Liquidation and bankruptcy]* **Any natural or legal person**

(a) knowingly liquidating the legal person in order to shield it from financial sanctions; or

(b) criminally liable for a bankruptcy offence;

is liable insofar the legal person is unable to pay the financial sanctions.

Paragraph 1

A natural person may change its face, name, or gender. Nonetheless, under civil or criminal law, it will still have the same legal personality being liable for the same contracts or criminal offences. Legal persons can lose their legal personalities any way their owners want, through merger (two corporations forming a new one), transformation (a limited partnership transforming into a corporation), or demerger (one corporation splitting into two). As the result, there are one, two, or more **new legal personalities**. Thus, the law needs to clarify that the liability of the previous legal person will migrate to the new legal person(s). Several national laws contain clauses clarifying this legal succession,[72] whereas many new laws of transitioning countries do not. In Germany, liability of successors was introduced in 2013. Before, companies would sometimes try to escape liability by merging with other companies.[73] A current legal draft pending in the Upper House of Germany limits legal succession to cases where the "successor knew or should have known at the time of succession about the predecessor's liability" before the sanction is applied. However, sanctions already applied always take effect against the successor.[74] The second half of Article 7 paragraph 1 is modelled after Article 10 paragraph 2 of the Austrian Law on the Liability of Legal Persons for Criminal Offences.[75] It targets cases where one company does not succeed another one by way of universal succession, but by way of singular succession. The essential business of one company is transferred to another company without any overall legal transformation between the two distinct legal persons. Such transfers are done through conveying essential assets such as intellectual property, customers, staff, and/or property to the other company; hence the description as "singular succession", as each asset has to be transferred.

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[72] See for example Austria, ibid, § 10; Czech Republic, ibid, section 10 ("criminal liability of legal persons descends to all its legal successors"); Germany, § 30 subsection 2a *Act on Regulatory Offences* [*Gesetz über Ordnungswidrigkeiten – OWiG*] as amended in 2009, available at www.gesetze-im-internet.de, accessed 31 January 2016; Romania, Art. 151 LAW #286 of 17 July 2009 (Criminal Code).

[73] E.g. the case of an international coffee producer, see German Federal Anti-Trust Agency, press release of 11 February 2014, "*Düsseldorf Higher Regional Court confirms fines against Melitta*", available at www.bundeskartellamt.de, accessed 31 January 2016: "The Bundeskartellamt [federal anti-trust agency] assumes that this reorganisation [=a merger] was carried out with the aim of avoiding liability for payment of the fines."

[74] North-Rhine Westphalia, *Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden* (Draft Law by North-Rhine Westphalia, Law on the Introduction of Criminal Liability of Enterprises and other Associations), § 2 subsection 4: "The corporate sanction will be applied against the legal successor if it knew or should have known fully or partially of the offence at the time of succession." available at www.justiz.nrw.de, accessed 31 January 2016.

[75] Federal Law on the Liability of Legal Persons for Criminal Offences of 2005 [*Bundesgesetz über die Verantwortlichkeit von Verbänden für Straftaten (Verbandsverantwortlichkeitsgesetz – VbVG)*], available at www.internet4jurists.at, accessed 31 January 2016.

Transformations can occur by **agreement**, for example between shareholders of different companies. Transformations can also be the result of statutory provisions. For example, in many jurisdictions a simple partnership with the aim of establishing a company of limited liability ("Limited") will transform *de iure* into the Limited once it is properly registered.

Paragraph 2

From the perspective of company law it should go without saying what paragraph 2 is underlining: in legal persons with **personal liability**, such as partnerships, the partners are liable for the financial obligations of the legal person. However, it is important to make a clear legislative statement on this point. Otherwise, avoidable discussions will arise during trials on whether personal liability under civil company law only includes civil liabilities, or also criminal fines. For example, in Germany, it is difficult to find any legal doctrine on this question,[76] even though liability of legal persons is a concept that has existed there for several decades.

A specialty applies to partners who were involved in the corruption offence. They could owe double for the same offence: the fine from their personal conviction as well as a share of the fine their partnership owes. This raises the procedural question of **double punishment** (see Article 12).

In practical terms, a partner cannot be liable for confiscation of a specific asset of a partnership: either the asset is with the partnership, or it is not. If the asset is with the partner, it would be confiscated under third party confiscation. However, paragraph 2 is important for cases of **in value confiscation**. This concerns cases where the proceeds of a crime cannot be seized, but the value of which corresponds to such proceeds can be confiscated.[77]

Paragraph 3

This paragraph is taken more or less verbatim from the Austrian Law on the Liability of Legal Persons for Criminal Offences.[78] The regulatory aim of this paragraph is to leave the **effect** of financial sanctions with the legal person. Otherwise, the possibility of a fine might not have sufficient deterrent effect on the legal person. However, it is important that the legal person can take recourse against its managers and employees for any other financial damage it has occurred. This includes damages for loss of business, loss of reputation, procedural costs, etc.[79] In practice, managers are usually covered by directors and officers insurance ("D&O insurance").[80] However, D&O insurance does not cover fines from criminal offences and neither any other damage.

