LEGAL
RESEARCH
GROUP

EUROPEAN COMPLIANCE BENCHMARK

The Final Report

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The European Law Students' Association

K&L GATES

The European Law Students' Association

INTERNATIONAL LEGAL RESEARCH GROUP

EUROPEAN COMPLIANCE BENCHMARK

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FOREWORD

1. WHAT IS ELSA?

ELSA is a non-political, non-governmental, non-profit making, independent organisation which is run by and for students. ELSA has 43 Member and Observer countries with more than 250 Local Groups and 40,000 students. It was founded in 1981 by 5 law students from Poland, Austria, West Germany and Hungary. Since then, ELSA has aimed to unite students from all around Europe, provide a channel for the exchange of ideas and opportunities for law students and young lawyers to become internationally minded and professionally skilled. Our focus is to encourage individuals to act for the good of society in order to realise our vision: "A just world in which there is respect for human dignity and cultural diversity". You can find more information on www.elsa.org.

2. LEGAL RESEARCH GROUPS IN ELSA

A Legal Research Group (LRG) is a group of law students and young lawyers carrying out researchon a specified topic of law with the aim to make their conclusions publicly accessible. Legal research was one of the main aims of ELSA during our early years. When ELSA was created as a platform for European cooperation between law students in the 1980s, sharing experience and knowledge was the main purpose of our organisation. In the 1990s, our predecessors made huge strides and built a strong association with a special focus on international exchange. In the 2000s, young students from Western to Eastern Europe were facing immense changes in their legal systems. Our members were part of such giant legal developments such as the EU expansion

and the implementation of EU Law. To illustrate, the outcome of the ELSA PINIL (Project on International Criminal Court National Implementation Legislation) has been the largest international criminal law research in Europe. In fact, the final country reports have been used as a basis for establishing new legislation in many European countries.

The results of our more recent LRGs are available electronically. ELSA for Children (2012) was published on Council of Europe's web pages and resulted in a follow up LRG (2014) together with, among others, Missing Children Europe. In 2013, ELSA was involved in Council of Europe's 'No Hate Speech Movement'. The final report resulted in a concluding conference in Oslo that same year and has received a lot of interest from academics and activists in the field of discrimination and freedom of speech. The results of the LRG conference, a guideline, have even been translated into Japanese and were presented in the Council of Europe and UNESCO!

3. Legal Research Group - European Compliance Benchmark

The International Legal Research Group - European Compliance Benchmark is a cooperation between The European Law Students' Association (ELSA) and K&L Gates. K&L Gates has provided ELSA with research questions that 24 member and observer groups in our network successfully investigated in the framework of their respective national legislation.

The topic of this LRG centered around the world of Corporate Compliance, as it is one of the hottest legal topics currently. What is meant by this is the degree to which companies abide by the regulations set for corporate governance and prevention of criminal measures in a commercial context. The questions of the LRG focused on outlining the relevant rules as well as assessing what the ramifications are for breaking them.

ACKNOWLEDGEMENTS

The achievements of the International Legal Research Group - European Compliance Benchmark would not have been possible without the kind support and help from many individuals.

The International Coordination Team would first and foremost like to thank and congratulate the National Research Groups for their extraordinary effort. More than 200 students and academics from 24 countries have participated as Researchers, Coordinators, Linguistic Editors and Supervisors. Thanks to your great work, this project has put corporate compliance on the agenda of many law students and you have provided a valuable source of information for readers who seek to learn more about the corporate's criminal liability regulatory framework around Europe.

Academic background and support has been crucial for this student initiative. We are very grateful for the assistance we received from Mr. Jeroen Smets from the K&L Gates office in Brussels and Ms. Christine Braamskamp, from the London's K&L Gates office, who actively contributed to the accompanied European Compliance Webinar. Without you, we would not have been able to achieve a successful project.

Thankfully yours,

Jakub, Mariagiulia, Kristýna and Kerli

International Coordination Team of the International Legal Research Group - European Compliance Benchmark

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4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?
5. Please state and explain any:
   - 5.1 internal reporting processes (i.e. whistleblowing);
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10. If relevant, please set out information on the following:

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    10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance).

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

NATIONAL REPORTS

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ACKNOWLEDGEMENTS

We would like to express our sincere gratitude to our academic advisor Prof. Asoc. Dr. Argita Malltezi for the continuous support in drafting this report and related research, for her patience, motivation and immense knowledge.

1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction.

Albania has made progress in improving its legal framework of fight against money laundering and financing of terrorism. Legal framework is improved with international standards. Bazel AML index 2016 report provided by Bazel Institute of Governance, has ranked Albania the 102nd among 149 countries observed by the index. Scored is improved in 5.04 points, compared with year 2015 scored 5.56 points, showing lower risk of money laundering and terrorism. Albania is underlined by the index, as one of top 10 improvers 2016.[1] Albanian Financial Inteligence Unit, established in Albania during year 2009, as member of EGMONT Group (international forum), is responsible for receiving, analysing & disseminating to the competent authorities, disclosures of financial information. The attempt of FIU for searching and fighting the potential financing of terrorist activities in the national and international levels has been supported in Albania by the law of terrorism in 2004[2].

Main bodies involved in the identification and prevention of bribery and corruption are

- The General Directorate for the Prevention of Money Laundering,
- The High Inspectorate of Declaration and Audit of Assets, General Directorate of Prevention of money laundering (part of ministry of Finance), and all structures created for such purpose within the public bodies.

Other regulators are Bank of Albania, Ministry of Finance, Ministry of Justice, Financial Supervisory Authority etc.

The Prosecution Office is the competent authority for investigating and prosecuting corruption. The Prosecution Office is organised and operates under the supervision of the general prosecutor as a centralised structure, and includes the office of the General Prosecutor, the Prosecution Council and the District Prosecution Offices. The General Prosecutor is the highest authority

1 https://index.baselgovernance.org/sites/index/documents/Basel_AML_Index_Report_2016.pdf
2 http://www1.fint.gov.al/en/historiku-3/albanian-financial-intelligence-unit

exercising the criminal prosecution and representing the accusation in court on behalf of the state. He is also responsible of the carrying out a series of other duties assigned by law to the prosecution.[3]

Physical persons & juridical bodies shall undertake customer due diligence measures, before they establish a business relationship, and after that, when the customer carries out or intends to carry out i. a transfer within the country or abroad or a transaction at an equal amount or exceeding 100, 000 (one hundred thousand) Albanian Lek.

If the amount of transactions is not known at the time of operation, the identification shall be made once the amount is known and the above threshold is reached.[4] For Legal entities, that do not carry out for-profit activity are required personal data's like; name, number and date of court decision related to registration as a legal person, statute and the act of foundation, number and date of the issuance of the license by tax authorities, permanent location, and the type of activity;[5]

The subjects, the activities of which include money or value transfers, must obtain and identify, first name, last name, address, document identification number or account number of the originator, including the name of the financial institution from which the transfers is made.

The information must be included in the message or payment form attached to the transfer. If there is no account number, the transfer shall be accompanied by a unique reference number. The entities transmit the information together with the payment. Activities shall keep a list of their agents and make such list available to the responsible authority, supervisory authorities, and auditors as may be required.[6]

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[3] http://www.pp.gov.al/web/About_As_2_2.php#.WKvNqjuLTIU
[4] Article 4 LAW: Nr.9917, dated on 19.5.2008 On the Prevention of Money Laundering & Financing of Terrorism, amended.
[5] Article 5 LAW: Nr.9917, dated on 19.5.2008 On the Prevention of Money Laundering & Financing of Terrorism, amended.
[6] Article 10 LAW: Nr.9917, dated on 19.5.2008 On the Prevention of Money Laundering & Financing of Terrorism, amended.

Entities shall have the obligations:

a. Draft and apply internal regulations and guidelines that take into account the money laundering and terrorism financing risk,
b. Nominate a responsible person for the prevention of money laundering and terrorism financing, at the administrative/management level,
c. Establish a centralized system, in charge of data collection and analysis;
d. Apply fit and proper procedures when hiring new employees, to ensure their integrity,
e. Train their employees on the prevention of money laundering and terrorism financing through regular organization of training programs,
f. Instruct the internal audit to check the compliance with the obligations of this law and of the relevant sublegal acts,
g. Ensure that subsidiaries, branches, sub-branches, as well as their agencies, outside the territory of the Republic of Albania,
h. The company should submit information, data and additional documents to the responsible authority, in accordance with the provisions and time limits set forth in this law.

The responsible authority may extend this time limit in writing for a period of no more than 15 days. If the number of the employees of the entities referred to in this law is less than 3 persons, the obligations of this law shall be fulfilled by the administrator or by an authorized employee of the entity.[7] Entities shall not use professional secrecy or benefits deriving from it as a rationale for failing to comply with the legal provisions of this law, when information is requested or when, in accordance with this law, the release of a document, which is relevant to the information, is ordered.[8]

[7] Article 11 LAW: Nr.9917, dated on 19.5.2008 On the Prevention of Money Laundering & Financing of Terrorism, amended.
[8] Article 25 LAW: Nr.9917, dated on 19.5.2008 On the Prevention of Money Laundering & Financing of Terrorism, amended

The criminal code of the Republic of Albania is in charge of protecting (against the penal acts) the state's dependence and its territorial integrity, human's dignity, human's rights and freedoms, constitutional order, property, environment, Albanians' co-habitation and well-understanding with national minorities, and religious cohabitation; also, the criminal code should prevent the penal acts.[9]

Organizing and putting in function fraudulent and pyramid schemes by borrowing money, in order to have material benefits, is condemned by imprisonment from three to ten years. This act, when it brings about serious consequences, is sentenced by imprisonment from ten to twenty years.[10]

Fraud on documents presented, thus fraudulently obtaining subsidies from the state, is punishable by a fine or up to four years of imprisonment.[11] Presenting false circumstances related to the object to be insured, or fabricating false circumstances and presenting them into documents thus fraudulently obtaining insurance is punishable by a fine or up to five years of imprisonment.[12]

Fraud on presented documents, thus fraudulently obtaining credit through fictitious registration in property registration offices25 of objects which do not exist, or over estimated, or which belong to somebody else's property, committed with the intent of not paying back the credit, is punishable by a fine or up to seven years of imprisonment.[13] Publication or use partially or totally with his own name of a work of literature, music, art or science which belongs to another, constitutes criminal contravention and is punishable by a fine or up to two year of imprisonment.

[9] Article 1/b Criminal Code of the Republic of Albania approved upon Law no. 7895, dated 27 January 1995 amended
[10] Article 143/a Criminal Code of the Republic of Albania approved upon Law no. 7895, dated 27 January 1995 amended
[11] Article 145 Criminal Code of the Republic of Albania approved upon Law no. 7895, dated 27 January 1995 amended
[12] Article 144 Criminal Code of the Republic of Albania approved upon Law no. 7895, dated 27 January 1995 amended
[13] Article 148 Criminal Code of the Republic of Albania approved upon Law no. 7895, dated 27 January 1995 amended

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

Definition of corruption offence is provided under the provisions of the Albanian Criminal Code, which indicated two forms of corruption.[14] Active Corruption includes the promising, offering, giving, directly or indirectly any type of irregular advantage or promise. Passive Corruption includes the requesting, receiving, directly or indirectly any type of irregular advantage or promise.[15]

False statements, about the increase of capital of a company, related to the distribution of shares of initial capital to the shareholders or the deposit of funds constitutes criminal contravention and is punishable by a fine.[16] Falsifying signatures and deposits, or false statement of deposits of the company's funds, or publication of signatures and deposits of fictitious people, or assessing the contribution in kind to a bigger value than the factual one, is punishable by a fine or up to five years of imprisonment.[17]

Irregularly issuing shares before registration of the company, or when registration is made illegally, or when the documents of the company have not yet been completed, or when the statute of the company after its increase of capital has not been changed or has not been registered or has been drafted unlawfully, constitutes criminal contravention and is punishable by a fine or up to three years of imprisonment.[18]

Simultaneously holding the capacities of shareholder and certified accountant constitutes criminal contravention and is punishable by a fine or up to six months of imprisonment.[19]

[14] Article 146 Criminal Code of the Republic of Albania approved upon Law no. 7895, dated 27 January 1995 amended
[15] Article 163 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[16] Article 164/a of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[17] Article 165 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[18] Article 166 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[19] Article 167 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended

Giving false information on the situation of a society by the certified accountant of a corporation, to the competent agency on an offence committed, when cases of exclusion from criminal responsibility provided in Article 300 of this Code do not exist, is punishable by a fine or up to five years of imprisonment.[20]

Revealing the secrets of a company by its certified accountant, except in the case when he is compelled to do so by law, constitute's criminal contravention and is punishable by a fine or up to two years of imprisonment.[21] Refusing to write mandatory notes by the manager or the liquidator of the company constitutes criminal contravention and is punishable by a fine.[22]

Unlawful importing, exporting or transiting unauthorized goods entering or leaving the 58 Republic of Albania, committed through any means or ways, is sentenced up to ten years of imprisonment.[23] Importing, exporting or transiting goods to which excise duty is applied, by passing them through places out of the custom stations, their partial or total concealment, inaccurate declaration to customs, false declaration of the kind, sort, quality, price, destination of goods or other forms aimed at avoiding custom duties, are punishable by a fine or up to seven years of imprisonment.[24]

Importing, exporting or transiting goods which require a license from the competent authority by passing them through places out of the custom stations, their partial or total concealment, inaccurate declaration to the customs, false declaration of the kind, sort, quality, price, destination of goods or other forms aimed at avoiding custom duties, are punishable by a fine or up to five years of imprisonment.[25]

[20] Article 168 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[21] Article 169 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[22] Article 171 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[23] Article 170 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[24] Article 172 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[25] Article 173 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended

Importing, exporting or transiting goods by passing them through places out of the custom stations, their partial or total concealment, inaccurate declaration to the customs, false declaration of the kind, sort, quality, price, destination of goods or other forms aimed at avoiding custom duties, are punishable by a fine or up to five years of imprisonment.[26] Smuggling by employees that are related with customs activities, even by collaborating with other persons, is condemned by imprisonment from three to ten years.[27]

Trading, alienation or transport of smuggled goods, as well as any other support given to persons dealing with these activities, is sentenced with fine or imprisonment up to three years.[28] Storing, accumulating, keeping or processing goods that are known to be smuggled, is punishable by a fine or up to three years of imprisonment.[29]

Concealment or false statement of income or other objects that are subject to taxation, in cases when other administrative sanctions have been previously taken, constitutes criminal contravention and is punishable by a fine or up to two years of imprisonment.[30]

Non-payment of taxes within the time required by law by the person, against whom administrative sanctions were previously taken for the same reason, although their payment was possible by the person, is punishable by a fine or up to three years of imprisonment.[31]

Non completion of the duties related with collecting of the taxes and tariffs within the defined legal term from the employees of the tax organs and other official persons assigned with these duties, when it is done because of their fault and has brought a damage to the state with a value of less than 1 million Albanian Lek (ALL), is punished by fine of up to 2 million Albanian Lek; When

[26] Article 174 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[27] Article 175 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[28] Article 179 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[29] Article 178 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[30] Article 180 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[31] Article 181 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended

the value is higher than 1 million Albanian Lek it is punishable by 3 to up to 10 years imprisonment.[32]

Modification or any other intervention in measurement devices and counters, or utilizing altered measurement devices and counters, or allowing the use by others of irregular measurement devices and counters, with the intent of avoiding the full payment of taxes, constitutes criminal contravention and is punishable by a fine or up to two years of imprisonment.[33] Forging and putting in use checks, bills of exchange, credit cards, or other valued papers, is condemned by imprisonment up to five years. This very act, when committed by accomplices, more than once, or when it brought about serious consequences, is condemned by imprisonment from three to ten years.[34]

Producing or keeping equipment for falsifying currency, checks, bills of exchange, credit cards, traveler's checks or other financial documents, is punishable by a fine or from one to three years of imprisonment. This very act, when committed by accomplices, more than once, or when it brought about serious consequences, is punished by imprisonment from three to ten years.[35] The falsification or use of falsified documents is punished with imprisonment of up to three years and with a fine of from two hundred thousand to six hundred thousand Albanian Lek. When this offence is committed in collaboration or more than once or when it has brought serious consequences, it is punished with imprisonment of from six months to four years and with a fine of from three hundred thousand to One Million Albanian Lek.

When the falsification is done by a person who has the duty of issuing the document, it is punished with imprisonment of from one year to seven years and with a fine of from five hundred thousand to Two Million Albanian Lek.[36] The falsification or use of falsified seals, stamps or forms, or the

[32] Article 182 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[33] Article 183 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[34] Article 184 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[35] Article 185 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[36] Article 186 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended

presentation of false circumstances in the latter that are directed to state organs, is punished with imprisonment of from six months to four years and with a fine of from four hundred thousand to one million Albanian Lek.[37]

Intentionally provoking bankruptcy by a juridical person is punishable by a fine or up to three years of imprisonment.[38]

Entering into an economic commercial relationship with a third party by a juridical person with the intent of concealing bankruptcy status is punishable by a fine or up to five years of imprisonment.[39] Concealment of assets by a juridical person upon the act of bankruptcy with the intent of avoiding its consequences is punishable by a fine or up to seven years of imprisonment.[40] Failure by a juridical person to comply with its obligations arising under bankruptcy constitutes criminal contravention and is punishable by a fine or up to two years of imprisonment.[41]

Provisions of the "Law on the Criminal Liability of Legal Entities" are applicable to Albanian legal entities and to foreign legal entities that have acquired legal personality according to the provisions of the Albanian Company Law. The law applies to both national and foreign legal persons (ie joint stock and limited liability companies, and non-profit organisations) and, with a few exceptions, to local governmental bodies, public legal entities, political parties and labour unions.[42]

There are two types of penalties imposed on legal entities: principal penalties, consisting in pecuniary fines or compulsory dissolution of the legal entity; and supplementary penalties, which are applicable to the offender in addition to the principal penalties.[43]

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[37] Article 190 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[38] Article 193 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[39] Article 194 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[40] Article 195 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[41] Article 196 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[42] Article 2 of Law no. 9745, dated 14 June 2007 "On the criminal liability of the legal entities"
[43] Article 3 of no. 9745, dated 14 June 2007 "On the criminal liability of the legal entities"

The responsible unit fulfils tasks from The High Inspectorate of Declaration and Control of Property and Conflict of Interest (ILDKPKI) for development of the process of signalization, & reports every year, not later than January 15 of the next year, a written report with registered signalizations, steps followed for investigation. The responsible office reports every year the fulfilment of the law.[44]

3. Please, explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability.

The Criminal Code of the Republic of Albania has a special chapter on the criminal offenses happening in the domain of corporate or companies. Most of them refer to breaches committed by directors or administrators of the company since they are the persons responsible for the ongoing activity of the company. From drafting of false statements, misuse of powers, active and passive corruption, these are some of the most common offenses happening. As it will further be explained, The Law on Criminal Liability of Legal Persons (LCLLP) establishes the conditions upon which the act committed by a company's representative generate liability for the company itself on Chapter II as it says:

The Legal person is responsible for offenses committed:

a. on behalf or for the benefit of his organs and his representatives;
b. the name or on his behalf, by a person who is under the authority of the person who It represents, leads and manages the legal person;
c. the name or on his behalf, due to lack of control or supervision the person who manages, represents and manages legal entities.

Furthermore the Legal Person will be handled with Criminal liability when bodies and representatives acting on their behalf or on behalf of the legal person.

[44] Article 22 of Law no 60/2016 "For signaling and Protection of Whistleblowers"

In terms of Article 3 letter "a" of this law, and representative organ of the person legal, acting on behalf or for the benefit of a legal person is any person who, by Law or legal person is charged for representation, management, administration or control the scope of activity of the legal entity and its structures.

The Criminal Code of Albania also provides a set of offences that the individual may commit but taking in consideration which position he uses such as his position to represent the company it might raise criminal liability for the company. These offences committed while on duty or serving to a purpose of his duty as director or administrator of the company will bring consequences also for the company. These offences are to be found from Section II (Frauds) Art 143-149 and on Section III (Destruction of Property) Art 150-162.

Such Crimes are considered to be punishable by prison and imply criminal liability of the responsible individual who committed the offence on behalf of his status as director or administrator of the company. The Criminal Code also condemns fraudulent schemes by three to ten years and in case of serious consequences by ten to twenty years. Market manipulation in case there is inaccurate presentation of the product of service is subject to imprisonment up to four years.

Price manipulation and dissemination of false information is condemned with imprisonment to three years and in case of cooperation and brought serious consequences from two to five years. Registration of securities in an unauthorized manner by the subject whose responsible of the stock management shall be condemned with imprisonment from six months up to three years, and in case of serious consequences from two to five years.

Wilful hiding of property or ownership of securities from the Authority for Financial Supervisory would imply the subject with a punishment up to one year and in case of serious consequences up to two to five years. Also illegal trade of securities can imply the subject with criminal liability and the obligation to suffer imprisonment from one to five years in case of serious consequences. In reference to computer fraud one, in case of Entering, changing, or deleting computer data removal

or interference in the functioning of a computer system in order to provide themselves or third parties, with fraud, a benefit economic situation or to inflict a third reduction of property, will be punished by six months to six years.

Tax fraud is also settled in the Criminal Code and it implies that the organization and operation of fraudulent schemes, in order to acquire material for him or others, through default, or obtaining credit or refund of added tax value is punishable by three to ten years.

Other types of fraud are also included in the Albanian legislation differencing Fraud on insurance, on Credit, for Art and culture which can be punished by a fine or imprisonment by up to five, seven or four years respectively. In case someone holding a position on a company willingfuly publishes another person's work within its own name or chooses to reproduce the work of another without the authors consent it will be considered as criminal offense and will be subject to punishment by fine or up to two years of imprisonment.

On Section IV, for crimes committed on Companies or Corporate, there is a very strict provision[45] about drafting false statements and the increase of capital of the company since this is narrowly connected with the financial outcomes of the company. By doing so the legislator is trying to condemn these offences under the 3Criminal Code also regarding the distribution of shares of capital to the shareholders, its repayment or the deposit of funds, as they are considered criminal offense and are punishable by a fine.

Falsifying signatures and deposits or false statement of deposits of funds to the company or publication of the signatures and deposits of fictitious people, or assessing the contribution in kind with a value greater than the value of fact, punishable by a fine or imprisonment up to five years.[46] The misuse of powers by members of the supervisory board or managers of the company in order

[45] Article 163, Criminal Code of Albania, Approved by Law no. 7895, dated 27.1.1995,(Updated)

[46] Article 165, Criminal Code of Albania, Approved by Law no. 7895, dated 27.1.1995,(Updated)

to obtain or favouring another company where they have interests is punishable by a fine or imprisonment up to five year.[47]

Another offense related to the competencies and duties of directors who tend to give false information about the state of, or the failure to report to the competent authorities for committing a crime, shall be punished by a fine or imprisonment up to five years.[48]

The Criminal Code also provides criminal liability towards offences covered in Article 150, Destruction of Property, and Destruction of property with fire, Wilful destruction of property with explosion, flood and other means. Destruction of streets and connectivity infrastructure, destruction of Electric systems, Destruction of irrigation and watering systems. Wilful destruction of works of Art, Destruction of property from negligence and Destruction brought by Mavis transport means crush. All of the aforementioned equip the victims with protection for offences and crimes made not only by individuals, but also from companies or individuals that act as such.

Active/Passive Corruption in the Private sector

Corruption is seen with a double prism on the Criminal Code as it condemns both active and passive corruption. Considering this a very important problem, active corruption[49] in the private sector [50] is punished by a fine as the main sentence, in addition to imprisonment.[51]

Promise, offer or giving, directly or indirectly, of any irregular benefit for himself or for others, a person who exercises a management function in the company or in any position in the private sector, to perform or failing to act in contrary to his duty or function, is sentenced to imprisonment from three months up to three years.

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47 Article 164, Criminal Code of Albania, Approved by Law no. 7895, dated 27.1.1995,(Updated)
48 Article 168, Criminal Code of Albania, Approved by Law no. 7895, dated 27.1.1995,(Updated)
49 Article 164/a Criminal Code of Albania, Approved by Law no. 7895, dated 27.1.1995,(Updated)
50 Law no. 9275, dated 16.09.2004, Article 13, amended by Law no. 23/2012, dated 01/03/2012, Article 22,
51 Law no. 144 dated 02.05.2013, Article 48

Passive corruption[52] in the private sector[53] again is subject of a fine but the imprisonment from three months to three years. Soliciting or receiving, directly or indirectly, of any irregular benefit that such promise for himself or a third person, or accepting an offer or promise, coming from an irregular benefit, the person who exercises a management function or in any position in the private sector, to act or not to act contrary to his duty or function shall be punished by imprisonment from six months to five years.

Issuing shares on behalf of the shareholders is it not allowed before the registration of the company or when the recording was made illegally. When the formalities of society are still not met, or when the statute in the case of capital increase has not yet been made or not registered or it was made unlawfully this constitutes a criminal offense and is punishable by fine or imprisonment up to three months.[54]

The Criminal Code of Albania also constitutes as offence unfairly holding two capacities on an enterprise.[55] When simultaneously holding the capacities of shareholder and certified accountant constitutes a violation shall be punishable by a fine or by imprisonment up to six months.

The administration of an enterprise or company delivers a number of responsibilities on the directors regarding also the management of human resources. For such responsibility on the administration of the employment services the need for more regulated provisions raised and there have amendments on the *Illegal Employment*.[56]

Employment without registration authorities or without ensuring the employees according to the rules, when given before an administrative measure, constitutes a criminal offense and fined up to 10 thousand for each case or with imprisonment up to 1 year. Intentional failure or infringements

52 Article 164/b, Approved by Law no. 7895, dated 27.1.1995,(Updated)
53 Law no. 9275, dated 16.09.2004, Article 13, amended by Law no. 23/2012, dated 01/03/2012, Article 22,
54 Article 166, Criminal Code of Albania, Approved by Law no. 7895, dated 27.1.1995,(Updated)
55 Article 167, Criminal Code of Albania, Approved by Law no. 7895, dated 27.1.1995,(Updated)
56 Added by Law no. 8279, dated 15.01.1998, Article 2, amended by Law no. 8733, dated 01.24.2001, Article 47

connected with employment and social security of persons entrusted with the implementation and control of the relevant provisions, constitutes a criminal offense and punishable by a fine up to 100 thousand or imprisonment up to 2 years.[57]

More than providing criminal liability for these subjects the law for "Financial Securities" establishes financial and administrative penalties that the subjects will have to pay in cases of breaching the legal conditions for acting on financial securities.

Other than the Criminal Code offences regarding the administration of enterprises or companies related with the responsibilities of the administrators are found also in the Law No. 9879, dated February 21st 2008 "For financial Titles". The publication of the Prospectus, which is a very important document when trading or entering a trade relationship among companies/corporate because it contains a summary of the most important legal and financial information of the company, is an obligation by law.

Publishing distorted information in this document would make the issuing party obliged to compensate third parties for damage arising from confidence in the truthfulness of the information, if they have entered a relationship with this company. There is a lot of responsibility for the content of the prospectus as the issuer is responsible for the accuracy of data contained in the prospectus. Authority decision, confirming only that the prospectus is filed under requirements of the law, that contains all the information provided herein and it can be published.

The issuer and persons found to have used the prospectus to cover or distorting important facts bear full responsibility for the entirety and authenticity of the data contained in the prospectus them, because of the position their connection with the issuer, knew or should have known about the information undeclared.[58]

[57] Article 170/a Criminal Code of Albania, Approved by Law no. 7895, dated 27.1.1995,(Updated)
[58] Article 31, Law No. 9879, dated 21.02.2008 "For financial Titles"

The consequences for the damages caused by the publication of false information raise liability for the issuer of this information. If the issuer is allowed to trade on the stock exchange and publishes false information, he is obliged to compensate third parties for damage arising from confidence in the truthfulness of the information, if the third party:

- Has purchased securities after the publication of false information and still owns them at the moment when it becomes publicly known that the information was incorrect.
- Has purchased securities before the publication of false information and has sold them before it became clear that the information was inaccurate.

In the event that the issuer proves that the publication of false information is not made knowingly or in terms of negligence, he is liable for damages, according to the first paragraph of this article. Is not considered as damage, in accordance with the first paragraph of this article, if in the case of paragraph 1 of this article, the third party in the moment of purchase, was aware that the information was false and if in the case of paragraph 2 of this Article third party at the time of sale, was aware that the information published was incorrect.

4. What are the potential bars to extradition of an individual (i.e in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

The Criminal Code of Republic of Albania has a distinct article for the Extradition. As Albania is a contracting party of the European Convention of Human Rights the conditions of which this procedure might happen are very strict. Extradition may be granted, only when it is expressly provided in international Conventions or mutual signed agreements to which Albania is party. Extradition is permitted when the offense which is subject of the extradition request is as such provided by law at the same time as Albanian and foreign.[59]

[59] Article 300, Criminal Code of Albania, Approved by Law no. 7895, dated 27.1.1995,(Updated

Extradition is not allowed, if the person to be extradited is an Albanian citizen, unless the agreement provides otherwise, if the criminal act constituting the object of the request for extradition has a political character or the military, if there is reason to suspect that the person sought to be extradited will be prosecuted, punished or wanted because of his political, religious, national, racial or ethnic origin, if the person sought to be extradited has been tried by a competent court Albanian criminal offense for which extradition is requested.

5. Please state and explain any:

5.1 Internal reporting processes (i.e. whistleblowing).

a. Criminal Procedure Code of the Republic of Albania has a special chapter on the way how internal reporting processes are made on article 280, 281, 282, 283 and 294. The prosecutor and the judicial police become aware of the criminal offence ex-officio and by others information related the public officials, who during the exercise of the duty or due to their position or service, become aware of a criminal offence prosecutable ex-officio, are obliged to make a written indictment even when the person to whom is attributed the criminal offence has been not identified to the prosecutor or an officer of the judicial police.

When, during the civil or administrative proceedings, it is discovered a fact which constitute a criminal offence which is prosecutable ex-officio, the relevant authority presents the indictment to the prosecutor.

The medical personnel is legally bound to indict to the prosecutor or any officer of the judicial police.

Any person that has become aware of a criminal offence prosecutable ex-officio must indict of it. In cases specified by law the indictment is compulsory and is presented to the prosecutor or to an officer of the judicial police orally or in writing, personally or through an attorney.

Even after reporting the criminal offence, the judicial police continue gathering every valid element for the reproduction of the fact and for the individualization of the guilty.

b. The purpose of the Law no 60/2016 "For signalling and Protection of Whistleblowers", is prevention and fight against corruption in the public and private sector as well as protection of individuals that signal actions or alleged corruption practices in their work place. Whistleblowers need support in order to overcome the consequences of retaliatory actions arising from the discovery and reporting of corruption actions and practices within the organization.

5.2 External reporting requirements (i.e. to markets and regulators) that may arise on the discovery of a possible offense.

a. Law no 60/2016 "For signaling and Protection of Whistleblowers"

External reporting process according to Article 8 of the same law is when High Inspectorate of Declaration and Audit on Assets and Conflict of Interests (HIDAACI) discovers unequivocally about hidden forms of wrongdoing or to an alleged corruptive act or practice to organizations without any specialized unit that would uphold responsibility, as a certain and special body within the public authority or private entity.

HIDAACI exercises its authority in compliance to Albanian Constitution, Law no 60/2016 "For signalling and Protection of Whistleblowers**,** Administrative Procedure Code of the Republic of Albania and other relevant laws.

In cases of a possible wrongdoing or corruption practices the HIDAACI or the specialized unit presents the indictment to the prosecutor or to an officer of the judicial police.

b. LAW No. 9572, dated July 3rd 2006 "On The Financial Supervisory Authority"

Its main function is the regulation and the observance of financial securities, the insurance market, voluntary pensions market and other nonbanking financial activities. Violations of the provisions of this law give due to criminal responsibility according to the penal code.

According to article 31 as an administrative sanctions fines, are predicted.

c. Law no. 18/2014 "On state police"

State institutions and entities that produce database for the identity of the citizens should give access to their recognition and processing by the police officer with the authorization of the director of the policy. Under Article 130 of this law when the police officer provides secret information related to prevention and detection of offenses is obliged to keep the secret of this cooperation and classified information until the legal obligation of confidentiality under Article 130 of this law is.

d. Law No.9917, dated on May 19th 2008 "On the Prevention of Money Laundering & Financing of Terrorism"

Reporting to the responsible authority, means that each subject presents to the responsible authority a report on the doubts that were conducted or is conducting a terrorism financing, laundering of a criminal act, or if they observe the funds that may derive from criminal activities.

According to this law they are obliged to report to the responsible authority:

- Customs authorities should send to the competent authority copies of declaration forms for instance, amount in cash, valuables, metals or precious stones ranging from the amount a million leke or its counteroffer in other currencies or justifying documents;
- Tax authorities are obliged to any suspicion, or whistleblowing, that relates to money laundering to report to the responsible authority immediately and in any event not later than 72 hours;
- Central registration office to non-movable assets;

Article 20 of this law obliges any authority that records, licenses and controls non-profit organizations activities should immediately report to the competent authority any suspicion, information or data, relating to money laundering or terrorist financing.

e. Directorate General of Taxation, 015 Law No 9920, dated on May 19th 2008

Investigation tax structures have as a primary function:

- the collection of tax information;
- tax investigation;
- monitoring and implementation of austerity measures

Tax investigation units employees enjoy attributes of Judicial Police, in accordance with the Criminal Procedure Code and the law on organization and functioning of the Judicial Police. Investigating tax structures employees that exercise the functions of prosecution and execution of coercive measures are equipped with weapons, in accordance with the Albanian legislation.

f. Law no.10 091 dated 5.03.2009 "On statutory auditing, organization of the profession of registered auditor and chartered accountant"

Article 2 states that registered auditor is an independent professional registered in the public register of auditors, in accordance with the provisions of this law, which practises for the annual financial statements, individual and / or consolidated, the companies, enterprises or other organizations when audit is compelled by law or required by the partners / shareholders.

The statutory auditor shall also perform accounting services and services of review and issuance of security for financial information and related services, as determined by them in the manual international declaration audit, providing the security and ethics of the International Federation of Accountants, when they are consistent with the nature of the profession and the requirements of applicable law.

6. Who are the enforcement authorities for these offences?

After becoming familiar with the kinds of information enshrined in the Albanian legislation, let us now elaborate on these authorities of coercive character during an official investigation.

a. Code of Criminal Procedure, in Article 277, 278, Prosecutor and judicial police, the prosecutor heads the investigation and the judicial police is at his disposal, whereas criminal offences adjudicated at first instance by the High Court are proceeded by the General Prosecution. Article 278 specifies the powers of the court in preliminary investigation.

b. ILDKPKI - As regards the High Inspectorate of the declaration and examination of assets and conflict of interests, we will mainly focus on the powers of ILDKPKI concerning whistle-blowing mechanisms.

c. Law no. 9572, dated July 3rd 2006, amended by law no. 54/2014 "On some additions and amendments" On The Financial Supervisory Authority.

d. Law no. 9917, dated May 19th 2008 "On preventing money laundering and financing terrorism" Article 21 focuses on the organization of the authority in charge, the General Directorate of Preventing Money Laundering, which exercises the powers of the relevant authority, under this Law, as an institution subordinate to the Minister of Finance and it serves as the Financial Intelligence Unit of Albania. This directorate, within its scope, is entitled to decide about the manner of following and solving issues regarding potential money laundering and financing potential terrorist activities.

Article 24 of this law introduces us into the powers of the supervisory authorities, including:

- Bank of Albania, for the entities specified in letters "a", "b", "c", "ç" and "d" of Article 3 of this law;
- The Financial Supervisory Authority, for the entities specified in letters "e" and "ë" of Article 3 of the law;

- relevant ministries on the supervision of the entities specified in letters "f" and "g" of Article 3 of this law;
- National Advocates Chamber for lawyers;
- Ministry of Justice for notaries;

e. The relevant authorities for the supervision of the entities specified in letters "h – non-banking financial subjects", and "k - Agency for Legalization, Urbanization and Integration of Informal Areas/Buildings" of Article 3 of this law.

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

As mentioned above, after determining the forms of data acquisition during an official investigation, we continued with the coercive authorities enshrined in our legislation. Below we discuss the power of these authorities at the moment of being informed of an irregularity or a criminal offense.

a. According to the Code of Criminal Procedure there are a number of Articles that specify the measures that the relevant authorities, such as police officers or the prosecutor have to take in the case of offenses or when informed of an irregularity or criminal offense. For example, Article 298, which includes control, in the case of intervention or flagrance, judicial police officers conduct controls in buildings or bars when they deem that there they can find clues that lead to the success of the investigation.

The deadline for delivering the minutes to the prosecutor is 48 hours. Another case is when the prosecutor orders the accelerated computer protection and decides whether there is risk of damage or deletion. In case another person saves the data on order of the prosecutor, the specified deadline is 90 days and he is obliged to keep the data secret until the termination of the investigation. The law, namely Article 300, has provided for fast verification in the field where the state of traces,

things and scene must stay unchanged until the prosecutor intervenes for the investigation and evidence and materials relating to the investigation are sequestered.

b. Law on whistle-blowing and protection of whistle-blowers.

Except for cases when the relevant unit will report to ILDKPKI, Article 8 has also provided for direct investigation on its part.

ILDKPKI studies and deals with the investigation of whistle-blowing for acts or practices suspected of corruption in organizations. The whistle-blower has the right to signal the suspected offense in cases where the responsible unit does not start the administrative investigation, and in the case where there is doubt that the receiver of the signalling is involved or not in the suspected act of corruption. There are also other reasons based on the impartiality of the unit responsible for reviewing the signalling. Any investigation that has initiated is interrupted and whistle-blowing (signalling) is investigated by ILDKPKI.

It has the right to collect information from different areas and to conduct inspections and analyses, based on the awareness of the circumstances indicated on the investigation of ILDKPKI and there is participation of the whistle-blower and any third person. Each party shall guarantee a fair process within 30 days and from the moment of conducting the action the whistle-blower is notified of any measure that has been taken. Afterwards, it takes immediate measures for the discontinuation of the consequences of corruption and if the investigation shows that there are administrative offenses, the competent authority is informed.

Nevertheless, despite the careful drafting of the law and the proper definition of powers of all stakeholders, at the moment, the law on whistle-blowers is still theoretical because the first structures in institutions have not been established yet. Sometimes it is also viewed as the law on spies, and as a result, we would like to underline that ILDKPKI should work hard to increase the awareness of the process, starting with the term whistle-blower itself.

c. Law No. 9572, dated July 3rd 2006 "On The Financial Supervisory Authority"

Under Article 18/1, the Authority:

Any information obtained by the Authority and any information given to another supervisory authority is treated as confidential and is used only for purposes specified in the law or by-laws. The Authority is responsible for collecting and processing information about the facts and circumstances related to the fulfillment of its supervisory duties and responsibilities provided in this law.

The supervised entity is obliged to provide the Authority and its administration with: a) the necessary means for the inspection, if so requested, and to answer questions on the premises of the Authority; to provide all accounts, commercial documents and any other necessary documents, in order to determine the facts and circumstances related to issues for which inspection is carried out;

With regard to the Administrative Sanctions, according to Article 31, any person who obstructs the Supervisory Authority and its structures or authorized officials of its administration in the exercise of powers assigned by this law or by any other act, shall be punished by a fine of 50,000 (fifty thousand) Albanian Lek to 75,000 (seventy five thousand) Albanian Lek, and in case of repeated violation, from 80,000 (eighty thousand) to 100,000 (one hundred thousand).

Any violation, under the first paragraph of this Article, committed by persons who are partners or shareholders of the legal person, who have managerial positions of the legal person or by sole partners of a commercial company, it is punishable by a fine of 100,000 (one hundred thousand) Albanian Lek to 125,000 (one hundred and twenty five thousand) Albanian Lek and in case of repeated violation, from 130,000 (one hundred and thirty thousand) Albanian Lek to 150,000 (one hundred fifty thousand) Albanian Lek.

d. Directorate General of Taxation

The tax administration, for lack of information or documents, or even worse, falsification of necessary documents, lack of cooperation with the tax control, can then find any other alternative method of evaluating the tax obligation of the taxpayer.

e. Law no. 99/7 "On Money Laundering And Financing Terrorism"

Supervisory authorities may request from subjects access and provision of any information and documents relevant to the compliance of obligations of entities pursuant to this law. In cases when the requirements and deadlines specified in the regulations pursuant to this law are not respected, for reporting transactions above the threshold or reporting of suspicious activity, set forth in Articles 4/1, 9 and 12, the entities are fined as follows:

a. natural persons: from 300,000 Albanian Lek to 3,000,000 Albanian Lek;
b. legal persons: from 500,000 Albanian Lek to 5,000,000 Albanian Lek.

The supervisory authorities immediately report to the relevant authority on any suspicion, information or data related to money laundering or terrorist financing, for the activities under their jurisdiction.

f. Law no. 18 2014. "On State Police"

The police officer informs the person to be presented at the premises of the police to obtain information on preventing the action or unlawful inaction. In cases when the notified person does not appear at police premises without justified causes and reasons, the police escort him against his will, in accordance with the Code of Criminal Procedure.

To perform data collection, the police can also use secret cooperation with individuals, camera recording in public areas, secret surveillance of persons and premises, as well as location tracking devices, in accordance with the Code of Criminal Procedure.

g. Law No. 47/2016 Dated On April 28th 2016 On Some Amendments And Additions To Law No. 10 091, Dated March 5th 2009, "On Legal Auditing, Organization Of The Profession Of Regsitered Accounting Expert And Approved Accountant", As Amended

Under Article 55 Disciplinary offenses and measures are as follows:

1. Fine at the amount of 50,000 – 150,000 Albanian Lek is given in the case of not providing information or documents requested by the relevant authorities, under the process of quality control.
2. Fine at the amount of 50,000 – 100,000 Albanian Lek is given in the case when annual statutory information submitted to the professional organization of legal auditors is inaccurate.

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self incrimination)?

Societies are going towards making everything more and more public, especially making data public. It is a problematic what should be done regarding to data that might lead to incrimination or that are part of state secret or have a specific protection on them. It might be obligatory to release any information requested, but there are also some exemptions. Some exemptions to give information relate to government policy or if disclosure would be likely to prejudice a criminal investigation or prejudice someone's commercial interests.[60] Authorities will need to issue a refusal notice if you are either refusing to say whether you hold information at all, or confirming that information is held but refusing to release it.

The reason for not releasing the information might be supported by privileges, like the one against self-incrimination. Confessions, admissions, and other statements taken from defendants in

[60] https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/

violation of this right are inadmissible against them during a criminal prosecution. All declarations done before notice of prosecution should not be used against the accused party.[61]

There are also some protections for witnesses. A witness may refuse to answer questions or give documentary evidence only if the answer or document would incriminate the witness. The privilege does not allow a witness to refuse to answer a question because the response may expose the witness to civil liability, social disgrace, loss of status, or loss of private employment.[62]

Under the Albanian legal framework the privilege against self-incrimination is stated in the Constitution of the Republic of Albania. No one may be compelled to testify against himself or his family or to confess his guilt and no one may be declared guilty on the basis of data collected in an unlawful manner.[63]

The Criminal Procedure Code has several articles referring to this privilege. When a person not in the capacity of a defendant (suspected person), makes a statement before the proceeding authority, which provide information on his incrimination, the proceeding authority stops the questioning, and warns him that after the statement an investigation may be conducted against him and ask him to assign a defence counsel.

Statements previously made by the person cannot be used against him.[64] The court explains the right not to testify and asks the people involved if they wish to benefit from this right. Noncompliance with this rule causes the testimony to be invalid.[65] The lists of people that are not obliged to testify are:[66]

[61] Halim Islami, Artan Hoxha, Ilir Panda , Criminal Procedure, page 128, Tirana 2012, botimet Morava.
[62] http://legal-dictionary.thefreedictionary.com/Privilege+against+Self-Incrimination
[63] Article 32 of Law no. 8417 dated 21.10.1998 Constitution of the Republic of Albania, amended.
[64] Article 37 of Law no 7905 dated 21.3.1995 Criminal Procedure Code of the Republic of Albania, amended.
[65] Article 15/28 of Law no 7905 dated 21.3.1995 Criminal Procedure Code of the Republic of Albania, amended.
[66] Article 158/1 of Law no 7905 dated 21.3.1995 Criminal Procedure Code of the Republic of Albania, amended.

- a defendant's close kindred or in-laws, except in cases where they have lodged a criminal report or complaint or where they or a close relative of them are injured by the criminal offence;
- a spouse, for facts learnt from defendant during their marital life;
- a spouse divorced from defendant;
- one, who even though is not defendant's spouse, cohabitates or has cohabitated with him;
- one, who is related to the defendant in an adoptive relationship.