Paragraph 4

Obviously, owners might simply want to **liquidate** the legal person. As a result it will lose its legal personality. This raises the question whether anybody and if so who will carry the liability for the

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[76] The following 15 volume legal commentary (selling price: 2,300 €) on commercial law (including partnerships) contains an answer to this question, whereas many shorter commentaries do not: Staub, *Handelsgesetzbuch: HGB, Großkommentar in 15 Bänden*, 5th edition, § 128 no. 10.

[77] Article 4, *Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union*, available at http://eur-lex.europa.eu, accessed 31 January 2016.

[78] § 11 Federal Law on the Liability of Legal Persons for Criminal Offences of 2005, ibid.

[79] See in this context for example the award of 15 Million € in damages Siemens won against one of its CEO's: Reuters, (6 February 2015), *Ex-Siemens CFO Neubuerger commits suicide*, www.reuters.com.

[80] *Businessdictionary*: "Personal liability insurance that provides general cover to a firm's directors and senior executives. Paid usually by the firm, it reimburses (in part or in full) the costs resulting from law suits and judgments arising out of poor management decisions, employee dismissals, shareholder grievances, and other such acts committed in good faith. Criminal offenses are not covered under this insurance.", -available at www.businessdictionary.com.

vanished legal person. Similar questions arise in the context of bankruptcy of the legal person. Bankruptcy offences include various forms of diminishing the assets of a legal person in bad faith, for example by disposing or hiding assets, by recognising fictitious liabilities, or by destroying books.[81] Both, intentional liquidation of legal persons or committing bankruptcy offences, in order to shield the legal person from paying financial sanctions would or should be torts under general civil law principles.[82] For avoiding any unnecessary debate in the courtroom, paragraph 3 clarifies this question.

Article 8 – Applicability of domestic law

The law applying in the territory where the legal person has its registered or effective seat or where the natural person committed an offence (Article 1 paragraph 2) shall apply with respect to, the legal person's liability under Articles 2 to 4.

The Council of Europe (Article 18) and UNCAC (Article 42) conventions do not contain any special provision on the applicable law in cases of liability of legal persons. Similarly, the general provisions of criminal codes are often only designed around natural persons. An example is a previous version of the Romanian Criminal Code.[83] For international application it reads in short: "Criminal Law shall apply to offences committed on Romanian territory. Criminal law shall apply to offences perpetrated outside Romanian borders, by a Romanian citizen or by a person without citizenship which resides in Romania, if the act is provided as an offence also by the criminal law of the country of perpetration." This raises the following questions: First, what is the "offence" when it comes to liability of legal persons – the corruption offence by the natural person, or the liability link, i.e. the lack of supervision or the lack of prevention mechanisms? For example, if one only looks at the act of the natural person, the bribery, this could be committed by a foreign employee abroad. The lack of supervision might have taken place only in Romania, where a company might have its seat. Does this qualify as commission on Romanian territory? Secondly, a legal person would probably not qualify as "citizen" unless the term was defined explicitly to include legal persons. But even if a legal person could in general be seen as fitting under the term "citizen", when would it qualify as such – when being registered with its main seat in Romania but established under foreign law or only when established under Romanian law? Furthermore: When would a legal person "reside" in Romania – does a branch or subsidiary suffice, the de facto seat, or is registered office in Romania necessary?

Article 8 seeks to ensure a clear answer to all above questions. They consolidate respective provisions as found for example in the Austrian, Czech, Romanian (updated version), and United Kingdom law,[84] and follow recommendations of the OECD Working Group:

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[81] See for example the bankruptcy offences in the German *Criminal Code*, section 283, available at www.gesetze-im-internet.de, accessed 31 January 2016.

[82] As is the case for example under German law.

[83] Article 11 *Criminal Code* (undated, pdf-file as of 2010), available at www.vertic.org, accessed 31 January 2016.

[84] § 12 Federal Law on the Liability of Legal Persons for Criminal Offences of 2005, ibid; United Kingdom, *Bribery Act 2010*, Section 7 subsection 5, available at www.legislation.gov.uk (liable are: "any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom"); Czech Republic, Act No. 418/2011, ibid, sections 2 to 5; Romania, Criminal Code, ibid, Article 9.

- To exercise jurisdiction "when the foreign bribery offence is perpetrated abroad through an intermediary who is not a Swedish national"[85] or over "companies incorporated or headquartered in Mexico";[86]
- "To clearly provide territorial and nationality jurisdiction";[87]
- To apply "territorial and nationality jurisdiction concerning offences committed in whole or in part abroad, [...] whether it is committed directly or through intermediaries (including related legal persons such as foreign subsidiaries)";[88]
- To "clarify by any appropriate means that the jurisdiction over legal persons [...] should be broadly interpreted and cover, in particular (i) companies not incorporated in Brazil if their main seat is in Brazil; and (ii) companies that have their main management and control situated in Brazil even if some part of this function is located outside of Brazil".[89]

Article 8 applies the **nationality** principle to companies founded under domestic law (having their registered seats usually in their home country) or *de facto* residing in the country. In addition, it applies the **territorial** principle to the offence committed by the natural person.

It is important to keep in mind that Article 8 does not refer (only) to the legal person which is the closest to the offence committed, but also to the legal person in whose interest the offence is committed. Thus, for example, if company A resides abroad and is liable for bribery committed abroad, domestic criminal law still applies if the bribery was committed in the interest of its parent company B with a domestically registered seat. As formulated in Article 8, "legal person" is always the legal person referred to in Articles 2, 3, and 4, which can mean various entities in a **conglomerate** of legal persons.[90]

It should be noted that some countries go further than Article 8 and even apply **universal** jurisdiction. For example, the "law of the Czech Republic shall apply when determining the liability to punishment" of certain money forgery and terrorism acts, "even if such criminal act has been committed abroad by a legal person with no registered office in the Czech Republic."[91]

Article 9 – Application of general administrative/criminal law

In all other respects, general substantive provisions apply to legal persons insofar they are not exclusively applicable to natural persons.

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[85] OECD (June 2012), *Sweden: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 3b, available at www.oecd.org, accessed 31 January 2016.

[86] OECD (October 2011), *Mexico: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 3c, available at www.oecd.org, accessed 31 January 2016.

[87] OECD (March 2014), *Chile: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 5, available at www.oecd.org, accessed 31 January 2016.

[88] OECD (March 2014), *South Africa: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 14k, available at www.oecd.org, accessed 31 January 2016.

[89] OECD Brazil, ibid, p.29.

[90] The Czech law (Act 418/2011 Coll., ibid) contains an explicit provision in this regard (section 4 subsection 2), as it follows a different regulatory wording: "The law of the Czech Republic shall also apply when determining the liability to punishment for a criminal act committed abroad by a legal person with no registered office in the Czech Republic, if the criminal act has been committed for the benefit of a legal person with registered office in the Czech Republic."

[91] Section 4 subsection 1, Act 418/2011 Coll., ibid.

There are many provisions which apply to natural and legal persons equally. An example is the prohibition on retroactive application of criminal law. There is no need to **double** these common provisions again in a law regarding liability of legal persons. Article 9 serves this purpose. There are only a very limited number of provisions that apply exclusively to natural persons. It is obvious which provisions this concerns, such as the sanction of imprisonment. Many national laws have a provision as in Article 9, for example, the Austrian Law on the Liability of Legal Persons for Criminal Offences.[92]

In the context of Article 9, it is important to keep in mind that one should be careful when considering special regulations for legal persons. An example are **statutes of limitation**. Several times, the OECD Working Group criticised statutes of limitations that were shorter for legal persons than for natural persons.[93]

[92] Ibid, § 14 subsection 1.

[93] OECD Switzerland, ibid, recommendation 17: "The continued application, by tribunals, of a 15-year limitation period to prosecutions of legal persons to allow an adequate period of time for the investigation and prosecution of the offence of foreign bribery"; OECD Brazil, ibid, recommendation 8: "Regarding the statute of limitations, the Working Group recommends that Brazil [...] (ii) clarify its ability to extend the timeframe for administrative proceedings against legal persons."; OECD Italy, recommendation 4f: "re-evaluate the impact of the shorter base limitation period applicable to legal persons and consider aligning that period to the limitation period applicable to individuals".

Chapter II: Procedural questions

Preliminary note: necessity of separate provisions?
One can distinguish roughly two models of procedural regulation: most countries remain rather silent on procedural questions, and leave it up to the courts to apply procedural law designed around natural persons in an analogous manner to legal persons. Other countries try to regulate exhaustively all procedural particularities concerning legal persons, such as how to summon a legal person, whether the legal person has a right to remain silent, etc. This legislative toolkit opts for a rather exhaustive regulation for the following reason: In particular in countries where the concept of liability of legal persons is new anyhow, courts will already have enough to struggle with. Putting them in charge to come up with particular procedural solutions for legal persons might overstrain them. In any case it is preferable to have clear answers in the law instead of regulatory gaps to fill later by the courts.