Some specific profession are also entitled to refuse release of information.[67] They are:

- religious representatives, whose statutes are not in contravention of the Albanian legal order;
- attorneys at law;
- legal representatives and notaries;
- physicians;
- surgeons;
- pharmacists;
- obstetrics;
- anyone who exercises a medical profession;[68]
- those who exercise other professions, which the law recognises them the right not to testify on what is related to professional secrecy;[69]
- professional journalists pertaining to the names of persons whom they have got information from during the course of their profession;

[67] Article 159 of Law no 7905 dated 21.3.1995 Criminal Procedure Code of the Republic of Albania, amended.
[68] Idem.
[69] Idem paragraph 1, point d.

- state employees, public employees and persons appointed to a public service are obliged not to testify on facts that are state secret;[70]
- judicial police officers and agents, as well as, state intelligence service personnel may not be compelled to reveal the names of their informers.[71]

There are some restrictions to the right to refuse release of information. It is possible for the court when they have reasons to suspect that the claim made by these people in order to avoid the testimony has no grounds, to order the necessary verification and when it (claim) results baseless, the court orders the witness to testify.

When the information not released from the journalist is indispensable to prove the criminal offence and the truthfulness of the information may only be proved through identification of the source, the court orders the journalist to reveal the source of his information.[72] To decide if specific fact is a state secret is needed a confirmation from the competent state authority, and afterwards not releasing it or not depends if the fact is essential or not the solution of the case.[73]

Under the law On statutory auditing, organisation of the profession of registered auditor and chartered accountant information and documents used in or on which the knowledge obtained by the statutory auditor or audit firm, during the audit, are protected by confidentiality and professional secrecy.[74] The rules of confidentiality and professional secrecy, related to auditors or audit firms, does not constitute an obstacle to the implementation of the provisions of this law, the application of standards or are in conflict with legal requirements with other laws applicable in the Republic of Albania, which provide obtaining this information even when they are protected as confidential and part of professional secrecy.

[70] Article 160 paragraph 1 of Law no 7905 dated 21.3.1995 Criminal Procedure Code of the Republic of Albania, amended.
[71] Idem paragraph 5.
[72] Idem paragraph 3.
[73] Idem paragraph 2 and 3.
[74] Article 34 of Law no.10 091 dated 5.03.2009 On statutory auditing, organisation of the profession of registered auditor and chartered accountant, amended.

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

Under EU law, as well as under CoE law, 'personal data' are defined as information relating to an identified or identifiable natural person, that is, information about a person whose identity is either manifestly clear or can at least be established by obtaining additional information.[75] Data processing is any operation which is performed upon personal data, whether or not by automatic means, such as the collection, recording, storage, organization, adaptation, alteration, consultation, use, retrieval, blocking, erasure, destruction or any other action, as well as data transmission.[76] All the process of data should be honest, fair and lawful and the collection for specific clearly defined and legitimate purposes and shall be processed in a way that is compatible with these purposes, the sufficient data and also taking care for the data for the time that is necessary.[77]

The volume and characteristics of cross-border data flows are evolving, elevating privacy risks and the need for improved law enforcement co-operation. Developments in global communication networks and business processes have increased the volume of transborder data flows. Data transfers in areas like human resources, financial services, education, e-commerce and health research – to name a few – are now an integral part of the global economy.

There are different laws that provide various restrictions on providing employee data to domestic or foreign enforcement authorities. These include Labour Law Code of the Republic of Albania, the Code of Administrative Procedures of the Republic of Albania and Law On protection of personal data.

The employers are not allowed to collect information concerning the employee, except for the cases where this information has to do with the professional skills of the employees or is necessary

[75] Handbook on European data protection law, page 36, http://fra.europa.eu/sites/default/files/fra-2014-handbook-data-protection-law-2nd-ed_en.pdf.
[76] Article 3, point 7 of Law no. 9887 dated 10.03.2008 On protection of personal data, amended.
[77] Article 5 of Law no. 9887 dated 10.03.2008 On protection of personal data, amended.

for the contract to be executed.[78] The employer is obliged to take security measures to protect employee's personal data processed in the employment relation and in particular to sensitive data, in compliance with legislation on the protection of personal data.[79]

Also the Code of Administrative Procedures addresses some aspects on the protection of data and outlines different principles. Participants in an administrative procedure shall have the right to ask for their personal and confidential data to be treated in accordance with the legislation in force.[80] The code also states some principles on the protection of data.

The public organ during the lawful and fair processing of personal data, data related to commercial or professional activity, on which it becomes aware during the administrative procedure and which are protected under the legislation on personal data protection in force, shall have the duty to adopt measures on their protection, safeguard, non-disclosure and confidentiality and the protection, safeguard, non- disclosure and confidentiality duties, shall extend also to public employees, during and after their stay in office.[81]

The main law that is relevant in the case of data protection is the Law On protection of personal data. The law provides definition of personal data, sensitive data, the cases when these data are processed, and the specific the authorities that are entitled to do this data process and on the other side also some sanctions for incorrect implementation of the law.

Elements used to identify a person directly or indirectly are identity numbers or other factors specific to his physical, psychological, economic, social and cultural identity etc.[82] According to the law, personal data subject means any natural person, whose personal data are processed and the

[78] Article 33 paragraph 1 of Law no. 7961 dated 12.7.1995 Labour Law Code of the Republic of Albania, amended.
[79] Idem paragraph 2
[80] Article 8, Law no. 44/2015 dated 30.4.2015 Code of Administrative Procedures of the Republic of Albania.
[81] Article 9, Law no. 44/2015 dated 30.4.2015 Code of Administrative Procedures of the Republic of Albania.
[82] Article 3/1, Law no. 9887 dated 10.03.2008 On protection of personal data, amended.

processor[83] is a natural or legal person, public authority, agency or other body, except for the employees of the Controller, which processes personal data on behalf of the Controller.

The law on the processing of data is used for the processing of personal data, wholly or partly by automatic means and to the processing by other means of a personal data stored in a filing system.[84]

The law identifies the process of transfer nationally and internationally, and also the processing of data when referring to proving information to national or international authorities. The processing of the data has specific legal criteria to be filled in, which are:

- the personal data subject has given his consent;
- if it's based in a contract;
- to comply with a legal obligation of the controller;
- for the performance of a legal task of public interest or in exercise of powers of the controller or of a third party to whom the data are disclosed;
- for the purposes of the legitimate interests pursued by the controller or by the third party to which the data are disclosed, except when such interests override interests or fundamental rights and freedoms of the data subject.[85]

In additional to the national transfer of data the law provides information on international transfer of personal data, which is done with recipients from states which have an adequate level of personal data protection. The level of personal data protection for a state is established by assessing all circumstances related to processing, nature, purpose and duration of processing, country of origin and final destination, legal provisions and security standards in force in the recipient state. States that have an adequate level of data protection are specified by a decision of the Council of

[83] Idem 5.
[84] Article 4, Law no. 9887 dated 10.03.2008 On protection of personal data, amended.
[85] Article 6, Law no. 9887 dated 10.03.2008 On protection of personal data, amended.

Ministers.[86] When the other state does not have an adequate level of personal data protection may be done in specific cases.[87]

Even though the law provides the possibility to process and transfer the data, there is the option for the data subject may refuse at any time on legal basis, the processing of data related to him done according to the provision of the law.[88] Also every person to whom damage has been caused due to an unlawful processing of personal data shall have the right to claim compensation by the controller for the suffered damage.[89]

The data subject has also the right of information. When the controller collects personal data, he shall inform the data subject. The information shall contain the categories of personal data to be processed, the purpose of processing, controller's name and address as well as any other necessary information to ensure a fair processing of the personal data. The information is not given when the data subject is aware.[90] Also controllers, processors and persons who come to know the content of the processed data while exercising their duty, shall remain under obligation of confidentiality and credibility even after termination of their functions. These data shall not be disclosed save when otherwise provided by law.[91]

[86] Article 8 paragraph 1, Law no. 9887 dated 10.03.2008 On protection of personal data, amended.
[87] Idem paragraph 2.
[88] Article 15, Law no. 9887 dated 10.03.2008 On protection of personal data, amended.
[89] Article 17, Law no. 9887 dated 10.03.2008 On protection of personal data, amended.
[90] Article 18 paragraph 1, Law no. 9887 dated 10.03.2008 On protection of personal data, amended.
[91] Article 28, Law no. 9887 dated 10.03.2008 On protection of personal data, amended.

10. If relevant, please set out information on the following:

10.1 Defenses to the offences listed in question 2;

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement); and

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

Although situations, there are circumstances under punishment is mitigated, a) Where the offence is committed due to motivations of positive moral and social values; b) Where the offence is committed under the effect of a psychiatric distress caused by provocation or the unfair actions of the victim or some other person; c) Where the offence is committed under the influence of wrong actions or instructions of a superior; d) Where the person who has committed the offence shows deep repentance; e) Where the person has recovered the damage caused by the criminal offence or has actively helped to eliminate or reduce its consequences; f) Where the person surrenders to the competent authorities after committing the criminal offence; g) Where the relationship between the person having committed the criminal offence and the victim has gone to normal.[92]

The person who promises or gives rewards or other benefits, may enjoy exclusion from serving the sentence or a reduction of the sentence, in the event the person files are a criminal denunciation and gives assistance during the criminal proceedings for these offences. When issuing the decision, the court shall also consider the time when the denunciation is filed, and the occurrence, or not, of the consequences of the offence.[93]

While, in specific cases, when the court deems that both the offence and the perpetrator are of low dangerousness and there are several mitigating circumstances and no aggravating

[92] Article 48 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[93] Article 52/a of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended

circumstances exist, the court may impose a sentence under the minimum or a more lenient punishment than the one provided for in the respective provision.[94]

Concerns criminal contraventions for which, besides the fine, an imprisonment sentence is also imposed, the court, upon the request of the perpetrator of the criminal contravention, may admit that the latter pays an amount of money to the benefit of the state budget, equal to half of the maximum fine provided for criminal contraventions in the General Part of this Code. The request may be presented at any stage of the trial proceeding before the rendering of the final decision of first instance. When the court rejects such a request, it shall impose the sentence for the offence committed. The request shall not be admitted for persons previously convicted also for criminal contraventions.[95]

The court may, when rendering a decision, also decide to impose a security period, during which Article 64 of this Code is not applicable, in cases where one of the following circumstances exists:

a. the criminal offence, the punishment of which is over five years;
b. the criminal offence has been committed in a cruel and brutal manner;
c. the offence has been committed against children, pregnant women or persons who, for various reasons, cannot be protected;
d. the offence has been committed by taking advantage of family or cohabitation relationships;
e. the commission of the offence has been driven by motives related to gender, race, religion, nationality, language, political, religious or social beliefs. The security period shall range between three-quarters of the sentence imposed by the court and entire duration of the criminal sentence.[96]

[94] Article 53 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[95] Article 54 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[96] Article 65/a of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended

Without criminal record shall be:

a. those who are sentenced to imprisonment for less then six months or with any other lower sentence, who have not committed any other criminal offence for two years since the day of their served sentence;
b. those who are sentenced to imprisonment ranging from six months up to five years and who have not committed other criminal offence for five years since the day of their served sentence;
c. those who are sentenced to imprisonment ranging from five to ten years and who have not committed any other criminal offence for seven years since the day of their served sentence;
d. those who are sentenced to imprisonment ranging from ten to twenty five years and who have not committed any other criminal offence for ten years since the day of their served sentence. [97]

The competent authority shall, through the act of pardoning; either excludes the person completely or partially from serving the court sentence or shall substitute the sentence with a more lenient one.[98]

The competent authority shall, through the act of amnesty, affect the exclusion from criminal prosecution, from serving the sentence completely or partially, or shall substitute the sentence with a more lenient one. Amnesty includes all those criminal offences committed up to one day prior to its announcement unless otherwise provided for by the respective act.[99]

[97] Article 69 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[98] Article 70 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended
[99] Article 71 of Law No. 7895, dated 27 January 1995 "Criminal Code of the Republic of Albania" amended

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance)

Cost mitigation in companies, out of the spectres of issues that are related to tax legislation, according to the Albanian law, allows companies to decrease their costs by the professional liability insurance of directors and officers.

Professional liability insurance is being recently used in Albania. Albanian law does not directly defines the professional liability insurance, including it in other responsibilities not explicitly mentioned in the law.[100] Also we can only refer to the list of professions that can be insured. [101] The professions governed by the law in general way are subject to voluntary professional liability insurance.

From this gain only the economists of these companies while allowing them to insurance their responsibility through this type of insurance.If the director is not the economist of the company, he will be excluded immediately as a profession that can not benefit from the professional liability insurance.[102]

12. Looking forward, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

All these report made us think that there are some fields in our law that must change always taking a look over next five years, since we think that are really necessary in filling some legal vacuums and changing some existing.

100 Annex I, A, point 13 of Law no. 52/2014 date 22.05.2014, "On the activity of Insurance and Reinsurance"
101 Decision No.627, date 11.6.2009, "For the approval of the National List of Professions".
102 See question 12.

Regarding the circumstances when information can be withheld from enforcement authorities the law has several provisions from the Constitution to Criminal Code and also the Law on Auditing. It has general provision regarding the privileged against self incrimination, legal privilege not to testify based on special relations, professions or specific conditions. The Constitution and the Criminal Code has been amended recently, but these articles have not changed yet, hoping to change in this five years these circumstances when information can be withheld. Referring to the restrictions on providing employee's data to domestic or foreign enforcement authorities, there are general provisions on personal data's protection and do not specifically relate them to the transferring employee's data, only some provisions in the Labour Law Code, which has been also amended recently.

Taking a look into the professional liability insurance Albanian's law, as we mentioned in question 11, we think that should be amended some provisions about professional liability insurance of administrators since that is not predicted at all. Furthermore must be determined all conditions that must fill the administrator to benefit from this type of insurance and the exceptional cases that do not allow it, taking into consideration always the protection of third parties.

Nowadays we are always a state in a change in everything or like we are looking for the best legislation that can fit us in every fields so we cannot really say, out of these changes described above, what is likely to change over next five years.

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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction.

Many international regulations are binding in Belgium: Belgium had ratified the OECD Convention on the fight against corruption in 1997 and to redress the two European Directives on corruption and its consequences[1], the united nations convention against corruption[2] on October 31 2003, the Criminal Law Convention on Corruption[3] Council of Europe in 1999 and member of the GRECO (anti-corruption group of states).

At the national level; the corruption is governed by the Law against corruption[4] and the law on criminal liability of legal persons.[5] The offence of corruption is governed by the Belgian Criminal code by articles 246-252 (public corruption) and 504bis and ter (private corruption). Public corruption refers to the bribery of persons performing public functions, private bribery: refers to persons who are administrators or managers of legal entities, agents or servants of a legal or natural person.[6]

Belgium also has a national agency; The Central Office for the Suppression of Corruption (OCRC), this agency 'is competent to investigate and support the investigation of offenses committed to the detriment of the interests of the State, as well as complex and serious corruption offenses. In addition, it has a pilot function in the fight against abuses and unlawful conduct in public procurement, legislation on subsidies, licenses and permits[7]'.

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[1] (2004/17 / EC and 2004/18 / EC)
[2] UNODC, 'United Nations Convention against Corruption', (Vienna, 2004), <http://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf>, January 23 2017.
[3] The Council of Europe's Criminal Law Convention on Corruption (STE 173, Strasbourg), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007f3f5>, January 23 2017.
[4] Law February 10 1999 on the repression of corruption, *Belgian Official Journal*, March 23 1993
[5] Law of May 4 1999 on the criminal liability of legal persons, *Belgian Official Journal* , June 22 1999.
[6] Spreutels Jean-Roggen Françoise- Roger France Emmanuel, 'Droit Pénal des Affaires', (Bruylant, Bruxelles, 2005). 261 –289, [French].
[7] <http://www.police.be/fed/fr/a-propos/directions-centrales/office-central-pour-la-repression-de-la-corruption-ocrc>, January 30 2017, [French].

The preventive part to avoid public corruption is provided by the Ethics and Professional Ethics Office of the Federal Public Service Budget and Management Control.[8]

Penalties range from 6 months to 10 years (depends on the type of corruption).[9] In the case of fines the sums required can be up to EUR 100,000. The legal person may be removed from the list of undertakings authorized for public procurement.[10]

About fraud and specially tax, Belgium government has created a Federal public service of finance divided in different departments; Taxation, Collection and Collection, Special Tax Inspection, Customs and Excise, Heritage Documentation, Treasury. With all these key areas, this agency cover all the matter related to financial affair, tax, vat etc[11]. This agency is also acting against fraud through to the Special Tax Inspection agency (ISI) who is dealing with important fraud (national or international). Belgium also joined a Benelux approach to the problem and work closely with The Netherlands and Luxembourg to exchange idea and solve the problem of tax fraud.[12]. There are two types of sanctions; administrative and criminal.

Administrative sanctions often take the form of a tax increase.[13] Criminal ones often take the form of imprisonment from eight days to two years and a fine of between EUR 250 and 500,000 euros[14].

Belgium is actively engaged 'in the development and implementation of the new international financial standards. Several initiatives have been taken in this regard: Belgium has signed a bilateral *Foreign Account Tax Compliance Act*, an agreement with the United States, providing for the automatic exchange of information between our two States'.

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[8] Circulaire n°537 relative au cadre déontologique des agents de la fonction publique administratives fédérale, *Moniteur Belge*, 27aout 2007, [French]
[9] Art. 247-249 Criminal Code
[10] Art. 8 of the Law February 10 1999 on the repression of corruption.
[11]<https://finances.belgium.be/>, February 3 2017, [French].
[12]<http://www.benelux.int/files/4313/9176/9412/FiscaleFraude_fr.pdf>, February 12 2017.
[13] Art. 444, al. 1-3 Criminal Instruction Code.
[14] Cass., April 25 1960, *Pas.*, 1960, I, 988, [French].

The OECD and its members, including Belgium, have developed an international standard CRS (Common Reporting Standard) for the automatic exchange of information at the international level and for tax purposes (AEOI - Automatic Exchange of Information).

The OECD principles have been transposed into the European Union with the adoption of a new directive on administrative cooperation. It provides for the automatic exchange of information among the 28 Member States[15].

Following the rise of terrorism, the Belgian government focused on the fight against the whitening of money, being one of the main sources of revenue for its various groups. 'In Belgium, the preventive part of anti-money laundering regulations is contained in the anti-money laundering law of 11 January 1993' on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing" modified by the law of 18 January 2010. This regulation are respecting the Directive 2005/60 / EC of the European Parliament and of the Council of 26 October 2005 on prevention of the use of the financial system for the purpose of money laundering and the financing of terrorism and Directive 2006/70 / EC of The Commission of 1 August 2006 laying down measures for the implementation of Directive 2005/60 / EC of the European Parliament and of the Council as regards the definition of 'politically exposed persons'[16] In order to collect all those information and ensure coherence, a national agency was created. The Financial Information Processing Cell (CTIF), this agency have the power to take sanctions against company who not respect this legislation. In criminal law view, Money laundering shall be sanctioned by imprisonment from fifteen days to five years and a fine of between twenty-six and one hundred thousand euros or one of these penalties only.[17] In addition the things obtained by laundering can be confiscated[18].

[15]<http://finances.belgium.be/fr/Actualites/nouvelle-%C3%A9tape-dans-la-lutte-contre-la-fraude-fiscale-internationale-la-belgique-aux>, February 3 2017, [French].
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[17] Art. 505, al. 1 Criminal code.
[18] Art. 43bis Criminal code.

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

In its operations, a company can commit a number of offenses, for the needs of our expose we will address only the most important and common offences: False and the use of forgery in writing. According the Article 193 of the Belgian Criminal code 'Forgery committed in writing (in computer science) or telegraphic dispatches, with fraudulent intent or with intent to harm, shall be punished in accordance with the following articles' the sanction can be 5 – 10 years of reclusion according the Belgian Criminal Code.[19]

The Main element of this infraction is the alteration of the truth, the second element having importance is that the document is a writing protected by the law finally it must that be the source of a possibility of harm.[20]

The second offence that we can see often is: swindle is the offense committed by a person who, in order to appropriate something belonging to another, is receiving this thing by using fraudulent means.[21]

The Main element of this infraction is the intention to appropriate a thing belonging to another, the delivery of this thing and the use of means of fraudulent maneuvers.[22] This offence is sanctioned by one month to five years and a fine of 26 to 3,000 euros.[23] And the things that are at the root of the offense or which have allowed it to be realized can be confiscated.[24]

[19] Art. 194 -195 and 196 Criminal code.
[20] Jean Spreutels, Françoise Roggen, Emmanuel Roger France, 'Droit Pénal des Affaires', (Bruylant, Brussels, 2005), 204-231 [Belgium].
[21] H.-D. Bosly, L'escroquerie in Les infractions (volume 1): Les infractions contre les biens, Bruxelles, (Larcier, 2008), 249 [Belgium].
[22] Spreutels Jean, Roggen Françoise, Roger France Emmanuel, ibid., 378.
[23] Art. 496 Criminal code.
[24] Art. 42 and next. Criminal code.

The swindle should be related to another defined offense *breach of trust*: this offence are defined by the article 491 of the Belgian Criminal Code as 'Any person who has fraudulently misappropriated or dissipated for the prejudice of others any money, merchandise, notes, receipts, writings of any kind containing or effecting an obligation or discharge and which have been delivered to him on condition that they are rendered or Make a specific use or employment'. The constituent elements of that infringement are; the delivery of a thing, this delivery has a load and this charge is the commitment to restore it and so we will use it for a specific purpose then we will render it and this is the fundamental difference with the theft. There is an importance in relation to the nature of the object and there is a diversion of the object. Injury: the person to whom the object was taken will be prejudiced and Fraudulent Intent.[25] The sanction for this offence is a term of imprisonment of one month to five years and a fine of twenty-six to five hundred euros.[26]

The last offence that occurs a lot in practice is *abuse of social Goods* : this offence is defined by the Belgian Criminal Code on the article 492 Bis 'Legal or factual officers of commercial and civil corporations and not-for-profit corporations who, with fraudulent intent and for personal gain, directly or indirectly, have made the property or credit of the corporation a use that, They knew significantly harmful to the patrimonial interests of the latter and those of its creditors or partners'. The Main element of this infraction is 1: Persons criminally punishable: stated in an exhaustive way, the leaders of the company with legal personality. 2: Any type of company having legal personality, 3 Use of the assets of the company and of credit, 4 Significant harm 5 The damage must be done in relation to the others: partners but also contracting parties and 6 Moral elements: fraudulent intention but the objective is indeed a personal enrichment therefore it is about obtaining an advantage for personal ends but also for others but with a personal will. The sanction for this offence is a term of imprisonment of from one month to five years and a fine of EUR 1000[27].

[25] Jean Spreutels, Françoise Roggen, Emmanuel Roger France, ibid., 324.
[26] Article 491, al. 1 Criminal code.
[27] Article 492 bis Criminal code.

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

3.1 Introduction

The legal responsibility of a corporation is complex but interesting question. Can a Belgian corporation be held responsible for any criminal conduct or is it the physical person in a representative role who will have to take the fall? Or both?

The Belgian legal framework is not based on a "fiction model" where the legal person is merely seen as a collection of natural persons. There is no derived liability where proof needs to be delivered of any criminal conduct by a natural person which in its turn needs to be attributed to the legal person. Rather, the Belgian jurisprudence accepts the legal person as a *maatschappelijke realiteit/réalité sociale* (social reality). This concept means that the legal person can commit any criminal conduct by himself and can also be held responsible for it. In this concept, it is not necessary to attribute the criminal conduct to a natural person.[28] The Belgian legislator is currently further developing this legal concept by making additional sanctions available and has proposed to modify the cumulation rule (further explained here below).

3.2 The legal framework

Article 5 of the Belgian Criminal Code of June 8 1867, published in the Belgian Official Gazette on 9 June 1867 as amended from time to time. More specifically, the criminal liability of the legal person was introduced by the Law of 4 May 1999 on the introduction of the criminal liability of the legal person, published in the Belgian Official Gazette on 22 June 1999.

'A legal person is criminally liable for offences which either are intrinsically connected to the execution of the corporate purpose, or which, as seen from the specific circumstances, have been

[28] *Parl.St.* Senaat, 1998-99, nr. 1271/6, 6-19; Kamer, 1998-99, nr. 2093/5, 17; A. De Nauw en F. Deruyck, 'De strafrechtelijke verantwoordelijkheid van rechtspersonen', (*RW*, nr. 27, 1999), 897, [Dutch].

committed on his behalf. Whenever the legal person is held liable solely because of the conduct of an identified natural person, only the person who was deemed to have committed the most grievous fault will ultimately be held liable. In the event the identified natural person has committed the fault knowingly and purposely, both the natural and legal person can jointly be held liable[29]'. (free translation)

The Belgian Criminal Code provides for certain exemptions. Several institutional legal persons are exempted from Article 5 of the Criminal Code and can in principle not be held criminally liable for their actions, ao. The federal state of Belgium, the communities and the provinces.[30] This entails the political legal persons. The reasoning for this is found in that fact that these colleges are directly elected by the Belgian people.[31]

The following sanctions which can be imposed on legal persons are currently recognized by the Belgian Criminal Code[32]:

- Fine;
- Confiscation;
- Publication of the sentence;
- Closure of one or more establishments;
- Prohibiting an activity which is part of the corporate purpose; and
- Dissolution of the corporation.

For now, the fine and confiscation are possible sanctions applicable on every criminal conduct and the remaining four (publication, closure of establishment, activity limitations and dissolution) are only applicable in specified cases. The criminal code is currently undergoing modifications and

[29] Art. 5, Section 1 Civil code.
[30] Art. 5, *in fine* Civil code.
[31] A. De Nauw en F. Deruyck, De strafrechtelijke verantwoordelijkheid van rechtspersonen, (*RW*, nr. 27, 1999), 899, [Belgium].
[32] Art. 7bis, section 2, 2° Civil code.

one of the propositions is to add several sanctions specifically for legal persons. Also the distinction between the different categorizations of offences are under scrutiny.

3.3 Analysis

3.3.1 Allocation of criminal conduct to the legal person - Material element

In principle, the legal persons are subject to all the provisions foreseen in the Belgian Criminal Code.[33] The question does rise however, how can the criminal offence be allocated to the legal person because in any case, there is always an action involved which is executed by a natural person. For this, there needs to be a link between the criminal offence and the legal person as such. This is called the "intrinsic link".[34] More specifically, this link will be met whenever the actions relate to the execution of the corporate purpose, is in the interest of the legal person or is done for his account.[35]

It will ultimately be the relevant judge who will decide whether or not there is an intrinsic link established between the actions and the legal person.[36]

3.3.2 Allocation of the criminal conduct to the legal person - Moral element

In addition to the fulfillment of the material element of the offence, the legal person must also meet the moral element of the criminal offence.[37] It will have to be proven that the conduct was within the intention of the legal person or there is a negligence with causality by the legal person.[38] In meeting the moral element, the conduct of the representative bodies of the legal person can play a decisive role.

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[33] It is imaginable however that certain offences cannot be committed by a legal person, a much-cited example is the bigamy offence.
[34] Toelichting, *Parl. St.,* Senaat, 1998-99, (nr.1217/1), 4, [Dutch].
[35] A. De Nauw en F. Deruyck, De strafrechtelijke verantwoordelijkheid van rechtspersonen, (*RW*, nr. 27, 1999), 903, [Belgium]
[36] Ibid.
[37] *Parl. St.,* Senaat, 1998-99, (nr. 1217/6), 27-28, [Dutch].
[38] A. De Nauw en F. Deruyck, De strafrechtelijke verantwoordelijkheid van rechtspersonen, (*RW*, nr. 27, 1999), 904, [Belgium].

3.3.3 Cumulation rule

Article 5 of the Belgian Criminal Code foresees, where appropriate, a complex rule of potential cumulation of criminal liability for both the legal and natural person. This section will be limited to the mere rule without further interpretation since this exact rule is under scrutiny and will be revised soon.

'Whenever the legal person is held liable solely because of the conduct of an identified natural person, only the person who was deemed to have committed the most grievous fault will ultimately be held liable'. This exact provision goes straight into the very principle of the Belgian legislator where there is no derived criminal liability in Belgium but rather the acceptance of the legal person as a social reality.

In the event where both a natural and legal person are found to have committed the criminal offence with intent, it is possible that the cumulation will be applied and consequently, both the natural and the legal person can be convicted. In case it is found that there was no intent present, it will be the duty of the judge to decide who has committed the most grievous fault or has committed the highest negligence. Only he will then be held criminally liable.

3.3.4 Conclusion

It is important to note that the criminal code will soon undergo changes that do have their effect on what has been discussed here above. More specifically, the cumul rule will be affected but also, there is the introduction of new punitive sanctions that can be imposed on legal persons. For example, it will be possible for a legal person to be sentenced to performing community service.[39] This is a sentence that previously was only foreseen for natural persons[40].

[39] For example: delivering services related to the cleaning up of an environmental crime.
[40] < http://moneytalk.knack.be/geld-en-beurs/rechten/hervorming-moet-strafwetboek-beter-leesbaar-en-coherenter-maken/article-normal-804507.html>, March 9 2017, [Dutch].

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

Belgium is a federal State composed of Communities and Regions and three Communities: the Flemish Community, the French Community and the German-speaking Community. Belgium comprises three Regions: the Flemish Region, the Walloon Region and the Brussels Region[41].They all have competences to make law with the consequence that Belgium has many lawmakers.

The article 34 of the Constitution specifies that the exercising of specific powers can be assigned by treaty or by law to institutions of public international law. By becoming member of the European Union Belgium assigned specific powers to the European Union. Those elements imply that Belgium has a very large legal framework for different matters. Moreover, European law has a big impact on Belgium law and extradition is also a matter which is regulated by European and international law.

Since the introduction of the European arrest warrant to facilitate extradition between member states based on mutual recognition trust, the legal framework to extradition changed. When the requested state is a member state the European arrest warrant convention should be applied on situations regulated by it. When the concrete situation is not regulated by the European arrest warrant convention, or the requested state is not a member state, the extradition falls under international law[42].

The European arrest warrant is a coercive instrument involving extradition of a wanted person to another state. It represents the first concrete realisation of the principle of mutual recognition, and changed the European extradition proceeding[43]. The existing international instruments based

[41] Art. 1 to 4 of the Belgian Constitution
[42] Preambule council framework decision of June13 2002 on the European Arrest Warrant and the surrender procedures between member states.
[43] Art. 2 council framework decision of June 13 2002 on the European Arrest Warrant and the surrender procedures between member states.

on mutual legal assistance was for a part replaced by a new European instrument based on mutual recognition. The main difference between mutual legal assistance and mutual recognition must be situated in the proceeding itself and also the important grounds for refusal. Mutual recognition means that decisions made by a judicial authority in a member state must be recognised by the authorities in the other member state. Mutual trust between member states in each other's judicial system is a very important ground for mutual recognition. It depends the safeguards for an individual when he's object of an extradition request.

Bars to extradition on Europeanlegal basis

The preamble council framework decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between member states explains that it respects fundamental rights and observes the principles by article 6 of the treaty on the European Union and reflected in the charter of fundamental rights of the European Union, in particular chapter VI thereof. There is also expressed that nothing in this framework may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe , on the basis of objective elements , that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his/ her sex , race, religion, ethic , origin , nationality, language , political opinions or sexual orientation or that that person's position may be prejudiced for any of these reasons.

This expression is by the way followed by the information that this framework does not prevent a member state from applying its constitutional rules relating to due process, freedom of association, freedom of the press of expression in other media.

Another precision in this framework is mentioned about the non-removal, non - expelation, or extradition to a state where there is a serious risk he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

The council framework decision makes an important distinction between[44] *mandatory* non – executive grounds and *optional* non – executive[45] grounds of a European arrest warrant. There are three grounds of mandatory non – executive grounds:

Extradition bars in function of international law

In general, there is no rule of international law that create a duty to extradite. According to international extradition law states are only bounded if they expressed to be as such. This can happen for example by being part of a bilateral / Multilateral treaty but also by conventions. On the other hand, international, human rights law imposes obligations to states to act with respect for human rights. Seen by the point of view of the requested person, international human rights do not give a right to not be extradited. It imposes bars to extradition in certain circumstances.

The risk to be exposed to torture, cruel, inhuman or degrading treatment or punishment is considerate as being a rule of ius cogens. This means that this rule is binding on all states and decisions on extradition must take in account the fact the individual will not be exposed to torture, cruel, inhuman or degrading treatment or punishment. The international and human rights institutions have confirmed this statement in multiples jurisprudence as well as national courts.

The political offence exemption became a bar for extradition. This bar is generally accepted by the states and can be shown in the multiples treaties and national law by the states. It can be considerate as a general principle of law. It means that extradition shall not be accepted if the request has a political nature.

There are different grounds that might be a bar to extradite an individual to individual based on mutual trust between states and mutual recognition. In fact, many cases show that there is a different in theory and in practice. The bar to extradite in fact is the wish of the state to extradite or

[44] Article 3 council framework decision
[45] Article 4 council framework decision

to not and when the courts take a decision, the requested person might already be extradited. This happened in the Trabelsi case, Trabelsi was already extradited when the human rights court decided there was violation of the convention on human rights. The concept of democracy and the fact states are also bound by rules they made are an important part in this matter. The question of the bar to extradite is in principle the same as asking the question if there is a rule that obliges states to respect International, European law. If states decide to not be bound anymore, no rule, no instance could sanction and there would be not even a bar in theory.

5. Please state and explain any:

5.1 Internal reporting processes (i.e. whistleblowing);

Through a whistleblowing procedure an employee can point out any possible corporate wrongdoing. The objective of such procedure is to start an independent and rational investigation within the company.[46]

Internal reporting procedures have been important in the prudential framework, especially in the financial sector.[47] In that regard we can quickly make reference to the heightened prudential requirements and rules of conduct and know-your-customer (KYC) and anti-money laundering (AML) obligations.[48]

We can also refer to the common three lines of defense to assure an adequate control over the legal and prudential obligations, which will need to be implemented in the relevant financial service provider. Each will require to have continuous training and procedures to be followed.

[46] T. Van Canneyt, 'Whistleblowing tussen hamer en aambeeld', (Cah.Jur.1.2008), 8, [Dutch].
[47] See the L&H case.
[48] The law of August 2 2002 on the supervision of the financial sector and financial services, as published, *Belgian Official Gazette,* September 4 2002, Dutch and French.

Through these procedures, special attention must be given to employees who are aware of any internal wrongdoings and should be incentivised to report this to the relevant person in-house.

These procedures allow both the employee and the employer to benefit. On the one hand, the employee should in general not fear for any corporate retaliation, and on the other hand, the employer can quickly act on the issue that has been raised and avoid any public scandal.[49]

It is imaginable that a person aware of any corporate wrongdoings fears for his job security or any kind of corporate retaliation. Therefore, it is required that the compliance programs foresee a special protection plan for the whistleblower and encourages the employee to openly and swiftly report any wrongdoings he has become aware of.[50]

A distinction has to be made between guaranteeing confidentiality and anonymity in the procedure. The relevant procedure will have to explain the difference and avoid confusion.[51]

For the public sector a legal framework is set in place by the Royal Decree of 7 May 2004 on the protection of public officers who report inconsistencies.[52]

For the private sector, we have to rely on two corporate governance codes. For listed companies this is the "Code of 2009"[53] and for non-listed companies, the *Code Buysse*[54]. The comply or explain principle is applicable.[55]

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[49] P. Van Eecke, 'Klokkenluiden in het bedrijfsleven: privacyaspecten', (DAOR, 2010), 21, [Dutch].
[50] W. Vandekerckhove, 'Freedom to speak up, University of Greenwich', (2014), <http://gala.gre.ac.uk/13128/1/13128_VANDEKERCKHOVE_Freedom_to_Speak_Up.pdf.>, February 9 2017.
[51] Ibid, 7.
[52] Royal Decree of 7 May 2004 on the protection of public officers who report inconsistencies, *Belgian Official Gazette*, June 11 2004.
[53] http://www.corporategovernancecommittee.be/sites/default/files/generated/files/page/corporategovnlcode2009.pdf, February 9 2017, [Dutch]
[54] http://www.codebuysse.com/downloads/CodeBuysseII_NL.pdf , February 9 2017, [Dutch].
[55] Art. 96 *Belgian Companies Code*.

Through the audit committee, the Belgian listed companies should put in place adequate safeguards for the employee who wishes to report any wrongdoings. Potentially on an anonymous basis but with the necessary steps that can be followed should the gravity of the wrongdoing require identification of the whistleblower. A thorough internal investigation should remain possible, something which cannot be guaranteed when full anonymity has been put in place.[56]

More specifically for the banking sector, we have the Banking law of 2014, article 21, par. 1, 8° requiring an adequate system that needs to be present to facilitate the reporting of any wrongdoings. The National Bank of Belgium has provided a Corporate Governance Manual, in which principle eight of the general principles regarding the organization of the business lays out in general terms what is expected from financial institutions.[57]

All these procedures need to comply with the applicable privacy law and the safekeeping of the privacy of the employee.[58]

An interesting question remains whether whistleblowing has become a right or a duty.

5.2 External reporting requirements (i.e. to markets and regulators), that may arise on the discovery of a possible offence.

It is recognized in Belgian law that several professionals have an external reporting obligation. In respect of anti-money laundering regulation, we identify the law of 13 January 1993, published in the Belgian Official Gazette on 28 January 1993, as amended from time to time.

These professionals involve a.o.[59]

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[56] P. Van Eecke 'Klokkenluiden in het bedrijfsleven: privacyaspecten', (DAOR, 2010), 21, Frebruary 9 2017, [Dutch].
[57] Wet en Duiding, Deel 8, (2016, Larcier), 218; <https://www.nbb.be/en/financial-oversight/prudential-supervision/areas-responsibility/credit-institutions/governance-21>, February 9 2017. .
[58]<https://www.nbb.be/nl/financieel-toezicht/prudentieel toezicht/toezichtsdomeinen/kredietinstellingen/handboek-governanc-21>, February 9 2017, [Dutch].
[59] Art. 1, par 2, 3 and 4 of the Law of January 13 1993.

- Financial institutions
- Notaries
- Accountants
- Lawyers
- Court Bailiff

These professionals have a mandatory reporting duty towards the Belgian Financial Intelligence Processing Unit (CTIF-CFI) with respect to suspicion of grieve fiscal fraud.[60] This specification with respect to "grieve fiscal fraud" creates legal uncertainty and confusion when this is read together with Article 505 of the Criminal Code which is the relevant provision for the anti-money laundering offense.

For this high-level overview, we can conclude in principle that there is only a reporting obligation for the mentioned professionals, most likely banking employees, to report to the CTIF-CFI when they suspect a qualified grieve fiscal fraud.[61]

The reporting of the transaction under scrutiny has to be done, in principle, before the execution of the said transaction.[62] It is possible under specific circumstances for this notification to happen afterwards.[63]

The professionals on which this reporting obligation lies are often charged with a certain duty of professional secrecy. How is this to be combined with the reporting obligation?

[60] Art. 28 ibid.
[61] It this were not the case, the banking sector would face an enormous liability if the simple deposit of for example 50 euro which is the result from a money-laundering offense would not be reported to the CTIF-CFI. They would have to report basically every cash deposit to be 100% covered, which is not feasible for neither the banking sector, nor the CTIF-CFI to process all these reports.
[62] Art. 23, par. 1 of the Law of January 13 1993.
[63] Article 24 ibid.

The legislator has in fact foreseen the possibility of a duty to speak when the law provides circumstances where the holder of professional secrecy is obliged to report certain occurrences.[64]

We will discuss the issue of professional secrecy from the perspective of a lawyer who may get contacted by someone involved in a money-laundering offense.

The European Court of Justice has decided in its ruling of June 26 2007 that the right of an honest and fair trial is not damaged by a reporting duty for lawyers where they are obliged to inform the competent authority of certain offences in the fight against money-laundering. The Belgian constitutional court has in its ruling of 23 January 2008 provided further clarification on the reporting obligation for lawyers.

A lawyer is not obliged to report when:

- He is defining the legal position of his client;
- Providing legal counsel, defending his client before court.

To add a level of review, the lawyer will not have to report directly to the CTIF-CFI, but to the president of his respective Bar (Batonnier).

The reporting obligation occurs whenever the person involved knows or suspects that the transactions in which he is involved, have something to do with money-laundering.

With respect to the suspicion of transactions involved in a money-laundering offense differ from which profession is involved. A "regular" suspicion is sufficient for people involved in the financial sector, whereas for notaries for example, a "heightened" level of suspicion is necessary.[65]

[64] Art 458 of the *Belgian Criminal Code.*
[65] MvT, Parl.St., Kamer, (1997-1998, nrs. 1335/1 en 1336/1), 18.

According to the parliament a suspicion occurs when it is not possible to exempt the possibility that the relevant transaction is involved in a money-laundering activity.

The attempted clarification that was offered by the parliament does in fact not offer any clarity but creates a very broad framework, feeding legal uncertainty.

Important to note is that each report to the CTIF-CFI has to be done in good faith. When the bank fails to do so, it can be held liable for any damages occurred by the bank's client. A bank or financial institution will act in good faith when it has done all necessary and possible investigation in its power to find out the rational behind a suspicious transaction.

In respect of identifying its client, there is an obligation to achieve a result. Whereas its obligation to investigate the rational behind a transaction, this is a best efforts obligation. However, a financial institutions should not take this obligation lightly. A financial institution has been sanctioned by a court ruling of 2 May 2017 for reporting a transaction to quickly to the CTIF-CFI, without doing proper investigation.

It is of course forbidden for holders of a reporting obligation to inform any clients involved of the reporting that occurred or is about to be filed.[66]

With regard to this legal issue, an entire doctorate can be written and any further details fall outside the scope of this high-level overview.

[66] Art. 19 of the Law of January 13 1993.

6. Who are the enforcement authorities for these offences?

6.1 Introduction

For a long time, legal entities had no criminal liability under Belgian law. If there was an offence committed by a corporate entity, only the responsible persons for the corporate and those who had the duty to prevent them could be punished[67].

In 1999, the situation changed due to the adoption of the law establishing criminal liability of legal persons that enables corporate entities to be prosecuted. Those are, under the Belgian law, exposed to criminal investigations or prosecution in the fields of environmental law and regulation, labor law, road traffic offences, consumer protection, aggravated tax fraud, market manipulation and money laundering[68].

The Belgian authorities enforcing law have an adequate legal framework and wide powers to prosecute those offences. Unfortunately, there are structural problems preventing them to be effective as it should be due to a lack of human and technological resources[69].

6.2 Public prosecutor

In Belgian law, the competent authority to enforce and prosecute criminal offences made by corporate entities is the public prosecutor (Procureur du Roi/Procureur des Konings)[70]. Either on federal or local level, he will have to respect the principle of the opportunity for prosecution. That means that he will have to balance the opportunity to prosecute or not a case[71].

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[67]Clifford Chance, 'Report on Corporate liability in Europe', (8, 2012), < https://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf>, March 11 2017, [French].
[68] Ibid., 5.
[69] GAFI, Measures to combat money laundering and terrorist financing in Belgium, report of the fourth round of mutual evaluations, (2015), 50.
[70] Clifford Chance, 'Report on Corporate liability in Europe', (9, 2012), < https://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf>, March 11 2017, [French].
[71] OECD, Report on the third phase of implementation by Belgium of the OECD Anti-Corruption Convention, (2013), 36.

Most of the investigations will be carried out by him but when he has to face more complex cases, he will ask the investigating judge (Juge d'instruction/Onderzoeksrechter) to take acts requiring special investigation powers (as powers of search, seizure…)[72] . They both receive help from the judicial police[73].

The enforcement authorities have a huge amount of measures available for their investigations that can be used to obtain necessary informations for seizing assets and identify offences' perpetrators[74].

At the end of the investigations, the Council Chamber (Chambre du conseil/Raadkamer) will decide if there is enough evidence to prosecute the suspect(s). If there is, cases are judged by the criminal court of first instance (Tribunal correctionnel/Correctionele rechtbank) and appeal against those decisions can be made before the Court of appeal (Cour d'appel/Hof van beroep). Afterwards, law issues can be appealed before the Belgian Supreme court (Cour de cassation/Hof van Cassatie), this court can only rule on a point of law and not on the merits of the case[75].

It is important to remind that all criminal proceedings are conducted according the Belgian Code of Criminal Procedure.

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[72] Clifford Chance, 'Report on Corporate liability in Europe', (9 2012), < https://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf>, March 11 2017, [French].
[73] OECD, report on the second phase of implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in Commercial and International Business, 2005, 24.
[74]Clifford Chance, 'Report on Corporate liability in Europe', (9, 2012), < https://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf>, March 11 2017, [French].
[75]Clifford Chance, 'Report on Corporate liability in Europe', (5, 2012), < https://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf>, March 11 2017, [French].