Article 10 – Domestic jurisdiction

(1) *[Domestic legal persons]* **Venue shall be deemed to be established in the court in whose district the legal person has its registered or *de facto* seat.**

(2) *[Foreign legal persons]* **For legal persons with registered and *de facto* seat abroad, venue shall be deemed to be established in the court**

- **(a)** *[Domestic offence]* **in whose district the offence was committed, if it was committed inside the territory; or**
- **(b)** *[Foreign offence]* **which is competent for foreign or stateless natural persons, if the offence was committed outside the territory.**

(3) *[Connected cases]* **Provisions on venue for connected cases shall remain unaffected.**

Article 8 determines the international applicability of substantive criminal law. Once (and only) if this question is answered in the affirmative, Article 10 provides guidance on which **domestic** court is competent to decide the case. There are basically two options for venue: the place where the corruption offence took place, or the place where the legal person has its registered seat. There are arguments for both options. The place of offence has the advantage that the same court would conduct the trial over the natural and legal person (since the natural person usually is tried at the venue of the offence). The venue of the legal person's seat has the advantage that the same court would always be competent for offences by the same legal person. It would also be a venue easy to determine in case the legal person's corruption offence(s) took place in various locations. In addition, the prosecutor's office at the court would be closer to the legal person for collecting evidence at the legal person. Furthermore, the exact circumstances of the offence – including the place – are often not clear where legal persons are involved: was the bribe handed over at the company's premises, in a public office, or in a third place? Lastly, legal persons tend to have their seat in rather larger cities. Judges of courts in larger cities will be more likely to deal with the concept of liability of legal persons; to their colleagues in smaller courts the concept might be rather unfamiliar. For these reasons, **paragraph 1** defines the seat of the legal person as the venue of default. However, should the court want to connect the case with the trial against the natural person, it may decide to do so under Article 10 **paragraph 3**. As for companies with a seat abroad, **paragraph 2** defines the venue in an analogous manner as is usually done for natural persons.

Obviously, there are many variations possible for determining the venue of domestic courts. The only two things legal drafters need to ensure in the end are to consider above mentioned policy arguments and to define a venue for all possible case constellations. A provision defining the venue only by the place where the offence was committed would not be sufficient: legal persons can also be liable in their home country for committing corruption abroad.

Article 11 – Autonomous procedure

The procedure against the legal person can proceed separately from or without a procedure against the natural person having committed the offence.

Article 11 is the procedural mirror provision to Article 2 paragraph 2c. Article 2 paragraph 2c decouples the liability of the legal person from the liability of the natural person. Article 11 does the same on a procedural level. It is a provision frequently found in Criminal Procedure Codes.[94] Monitoring reports by the OECD also seem to suggest that the procedure against the natural and legal person should not depend on each other by necessity.[95] Such provisions are a helpful with regard to trial tactics. Legal persons are often more willing to co-operate with the prosecutors from the beginning in order to gain a lenient sentence. The legal person will provide comprehensive evidence on the corruption schemes. This will make it easier to build a case against the involved natural persons in a subsequent trial. The procedural separation is also important where one or several natural persons protract the trial with seemingly endless motions. The court might already be fully convinced of the liability of the legal person. Would the trial against the legal person be undividable from the trial against the natural persons, it might risk failing because it would exceed a reasonable duration: "Permitting investigators and prosecutors to focus on the legal person and leave the individual defendants (or some of them) for another case may save some valuable time, and, thus, enhance the system's ability to bring significant cases to justice."[96]

Article 12 – Double punishment

(1) *[Natural and legal person]* **The prohibition on double punishment (*ne bis in idem*) does not apply where a legal person and a natural person are both convicted for the same offence.**

(2) *[Fines]* **When assessing fines and applying confiscation measures, courts shall consider the overall economic effect on any natural person offender being a partner or shareholder in order to avoid double punishment.**

(3) *[Multiple legal persons]* **Paragraph 1 and 2 apply analogously where connected legal persons are liable for the same offence.**

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[94] See for example Austria, Federal Law on the Liability of Legal Persons for Criminal Offences, ibid, § 15.

[95] OECD (2000), *Mexico, Phase 1 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, p.24, available at www.oecd.org, accessed 31 January 2016: "Thus a legal person cannot be criminally sanctioned where the natural person who committed the bribery offence cannot be convicted. This raises doubts whether the standard of effective, proportionate and dissuasive sanctions has been met."; OECD (2001), *Poland, Phase 1 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, available www.oecd.org, accessed 31 January 2016: "The Working Group is concerned about certain features of this approach as explained in the review report, in particular the requirement, in most cases, of a prior conviction of the natural person […]."

[96] OECD/ACN, ibid, p.28.

Paragraph 1

Paragraph 1 is a reflection of international standards: "Liability of a legal person [...] shall **not exclude** criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offences [...]." (Council of Europe Criminal Law Convention, Article 18 paragraph 3).[97] Many countries include this principle in their legislation, such as Article 20 para. 4 of the Criminal Code of Lithuania: "Criminal liability of a legal entity shall not release from criminal liability a natural person who has committed, organised, instigated or assisted in commission of the criminal act."[98] Where this is not the case, upper courts have confirmed this principle.[99]

Paragraph 2

In some cases the sanctioning of the legal person and the natural person offender need to be **coordinated** to some extent. This is necessary where the natural person fully or partially owns the legal person. In this case, the fine against the legal person punishes their owners already: they either have to provide the necessary liquidity to the legal person for paying the fine, or the value of their shares diminishes corresponding to the losses incurred by the fine. Therefore, for example, German courts of appeal have held that two different proceedings against a legal person and against its representatives are not violating the principle of *ne bis in idem*.[100] The proceeding against the natural person can follow the proceeding against the legal person. However, for determining the sanction against the natural person it has to be taken into account whether the natural person (for example, as shareholder) has already suffered an economic loss through the sanction against the legal person.[101] Paragraph 2 sets out this coordination of sanctions.

Paragraph 3

This paragraph addresses a problem frequently found in practice, but rarely if ever regulated by law: several **connected legal persons** being involved in a corruption offence. Again, this raises the question whether a sanction against one legal entity bars proceedings against the other legal entities of the conglomerate. In principle, separate legal entities are all separately liable for any involvement in a corruption scheme. For example, where two legal persons horizontally connected to a trust are involved in a bribery scheme, nothing stands in the way of sanctioning both legal persons. The situation might look different, where a holding company and its subsidiaries participated in a bribery case. Any fine to the subsidiary will hurt the holding company already economically, as it will receive equivalently lesser revenue from the subsidiary. The European Court of Justice has thus held in 2015, "that, in a situation where the liability of a parent company is purely derivative of that of its subsidiary and in which no other factor individually reflects the conduct for which the parent company is held liable, the liability of that parent company cannot exceed that of its subsidiary".[102]

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[97] Emphasis by author; similar Art. 26 para. 3 UNCAC.

[98] Lithuania, Law no. VIII-1968 (*Criminal Code*), available at www3.lrs.lt, accessed 31 January 2016.

[99] See for example Estonia, Ginter J., *Criminal Liability of Legal Persons in Estonia*, Juridical International XVI/2009, 151 (155), available at http://www.juridicainternational.eu, accessed 31 January 2016, citing a Decision of the Civil Law Chamber of the Supreme Court (CLCSCd) 3-1-1-7-04.

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

[101] Court of Appeal Frankfurt am Main, *decision no. 1 Ss 63/11 of 25 January 2012*, available at http://openjur.de, accessed 31 January 2016.

[102] ECJ, Judgment of 17 September 2015, *C 597/13 P*, available at http://curia.europa.eu accessed 31 January 2016.

Paragraph 3 only focuses on **financial** sanctions. Obviously the sanctions of publication of judgement or a procurement ban can apply to all legal entities involved.

Paragraph 3 can also have an **international** dimension. For example, the Director of the U.K.'s Serious Fraud Office said in an interview that the U.K. would not pursue charges against a legal person because the company had already been prosecuted in the U.S.: "Our law does not allow someone to be prosecuted here in relation to a set of facts if that person has been in jeopardy of a conviction in relation to those facts in another jurisdiction."[103] However, it should be pointed out that the prohibition on international double punishment is anything but a clear and uniform practice. As international attorneys point out: "The notion [of double punishment] doesn't have the same meaning among all of the [OECD] convention signatories".[104] In the Siemens case, several jurisdictions pursued the company for conduct in cases, that in part, overlapped (Germany, Italy, Nigeria, United States).[105]

[103] Dunn C. (12 March 2012), *Double Jeopardy and the New World of Antibribery Laws*, Corporate Counsel, p.7, available at www.immagic.com, accessed 31 January 2016.

[104] Ibid.

[105] Anyango Oduor J. and others (2013), *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*, p.61.

Article 13 – Privilege against self-incrimination

[Natural person] **Natural persons representing the legal person as defendant have the right to remain silent if their testimony would incriminate themselves.**

The European Convention on Human Rights does not contain an explicit right to remain silent. Even though, the **European Court of Human Rights** has held that "there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure."[106] Article 13 is a reflection of this right.

For investigations against natural persons, the right to remain silent can pose already quite an **obstacle** for investigators. They will not fully know what happened in a case and why, without a confession by the offender. With legal persons, the obstacle is probably even bigger. An investigator might often only know that somebody from within a legal person bribed a public official, but not know who this was and how the bribery was done exactly. The legal person might have many subsidiaries and several thousand employees. If the legal person has the right to remain silent, the investigator will not know in which of the million company documents to look for traces of the offence, and with which of the many thousand employees to start the questioning (let alone the fact that he/she would not know most names and addresses of the employees).