6.3 Determination of the punishment

Each offence has a maximum and a minimum penalty that will be determined by the court, taking into account several factors that can aggravate (harm which the offence caused, whether it was planned or not, the profit generated and previous offendings) or mitigate (co-operation during the investigations or early acceptance of guilt) the sentence[76].

6.4 Sanctions

Belgium has a good sanctioning regime but the lack of resources has negative consequences on the system in place. Indeed, proceedings are long, having an impact on the effectiveness and deterrent of sanctions due to the length of sentences handed down by the court. Furthermore, there is a risk of non-conviction if the statute of limitations for proceedings and offences is not meet[77].

Corporate entities can face penalties determined by the Belgian Criminal Code. If an imprisonment is the punishment for a specific offence, it will automatically be converted into a fine (its amount will be defined according a formula taking into account the number of months imposed as imprisonment)[78].

Next to those financial sanctions, a corporate entity could face additional penalty such as confiscation[79], dissolution[80], prohibition from conducting certains activities, the closure of one or more businesses[81] or the publication of the decision[82].

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[76] Clifford Chance, 'Report on Corporate liability in Europe', (9, 2012), < https://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf>, March 11 2017, [French].
[77] OCDE, Rapport de Phase 3 sur la mise en œuvre par la Belgique de la convention de l'OCDE sur la lutte contre la corruption, (2013), 36.
[78] Clifford Chance, 'Report on Corporate liability in Europe', (9, 2012), < https://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf>, March 11 2017, [French].
[79] Art. 7bis Criminal code.
[80] Art. 35 Criminal code.
[81] Art. 47 Criminal code.
[82] Art. 37 Criminal code.

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

The adequate law enforcement authorities in Belgium have a wide variety of measures for their investigations. Indeed, all classic methods, as referred in the Code of Criminal Procedure, can be used[83]. They have access to financial and other kinds of intelligences, especially tax-related documents that contain useful information on the company. Unfortunately, they don't use all those investigation measures and data in an effective way because of the lack of resources[84].

That is why the enforcements authorities should focus on the problem and step up the researches for financial intelligence. They also should improve the exchange of information and co-ordination with other agencies involved in the same questions (forwarding, processing and feedback)[85].

This could be done by a unified approach and a reinforcement of the relations within the prosecution authorities and by having appropriate statistics and databases so that all the useful and necessary information for criminal proceedings can be defined and evaluated.

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self-incrimination)?

8.1 Introduction

In answering this question, it is important to make the distinction between the type of ongoing investigation. Indeed, in for example a Belgian tax investigation, the subject under scrutiny is held

[83] [83] GAFI, 'Belgium Report on Anti-money Laundering and Counter Terrorist Financing Measures', (47-48, 2015), <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Belgium-2015.pdf> , June 8 2017.
[84] Ibid. (46-49)
[85] Ibid. (69)

to an obligation to cooperate[86] and provide the competent authorities with the requested information. On the other hand, as soon as the investigation has the characteristics of a criminal investigation, additional safeguards have been put in place to protect the subject under scrutiny in the form of the privilege against self-incrimination.[87]

8.2 Criminal investigation

The right to not incriminate himself is guaranteed by European law and the basic principles of criminal law.[88] As soon as the applicable sanctions cross certain criteria[89], they move from being administrative sanctions to being criminal sanctions which subsequently offer heightened procedural safeguards to the subject under scrutiny. The criteria are as follows:[90]

- The qualification of the sanction;
- The nature of the violated norm;
- The gravity of the sanction imposed.

If a sanction is deemed criminal, the subject under scrutiny will move from having the obligation to cooperate to the right against self-incrimination. In practice, this distinction is not always clear.

A special case: encryption

The question can be asked whether a subject under criminal investigation is held to provide the competent authorities with a key to encrypted data. We refer to the court ruling of the Court of Appeals of Ghent.[91]

[86] Rb. Namen 16 maart 2005, FJF 2005/279, Rb. Bergen, 12 maart 2003, FJF 2003/151, Rb. Brussel, 7 november 2000, TFR 2001, 87, Rb. Brussel 21 maart 2001 FJF 2002/88, [Dutch]
[87] Cass. 13 mei 1986, *Pas.* 1986, I, 1017*; Arr. Cass.* 1985-1986, 1230, concl. J. du Jardin; Cass. 13 januari 1999, *FJF* no, 99/125.
[88] Art. 6 EVRM.
[89] The Engel criteria.
[90] Arrest Engel, Par 78, EHRM, Engel v The Netherlands.
[91] HvB Gent, 23 juni 2015.

The legal basis which is referred to requires a third party, who has distinctive IT-knowledge of the relevant IT system in the investigation, to offer his assistance when this is so required by the competent authorities.[92] The assistance relates to offering a.o. access to the IT system when data has been encrypted.

Requiring the subject under investigation to offer the key would go straight into against the right against self-incrimination and would be a violation of Art. 14.3g IVBPR and Art. 6 EVRM.

8.3 Compliance procedures

As the saying goes, "it is better to sit at the table then to be on the menu". Meaning that it is in the benefit of the entity or person under investigation to provide the competent authorities with a certain form of cooperation. Notwithstanding any procedural safeguards that of course must be respected by the authorities, when it does come to a fine which may often take very high amounts depending on the applicable legislation, any form of cooperation will be taken into account by the authorities when setting the fine.

In the field of antitrust and dawn raids, there are many compliance issues to take into account. A well thought-through compliance policy and procedures need to be put in place to adequately deal with a dawn raid when it does occur. It is advisable to create a game plan which clearly lays out the role people need to take on as soon as the investigators show up. This goes from the first person which comes into contact, being a reception secretary to the board which will have to decide on strategic decisions behind closed doors as soon as possible.

There are limitations to the investigator's powers. Through the use of an external law firm, privileged documents offer protection to the company. However, the company needs to be prepared to deal with a discussion on whether a document is protected by legal privilege or not. A

[92] Art. 88 quater, par. 1 Sv.

practice has been developed on how to deal with these types of discussions between the investigating authorities and the company under scrutiny[93].

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

Data protection is protected by national and international regulations.

At national level; law of 8 December 1992 (Privacy Act) aims to protect the citizen against any misuse of his or her personal data. The personal date is supervised by an official body, the Privacy Commission of Belgium[94], his role is to maintain a good level of protection of each person privacy.

In the international level; according the European Directive 95/46 / EC, Member States shall apply the same level of protection when processing personal data.[95]and if it's the case they have the right to share it. The treatment should to respect the same level and condition that Belgium; "Treatment is necessary, The person concerned agrees, You formally declare the treatment, You are clear about your intentions and You respect the purpose of the treatment"[96]. If the treatment concern a country who is not in Europe, the transfer would be authorised only if they have the same level of protection that EU country. A list of these country are publish by the European commission[97] On the other hand, if the treatment concerns a country outside the EU and does not offer a sufficient level of protection it will be possible to exchange information if and only if an international contract is signed call "Model Contracts for the transfer of personal data to third countries"[98] or a contract write by the company, but this company should respect the Belgium

[93] Takes the form of signing documents with a common reference system of the documents taken by the authorities. The documents will be held by the authorities until further investigation on the status of the documents.
[94] <https://www.privacycommission.be/fr/node/7228>, February 22 2017.
[95] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>, February 22 2017.
[96]<https://www.belgium.be/fr/justice/respect_de_la_vie_privee/protection_des_donnees_personnelles/donnees_personnelles/conditions>, February 22 2017, (French).
[97] <http://ec.europa.eu/justice/data-protection/international-transfers/index_en.htm>, February 22 2017.
[98] <http://ec.europa.eu/justice/data-protection/international-transfers/transfer/index_en.htm>, February 9 2017.

level of protection. This contract will be analyzed by the Belgian private life commission, which will check whether these clauses provide sufficient protection for the data transmitted [99]

10. If relevant, please set out information on the following:

10.1 Defences to the offences listed in question 2;

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement);

When directors are facing a liability action, they have a protection called the margin of appreciation test which means that the party alleging the breach has to prove that there were breaches of obligations[100].

Directors can also, under Belgian law, enter into an indemnity agreement with the company. In practice, most claims based on liability will be made upon insolvency[101].

There is a case law in Belgium stating that a director is not liable when merely executing general decisions but this does not free him from having to comply with the Companies Code or a ratification of the other managerial errors[102].

[99] <https://www.privacycommission.be/sites/privacycommission/files/documents/protocole-contrats-SPF-Justice-CPVP.pdf>, February 9 2017.
[100] Carsten Gerner-Beuerle Philipp Paech and Edmund Philipp Schuster, 'Study on Director's Duties and Liability', (58), < http://ec.europa.eu/internal_market/company/docs/board/2013-study-reports_en.pdf>, June 8 2017.
[101] D. Van Gerven, 'Les clauses limitatives de responsabilité, les garanties d'indemnisation et l'assurance responsabilité civiles des mandataires sociaux' (1998, Revue Pratique des Sociétés), 147, [French]
[102] Antwerp, March 2 2006, (TRV2007, 192).

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

Voluntary disclosure of a criminal offence can be considered as a mitigating factor. Certain public prosecutors entered agreements with suspects whereby they were willing to discontinue the prosecution in case of the suspect paid a fine[103].

Furthermore, criminal law was modified recently and there is now a possibility, under Belgian law to plead guilty. This is a very new procedure in Courts and we have to wait a few years to see how it will work.

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance)

A director can be insured against contractual liability even for serious errors or criminal acts. Only in case of serious errors, expressly listed in the agreement, those will not be covered by the insurance policy[104].

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

There are many new European regulations coming into play in the near future. It will prove to be a difficult exercise for both the regulators and the market players to adhere to these new rules and we believe this will result in more dialogue between the two parties. At least in the financial sector.

[103] Clifford Chance, 'Report on Corporate liability in Europe', (9, 2012), < https://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf>, March 11 2017, [French

[104] M. Vandenbogaerde, 'Aansprakelijkheid van vennootschapsbestuurders',(Intersentia 2009), 29-30 [Dutch].

Fines and the number of enforcement actions have increased in the past five years; we believe this trend will continue in the next five.

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ELSA BOSNIA AND HERZEGOVINA

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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction.

Corruption in Bosnia and Herzegovina is a serious problem, almost all sectors of the economy suffer from rampant corruption and most particularly public procurement. The Criminal Code in B&H criminalizes several forms of corruption; including passive and active bribery and the bribery of foreign officials. Nonetheless, the government did not enforce the relevant laws effectively and prosecutions of corruption offences have been selective and officials engaged in corruption with impunity. The offer and demand of bribes and gifts is criminalized in B&H, however, these practices are widespread.[1] The country routinely performs very poorly in TI's Corruption Perceptions Index (CPI). In 2009, consistent with previous iterations of the index, B&H scored 3,0 on a scale of 0 (highly corrupt) to 10 (highly clean), ranking 99 out of the 180 countries assessed, suggesting widespread and endemic forms of corruption. Corruption is also identified by the World Economic Forum's 2008-2009 Global Competitiveness Report as one of the major constraints for doing business in the country, along with government instability, policy instability, inefficient government regulation and inadequate infrastructures. Consistent with regional trends, 35% of the companies surveyed within the framework of the World Bank and IFC 2009 Enterprise Survey also identified corruption as one of the largest constraints to business operations.[2] Bosnia and Herzegovina since 1997 has gone through a wave of privatization processes which include avoiding transparent and open bidding procedures, introducing legal changes allowing government to privatize virtually every public company, etc.

As in public sector bribery, in business-to-business bribery payment can be made in a variety of forms: money, goods, food and drink, valuables or in the form of an explicit exchange for another favor. In the business world of Bosnia and Herzegovina, cash is the most important form of bribe payment among private sector entities, as it is between businesses and public officials. However, the provision of food and drink also plays an important role when it comes to illicit dealings among

[1] Business-anti-corruption portal, Bosnia and Herzegovina Corruption Report <http://www.business-anti-corruption.com/country-profiles/bosnia-herzegovina> accessed February 18, 2017.
[2] Anti-Corruption Resource Centre, Corruption and Anti-Corruption in Bosnia and Herzegovina <file:///C:/Users/ivica/Downloads/expert-helpdesk-221.pdf> accessed February 18, 2017.

business representatives.[3] In Bosnia and Herzegovina, the majority of bribes (79%) are paid in cash, while only 15 % are given in the shape of food and drink. Considerably lower down the scale come valuables (8%), the exchange of services (2%) and other goods (2%). Although most bribes are paid in cash, they can be interpreted as a barter – either explicit or implicit – between two parties in which each one of them both gives and receives something in the exchange. The giving of food and drink is however somewhat more prevalent among residents of Republika Srpska (17% vs. 14% in FB&H), while the giving of valuables seems to be more common in the Federation of B&H (9% vs. 4% in the RS). On a national level, giving food is also more prevalent among women (18%) than among men (11%), who use money more readily to pay bribes (83%) than women (75%). When focusing on bribes paid in cash, the results of this survey show that more than 50 per cent of all bribes are for amounts smaller than 100 BAM (approx 50 Euro), one in six of all bribes paid are in the 100-199 BAM range (between 50 Euro to 100 Euro) and 15 per cent are in the 200-499 BAM range (approximately 100-250 Euro). Large amounts are paid in the 6 per cent of cases of the 500-999 BAM range (between 250 Euro to 500 Euro) and in the 4 per cent of cases for amounts that exceed 1000 BAM (500 Euro). While not quite "grand corruption" these are certainly very considerable amounts for the households involved.[4]

Corruption relating to offenses in Section XXII, XXIII and XXXI Criminal Code FH, within the jurisdiction of a Special Court under Article 25, paragraph 1, point d this legislation.[5]

(1) An official or responsible person in the institutions of Bosnia and Herzegovina including also a foreign official person, who demands or accepts a gift or any other benefit or who accepts a promise of a gift or a benefit in order to perform within the scope of his official powers an act, which ought not to be performed by him, or for the omission of an act, which ought to be performed by him, shall be punished by imprisonment for a term between one and ten years. (2)

[3] UNODC, B&H Business corruption report 2013 <https://www.unodc.org/documents/data-and-analysis/statistics/corruption/UNODC_BiH_Business_corruption_report_2013.pdf> accessed February 18, 2017.
[4] UNODC, Corruption in Bosnia and Herzegovina: Bribery as experienced by the population <https://www.unodc.org/documents/data-and-analysis/statistics/corruption/Bosnia_corruption_report_web.pdf >accessed February 18, 2017.
[5] Law on Suppression of Corruption and Organized Criminal FH (Off. Gazette of FH No. 59/41), Article 2, paragraph 1, point b.

An official or responsible person in the institutions of Bosnia and Herzegovina including also a foreign official person, who demands or accepts a gift or any other benefit or who accepts a promise of a gift or a benefit in order to perform within the scope of his official powers an act, which ought to be performed by him, or for the omission of an act, which ought not to be performed by him, shall be punished by imprisonment for a term between six months and five years. (3) The punishment referred to in paragraph 1 of this Article shall be imposed on an official or responsible person in the institutions of Bosnia and Herzegovina including also a foreign official person, who demands or accepts a gift or any other benefit following the performance or omission of an official act referred to in paragraphs 1 and 2 of this Article and in relation to it. (4) The gifts or any other benefits shall be forfeited.[6] Corporations just by corruption, financed or receive other benefits from public institutions in Bosnia and Herzegovina.

Receiving awards or other forms used for trade in influence

Whoever directly or indirectly solicits or receives or accepts a reward or other benefit or promise of reward or some other benefit, for himself or for another person to use his real or perceived official or social or influential position or other status forwarded to an official or responsible person in institutions Bosnia and Herzegovina or a foreign public official or international civil servant or arbitrator or juror perform or not to perform an official or other act shall be punished by imprisonment of six months to five years.

Whoever forward, using his official or social position or influence or other status, that official or responsible person in the institutions of Bosnia and Herzegovina or a foreign public official or international civil servant or arbitrator or juror perform or not perform an official or other act shall be punished by imprisonment for a period of one to eight years.

[6] Criminal Code of B&H (Off. Gazette of B&H No. 3/03, 32/03, 37/03, 54/04, 32/07, 61/04, 30/05, 53/06, 55/06, 8/10, 47/14, 22/15, 40/15), Article 217.

If the perpetrator to commit the offense referred to in paragraph (2) shall require or receive or accept a prize or other benefit for himself or another, shall be punished by imprisonment of one to ten years. Reward or other benefit shall be seized.[7]

Giving prizes or other form used for trading in influence

Whoever directly or indirectly, to a person who is an official or social position or influence or other status makes or offers or promises a reward or any other benefit for interceding that an official or responsible person in the institutions of Bosnia and Herzegovina or a foreign public official or international civil servant or arbitrator or juror perform or not to perform an official or other act shall be punished by imprisonment of six months to five years.

Whoever, directly or indirectly, at the request of a person having official or social position or influence or other status, commit an offense under paragraph (1) of this Article, and report the crime before it is discovered or before knowing that the deed has been discovered may be released from punishment.

Reward or other benefit shall be seized, and in the case of paragraph (2) of this Article may be returned to the person who gave the prize or other benefit.[8]

Criminal offences of corruption and criminal offences against official duty, Chapter XIX of the BH Criminal Code (Article 217-229), Chapter XXXI of the Criminal Code of the Federation of BiH,87 (criminal offences of bribery and criminal offences against official duty (Article 380 – 392), Chapter XXVII of the RS Criminal Code (criminal offences against official duty, Article347 – 360) and Chapter XXXI of the Criminal Code of the Brčko District of B&H (criminal offences of bribery and criminal offences against official duty).

[7] Criminal Code of B&H (Off. Gazette of B&H No. 3/03, 32/03, 37/03, 54/04, 32/07, 61/04, 30/05, 53/06, 55/06, 8/10, 47/14, 22/15, 40/15), Article 219.
[8] Criminal Code of B&H (Off. Gazette of B&H No. 3/03, 32/03, 37/03, 54/04, 32/07, 61/04, 30/05, 53/06, 55/06, 8/10, 47/14, 22/15, 40/15), Article 219 a.

It is common practice for political parties to receive donations from companies doing business with the institutions of the executive branch, although this represents a violation of the Law on financing political parties. Center for Investigative Reporting in Sarajevo (CIN) found that the six major political parties in this way in the period from 2006 by the end of 2010 g. of 70 private firms that had contracts with the government, received donations totaling close to 210,000 KM. The ruling parties also received donations of 39 companies that operated with public companies that control the government. Although the law prohibits accepting donations from companies doing business with the government, the same does not apply to business with public companies. The same report states that in 2012, 21 million direct budget allocations divided by the FB&H Ministry of Agriculture to subsidize agricultural holdings, at least 2.7 million shared the fictitious companies or firms owned by party colleagues and relatives line ministry.[9]

Money Laundering

Bosnia and Herzegovina is primarily a cash-based economy and is not an international or regional financial center. Most money laundering activities in B&H are for the purpose of evading taxes. Although the Government of B&H recognizes the threat of money laundering posed by bulk cash couriers, enforcement problems continue to exist. In accordance with the Law on Indirect Tax Administration, B&H law requires customs officials and the Indirect Tax Administration to notify the State Investigation and Protection Agency's Financial Intelligence Department (FID) of all reported, cross-border transportation of cash and securities in excess of $6,921. Customs officials also have the authority to seize unreported bulk cash in excess of $3,460 crossing the border. If the seized currency is suspected of having criminal origins, or is suspected of being the proceeds of money laundering activity, FID has the authority to temporarily seize the monies and initiate criminal proceedings. Otherwise, the dispositions of these seized currencies are handled as minor offenses at the entity level, in accordance with the Laws on Foreign Currency Operations. Due to weak enforcement and corruption, large amounts of currency leave and enter

[9] Transparency International Bosnia and Herzegovina, How Bosnia's Political Economy Holds It Back And What To Do About It? <https://ti-bih.org/bosna-i-hercegovina-kao-zarobljenik-politicke-ekonomije-i-sta-uciniti/ > accessed February 18, 2017.

the country undetected. The government should remedy these shortcomings.[10] Money laundering regulators of Bosnia and Herzegovina are the Criminal Investigation Department in State investigation and Protection Agency (SIPA) and the Prosecutors Office of Bosnia and Herzegovina since money laundering, as defined under the Article 209 of Criminal Code of Bosnia and Herzegovina, is a criminal act.

In June 2015, Bosnia and Herzegovina made a high-level political commitment to work with the FATF and MONEYVAL to address remaining strategic deficiencies in the area of criminalization of money laundering and terrorist financing, freezing terrorist assets under UNSCR 1373, effective supervision, non-profit sector, cross-border currency controls and confiscation of assets. The Council of Ministers adopted the Action Plan for removal of deficiencies in the anti-money laundering system, as required by FATF. The number of confirmed indictments and verdicts remains low.[11]

In terms of economic structure, the majority of the companies in Bosnia and Herzegovina operate in only five sectors of the economy. Following the "Statistical classification of economic activities in the European Community" (NACE), these five sectors are defined as:

1. Manufacturing, Electricity, Gas, and Water supply[12]
2. Building and Construction[13]
3. Wholesale trade and Retail trade; Repair of motor vehicles and motor cycles[14]

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[10] Countries/Jurisdictions of Primary Concern - Bosnia and Herzegovina Volume II: Money Laundering and Financial Crimes <https://www.state.gov/j/inl/rls/nrcrpt/2014/supplemental/227737.htm?goMobile=0> accessed February 19, 2017.

[11] European Commission, Communication from the commission to the European parliament , the Council, the European economic and social committee and the committee of the regions <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2015/20151110_report_bosnia_and_herzegovina.pdf > accessed February 19, 2017.

[12] Categories, C, D, E of NACE Rev. 2. <http://ec.europa.eu/eurostat/documents/3859598/5902521/KS-RA-07-015-EN.PDF> accessed February 19, 2017.

[13] Category F of NACE Rev. 2. <http://ec.europa.eu/eurostat/documents/3859598/5902521/KS-RA-07-015-EN.PDF> accessed February 19, 2017.

[14] Category G of NACE Rev. 2. <http://ec.europa.eu/eurostat/documents/3859598/5902521/KS-RA-07-015-EN.PDF> accessed February 19, 2017.

4. Transportation and Storage[15]
5. Accommodation and Food service activities (hotels and restaurants)[16]

The present survey of corruption and crime affecting businesses surveyed only businesses from these five sectors while excluding other economic activities (such as agriculture, education or health services). This choice of economic sectors also ensures broad coverage of the economy of Bosnia and Herzegovina in terms of the value added (percentage of GDP by sector) and employment (percentage of total employees in each sector), as well as the share of businesses covered. The five sectors listed account for 66.8 per cent of all businesses in the country, 51 per cent of total employees and 49.3 per cent of the total GDP (net of taxes). The rest is distributed among all other economic activities that are typically carried out either by private businesses (such as agriculture, mining, financial activities, real estate activities, professional, scientific or technical activities) or by public institutions (public administration, defense, education, health). On taking a closer look at the structure of businesses in Bosnia and Herzegovina (Figure 49), the largest shares are in the Wholesale Trade and Retail Trade; Repair of Motor Vehicles and Motor Cycles sector (34.5 per cent), the Manufacturing, Electricity, Gas, and Water supply (12 per cent) and the Accommodation and Food Service activities (8.5 per cent) sectors. Smaller shares of businesses are in the Transportation and Storage (6.8 per cent) and Building and Construction (4.9 per cent) sectors.[17]

[15] Category H of NACE Rev. 2. <http://ec.europa.eu/eurostat/documents/3859598/5902521/KS-RA-07-015-EN.PDF> accessed February 19, 2017.
[16] Category I of NACE Rev. 2. <http://ec.europa.eu/eurostat/documents/3859598/5902521/KS-RA-07-015-EN.PDF> accessed February 19, 2017.
[17] United Nations Office on Drugs and Crime, Business, Corruption and Crime in Bosnia and Herzegovina: The impact of bribery and other crime on private enterprise <https://www.unodc.org/documents/data-and-analysis/statistics/corruption/UNODC_BiH_Business_corruption_report_2013.pdf> accessed February 19, 2017.

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

Legal framework of criminal liability companies:

1. Criminal Code of B&H (Off. Gazette of B&H No. 3/03, 32/03, 37/03, 54/04, 32/07, 61/04, 30/05, 53/06, 55/06, 8/10, 47/14, 22/15, 40/15);
2. Criminal Code of FB&H (Off. Gazette of FH No. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14);
3. Criminal Code of RS (Off. Gazette of RS No. 73/03);
4. Criminal Code of BD (Off. Gazette of BD No. 33/13).

State level

Punishment for Legal Persons

The following types of punishment may be imposed upon the legal persons:

a. Fines;

b. Seizure of property;

c. Dissolution of the legal person.[18]

Fines for Legal Persons

a. Fines imposable on a legal person shall be no less than 5.000 KM and shall not exceed 5.000.000 KM.

b. In the event that, by perpetrating the criminal offence, the legal person has caused material damage to another party or the legal person has come into possession of an unlawful material gain, the scope of the imposed fine may be twice as much as the amount of this damage or benefit.[19]

[18] Criminal Code of B&H (Off. Gazette of B&H No. 3/03, 32/03, 37/03, 54/04, 32/07, 61/04, 30/05, 53/06, 55/06, 8/10, 47/14, 22/15, 40/15), Article 131.
[19] Ibid, Article 132.

Seizure of Property

The seizure of property may be imposed for criminal offences for which a punishment of imprisonment for a term of five years or more severe punishment is prescribed.[20]

Dissolution of the Legal Person

a. Dissolution of a legal person may be imposed in the case that its activities were entirely or partly being used for the purpose of perpetrating criminal offences.
b. Besides the dissolution of a legal person, the property seizure punishment may be imposed.
c. In addition to the dissolution of a legal person, the court shall propose the opening of a liquidation procedure.
d. Creditors may be paid out from the property of the legal person upon which the punishment of dissolution has been imposed.[21]

Meting out Punishment for Legal Persons

a. When meting out punishment for a legal person, in addition to the general rules of meting out punishments referred to in Article 48 (General Principles of Meting out Punishments) of this Code, the economic power of the legal person shall also be taken into account.
b. When meting out the fine for criminal offences for which, in addition to a fine also a property seizure punishment is imposed, the punishment may not exceed a half of the amount of the legal person's property. [22]

Imposing a Suspended Sentence to a Legal Person

a. The court may impose a suspended sentence on the legal person instead of a fine.
b. When imposing a suspended sentence the court may impose on the legal person a fine not exceeding 1.500.000 KM, but at the same time decide that the same shall not be executed

[20] Ibid, Article 133, paragraph 1.
[21] Ibid, Article 134.
[22] Ibid, Article 135.

unless the legal person becomes liable for other criminal offences within the period of time not shorter than one year or longer than five years.[23]

Violation of Equality in Performing Economic Activities

Whoever, by misusing his official or influential position or powers in the institutions of Bosnia and Herzegovina, restricts the free movement of people, goods, services or capital between the entities and among the entities and the Brčko District of Bosnia and Herzegovina, denies or restricts the right of a business enterprise or another legal person to engage in the trade and sale of goods and services on the territory of the other entity or Brčko District of Bosnia and Herzegovina, or puts a business enterprise or another legal person in an unequal position in relation to other organizations regarding the conditions for work or turnover of goods and services, or restricts free exchange of goods and services among the entities and Brčko District of Bosnia and Herzegovina, shall be punished by imprisonment for a term between six months and five years.[24]

Counterfeiting of Money

a. Whoever makes false money with an aim of bringing it into circulation as genuine, or whoever alters genuine money with an aim of bringing it into circulation, or whoever brings such counterfeit money into circulation, shall be punished by imprisonment for a term between one and ten years.
b. The punishment referred to in paragraph 1 of this Article shall be imposed on whoever procures counterfeit money with an aim of bringing it into circulation as genuine.
c. If there has been an upset in the economy of Bosnia and Herzegovina as a result of the criminal offence referred to in paragraphs 1 and 2 of this Article, the perpetrator shall be punished by imprisonment for a term not less than five years.

[23] Criminal Code of B&H (Off. Gazette of B&H No. 3/03, 32/03, 37/03, 54/04, 32/07, 61/04, 30/05, 53/06, 55/06, 8/10, 47/14, 22/15, 40/15), Article 136.
[24] Criminal Code of B&H (Off. Gazette of B&H No. 3/03, 32/03, 37/03, 54/04, 32/07, 61/04, 30/05, 53/06, 55/06, 8/10, 47/14, 22/15, 40/15), Article 204.

d. Whoever brings into circulation counterfeit money received by him as genuine, or who has knowledge of a counterfeit money being made or brought into circulation, and fails to report it, shall be punished by a fine or imprisonment for a term not exceeding one year.
e. Counterfeit money shall be forfeited.[25]

Counterfeiting of Securities

a. Whoever makes false securities issued pursuant to the regulation of Bosnia and Herzegovina with an aim of bringing them into circulation as genuine, or whoever alters such genuine securities with an aim of bringing them into circulation, or whoever brings such counterfeit securities into circulation, shall be punished by imprisonment for a term between one and ten years.
b. If there has been an upset in the economy of Bosnia and Herzegovina as a result of the criminal offence referred to in paragraph 1 of this Article, the perpetrator shall be punished by imprisonment for a term not less than five years.
c. Counterfeit securities shall be forfeited.[26]

Counterfeiting of Instruments of Value

a. Whoever makes false tax or mail stamps or other instruments of value issued pursuant to the regulation of Bosnia and Herzegovina, or whoever alters some of these genuine instruments of value with an aim to use them as genuine or to let another person use them, or whoever uses such counterfeit instruments of value as genuine or procures them with such an aim, shall be punished by a fine or imprisonment for a term not exceeding three years.
b. If the instruments of value referred to in paragraph 1 of this Article are of larger value, the perpetrator shall be punished by imprisonment for a term between six months and five years.

[25] Criminal Code of B&H (Off. Gazette of B&H No. 3/03, 32/03, 37/03, 54/04, 32/07, 61/04, 30/05, 53/06, 55/06, 8/10, 47/14, 22/15, 40/15), Article 205.
[26] Criminal Code of B&H (Off. Gazette of B&H No. 3/03, 32/03, 37/03, 54/04, 32/07, 61/04, 30/05, 53/06, 55/06, 8/10, 47/14, 22/15, 40/15), Article 206.

c. Whoever removes the cancelling stamp from an instrument of value referred to in paragraph 1 of this Article, or whoever in some other way, and for the purpose of repeated use, attempts to make these instruments of value appear as if they have never been used before, or whoever makes use of these used instruments of value or sells them as valid, shall be punished by a fine or imprisonment for a term not exceeding three years.
d. Counterfeit instruments of value shall be forfeited.[27]

Forgery of Trademarks, Measures and Weights

a. Whoever, with an aim to use as genuine, makes false trademarks used for the identification of domestic or foreign commodities, such as seals, stamps or hallmarks for branding gold, silver, livestock, wood or some other commodities, or with the same aim alters such genuine trademarks, or whoever uses false trademarks as genuine, when such an act endangers the common economic space of Bosnia and Herzegovina, shall be punished by imprisonment for a term between six months and five years.
b. The punishment referred to in paragraph 1 of this Article shall be imposed on whoever makes false measures or weights, endangering the common economic space of Bosnia and Herzegovina.
c. False trademarks, measures and weights shall be forfeited.[28]

Money Laundering

a. Whoever accepts, exchanges, keeps, disposes of, uses in commercial or other activity, otherwise conceals or tries to conceal money or property he knows was acquired through perpetration of criminal offence, when such a money or property is of larger value or when such an act endangers the common economic space of Bosnia and Herzegovina or has detrimental consequences to the operations or financing of institutions of Bosnia and

[27] Criminal Code of B&H (Off. Gazette of B&H No. 3/03, 32/03, 37/03, 54/04, 32/07, 61/04, 30/05, 53/06, 55/06, 8/10, 47/14, 22/15, 40/15), Article 207.
[28] Criminal Code of B&H (Off. Gazette of B&H No. 3/03, 32/03, 37/03, 54/04, 32/07, 61/04, 30/05, 53/06, 55/06, 8/10, 47/14, 22/15, 40/15), Article 208.

Herzegovina, shall be punished by imprisonment for a term between six months and five years.

b. If the money or property gain referred to in paragraphs 1 of this Article exceeds the amount of 50.000 KM, the perpetrator shall be punished by imprisonment for a term between one and ten years.

c. If the perpetrator, during the perpetration of the criminal offences referred to in paragraphs 1 and 2 of this Article, acted negligently with respect to the fact that the money or property gain has been acquired through perpetration of criminal offence, he shall be punished by a fine or imprisonment for a term not exceeding three years.

d. The money and property gain referred to in paragraph 1 through 3 shall be forfeited.[29]

Tax Evasion Article

a. Whoever evades payment of amounts required under the legislation of Bosnia and Herzegovina on taxes or social contributions by not submitting required information, or by submitting false information on acquired taxable income or 50 on other facts which may effect the determination of the existence or the amount of such obligation, and the obligation that is evaded exceeds the amount of 10.000 KM, shall be punished by a fine or imprisonment for a term not exceeding three years.

b. Whoever perpetrates the offence referred to in paragraph 1 of this Article and the evaded obligation exceeds the amount of 50.000 KM, shall be punished by imprisonment for a term between one and ten years.

c. Whoever perpetrates the offence referred to in paragraph 1 of this Article and the evaded obligation exceeds the amount of 200.000 KM, shall be punished by a term of imprisonment for a term not less than three years.[30]

[29] Criminal Code of B&H (Off. Gazette of B&H No. 3/03, 32/03, 37/03, 54/04, 32/07, 61/04, 30/05, 53/06, 55/06, 8/10, 47/14, 22/15, 40/15), Article 209.
[30] Criminal Code of B&H (Off. Gazette of B&H No. 3/03, 32/03, 37/03, 54/04, 32/07, 61/04, 30/05, 53/06, 55/06, 8/10, 47/14, 22/15, 40/15), Article 210.

Failure to Pay Taxes

A person who fails to pay tax obligations in accordance with a tax legislation of Bosnia and Herzegovina, shall be punished by a fine or imprisonment for a term not exceeding three years. [31]

Illicit Trade

a. Whoever, without authorization, sells, buys or exchanges items or goods whose distribution is forbidden or limited pursuant to the regulations of the institutions of Bosnia and Herzegovina or international law, and if, by such an act, some other criminal offence for which a more severe punishment is prescribed has not been perpetrated, shall be punished by imprisonment for a term between one and ten years.
b. Items and goods referred to in paragraph 1 of this Article shall be forfeited. [32]

Illicit Manufacturing

a. Whoever manufactures or processes items or goods whose production is forbidden pursuant to the regulations made by the institutions of Bosnia and Herzegovina or international law, if by such an act some other criminal offence for which a more severe punishment is prescribed has not been perpetrated, shall be punished by a fine or imprisonment for a term not exceeding one year.
b. Items and goods referred to in paragraph 1 of this Article and means for its' manufacturing or processing shall be forfeited.[33]

Entity level

Criminal Code of RS[34], Criminal Cod of FB&H[35] and Criminal Code of BD[36] contains some offences such as monopolization, fraud on creditors, causing bankruptcy by careless management,

[31] Ibid., Article 211.
[32] Ibid., Article 212.
[33] Ibid., Article 213.
[34] Article 257-293.
[35] Article 242-272.
[36] Article 235-266.

business mismanagement, corporate fraud, making a prejudicial contract, unlawful accepting of gifts, counterfeiting of securities, counterfeiting or destruction of business or trade books or documents, breach of innovators rights, deceiving buyers, tax evasion etc.

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

General Background

Corporate liability, in general, determines the responsibility of a corporation as a legal person for criminal action, or the failure to act in some cases, committed by the company's employees.

The concept of corporate liability is defined under various models of a country's judicial system and laws. It can be determined in terms of whether the criminal offenses were committed by management of the company or the employees, and whether the perpetrator had a directing will of mind.

International documents which prescribe corporate liability are as follows: the United Nations Convention against Transnational Organized Crime and the Protocols Thereto (2000), the Convention on the Protection of the Environment through Criminal Law (Strasbourg, 1998), Criminal Law Convention on Corruption (1999) and the Convention on Cybercrime (2001).

It is also important to mention the Council of Europe Recommendations R (96) 8 of 5 September 1996 on Crime Policy in Europe in a Time of Change and the Council of Europe Recommendation (88) 18 on the Corporate Liability for Criminal Offenses. This recommendation applies to companies, private or public, who have a legal entity and their economic activities. The recommendation prescribes that companies should be responsible for crimes committed during their operation. Establishing corporate liability does not relieve the individuals involved in the perpetration of the crime. Special attention was dedicated to persons who performed management

functions related to responsibility. The implementation of corporate liability should prevent future crimes and damages suffered by the victims of the crime during companies operations.

National legislation

Upon entry into force of the Criminal Code of Bosnia and Herzegovina[37], followed by the entity level criminal codes, corporate liability for criminal offenses was introduced. Through the criminal legislation, B-H was thus classified into a group consisting of a significant number of countries whose laws (criminal or special laws on corporate liability for criminal offenses) defined corporate liability for criminal offenses in accordance with a number of documents of the Council of Europe, European Union, Organization for Economic Cooperation and Development and the United Nations, which require from or recommend to member states to introduce corporate liability for criminal offenses.

Article 122 of the Criminal Code of B&H regulates the, criminal liability of legal persons, with the exception of B-H, Federation of Bosnia and Herzegovina, Republika Srpska, Brčko District of Bosnia and Herzegovina, cantons, cities, municipalities and local communities, for criminal offences perpetrated by the perpetrator in the name of, for account of or for the benefit of the legal person.

Basis of corporate liability

Regarding the basis of corporate liability, Article 124 of the Criminal Code of B&H defines certain conditions. For a criminal offence perpetrated in the name of, for account of or for the benefit of a legal person, the legal person is liable:

a. When the purpose of the committed criminal offence is arising from the conclusion, order or permission of its managerial or supervisory bodies; or

[37]Official Gazette of B&H, No. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10 and 47/14.

b. When its managerial or supervisory bodies have influenced the perpetrator or enabled him/her to perpetrate the criminal offence; or
c. When a legal person disposes of illegally obtained property gain or uses objects acquired in the criminal offence; or
d. When its managerial or supervisory bodies failed to carry out due supervision over the legality of work of the employees.

As stated above, according to paragraph b) of Article 124 of the Criminal Code of B&H, a legal entity will be responsible for a criminal offence committed in the name of the offender, for the account or for the benefit of a legal person, if its managerial or supervisory bodies have influenced the perpetrator or enabled him/her to commit a criminal offense.

With the conditions referred to in Article 124 (Basis of Corporate Liability), a legal person is also liable for a criminal offence when the perpetrator is not guilty for the perpetrated criminal offence. Liability of the legal person does not exclude culpability of physical or responsible persons for the perpetrated criminal offence. For criminal offences perpetrated out of negligence, a legal person may be liable under the conditions referred to in Article 124, item d) and in that case the legal person may be punished less severely. When in the legal person except from the perpetrator there is no other person or body that could direct or supervise the perpetrator, the legal person is liable for the criminal offence within the limits of the perpetrator's liability.

Concerning a legal person under bankruptcy, such legal person is liable for a criminal offense regardless of whether a criminal offense was committed prior to the start of the bankruptcy proceedings or in the meantime; however, such legal person may not be punished, but a security measure of forfeiture or the confiscation of the proceeds of crime may be imposed. In case a legal person is terminated prior to the final completion of criminal proceedings, and in the criminal proceedings the legal person is found to be liable, penalties and other criminal sanctions will be imposed on the legal successor of the legal person. A security measure of forfeiture or the confiscation of material gain may be imposed on such successor.

With regard to corporate liability for an attempt, if the perpetrator commences the execution of a planned criminal offence, but does not complete such offence, under the terms of Article 124 (Basis of Liability of a Legal Person), the legal person is liable where the law prescribes that the attempt is punishable and will be punished equally as if it were for the completed criminal offence but may nevertheless be punished less severely. If the managerial or supervisory authorities of the legal person have prevented the perpetrator from completing the commenced criminal offence, the legal person may be released from punishment.

Considering the limits of liability of a legal person, Article 164 of the Criminal Code of B&H stipulates the following:

- With the conditions referred to in Article 124 a legal person is also liable for a criminal offence when the perpetrator is not guilty for the perpetrated criminal offence.
- Liability of the legal person will not exclude culpability of physical or responsible persons for the perpetrated criminal offence.
- For criminal offences perpetrated out of negligence, a legal person may be liable under the conditions referred to in Article 124, item d) and in that case the legal person may be punished less severely.
- When in the legal person except from the perpetrator there is no other person or body that could direct or supervise the perpetrator, the legal person is liable for the criminal offence within the limits of the perpetrator's liability.

The Criminal Code of B&H also defines the general reasoning for less severe punishment of legal person or release from punishment. Article 130 prescribes:

- A legal person, whose managerial or supervisory authority has willingly reported on the perpetrator upon a criminal offence perpetrated, may be punished less severely.
- A legal person whose managerial or supervisory authority, following the perpetration of a criminal offence, decides to return the illegally obtained material gain or to remove the caused harmful effects or to communicate the information concerning the grounds for holding the other legal persons responsible, may be released from punishment.

According to the aforementioned Code, the following types of punishment may be imposed upon the legal persons: fines, seizure of property or dissolution of the legal person.

Consequences

It is necessary to mention the legal consequences incident to conviction for a legal person, which are as follows: (i) bar on work based on a permit, authorization or concession issued by the authorities of foreign countries, and (ii) bar on work based on a permit, authorization or concession issued by the institutions of Bosnia and Herzegovina.

Legal consequences incident to conviction for a legal person may take effect even when a fine has been imposed on a legal person for the perpetration of a criminal offence.

The execution of a sentence imposed on the legal person will become time-barred when the following periods from the date of the entry into force of the judgment whereby such punishment has been imposed have elapsed:

a. Three years for execution of a fine;
b. Five years for execution of the property seizure punishment and of the punishment of dissolution of legal person.[38]

Considering all the aforementioned provisions related to corporate liability at national level (B-H), there are identical provisions in the Criminal Code of the Federation B&H[39], the Criminal Code of the Republika Srpska [40] and the Criminal Code of the Brčko District of Bosnia and Herzegovina[41].

38 Criminal Code of B&H, Article 14.
39Official Gazette of FB&H, No. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14. i 46/16.
40Official Gazette of RS, No. 49/2003, 108/2004, 37/2006, 70/2006, 73/2010, 1/2012 and 67/2013.
41Official Gazette of BD, No. 6/05, 21/10 and 9/13.

The most common cases of liability of legal persons are cases of tax evasion, the crime of falsifying business records or documents, and money laundering offenses.

Considering that B&H society is in the process of transition, penal policy must play a significant role in establishing effective protection of society from illegal activities of legal entities. Success cannot be achieved with just fine punishment, and a significant part in the penalties must be seizure of corporation assets and termination of a legal entity.

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

The procedure for international legal assistance, as well as the procedure for extradition of suspects or accused and convicted persons has been regulated in Chapter XXX and Chapter XXXI of the Criminal Procedure Code until the adoption of the Act on Mutual Legal Assistance in Criminal Matters, which was adopted on 15th June, 2009 (Official Gazette of B&H, No. 53/09). The provisions of the Criminal Procedure Code of the entities and BD, relating to the procedure for mutual assistance, the entry into force of the Act on Mutual Legal Assistance in Criminal Matters will be harmonized with the provisions of this law within six months from the date of entry into force.[42]

Extradition of suspects or accused or convicted foreign nationals from Bosnia and Herzegovina to another country is carried out according to the provisions of the Mutual Legal Assistance in Criminal Matters[43], unless an international agreement provides otherwise.

[42]Ismet Šuškić, Mutual Legal Assistance in Criminal Matters.
[43](Official Gazette No. 53/09 and 58/13).

The extradition of foreigners to another country is allowed for prosecution or execution for a final prison sentence only for offenses punishable under the laws of Bosnia and Herzegovina as well as the laws of the requesting State.

The final decision on extradition adopted by the Ministry of Justice of Bosnia and Herzegovina Department for Mutual Legal Assistance and Cooperation is based on the principle of opportunity, regardless of the final decision of the court.

According to Article 9 of the aforementioned Law the relevant national judicial authority may refuse the request for mutual legal assistance:

- if the execution of the request would affect the legal order of Bosnia and Herzegovina or its sovereignty or security;
- if the request concerns an offense which is considered to be a political offense or an offense connected with a political offense;
- if the request concerns a military criminal offense;
- if it is for the same offense the person to whom the request relates from substantive reasons acquitted or the proceedings against him suspended, or if released punishment, or if the sanction was executed or may not be perpetrate to the state law in which the judgment is rendered;
- if it is against the person in Bosnia and Herzegovina to whom criminal proceedings for the same criminal offense applies unless the execution of the request might lead to a decision to release this person to freedom;
- if the criminal prosecution or enforcement of sanctions under national law would be barred by the statute of limitation.

The same Law in Article 10 determines the exceptions for denuding mutual legal assistance in criminal matters as following:

- The crimes against humanity and other goods protected by international law can not be a basis to deny the request for mutual legal assistance within the meaning of Article 9, sections b) and c)
- Request for mutual legal assistance shall not be rejected just because it relates to the work that is under domestic legislation considered fiscal offenses.

Considering the preconditions for extradition the Article 34 prescribes as following:

- the person whose extradition is requested is not a national of Bosnia and Herzegovina;
- the person whose extradition is requested does not enjoy asylum in Bosnia and Herzegovina, that is, that the asylum seeking process is not underway in Bosnia and Herzegovina at the moment the extradition request is filed; the offence for which the extradition is requested was not committed in the territory of Bosnia and Herzegovina, against it or against a national of Bosnia and Herzegovina;
- the offence for which the extradition is requested is a criminal offence pursuant to both the criminal legislation of Bosnia and Herzegovina and the law of the State in which it was committed;
- the offence for which the extradition is requested is not a criminal offence of political or military nature;
- pursuant to national law, a statute of limitations for criminal prosecution or statute of limitations for the enforcement of the punishment has not taken effect prior to ordering the alien into custody or prior to his questioning as a suspect or accused; an alien whose extradition is requested had not already been sentenced for the same offence by the national court, or he was not finally acquitted in respect of that same offence by the national court, unless conditions are met for a retrial, or if the criminal proceedings have not been initiated in Bosnia and Herzegovina against the alien for the same offence and, in case the proceedings were initiated due to an offence against a national of Bosnia and Herzegovina, security must be deposited for the realization of property claim by the injured party;
- the identity of the person whose extradition is requested has been established;

- there is sufficient evidence for a reasonable doubt that the alien whose extradition is requested has committed the particular criminal offence and that there exists a final conviction, and
- the extradition of the alien is not requested for the following purposes: criminal prosecution or punishment on the grounds of the person's race, gender, national or ethnic origin, religious or political belief, as well as that the extradition is not requested for a criminal offence which carries the death penalty pursuant to the law of the requesting State, unless the requesting State provides guarantees that the death penalty would not be imposed or carried out.

Extradition shall not be allowed if the person sought is a national of Bosnia and Herzegovina. Where there is bilateral Agreement that regulates this issue, extradition might be approved. Competent authorities for enforcement of the decision on extradition are Bureau for Cooperation with Interpol (organization within the Ministry of Security of Bosnia and Herzegovina) and Border Police of Bosnia and Herzegovina. Bureau for Cooperation with Interpol shall agree with the Interpol of the requesting state on the place and time for surrender of the defendant or the convicted person. The surrender of the extradite is performed by Border police of Bosnia and Herzegovina, with assistance of the Bureau. Surrender shall be done within period of 30 days from the date when decision on extradition is made. This deadline may be extended up to 15 days on the express and justified request of the requesting state. If the requesting state, without justified reason, does not take over the extradite, within five days from the agreed date of surrender, the extradite will be released.[44]

[44] *Ibid*

5. Please state and explain any:

5.1 Internal reporting processes (i.e. whistleblowing);

A group of people in the company has its work habits, relationships in business, understanding and attitude toward internal control. If the management is committed to implementing the fundamental legality and value systems that are based on correct and fair relations in all spheres of business then create the right conditions for the implementation of the system of control in the company at a level that will assure that auditors are starting check prerequisites for proper business and financial reporting. The attitude of the management towards internal control will be followed by all the remaining bodies and individuals in the company. A checking the functioning of the system of internal controls is made from highest to lowest, the operational level of control. This means checking brought to bear verification responsibilities, control authorities, interviews with staff and the like. Based on testing various fields detected by the control points in the scheme of sensitive sites and checks the risk to jobs, then tested business confidentiality and considers changes and functioning of the internal accounting as the most important control system of the company. In the company in which the management does not give a true status to internal control the personel does not have a different attitude and approach. If employees of the company have the feeling that internal control is not important for management, it will not be important. (Whistleblowing)

Activities, policies and procedures to maintain the ratio of the highest management structure, directors and owners of companies related to the control and their importance. Determining and detecting of the fraud is a long and complex process that demands plans for the detection of the fraud, where the activity takes place in two directions. First, especially formed work teams to detect fermented check the functioning of the internal control system and attention directed to critical points susceptibility to fraud. Second, the direction of activity is focused on the involvement of professional experts in fraud investigation, forensic accountants and auditors, legal experts, criminal inspectors and other specialists who will contribute to faster detection of fraud and at the same time discourage others to make new scams. (Internal and External)

Law on whistleblower protection in the Institutions of B&H

In December 2013, legislation to protect whistleblowers was adopted by the B&H Parliament. The Law on the Protection of Whistle-blowers entered into force in 2014 making B&H one of the first European countries to pass such law. The law protects individuals employed in state-level institutions who in good faith report corruption at work. Bosnia and Herzegovina passed this law following a two-year public and political campaign. The effort engaged numerous civil society organizations, parliamentarians from a range of political parties and government officials. This multi-stakeholder initiative was seen as unique in Bosnia and Herzegovina. The Law on protection of whistleblowers in the Institutions of Bosnia and Herzegovina regulates the status of persons reporting acts of corruption in the institutions of Bosnia and Herzegovina and legal persons established by the institutions of Bosnia and Herzegovina, the reporting procedure, the obligations of the institution in regard to reporting acts of corruption, procedure for protection of the whistleblowers, and shall lay down sanctions for violation of provisions of the Law.[45]

Law on the Agency for Preventing Corruption and Coordinating the Fight against Corruption

Bosnia and Herzegovina met the obligation referred tin the UN Convention against Corruption (UNCAC) and established a body at the level of Bosnia and Herzegovina (state level). Article 8 Paragraph 4 of the Law on the Agency for Preventing Corruption and Coordinating the Fight against Corruption (Anti-Corruption Principles) stipulates the principle of protection for 'corruption reporting'. [46] Person may not be punished and may not otherwise suffer consequences due to reporting, in good faith, what the person considers a corruptive act or irregularity in the prescribed procedures. If the person reporting possible corruptive behaviour or irregular actions in public service performance, suffers consequences, that person shall have the right to damages determined by a separate procedure of the competent entity and the Agency shall pass a separate regulation thereon. [47] This regulation represents the first legal definition of the whistleblowing

[45] Law on Whistleblower protection in the Institutions of Bosnia and Herzegovina, Article 1.
[46] Whistleblowing Protection - CEE org, http://www.whistleblowing-cee.org/countries/bosnia-and-herzegovina/research/8, accessed March 1, 2017.
[46] Ibid
[47] Whistleblowing Protection - CEE org, http://www.whistleblowing-cee.org/countries/bosnia-and-herzegovina/research/8, accessed March 1, 2017.

institute in Bosnia and Herzegovina, as it defines whistleblowing as a legal instrument, on the one hand, and provides protection to persons that make information public, on the other hand. The Law also stipulates the right to compensation of damages for the person who, upon reporting corruptive behaviour, suffers consequences.[48] The most important law relevant to the fight against corruption is the **Law on Criminal Procedure of Bosnia and Herzegovina**, which entered into force in 2003 (along with the harmonized laws on criminal procedure of the entities and the Brčko District). Procedural institutes prescribed by this Law, such as special investigations, the possibility of concluding a plea agreement, direct and cross-examination of witnesses during the trial, all of which present modern instruments which allow the efficient fight against corruption. **The Criminal Code of Bosnia and Herzegovina** (as well as Criminal Codes of the entities of Bosnia and Herzegovina and the Criminal Code of Brčko District BiH) stipulates the criminal offence of False Reporting – It foresees that a person who reports another person knowing that that person did not commit a criminal offence shall be held responsible (the so called direct reporting or reporting in a narrower sense) or a person who forges evidence or in some other way causes the initiation of the criminal proceeding defined in the criminal code against a person whom he knows not to be the perpetrators (the so called indirect reporting or real reporting). The Criminal Code of Bosnia and Herzegovina stipulates prison sentences of six months to five years for these criminal offences.[49] Criminal Procedure Code and Civil Procedure Code stipulate that every court decision must contain an explanation. In the explanation of the verdict, the court must explain the allegations of the parties, evidence and evaluation of the evidence, as well as the regulations on the basis of which the court reached the verdict. The content of the explanation depends on the factual and legal complexity as well as on the extent of the case.[50]

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[48] Whistleblowing Protection - CEE org, http://www.whistleblowing-cee.org/countries/bosnia-and-herzegovina/research/8, accessed March, 1 2017.
[49] Criminal Code of B&H www.sudbih.gov.ba/files/docs/.../en/Criminal_Code_of_BH_-_Consolidated_text.pdf.
[50] Whistleblowing Protection - CEE org, http://www.whistleblowing-cee.org/countries/bosnia-and-herzegovina/research/8, accessed March,1 2017.

5.2 External reporting requirements (i.e. to markets and regulators), that may arise on the discovery of a possible offence.

Law on auditing Institutions of B&H

This Law regulates audit of institutions of Bosnia and Herzegovina - goals, duties, organization, management and competencies of auditing bodies. The Law defines the types of companies that are subject to mandatory audit.Audit standards from several sources to explain the responsibilities for errors, fraud and illegal actions. Provisions of the law apply to all business companies, including insurance, microcredit, leasing, investment funds, companies managing investment funds, broker-dealers, stock exchanges and banks, other financial organizations, cooperatives, among others. All enterprises need to prepare and file their financial statements. The Ministry of Finance is responsible for supervising bookkeeping and accounting systems and ensuring that legal entities comply with the provisions of the Law. 2009. B&H has substantially aligned its accounting and auditing laws with the EU acquis communautaire. B&H has agreed to implement the European Union (EU) corpus of laws (also known as the acquis communautaire) after signing a Stabilization and Association Agreement with the European Union (SAA) in 2008.

Article 3 - to whom does the external audit

(The provisions of this Act shall apply to all companies, including insurance companies, micro-credit companies, leasing companies, investment funds, management companies of investment funds, broker-dealer companies, stock exchanges and banks and other financial organizations, cooperatives, profit and non-profit legal entities whose headquarters registrered in the Federation. The provisions of this law also apply to legal persons and other forms of organization which is a legal entity based in the Federation established abroad, if the regulations of these countries is not the obligation of book-keeping and preparation of financial reports. Theprovisions of this Act apply to the business units and drives corporate headquarters outside the Federation, if these business units and plants are considered to taxpayers in the Federation. the provisions of this law also apply to the users of the budget of the Federation, cantonal budgets, budget cities and municipalities and extra budgetary funds).

6. Who are the enforcement authorities for these offences?

The provisions of the Chapter XIV. of the Criminal Code of Bosnia and Herzegovina on the liability of legal persons for criminal offenses shall apply, with the exclusion set out in the Article 122, paragraph 1 of the Code , only to those social formations that are considered as legal persons according to the meaning of the term specified in the Article 1, paragraph 13 of the Criminal Code of Bosnia and Herzegovina.

According to the Article 1, paragraph 13 of the Code, a legal person, in terms of the Code is:

- Bosnia and Herzegovina,
- Federation of Bosnia and Herzegovina,
- Republika Srpska,
- Brčko District of Bosnia and Herzegovina,
- canton,
- city,
- municipality,
- local community,
- any organizational form of the business enterprise,
- all forms of association of business enterprise,
- institutions, crediting and other banking,
- institutions for insurance of property and persons,
- other financial institutions,
- fund,
- political organizations,
- associations of citizens,
- other associations that may acquire funds and use them in the same way as any other.

The following legal persons may be liable for criminal offences:

- any organizational form of business enterprise,
- all forms of associations of business enterprise,
- institutions,
- crediting and other banking institutions,
- property and personal insurance institutions,
- other financial institutions,
- funds,
- political organizations,
- associations of citizens,
- other associations that may acquire funds and utilize them in the same way as any other institution or agency that acquires and utilizes funds and that are legally recognized as legal persons.

The governing or the supervisory authorities are bodies authorized for presentation of a legal person, for decisions making on behalf of a legal person and to exercise control or supervision within the legal person. In relation to its composition, they can be individually or as a collective. The bodies authorized to represent a legal person by the decision making on behalf of a legal person and for exercising control or supervision within a legal person have been stipulated by law or other regulations, including regulations of the legal person. However, the governing bodies as referred to in this law provision are persons or groups of persons within the legal person who actually conduct the business of a legal person and direct its actions. Therefore, the responsibility of a legal person for a criminal act can be based on the actions or omission of the governing or supervisory bodies. In the case of charges or advertising of a legal person responsible for the criminal offence of the perpetrator on the basis of the Article 124, item a) of the Criminal Code of Bosnia and Herzegovina, the factual basis for the indictment and the verdict must contain facts and circumstances relating to the determination of the governing or supervisory body of the legal person who has made one of the decisions, in that the legal provision mentioned, as well as the facts and circumstances that reflect the content and meaning of this decision, and its connection

with the committed criminal offense. The obligation for surveillance of the legality of employer duty implies an obligation of governing or supervisory bodies as well to take measures the monitoring failures to eliminate. Therefore, this requirement regarding the liability of legal persons for the criminal offence may be fulfilled and when the governing bodies had not taken adequate measures to eliminate the illegality observed by the taking and control of measures[51].

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

Criminal Procedure Code contains special provisions on criminal proceedings against legal persons, so that these provisions bring the specifics of which are the result of circumstances that as the respondent appears legal and not individuals. Against legal persons procedure is possible when it is against the perpetrator of the crime of criminal proceedings cannot be instituted or conducted under the statutory reasons or if it is against the natural person as the perpetrator, the process has already been conducted. Although the criminal procedure provided for the principle of legality of criminal prosecution, however, the specific provision in proceedings against legal persons protected by applying the principle of expediency (opportunity) to prosecution. The prosecutor may decide against legal persons not to bring criminal proceedings when the circumstances indicate that it would not be purposeful, because: contribution to the legal person committing a crime was negligible, or legal person has no assets, or has so little property that would not be sufficient to cover the costs of the proceedings, or if against legal entities initiated bankruptcy proceedings or when the perpetrator sole owner of a legal person against whom criminal proceedings would be initiated otherwise. The accused legal person cannot realize the process capability. The legal entity must have its representative, who is authorized to undertake all actions for which, under the law of the suspect or the accused. The legal representative of a legal entity shall take action procedure. Representative of the legal person is a person who is authorized to represent the legal person under the law, the act of the state body, under statute, articles of

51 Criminal Procedure Code of Bosnia Herzegovina www.ohr.int/ohr-dept/legal/oth-legist/doc/criminal-procedure-code-of-bih.doc.

incorporation or other act of legal persons. The accused legal person may have only one representative, whose identity and authority to represent the Court shall each time verify. Representative may, in writing or orally in the court, authorized to represent another person. With regard to substantive criminal law regulates the issue of criminal liability of legal persons in the event of its shutdown before the court decision, the procedural provisions provided that the representative appointed by the court in the case of a legal person before the final completion. Although the substantive provisions of the foreseen criminal responsibility by a legal person for a criminal offense committed in the territory of B&H, against its citizens and domestic legal entities, however, procedural provisions do not contain a decision on who is the representative of the accused in criminal proceedings by a legal person? In other legal systems representative of the foreign legal person is the one who leads thereof. The criminal procedure provide for exemption of its representative in terms of: that the accused legal person cannot be represented by a person who has been called as a witness, or is a person against whom the proceedings for the same criminal offense, unless it is the only member of the legal person. With accused legal person may have a defense counsel, with the conflict of interest suspected or accused persons and natural persons indicted legal person, (they) cannot have a common defense counsel. The law provides for mandatory and optional components of the indictment: Name / memorandum / under which the legal person acts in legal case, seat of a legal person, provided that the conflict of interest suspected or accused persons and natural persons indicted legal person, (they) cannot have a common defense counsel. Provides for mandatory and optional components of the indictment: Name / memorandum / under which the legal person acts in legal case, seat of a legal person, description of the crime and legal basis for the liability of legal persons and judgment: and personal data representative who participated in trial, and the operative part of the judgment and more: name under which the legal person acts in legal dealings and seat of a legal person, and legislation, under which the legal person is charged with a criminal offense or, the basis of which the guilty. or: acquitted of the charge, after which the charges. The legislative framework of the proceedings against legal persons are established, also, and: rules that apply during the examination of the defendant (as individuals) and, after completion of the evidence, in the context of closing arguments at the trial. On trial are: heard first accused, and then representative of the legal person. Upon completion of the evidentiary proceedings and closing arguments, the prosecutor and the victim, the judge or the presiding judge gives the word: counsel,

then representative of the legal person, and counsel for the accused and at the end of the accused, noting that before the accused final word belongs to his counsel. To ensure the execution of the sentence or measures that may be imposed in the criminal proceedings against the accused legal persons, confiscation of property or property used in the motion of the prosecutor, the court may order temporary security measures / security against the accused legal person. In terms of execution of these measures consistently apply the provisions of the law that provides a property claim. If there is a justified fear that they will: within an indicted legal person be repeated crime and it would for him be a responsible legal person or there is a threat that they will commit new work, the Court may in the same procedure, except the already mentioned measures, the legal person: to carry out one or more activities at certain times. When is against legal persons subject to criminal proceedings, the court may, on motion of the prosecutor or ex officio, forbid status changes in the legal entity that would result in the deletion of the legal person from the register. The decision on this ban is registered in the court register. When is against legal persons subject to criminal proceedings, the court may, on motion of the prosecutor or ex officio, forbid status changes in the legal entity that would result in the deletion of the legal person from the register. The decision on this ban is registered in the court register. When is against legal persons subject to criminal proceedings, the court may, on motion of the prosecutor or ex officio, forbid status changes in the legal entity that would result in the deletion of the legal person from the register. The decision on this ban is registered in the court register.

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self-incrimination)?

The focus of the reform of the criminal procedure law in Bosnia and Herzegovina was in the area of preliminary proceedings and the proceedings on remedies. The need for systemic reform of national criminal procedural law, especially criminal proceedings resulted from several facts. First of all, Bosnia and Herzegovina, according to their social and governmental regulation of complex state in which there are still four levels of legislative, executive and judicial branches. From this is derived the fact that a big company's liabilities in accordance with such constitutional arrangement

and adopt appropriate principles. When it comes to criminal procedure legislation, Bosnia and Herzegovina as the highest level of government has its own Code of Criminal Procedure.

Furthermore, the transition process in the country went inevitably led to radical changes in its legal system as well as in penal legislation which, among other things, led to the structurally new criminal proceedings in which the stage of preliminary proceedings got significant place in relation to the main stage debate. As an important facilitator for reforms were taken and international human rights law, in particular the case law of the European Court of Human Rights (ECHR), Council of Europe resolutions and recommendations of other international organizations whose contribution was very useful but is produced and the inevitable acceptance of certain legal solutions from completely different legal cultures as reflected in the coherence and consistency of the fundamental criminal law, particularly the law on criminal procedure of Bosnia and Herzegovina. In addition, it was necessary to carry out the rationalization of the criminal justice system in B&H, but also to provide the higher quality, which is done by simplifying common forms of criminal procedure, more frequent implementation of the abbreviated form of the procedure and facilitating consensual resolution of criminal cases. As a country that aspires to join the rapid community of sovereign European states, the final aim of legislative reform in B&H was the complete harmonization of domestic criminal legislation with international human rights law as well as with new, modern tendencies in criminal law that have long since taken root in the European Union. The legislator has in fact paid attention to long-standing legal tradition in this area that is not in these reforms is not betrayed.

These were the main objectives of the reform of criminal legislation in Bosnia and Herzegovina, noting that it is not yet complete. Modern criminal procedural legislation can be divided into the right common law and the right to civil law or European civil law. What else is different and based on the model of the criminal proceedings and in particular the structure of the procedural rules

governing criminal procedure.[52] According to the model of criminal procedure are different: adversarial, inquisitorial and mixed European-continental model of criminal proceedings.[53]

Bosnia and Herzegovina is one of the few European countries that have recently adopted their new, systemic procedural laws which is in a different style furnishings criminal proceedings. According to these procedural acts, the model of the criminal proceedings in B&H is mixed, adversarial inquisitorial-with some features that make it a special model of mixed type of criminal proceedings. The basis of the current model of the criminal proceedings makes civil law mixed type and Anglo-American law adversarial type. Criminal proceedings in Bosnia and Herzegovina is, therefore, a compromise between these two types, which means that there is not a pure adversarial system is not a pure mixed system, but the acceptance of certain elements of the adversarial and inquisitorial models such legal cultures merged into one unified whole of.

When we talk about the proceedings against the legal person he has a certain flow. We can distinguish two stages of the first instance procedure:

- first stage: the process of detection, investigation and charges;
- second stage: the main proceedings. In the main proceedings are: the preparation of the trial, the trial and verdict.

The investigation:

- the investigation was carried out along the natural or legal person;
- it should reach the level of suspicion that could raise an indictment and submitted to the competent court for confirmation.

[52] D. KRAPAC: Starting points for reform of the criminal proceedings in the Republic of Macedonia.
[53] V. BAYER: Criminal Procedural Law.

The provision of the unity of the procedure is applied in the investigation stage, and the law does not lay down specific rules for the investigation of a legal entity. This means that the applicable general provisions that apply to a natural person. This refers to the obligation of the prosecutor that in parallel and at the same time undertaking all activities and actions in order to collect evidence and the legal entity. Most often these are the same evidence relating to a natural person (for derivative liability), but sometimes they can also be necessary to collect evidence for a legal entity (when it will not take action against a natural person). In addition to this evidence, it is necessary to gather the evidence that confirm the link between the act of commission of a natural person and legal entity. This can be a sensitive issue, sometimes fraught with various difficulties, although in most cases, this connection will be apparent.

This is because our area most companies, as well as the most common perpetrators, simple organizational and ownership structure.

In order to effectively implement the investigation, it is necessary (among other things):

- necessarily along with evidence for a person to collect all the evidence against the legal entity (especially for interconnectivity);
- timely exempt all physical evidence that can confirm the above link (sometimes this is not evidence that are necessary for the determination of guilt of the person);
- implement an integrated investigation (which includes the financial aspects of the crime, security of property, and in particular blocking bank accounts);
- to work on these cases make the specialization of the prosecution and provide specially trained investigators police;
- provide ongoing training of certain persons to work on these cases;
- properly assess the need, timing and extent of measures of ensuring and put the proposal for it;
- the exclusion of evidence and proposal of ensuring take into account the necessary extent of such actions and measures, (must be reduced to the necessary volume) not to unnecessarily endangers the performance of the legal entity (significantly due to the

occurrence of unnecessary damage, compensate later with an acquittal or because job loss of employees and taxes and fees).

The aim of the procedure is to be undertaking, statutory action process subjects a decision of the competent court on the crime, the offender accountability and sanction; This goal is achieved by following his general and special rules; Criminal offenses and sanctions prescribed by the Criminal Code; The entity shall apply its general but also specifically prescribed rules Procedural entities can be divided into two groups: a) the main and b) secondary.

The main subjects: Holders of the main functions of criminal procedure who have a direct interest in the realization of criminal task are the main subjects. These include: a) authorized prosecutor (feature charges); b) charged person or legal person (defense functions) and c) the court (trial function). The prosecutor and the accused person and legal entity are criminal law parties. The secondary or auxiliary entities: Secondary or additional criminal procedural subjects have only a secondary or indirect interest in clarifying criminal matters. They are holders of secondary or ancillary function of criminal procedure, and are also called criminal procedural participants. The criminal process participants: a) defense lawyers, b) representatives of legal entities, c) the legal representatives, d) witnesses, e) experts, professionals, interpreters, f) damaged and proxies.

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

Processing of personal data in our country is governed primarily by the Law on the protection on personal data which was passed in 2005. The purpose of this Law is to secure in the territory of Bosnia and Herzegovina for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to the processing of personal data relating to him. The Personal Data Protection Agency in Bosnia and Herzegovina was established by this Law and its responsibility, organization and governance were defined.

This Law shall apply to personal data that are processed by all public authorities, natural and legal persons in Bosnia and Herzegovina, except the information which are selected and processed by Intelligence and Security Agency of Bosnia and Herzegovina. The Law shall not apply to personal data being processed by natural persons exclusively for personal needs. The law defines the concept of personal data. Personal data shall be understood to mean any information relating to an identified or identifiable natural person. It will not be considered that a person can be identified if the identification needs an unreasonable amount of time, resources, and human labour. For example, the personal data include: name and surname, place of residence, date of birth, identification number, salary information, bank accounts, the number of identification documents, such as the number of identity cards, passports and similar. The Law also defines the term "special categories of data" for which the higher level of protection is provided and "data collection". Special categories of data shall be understood to mean any personal data revealing:

a. racial origin, nationality, national or ethnic origin, political opinion or party affiliation, trade union affiliation, religious, philosophical or other belief, health, genetic code, sexual life;
b. criminal conviction, and
c. biometric data.

The processing of personal data, which means any act of such data such as collection, use, modification, disclosure or destruction of data, must be done in accordance with the principles stipulated in Article 4 of this Act. First of all, the processing must be carried out fairly and lawfully. For example, laws on criminal procedure in Bosnia and Herzegovina represent a legal basis for the processing of personal data for the purposes of criminal prosecution of persons. However, according to the regulations and opinion of the Agency for Protection of Personal Data, the same laws do not constitute a basis for the publication of the indictments or verdicts on the websites of the judicial institutions, and that such notice would be contrary to the principle of fairness and legality. Also, this principle will not be satisfied if the person who processes personal data lists projects, strategies or similar documents as a legal basis for processing.

In addition to the law, data processing can be done with the consent of the holder of the data, i.e. the person to whom the data relate. After harmonization of the Law on Personal Data Protection

with the Directive 95 / 46EC, which provides that consent must be unambiguous, written consent is required only in the case of special categories of personal data, while approval for the treatment of other personal data can be given in a different way. Consent can be withdrawn at any time; unless the data subject and the controller were not expressly agreed to the withdrawal of consent is not possible. Article 6 of the Act states the cases in which the consent of the data holder is not required.

When processing personal data, the purpose of processing has to be taken into account. A person who processes personal data (i.e., controller) must always determine the purpose of processing, and the processing has to be carried out to the extent, scope and time period that is necessary for its fulfilment. After this time period expires, the collected data can only be used for statistical, archival and scientific purposes, providing that personal data must be anonymised, i.e. put in such a form on the basis of which they can not perform the identification of persons. As a rule, personal data collected for different purposes can not be consolidated or combined.

The accuracy and security of data and the form in which the personal data are stored is also important. The law provides that the controller is obliged to process only authentic and accurate personal data, and the same, if necessary, update, delete or correct. The form in which the personal data are stored should allow the identification of the persons to whom the data relate, but for no longer than it is necessary for the purposes for which the data are collected and processed.

The one who performs the data processing shall develop the data security plan and take all technical and organisational measures to prevent unauthorised or accidental access to personal data, their alteration, destruction or loss, unauthorised transfer, other forms of illegal data processing, as well as measures against misuse of personal data. The measures may include informing and training of the employees who work on the processing of personal data, physical and technical security measures of the working premises and equipment, confidentiality and security of passwords for access to the information system, and the similar.

Every person has a right to be warned in advance that his/her personal data will be collected. As a part of such notification, the person is entitled to receive, among other things the information on the purpose of processing, controller, receiving authority or third party whom the data will be accessible, if forwarding of data for processing is legal obligation, consequences in the case that the data subject refuses to proceed so, the cases in which the data subject has right to refuse to provide personal data, if the personal data collection is voluntary, etc.

If the personal data are not obtained from the persons to whom the data relate, that person is entitled to be informed of the third party which delivered his/her personal data to the controller. In principle, every person also has to request the right to access and the right to correct data referring to him/her.

These rights can be excluded or limited in accordance with the law. For example, the information on the processing of personal data or access to personal data may refuse if that action could cause significant damage to legitimate interests of the following categories in Bosnia and Herzegovina: state security, defence, public security, prevention, investigation, detection of crimes and prosecution of perpetrators as well as violations of ethical regulations of the profession, economic and financial interests, including monetary, budgetary and tax issues, inspection and duties related to control, protection of data subjects or rights and freedoms of other people. These restrictions shall be allowed only to the extent required in a democratic society for any of the aforesaid purposes.

Filing a complaint is another right of the data holder. In fact, any person may file a complaint with the Agency for Protection of Personal Data, if he/she considers that his/her personal data are unlawfully processed or that there is a risk of such a breach, and to require that a person who carries out the processing refrains from such activities and remedy the factual situation caused by such activities, carry out a correction or supplementation of personal data so as to make them authentic and accurate and block or liquidate the personal data. Furthermore, in the court proceedings, everyone has the right to seek compensation from the data controller for physical

and consequential damage if it was inflicted on him as a result of the violation of the right to privacy.

In addition to the above stated obligations towards persons whose data are processed, the person who processes personal data has certain obligations towards the Agency for Protection of Personal Data. Namely, the personal data filing system controller shall establish and maintain the records for each personal data filing system, which shall contain the basic information on the system, and in particular: the title of personal data filing system, type of data being processed, legal basis of the data processing, data source, type of transferred data, the recipients of such data and the legal basis for this transfer, whether the transfer is carried out abroad with all the details of such transfer and the similar.

These data from the records of each controller are submitted to the Agency, which integrates them into the Central Registry.

Amendments to the Act, new provisions on the transfer of data abroad were introduced. Article 18 of the Act provides that personal data which are processed may be transferred from Bosnia and Herzegovina to another country or made available to the international organization which applies appropriate measures to protect personal data stipulated by this law. The adequacy of protective measures is estimated based on the particular circumstances in which the procedure of the transfer of personal data is performed, where some facts are particularly taken into account:
the type of personal data, the purpose and the period of processing, the country in which they are transferred, the rules stipulated by the law which are in force in the country in which the data are disclosed, the rules of the profession and security measures that must be observed in that country.

The personal data to be processed can be taken out of Bosnia and Herzegovina to another country that does not provide the adequate protection measures prescribed by this Law when:

a. the transfer of personal data required by a special law or international treaty binding Bosnia and Herzegovina;

b. of the person whose data is being obtained prior approval and the person is familiar with the potential consequences of the presentation of data;
c. the transfer of personal data necessary for the performance of a contract between the data subject and the controller or the fulfillment of pre-contractual obligations undertaken at the request of the person whose data is processed;
d. the transfer of personal data is necessary for saving lives of persons to whom the data relate, or when it is in its vital interest;
e. personal data amount from the register or records which are in accordance with the law or other regulations, available to the public;
f. the transfer of personal data is necessary for the public interest;
g. the transfer of personal data is necessary for the conclusion or fulfillment of a contract between the controller with a third party, when the contract is in the interest of the persons whose data are processed.

In addition to the Law on the Protection of personal information, the protection of personal data of employees is guaranteed by the Law on Labour. In the Labor Law of the Federation of Bosnia and Herzegovina this is stipulated in the second part of the Law: Conclusion of labor contracts. Article 30 of this Law provides that personal data on employees may not be gathered, processed, used or supplied to third persons, unless this is laid down by the law or if this is necessary to exercise the rights and obligations arising from labour relations. In the Labour Law of Republika Srpska, this issue is regulated by Chapter VII: Protection of employees. Under this law, the employee has the right to inspect all documents containing his/her personal data, which are stored or processed by the employer and the right to request the deletion of data that are not directly relevant to the job he/she performs, as well as the correction of incorrect data. It is also stipulated that personal data relating to employees may not be available to the third party, except in cases and under the conditions stipulated by the law or if it is necessary to prove the rights and obligations arising from employment or related to the work. Under this law, the personal data of employees may be collected, processed, used and delivered to third parties only for the authorized person employed by the employer in accordance with regulations governing the protection of personal data.

10. If relevant, please set out information on the following:

10.1 Defences to the offences listed in question 2;

The entry into force of the Criminal Code of Bosnia and Herzegovina, and then the entity criminal codes, the liability of legal persons for criminal offenses was introduced in our criminal law. Due to this fact, our criminal law was included in a significant number of countries in which the law (criminal or special laws on the liability of legal persons for criminal offenses) provides the liability of legal persons for criminal offenses in accordance with a number of documents of the Council of Europe, European Union, Organization for Economic Cooperation and Development and the United Nations, which requires or recommends the member states introduce the liability of legal persons for criminal offenses.

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement);

The prosecutor is the authorized body to which belongs the right and duty of initiating criminal proceedings if there are grounds for suspicion that a criminal offense was committed. The criminal prosecution of legal entities is based on the principle of legality of criminal prosecution. The prosecutor is obligated to initiate a prosecution if there is evidence that a criminal offense has been committed unless otherwise prescribed by the Criminal Procedure Code (Article 17 of the CPC B&H, Article 17 of the CPC RS, Article 18 of the CPC B&H, Article 17 of the CPC BDB&H). Articles 158 and 159 of the Labour Code deal with the obligation of an employer to employ employees with health disabilities in suitable positions, and to enable them training or study to attain the necessary qualification and shall also be obliged to attend to the development of such qualifications. Furthermore, an employer shall be obliged to create conditions for employees to enable them working and to improve the facilities of workplaces so that, where possible, they may attain the same work results as other employees, and for their work to be made as easy as possible.

However, the principle of legality of the law in legal entities exceptionally allows deviation and application of the principle of opportunity. This is reflected in giving authority to the prosecutor to assess the expediency of prosecution of a legal person, even though they met all the legal requirements for the prosecution.

There are four alternatively prescribed conditions under which the prosecutor may decide not to initiate criminal proceedings against a legal person:

a. the contribution of the legal person to the commission of the criminal offense was insignificant;
b. the legal person has no property or has so little that it would not be enough to cover the costs of the proceeding;
c. if a bankruptcy proceeding has been instituted against the legal person;
d. if the perpetrator is the only owner of the legal person against whom the proceeding should be instituted.

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

The Criminal Code of B&H contains a specific provision related to the general reasoning for the less severe punishment of legal person or release from punishment. The provisions of Article 130 of the Criminal Code of B&H stipulates that a legal person, whose managerial or supervisory authority has willingly reported on the perpetrator upon a criminal offence perpetrated, may be punished less severely. The same Article stipulates that a legal person whose managerial or supervisory authority, following the perpetration of a criminal offence, decides to return the illegally obtained material gain or to remove the caused harmful effects or to communicate the information concerning the grounds for holding the other legal persons responsible, may be released from punishment. In addition to the basis stipulated in Article 130 of the Criminal Code of B&H, special provisions on the liability of legal persons for criminal offenses as a ground for optional commutation of sentence, the legal entity is prescribed for criminal offenses perpetrated out of negligence and for attempted criminal offense.

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance)

State level taxes

In Bosnia and Herzegovina, value added tax (VAT) was put into force on 1 January 2006. and with only one single rate of 17%.[54] A taxpayer is any person who independently carries out any economic activity (activity of a manufacturer, trader or supplier of services performed with a view to generating income, including the activity of exploitation of natural resources, agriculture, forestry and professional activities). The taxpayer shall be the person in whose name and for whose account goods or services are supplied or goods imported. The taxpayer shall also be the person who supplies goods or services or imports goods in his own name, but for the account of another. A taxpayer is any person who independently carries out any economic activity (activity of a manufacturer, trader or supplier of services performed with a view to generating income, including the activity of exploitation of natural resources, agriculture, forestry and professional activities). The taxpayer shall be the person in whose name and for whose account goods or services are supplied or goods imported. The taxpayer shall also be the person who supplies goods or services or imports goods in his own name, but for the account of another.

VAT shall be calculating on:

- supplies of goods and services (hereinafter: supply of goods and services) which a taxpayer, within the performance of his economic activities, makes for consideration within the territory of Bosnia and Herzegovina;
- the importation of goods into Bosnia and Herzegovina.[55]

As mentioned, Value added tax (VAT) rate is flat rate of 17% in B&H. Bosnia and Herzegovina has one of the lowest rates of VAT.

[54] The Law on VAT in B&H, article 23.
[55] Law on Value Added Tax (Official Gazette B&H No. 09/05, 35/05, 100/08).

Comparable review of VAT rates in region:

- Bosnia And Herzegovina – 17%
- Serbia – 18%
- Romania – 19%
- Slovenia – 20%
- Slovakia – 20%
- Czech Republic – 20%
- Poland – 23%
- Croatia – 23%

Competent Institutions

The Indirect Taxation Authority is responsible for the collection of all indirect taxes at the entire territory of Bosnia and Herzegovina.[56] The Indirect Taxation Authority is an autonomous administrative organization responsible for its activities, through its Governing Board, to the Council of Ministers of Bosnia and Herzegovina The field activities are run by four regional centers in: Sarajevo, Banja Luka, Mostar and Tuzla, 30 customs sub-offices and 59 customs posts, out of which 40 are passenger border crossings, 4 airports, 8 railway border crossings, 3 overseas mail offices and 4 free zones.

Incentives

Benefits related to the value added tax are regulated by the Law on Value Added Tax and its implementing regulations for the Value Added Tax and the Law on Free Zones B&H and the Law on Customs Policy B&H.

[56]Law on Indirect Taxation System in Bosnia and Herzegovina (Official Gazette of B&H No. 44/03, 52/04, 34/07, 49/09).

Excises

Excises are a special type of sales tax paid on some commodities like oil products, tobacco products, soft drinks, alcohol drinks, beer, wine and coffee.

Taxpayer of excises

The taxpayer shall be the legal person and entrepreneur that imports or exports the excise products in the territory of Bosnia and Herzegovina.

Subject of taxation - Tax base

The Law stipulates that the subject of taxation is the trade of excise products that are manufactured in Bosnia and Herzegovina, when the manufacturer for the first time trade with them and / or import of excise products in Bosnia and Herzegovina.

Entity level taxes – Corporate income tax of FB&H

Taxpayer of Corporate income tax

Taxpayer is an enterprise and other legal entities performing an independent permanent economic activity through the sales of goods and provision of services on the market in order to make profit. Taxpayer is:

- a resident of the Federation B&H, making profit on the territory of the Federation and abroad and
- a non-resident making profit on the territory of the Federation.[57]

RESIDENT is a legal entity with principal place of business (HQ) (Registration) entered into the registry of enterprises in the Federation or with actual management and supervision over the business activities in the Federation.

[57] Law on Corporate Profit Tax FB&H (Official Gazette of FB&H No. 97/07, 14/08 i 39/09), Rulebook for the implementation of the Law on Corporate Profit Tax (Official Gazette of FB&H No. 36/08 i 79/08).

NON-RESIDENT is a legal entity established and with HQ or actual management and supervision over the business activities outside of the Federation and business activities in the Federation are carried out through the branch office or temporary establishment.

Corporate income tax base

The tax base is the taxable profit of a taxpayer that is determined in the tax balance. The taxable profit is determined by coordinating the profit of the taxpayer stated in the tax return, in a way determined by applicable law. Profit determined in the process of taxpayer liquidation is included in tax base and also the tax base includes capital gain determined in the tax balance.

Dividends realized based on participation in the capital of other taxpayer are not included in the tax base, also shares in the profit.

Corporate income tax rate - stimulating rate

Taxation system in Bosnia and Herzegovina is characterized with low tax rates. Profit tax is paid per rate of 10% onto the assessed tax base from the Tax Balance. Corporate Income Tax is one of the most favorable in Europe, in compare with Central and East Europe countries:

- Bosnia And Herzegovina – 10%
- Romania – 16%
- Slovenia – 18%
- Hungary – 19%
- Czech Republic – 19%
- Poland – 19%
- Croatia – 20%
- Slovakia – 20%

Tax Administration of Federation B&H is responsible for the implementation of tax assessment, tax collection and control through its cantonal branch offices. The Federation Law on Corporate Income Tax enables foreign investors to enjoy the following benefits:

- taxpayer who in the period of five consequent years invests into production in the value of minimum 20 million BAM, on the territory of the Federation of Bosnia and Herzegovina, is being exempted from the payment of corporate income tax for the period of five years beginning from the first investment year, in which minimum four million BAM must be invested;
- the taxpayer who in the year for which the corporate income tax is being determined, has achieved 30% of their total revenue by export to be exempted from the tax payment for that year;
- the taxpayer who employs more than 50% of disabled persons and persons with special needs longer than one year is being exempted from the payment of corporate income tax for the year in which more than 50% disabled persons and persons with special needs were employed;
- a taxpayer – business unit of a non-resident, established within or with the HQ or management and supervision of business activities outside of the Federation, but within Bosnia and Herzegovina, shall be exempt from profit tax payment for profits realized in the Federation.

Profits transferred abroad are not taxed in B&H, if they were previously subject to the taxation abroad.

Corporate income tax of Republika Srpska

Taxpayers of corporate income tax in Republika Srpska are:

- legal entity of the Republika Srpska pays tax on profits earned from any source either in the Republika Srpska or abroad;
- a branch of the legal entity for the profit realized in the Republika Srpska;
- foreign legal entities that deal and has a permanent place of business in the Republika Srpska, for profit attributable to the permanent establishment;

- a foreign legal entity that receives income from property located in the Republika Srpska, for profit attributable to the property.[58]

Corporate income tax base

The tax base for the tax year is the difference between taxable income and deductible expenditures for this fiscal year, in accordance with the Law on Income Tax of the Republika Srpska. Revenues which are included in the calculation of the tax base:

- taxable income for the purpose of calculating the tax base includes: all income from any source, whether in cash or in any other type of income, and whether it is linked to the performance of business.

Corporate income tax rate - stimulating rate

Corporate income tax is payable at the rate of 10% on the tax base for that tax year.

Competent Institution

Tax Administration of the Republika Srpska is responsible for implementation of all tax laws. Tax Administration is under the Ministry of Finance of the Republika Srpska.

Law on Amendments to the Law on Corporate Income Tax of Republika Srpska allows reduction of the tax base for the investment value of investments in the following cases:

- they shall be exempted from payment of income tax revenue from humanitarian organizations in connection with the basic activity;
- introduced the stimulation of investment in production, so that a taxpayer who invests in equipment, facilities and real estate has the right for tax reduction for the value of the investment;

[58] Corporate Income Tax Law of Republika Srpska (Official Gazette of RS No. 91/06, 57/12).

- in order to stimulate employment, the taxpayer who in a calendar year employed at least 30 permanent employees has the right for tax reduction by the amount of tax paid on income and contributions for those employees;
- freed from the withholding tax for interest from credits and loans has been used by resident to invest in equipment, facilities and real estate.

Corporate income tax Brčko District

The taxpayer is:

- legal entity from the District, the profits obtained from any source in Bosnia and Herzegovina or abroad;
- branch legal entity headquartered in the entities, the profits obtained in the District;
- foreign legal entities which deal and has a permanent place of business in the District, profit which contributes to the permanent establishment;
- foreign business who receives income from property located in the District, the profit which contributes to immovable assets;
- foreign person which generates revenue in the District.[59]

Corporate income tax base

Tax base for the tax year is the taxable profit determined in the tax balance. Taxable income is determined by adjusting income and expenditure of taxpayers reported in the income statement, in accordance with the law governing accounting, except for revenues and expenditures for which the law prescribes a different way of determining.

Corporate income tax rate - stimulating rate

Corporate Income tax is payable at the rate of 10% on taxable income for that tax year.

[59] Law on Corporate Income Tax of Brčko District (Official Gazette BD No. 60/10, 57/11, 33/12).

Competent Institution

Tax administration Brčko District is the institution responsible for the issue of direct taxes.

Incentives

Tax incentives in Brčko District for taxpayers investing into machinery and equipment for performing of their own registered production activity, the tax base shall be reduced for the amount of the respective investment. The taxpayer during the tax year that employed new workers for an indefinite time reduces the tax base in the amount of gross wages paid to newly hired workers. Withholding tax in the Brčko District is regulated in the same way as in the entities of Bosnia and Herzegovina.

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

Corporate governance is now considered as a key element in improving economic efficiency and growth, as well as increasing investor confidence. Countries which want to participate fully in the global capital market and attract foreign investors, and among them, certainly is Bosnia and Herzegovina, must provide convincing understandable regulation of corporate governance and adhere to internationally recognized principles. Respect for good corporate governance in Bosnia and Herzegovina will lead to an increase in the confidence of investors, both domestic and foreign, to support the good functioning of financial markets, which will result in a lower cost of capital and encourage companies to use more efficient resources. This would be, then, a positive effect on the economic growth of the whole country.

In the area of company law in 2003. the EU Company brought Law Action Plan (Action Plan of the European Union on corporate law), which designed directions of change of company regulations of the Member States of the European Union in the short, medium and long term. Of all the countries with the commitment to joining the European Community is expected to implement structural reforms of its legal, political and economic system. Bosnia and Herzegovina on 16 June 2008., signed Stabilisation and Association Process. By signing this Agreement, Bosnia

and Herzegovina has made a commitment to harmonize its laws and regulations with the laws and regulations of the European Union. Despite attempts to equalize, there are significant differences between the entity company law, including different board structures and mechanisms to protect shareholders. The Federation of economic reform legislation companies started suggesting the Law on Amendments to the Law on Business Companies in the Federation that in the part relating to the management of equity societies. In the Republika Srpska after the adoption of the Law on Enterprises ("Official Gazette of the Republika Srpska", Nos. 24/98, 62/02, 66/02, 38/03, 97/04 and 34/06) is preparing for the adoption of the Law on Companies of the RS.[60] RS in 2008 acceded to the adoption of this law. Until their adoption the RS has applied The Law on Enterprises.