There is no international standard on this question. The anti-corruption conventions are silent on this issue, as are most publications. The fact that natural persons have the right to remain silent does not mean that this automatically applies to legal persons as well: not all of the Convention's Articles confer rights to legal persons. The Court adheres to a practical operation in this matter and evaluates per provision whether it can attribute any rights to corporations.[107] As far as can be seen, the ECtHR has not yet had to deal with the question whether the right to remain silent applies to legal persons.[108] Some scholars have pointed out that the Court applies all other fair trial rights to individuals and legal persons. Therefore, they argue, the Court will most probably also apply the right to freedom from self-incrimination equally to natural and legal persons to the extent possible.[109] However, the right to remain silent has a strongly personal component, as the **German** Constitutional Court underlined: "The protection from self-incrimination is in the interest of human dignity. An obligation to self-incriminate would lead an individual into an unbearable personal dilemma. Legal persons would not be able to experience such a dilemma."[110] Therefore, the German Constitutional Court excludes legal persons from the right to remain silent. As for jurisprudence outside of Europe, it should be noted that the United States Supreme Court held

[106] ECHR, *John Murray v. the United Kingdom*, Application no. 18731/91, Judgment of 8 February 1996, para. 45, available at http://hudoc.echr.coe.int, accessed 31 January 2016.

[107] Van den Muijsenbergh W./Rezai S. (2012), *Corporations and the European Convention on Human Rights*, Global Business & Development Law Journal, Vol. 25, p.48, available at http://digitalcommons.mcgeorge.edu, accessed 31 January 2016.

[108] Van Kempen P. (2010), *Human Rights and Criminal Justice Applied to Legal Persons. Protection and Liability of Private and Public Juristic Entities under the ICCPR, ECHR, ACHR and AfChHPR*, Electronic Journal of Comparative Law, vol. 14.3 (December 2010), p.16, available at www.ejcl.org, accessed 31 January 2016.

[109] Van Kempen, idem; Van den Muijsenbergh, ibid, 49.

[110] German Constitutional Court, *decision no. 1 BvR 2172/96 of 26 February 1997*, available at www.servat.unibe.ch (German), accessed 31 January 2016.

already in 1906 that a corporation does not enjoy the Fifth Amendment privilege against self-incrimination because of the personal nature of the right.[111]

However, legal drafters should keep in mind that a number of countries and courts take a different stance. From this fact alone, it cannot be excluded that a national provision in line with Article 13 of this toolkit would be found later on to violate Article 6 ECHR. For example, the European Court of Justice has ruled that: "in general, the laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings." However, the Court held "the need to safeguard the rights of the defence […] to be a fundamental principle of the Community legal order". Thus, the state must "not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove."[112] The ruling has only a legal effect for the implementation of **European Union** law, but not a general effect on the national level of the European Union member states. As far as country examples are concerned, Austria[113] and Poland enshrine the right to remain silent in their laws: "The court may question the representative of the collective entity in the capacity of a witness. The person may refuse giving explanations."[114]

In view of the lack of a clear international guidance on the right of legal persons to remain silent, this legal toolkit does not take a specific stance on this issue; lawmakers of any **country** will have to decide for themselves which stance to take.

The **practical value** of this question is rather limited. In practice, a legal person has hardly ever an interest in remaining silent. It will want to avoid fines and other damage to its business, and it will want to be seen as cooperative and supporting integrity. At the same time, prosecutors will encourage the legal person to cooperate, as they do not have the resources for investigating large companies and countless pieces of evidence. Therefore, Article 5 paragraph 2 (Sanctions) incentivises cooperation.

Article 14 – Preliminary measures

(1) *[Court order]* **The competent court can order on proposal of the competent authorities one of the following measures for a set maximum period of time, if there are grounds to assume that the legal person is liable under Article 2, 3, and 4 and that without these measures the investigation and the implementation of sanctions would not be secured:**

(a) *[Ban on liquidation]* **Banning the initiation or, as the case may be, suspension of the procedure to dissolve the legal person or liquidate it;**

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[111] *Hale v. Henkel*, 201 U.S. 43, 75-76 (1906), available at http://caselaw.findlaw.com, accessed 31 January 2016: "The amendment is limited to a person who shall be compelled in any criminal case to be a witness against himself; and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation. [...] Indeed, so strict is the rule that the privilege is a personal one that it has been held in some cases that counsel will not be allowed to make the objection."; see on this also: Brodowski D. and others (2014), *Regulating Corporate Criminal Liability*, p.200.

[112] European Court of Justice, *Orkem v Commission of the European Communities, Case 374/87, Judgment of 18 October 1989*, available at http://eur-lex.europa.eu, accessed 31 January 2016.

[113] § 17 Federal Law on the Responsibility of Legal Persons for Criminal Offences of 2005, ibid.

[114] Article 21a para. 1 *Act of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty*, available at www.oecd.org (English), accessed 31 January 2016.

(b) *[Ban on transformation]* **Suspension of the legal person's merger, transformation, or demerger, or reduction in nominal capital, that began prior to the criminal investigation or during it;**

(c) *[Ban on asset disposal]* **Banning asset disposal operations that are likely to diminish the legal person's assets or cause its insolvency;**

(2) *[Preliminary bail]* **Posting bail is foreseen as follows, with provisions on bail for natural persons applying analogously:**

(a) Bail is ordered by court upon request of the legal person under investigation or the investigating authority;

(b) The bail is calculated by the expected fine and procedural costs;

(c) Once bail is posted, measures under paragraph 1 are inapplicable.