RS is preparing for the Law on Companies and will be submitted to the National Assembly for adoption. To change the name of the Law on Enterprises Law, there are at least two important reasons:

1. the new name is universally accepted in the EU countries, and
2. the draft law seeks to provide the necessary new content and quality solution of the existing law.

The Draft law has 446 members and has a shorter overall part that in principle refers to all forms of business organizations that regulate, and after that, every form of the company develops to the end with all the institutes, which is the best for business people when choosing a legal form that will in this form see all what is regulated, the so called pure concept of regulation. The legal institutions that are common to all legal forms of companies are regulated again in one place after regulation of individual forms of business organizations: a group of companies (merger, acquisition, division, separation and legal form changes), the so called, property transfer of great value, special rights of dissenting shareholders and members of companies, penalties and transitional and final provisions. The Draft law does not regulate the status position of

[60] Official Gazette of RS, no. 24/98, 62/02, 66/02, 38/03, 97/04, 34/06.

entrepreneurs, leaving it to a special law because the entrepreneur is not a legal but a physical person.

In contrast to the existing Law of Enterprises, the law makes it absolutely clear that the internal relations between the partners of a partnership and a limited partnership may be regulated differently from the regime planning with this law, while the external relations of partners these companies and third parties as a rule cannot be regulated differently of the legal regime (liability obligations, representation, transfer of shares to third persons). Also, this Draft law makes it clear that these companies basically have their bodies, but the partners have that position, other than an agent of society that entered in the register (it can be all partners, a few or only one).

General feature of this regulation with a limited company liability is flexibility law, which allows single members of society to its actual needs. The main characteristics are:

- facilitate the process of establishment and enrollment in the register (one founding act instead two);
- makes a clear delineation in the process of establishing joint stock companies with public subscription of shares – open society – and joint-stock companies which are established without initial public offering – a closed society;
- minimum size of the capital share remained at the previous level of 2,000 BAM;
- increase and decrease of the capital share of limited companies liability makes this law more flexible, and in the joint stock company more regulatory, because of the need to protect the interests of existing shareholders;
- transparency of open business – public companies that are offering issue shares and other securities): the strengthening of information of shareholders, company members and creditors, including the disclosure of remuneration administration and management; on access to acts and documents of society, depositing in the register and publication of financial statements of the company, as well as other appropriate redesign legal issues;
- the internal audit, independent audit reports of the Management Board, independent directors, independent directors, independent committees, related parties, test function

Assembly, engagement of so called special Auditor (professional trustee), emission prospectuses for securities value, the supervisory function of the Securities Commission of RS, control functions of administrative authority and the court, the registration of certain data in the registry and its public, to protect the shareholders/members, minority shareholders/members;

- corporate governance (strengthening of flexible rules for the model of administration at small and medium companies, improve the system of management of the company and strengthen the control mechanisms of the Board and company management);
- arranging the rights and obligations of the members and shareholders of the company from the standpoint of legal security of creditors of the company;
- regulation of ownership and managerial functions in corporations: these questions are regulated in a way that the director and board of directors are not two bodies but one;
- question of exercising control functions arranged on a completely new basis: directly strengthen the competence of Assembly members, shareholders, independent members of the board, external independent auditors, minorities experts (professional commissioners).

This Draft law regulates the issue of linking companies and persons through capital, and on that basis by the management of capital, alone or in combination with a contractual form. He extends special regulations connectivity of companies through capital regulating institutes majority share (referring negatively on the so called mutual equity participation, which are in our conditions in labor, so called pyramid structure of capital), the Group, the holding company the parent (control) and dependent (subordinate) of the company and predicting a series of protective norms minority shareholders in subsidiaries. The issue of the protection of so called minority shareholders and members of the company (after minority equity issue votes), and is regulated by a separate chapter, which it further enhances and provides additional guarantees for its implementation. It is important to point out that the Draft law predicted the delayed implementation of this law, six months after the adoption because of the need to harmonize other relevant laws with this law.

Improving management practices of society leads to improvements in the system of accountability, reducing the risk that officials of the company commit fraud or do business for its own sake. Being

responsible, together with the effective risk management and internal controls, potential problems can be brought to light before it comes to complete crisis. Corporate governance improves the management and control on the effect of executive directors, for example by linking the remuneration of executive director of financial results of the company. This creates favorable conditions not only for planning a smooth succession and continuity of corporate executives, but also for maintaining long-term development of enterprises.

Adherence to standards of good corporate governance helps improving the decision-making process. For example, managers, directors and shareholders are likely to make quicker and better decisions if they are better informed, if their governance structure allows the company to clearly understand their roles and obligations, and if the process of communication is regulated in an effective way. This will significantly increase the efficiency of financial and business activities of enterprises at all levels. Quality corporate management rationalizes all business process of enterprises, and this leads to more successful business and lower capital expenditure, which, in turn, can contribute to the growth of sales and profits, while reducing capital expenditures and needs. An effective system of governance practices should ensure compliance with applicable laws, standards, rules, rights and duties of all concerned sides, and, in addition, should enable companies to avoid costly litigation, including costs relating to the claims of the shareholders and other disputes that arise as a result of fraud, conflict of interest, corruption, bribery and insider trading. A good system of corporate governance facilitate the resolution of corporate conflicts between shareholders and those shareholders who control the company, executives and shareholders, as well as shareholders and stakeholders. Also, enterprises officials will be able to reduce the risk of personal liability.

B&H's top economic priorities are:

- acceleration of EU integration;
- strengthening the fiscal system;
- public administration reform;
- World Trade Organization (WTO) membership; and

- securing economic growth by fostering a dynamic, competative private sector.

To date, work on these priorities has been inconsistent. The country has received a substantial amount of foreign assistance and will need to demonstrate its ability to implement its economic reform agenda in order to advance its stated goal of EU accesion. In 2009. Bosnia and Herzegovina undertook an International Monetary Fund (IMF) standby arrangement, necessited by sharply increased social spending and a fiscal crisis precipitated by the global economic downturn. The program aims to reduce recurrent government spending and to strengthen revenue collection.

Bosnia and Herzegovina has made significant efforts to attract foreign investors by passing a liberal foreign investment law and uniform trade, corporate tax and customs policies. The state level Law on Foreign Direct Investment accords foreign investors the same rights as domestic investors, including bidding on privatisation tenders, and provides for non-restrictive investment, except in the media and defence sectors where foreign ownership is limited to 49%. The law also prohibits expropriation and nationalisation of assets, unless under exceptional circumstances. However, the investment climate in the country is far from ideal. Companies in the World Economic Forum (Global Competitiveness Report 2008.-2009.) identify government instability, policy instability, inefficient government regulation and inadequate infrastructure as the first, second, third and fourth most problematic factors for doing business in Bosnia and Herzegovina respectively. Wartime destruction has hampered the emergence of a market-based economy, as has the informal network between political elites and organised crime and economic structures. Many reported violations of public procurement legislation and other laws and have not led to prosecution. This hightlights the fact that corruption remains prevalent within Bosnia and Herzegovina's regulatory environemnt, particulary in relation to business registration, public procurement, licensing and tax.

Work is underway to produce a uniform registration system for the whole country as well as to establish other single regulatory institutions and frameworks at the state level to replace entity level equivalances, which have prevented cross-entity business developtment and foreign investment. However, the weak judicial structures in Bosnia and Herzegovina pose a challenge to investors, as there is no means for rapid resolutions of commercial disputes. There are only few non-judicial dispute resolution mechanisms available and commercial courts are still developing through

capacity building and reforms to streamline procedures. Companies are thus currently forced into settling commercial disputes in the courts, which can be both time-consuming and costly and, according to some observers, can often appear to be less than objective.

In next five years there will surely be some changes, but, because of the slow recovering process, and weak economy, changes will be unfavourable for all citizens of Bosnia and Herzegovina.

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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction.

1.1 Introductory Words into Bulgarian Criminal Law

It should be noted from the outset that all criminal offences under Bulgarian legislation are codified in the 1968 Criminal Code.[1] There are no criminal offences regulated in other legislative acts. Another important feature of Bulgarian criminal law is that an attempt to commit a crime is punishable with the same sanctions as the offence attempted.[2]

As pertains to the specific crimes at issue in the present report, the CC does not contain a separate 'corruption' offense, nor is there a legal definition of 'corruption' within the legislation in effect.[3] Notwithstanding, the term has been defined by theory as an abstract state of putting the public interests at stake and/or giving priority to personal interests. The theory, furthermore, is not unanimous about which criminal offences under the CC shall be considered to be included within the meaning of corruption. However, there is no doubt that corruption includes offences such as bribery and influence peddling.

1.2 Bribery

Prosecuting the criminal offence of bribery is widely recognized as **the primary instrument to combat corruption**. Bribery is defined in Arts. 301-307a CC. The CC notably **distinguishes between passive bribery** (ie the receipt of goods, money, or any sort of benefit) **and active bribery** (ie the act of offering or giving such goods or money). The reason for this distinction lies, on the one hand, in the significance of each offence and the concept that passive bribery poses a

[1] Criminal Code 1968 [Наказателен кодекс]. Hereinafter referred to as **CC**.
[2] CC, Art. 18, para. 2.
[3] It is curious to note, however, that the term corruption is used in some acts of legislation, eg Law on Acknowledging, Execution and Dispatching of Court Decisions and Decisions for Probation Measures in View of Exercise of Control on the Probation Measures and Alternative Sanctions (*Закон за признаване, изпълнение и изпращане на съдебни решения и решения за пробация с оглед упражняване на надзор върху пробационните мерки и алтернативните санкции*), as well as in the titles of other acts of the parliament. There are also governmental authorities such as Center for Prevention and Countering Corruption and Organized Crime, Commission against Corruption, National Council on Anticorruption Policies.

more serious threat to the public order. This is so because civil servants are expected to follow the rule of law strictly while performing their duties on behalf of the state. On the other hand, the distinction is important because there are certain provisions that exclude the criminal liability only for the active bribery offender.

Art. 301 CC defines **passive bribery** as an act of a person employed in a state authority or agency (ie a civil servant) or otherwise exercising state power in order to undertake or to omit an action within their scope of work.[4] Foreign civil servants are also liable for this crime. Additionally, Art. 305 CC expands the range of persons who may commit the offence of bribery and influence peddling to include arbitrators, experts (within court proceedings or appointed by enterprises or organizations), and attorneys at law – all within their scope of work.

The *actus reus* of this offence requires that the perpetrator demand or accept goods, money or any kind of benefit whatsoever. After amendments to original text of the CC,[5] the benefit no longer needs to be of a monetary value. The *actus reus* also requires that the civil servant should receive the benefit, but instances where a person other than the civil servant physically receives the benefit are also punishable, and so are attempts at this offence. Due to the nature of the act, the required *mens rea* is intention.

The **sanction for passive bribery** is imprisonment for up to six years, which makes the offence a grave one under Bulgarian criminal law.[6] There is also a fine of a maximum amount of BGN 5,000 (approx. EUR 2,500). The sanction is differentiated based on whether the act/omission of the civil servant constitutes a breach of their legal obligations in the field of their work, or if it constitutes a separate criminal offence.

[4] The scope of such officials is defined in CC, Art. 93, p. 1.
[5] State Gazette [Държавен вестник]No. 95/1975
[6] CC, Art. 93, p. 7 defines grave crimes as 'any crime for which the law provides punishment by deprivation of liberty for more than five years, life imprisonment or life imprisonment without substitution'.

More serious sanctions that the ones discussed are imposed in cases when the civil servant enjoys more authority (within the governmental structure where they are employed); when the benefit is of a large scale; when the perpetrator has committed this offence before; or when the demand is made through blackmail with abuse of one's official position. The most severe sanction – imprisonment for ten to thirty years, confiscation of the half or of all their assets, and the deprivation of the right to exercise certain profession or position – is enforced when the bribery is of a particularly large amount and represents a particularly grave case.

The **active bribery**, regulated in Arts. 304-305 CC, provides that it is a criminal offence if a person offers, promises to give, or gives a bribe to a civil servant. An offender may be any natural person, who can be deemed criminally liable in accordance with the general provisions of the Bulgarian criminal law.

The *actus reus* consists of three possible acts. Two of them – offering and promising to give a bribe – are seen as formal offences, ie the act itself already constitutes a crime and attempts are not possible. The third option – giving a bribe – requires the delivery of the benefit and an attempt here is feasible. Active bribery essentially mirrors passive bribery, thus the observations regarding the benefit (that is offered to or accepted by the civil servant) apply here as well. The required *mens rea* is intent (also due to the nature of the act).

The **sanctions for the active bribery** are the same as the ones for passive bribery with one exception. In situations where a benefit it given to a civil servant in order for the latter to commit an act or omission which in itself constitutes a crime, the person providing or offering the bribe would be liable for instigation of the respective criminal offence.

Art. 306 CC provides for an **exclusion from the criminal liability in cases of active bribery**. When the person offering, promising to give, or giving a benefit to the civil servant has been blackmailed by the civil servant to do so, then he or she will not be liable for the crime. To benefit from this exemption, however, the person should also have immediately and voluntarily reported the bribery to the relevant authorities.

1.3 Influence Peddling

Influence peddling (Art. 304b CC) is another offence within the strict meaning of "corruption offences" within the Bulgarian legislation. The CC implements the difference between active and passive influence peddling.

The *actus reus* of **passive influence peddling**[7] requires a person to demand or accept a benefit, or to accept an offer or a promise for such a benefit, that is not usually due in order to exercise influence over the decision of a domestic or foreign civil servant within the scope of their work. The offender can only be a natural person who may be criminally liable. Courts sometimes recognize that it is irrelevant whether the offender in fact can influence the other person.[8] The exercise of the influence and the outcome of this influence is not relevant to the offence, ie it is not a necessary element of the *actus reus*.[9] The sanction for this offence is imprisonment for up to six years as well as a fine of up to BGN 5,000 (approx. EUR 2,500). This criminal offence constitutes a grave crime in accordance with the general provision of Bulagarian criminal law (Art. 93, para. 7 CC).

Active influence peddling[10] essentially mirrors its passive counterpart. The *actus reus* requires a criminally liable natural person to offer, promise to give or give a benefit to another person, who claims to be able to exercise influence over the decision-making of a civil servant. The required *mens rea* is intent. The sanctions for this offence are the same as those for passive influence peddling.

[7] Active influence peddling is regulated under CC, Art. 304b, para. 1.
[8] *167/2009* [2009] Supreme Court of Cassation, Criminal Division, First Criminal Department, Decision No. 207 from 16 September 2009 [Bulgarian]
[9] *455/2009* [2009] Supreme Court of Cessation, Criminal Division, Third Criminal Department, Decision No. 413 of 17 November 2009
[10] Passive influence peddling is regulated under CC, Art. 304b, para. 2.

1.4 Economic Bribery

Bulgarian criminal legislation contains the offence of **economic bribery**. There are two separate offences which fall under the category 'economic bribery'. The CC provides specific requirements for the persons who may receive a bribe and thus be held criminally liable – the person must be an employee of a company/legal person and their work tasks must relate to directing the company or to management or safeguarding the company's property. This person may also be a civil servant (limited applicability) within the meaning of Art. 93, para. 1 CC.

The first offence set out in Art. 225b CC is applicable in the field of economy broadly defined (as opposed to commercial activity only). The *actus reus* elements include: (1) a legal relation between the person giving the bribe and the legal person (company) in which the receiving person is employed; (2) the receiving person shall have contributed to the result/goods owed by the company; (3) this contribution shall fall within the receiving person's obligations by virtue of labour or other contract with the company; (4) a price shall have been defined between the giving/offering person and the company; (5) the receiving persons shall have received compensation separate from the price arranged for the delivery of services/goods. The *mens rea* requires intention. The sanction provided for this offence is imprisonment of up to two years well as a fine between BGN 100 and 300 (approx. EUR 50 and 150).

The second form of economic bribery is regulated in Art. 225c CC. This offence is also divided into active and passive bribery. The scope of this offence is limited to commercial activity only (in conjunction with the Commercial Act of Bulgaria).[11] The *actus reus* requires that the employee receive the bribe in order to or in connection with an act or omission which constitutes a breach of their obligations within the company. The required *mens rea* is intent. The sanction for the offence is imprisonment of up to 5 years and a fine of up BGN 20,000 (approx. EUR 10,000). The person offering the bribe is also subject to a criminal liability with the same sanction.

[11] Commerce Act 1991 [Търговски закон]. Hereinafter referred to as **Commerce Act**.

1.5 Fraud

The offence of **fraud** is regulated in several provisions of the CC. Legal theory does not usually describe the offence of fraud as connected with corruption, but this offence does constitute a grave crime against property. The legislation currently in effect distinguishes four main types of fraud: (1) classic fraud; (2) document fraud; (3) computer fraud; (4) insurance fraud.

Classic fraud is regulated under Art. 209 CC. The *actus reus* elements here cover a range of alternative circumstances. The offender must evoke, maintain, or take advantage of the victim's wrongful perception. The first two instances require the offender to commit and act – he either acts in order to evoke wrongful perception (deceives the victim regarding material facts), or acts to maintain already existing wrongful perception (irrespective of the means for its origin). An alternative element of the *actus reus* is taking advantage of the victim's wrongful perception (here no act is committed in order to evoke or maintain it), lack of experience (mainly to safeguard the youth), or of the lack of sufficient knowledge of the victim (eg regarding information on the transaction, its necessity, etc). In order to fulfil the *actus reus* requirements, the victim or a third party must suffer a damage. The damage usually and logically occurs as a result of a transaction; however, this transaction is not element of the offence. The *mens rea* requires intent with a specific aim – the offender or a third party to acquire benefit. The classic fraud is punishable with imprisonment for one to six years.

Document fraud is regulated under Art. 212 CC. Although it is still a type of fraud, the *actus reus* elements vary. First, the offender must receive movable or immovable property with no legal basis for this transaction. Second, he or she must use a forged or counterfeited document. The mechanism of this offence is as follows: the offender presents/uses a forged or counterfeited document in order either to evoke a wrongful perception, or to provide a seemingly legal basis for the transaction. The victim, who has formed a wrongful perception, conducts the transaction (concludes a contract) and the offender receives the property. It should be noted that if the property (funds) stems from the European Union, this is considered an aggravating *actus reus* element. The required *mens rea* for a document fraud is intent with the aim to acquire the property. The main difference from the classic fraud is the means for evoking wrongful perception on the

part of the victim (here – with a forged or counterfeited document), as well as the result needed in order the offence to be committed (document fraud requires that the property be acquired by the offender, whereas classic fraud requires only damage). Document fraud is punished with imprisonment for two to eight years.

Computer fraud under Art. 212a CC is different to the two of the above mentioned types of fraud only in respect of the means – with the amendment/erasure of computer data or misuse of electronic signature. The sanction for this offence is also imprisonment for two to eight years.

Insurance fraud under Art. 213 CC requires an insured property owned by the offender. The *actus reus* requires its damage or destruction. The *mens rea* of this offence is intent with specific deceptive purpose. The sanction is imprisonment for up to three years and a fine of BGN 100 to 300 (approx. EUR 50 to 150).

1.6. Money Laundering

Bulgarian criminal legislation includes provisions incriminating **money laundering** activities (Art. 253-253b CC). The offences connected with money laundering require that the property (not limited to money) be acquired as a result of another criminal offence or the act of such offence even if no criminal liability can be evoked for the particular conduct. Thus the money laundering is a secondary, but separate criminal offence.

The first type of conduct, incriminated by the CC, covers the acts of conducting a financial operation or transaction with property, concealing the location, origin, movement or the beneficial owners of a property, for which the person knows or suspects that has been acquired by a criminal offence.

The second type of conduct (Art. 253, para. 2 CC) relates to persons who acquire, hold, use, converse or facilitate the conversion of property for which they know or suspect to have been acquired by a criminal offence.

The offences outlined above are also basis for seeking criminal liability in Bulgaria, even if the criminal offence which serves as the source of this property has been committed out of the jurisdiction of Republic of Bulgaria. The sanction for the offences is one to six years of imprisonment and a fine of BGN 3,000 to 5,000 (approx. EUR 1,500 to 2,500).

Additionally, there are several aggravating circumstances forming the *actus reus* (Art. 253, paras. 3-5 CC). The required *mens rea* is intent. Pursuant to Art. 253a CC, preparations towards money-laundering, formation of a group for this purpose or abetting the offence constitute separate criminal offences. Facilitating, aiding, or counselling money-laundering is punishable in conjunction with the committed crime and the general provision of Art. 20 CC.

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

It is important to observe at the outset that **Bulgarian law does not institute corporate criminal liability**. Instead, for the crimes discussed in Section 1, legal persons are liable to **administrative penal sanctions**.[12] The sanctions and the court procedure for their implementation are set in Chapter Four of the Administrative Violations and Sanctions Act, Arts. 83a-83g.[13]

2.1 Administrative Punitive Liability for Crimes

Legal persons may be held administratively liable for crimes under **two sets of circumstances**. The first situation in which liability occurs is when certain natural persons connected to the legal person commit one or more of the crimes exhaustively listed under Art. 83a AVSA. The precise connection between the natural and the legal persons will be the focus of Section 3 of this Report,

[12] OECD Anti-Corruption Network for Eastern Europe and Central Asia, 'Liability of Legal Persons for Corruption in Eastern Europe and Central Asia', 13-14 <https://www.oecd.org/corruption/ACN-Liability-of-Legal-Persons-2015.pdf> accessed 11 March 2017.
[13] Administrative Violations and Sanctions Act 1969 [Закон за административните нарушения и наказания]. Hereinafter referred to as **AVSA**.

but suffice to say that the scope of individuals extends beyond the most senior levels of management. The second situation is when the aforementioned individuals commit any act considered a crime under the CC, whilst acting under orders of or for the implementation of a decision of an organized criminal group.

An important attendant circumstance in both cases is that the legal person should have either enriched itself through the criminal act, or would have enriched itself (ie the conditions for such enrichment were in place in the aftermath of the crime).

2.2. Crimes Leading to Administrative Punitive Liability

The first category of crimes triggering administrative liability are the ones **specifically listed in Art. 83a, para. 1 AVSA**. This provision contains a number of references to crimes under the CC. In relation to the particular crimes discussed in Section 1, legal persons may be held liable for: all forms of bribery (Arts. 301-307 CC), economic bribery (Art. 225 CC), classic fraud (Art. 209 CC), document fraud (Art. 212 CC), computer fraud (Art. 212a CC), and money laundering (Art. 253 CC).

Unlike this first category of crimes, the second is not exhaustive. **Any criminal act** under the scope of the CC can trigger administrative liability for legal persons, if it is committed either **while acting under orders of an organized criminal group**, or for the implementation of a decision of such a group. The CC defines an 'organized criminal group' as the permanent structured association of three or more individuals intended for the agreed perpetration, inside the country or abroad, of crime punishable by deprivation of liberty of more than three years, through which a material benefit is sought.[14] Associations are considered structured even in the absence of any formal distribution of functions among their participants, the duration of their involvement, or any developed internal structure.

[14] CC, Art. 93, p. 20.

Companies are administratively liable under Art. 83a, para. 3 AVSA, even if the individuals involved in the crime have abetted or assisted its commission, rather than committed it alone. This holds true unless the perpetrator is an employee within the meaning of Art. 83a AVSA. Companies are also liable in cases when the acts were stopped at the stage of attempt.

2.3 Legal Persons That May Be Held Liable for Crimes

Until recently, the only legal persons which could be held liable under Art. 83a AVSA were those **established in the territory** of Bulgaria. Following the latest amendments of the Act from November 2015, legal persons **established abroad** can now be held liable too. In those cases, however, the crime itself must have been committed on the territory of country. States, state bodies, local self-government bodies, and international organizations are **excluded** from the scope of Chapter Four of AVSA.

2.4 Penalties

For the commission of the crimes discussed, legal persons face **financial penalties**.[15] Where legal persons have derived a benefit of a property nature from the crime, the penalties may amount to up to BGN 1,000,000 (approx. EUR 500,000), but no less than the monetary equivalent of the benefit. The same maximum penalty is currently set in cases where the benefit is not of a property nature or its amount cannot be established. Prior to the November 2015 amendments, this penalty was set between BGN 5,000-100,000 (approx. EUR 2,500-50,000). The penalties are imposed regardless of the materialization of criminal responsibility of the natural persons accessories to the criminal act (Art. 83a, para. 4 AVSA).

In addition to the financial penalties, **the benefit** derived by the legal person from the crime **is also confiscated in favour of the state**.[16] Under the newest amendments, this includes both direct and indirect benefits. AVSA defines 'direct benefit' as any favourable change in the legal

[15] AVSA, Art. 83a, para. 1.
[16] AVSA, Art. 83a, para. 5.

person's legal situation directly resulting from the crime.[17] 'Indirect benefit', meanwhile, is either: (1) anything acquired as a result of disposal of the object of the crime; or (2) the effects or property acquired through a transaction or deal involving the direct benefit from the crime; or (3) the effects into which the direct benefit from the crime has been transformed.[18]

There are **exceptions** to the rule of confiscation. The benefit will not be confiscated if it is subject to return, restitution, or forfeiture under the procedure of the CC. Finally, if the effects or property that were the object of the crime are missing or have been expropriated, their BGN equivalent is adjudged.

2.5 Court Proceedings

Cases concerning the administrative punitive liability of legal persons are currently initiated by prosecutors before the district court of the company's registered office. For companies registered abroad, the proceedings are initiated before the Sofia City Court. The appellate court acts as a second instance court and its decisions are final.[19] Specific aspects of the pre-trial and trial proceedings will be further discussed in the sections to follow.

[17] AVSA, Additional Provision §1, p. 2.
[18] AVSA, Additional Provision §1, p. 3.
[19] AVSA, Art. 83d, para. 5.

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

3.1 General Outline

In relation to corruption crimes and the administrative punitive liability borne by companies for them, Bulgaria follows the so-called vicarious liability model.[20] This means that the liability of the legal persons can be triggered by offences of individuals exercising certain specific functions within the company or by any employee acting within the scope of his employment and with the intent to benefit the company. The vicarious model employed in Bulgaria differs from the identification principle used in the United Kingdom.[21] It concerns a much wider scope of individuals who can trigger the liability of a legal person, and not just persons within the top management who control 'the mind or will' of the company.

Additionally, Bulgarian law draws a clear distinction between the criminal liability of the individuals and the administrative liability of the legal persons. The conduct of the former may lead to the liability of the latter, regardless of the materialization of the criminal responsibility of the individuals themselves.[22] In other words, even if the individual is not found criminally responsible for his actions, sanctions may still be imposed on the company.

It also bears repeating that, where the individuals have abetted or assisted the commission of the acts in question, rather than committed them by themselves, or where the acts stopped at the stage of attempt, the companies may still be found administratively liable.[23] The sole exception to this rule are employees, who are specifically excluded from the ambit of Art. 83a, para. 3 AVSA.

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[20] OECD Anti-Corruption Network for Eastern Europe and Central Asia, 'Liability of Legal Persons for Corruption in Eastern Europe and Central Asia', 20 <https://www.oecd.org/corruption/ACN-Liability-of-Legal-Persons-2015.pdf> accessed 11 March 2017.
[21] The Crown Prosecution Service, 'Corporate Prosecutions' <http://www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/> accessed 11 March 2017.
[22] AVSA, Art. 83a, para. 4.
[23] AVSA, Art. 83a, para. 3.

3.2. The Individuals Whose Conduct May Trigger Administrative Punitive Liability of Companies

Art. 83a, para. 1 AVSA sets down **four categories of natural persons** whose actions may trigger the liability of companies. They are as follows:

- individuals who are authorized to formulate the will of the legal person;
- individuals who represent the legal person;
- individuals who are elected to a control or supervisory body of the legal person;
- employees of the legal person who have been assigned a certain task by the legal person and the crime is committed during or in connection with the performance of this task.

3.2.1 Individuals Who Are Authorized to Formulate the Will of the Legal Person

In relation to companies established in the territory of Bulgaria, individuals falling under this category will vary in accordance with the form of legal organisation of the entity and the manner in which liability is apportioned. Commercial corporations are exhaustively listed in the Commerce Act as follows: 1) general partnership (SD); 2) limited partnership (KD); 3) limited liability company (OOD); 4) single-member limited liability company (EOOD); 5) joint-stock company (AD); 6) single-member joint stock company (EAD); 7) partnership limited by shares (KDA).[24] The first two types are what is known as personal companies, while the rest are capital companies.

With personal companies, decision-making and management are concentrated in the hands of the individuals who are part of the companies. For **SDs**, generally each partner within the SD may formulate the will of the legal person, unless management has been assigned with the articles of partnership to one or several of the partners or to a third party (a specially appointed manager who is not a partner).[25] For **KDs**, those persons are the general partners, ie the partners whose liability as concerns the commercial activities of the partnership is unlimited.[26]

[24] Commerce Act, Art. 64.
[25] Commerce Act, Art. 84.
[26] Commerce Act, Art. 105.

Formulating the will of a capital company is different, in that it is accomplished, to a large extent, through the decisions made by company organs and not by individuals *per se*. Those organs and their members will be dealt with separately in Section 3.2.3. below. The two exceptions of individuals who can formulate the will of a capital company are single owners of the capital of EOODs and EADs and the manager(s) of OODs and EOODs. In this respect, court practice tends to view individuals who simultaneously manage and represent the company, including single owners of the capital in EOODs acting as managers, as persons with the power to represent.[27] Consequently, these individuals will be are included in Section 3.2.2.

3.2.2 Individuals Who Represent the Legal Person

Representation also varies depending on the type of company involved. For **SD**s, generally each partner may represent the legal person, unless representation has been assigned with the articles of partnership to one or several of the partners. **KDs** are represented by any of their general partners. **OODs** and **EOODs** are represented by their manager(s). Managers are natural persons who may or may not be partners of the company and are chosen by the general meeting of the stakeholders or by the single owner of the capital respectively.[28] Managers might additionally conclude a contract with the OOD, where their specific duties are outlined, but this is not a set requirement. **ADs** and **EADs** are represented by the board of directors or by the management board, depending on what system of management they utilize.[29] While this means that, unless otherwise decided, members of those bodies represent the companies collectively, in practice the boards tend to choose one or several of their members for this purpose. Likewise, **KDAs** are represented by their board of directors or some of its members.

3.2.3 Individuals Who Are Elected to a Control or Supervisory Body of the Legal Person

Different types of capital companies in Bulgaria have different organs who manage them. In **OODs** and **EOODs** the management is split between the manager(s) and the general meeting of

[27] Decision № 84 from 27.07.2012 of the Administrative Court – Sliven; Decision №2059 from 02.12.2014 of the Administrative Court – Burgas.
[28] Commerce Act, Art. 141, para. 2.
[29] Commerce Act, Art. 235.

the stakeholders or the single owner of the capital respectively.[30] The general meeting consists of all stakeholders within the company.[31] Depending on the preferences of the **AD**, its organs include either the general meeting of the shareholders and the board of directors, or the general meeting of the shareholders, the supervisory board, and the management board.[32] The general meeting includes all the shareholders with voting rights.[33] The rest of the bodies may include members who are natural persons, as well as legal persons, but the latter must be represented by a natural person for the purposes of their participation in the body.[34] With **EADs**, instead of a general meeting of the shareholders, there is a single owner of the capital. Finally, **KDAs** are managed by the general meeting of the shareholders, where only limited partners have the right to vote, and the board of directors, which consists of general partners.

3.2.4 Employees Performing a Certain Task

As concerns this fourth category of individuals, three cumulative conditions must be met before companies can be held liable for their actions. First, those individuals must have the status of employees of the legal person in question. Therefore, in accordance with the Labour Code of Bulgaria,[35] they must be natural persons who are either in an employment contract with the legal person,[36] have been appointed to work on the basis of election,[37] or on the basis of a competitive examination.[38] Second, the employee must have been assigned the performance of a particular task by its employer, the legal person. Third, the crime must have been committed either during the performance of this task or in connection with its performance.

[30] Commerce Act, Arts. 137, 141.
[31] Commerce Act, Art. 136.
[32] Commerce Act, Art. 219
[33] Commerce Act, Art. 220
[34] Commerce Act, Art. 234.
[35] Labour Code 1991 [Кодекс на труда]. Hereinafter referred to as **Labour Code**.
[36] Labour Code, Art. 61 and the following.
[37] Labour Code, Art. 83.
[38] Labour Code, Art. 89.

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

Bulgarian legislation imposes several potential bars to extradition of an individual. To ensure clarity, those bars will be presented in accordance with the accepted hierarchy of the legal sources in Bulgaria.

4.1 The Constitution

The general prohibition of extradition under Bulgarian law is set down in Art. 25, para. 4 of the Constitution of the Republic of Bulgaria,[39] according to which no Bulgarian citizen may be surrendered to another State or to an international tribunal for the purposes of criminal prosecution. The only exception is when there is an international treaty in force for Bulgaria which allows for such an extradition.

Aliens residing legally in Bulgaria are also protected from extradition (Art. 27, para. 1 CRB). In their cases, the exceptions to the protection are not related to international treaties, but to the provisions and the procedures established by Bulgarian law. Based on these general provisions, more specific ones have been implemented in the domestic legislation.

4.2 European Convention of Human Rights

Another set of restrictions to extradition is imposed by the European Convention of Human Rights,[40] which has been in force for Bulgaria since 1992. **Art. 3 ECHR** provides the general prohibition of torture, inhuman and degrading treatment. This provision has extraterritorial application, as established by the European Court of Human Rights in the *Chahal* case.[41] That

[39] Constitution of the Republic of Bulgaria 1991 [Конституция на Република България]. Hereinafter referred to as **CRB**.
[40] Convention for the Protection of Human Rights and Fundamental Freedoms. Hereinafter referred to as **ECHR**.
[41] *Chahal v. United Kingdom* [1996] European Court of Human Rights [English], available at < http://hudoc.echr.coe.int/eng?i=001-58004 >.

means that if Bulgaria extradites an individual to another State (regardless if this is a State member to the Convention, or a third State), it would bear responsibility for any violations of the provision in question. For example, the case of *M.G. v Bulgaria* is one of only two cases where the European Court of Human Rights has found a violation regarding an extradition to a State member of the Council of Europe (in that case – Russia).[42]

The status of Art. 3 ECHR as a potential bar to extradition is ensured by the fact that it is mirrored by Art. 29, para. 1 CRB, according to which 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment, or to forcible assimilation'. What is more, when there is a danger of a violation of this norm, the European human rights court can impose an interim measure prohibiting an extradition.

Another potential bar to extradition Art. 6 of the ECHRC, which enshrines the right to a fair trial. In the case of Stoichkov v Bulgaria[43] the European human rights court has established as the relevant standard "flagrant denial of justice". If there is a possibility of a violation of that norm, again an interim measure can be imposed by the court and an extradition shall not be concluded.

4.3. Law of the Extradition and the European Arrest Warrant

The Law of the Extradition and the European Arrest Warrant[44] applies in cases where Bulgaria is a party to an international treaty and the treaty leaves any matters unsettled. Alternatively, if there is no applicable international treaty, the law is applied 'under the condition of reciprocity' with the other State concerned. This reciprocity is determined by the Minister of Justice. Finally, the Extradition Law is applied in cases of receipt of Bulletin of international searching of the International Organization of the Criminal Police (Interpol) or receipt of signal through the

[42] *M.G. v Bulgaria* [2014] European Court of Human Rights [French], available at < http://hudoc.echr.coe.int/eng?i=001-142125>.
[43] *Stoichkov v. Bulgaria* [2005] European Court of Human Rights [English], available at < http://hudoc.echr.coe.int/eng?i=001-68625 >.
[44] Law of the Extradition and the European Arrest Warrant 2005 [Закон за екстрадицията и Европейската заповед за арест]. Hereinafter referred to as **Extradition Law**.

Schengen Information System with detention and extradition purpose.

4.3.1 Definitions

According to Art. 2 Extradition Law, **extradition** is the handing over of a person, located on the territory of one country: (1) against which person a prosecution procedure has been started in another country or before an international court; (2) who is wanted to serve an imposed by the court authorities of another country or international court penalty imprisonment; (3) to which a measure requiring detention has been imposed by the court authorities or by an international court.

A **European Arrest Warrant** (Art. 3 Extradition Law), on the other hand, is an act, issued by the competent bodies of a Member State of the European Union, for detention and surrender of the looked person by another Member State with the purpose of performing of criminal prosecution or execution of imprisonment penalty or a measure requiring his/her detention.

4.3.2 Conditions for Extradition

The Extradition Law establishes conditions for extraditions in Arts. 5-8. To begin with, individuals may only be extradited if certain **prerequisites** are present. First, the principle of reciprocity has been introduced, meaning the offense needs to be criminalised in both States (the so-called 'double criminality'). Second, the penalty for the offence should be imprisonment of at least one year. If either condition is not met, extradition is not at all possible. Bulgarian citizens (unless specifically provided by an international treaty), people with refugee status acquired in Bulgaria, foreign citizens with immunity, and people who do not bear penal liability as per Bulgarian legislation **may not be extradited**.

Next, there are certain **mandatory grounds for refusing extradition**. The exhaustive list, drawn up in Art. 7 Extradition Law, includes cases where: the offences are political or military in nature; extraordinary courts are involved; the prosecution is motivated by discriminatory grounds; the person will be subjected to violence, etc; the offence has been amnestied or its limitation period has expired; the person has an entered in force sentence in Bulgaria for the same offence; the legislation of the applying state provides a death sentence for the offence and there are no sufficient guarantees that the latter will not be imposed.

Finally, Art. 8 Extradition Law provides for grounds which, while not mandatory, **may still be a cause for the extradition to be refused**. Those are cases where: the act is judicable by the Bulgarian court; the prosecution procedures have been terminated in Bulgaria for the same offence; there are pending prosecution procedures against the person for the offence; the sentence has been pronounced not in the presence of the person, etc; the offence is committed outside the territory of the applying State and Bulgarian legislation does not allow performance of criminal prosecution for such an offence.

4.3.3 European Arrest Warrant

A European Arrest Warrant is issued for offences which are punishable by at least one year of imprisonment. However, unlike the standard extradition procedure, there are certain exceptions to the reciprocity (double criminality) principle here, specifically in cases where the offences carry no less than three years of imprisonment in the issuing State. **The offences include**, among others, corruption, fraud (including affecting the including that affecting the financial interests of the European Communities within the meaning of the Convention on the Protection of the European Communities' Financial Interests), laundering of the proceeds of an offense, participation in a criminal organization, counterfeiting currency, counterfeiting and piracy of products, forgery of administrative documents and forgery of means of payment.

5. Please state and explain any internal reporting processes (i.e. whistleblowing) and external reporting requirements (i.e. to markets and regulators) that may arise on the discovery of a possible offence.

In regards to internal reporting processes such as whistleblowing, Bulgarian law has not adopted a unified regulatory system. Corporations are free to institute their own **internal policies** on these matters. Therefore, the present Section will focus on two general and two specific reporting processes, all of which are **external** in nature.

5.1 Procedure under the Administrative Procedure Code

The Administrative Procedure Code[45] has **a general procedure** set in place for filing **signals for** several violations, including **'abuse of power and corruption'**.[46] The procedure is open to every citizen and organisation,[47] and the signals are considered and decided by administrative bodies or other bodies which carry out public and legal functions.[48] The provisions in question, however, concern actions or inactions of administrative bodies and officials, ie the public sector, and are not applicable against private companies.

5.2 Law on Measures against Money Laundering

The Bulgarian Law on Measures against Money Laundering[49] introduces certain **preventive measures against** using the financial system for **money laundering** purposes. The measures must be implemented by persons specifically listed in Art. 3, para. 2 LMML, henceforth referred to as 'implementers'.

The implementers include: the Bulgarian National Bank, credit and financial institutions, payment service providers, insurers, re-insurers, and insurance agents, mutual investment schemes, investment intermediaries and management companies, pension funds and health insurance companies, privatisation authorities, persons who organise the awarding of public procurement orders, who organise and conduct gambling games, and who lend cash against a pledge of chattels, legal persons which have employee mutual aid funds, postal operators licensed to perform postal money orders, notaries public, market operators and/or regulated marker, leasing entities, state and municipal authorities executing concession agreements, political parties, trade unions and professional organisations, non-profit legal entities, registered auditors, the National Revenue Agency and customs authorities, sports organisations, the Central Depository, merchants dealing

[45] Administrative Procedure Code 2006 [Административнопроцесуален кодекс]. Hereinafter referred to as **APC**.
[46] APC, Art. 107, para. 4.
[47] APC, Art. 109.
[48] APC, Art. 107, para. 1.
[49] Law on Measures against Money Laundering 1998 [*Закон за мерките срещу изпирането на пари*]. Hereinafter referred to as **LMML**.

in arms, petrol and petrochemical products, wholesale traders, and persons providing by occupation:

a. advice in taxation matters;
b. advice in legal matters - in certain cases detailed by the Law;
c. real property intermediation;
d. accounting services;
e. certain services for the purpose of legal person registration and the like, detailed by the law.

The measures must also be implemented by branches of the listed persons that are registered abroad, and by Bulgarian branches held by foreign persons falling within the scope applicable to local persons.[50] Each implementer adopts their own internal rules for the control and prevention of money laundering, which are approved by the Chairperson of the State Agency for National Security.

Under the LMML, the implementers must carry out **the following measures**: identify clients and their actual legal-person owners; collect information from the clients on the purpose and nature of the established or intended relationship between them and the implementers; perform ongoing monitoring of all established commercial or professional relations and verify all transactions in connection therewith; disclose information on any doubtful transactions and clients.[51]

When doubts of money laundering arise during the implementation of the aforementioned measures, the implementers or any of their personnel must **alert the Financial Intelligence Directorate of the State Agency for National Security** (FID).[52] The notification must be given prior to the completion of the transaction or deal and the implementers must delay its execution within allowable time as per relevant regulations. In such cases, the Chairperson of the FID may put a stay, by an order in writing, on the transaction or deal for a period of up to 3 business days.

[50] LMML, Art.3, para. 4.
[51] LMML, Art.3, para. 1.
[52] LMML, Art.11.

If a delay is objectively impossible, the notification must be given immediately after the completion of the transaction or deal. The FID must also be notified whenever a payment in cash occurs at a value exceeding BGN 30,000 (approx. EUR 15,000) or its equivalent in foreign currency made by or to any of their clients.[53]

After notification is given, the FID may request information about suspicious transactions, deals, or clients from the implementers. The request must be in writing if it is addressed to the Bulgarian National Bank or the credit institutions that operate on the territory of Bulgaria. The provision of information may not be refused or restricted due to considerations of official, banking, or commercial secrecy.

Finally, the FID may also receive information on suspicion of money laundering from **governmental authorities** and through **international exchange**. It is authorized to exchange such information, on its own initiative and if requested, with the respective international authorities, authorities of the European Union and authorities of other states, based on international treaties and conditions of reciprocity.[54]

5.3 Signals to the Protection of the European Union Financial Interests Directorate

The Protection of the European Union Financial Interests Directorate (AFCOS) is a specialised administrative directorate within the Ministry of Interior of Bulgaria. As a **partner of the European Anti-Fraud Office** (OLAF) for Bulgaria, its main function is to **protect the financial interests of the European Union** in the country. The AFCOS coordinates the fight against infringements of those interests by carrying out operational cooperation with OLAF, reporting irregularities and asserting administrative control over the local structures that manage the distribution of European funds.[55]

[53] LMML, Art.11a.
[54] LMML, Art.18.
[55] Rules for Implementation of the Law for the Ministry of Interior 2014 [Правилник за прилагане на Закона за министерството на вътрешните работи], Art. 141o.

The AFCOS is also in charge of receiving signals for irregularities in connection with the funds. Anyone is free to alert the Directorate, either in writing (including through a special online form) or verbally; anonymously or not. Upon receiving such a signal, the Directorate must evaluate, analyse and conduct inspections. In doing so, it may request assistance from other structures within the Ministry of Interior and other state organs.

5.4. Procedure under the Criminal Procedure Code

Apart from the specific investigations discussed above, anyone can report a crime listed in Section 1 to investigation bodies, most notably the police. This action begins the process of initiating pre-trial proceedings under the general procedure established in the Criminal Procedure Code of Bulgaria.[56] A brief outline of these proceedings and their link to the administrative punitive liability under Art. 83a AVSA follows.

There are four conditions for validly instituting pre-trial proceedings: 1) the existence of a statutory occasion; 2) the existence of sufficient information about the perpetration of a crime; 3) a competent organ – most often a prosecutor; 4) a proper act – most often a decree of the prosecutor.

An investigation can commence following four types of **statutory occasions**.[57] First, any individual can send a notice (oral or written) to the pre-trial bodies of the perpetration of a criminal offence.[58] The notice cannot be anonymous. Second, information about a perpetrated criminal offence distributed by the mass media can also serve as a statutory occasion. Third, the perpetrator himself can appear in person before the pre-trial bodies with a confession.[59] Finally, the pre-trial bodies can discover signs of a perpetrated crime, most often while investigating a different offence.

[56] Criminal Procedure Code 2005 [*Наказателно-процесуален кодекс*]. Hereinafter referred to as **CPC**.
[57] CPC, Art. 208.
[58] CPC, Art. 209.
[59] CPC, Art. 210.

As pertains to the **sufficient information** requirement, in practice it means that there should enough evidence that makes it seem likely that a crime has been committed.[60] An additional investigation, one that precedes the central pre-trial investigation, can be carried out to satisfy this requirement.

Once all these requirements are in place, **the pre-trial proceedings** are officially initiated. Next follows the investigation phase – evidence is gathered, the accused party is constituted to the proceedings and questioned, after which the investigation body may officially present the investigation to the accused.[61] Finally, if the prosecutor is persuaded that the evidence necessary to press charges has been collected, that there are no grounds for terminating or suspending the criminal proceedings, and that no considerable violation of procedural rules has been allowed, he or she draws up an **indictment**.[62]

It is at this point that the prosecutor may submit **a substantiated proposal to initiate proceedings** in relation to the legal person under **Art. 83a AVSA**. The court competent to hear such a case is either the district court having jurisdiction over the territory where the legal person's seat is or, if that seat is outside Bulgaria, the Sofia City Court. This marks a distinct change from the procedure prior to the newest amendment of the AVSA, when such cases were brought before administrative courts.

The prosecutor may **also initiate proceedings** under Art. 83a AVSA **when** criminal proceedings could not be initiated, were abandoned or suspended on certain legal grounds. Relevant legal reasons for abandonment include, for example, instituting amnesty or reformative measures for the perpetrator, transferring him or her to another State, permanent mental disorder, death, or expiry of the criminal responsibility due to legal prescription. Reasons for suspension include the perpetrator suffering from brief mental derangement or having immunity. Additionally, the

[60] CPC, Art. 211.
[61] CPC, Art. 227.
[62] CPC, Art. 246.

prosecutor may initiate proceedings when a decision under Art. 124, para. 5 of the Code of Civil Procedure has entered into force, regarding an action to establish a criminal circumstance relevant to a civil legal relation or to reversal of an effective judgment.

6. Who are the enforcement authorities for these offences?

The enforcement authorities for the offences discussed in Section 1 are the: (1) investigative bodies, (2) prosecutors, (3) courts – predominantly district courts, (4) General Directorate for Combating Organised Crime, (5) Financial Intelligence Directorate of the State Agency for National Security.

According to Art. 52 CPC, the **investigative bodies** generally include investigators and investigating police officers (employed at the Ministry of the Interior or the National Customs Agency). The investigative bodies operate under the guidance and supervision of a prosecutor.

Prosecutors play the main role in the pre-trial proceedings. Their main functions are laid out in Chapter 5 CPC. According to Art. 46 CPC, the prosecutor presses charges and maintains the indictment for publicly actionable criminal offences. He directs the investigation and exercises constant supervision for its lawful and timely conduct in his capacity of a supervising prosecutor; performs investigation or separate investigative or other procedural action; participates in court proceedings as accuser on behalf of the State and takes measures for the elimination of infringements on the laws pursuant to the procedures set forth in the CPC and exercises supervision for legality in the enforcement of coercive measures. A prosecutor with a higher prosecution office may revoke in writing or amend the decrees of prosecutors with a lower prosecution office, if those decrees have not been reviewed by a court. His written instructions are binding on them, but he may also take the necessary investigative or other procedural action alone. Finally, the Prosecutor-General exercises supervision for legality of and provides methodological guidance for the operation of all prosecutors.

District courts (23 in total in Bulgaria) are the first instance for most of the crimes discussed in Section 1, including bribery, corruption, and money-laundering. The sole exception is fraud, for which regional courts are the first-instance courts. According to Art. 27 CPC, after the prosecutor files the indictment or the victim files a complaint, the court conducts proceedings and decides on all matters relevant to the case. In pre-trial proceedings the court discharges its powers as provided for in the special part of the CPC. The court rules on the issue of jurisdiction, based on the statement of facts contained in the indictment. Where the court finds that the case is not triable by a court, but falls within the jurisdiction of another body, it terminates criminal proceedings and refers the case to said body.

The State Agency for National Security incorporates within its structure a specialized administrative directorate for financial intelligence. As discussed in Section 5.1 above, t**he Financial Intelligence Directorate (FID)** collects, stores, investigates, analyzes and discloses financial intelligence under the terms and procedures of the Law on Measures against Money Laundering and the Law on Measures against the Financing of Terrorism. The Directorate is responsible for protecting the shared intelligence on the website of the Egmont Group of Financial Intelligence Units and the security of the site itself. It performs functions of detection and prevention against money-laundering and financing of terrorism, as well as with regard to capital flows, corruption, bribery in international trade transactions and confiscation. In the fulfilment of its functions the FID closely interacts with the Bulgarian security and public order services and its foreign counterparts. The State Agency for National Security works in a close collaboration with the Financial Action Task Force, an organization which sets the standards for prevention of money laundering and financing of terrorism, and MONEYVAL – the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism towards the Council of Europe.

Another State authority that has power in the area is **the General Directorate for Combating Organised Crime (GDBOP)**. GDBOP is a national specialized structure responsible for conducting investigations, gathering information, ensuring protection and prevention as relates to organized criminal activity. The full scope of criminal activities that the Directorate combats is listed in Art. 39 of the Law on the Ministry of Interior.

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

Investigating police officers have the power to: (1) call on citizens as defendants or witnesses; (2) conduct interrogations, searches, confrontations, and views of the place of the crime; (3) assign export reports to experts; (4) propose retention of people to the General Prosecutor; (5) impose remand measures under the CPC; (6) elevate accusation for committing a crime.

According to Art. 145 of the Judiciary System Act,[63] in discharging their functions stipulated by the law, **prosecutors** may: (1) obtain documents, information, explanations, expert opinions and other material within a time limit set by them; (2) carry out inspections in person; (3) entrust the appropriate bodies to carry out inspections and audits within a time limit, be provided with their conclusions and, upon request, with all supporting materials; (4) summon citizens and authorised representatives of legal persons, or order that they be brought by coercion if they fail to appear without a valid reason; (5) forward materials to a competent body if there are grounds to enforce liability or to apply coercive administrative measures, which the prosecutors may not take in person; (6) apply the measures envisaged by law if there is data conducive to the existence of an impending publicly actionable criminal or another legal offence.

Personal orders of prosecutors issued in compliance with their competence and with the law are binding on state bodies, officials, legal persons and citizens. State bodies, legal persons and officials are obligated to provide assistance to prosecutors and allow them access to the premises and the places concerned. Prosecutors may also deliver binding written personal orders onto police bodies.

The **FID** performs functions of detection and prevention against money laundering and financing of terrorism, as well as with regard to capital flows, corruption, bribery in international trade transactions and confiscation for which fulfilment it closely interacts with the Bulgarian security and public order services and its foreign counterparts.

[63] Judiciary System Act 2007 [Закон за съдебната власт]. Hereinafter referred to as **JSA**.

In performing its functions, the **GDBOP**: (1) observes, establishes and controls persons and objects for which there is data that are related to the criminal activity of local and transnational criminal structures; (2) conduct operational-search activities; (3) jointly with the customs authorities carry out controlled deliveries; (4) collect, process and store information about individuals, activities and facts related to organized crime; (5) prevent and detect organized criminal activity and participate in its investigation; (6) use special intelligence means under conditions and procedures specified by law; (7) receive assistance and organize the cover of employees and their work in state bodies, organizations and legal entities in an order determined by an ordinance of the Council of Ministers.

Pre-trial proceedings against bribery are often surceased because of lack in object or proof.

While conducting an investigation for corruption in the upper levels of authority more proofs need to be gathered. Also, cooperation with legal entities and citizens as well as with organisations is needed in order to reveal the truth but that could take long time.

It is a common case when by the time the authorities reveal the committed crime, the possibility of forcing administrative or disciplinary liability has expired.

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self-incrimination)?

Bulgarian legislation on criminal proceedings includes several provisions that give the right to the accused to remain silent or the right for third parties to withhold information. The rules apply before all authorities responsible for criminal investigation and before the criminal court.

The right to remain silent is one of the main rights of the accused listed in Art. 55 CPC. This right is further restated in Art. 115 CPC, according to which the accused may refuse to give any information after he has been accused of committing a crime, ie after the investigation authorities have issued the relevant act with a concrete accusation. Exercising this right is not considered by the court as an aggravating circumstance.

Furthermore, there are certain requirements as far as **the persons who may be admitted as witnesses** are concerned. While the rules regarding testimonies are imperative, there are also persons who are entitled to refuse to give statements as a witness, even though they are otherwise eligible to do so (Art. 119 CPC). Such a right to refuse to testify is given to the: (1) spouse; (2) ascendants; (3) descendants; (4) siblings of the accused; and (5) the individuals with whom he/she lives together. However, this legal privilege only provides for the right to refuse to give statements. However, if one does not make use of it initially and consents to testifying, then they shall be obliged to testify truly and accurately, according to the facts as appreciated by them.

Another relevant circumstance is the **protection against self-incrimination**. Just as the well-known Fifth Amendment of the U.S. Constitution preclude anyone from being compelled to testify against themselves, so too does Art. 121 CPC. According to this rule, even if none of the abovementioned exceptions apply and the individual – either the accused, or any witness in general – is being subjected to an interrogation, they may lawfully refuse to answer questions when the information from the answers might lead to incrimination of their conduct or the conduct of the relatives (including the spouse, ascendants, descendants, siblings or individuals with whom the person lives together). If the witness fears that their answers may incriminate them or the persons mentioned, the witness is entitled to seek advice from an attorney-at-law. When the witness requests such advice, the court or the relevant investigating authorities are obliged to provide him or her with the legal services of an attorney-at-law.

The same right to refuse to testify, but only as concerns certain information, applies to persons who have become privy of this information in their capacity as defenders or agents of the accused. The right also extends to interpreters assisting at the meetings of the accused with their legal counsel. It is important to not, as the courts continuously restate, that this information shall have to the knowledge of the described persons only while performing their duties as attorneys at law.

Finally, **search and seizure** during the investigation can only be conducted with the prior approval of a regional judge. Only in urgent cases may the investigating authorities conduct search and seizure without such prior approval, but in those cases the measure is subjected to a subsequent

evaluation by the judge. There are no specific provisions regarding the seizure **of documents**. However, the detention and seizure **of correspondence** is subject to additional requirements: it is only admissible in investigations of grave crimes (within the meaning of Art. 93 CC). Moreover, in urgent cases the investigating authorities may detain and seize correspondence without prior approval of a judge only for the purpose of investigating terrorism (Art. 108a CC) and drug-related offences (Art. 165 CC).

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

9.1 Data Protection within the EU

The legal definition in Bulgaria for 'personal data'- shall refer to any information relating to an individual who is identified or identifiable, directly or indirectly, by reference to an identification number or to one or more specific features.

The purpose of this law is to guarantee the inviolability of personality and privacy by ensuring protection of individuals in case of unauthorised personal data processing referred to them, in the process of free movement of data.

Personal data can be collected directly from the individual or from existing data base. These data may subsequently be used for other purposes and/or shared with other parties. Personal data can be any data that identifies an individual, such as a name, a telephone number, or a photo.[64]

There are several cases in which personal data should be given in order to contribute further to an official investigation started by domestic or foreign authorized by Bulgarian or European law. The Bulgarian legal framework in the field of personal data protection includes:

[64] http://ec.europa.eu/justice/policies/privacy/docs/guide/guide-ukingdom_en.pdf – main source of knowledge

- The Constitution of the Republic of Bulgaria sets down- Art. 32.
    - The privacy of citizens shall be inviolable. Everyone shall be entitled to protection against any unlawful interference in his private or family affairs and against encroachments on his honour, dignity and reputation.
    - No one shall be followed, photographed, filmed, recorded or subjected to any other similar activity without his knowledge or despite his express disapproval, except when such actions are permitted by law.
- The Law for Protection of Personal Data sets down further more
    - Under Art. 36 from the law of protection of personal data, there are hypothesis in which transfer of personal data to third country shall be allowed only if this third country or enforcement authority ensures an adequate level of personal data protection within its territory.

The following paragraphs are related with it:

- Where a special law introduces restrictions to the data provider under Art. 1, para. 6 related to data processing, the recipient shall be mandatory notified accordingly by the data provider.
- When a controller receiving data under Art. 6, para. 1 is notified by the data provider of such processing related restrictions under his national legislation, the former shall be obliged to comply with those restrictions.
- By the provision of data under Art. 1, para. 6, the controller submitting the data may set specific deadlines for data storage or for review of their necessity.
- Any controller receiving data under Art. 1, para. 6, shall be obliged to delete or block the data or review their necessity after expiration of the deadlines set by the data provider.

The Law for protection of personal data also sets down in Article 36 that:

- Unless otherwise provided for in a special law, this Law shall be applied also to the personal data processing for the purposes of: the state defence; the national security; the protection

of the public order and prevention of crime; the penal proceedings; the enforcement of penalties.

- (new - SG 81/11) Where under the police or judicial cooperation, data under para. 5, Items 3, 4 and 5 has been received from or provided to a Member State of the European Union, or to authorities or information systems established pursuant to the Treaty Establishing the European Community and the Treaty on the Functioning of the European Union, it shall be processed under the conditions and order of this Law.[65]

Under EU law, personal data can only be gathered legally under strict conditions, for a legitimate purpose. Furthermore, persons or organisations which collect and manage your personal information must protect it from misuse and must respect certain rights of the data owners which are guaranteed by EU law.

Therefore, common EU rules have been established to ensure that personal data enjoys a high standard of protection everywhere in the EU. Individuals have the right to complain and obtain redress if their data is misused anywhere within the EU – without to have the right to harm the investigation or presumable to leave the country itself.

In this context, national laws regarding data protection demanded good data management practices on the part of the entities who process data, called 'data controllers'. These included the obligation to process data fairly and in a secure manner and to use personal data for explicit and legitimate purposes. National laws also guaranteed a series of rights for individuals, such as the right to be informed when personal data was processed and the reason for this processing, the right to access the data and if necessary, the right to have the data amended or deleted.

[65] https://www.cpdp.bg/en/index.php?p=element&aid=373

Although national laws on data protection aimed to guarantee the same rights, some differences existed. These differences could create potential obstacles to the free flow of information and additional burdens for economic operators and citizens. Some of these were: the need to register or be authorised to process data by supervisory authorities in several Member States, the need to comply with different standards and the possibility to be restricted from transferring data to other Member States of the EU. Additionally, some Member States did not have laws on data protection.

In order to remove the obstacles to the free movement of data without diminishing the protection of personal data, Directive 95/46/EC (the data protection Directive) was developed to harmonise national provisions in this field.[66]

National law might allow other exceptions to provisions of the Directive.(These include the obligation to inform the data subject; the publicising of data processing operations; the obligation to respect the basic principles of good data management practice.) Such exceptions are permitted if, among other things, it is necessary on grounds of national security, defence, crime detection, enforcement of criminal law, or to protect data subjects or the rights and freedom of others. Additionally, derogation from the right to access data may be granted for data processed for scientific or statistical purposes.

In conclusion we can point out that the advances in information and communication technologies, personal data can travel across the globe with great ease so there are law mechanisms that guarantee personal right of individuals. The digitalisation and new technologies offer huge benefits, but they also imply new risks for the misuse of personal data and have created a whole set of new challenges – the EU and Bulgarian Personal Data Legislation and protection of it is a very fundamental part of developing/reaching a higher law security for individuals and their personal information, but not even when it is required by enforcement authority – there are several cases in which the data controller could not refuse to provide it to authorized authorities.

[66] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML

10. If relevant, please set out information on the following:

10.1 Defences to the offences listed in question 2;

It must be noted that, even as concerns liability for administrative offences, the principle laid down in the AVSA is that only natural persons can be held liable. In this regard, Art. 83(1) is the sole exception. It allows for property sanctions to be imposed on legal persons and sole proprietors for any failure to discharge their obligations to the state or the municipality, when specific legislation provides for this.

The Bulgarian legislation also consists another articles, which are connected with the possibility of protection. The two main sources are the Constitution and some articles in the law of Administrative violations and sanctions acts.

Under Art. 120., Constitution of Republic Bulgaria courts must:

1. The courts shall supervise the legality of the acts and actions of the administrative bodies.
2. Citizens and legal entities shall be free to challenge any administrative act which affects them, except those listed expressly by the laws.[67]

10.2. Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred- prosecution agreement) and c. Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

There are several law case scenarios, which are implemented it the law, they were already discussed in the research, so they will be concluded here only by headlines.

The first one is the right to remain silent is listed among other rights of the accused, as enshrined in **Art.55** of the Code for Criminal Proceedings (CCR). The right to remain silent is further restated

[67] http://www.vks.bg/english/vksen_p04_01.htm

in **Art. 115** CCR – he may refuse to give any information after he has been accused of a committed crime, i.e. after the investigation authorities have issued the relevant act with a concrete accusation. Exercising this right shall not be accepted by the court as an aggravating factor.[68]

Furthermore, there are certain requirements as for the persons who may be admitted as witnesses. The Bulgarian legislations also knows the common protection from self-incrimination, as seen in the Fifth amendment of the U.S. Constitution. Even when being subject to an interrogation (i.e. none of the above described situations apply), the person (not necessarily accused, but also witnesses in general) may under **Art. 121** of CCP lawfully refuse to answer questions when the information from the answers might lead to incrimination of their conduct or the conduct of the relatives, as outlined above – the spouse, relatives in the ascending or descending line, the siblings of the witness as well as to the stable partner/cohabitee of the witness - the same right to refuse to answer only to certain questions or withhold information applies to persons to whom this information has come to their knowledge in their capacity of a defender or agents, as well as to interpreters assisting at the meetings of the accused with their legal counsel.

The direct related **Article is 66** from Criminal Procedure Code:

1. Where the accused party fails to appear before the respective body without valid reasons or changes his/her then current place of residence without notifying said body thereof, or breaches the remand measure imposed, a measure of remand shall be applied or, if so has already been done, it shall be substituted for a more restrictive one pursuant to the procedure herein set forth.
2. Where the measure of remand is bail, money or securities deposited shall be forfeited to the benefit of the state. In these hypotheses bail at a larger amount may be set.

[68] http://www.vks.bg/english/vksen_p04_04.htm#Chapter_Seven__

Also Articles from **67 to 73** from Criminal Procedure Code are showing the hypothesis and scenarios when Bulgarian legislation gives the sentenced a possibility of merciful punishment from the court judgment.

In **Articles 78- 84** the legislator is stipulating alleviation scenarios for sentenced – for example in **Article 79**:

1. Penal prosecution and the serving of punishment shall be excluded:
    a. where the perpetrator has died;
    b. where the term of statutory prescription has expired;
    c. where an amnesty has followed.
2. Not excluded by prescription shall be the penal prosecution and the serving of punishment with respect to crimes against peace and humanity.[69]

There are also hypothesis of early guilty pleas:

The concept of the Early Guilty Plea scheme is not, in itself, an offensive one. Where a case is straightforward, a defendant accepts their guilt, and the evidence is substantial and undisputed, it seems justifiable to encourage a guilty plea at the initial stages, so long as the circumstances of the defendant do not negate his or her free and informed choice. In circumstances where these conditions are not met, the scheme poses problems. The scheme states that the discount is not a reward but an incentive, but this is arguably a matter semantics rather than substance. In reality, a defendant may view the discount as neither a reward for "doing the right thing" and admitting guilt nor an incentive to assist those prosecuting him or her - but as a temptation to reduce the risk of conviction for an offence they have not committed or an inducement to sacrifice their legitimate fair trial rights.

[69] http://www.vks.bg/english/vksen_p04_04.htm#Chapter_Seven__Articles from 67-73 and 78-84

Often, the early guilty pleas will require the prosecution and the defence to agree basis of that plea. For that reason, the fact that the prosecution or trial judge indicates for sentence which the defendant would receive after pleading guilty at an earlier stage and the sentence the defendant would receive if convicted at trial cannot of itself amount to oppressive conduct.

In most cases it's adopted by default that when the defendant is co-operating the punishment quantity would be merciful in comparison with non co-operation scenarios.

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance)

Having in mind the specifics of corporate liability for criminal acts in Bulgaria, the question of means of cost mitigation is not relevant. Further, no directors and officers insurance is possible and there are no specifics regarding taxation.

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

12.1 Overview of Liability of Legal Persons in Bulgaria

Bulgaria first began sanctioning legal persons for crimes in 2005 by enacting Arts. 83a-83f AVSA. This administrative punitive liability was created in order to bring the State's legislation in line with international standards.[70] It was also an answer to the Phase 2 evaluation of the Working Group on Bribery with the Organisation for Economic Co-operation and Development (OECD).[71]

[70] Recommendation No. R (88) 18 of The Committee Of Ministers To Member States Concerning Liability Of Enterprises Having Legal Personality For Offences Committed In The Exercise Of Their Activities; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.
[71] OECD (2016), 'The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report', 23. <http://www.oecd.org/daf/anti-bribery/liability-of-legal-persons-for-foreign-bribery-stocktaking-report.htm> accessed 11 March 2017.

Administrative punitive liability has come a long way since 2005. The latest amendments from November 2015, for example, were particularly significant. They included: expansion of the scope of crimes for which liability may be triggered, heavier sanctions, altered court jurisdiction (regular courts now decide such cases instead of administrative ones), and changes in the court procedure itself. The amendments were adopted with two major goals in mind - to improve the existing legal regime and to implement new recommendations by the OECD and by the review mechanism towards the United Nations Convention against Corruption (UNCAC).[72]

12.2. Looking Forwards

Taking into account the development of administrative liability in Bulgaria in the past 12 years, the authors of this report do not expect any significant changes to occur in this field in the near future. There are currently no academic debates or pending legislative proposals regarding amendments, and case law regarding corruption crimes is scarce and therefore not indicative of new trends. What is more, the jurisprudence as a whole has been extremely reluctant to accept the concept of corporate criminal liability,[73] making it unlikely that Bulgarian legislation will enact this kind of liability anytime soon.

If changes do occur, it is likely they will come about following new international recommendations. Bulgaria is slated for a new monitoring under the OECD Anti-Bribery Convention mechanism in March 2021.[74] Unlike the 2011 Phase 3 Report, which focused on the broader enforcement of the Convention and brought about the latest significant amendments to Bulgarian legislation, Phase 4 will be about taking a tailored approach and considering each country's unique situation, challenges and positive achievements. In light of this, it is probable that the next set of changes pertaining to corporate liability will be about fine-tuning the already existing legislation, e.g. expanding the list

[72] Law on Amendments and Supplements to AVSA – Motives, available in Bulgarian at <http://parliament.bg/bg/bills/ID/15277/> accessed 11 March 2017.
[73] A. Stoynov, *Criminal Law* (Ciela 2015) 113.
[74] Working Group on Bribery in International Business Transactions, 'Monitoring Schedule December 2016-June 2024' <https://www.oecd.org/daf/anti-bribery/Phase-4-Evaluation-Schedule-2016-2024.pdf> accessed 11 March 2017.

of crimes that may engender administrative liability or introducing new kinds of penalties besides financial sanctions and confiscations.

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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction

Cyprus is still developed in the anti-corruption, bribery and all relevant according to these offences[1]. It is understood that because of the lack of incidents in the past and with an increasing amount of similar high profile related cases in the recent years,[2] a piece of legislation was needed. The first piece of legislation was the authorization of the Criminal Law Convention on Corruption[3] (ETS 173) and then Penal Code (Cap.154)[4] . More specifically the article 102 of Penal Code (Cap.154)[5] , defines the meaning of bribery on public officials and the penalty. While articles 113,119 and 300 of the Penal Code[6] define the meaning of fraud and the penalty. In relation of corruption the relevant legislation in Cyprus is the Law of Corruption 2012 (Cap.112)[7].

In order to understand an offence and the relevant defenses according to A.C Dicey[8] you should find out their exact legal meaning[9]. The Oxford Law Dictionary[10] gives a clear definition about the following offences: bribery, corruption, fraud, and money laundering. Bribery is defined as: 'the common-law offence of making improper payments to judges, magistrates, or other judicial officers'[11], while it is compared to corruption, which is characterized as: 'Offences relating to the improper influencing of people in certain positions of trust'[12]. Moreover money laundering is defined as: "Legitimizing money from organized or other crime by paying it through normal

[1] Christina Orphanidou and Marianna Georghadji, 'ANTI-CORRUPTION LAWS IN CYPRUS' [2013] (1) Ioannides Demetriou LLC p.1
[2] 'Business Anti-corruption', (GAN Business, 2015) <http://www.business-anti-corruption.com/country-profiles/cyprus> accessed 5 February 2017
[3] Criminal Law Convention on Corruption 1999
[4] Penal Code 2012
[5] Ibid.
[6] Ibid.
[7] Law of Corruption 2012 (Cap.112)
[8] Plaxton Michael, 'Police powers after Dicey' (2012) 38(1) Queen's law journal p.109
[9] Ibid
[10] Elizabeth Martin, Oxford Dictionary of Law (Jonathan Law ed, 7th edn, Oxford University Press 2013)
[11] Cited in: Elizabeth Martin, p.67
[12] Cited in: Elizabeth Martin, p.137

business channels",[13] while fraud is described as: "Dishonestly making a false (untrue or misleading) representation with a view to gain or with intent to cause losses"[14].

To begin with in relation to bribery, Cyprus parliament has adopted from the European Union the Convention on 'Combating Corruption Involving Officials of the European Communities or the Member States of the European Union'[15] into its the Penal Code[16]. Moreover it adopted the on Convention of the Council of Europe Convention on Criminalization of Corruption (Ratification) Law[17] which for the first time gave Cyprus the 'order' to criminalize corruption. Articles 2, 3[18] of this Convention distinguished the deference of Passive[19] and Active[20] bribery.

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties

Active bribery was described as "promising, offering or giving by any person, directly or indirectly, advantage to any of its public officials… to act or refrain from acting in the exercise of his functions",[21] while passive bribery was cited as: 'request or receipt by any of its public officials, directly or indirectly any undue advantage, for himself or a promise of such advantage to act or refrain from acting on the exercise of his functions'.[22] Articles 4-11[23] form the different ways of bribery to private sector, to different bodies of the government[24]: judges, officials, international assemblies.[25]

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[13] Cited in: Elizabeth Martin, p.357
[14] Cited in: Elizabeth Martin, p.240
[15] Convention on Combating Corruption Involving Officials of the European Communities or the Member States of the European Union 2004
[16] Penal Code 2012
[17] The Law on the Council of Europe Convention on Criminalization of Corruption (Ratification) Law 2000
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Cited in: The Law on the Council of Europe Convention on Criminalization of Corruption (Ratification) Law 2000
[22] Cited in: The Law on the Council of Europe Convention on Criminalization of Corruption (Ratification) Law 2000
[23] The Law on the Council of Europe Convention on Criminalization of Corruption (Ratification) Law 2000
[24] Ibid.
[25] Ibid.

Also Article 13[26] sets out the money laundering proceeds from corruption offences. More importantly in the Article 16 of this Convention[27] raises the importance of Immunity and that it should be without prejudice, according to Treaties, protocols or Statues as regard to the withdrawal of the Immunity[28]. In relation to corporate liability, article 18(1)[29], states that also liable except from the person who bribed is the legal person in a leading position based on: 'a power of representation of the legal person, an authority to take decision on behalf of the legal person, an authority to exercise control over the legal person'[30].

Another legislation was made by the Cypriot Parliament adopting a EU Convention on bribery[31] in 2004. In this act someone can be found guilty of bribery according to article 4(c)[32], if by the time the offence was committed the perpetrator was "State employee or Official, or employee of the European Committee or organization"[33]. Also article 4(a-b)[34] states that the Cypriot executive power has only jurisdiction in Cyprus and only can prosecute this offence in its jurisdiction[35]. Both passive bribery (article 5)[36] and active bribery (article 6)[37], if found guilty[38] the penalty is 7 years imprisonment, fine 17.086.01 EUR or both penalties and article 366 of the penal code[39] applies. Moreover article 8[40] designates the attempt of briber, with penalty[41] of 2 years imprisonment, fine no more than €3.447.20 EUR. Finally article 9[42] of this act, defines the corporate liability and the

[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Cited in: The Law on the Council of Europe Convention on Criminalization of Corruption (Ratification) Law 2000
[31] The Convention on Combating Bribery involving officials of the European Communities or of the European Union Member States (Ratification) Law of 2004
[32] Ibid.
[33] Cited in: The Convention on Combating Bribery involving officials of the European Communities or of the European Union Member States (Ratification) Law of 2004
[34] The Convention on Combating Bribery 2004
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] Cited in: The Convention on Combating Bribery involving officials of the European Communities or of the European Union Member States (Ratification) Law of 2004
[39] Penal Code 2012
[40] The Convention on Combating Bribery 2004
[41] Ibid.
[42] Ibid.

directors liability. "If a person under the directions and in controlled of another person in the company committed this offence for the company's account, then the director may be found guilty"[43], and the penalty would be 1 year imprisonment, fine 1708.60 EUR or both penalties. In addition to this article 102 of the Penal Code (Cap.154)[44] mentions the corporate bribery or individually from an employee to a public official, if the defendant found guilty in 2 years imprisonment and an amount of money as fine[45].

Furthermore there was also a European Convention of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Crime and Terrorist Financing, which then became an Act of 2007 by the Parliament of Cyprus[46].

Article 10[47] of this act, presents the corporate liability and states that: " legal persons can be held liable for criminal offences of money laundering, 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 with the legal person, based on: a) power of representation of the legal person, b) authority to take decisions on behalf of the legal person, c) authority to exercise control within the legal person"[48].

[43] Cited in: The Convention on Combating Bribery involving officials of the European Communities or of the European Union Member States (Ratification) Law of 2004
[44] Penal Code (Cap.152) 2012
[45] Ibid.
[46] The Law on the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Crime and Terrorist Financing Act 2007
[47] Ibid.
[48] Cited in: The law on the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Crime and Terrorist Financing Act 2007

Moreover one more legislation from the Cypriot Parliament according to corruption was the Law of Corruption (Cap.161),[49] which was legislated in 2012. Article 3[50] of this act, states that: "Everyone who accepts to get gifts direct or indirect from anyone who has done an act of corruption"[51] if found guilty will be convicted in imprisonment for no more than 7 years or fine of 10.000 EUR or both penalties.[52] In cases of corruption of public officials the government according to article 4,[53] has the right to increase the penalty.

3. Please explain whether and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK)?

3.1 The Identification Principle Within the Cypriot Legal Framework

Under Cyprus Law, companies are legal persons. More specifically, based on the Interpretation Law (Cap. 1), a "person" is defined to include 'any company, partnership, association, society, institution or body of persons, corporate or unincorporated[54] and can be prosecuted in a similar way as an individual offender. In other words, whenever any statute makes it an offence for a "person" to do or omit to do something, that an offence can be committed by a corporation as well, unless a contrary intention is apparent in the statute[55]. To that extent, companies may also be criminally responsible for offences requiring mens rea by application of what is known in the UK's

[49] Law of Corruption (Cap.161) 2012
[50] Ibid.
[51] Law of Corruption 2012 Article 3 (a,b,c)
[52] Ibid.
[53] Law of Corruption(Cap.161) 2012
[54] Interpretation Law 1989 a 2.
[55] 'Criminal Liability of Companies' (Lex Mundi Ltd, 2008) Dr. K. Chrysostomides & Co. 1 <www.lexmundi.com/Document.asp?DocID=1061> accessed 14 February 2017.

legal system as the *identification principle/theory*[56]. This suggests that, 'the acts and state of mind' of those who represent the *directing mind* and *will*, will be imputed to the company[57].

Briefly, in *Tesco Supermarkets Ltd v Nattrass* – the leading case in reference to the *identification principle* in the UK – it is proposed that this principle is applied to the actions of the Board of Directors, the Managing Director and perhaps other superior officers who carry out functions of management, speak and act as the company[58]. These actions/decisions of the corporate directors/officers can be attributed to the company itself[59]. Hence, criminal acts by such directors/officers will not only be offences for which they can be prosecuted as individuals, but also offences for which the company can be prosecuted because of their status within the company[60].

Considering that the Cypriot criminal and company laws are based to a large extent on the general principles and main offences prescribed under English Common Law[61], the interpretation of the Cypriot Criminal Code (Cap. 154), the Cypriot Criminal Procedure Law (Cap. 155), as well as the Cypriot Companies Law (Cap. 113) is greatly assisted by the precedents set by English case law or general legal principles in England[62]. Despite the fact that these precedents and principles do not constitute binding authority[63] under Cyprus Law, they however, provide useful guidance on numerous points of law, and it is rarely that the Cyprus Supreme Court will depart from such English precedents[64]. Therefore, the UK's legal modelling of the identification principle, as

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[56] Richard Card, Card, Cross & Jones: Criminal Law (21st edn, Oxford University Press 2014) 778; and 'Corporate Prosecutions' (The Crown Prosecution Service, 2004) <www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/#a07> accessed 23 January 2017.
[57] Lennards Carrying Co and Asiatic Petroleum [1915] AC 705, Bolton Engineering Co v Graham [1957] 1 QB 159 (per Denning LJ) and R v Andrews Weatherfoil 56 C App R 31 CA; also see Richard Card, 'Card, Cross & Jones Criminal Law' (21st edn, Oxford University Press 2014) 778- 9.
[58] Tesco Supermarkets Ltd v Nattrass [1972] AC 153.
[59] Chris Taylor, Company Law (3rd edn, Pearson Education Limited 2015) 42.
[60] 'Corporate Prosecutions' (The Crown Prosecution Service, 2004) <www.cps.gov.uk/legal/a_to_c/corporate_prosecutions/#a07> accessed 23 January 2017.
[61] 'Criminal Liability of Companies' 1- 2.
[62] Court of Justice Law 1960 a 29(1)(C); and Criminal Code a 3.
[63] Mouzouris v Xylophagou Plantations Ltd [1977] 1 CLR.
[64] Attorney General v Tsioli [1991] 2 CLR 194.

described above, will present itself as having principal advisory authority and effect within the Cypriot legal framework.

3.2 The General Duties of Directors

The general duties of the directors are well established by common law. The categories of a director's duties in Cyprus include: (a) the fiduciary duty (b) the duty to exercise skill and care, and (c) statutory duties[65].

In reference to the *fiduciary duty* of directors[66], a director owes to the company to act in good faith for the best interests of the company[67]. In practice, this duty involves the principles and elements of loyalty, compliance, no secret profits practices, independence, conflicts of interest, fairness as well as issues under Article 307.v and 312 of the Cypriot Companies Law governing a company's creditors[68].

In relevance to the *duty to exercise care skill and diligence*, as presented in *Re D' Jan of London Limited* and elsewhere[69], the conduct of a reasonably diligent person means a person having both (a) the general knowledge, skill and experience that may reasonably be expected of persons carrying out

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[65] Juliana Georgallidou, 'The Duties of Directors in Common Law in the Era of the Economic Crisis' Nomomachia, 3rd edn (Sakkoula Publications, 2017, in press); also see 'Duties and Liabilities of Directors under Cyprus Law' Stelios Americanos & Co LLC <www.practicallaw.com/directorsdutieshandbook> accessed 19 February 2017; and 'Duties & Liabilities of Directors under Cyprus Law' (N. Pirilides & Associates LLC, 2013) <www.pirilides.com/en/publication-detail/22/duties---liabilities-of-directors-under-cyprus-law> accessed 22 February 2017.

[66] Christakis Loukas, 'Company Directors (Σύμβουλοι Εταιρειών)' (Limassol 1991) 155; and Philipps v Boardman [1964] 1 WLR 993.

[67] 'Duties and Liabilities of Directors under Cyprus Law'.

[68] Ibid; and Loukas, 155.

[69] Re D' Jan of London Limited [1993] B.C.C. 646; Bill Perry and Lynne Gregory, 'The European panorama: directors' economic and social responsibilities' (2009) I.C.C.L.R, 20(2), 25- 36, 7; Derek French, Stephen Mayson and Christoher Ryan, Company Law (31st ed, Oxford: Oxford University Press, 2014), 489; and Tatiani-Eleni Synodinou, 'Cyprus Private Law: Per Article Interpretation (Κυπριακό Ιδιωτικό Δίκαιο: Κατ' άρθρο ερμηνεία)' (Sakkoula Publications 2014) 887. Also see relevant English case law applicable in an advisory manner to the Cypriot legal context: Lister v Romford Ice & Cold Storage Ltd [1857] 1 All ER 125; Re Mashonaland Exploration Co [1892] 3 Ch. 577; Langunas Nitrate Co v Langunas Syndicate [1899] 2 Ch. 392; Bristos and West Building Society v Mothew [1998] Ch 1; and Base metal Trading Ltd v Shamurin [2004] EWCA Civ 1316.

the same functions as carried out by that director in relation to the company, and (b) the general knowledge, skill and experience that that director has[70].

Any breach of these two duties (i.e. the *fiduciary duty* and the *duty of skill and care*) will render a director personally liable to the company in damages or injunctive relief[71]. The liability is for the company not for individual shareholders and thus, the company (or its liquidator) should take the necessary action[72].

Lastly, directors have various *statutory duties* imposed by the Cypriot Companies Law and other legislations, such as the Income Tax, VAT, Customs & Excise legislation, Health and Safety of Work Law and Environmental Protection legislation[73]. Breach of a statutory duty may result in criminal, civil or administrative liability or all these together[74].

[70] Georgallidou; and Re Austinsuite Furniture Ltd (1992) BCLC 1047 Ch D.
[71] 'Duties and Liabilities of Directors under Cyprus Law'.
[72] Ibid.
[73] As cited in the 'Duties and Liabilities of Directors under Cyprus Law': […] Additionally, special reference must be made to statutory liabilities imposed under the [Cypriot] Companies Law to directors in relation to the company, its shareholders or to the public, such as: (a) Register of Directors and secretary, (Article 192), (b) Register of Directors interests, (Article 187), (c) Disclosure of payment for loss of office made in connection with transfer of shares in a company, (Article 185), (d) Disclosure of interests in contracts, (Article 191), (e) Loans to directors, (Articles 188 and 189), (f) Prospectus offers (Articles 31 to 39), (g) Pre-emption rights /Transfer of shares (Articles 71 to 82), (h) Fraudulent trading (Article 311), (i) Profit and loss account and balance sheet (Article 142), (ia) Falsification of books or destroying company documents (Article 308), (ib) Duties antecedent to or in course of winding up (Articles 207 and 213), (ic) Directors report and annual return (Article 151), and (id) Financial Statement available for inspection (Article 141). Breach of these duties under Cypriot Companies Law translates to a criminal offence with penalties ranging from a default fine to 2 years imprisonment, while at the same time, the directors are liable to personally compensate the company in respect of any loss resulted by the breach of their duties (for details see respective articles in Cap. 113).
[74] Ibid; and Elena Kanarini, 'Liabilities of Directors under Cyprus Law' (AGP Articles, 2016) A.G. Paphitis & Co LLC <www.gr.agpaphitis.com/Liabilities-of-Directors-under-Cyprus-Law/pageid-1002/> accessed 20 February 2017.

3.3 Corporate Liability in Cyprus: Circumstances of Criminal Conduct by Directors and Officers

3.3.1 Criminal Liability

3.3.1.1 Offences and Sanctions

In general, the Cypriot Criminal Code (Cap. 154) provides that the same types of sanctions that apply for individuals also apply to legal persons (i.e. companies)[75]. Nonetheless, the most fundamental exception to this relates to offences that apply in particular to the directors[76] of the company. These offences include *theft of the company's property* (Article 269 Cap. 154), *falsification of the books or accounts* (Article 311 Cap. 154), and *circulation of false written statements* with intend to deceive any member, shareholder or creditor of the company (Article 312 Cap. 154)[77].

Similarly, other fields of law within the Cypriot legal context include sanctions (such as fines, dissolution of a company, etc.) which can be imposed on companies following accordingly the commission of an offence by its directors or/and its officers. Firstly, pursuant to the Cypriot Assessment and Collection of Taxes Law (Article 51.A.3.a),[78] where a company has *failed to pay the tax* that it was supposed to pay, and this was due to an unjustified refusal, failure or delay of its manager or other person having responsibility to carry out or perform the duties required to be done under this Law on behalf of the company, such manager or other person, in case of conviction, is subject to:

a. a monetary fine up to 20% of the tax due; and

[75] Criminal Code a 5.
[76] Based on Article 2 of the Cypriot Companies Law (Cap. 113) a 'director' includes any person occupying the position of director by whatever name called, while an 'officer', in relation to a corporate body, includes a director, manager or secretary. Moreover, Cyprus Companies Law provides that every private company must have at least one director and every public company must have at least two directors (Article 170). Every company shall have a secretary and a sole director shall not also be secretary, except in the case of a single-member private limited liability company where the sole director may also be the secretary (Article 171).
[77] George Christodoulou, 'Directors' Duties and Liabilities' (Practical Law Company 2009) L. Papaphilippou & Co. 64 <www.practicallaw.com/directorsdutieshandbook> accessed 13 February 2017.
[78] 'Criminal Liability of Companies' 2.

b. in the case where the amount of tax due over is €1.700, in addition to the penalty under (a) above, to imprisonment not exceeding 2 years or both the monetary fine and the imprisonment (author's italics).

What is more, according to Articles 53.1 and 54 of the Cyprus VAT legislation, all the members of the board of directors as well as the general manager or the director or the chief executive director of the company are responsible when tax evasion takes place[79]. Directors also face civil liability for any tax due to the state[80].

Also, directors may be liable for prosecution by the Cypriot Inland Revenue or Customs & Excise in respect of tax related offences. Apart from having the powers to impose a vast array of civil penalties and interest charges, both the Inland Revenue and Customs & Excise have the power to prosecute and to bring criminal proceedings against individuals involved in tax evasion, either personally or through their companies[81]. Nonetheless, there is no offence of "tax evasion" as such, but the evasion of tax by deceitful means represents fraudulent conduct[82]. To this regard, the possible channels of prosecution include *cheating the public revenue*, *false accounting* and *conspiracy to defraud*[83].

Lastly, in accordance with the Cypriot Securities and Stock Exchange Law (Article 190)[84], "criminal liability could be imposed on the Board of Directors, the Secretary and auditors of a company for any *misleading information* included in the prospectus of the company (my italics)". Additionally, Articles 68 and 69 of the Stock Exchange Law provide that directors who have consented or collaborated in making false and misleading fraudulent statements are jointly or severally criminally liable[85]. Moreover, in Law 9(1)/2001, which amends the Stock Exchange Law, it is stated that it is

[79] Kanarini.
[80] Ibid.
[81] 'Duties and Liabilities of Directors under Cyprus Law'.
[82] Ibid.
[83] Ibid.
[84].Ibid 3.
[85] Kanarini.

illegal for a company and its directors to collect funds in view of listing securities with the Stock Exchange prior obtaining a final permission towards its application for listing by the Stock Exchange authorities and, at the same time, it makes the Directors also personally liable for the refund of the collected funds in all cases where a right to refund is afforded by the said law creating in this regard an absolute liability[86].

3.3.1.2 Restrictions and Exceptions[87]

Evidently, if any act/omission, pertinent to the internal rules and regulations of a company, concentrates all the necessary elements of a criminal offence that could arise from any other piece of legislation, then that act or omission could give rise to that particular criminal offence[88]. Furthermore, whether an offence could be considered as a strict liability offence or an offence for which mens rea is required, could be inferred from the wording of the particular offence[89].

It is worth mentioning, that a company in Cyprus, and elsewhere, cannot be guilty of any criminal offences which can only be committed by natural persons (bigamy, etc.). Similarly, it cannot be guilty of those criminal offences which cannot be committed vicariously (perjury, etc.)[90]. Additionally, a company cannot be indicted for a crime where the only punishment is death or imprisonment[91]. Nonetheless, a company may be guilty both of statutory[92] and common law offences[93], even though the latter involve mens rea[94].

[86] 'Duties and Liabilities of Directors under Cyprus Law'.
[87] Ibid 3- 4.
[88] Ibid 4.
[89] Ibid.
[90] D.P.P. v Kent and Sussex Contractors Ltd [1944] K.B. 146.
[91] R v I.C.R. Haulage Ltd [1944] K.B.551, C.A.
[92] Brentnall and Cleland Ltd v London County Council [1945] 2 All E.R. 552.
[93] R v I.C.R. Haulage Ltd [1944] K.B.551, C.A.
[94] Halsburys Laws of England, (3rd edn, vol. 6) para 853.