Paragraph 1

Once a legal person is subject to a corruption investigation, a "smart" owner might try to move all financial assets away from the legal person. As a consequence, the legal person will be unable to pay the fine, and its owner will have avoided or reduced the economic effect of the sanction. Even big international corporations have tried such tactics in the past.[115] Advanced and detailed national laws therefore often contain provisions enabling prosecutors to prevent the financial resources of a legal person moving out of reach. Paragraphs 1a to 1c all relate to different forms of **hiding** away **financial assets**. At first sight, paragraph 1b might appear as being an unnecessary duplication of Article 7 paragraph 1 (legal succession in case of reorganisation). The latter ensures that the liability will continue with the new legal person. However, this legal transfer will not always suffice for ensuring the collection of a fine. For example, a domestic legal person might transform into a foreign legal person in an offshore jurisdiction where it is hard to reach for enforcing sanctions. Paragraph 1 is modelled after the Austrian[116] and Romanian[117] law, which both foresee preliminary measures in order to secure the collection of fines.

Paragraph 2

Measures under paragraph 1 limit the freedom of legal persons and their owners while an investigation is pending. **Preliminary measures** must not be disproportional. Furthermore, one needs to keep in mind that the legal person is presumed innocent until proven guilty. It is thus only fair to grant the legal person an opportunity to provide the state with a security for the financial sanction in exchange for avoiding or lifting the measures under paragraph 1. Paragraph 2 is modelled after the Romanian Criminal Code, with some modifications, though: the Romanian Criminal Code foresees posting of bail only by court order, but not upon request of the legal person.[118] Furthermore, posting bail does not suspend or lift the preliminary measures imposed on the legal person which could amount to a disproportionate burden upon the legal person. One might think about preliminary measures also in the context of securing evidence. For example, any liquidation or transformation of a legal person could also be relevant for impeding access to written evidence, as documents might disappear in the process of reorganisation. However, the

[115] German Federal Anti-Trust Agency, press release of 11 February 2014, ibid.

[116] Article 20 Federal Law on the Responsibility of Legal Persons for Criminal Offences of 2005, ibid.

[117] Article 493 subsection 1 Criminal Code, ibid.

[118] Article 493 subsection 2 Criminal Code, ibid.

availability of evidence is usually protected under regulations setting minimum periods for archiving company documents and under criminal sanctions against obstruction of justice.[119]

Article 15 – Legal succession

In case a legal person merges, transforms, or demergers during the proceedings, procedural acts concerning the previous legal person will continue to have legal effect concerning the legal person(s) resulting from the reorganisation.

Article 15 is necessary as legal persons have an option which natural person do not have: they can change their legal personality. Owners of legal persons can do this through merger (two corporations forming a new one), transformation (a limited partnership transforming into a corporation), or demerger (one corporation splitting into two) – see above at Article 7. In principle it should go without saying that procedural acts against a predecessor **continue** to be effective against a legal successor. However, in order to avoid any ambiguity, Article 15 makes clear that procedural acts such as service of court documents or questionings take effect against legal successors as well. Otherwise any legal reorganisation of a legal person would necessitate a restart of the complete proceedings. Article 15 is modelled after section 10 of the Austrian Law on the Liability of Legal Persons for Criminal Offences. All of the mentioned legal successions pose a particular risk if the change in personality happens transnationally. Prosecutors might risk that domestic criminal law will not continue to apply, and that in addition the (new) legal person is out of reach for enforcement, e.g. if it resides in an offshore location.

Article 16 – International cooperation

Rules on mutual legal assistance applicable to cases against natural persons will apply *mutatis mutandis* to cases against legal persons, notwithstanding whether the other state party foresees liability of legal persons.

Article 16 should go without saying. It is an expression of the obligation for international cooperation to the widest extent possible as defined under the Council of Europe Criminal Law Convention (Article 25) and the UNCAC (Chapter IV). Nonetheless, Article 16 is necessary for two reasons: First, it avoids any discussion whether international cooperation only concerns the offence, but not the liability of the legal person for it. Secondly, it is important where countries opt for **administrative** sanctions. It is a weakness of such systems that measures of mutual legal assistance might not be available for administrative procedures to the same extent as they are for criminal offences. In this case, Article 16 would ensure that the administrative liability of the legal person for the (criminal) offence is part of the international cooperation under the criminal framework. For example, in Germany, the Act on International Cooperation in Criminal Matters applies also to the administrative liability of legal persons.[120] Obviously, mutual legal assistance will be limited to the means of evidence available under German law on administrative offence

[119] Article 25 UNCAC.