3.3.1.3 Particularities in Prosecution and Conviction

In each case the different elements of the offence charged need to be proved. The burden of proof is on the prosecution and it must be beyond any reasonable doubt[95]. What is more, under the Cyprus Companies Law (Article 124), the parent and the subsidiary company are considered to be two distinct legal entities and therefore, in each case they have to be prosecuted separately. The only case where the parent company could be prosecuted for offences being committed within the subsidiary is when the criminal offence is committed upon instructions given by the parent company[96].

In reference to conviction, as stated in *Dias United Publishing Company Ltd v the Police*, there is no need in principle to identify or/and convict the individual offender in order to convict the company[97]. What is more, as described in *Alithia Ekdotiki Eteria Limited v The Police* there is no obstacle under the Cyprus criminal law for both the company and the individual offender to be convicted[98].

3.3.2. Civil Liability

3.3.2.1 Offences & Sanctions

Except from criminal liability, several actions of the company could give rise to civil liability. For instance *civil liability for misstatement in prospectus* (Article 43.1)[99], *publication of name by company* (Article

[95] 'Criminal Liability of Companies' 5.
[96] Ibid 6.
[97] Dias United Publishing Company Ltd v the Police [1982] Criminal Appeal No. 4250.
[98] Alithia Ekdotiki Eteria Limited v The Police [1984] Criminal Appeals Nos. 4484- 5.
[99] As cited in 'Criminal Liability of Companies' 6- 7: […] Subject to the provisions of this section, where a prospectus invites persons to subscribe for shares in or debentures of a company, the following persons shall be liable to pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for the loss or damages they may have sustained by reason of any untrue statement included therein: (a) every person who is a director of the company at the time of the issue of the prospectus; (b) every person who has authorized himself to be named in the prospectus as a director or as having agreed to become director either immediately or after an interval of time; (c) every person being a promoter of the company; and (d) every person who has authorized the issue of the prospectus.

103)[100], *liability as regards the reorganization plan of the company* (Article 201G.1)[101] and *penalty for improper use of word 'limited'* (Article 374) of the Companies Law (Cap. 113)[102].

3.3.2.2 Particularities in Prosecution and Conviction

Article 43.2 of the Cypriot Companies Law *exonerates any person for any civil liability for misstatement in prospectus* if he proves that:

a. having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or
b. the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent; or
c. after the issue of the prospectus, and before allotment he, on becoming aware of any untrue statement therein, withdrew his consent thereto and gave reasonable public notice of the withdrawal and of the reason thereof.

In addition to imposing duties and liabilities on directors, the Companies Law grants protective *relief to directors* in certain cases. Article 383.1 provides that, in any proceedings against a director for negligence, default, breach of duty, or breach of trust, if a director who is or may be liable has, in the opinion of the court, acted honestly and reasonably and that, having regard to all the

[100] Ibid 7: […] Every company shall (a) paint or affix, and keep painted or affixed, its name on the outside of every office or place in which its business is carried out, in a conspicuous position, in letters easily legible; (b) have its name engraved in legible characters on its seal; (c) have mentioned in writing in legible characters in all business letters of the company and in all notices and other official publications of the company, the name of the company, the registration number of the company and whether it is a private or a public company.
If the company and every officer of the company does not comply with the above, the company and every officer of the company who is in default shall be liable to a fine not exceeding €42 and if a company does not keep its name painted or affixed in manner so directed, the company and every officer of the company who is in default shall be liable to a default fine.
[101] Ibid: […] The directors who have signed the reorganization plan and the recommendation report, as well as the experts who signed the evaluation report, shall be liable in respect of every loss resulting from negligent conduct in drawing up those documents.
[102] Ibid: […] If any person or persons trade or carry on business under any name or title of which "limited", or any contraction or imitation of that word, is the last word, that person or those persons shall, unless duly incorporated with limited liability, be liable to a fine not exceeding £25 (now €42) for every day upon which that name or title has been used.

circumstances of the case, he ought fairly to be excused for the negligence, default, breach of duty or breach of trust, that court may either wholly or partly relieve him from his liability on such terms as the court thinks fit.

It should be emphasized that it is not enough for the director to have acted honestly and reasonably; additionally, it must be proved that he ought fairly to be excused.

Finally, according to Article 197 (*Relief from Liability*) of the Cypriot Companies Law, it is impossible to grant a general exemption in advance to directors in respect of liability to the company. Particularly, any provision in a contract or in the articles of association of the company which attempts to exempt a director or indemnify a director who has been in breach of his duty of care and skill is void by virtue of[103].

4. What Are the Potential Bars to Extradition of an Individual?

According to Article 74 of the Law on the Prevention and Suppression of Money Laundering Activities, Law 188(1)/2007, a prescribed offence, as defined in article 3 of the Law, consists an offence for the purposes of the extradition of fugitives under the relevant legislation. Thus, any individual who committed a prescribed offence as defined in Law 188(I)/2007 can be extradited in accordance with the provisions of the Extradition of Fugitives Law.[104]

In general, the extradition of an individual to stand trial in another country is governed by multilateral as well as possible bilateral agreements which specify the criterial for extradition of an individual to the applicant country. For this purpose, Cyprus has ratified several European and International Conventions and Protocols, such as the European Convention on Extradition,[105] the

[103] 'Duties and Liabilities of Directors under Cyprus Law'.
[104] Law 97/1980 as amended by Law 97/1990, L154/(I)/2011 and L175(I)/2013
[105] Paris, 13 December 1957, ratified by the Ratification Law No. 95/1970

Additional Protocol to the European Convention on Extradition,[106] the Second Additional Protocol to the European Convention on Extradition,[107] the Third Additional Protocol to the European Convention on Extradition,[108] the European Convention on Mutual Assistance in Criminal Matters[109] and its Additional Protocol,[110] the International Cooperation in Criminal Matters which has been ratified by the Ratification Law 23(I)/2001 and the European Arrest Warrant Law 133(I)/2004, the Joint Investigation Teams Law 244(I)/2004 and the Convention on Mutual Judicial Assistance in Criminal matters among Member States[111] and its Protocol.[112]

Yet, under the Extradition of Fugitives Law (Law 97/1980), there are some general limitation on extradition. First, no one can be extradited if the offence for which he/she is persecuted or for which he/she has been convicted is of civil character.[113] Second, no one can be extradited if the request for extradition has been made for the purpose of prosecuting or punishing a person on grounds of his race, religion, ethnic group or the political opinion.[114] Third, no one can be extradited if it is decided by the competent authority that the person is endangered to receive adverse treatment before the court, or to receive unfair trial, or be convicted or detained or his/her personal freedom could be restricted in any way, due to his/her race, religion, ethnic group or political opinion.[115]

Further, a person that is persecuted for an offence cannot be extradited in case that, if brought before the relevant Court of the Republic, could be derogated due to previous acquittal or conviction on that specific offence.[116] Finally, no one can be extradited to any state or country, or be detained for the purpose of extradition, unless the applicant state or country safeguards either

[106] Strasburg, 15 October 1975, ratified by the Ratification Law No. 23/1979
[107] 17 March 1978, ratified by the Ratification Law No. 17/1984
[108] Page 3 of 33, 10/11/2010, ratified by the Ratification Law No 28(III)/2012
[109] Strasbourg, 20 April 1959
[110] Strasbourg, 17 March 1978
[111] EEC 197, 12.7.2000
[112] EEC 326, 21.11.2001
[113] Article 6(1)(a) of the Extradition of Fugitives Law (Law 97/1980)
[114] Article 6(1)(b) of the Extradition of Fugitives Law (Law 97/1980)
[115] Article 6(1)(c) of the Extradition of Fugitives Law (Law 97/1980)
[116] Article 6(2) of the Extradition of Fugitives Law (Law 97/1980)

by law or by agreement with the Republic that the extradited person will not be judged, attributed, extradited or delivered to another state or country or be detained for purposes of such extradition, for an offence other than (a) the offence for which he/she is extradited, or (b) any lesser offence proved during the trial, or (c) any other offence which may fit to the extradition and regarding to which the Minister of Foreign Affairs will give consent.[117]

According to article 1 the Extradition of Fugitives Law, citizens of the Republic cannot be extradited to any applicant state or country. However, as stated above, Cyprus has signed and ratified the European Arrest Warrant (EAW).

In a leading decision, the Supreme Court of Cyprus held that it is unconstitutional for Cyprus to allow the surrender of a Cypriot citizen under a European Warrant Arrest.

Following the significant decision held by the Supreme Court of Cyprus,[118] regarding the implementation of the Framework Decision on European Arrest Warrant, the Cyprus Parliament proceeded with the amendment in 2006 of the Article 11 of the Constitution, which safeguards the right to freedom and security. Article 11(2)(f) was substituted by a new sub-paragraph, which allows the competent authorities of the Republic of Cyprus to proceed with the

"… the arrest or detention of a citizen of the Republic for the purpose of extraditing or surrendering him under the European arrest warrant or in compliance with an international agreement binding the Republic, under the condition that such agreement applies respectively by the counter party."[119]

This provision however, safeguards, in any case, against the arrest or detention of any person for the purpose of extraditing or surrendering him

[117] Article 6(3) of the Extradition of Fugitives Law (Law 97/1980)
[118] General Assembly v. Costas Constantinou, Civil Appeal 294/2005, Supreme Court, Decision of 7 November 2005. The Supreme Court stated that it is unconstitutional for Cyprus to allow a surrender of any Cypriot citizens under a EWA.
[119] Article 11(2)(f) of the Constitution of the Republic of Cyprus, as amended by the Law 127(I)/2006

"if the competent body or authority according to the law has substantial grounds for believing that a request for extradition or prosecuting has been made for the purpose of prosecuting or punishing a person on grounds of his race, religion, ethnic origin, political opinion, or of any legal claims of collective or individual rights in accordance with international law."

5. Please state and explain any:

a. internal reporting processes (i.e. whistleblowing) and;

b. external reporting requirements (i.e. to markets and regulators), that may arise on the discovery of a possible offence.

The Cyprus Securities and Exchange Commission, which is the financial regulatory agency of Cyprus, is the main body that oversees the compliance of the financial services in Cyprus. In this respect the following laws provide and set out the reporting processes and requirements, both internal and external, that Cypriot companies are under obligation to observe:

a. Law 188(i)-2007 for The Prevention and Suppression of Money Laundering Activities
b. Law 144(I)-2007 which provides for the provision of investment services, the exercise of investment activities, the operation of regulated market
c. Law 196(I)/2012 regulating Companies providing Administrative Services and Related Matters of 2012
d. Law 6(I)/2015 regulating the macroprudential supervision of institutions and related matters (in Greek)
e. Open-Ended Undertakings for Collective Investment (UCI) Law of 2012
f. The Alternative Investments Funds Law of 2014
g. Directive D144-2007-08 of the Cyprus Securities and Exchange Commission for the Prevention of Money Laundering and Terrorist Financing
h. Regulation (EU) No 596/2014 on market abuse

The main legal instrument for the reporting mechanisms in the current legal order is the Directive D144-2007-08 of the Cyprus Securities and Exchange Commission for the Prevention of Money Laundering and Terrorist Financing. More specifically according to Part 1 , Introductory Provisions, The Cyprus Securities and Exchange Commission has issued this Directive, in accordance with the powers vested in it by virtue of section 59 of the Prevention and Suppression of Money Laundering Activities Law, section 20 of the Investment Services and Activities and Regulated Markets Law and for the purposes of harmonization with the actions of European Community titled: "Directive 2005/60/EC of the European Parliament and the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing"· and "Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of 'politically exposed person' and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis"· 120

The reporting procedure to be following with regards to any suspicion for Money Laundering or terrorist financing within the company is clearly set out in the aforementioned law, in article 9 where the Compliance Officer's duties are mentioned:

First Appendix	(e) Receives information from the Financial Organisation's employees which is considered to be knowledge or suspicion of money laundering or terrorist financing activities or might be related with such activities. The information is received in a written report form (hereinafter to be referred to as "Internal Suspicion Report"), a specimen of such report is attached in the First Appendix.
Second Appendix	(f) Evaluates and examines the information received as per point (e), by reference to other relevant information and discusses the circumstances of the case with the informer and, where appropriate, with the informer's superiors. The evaluation of the information of point (e) is been done on a report (hereinafter to be referred to

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	as "Internal Evaluation Report"), a specimen of which is attached in the Second Appendix.
Third Appendix	(g) If following the evaluation described in point (f), the compliance officer decides to notify MOKAS, then he completes a written report and submit it to MOKAS the soonest possible. A specimen of such report (hereinafter to be referred to as "Compliance Officer's Report to the Unit for Combating Money Laundering") is attached to the Third Appendix. It is provided that, after the submission of the compliance officer's report to MOKAS, the accounts involved and any other connected accounts, are closely monitored by the compliance officer and following any directions from MOKAS, thoroughly investigates and examines all the transactions of the accounts.

The law as above, identifies the following reporting obligations for the regulated entities in regards to the internal reporting entities:

The law121 introduces the notion of the "internal suspicion reports" which can submitted by any employee of the financial institution to the Compliance Officer. The internal suspicion report is introduced in article 9(e) of the law and is defined as the written report containing information from the Financial Organisation's employees which is considered to be knowledge or suspicion of money laundering or terrorist financing activities or might be related with such activities.

A specimen of such report is found in the first appendix of the law122 and contains the following information:

[121] ibid
[122] ibid

FIRST APPENDIX

INTERNAL SUSPICION REPORT FOR MONEY LAUNDERING AND TERRORIST FINANCING

INFORMER'S DETAILS

Name: ..... Tel: .....
Department: ..... Fax: .....
Position: .....

CUSTOMER'S DETAILS

Name: ....
Address: ....
..... Date of Birth: .....
Tel: ..... Occupation: .....
Fax: ..... Details of Employer: .....
.....
Passport No.: ..... Nationality: .....
ID Card No.: ..... Other ID Details: .....

INFORMATION/SUSPICION

Brief description of activities/transaction: ....
....
Reason(s) for suspicion: ....
....
Informer's Signature Date

....

FOR COMPLIANCE OFFICER'S USE

Date Received: ..... Time Received: ..... Ref. .....

Reported to MOKAS: Yes/No ... Date Reported: ..... Ref. .....

This unofficial English text is for information purposes only and is not legally binding 49
The official, legally binding text is in the Greek language.

The number of these reports must be included in the Monthly Prevention Statement of each Financial Organisation According to article 11 of the law, as well as at the Annual Report of the Compliance officer which is submitted to the board of Directors, according to article 10. By inserting the aforementioned sections, the law ensures that the suspicion report contains the appropriate and coherent information regarding the suspicion as well as its submission both to the regulator and to the board of directors thus increasing the accountability of the Compliance Officer and the objective treatment and independent decision making for each report.

The procedure foreseen by the law, requires that these internal suspicion reports are reviewed by the Compliance Officer, where the Compliance Officer produces the Internal Evaluation Report specimen of which is provided by the Law123 and is as follows:

SECOND APPENDIX

INTERNAL EVALUATION REPORT FOR MONEY LAUNDERING AND TERRORIST FINANCING

Reference:.....Customer's Details:.....

Informer:.....Department:.....

INQUIRIES UNDERTAKEN (Brief Description)

.....

.....

.....

ATTACHED DOCUMENTS

.....

.....

.....

.....

COMPLIANCE OFFICER'S DECISION

.....

.....

.....

FILE NUMBER.....

COMPLIANCE OFFICER'S SIGNATURE DATE

....

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The official, legally binding text is in the Greek language.

After the completion of the above report, the Compliance Officer decides whether or not to proceed with reporting the suspicion to the Authorities. If the Compliance Officer decides not to proceed with reporting the suspicion, the reasoning of this decision should be stated clearly in the Internal Evaluation Report.

[123] ibid

Here, it should be mentioned that main body involved in investigating bribery and corruption allegations and complaints is the police, which cooperates with specialist financial intelligence units such as the Unit for Combating Money Laundering (MOKAS). The Office of the Attorney General examines the findings of the police and decides whether a case should be heard by a court. The Audit Office of the Republic may also refer incidents of bribery and corruption to the Attorney General for investigation.

The reporting of the suspicion takes place via an especially designed website solely for reporting purposes: http://goaml.unodc.org/. The United Nations Office on Drugs and Crime (UNODC) standard software system is implemented and used by MOKAS to counter Terrorist Financing and Money Laundering

In this case, and according to Article 8 (g) and the third appendix of the law, the following report is to be completed and submitted by the Compliance Officer to the designated Authorities:

THIRD APPENDIX

COMPLIANCE OFFICER'S REPORT TO THE UNIT FOR COMBATING MONEY LAUNDERING ('MOKAS')

I. GENERAL INFORMATION

Financial Organisation's Name : _____
Address where customer's account is kept : _____

_____

Date when a business relationship established or occasional transaction was carried out : _____
Type of account(s) and number(s) : _____

II. DETAILS OF NATURAL PERSON(S) AND/OR LEGAL ENTITY(IES) INVOLVED IN THE SUSPICIOUS TRANSACTION(S)

(A) NATURAL PERSONS

	Beneficial owner(s) of the account(s)	Authorised signatory(ies) of the account(s)
Name(s):	_____	_____
	_____	_____
Residential address(es):	_____	_____
	_____	_____

(B) LEGAL ENTITIES

Legal entity's name, country and date of incorporation: _____

Business address: _____

Main activities: _____

This unofficial English text is for information purposes only and is not legally binding. [53]
The official, legally binding text is in the Greek language.

Business address(es):

Occupation and Employer:

Date and place of birth:

Nationality and passport number:

This unofficial English text is for information purposes only and is not legally binding 52
The official, legally binding text is in the Greek language.

Further to the above, it can be observed that whistleblowing in the private sector is a relatively overlooked concept in Cyprus, considering in particular the country's small geographical area, population and close-knit society. Conceptually, the manner in which whistleblowing is regulated in Cyprus can be said to be largely influenced by the European legal order, namely the Council of Europe and the European Union, particularly the Council of Europe's Group of the States Against Corruption (GRECO).

There appears to be a significant lack of resources in private companies which would protect whistle blowers as the relevant sound practices have not been implemented in Cyprus.

However, on January 3 2017, the Cyprus Security and Exchange Commission proceeded with issuing the relevant circular, C177,124 entitled 'Persons wishing to report cases of actual or potential infringement of Regulation (EU) No 596/2014 on market abuse – Whistle-blower'. In this circular, the 'regulator' who is referred to relates to article 32 of the Regulation (EU) No 596/2014 of the European Parliament and of the Council, of 16 April 2014, on market abuse (market abuse regulation) and reaffirms the procedures in place in order to assist and protect whistle-blowers. The regulator emphasises that reports can be made either to individuals whose contact details are provided in the same circular, phone, email, postal address or via physical meeting, anonymously or not, facilitating this way the encouragement of transparency. The regulator further introduces the "Whistleblowing External Disclosure Form", as documented in Appendix A to this report.

The regulator also notes the following in regards to the procedures for the reports and the protection of the identity of the reporting person:[125]

In regards to the individuals who may be the subjects of a report to the authorities, the regulator emphasises that no person can be subject to any discrimination due to the submission of a report for infringement, and if indeed such discrimination take place, this individual may request from the court injunction or other compensation measures for losses or damages. Further, the reporting persons are not subject to criminal or civil or disciplinary proceedings because of the submission of the report. Additionally, the name of the reporting person shall only be revealed upon his written consent, and where this is not the case, the reporting person's name shall not be included in the administrative file opened for this case by the authority. The identity of the reporting person is protected in the following cases: a. in those cases in which CySEC is required to reveal the identity of the reporting person in the context of civil proceedings; b. in the context of exchange of information with other competent authorities in the Republic of Cyprus and abroad; c. when

[124] Circular 177 Cyprus Securities and Exchange Commission, January 2017 "Procedures for the receipt and follow-up of the reports of infringement of Regulation (EU) No 596/2014 on market abuse
[125] Cyprus Securities and Exchange Commission, January 2017, Procedures for the receipt and follow-up of reports of infringement of Regulation (EU) No 596/2014 on market abuse

requested by the reported person for the purposes of exercising the right to be heard or filing an administrative recourse to justice. The regulator further emphasises that the identity of the reporting person is not protected if and when revealing his identity is necessary in the context of criminal proceedings before the court or criminal investigation.

6. Who are the enforcement authorities for these offences?

As mentioned above, in the procedure of the reporting, the main body involved in the procedure of investigating these bribery and corruption allegations and complaints is the specialist financial intelligence unit of the Republic of Cyprus known as the Unit for Combating Money Laundering (MOKAS).

The Unit's powers derive from the legislation mentioned above, and specifically according to section 54 Prevention and Suppression of Money Laundering Activities Law 2007126. The Unit was established in December 1996 and became operational in January 1997127. It functions under the Attorney General of the Republic and it is composed of representatives of the Attorney General, the Chief of Police, and the Director of the Department of Customs and Excise. The members of the Unit are appointed by detachment and the Unit is headed by a representative of the Attorney General. In relation to the composition of the Unit, the Law was amended in 2003 in order to include other professionals. As a result, the Unit recruited accountants and financial analysts.

The Unit's main function is to work as the national center for receiving, requesting, analyzing and disseminating disclosures of suspicious transactions reports and other relevant information in regards to suspected money laundering or financing of terrorism activities128.

[126] Prevention and Suppression of Money Laundering Activities Law Law 188(I)/2007
[127] Unit For Combating Money Laundering <http://www.law.gov.cy/law/mokas/mokas.nsf/mokas01_en/mokas01_en?OpenDocument>
[128] ibid

Further, the Unit has certain powers in its disposal, in order to act in the most efficient manner to fulfil its functions. The powers it holds are inter alia: the ability to issue guidance directives and provides training to financial institutions, the Police, professionals and others, the ability to issues administrative orders for the postponement of transactions. Additionally, the Unit has the power to protect the privacy of the information it possesses. Further, members of the Unit can apply and obtain court orders, ie, disclosure orders, freezing orders, confiscation orders.

In regards to suspected financing of terrorism, the Unit was assigned this specific task by virtue of the Ratification Law of the UN Convention on the Suppression of the Financing of Terrorism Law No. 29(III)/2001 section 10129. The Unit has been designated by the Council of Ministers on 18 March 2009, as the Asset Recovery Office for the purposes of implementing the Council Decision 2007/845/JHA of 6 December 2007 130 concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related, to crime.

Additionally, the police of the Republic is involved to a great occasion as well as the Office of the Attorney General examines the findings of the police and decides whether a case should be heard by a court. The Audit Office of the Republic may also refer incidents of bribery and corruption to the Attorney General for investigation.

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

The enforcement authorities responsible are the inspectors appointed by the Council of Ministers. Under section 160 of the Company Law (Chapter 13), inspectors have the power to carry out investigations into affairs of related companies. In particular, section 160 indicates that inspectors

[129] Law of the UN Convention on the Suppression of the Financing of Terrorism Law No. 29(III)/2001 section 10
[130] Council of Europe Decision 2007/845/JHA of 6 December 2007

have the power to investigate the affairs of another corporate body which is or has at any relevant time been the company's subsidiary or holding company or a subsidiary of its holding company or a holding company of its subsidiary.

Under section 161 (1) of the Company Law (Chapter 13) all officers and agents of the company and all officers and agents of any other corporate body whose affairs are being investigated by virtue of section 160 have the duty to provide the inspectors with all books, documents and assistance in connection with the investigation which they are reasonably able to provide. This duty also covers all the officers and agents of the other corporate bodies which the inspectors may choose to investigate.

Under section 161 (2) of the Company Law (Chapter 13), an inspector may examine on oath the officers and agents of the company or other corporate body in relation to its business, and may administer an oath accordingly.

In cases where an officer or agent of the company or other corporate body refuses to provide the inspectors with any book or document which is his/her duty to produce, enforcement authorities (inspectors) can follow specific measures in order to ensure that they are compelled to produce such information.

Specifically, section 161 (3) of the Company Law (Chapter 13) indicates that inspectors may certify the refusal under their control to the Court if the officer or agent refuses to produce that information. In that instance, the Court may thereupon inquire into the case and after hearing any witnesses who may be produced against or on behalf of the alleged offender and after hearing any statement which may be offered in defence, the Court may punish the offender in a similar manner as if he or she had been guilty of contempt of Court.

According to Article 162 of the Constitution of Cyprus, the Supreme Court of Cyprus has the jurisdiction to punish any contempt of itself and any other Court of the Republic of Cyprus. The Supreme Court has the power to commit any person for disobeying a judgment or order of such

a court to prison until such person complies with such judgment or order. However, the period of imprisonment shall not exceed the duration of twelve months.

Moreover, section 161 (4) of the Companies Law (Chapter 13) enables the inspector to apply to the Court for the investigation of a person that he or she has no power to examine on oath. If the inspector needs to investigate a person for the purposes of his or her investigation, the Court after such a request may order that person to attend and be examined on oath before it on any matter relevant to the investigation. Under section 161 (4) (a) of the Companies Law (Chapter 13), if such an examination takes place before the Court, the inspector may take part therein either personally or by an advocate. Section 161 (4) (b) of the Companies Law (Chapter 13), enables the Court to ask any questions to the person examined. In relation to the procedure for such an investigation, section 161 (4) (c) of the Companies Law (Chapter 13) indicates that a person has the duty to answer all questions that the Court may ask him or her. According to Section 161 (4) (c) such a person may at his or her own cost employ an advocate who shall be at liberty to ask him or her such questions as the Court may deem just for the purpose of enabling him or her to explain any of the given answers. Moreover, the same section (Article 161 ,4, c) indicates that during this procedure notes of the examination shall be taken down in writing, read over and signed by the person examined, and may thereafter be used in evidence against him or her.

Section 161 (5) of the Companies Law (Chapter 13) clarifies the terms officers or agents in the context of this section. In particular, a reference to officers or agents shall include past as well as present officers or agents. Additionally, it states that the definition of agents in relation to a company or other corporate body shall include bankers and advocates of the company or other corporate body and any persons employed by the company or other corporate body as auditors, whether those persons are or not officers of the company or other corporate body.

The Cyprus Securities and Exchange Commission also provides some guidance on corporate governance and the prevention of criminal measures in a commercial context. In particular, the "CONSOLIDATION OF LAW 144(I)/2007 OF 26 OCTOBER 2007, LAW 106(I)/2009 OF 23 OCTOBER 2009, LAW 141(I) of 26 OCTOBER 2012, LAW 154(I) of 9 NOVEMBER 2012,

LAW 193(I)/2014 of 19 DECEMBER 2014 and LAW 8(I)/2016" indicates that the Cyprus Securities and Exchange Commission (Commission), the Cyprus Central Bank and the Authority for the Supervision and Development of Cooperative Societies (ASDCS) are designated as the 'Supervisory Authorities' to exercise the competencies set out in this Law.

Section 127 of the Consolidation Law states the powers of the Supervisory Authorities. According to this section, supervisory authorities should exercise their powers (a) directly (b) by collaborating among themselves and generally in collaboration with other authorities; or (c) by application to the competent courts.

Moreover, according to Section 127 (2) (a) the Commission has the following powers:

1. To require the existing telephone and existing data traffic records,
2. To demand the cessation of any practice that is contrary to the provisions of this Law;
3. To request by application to the relevant courts the freezing or/and the sequestration of assets;
4. To temporarily prohibit the exercise of professional activity;
5. To adopt any type of measure to ensure that the persons supervised by it continue to comply with the requirements laid down in this Law, or/and the directives issued pursuant to this Law;
6. To require the suspension of trading in a financial instrument;
7. To require the removal of a financial instrument from trading, whether on a regulated market or under other trading arrangements.

According to Section 127 (3) the Central Bank of Cyprus has the following powers:

1. To demand information from any person and if necessary to summon and question a person with a view to obtaining information;
2. To require existing telephone and existing data traffic records;
3. To demand the cessation of any practice that is contrary to the provisions of this Law,

4. To request by application to the relevant courts the freezing or/and the sequestration of assets;
5. To temporary prohibit the exercise of professional activity;
6. To adopt any type of measure to ensure that the persons supervised by it continue to comply with the requirements laid down in this Law, or/and the directives issued pursuant to this Law;
7. Carry out on-site inspections;
8. Allow auditors or experts to carry out verifications or investigations.

According to Section 127 (4) the ASDCS has the following power to compel the production of information:

1. To demand information from any person and if necessary to summon and question a person with a view to obtaining information;
2. To require existing telephone and existing data traffic records;
3. To demand the cessation of any practice that is contrary to the provisions of this Law;
4. To request by application to the relevant courts the freezing or/and the sequestration of assets;
5. To temporarily prohibit the exercise of professional activity;
6. To adopt any type of measure to ensure that the persons supervised by it continue to comply with the requirements laid down in this Law, or/and the directives issued pursuant to this Law.

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self-incrimination)?

Section 169 of the Companies Law (Chapter 13) describes two scenarios where information may be withheld from enforcement authorities if the information is provided by an advocate or a banker.

In particular, section 169 (a) indicates that an advocate may save any privileged communication made to him in that capacity, except with respect to the name and address of his or her client, whilst section 169 (b) indicates that a company's banker(s) may save such information regarding the affairs of any of their customers other than the company.

In relation to the Consolidation Law, it does not clarify specific circumstances where the information procured or kept by enforcement authorities (the Cyprus Securities and Exchange Commission, the Central Bank and the ASDCS (Authority for the Supervision and Development of Cooperative Societies) may be withheld.

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities in cyprus?

9.1 Data Protection: The Current Cypriot Legal Framework and Definitions

9.1.1 Cyprus Law and Employee Data Protection

Cyprus presents an extensive body of laws applicable to data protection.[131] The most prominent text on this subject-matter (i.e. 'employee data') is the Processing of Personal Data (Protection of Individuals) Law[132] which entered into force in 2001 to address privacy issues arising out of the collection, storage, processing and use of personal data.[133] In 2003, this law was amended in order to harmonise Cypriot legislation with the Directive of the European Union (95/46) on the protection of individuals with regard to the processing of personal data.[134]

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[131] Chryso Pitsilli-Dekatris, Alexandros Georgiades, Anna Rossides and Pavlos Symeonides, 'Doing Business in Cyprus' (Practical Law Company 2011) Dr. K. Chrysostomides & Co. p.1 <www.chrysostomides.com/assets/modules/chr/publications/15/docs/doing_business.pdf> accessed 19 February 2017

[132] Hereinafter: Personal Data Law

[133] The Processing of Personal Data (Protection of Individual) Law 138(I)/2001 (incorporating the Amending Legislation 37(1) 2003) (Personal Data Law) 2003.

[134] European Parliament and Council Directive (EC) 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281; and Protection of Individuals 30(III)/2003 on the Additional Protocol to the Convention for the Protection of Individuals regarding the Automatic Processing of Personal Data [2003].

What is more, the Cypriot Data Commissioner's Office[135] has issued a number of guidelines for the protection of personal data concerning among others the processing of data in the employment sector.[136] Furthermore, the *right to respect someone's private and family life* (Articles 15) and the *right to respect for, and to the secrecy of, his correspondence and other communication* (Article 17) of the Constitution of the Republic of Cyprus (1960) also reinforce the protection of employee data.

9.1.2 Employee Data

In Article 2 of the Personal Data Law, the term 'personal data' is defined as any information that identifies or can potentially identify a natural living person.[137] Article 2 provides also the definition regarding 'sensitive data' describing them as data concerning racial or ethnic origin, political convictions, religious or philosophical beliefs, participation in a body, association or trade union, sex life and sexual orientation and data relevant to criminal prosecutions and convictions.

Despite the fact that the Personal Data Law generally protects employee privacy and personnel data, the relevant Cypriot body of data protection laws contain no official or exact definition for

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It is significant to mention that the upcoming effective application of the EU Regulation 2016/679 (General Data Protection Regulation), which substitutes the current legislation on data protection (i.e. Directive 95/46/EC), and the additional efficient implementation of the EU Directive 2016/680, will introduce significant changes in the field of Cyprus' (employee) data protection regulatory system. European Parliament and Council Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] L119/1. The Regulation will enter into force on 24 May 2016, it shall apply from 25 May 2018. European Parliament and Council Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data [2016] L119/89. The Directive enters into force on 5 May 2016 and EU Member States have to transpose it into their national law by 6 May 2018. Also see Philippe Jougleux European Internet Law: Legal aspects of internet in Europe (Sakkoula Publications 2016) 29- 34.

[135] Personal Data Law Article 18, The "Commissioner for the Protection of Data" or "Commissioner" […] is responsible for monitoring the application of this Law and other provisions relating to the protection of individuals with regard to the processing of personal data and who shall exercise the functions assigned to him from time to time by this or any other law.

[136] 'Directive for Processing Personal Data in Employment' (Guidelines of the Commissioner for the Protection of Personal Data 2011) <www.goo.gl/VFlm0F> accessed 24 February 2017.

[137] Giannos Danielidis, 'Personal Data' (A. A. Georghiou LLC 2012) <www.cypruslawdigest.com/topics/personal-data/item/169-personal-data> accessed 20 February 2017; and Personal Data Law Article 2, "Data subject" […] means the natural person to whom the data relate and whose identity is known or may be ascertained, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural, political or social identity (author's italics).

the term 'employee data'. Nonetheless, the Cypriot Data Protection Commissioner has issued an explanatory Directive for Processing Personal Data in Employment, defining in Article 3.5 "personal employee data" as:

[…] any information relating to a particular employee. The term includes data such as a person's name, address, picture or social security number, but also information about others' opinions relating to a person and generally any information that can determine that person's identity (authors' translation).

According to this, the legal nature of 'employee data' appears to hold as a prerequisite the existence of a legally recognised employment relationship. Evidently, 'employee data' will vary per case in accordance with the particular kind of employment and in relation to the 'data type' (personal or sensitive) *provided by* or/and otherwise *selected from* the employees, both before and during the course of the employment at hand.[138]

9.2 Employee Data Processing and Restrictions in Cyprus

Activities involving employment relationships and associate with processing operations of personal or sensitive employee data, such as the restrictions on providing employee data to domestic or foreign enforcement authorities, will be regulated according to the Personal Data Law. In accordance to Article 2, the data processing involves:

[…] any operation that includes the collection, recording, organization, preservation, storage, alteration, extraction, use, transmission, dissemination or any form of form of disposal, connection or combination, blocking, erasure or destruction of data is a form of processing of personal data.

As noted by the Cypriot Commissioner of Personal Data Protection, any business activity or set of activities carried out by automatic means or not, that fall under this description, shall be affected by the legislation on personal data protection.[139]

[138] Loizos Papacharalambous and Eleni Korfiotis, 'Employment & Labour Law 2016 – Cyprus' (Koushos Korfiotis Papacharalambous L.L.C. 2016)
[139] Danielidis.

9.2.1 General Restrictions on Providing Employee Data to Domestic Authorities

Data controllers are those who collect and process data from various categories of data subjects, such us employees.[140] *Employers* are considered 'controllers' and *employees* are 'data subjects' for the purposes of the Data Protection Law.[141] In our case, where domestic or foreign enforcement authorities require employee data, it must be assumed that the processing is performed by a data controller-employer already established in Cyprus. This suggests that the data controller-employer already fulfilled the obligation, under Article 7.1, to inform the Commissioner, in writing, about the establishment and operation of a filing system[142] or the commencement of a processing operation involving employee data.[143]

The first restriction will relate to the obligations of the data controller-employer, since providing employee data could lead to a violation of the principle of legality, rendering the transmission incompatible with the specified, legitimate and recognised purposes, as well as in violation of the principle of confidentiality (Article 4.1). More specifically, Article 4.1 of the Personal Data Law emphasises the obligations of the data controller-employer to *collect and process data fairly and lawfully* for *specified, explicit and legitimate purposes* and not process data in a way which is incompatible with those purposes. What is more, the data controller-employer must ensure that the data are *relevant* and *not excessive* for the purposes of processing, are *accurate* and kept *up to date*, and that they are *not kept for longer than is necessary* for the fulfilment of the purposes for which it has been collected and processed, and kept *confidential* and *adequately protected.*[144]

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[140] Ibid; and Personal Data Law a 2, "controller" means […] any person who determines the purpose and means of the processing of personal data (author's italics).
[141] Nicholas Ktenas 'Labour & Employment - 2009' (Andreas Neocleous & Co LLC 2009) 69.
[142] Personal Data Law a 2, "personal data filing system" or "filing system" means […] any structured set of personal data which constitute or may constitute the subject of processing and which are accessible according to specific criteria.
[143] 'Employment & Labour Law – Cyprus' (International Comparative Legal Guides 2016). <http://iclg.com/practice-areas/employment-and-labour-law/employment-and-labour-law-2016/cyprus#chaptercontent7> accessed 21 February 2017; and Nicholas Ktenas 69, […] employers are discharged from the general obligation to notify the Commissioner about the establishment and operation of a filing system, provided that the employees have been previously informed.
[144] Personal Data Law a 4.1.

The data controller-employer must also notify and provide information to the Commissioner as to the collection and processing of personal data, unless an exception applies (Article 7). Secondly, the data controller-employer must obtain the data subject's consent[145] to the collection or processing, unless an exception applies (Article 5). Lastly, the data controller-employer must inform the data subject (Article 11), at the time of collection of the data as to:

a. the *identity* of the data controller-employer (and representative if applicable),
b. the *purpose* of processing,
c. the *recipients* of the data,
d. the data subject's *right of access and rectification* of the data, and
e. whether the data subject is *required to assist* in the collection of data and the consequences of not doing so.

Therefore, in our case, the person acting as a data controller-employer might be unable to perform the established duties and obligations under Article 11 towards its data-subjects (i.e. employees) violating their respective rights (right to access, right to be informed, etc.). Additionally, providing data for further processing or usage might contradict the content of the data subjects' original consent (Article 5), thereby rendering it void.

However, if necessary, the 'consent restriction' in relation to the fact that "the processing of personal data is permitted" can be escaped on the basis of the provisions of Article 5.2. Since the request towards the employee for data to be obtained arises from the enforcement authorities, the potential claim referring to purposes of "public interest" becomes quite relevant. Respectively, the prohibition barrier protecting the processing of sensitive data (Article 6) could be lifted in reference to the application of an exception listed in Article 6.2. Again, since there are certain enforcement authorities who impose the claim, referring to reasons regarding the protection of

[145] Ibid a 2, "consent" means […] consent of the data subject, any freely given, express and specific indication of his wishes, clearly expressed and informed, by which the data subject, having been previously informed, consents to the processing of personal data concerning him. The Commissioner has also adopted the Article 29 Data Protection Working Party's Opinion on Consent (WP 187).

vital interests and fundamental freedoms or to grounds of national or public security should be more effective.

9.2.2 Restriction Regarding the Transmission of Data to Foreign Authorities

The law sets further standards in reference to the processes relevant to the transferring of data. Under Article 9, the data controller-employer must obtain a licence from the Commissioner before transferring personal data to a country *outside the EU*.[146] The Commissioner shall issue the licence only if they are satisfied that the said country ensures an *adequate level of protection* of personal data by taking into consideration:

a. the nature of the data,
b. the purpose and duration of the processing,
c. the codes of conduct,
d. the general and specialised legislation, and
e. the security measures for and the level of the protection of personal data provided by the law of the said country.

However, in case there is a *foreign* enforcement authority, from a country *outside the EU*, which requests the transmission of personal data, the Commissioner is permitted to issue such a licence even if the country in issue does not ensure an adequate level of protection under exceptional circumstances which are defined in an exclusive manner (i.e. when one or more of the following conditions) in Article 9.2 of the Personal Data Law.[147] One potentially effective defence will suggest that since employee data are involved, the processing shall be deemed necessary so that the controller may fulfil his/her obligations or carry out his/her duties in the field of employment law. Also, another defence, since an enforcement authority administers the request, might be that the "processing relates solely to data which are made public by the data subject or are necessary

[146] More specifically Article 9 of the Personal Data Law suggests that "transmission of data which have undergone processing or are intended for processing after their transmission to any country."
[147] Directive for Processing Personal Data in Employment a 13.

for the establishment, exercise or defence of legal claims before the Court" (Article 9.2 of the Personal Data Law).

Moreover, according to Article 9.4, if the foreign authority is based on a) a Member State of the European Union, b) a Member State of the European Economic Area, or c) any of the third countries for which the European Commission has ruled that they ensure an adequate level of protection of personal data, the transmission will be unrestricted.

Finally, data export is potentially authorised if the proposed data recipient (i.e. enforcement authority) is based in the United States and participates in the EU-U.S. Privacy Shield Framework of 2016 (replacing the Safe Harbour self-certification scheme[148]).[149] The EU-U.S. Privacy Shield Framework offers more transparency about transfers of personal data to the U.S. and stronger protection of personal (employee) data. [150] Additionally, it further establishes a general Ombudsperson mechanism while recognising the existence of Data Protection Authorities (i.e. Cypriot Commissioner of Personal Data Protection) in each EU Member State responsible for protecting and enforcing the data protection rules at a national level.[151] Before authorising the transfer, the Commissioner will consider the national parameters as discussed above, in accordance with her/his obligations and rights as presented in Section IV of the Personal Data Law, while examining if the data recipient has been included within the U.S.-EU Frameworks List of participants (as well as the previous Safe Harbour List of participants).[152] The EU-U.S. Privacy Shield Framework specifies that the use of data by US public authorities will be done only under

[148] Ktenas 85; On 6 October 2015, the Court of Justice of the European Union declared invalid the Commission's 2000 Decision on EU-US Safe Harbour.
[149] European Commission Implementing Decision C (2016) 4176 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (IP/16/216). From July 12, 2016, EU-U.S. Privacy Shield Framework is the valid legal mechanism to comply with EU requirements when transferring personal data from the European Union to the United States.
[150] European Commission 'European Commission launches EU-U.S. Privacy Shield: stronger protection for transatlantic data flows' (European Commission Press release database 2016) <www.europa.eu/rapid/press-release_IP-16-2461_en.htm> accessed 20 February 2017.
[151] European Commission Directorate-General for Justice and Consumers 'Guide to the EU-U.S. Privacy Shield' (European Union 2016) <www.ec.europa.eu/justice/data-protection/files/eu-us_privacy_shield_guide_en.pdf> accessed 20 February 2017 13, 19- 21.
[152] European Commission; and European Commission Directorate-General for Justice and Consumers.

exceptional circumstances by authorities for law enforcement and public interest purposes (Section 3.2).

10. If relevant, please set out information on the following:

10.1. Defenses to the offences

Cyprus legislation provides for requests for information on banking transactions where "the party requested shall provide the particulars of specified bank accounts and of banking operations"[153] and the "obligation applies only to the extent that the information is in the possession of the bank holding the account".[154] Moreover "non –bank financial institutions, may be subject to the principle of reciprocity".[155] Monitoring of banking transactions may apply.[156] Last but not least, there are some grounds for refusal or postponement of co - operation[157] that may apply. Co – operation may be refused if: "the action sought would be contrary to the fundamental principles of the legal system of the requested party[158], prejudice the sovereignty, public order or other essential interests[159] or the offence to which the request relates is a fiscal offence, with the exception of the financing of terrorism"[160]. Postponement of the co – operation may apply "if such action would prejudice investigations or proceedings by its authorities".[161]

[153] Convention on Laundering, Search, Seizure and Confiscation of Crime and Terrorist Financing Act 2007 Article 18(1)
[154] Convention on Laundering, Search, Seizure and Confiscation of Crime and Terrorist Financing Act 2007 Article 18(2)
[155] Convention on Laundering, Search, Seizure and Confiscation of Crime and Terrorist Financing Act 2007, Article 18(5)
[156] Convention on Laundering, Search, Seizure and Confiscation of Crime and Terrorist Financing Act 2007 Article 19(1-3)
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[158] Convention on Laundering, Search, Seizure and Confiscation of Crime and Terrorist Financing Act 2007 Article 28 (1)a
[159] Convention on Laundering, Search, Seizure and Confiscation of Crime and Terrorist Financing Act 2007 Article 28 (1)b
[160] Convention on Laundering, Search, Seizure and Confiscation of Crime and Terrorist Financing Act 2007 Article 28 (1)d
[161] Convention on Laundering, Search, Seizure and Confiscation of Crime and Terrorist Financing Act 2007 Article 29

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement)

The importance of the Statute[162], is article 6 that states that "prosecution is not going to happen, without the consent of the Attorney General".[163] It can be argued that article 6 is not clear as to whether the defendant will get an immunity. It gives the AG the right to decide whether it is in the public interest for someone to obtain immunity. [164]

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas)

In Cyprus, plea bargaining does not exist and according to its criminal law system[165] it is deemed unconstitutional. It is believed[166] that the defendant should not make any agreement to plead guilty or otherwise, and that he or she has the right to a fair trial. On the other hand there are some "unwritten" rules that apply in the Cypriot legal system. It is customary, depending always on the circumstances of each case, that if the defendant pleaded guilty at the beginning of the case, the court would be more likely to mitigate the penalty as court time would not be wasted and the responsibility of one's actions would have been taken. Also, if the defendant decides to plead guilty for some of the charges faced, the district attorney or the legal service of Cyprus would consider withdrawing some of them, depending on the individual circumstances of the case. In some circumstances, while the case is still being investigated and in cases of corporate bribery, the company may decide to take some steps to limit such acts and the police may decide not to proceed with the case. The judge will however decide in the end as the exact penalty, and the district attorney will not be able to make a final agreement with the defendant.