[120] Section 1 paragraph 2 : "Criminal matters under this Act shall include proceedings resulting from an offence which under German law would constitute a regulatory offence sanctionable by a fine or which pursuant to foreign law is subject to a similar sanction, provided that a court of criminal jurisdiction determines the sentence.", *Act on International Cooperation in Criminal Matters* of 1982, available at www.gesetze-im-internet.de, accessed 31 January 2016.

and will thus not extend for example to special investigative means, which are available only for certain crimes.

The OECD Working Group has recommended in numerous instances that countries should "ensure that a broad range of MLA, including search and seizure, and the tracing, seizure, and confiscation of proceeds of crime, can be provided in foreign bribery-related civil or administrative proceedings against a legal person to a foreign state whose legal system does not allow **criminal** liability of legal persons".[121]

Article 17 – Application of procedural law

In all other respects, administrative/criminal procedural provisions apply to legal persons insofar they are not exclusively applicable to natural persons.

Article 17 is the mirror provision on a procedural level to what Article 9 (application of general substantive law). There are numerous provisions in procedural law which apply to legal persons equally as they do to natural persons. For example, most criminal procedure codes grant the defendant the last word in a trial. This provision naturally applies to legal persons as well, with its legal representative having the opportunity to address the court before it retires for deliberation. Some provisions obviously apply only to **natural persons**, such as arrest, blood test, or DNA-analysis.

In most countries, **special investigative means** are available also for investigating liability of legal persons.[122] Where special investigation means were not available, the OECD Working Group has made recommendations to introduce them for legal persons as well.[123] This is necessary as often there is no concrete natural person identified as suspect against whom the special investigative means can be directed, or the natural person is not within reach of domestic special investigative means.

Similar as with Article 9, any procedural privilege for legal persons needs to be taken with caution. For example, some countries contain **exemptions** for the prosecution of legal persons. The OECD Working Group has continuously been critical of such exemptions. For example in the case of Slovenia, it recommended that "a legal person cannot be exempted from prosecution because of its 'insignificant' level of participation in the commission of the criminal offence".[124]

There are **other procedural issues** involving legal persons, such as how a legal person is summoned or the procedural sequencing between the two defendants in a joint trial of a natural and legal person. Usually, such issues should follow already from existing procedural law. In any case, they are not part of this toolkit as they largely depend on the procedural particularities of any given country. This would also include non-prosecution and plea agreements.

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[121] OECD Australia, ibid, p.13; OECD Belgium, ibid, p.24: It is recommended "that Belgium can provide prompt and effective MLA to States whose legal systems do not have criminal liability for legal persons".

[122] OECD/ACN, ibid, p.29.

[123] OECD Bulgaria, ibid, p.34: It is recommended that "the full range of investigative tools in the Criminal Procedure Code is available in" investigations of legal persons.

[124] OECD (June 2014), *Slovenia: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials*, recommendation 2a, available at www.oecd.org, accessed 31 January 2016.

Annex – Systematic comparison of international standards

Convention	Council of Europe Criminal Law Convention	European Union Second Protocol	UNCAC	OECD Foreign Bribery Convention
Article	Article 18. – Corporate liability	Article 3. Liability of legal persons	Article 26. Liability of legal persons	Article 2. Responsibility of Legal Persons
Corruption offence	the criminal offences of active bribery, trading in influence and money laundering established in accordance with this Convention.	fraud, active corruption and money laundering.	for participation in the offences established in accordance with this Convention [bribery, embezzlement of public funds, trading in influence, abuse of functions, illicit enrichment, and money-laundering obstructing. justice; offences are partly optional].	for the bribery of a foreign public official. [accounting offences as per Article 8 are indirectly included]
Imputation liability	committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on: – a power of representation of the legal person; or – an authority to take decisions on behalf of the legal person; or – an authority to exercise control within the legal person; as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences.	committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on - a power of representation of the legal person, or - an authority to take decisions on behalf of the legal person, or - an authority to exercise control within the legal person, as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud.		
Objective liability	2. Apart from the cases already provided for in paragraph 1, each Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in	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		

	paragraph 1 for the benefit of that legal person by a natural person under its authority.	corruption or money laundering for the benefit of that legal person by a person under its authority.		
Undefined liability concept			1. […] to establish the liability of legal persons […] 2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.	to establish the liability of legal persons
Liability of natural persons	3 Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offences mentioned in paragraph 1.	3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money laundering.	3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.	
Definition: "Legal person"	Article 1. […] d "*legal person*" shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations.	Article 1. […] (d) 'legal person` shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations; […]		
Sanctions	Article 19. Sanctions and measures 1 Having regard to the serious nature of the criminal offences established in accordance with this Convention, each Party shall provide, in respect of those criminal offences established in accordance with Articles 2 to 14, effective, proportionate and dissuasive sanctions and measures, including, when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition. 2 Each Party shall ensure that legal persons held liable in accordance with Article 18, paragraphs 1 and 2, shall be subject to effective, proportionate and	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.	4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.	Article 3. Sanctions 2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.

	dissuasive criminal or non-criminal sanctions, including monetary sanctions.	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.		