[162] Ibid.
[163] Cited in: Prevention of corruption Act 2012
[164] Ibid.
[165] Christos Saltanis, Introduction to the Cypriot Criminal Law System (1st edn, Law Library 2017)
[166] Ibid.

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance)

As a means of cost mitigation, **Directors and Officers Liability (D&O) Insurance** is provided in Cyprus by various insurance companies. D&O Insurance protects Directors and Officers from claims that may arise from acts or omissions done under their regular business duties. D&O Insurance covers the personal liability of Directors and Officers as well as the reimbursement of the insured company for indemnification of Directors and Officers in relation to costs of claims when the company has indemnified them for the loss.[167]

The D&O Insurance Policy usually covers the following:

a. Managerial liability.
b. Investigation costs, such as the costs of an investigation that the Cyprus Securities and Exchange Commission (CySEC)[168] may implement in case of a possible violation of the obligation imposed in pursuance of the L73(I)2009 or the relevant legislation concerning corporate compliance.
c. Protection to non-executive directors for any loss that has been indemnified by the company – policyholder.
d. Extradition costs.
e. Assets and liberty protection. That is, it covers the bail bond costs and the asset and liberty protection expenses paid by the insured.
f. Public relation expenses for restoring the reputation of the company – policyholder.
g. Emergency defence costs with respect to any claim, including cases of civil, administrative and criminal law nature, any criminal proceeding or investigation, decisions for extradition, injunction measures or penal measures against the insured person.

[167] Barry R. Ostrager, Thomas R. Newman, *Handbook on Insurance Coverage Disputes*, (Volume I, 18th edn, Wolters Kluwer 2017)
[168] http://www.cysec.gov.cy

In general, the D&O Insurance covers the failures of directors and officers to comply with the relevant law or directives. However, it does not cover corruption or any fraudulent acts.

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

Over the next two years, the most significant changes will occur in the field of Cyprus' (employee) data protection regulatory system, through: a) the upcoming effective application of the EU Regulation 2016/679 (General Data Protection Regulation, GDPR), which substitutes the current legislation on data protection (i.e. Directive 95/46/EC), b) the additional efficient implementation of the EU Directive 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, as well as c) the new Proposal for an e-Privacy Regulation.

Most importantly, these legislative instruments will strengthen citizens' (employees') fundamental (data) rights in the digital age and will allow all businesses to operate through more simplified and unified rules in the Digital Single Market. Noteworthy changes will occur through the re-definition of 'personal data' (which also involves the classification of personal/sensitive employee data), since the concept will expand encapsulating, among others, online identifiers (such as IP addresses), biometric data and metadata. What is more, it is significant to notice that the new GDPR's will function as a treaty with a global impact. The Regulation's extraterritorial application will harmonize the practices-restrictions on providing employee data to both foreign authorities, strengthening the current fragmented and state-oriented framework.

As a Member State of the EU, Cyprus follows and implements the provisions of the EU Directives on the Anti-Money Laundering. Following the discussions and recent proposals regarding the 5th Anti-Money Laundering Directive, Cyprus is expected to proceed with the ratification of the 4th and upcoming Directive and the amendment of the current National Law on Anti-Money Laundering.

By consequence, the relevant legislation is expected to change regarding the following:[169]

a. Enhanced customer due diligence policies and procedures
b. Supervision of firms operating on a cross-border basis
c. Essential information on beneficial ownership and disclosure of beneficial interests in order to strengthen the beneficial ownership transparency rules
d. Risks of virtual currency exchange platforms and pre-paid instruments. Use of anonymous pre-paid cards will be harder
e. Access to information and information exchange for EU Financial Intelligence Units as well as to encourage information exchange between regulators
f. Implementation of restrictive measures
g. Regulation against the illicit cash movements
h. Centralised national bank and payment account registers or central data retrieval systems in all Member States.
i. Tackling terrorist financing risks linked to virtual currencies
j. Electronic Identification provided by new specific rules
k. E-signatures will not be considered as authentication means

Last, in a fast-forward world it is expected that the 5th AML Directive will just be the beginning of many changes to follow.

[169] European Commission, Press Resease: Commission presents Action Plan to strengthen the fight against terrorist financing (Strasbourg, 2 February 2016), < http://europa.eu/rapid/press-release_IP-16-202_en.htm> ; European Commission, *Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC*, 2016/0208 (COD), (Strasbourg, 5.7.2016).

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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction.

1.1 Governing National and International Laws

Anti-bribery and corruption, fraud, anti-money laundering and sanctions are regulated at the national level by the Finnish Criminal Code. In addition to this, international laws and agreements are binding in Finland if those have entered into force or if they have EU statute. Ratified international treaties form an integral part of the country's domestic legal system and belong on the same level as any other legislative act. Their place in the hierarchy of regulation is below constitutional norms and above decisions of the Council of State.

The incorporation of the United Nations Convention against Corruption (UNCAC) into the Finnish legal system was ensured by the adoption of the Act No.466/2006 and the Decree No. 605/2006. Thus, the Finnish competent authorities are in a position to directly apply UNCAC-based provisions.

Offences against UNCAC are all criminalized in the Criminal Code, even though the scope of some offences may go beyond the minimum required by UNCAC. Offences related to bribery in the private sector surpass the Convention's area of application, in that a breach of duty is not an element that constitutes a crime. The conditions of the Criminal Code are met if the recipient of the bribe favours the briber or another person in his or her function or duties. The criminalization is aimed both at protecting the relation of trust between employer and employee and at protecting free competition.

1.2 Sanctions for Breaking the Law

Sanctions vary from fines to imprisonment of up to four years. Both giving and accepting a bribe are considered as a criminal act under the Criminal Code. Both persons and companies may commit criminal corruption offences. It is important to notice that a company can be held liable for corruption offences committed by its employees and may be ordered to pay corporate fines.

A common feature of the Finnish criminal justice system is the use of relatively low sanctions compared to other European countries, with an emphasis on fines. Imprisonment is a rarely used sanction due to the fact that the Finnish legal system believes in second chances and reinsertion in society. Criminological studies provide strong evidence that the low level of punitive sanctions of the criminal justice system in Finland has not lead to an increase in the commission of offences. Judges have a tendency to apply sentences towards the lower end of the penal scales established in statutes. It has to be kept in mind that when deciding a sentence a judge has to compare it to the sentences commonly used in similar cases and therefore, the sanction level will remain the same.

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

2.1 Bribery

2.1.1 Definition of Bribery

According to section 7 one commits a bribery if he or she promises, offers or gives an unlawful benefit or a bribe to a person in the service of a business, a member of the administrative board or board of directors, the managing director, auditor or receiver of a corporation or of a foundation engaged in business, a person carrying out a duty on behalf of a business, or a person serving as an arbitrator and considering a dispute between businesses, between two other parties, or between a business and another party intended for the recipient or another, in order to have the bribed person, in his or her function or duties, favour the briber or another person, or to reward the bribed person for such favouring. The briber shall be sentenced, unless the act is punishable on the basis of Chapter 16, section 13 or 14. The briber can be sentenced for giving of bribes in business to a fine or to imprisonment for at most two years.

Aggravated version of giving bribes in business is qualified under section 7(a). The terms of an aggravated bribe in business can be met if (1) the gift or benefit is intended to make the person in question serve in his or her function in a manner that results in considerable benefit to the briber or to another person, or in considerable loss or detriment to another person, (2) the gift or benefit

is of considerable value. In addition to this, the giving of a bribe in business is aggravated also when assessed as a whole. In case the conditions are met, the offender shall be sentenced for aggravated giving of bribes in business to imprisonment for at least four months and at most four years.

2.1.2 Acceptance of Bribe

Acceptance of a bribe in business is regulated under section 8. According to the this section a person who (1) in the service of a business, (2) as a member of the administrative board or board of directors, the managing director, auditor or receiver of a corporation or of a foundation engaged in business (3) in carrying out a duty on behalf of a business, or (4) in serving as an arbitrator considering a dispute between businesses, between two other parties, or between a business and another party demands, accepts or receives a bribe for himself or herself or another or otherwise takes an initiative towards receiving such a bribe, in order to favour or as a reward for such favouring in his or her function or duties, shall be sentenced for acceptance of a bribe.

When committing a crime, the receiver of a bribe or the other shall be sentenced, unless the act is punishable in accordance with Chapter 40, sections 1 – 3, for acceptance of a bribe in business to a fine or to imprisonment for at most two years.

Conditions of aggravated acceptance of a bribe in business are met if in the giving of a bribe in business (1) the offender acts or the intention of the offender is to act in his or her function, due to the gift or benefit, to the considerable benefit of the briber or of another person or to the considerable loss or detriment of another person, or (2) the value of the gift or benefit is considerable. In addition to this, the giving of a bribe in business is aggravated also when assessed as whole. As a consequence of fulfilling these conditions, the offender shall be sentenced for aggravated giving of a bribe in business to imprisonment for at least four months and at most four years. Aggravated acceptance of a bribe in business is regulated under section 8(a) of chapter 30.

2.2 Property Receiving and Money Laundering Offences

Chapter 32 of the Criminal Code 61, 2003 [Laki rikoslain muuttamisesta] covers regulation related to property receiving and money laundering offences.

According to section 1, a person who hides, procures, takes into his or her possession or conveys property obtained from another through theft, embezzlement, robbery, extortion, fraud, usury or means of payment of fraud or otherwise handles such property, shall be incriminated for a receiving offence, unless the act is punishable as money laundering. Sentence of committing such a crime is imprisonment for at most one year and six months.

Conditions of aggravated receiving offence (769/1990) are met if the object of the receiving offence is very valuable property, and the receiving offence is aggravated also when assessed as a whole. The offender shall be sentenced for an aggravated receiving offence to imprisonment for at least four months and at most four years.

If the handling of property obtained through an offence is extensive and professional, the offender shall be sentenced for a professional receiving offence to imprisonment for at least four months and at most six years, according to section 3 of the chapter.

2.2.1 Negligent Offence

According to Section 4 (61/2003) a person commits negligent receiving offence, if he or she procures, takes possession of or transfers property acquired through an offence referred to in section 1, or otherwise handles such property, even though he or she has reason to believe that the property has been acquired in said manner. Sentence for a negligent receiving offence to a fine or to imprisonment for at most six months.

Section 5 rules about receiving violation (769/1990). If the receiving offence or negligent receiving offence, when assessed as a whole, with due consideration to the value of the property or to the

other circumstances connected with the offence, is deemed petty, the offender shall be sentenced for receiving violation to a fine.

2.2.2 Money Laundering

A person who (1) receives, uses, converts, conveys, transfers or transmits or possesses property acquired through an offence, the proceeds of crime or property replacing such property in order to obtain benefit for himself or herself or for another or to conceal or obliterate the illegal origin of such proceeds or property or in order to assist the offender in evading the legal consequences of the offence or (2) conceals or obliterates the true nature, origin, location or disposition of, or rights to, property acquired through an offence, the proceeds of an offence or property replacing such property or assists another in such concealment or obliteration perpetrates money laundering according to section 6. The person shall be sentenced for money laundering to a fine or to imprisonment for at most two years. It is notable that an attempt is also punishable.

Conditions of aggravated money laundering (61/2003) are met if (1) the property acquired through the offence has been very valuable or (2) the offence is committed in a particularly intentional manner. In addition to this, the money laundering is aggravated also when assessed as a whole. As a result of aggravated money laundering the offender shall be sentenced to imprisonment for at least four months and at most six years. It is notable that an attempt is punishable.

According to Section 8, a person who agrees with another on the commission of aggravated money laundering directed at the proceeds of the giving of a bribe, the acceptance of a bribe, or aggravated tax fraud or aggravated subsidy fraud directed at the tax referred to in Chapter 29, section 9, subsection 1(2), or at property replacing such proceeds, shall be sentenced for conspiracy for the commission of aggravated money laundering to a fine or to imprisonment for at most one year.

According to Section 9 (61/2003) a person who through gross negligence undertakes the actions referred to in section 6 shall be sentenced for negligent money laundering to a fine or to imprisonment for at most two years.

A person commits money laundering violation, according to section 10 (61/2003), if the money laundering or the negligent money laundering, taking into consideration the value of the property or the other circumstances connected with the offence, is petty when assessed as a whole. As a consequence of money laundering violation, the offender shall be sentenced to a fine.

2.2.3 Fraud and Dishonesty

Fraud and other dishonesty are regulated under the chapter 36 of the Criminal Code. (1) A person who, in order to obtain unlawful financial benefit for himself or herself or another or in order to harm another, deceives another or takes advantage of an error of another so as to have this person do something or refrain from doing something and in this way causes economic loss to the deceived person or to the person over whose benefits this person is able to dispose, commits a fraud. Such a person shall be sentenced to a fine or to imprisonment for at most two years. (2) Also a person who, with the intention referred to in subsection 1, by entering, altering, destroying or deleting data or by otherwise interfering with the operation of a data system, falsifies the end result of data processing and in this way causes another person economic loss, shall be sentenced for fraud. (3) It is notable that an attempt is punishable.

If the fraud involves the seeking of considerable benefit, causes considerable or particularly significant loss, is committed by taking advantage of special confidence based on a position of trust or is committed by taking advantage of a special weakness or other insecure position of another, then the conditions of aggravated fraud are met. In addition to this the fraud is aggravated also when assessed as a whole. As a result of aggravated fraud the offender shall be sentenced to imprisonment for at least four months and at most four years, according to section 2 of chapter 36. It is notable that an attempt is punishable.

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

In Finland, criminal conduct by the directors, officers or employees of a company may lead to corporate liability under the specific circumstances provided in Chapter 9 of the Finnish Criminal Code 39, 1889 [Rikoslaki]. In essence, criminal corporate liability is always based on the deliberate or negligent acts of individuals who are in a certain relationship with the corporation.[1] There are no other ways to attribute criminal liability to a corporation. Although administrative sanctions can also be imposed on a corporation, there is no such thing as administrative criminal law as such. Furthermore, the principle of legality in the Finnish criminal law allows the imposition of criminal sanctions on a (legal) person only when the offence or omission in question has been specifically criminalized by legislation at the time of its commission. The prerequisites for corporate liability are discussed in detail below.

In accordance with Chapter 9 Section 1 of the Criminal Code, a corporation, foundation or other legal entity **in whose operations an offence has been committed** shall on the request of the public prosecutor be sentenced to a **corporate fine** if the Criminal Code provides for such a sanction for the offence in question. In practice, the possible provision on corporate criminal liability can usually be found at the end of the relevant chapter in the Criminal Code. The premise is that attributing liability to the corporation (i.e. sentencing the corporation to a corporate fine) is mandatory if the prerequisites set out by the Criminal Code are met. However, pursuant to Chapter 9 Section 7, the public prosecutor is entitled to a certain amount of discretion in relation to the bringing of charges and the court seized to decide the charges may decide to waive the imposition of the corporate fine under conditions prescribed in Chapter 9 Section 4. Furthermore, it is useful to note that the pettiest forms of criminal offences are sometimes excluded from the scope of application of Chapter 9. For example, a corporation cannot be held liable for petty fraud or for money laundering violation. In addition, no corporate fine shall be imposed for a complainant

[1] HE 95 (Government Bill) 1993 vp, ch 5.1, [Hallituksen esitys Eduskunnalle oikeushenkilön rangaistusvastuuta koskevaksi lainsäädännöksi]

offence (an offence where charges may be brought only if the injured party so requests) that is not reported by the injured party so as to have charges brought, unless there is a very important public interest for bringing the charges as regulated in Chapter 9 Section 2 Subsection 2.

If the Criminal Code provides for a corporate fine for the offence in question, the prerequisites specified in Sections 2 and 3 of Chapter 9 must still be met before liability can be attributed to the corporation in the individual case.

As noted above, attributing liability to a corporation always requires that the offence in question has been committed in the operations of the corporation. According to Chapter 9 Section 3, the offence is deemed to have been committed in the operations of the corporation if the perpetrator has 1) acted on behalf of or for the benefit of the corporation **and** 2) belongs to its management or is in a service or employment relationship with the corporation or has acted on assignment for the corporation. This definition covers a large group of individuals within a corporation, naturally including its directors and officers, and the first requirement has been interpreted quite broadly in practice.[2] However, if the individual is not acting in his position as the representative of the corporation at the time of committing the offence, he is not acting on behalf or for the benefit of the corporation and therefore the corporation cannot be held liable.[3] Liability for offences that are not related to the operations of the corporation cannot be attributed to the corporation even though the perpetrator would per se hold a managerial position in that corporation. Simply the fact that an offence has been committed does not, obviously, suffice for evidence that the corporation has breached its duties in a way that justifies the attribution of liability to the corporation.[4]

[2] OECD Working Group on 16 March 2017: Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Finland, 50. See also the Supreme Court cases KKO 2014:20 and KKO 2008:33.
[3] HE 95 (Government Bill) 1993 vp, ch 5.3, [Hallituksen esitys Eduskunnalle oikeushenkilön rangaistusvastuuta koskevaksi lainsäädännöksi]; Matti Tolvanen, '*Trust, Business Ethics and Crime Prevention – Corporate Criminal Liability in Finland*' [2009], Fudan Law Journal No. 4, Legal Studies Research Paper No. 2, University of Eastern Finland, ch 6.
[4] HE 95 (Government Bill, Explanatory memorandum) 1993 vp, ch 1.1., [Hallituksen esitys Eduskunnalle oikeushenkilön rangaistusvastuuta koskevaksi lainsäädännöksi]

Chapter 9 Section 2 stipulates that a corporate fine may be imposed if 1) a person who is **part of the corporation's statutory organ or other management** or who exercises **actual decision-making authority** in the corporation has a) been an accomplice in an offence or b) allowed the commission of the offence or 2) if the care and diligence necessary for the prevention of the offence have not been observed in the operations of the corporation. Section 2 further stipulates that 3) a corporate fine may be imposed even if the offender cannot be identified or otherwise is not punished. From this, three different liability situations can be recognized: direct contribution of the members of the management, vicarious liability and anonymous liability.[5]

In accordance with Section 2 Subsection 1, **direct contribution of a member of the management** may be attributed to the corporation if a person who is part of the corporation's statutory organ or other management or who exercises actual decision-making authority in the corporation has been an accomplice in an offence or allowed the commission of the offence. This liability situation is therefore based on the "identification" (only in a fictional sense) of the offender with the corporation.[6] As the wording of the provision indicates, the applicability of this provision is in essence linked to the individual's possibility to exercise considerable decision-making authority (whether formal or actual) in the corporation. The more authoritative the position of the offender, the easier it is to identify him with the corporation and the more justified it is to establish corporate liability.[7] In most cases the provision would, therefore, probably cover the acts and omissions of directors and officers as members of the management.[8] This liability type is also probably the most typical one in practice.[9]

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[5] HE 95 (Government Bill, General Explanations) 1993 vp, ch 5.3, [Hallituksen esitys Eduskunnalle oikeushenkilön rangaistusvastuuta koskevaksi lainsäädännöksi]; Jussi Tapani – Matti Tolvanen, *Rikosoikeus – Rangaistuksen Määrääminen ja Täytäntöönpano* (Talentum, 2016), ch 6.1., [Finnish]

[6] Jussi Tapani – Matti Tolvanen, *Rikosoikeus – Rangaistuksen Määrääminen ja Täytäntöönpano* (Talentum 2016), ch 6.1, [Finnish]; Matti Tolvanen, *'Trust, Business Ethics and Crime Prevention – Corporate Criminal Liability in Finland'* [2009], Fudan Law Journal No. 4, Legal Studies Research Paper No. 2, University of Eastern Finland, ch 6.

[7] Ari-Matti Nuutila: *Corporate Criminal Liability in Finland – An addition to individual criminal responsibility* (In Antonio Fiorella & Alfonso Stile (eds.): Corporate Criminal Liability and Compliance Programs, Rome 2012), ch 7.

[8] See, however, case KKO 33, [2008], the Finnish Supreme Court, R2007/147, 2008, [Finnish]; where the Finnish Supreme Court held that officers belonging to the middle management of a corporation (production managers) were not part of the corporation's management when their decision-making authority was examined in relation to the decision-making authority in the corporation as a whole.

[9] Matti Tolvanen, *'Trust, Business Ethics and Crime Prevention – Corporate Criminal Liability in Finland'* [2009], Fudan Law Journal No. 4, Legal Studies Research Paper No. 2, University of Eastern Finland, ch 6.

In the case of **active participation** by the management it suffices if even one director or officer has participated in, aided or abetted or incited a criminal offence. No duty of care or diligence needs to be breached. Naturally, the offence can also be the result of a collective decision by several individuals. In the case of **passively allowing** the commission of an offence, the prerequisites for establishing corporate liability are knowledge of an offence about to be committed and the ability and omission to prevent such offence. If the offence could not have been prevented, mere awareness of the offence by the management does not result in criminal corporate liability.[10]

In accordance with the last clause of Section 2 Subsection 1, a corporation may be held **vicariously liable** if the care and diligence necessary for the prevention of the offence have not been observed in the operations of the corporation. Vicarious liability is usually applicable in situations where the perpetrator of the offence is in an employment relationship with the corporation or has acted on assignment for the corporation. In these cases, the corporation (or rather its management) has therefore negligently breached its duty to prevent the offence.[11] The offence itself does not have to be a direct consequence of the negligence, but the failure to observe the requirements of care and diligence must have enabled the commission of the offence or at least **considerably increased** the feasibility of an offence in the business activities. Criminal corporate liability is thus always subject to the existence of a sufficient cause and effect relationship between the breach of the corporation's duty of care as an employer and the commission of the offence.[12] A certain level of "corporate culpability" is thus always required; meaning that a negligent breach of duty has indeed taken place in the operations of the corporation and the offence is linked to that

[10] HE 95 (Government Bill, Explanatory memorandum) 1993, vp, ch 1.1, [Hallituksen esitys Eduskunnalle oikeushenkilön rangaistusvastuuta koskevaksi lainsäädännöksi]; Petri Taivalkoski, Gisela Knuts and Paula Puusaari '*Criminal Liability of Companies – Finland*', (Lex Mundi Publication, Roschier, Attorneys Ltd., 2008), <http://www.lexmundi.com/images/lexmundi/pdf/business_crimes/crim_liability_finland.pdf>, accessed February 2 2017, ch 2.4.

[11] Jussi Tapani – Matti Tolvanen, *Rikosoikeus – Rangaistuksen Määrääminen ja Täytäntöönpano* (Talentum, 2016), ch 6.1, [Finnish], Ari-Matti Nuutila, *Corporate Criminal Liability in Finland – An addition to individual criminal responsibility* (In Antonio Fiorella & Alfonso Stile (eds.): Corporate Criminal Liability and Compliance Programs, Rome 2012), ch 4; HE 22 (Government Bill, General Explanations) 2001, ch 2., [Hallituksen esitys Eduskunnalle laiksi rikoslain 9 ja 37 luvun muuttamisesta]

[12] HE 95 (Government Bill, Explanatory memorandum) 1993 vp, ch 1.1., [Hallituksen esitys Eduskunnalle oikeushenkilön rangaistusvastuuta koskevaksi lainsäädännöksi]

negligence.[13] In practice, the prosecution has the burden of proving the defendant's negligence, although it is not a complete defence even if the corporation could show that it took the necessary care. Rather, this could work as a mitigating factor in sentencing before the court.[14]

Under certain circumstances provided in Section 2 Subsection 2, it may be possible to hold a corporation **anonymously liable** even if the individual offender cannot be identified. According to Criminal Code preparatory works, the possibility for anonymous liability is necessary in order to avoid situations where the individual perpetrator cannot be identified because the corporation has completely ignored its obligations.[15] Therefore, a corporation may be held anonymously liable if the elements of a penal provision have without doubt been fulfilled in the operations of the corporation and the perpetrator who has acted on behalf or for the benefit of the corporation is obviously someone inside the corporation, even though he cannot be identified. In a similar manner, liability can also be attributed to the corporation if the individual offender can actually be identified but for some reason he is not otherwise punished. Despite this provision in the Finnish Criminal Code, corporate liability is always secondary to individual liability and finding a guilty individual remains the aim in relation to all criminal offences.[16] Furthermore, pursuing anonymous liability may prove difficult in practice due to evidentiary requirements.[17]

As a general remark, it is useful to emphasize that corporations can also be held liable where a related natural person enters into a plea bargain. In such a situation, the corporation can either

[13] HE 53 (Government Bill, General Explanations) 2002 vp, ch 2.4., [Hallituksen esitys Eduskunnalle eräiden rikoslain talousrikossäännösten ja eräiden niihin liittyvien lakien muuttamiseksi]
[14] OECD Working Group on 16 March 2017: Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Finland, 40.
[15] HE 95 (Government Bill, Explanatory memorandum) 1993 vp, ch 1.1., [Hallituksen esitys Eduskunnalle oikeushenkilön rangaistusvastuuta koskevaksi lainsäädännöksi]
[16] Ari-Matti Nuutila, *Corporate Criminal Liability in Finland – An addition to individual criminal responsibility* (In Antonio Fiorella & Alfonso Stile (eds.): Corporate Criminal Liability and Compliance Programs, Rome 2012), ch 4.
[17] OECD Working Group on 16 March 2017: Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Finland, 41.

appear before the court in a joint proceeding with the natural person or in a separate criminal proceeding against the corporation alone.[18]

Despite the above discussion, a corporation as a legal entity cannot act as an offender and it cannot be held guilty of an offence in the traditional sense of culpability in Finland. Instead, attributing liability to the corporation always (with the rare exception of anonymous liability) requires that the offence in question is imputable to the individual in accordance with the applicable penal provision. The requirement of imputability, in turn, always presupposes that the perpetrator has acted with a certain level of intent or negligence, as opposed to situations where the perpetrator had no possibility to act differently. Furthermore, as Chapter 9 Section 2 Subsection 1 indicates, there must exist at least some sort of breach of duty on behalf of the corporation or its management. The Finnish law does not contain provisions based on strict criminal liability.[19]

Finally, it is worth emphasizing that the Finnish legal doctrine does not as such embrace the classical identification theory, according to which the offender is acting **as** the company rather than **for** the company.[20] In Finland, corporate liability covers the actions of individuals at all levels of the organization, while still requiring that a person of authority is an accomplice in the offence or allows its commission, or that the corporation did not take the necessary steps to prevent the offence (see the above discussion). Therefore, the doctrine resembles to some extent the so-called respondeat superior –theory (where any person acting for the company can, at least in theory, trigger corporate liability[21]). Corporate liability cases have been relatively rare in practice, especially in relation to bribery and corruption, fraud and money laundering.[22] However, according to the

[18] OECD Working Group on 16 March 2017: Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Finland, 36.
[19] Matti Tolvanen, '*Trust, Business Ethics and Crime Prevention – Corporate Criminal Liability in Finland*' [2009], Fudan Law Journal No. 4, Legal Studies Research Paper No. 2, University of Eastern Finland, ch 2.4 and 3; HE 95 (Government Bill) 1993 vp, ch 5.2 and ch 5.3.
[20] Matti Tolvanen, '*Trust, Business Ethics and Crime Prevention – Corporate Criminal Liability in Finland*' [2009], Fudan Law Journal No. 4, Legal Studies Research Paper No. 2, University of Eastern Finland, ch 3.
[21] However, as discussed, the fact that Finnish law requires some degree of negligence also from the corporation or its managers works as a 'defense' for the management in cases against lower level employees.
[22] HE 1 (Government Proposal, General Explanations) 2016 vp, ch 2.1.3., [Hallituksen esitys eduskunnalle laeiksi rikoslain 2 a ja 9 luvun muuttamisesta sekä pysäköinninvalvonnasta annetun lain 3 §:n muuttamisesta]

recent phase 4 report on implementing the OECD anti-bribery Convention, corporate fines were imposed in approximately 70 % of the 367 corporate criminal prosecutions between 2010 and 2015 in Finland, including all kinds of cases.[23]

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

4.1 Introduction

Legislation regarding extradition is regulated primarily in the Extradition Act 456, 1970 [Laki rikoksen johdosta tapahtuvasta luovuttamisesta] however, in addition to this there are several bilateral and multilateral agreements between countries that regulate extradition in a specific manner, especially the European Arrest warrant that has a huge impact on national legislation. These include agreements such as the Act on extradition between Finland and other Nordic countries 1383, 2007 [Laki rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden Pohjoismaiden välillä], as well as the relationship between EU member states regulated by the European Union Framework Decision on the European Arrest Warrant 1286, 2003 [Laki rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden Euroopan unionin jäsenvaltioiden välillä]. According to Finland's Ministry of Justice there are several bilateral extradition treaties concluded between Finland and individual states such as the United States, Australia, Canada and New Zealand[24] as well as diplomatic notes concluded via ministers of foreign affairs of Kenya and Uganda[25].

[23] OECD Working Group on 16 March 2017: Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Finland, 41.
[24] Extradition Treaty, United States (Treaty Series 15/ 1980); Extradition Treaty, Australia (Treaty Series 24/1985); Extradition Treaty, Canada (Treaty Series 6/ 1985); Treaty between Finland and Great Britain on the Extradition of Criminals (Treaty Series 40/ 1924) and on the extension of the application of the Treaty to New Zealand (Treaty Series 32/ 1925) and resumption of the operation of the Treaty (Treaty Series 35/1948)
[25] Agreement on the Extradition of Criminals, Kenya (Treaty Series 55/1965); Agreement on the Extradition of Criminals, Uganda (Treaty Series 56 1965).

4.2 Extradition Act

Terms and conditions for extradition have been outlined in Sections 2-11. According to the Extradition act it is forbidden to extradite Finnish citizens. On crimes committed in Finland or in a Finnish vessel or aircraft extradition can only be performed if it is considered appropriate for the criminal investigations and proceedings relating to the offence in the requesting State, and legal punishment following from that offence would not essentially derogate from what is laid down in Finnish legislation. Extradition shall be refused if the requested act does not conform to a punishable offence according to the Finnish legal system or that has been made under corresponding circumstances, and which may entail more serious penalty than imprisonment of one year. Moreover the unofficial translation of the Extradition Act asserts that a person, who in a foreign State has been convicted for an act referred to in Section 1, may be extradited only when the sentence yet to be served includes the deprivation of liberty for at least four months.[26] Where the request for extradition includes several acts and the prerequisites referred to above are fulfilled, extradition may be granted also for the part of those other acts which, or the acts corresponding to, are punishable according to Finnish law.

The act regulates that extradition based on offences of military or political nature is prohibited. However if the act simultaneously contains an offence for which extradition would be permissible, extradition may be granted. It has also been asserted that murder and attempt thereof that has not occurred in an open combat shall never be regarded as a political offence. Extradition shall be refused where there is reason to believe that the person will be subjected to persecution against his life, liberty or other mistreatment because of her race, nationality, religion, political opinion, association to a particular social group, or due to political conditions. Furthermore extradition shall not be granted if it would be deemed unreasonable on grounds of age, state of health, personal conditions or other special circumstances. The request must be built on an enforceable judgment, where there is enough evidence to presume the guilty nature of the accused, or to an arrest warrant executed by a foreign state's authority. Extradition shall be declined whether the requested person

[26] NB: Unofficial translation, (Extradition Act, 7 July 1970/456, amendments up to 607/1993), <https://www.imolin.org/doc/amlid/Finland/Finland_Extradition_Act_1993.pdf >, accessed 10 January, 2

is being prosecuted of another offence leading to imprisonment in Finland or has to serve a comparable punishment or otherwise be deprived of his liberty. As long as this sort of a hindrance exists, extradition shall not be granted. Notwithstanding subparagraph 1, it can be decided for compelling reasons that the person can be extradited to a foreign state for trial if she will be immediately returned to Finnish authorities after the conclusion of the trial.

4.3 Extradition Act between Finland and Other Member States of the EU

The Act on Extradition on the Basis of an Offence between Finland and Other Member States of the European Union acts as a supplementary law to the Extradition Act, providing more detailed provisions concerning the matter. The European Arrest Warrant states that there are specific grounds for refusal regarding extradition, which are divided into two main categories; **mandatory and optional refusal**. Mandatory refusal, which is regulated in Chapter 2, Section 5, in turn is segregated into seven different subcategories.

First of all it should be mentioned that extradition shall be refused if the offense is covered by the general amnesty pursuant to Article 105(2) of the Constitution of Finland and enacted in accordance with the Criminal Code's Chapter 1. Secondly the person requested has been convicted in a legally final matter either in Finland or in another member state of EU for the offence in question provided that the individual has been sentenced to punishment, or has served or is currently serving the sentence or the member state that has put the sentence into force may no longer enforce the sentence. Moreover refusal shall be denied if the person was under the age of fifteen when committing the crime or the request deals with the enforcement of a custodial sentence and the person is a Finnish citizen requesting the custodial sentence to be served in Finland. Subsection 5 states that the offence has been committed fully or in part in Finland or in a Finnish vessel or aircraft and the act in question is not punishable in Finland or the time period for the right to bring charges has lapsed or the punishment may no longer be imposed or enforced. Moreover if there is a serious justifiable concern that the extradited individual should suffer a capital punishment, torture or other degrading treatment, or that she would be subjected to a persecution on the basis of origin, association to a social group, religion, belief or political opinion or the extradition would result in violation of human rights or constitutionally protected integrity

of freedom of speech or freedom of association. Lastly refusal shall be granted if the extradition would be unjustifiable on the grounds of humanitarian reasons relating to one's age, state of health or other personal circumstances and that the prosecution cannot be postponed due to Section 47. Section 47 states that as soon as the humanitarian grounds have ceased to exist the extradition decision shall take place and the person will be extradited within 10 days of the agreed new date.

Chapter 2, Section 6 regulates grounds for optional refusal which comprises of eight Subsections which state that extradition may be refused if the requested person is being prosecuted in Finland of the same act of which the request is being based on, or decision has been taken not to prosecute or withdraw it, or a final decision other than a judgment has been issued in a Member State regarding the act in question and which prevents the bringing of charges, or the Act has been committed fully or in part in Finland or in a Finnish vessel or aircraft and it is deemed appropriate to review the case in Finland. Extradition can also be refused if the criminal prosecution of the offence is statute-barred according to the law of Finland or punishment may no longer be imposed or enforced and pursuant to Chapter 1 of the Criminal Code, the law of Finland can be applied to the act. The request refers to the enforcement of custodial sentence and the requested person resides permanently in Finland and calls for the custodial sentence to be carried out there including that it is justifiable due to her personal circumstances or for other special reasons to carry out the sentence in Finland. The requested person has been legally convicted in another state than pertaining to the EU or in an international criminal court for the offence in question and she has served or is serving the sentence or the sentence cannot be executed according to the country's legislation where the judgment has been given. Lastly the offence, which the request is being based on, has been committed outside the territory of the requesting member state and Chapter 1 of the Criminal Code of Finland could not be applied in similar situations. It is also important to mention that refusal cannot be denied on grounds specified in Section 6 Subsection 1 or 4 even if the consent of the requested person has been acquired.

All the mandatory grounds for refusal are identically applicable to the Act on extradition between Finland and other Nordic countries (1383/2007). Furthermore optional grounds are similar between the two acts with only few exceptions. Nordic agreement excludes Subsection 5 of the European Arrest Warrant regarding offences made in Finnish aircraft or vessel as well as

Subsection 5 (b) regarding bringing of charges when they have become statute-barred. However it incorporates a new provision on that refusal can be obtained if Finnish authorities have opted out on bringing charges or have halted the process entirely.

4.3 Extradition between Finland and USA

Regarding the Extradition Treaty between United States and Finland it has been stated in Article 5 of the agreement that extradition shall be granted if the evidence provided against the person requested are sufficient for indictment according to the law of the requested state if the offence would have been committed in the territory of the requested state or that the identity of the person concerned of the offence has been established by the federal court of the requesting state. Article 7 declares specific grounds for refusal which are the following: the requested person is being or has been prosecuted and has been acquitted or sentenced of an offence in the territory of the requested state; the person requested has been prosecuted or acquitted or has suffered a penalty or pardoned of the offence which the request is being based on; the extraditing state sees that there is reason to consider taking account the requested person's age, state of health or other personal circumstances which would lead the extradition to become unreasonable due to human reasons. Extradition should also be refused if the right to prosecute or the execution of the sentence has become time-barred either according to the law of the extraditing or requested state. It has also been considered that refusal shall be denied if the offence is a war crime and is not a general offence or the offence is considered to be political by nature in the requested state or the person requested can show that the request has de facto been made with the intention to prosecute or punish her for an political offence in nature. However Article 2 Section c i) does not apply to murder or other serious attack or for attempting such crime if the act is directed to a person's life or physical integrity that the requested state is bound by international law to protect unless the offence has been committed in an open battle or neither to taking an unlawful hold on an passenger-carrying commercial aircraft. Furthermore there are several claims by which the refusal can be waived upon. If the requested person has been prosecuted for an offence in Finland and the charges has been dropped, the republic of Finland shall not be bound to extradite the individual in question unless Finnish authorities have carefully considered, taking into consideration the principal findings of the case, that extradition would not hamper rights and privileges. The requesting state needs to be allowed time to supplement the request until the extradition order

becomes final. Furthermore if the requested person has not turned eighteen years old and resides permanently in the requested state and the state authorities deem that the extradition would hinder individuals re-adaptation to the society, it can be suggested that the request to be revoked on specified grounds. If the offence might lead to a death penalty according to the law of the requesting state, penalty which the requested state does not sanction, the extradition can be refused unless the requesting state gives sufficient guarantees that the death penalty will not be imposed or that it will not be implemented as such. If the United States government submits an extradition request that is directed to an Finnish citizen, who at the time of the request resides permanently either in Finland or Iceland, Norway, Sweden or Denmark, Finland has the right on specified grounds to recommend the request to be terminated. Moreover extradition can be delayed if the person requested has been prosecuted or lawfully detained in the territory of the requested state of another offence than which the request is based on and shall be allowed time for the trial to be concluded or for the sentence to be served.

5. Please state and explain any:

5.1 Internal reporting processes (i.e. whistleblowing);

[Whistleblowing refers to denunciation systems used in corporations and in working life. The term whistleblowing originates from the United States of America's so-called Sarbanes-Oxley Act of 2002 on Corporate responsibility, which aims **to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.**[27] The afore-mentioned act concerns the publicly noted companies and their daughter companies located in the member countries of the European Union, and non-USA companies listed in any of the USA's stock exchanges. Therefore, the above mentioned companies in Finland are subject to the internal reporting processes stemming from this Act.

[27] An Act to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes. Public Law 107–204 107th Congress, Sarbanes-Oxley Act of 2002. Corporate responsibility. 15 USC 7201 note.

The Act aims to secure the financing market and industrial and commercial activity by the means of denunciation systems particularly in regards to accounting, audits, anti-bribery and white-collar crimes. The Act requires these companies to apply certain proceedings in their Public Company Accounting Oversight Boards regarding receiving, recording and handling of complaints about accounting, internal accounting controls and audits. Moreover, the Act sets out procedures for the companies to improve the employees' possibilities to report suspicions regarding accounting and audits of the company confidentially and anonymously. In addition to this, the Act seeks to ensure that sufficient measures are applied to protect the employees who provide proof of frauds and that they are protected from the possible acts of revenge arising from relying on the denunciation system.[28]

There is no explicit legislation on whistleblowing in Finland. However, to the extent that the companies in Finland must apply international legislation on this matter, apart from the international norms, they must take into account the Finnish legislation governing personal data and data protection. The most relevant laws are the Personal Data Act (henkilötietolaki) and the Act on the Protection of Privacy in the Working Life Act (työelämän tietosuojalaki). The Personal Data Act article 6 regulates that personal data shall solely be collected for a specific and predetermined purpose. According to the Finnish Data Ombudsman, the companies shall clearly define the varieties of information the denunciation systems can process, and limit this information to the information regarding accounting, internal accounting controls, audits, white-collar crimes and anti-bribery. The information shall be flawless and directly related to the rights and obligations of the employer and the employee Moreover, as per the article 1 and 3 of the Privacy in the Working Life Act, the information shall be directly pertinent to the objective of the denunciation system and this shall not be overreached. The companies shall ensure that the denunciation system is covered with a sufficient data protection and information security. In addition to this, particular attention shall be paid to professional secrecy. [29]

[28] Finnish Data Protection Ombudsman – Data protection in the working life in the so-called whistleblow denunciation systems 2010 (Tietosuojavaltuutetun toimisto – Työelämän tietosuoja ns. whistleblowing ilmiantojärjestelmissä) p. 3-4.
[29] Finnish Data Protection Ombudsman – Data protection in the working life in the so-called whistleblow denunciation systems 2010 p. 6-7.

5.2 external reporting requirements (i.e. to markets and regulators), that may arise on the discovery of a possible offence.

5.2.1 Anti-bribery, corruption, fraud, anti-money laundering offences for companies – reporting requirements

The Act on anti-money laundering and terrorist financing (AML Act) obligates certain entities, specified in the article 2, to report all the unusual transactions and suspicious business operations to the Financial Intelligence Unit, which is the national anti-money laundering unit and as such responsible for investigating possible offences regarding anti-money laundering. The entities in question include banks, investment service providers, management companies, custodians, insurance service providers, payment service providers, pawnshops, gaming operators, real estate agents, auditors, tax advisers, businesses or professions practicing payments transfer activity exceeding the amount of 15, 000 euros, and attorneys and businesses or professionals providing assistance for or on behalf of their clients in matters defined in the AML Act, namely acts concerning buying, selling or planning of real estate or business entities; managing of client money, securities or other assets, opening or management of bank, savings or securities accounts; organization of contributions for the creation, operation or management of companies; operation or management of trusts, companies or similar legal arrangements. The before mentioned entities are the actors to which the law refers as the parties subject to the obligation to report.

The obligation to report stems from the second chapter of the AML Act regulating the parties' responsibility to undertake customer due diligence and risk-based evaluation in their business operations. If, after fulfilling the customer due diligence obligation, parties subject to the obligation to report have a reason to suspect the business operation they shall report the matter to the Clearing House without delay and supply on request all information and documents that could be significant to clearing the suspicion. Pawnshops shall make such report if a transaction involves a pledge of a significant financial value. The report shall be made primarily in an electronic form, however, due to a specific reason the report may be submitted by other means. The immediate information acquired to comply with the reporting obligation shall be kept in store for five years. The information recorded shall be kept separated from the client register. The records shall be deleted in five years from the submission of the report, unless their conservation is necessary due

to a criminal investigation, ongoing trial; or for safeguarding the rights of the party obligated to report or its employee. The necessity of keeping the records shall be evaluated not later than three years after the previous evaluation of the necessity of keeping the records. Carrying out the evaluation shall be recorded.[30]

Furthermore, the AML Act recognizes an enhanced reporting obligation in relation to enhanced identification and customer due diligence required in certain cases. If a transaction is connected with a State whose system of preventing and clearing money laundering does not meet the international standards, an enhanced identification, customer due diligence and reporting obligation applies to the transaction. To fulfil an enhanced obligation to report, parties subject to the obligation to report shall make a report to the Clearing House if their customers do not provide them with an account they have requested in order to fulfil the customer due diligence obligation, or if they consider that this account is unreliable. The same applies if the account obtained by parties subject to the obligation to report does not provide sufficient information on the grounds for the transaction and on the origin of the assets. Parties subject to the obligation to report shall also make a report to the Clearing House if a legal person cannot be identified or beneficiaries established in a reliable way. The same also applies if a person on behalf of whom a customer is acting cannot be reliably identified.[31]

In regards to offences related to corruption, anti-bribery and fraud there are no specific reporting obligations for companies. These offences are regulated in the Criminal Code and both natural and legal persons are subject to criminal corruption and bribery offences. However, there are no particular provisions on reporting obligations.

[30] AML Act article 23§.
[31] <http://www.finlex.fi/en/laki/kaannokset/> AML Act Translation Section 11 a. AML Act 24§.

6. Who are the enforcement authorities for these offences?

6.1 Enforcement authorities for criminal offences

Under the Finnish criminal law, the enforcement authorities for individual crime and corporate crime are basically the same. A corporation may be prosecuted and it may act as a defendant in criminal proceedings much the same way as an individual offender, and a criminal procedure facing the corporation is therefore similar to one facing a natural person. It is also possible that both the individual offender and the corporation will be convicted for the same offence in a joint proceeding. The case is obviously the same for acts relating to bribery and corruption, fraud and money laundering regulated under the Finnish Criminal Code 39, 1889 [Rikoslaki]. Therefore, the relevant enforcement authorities include the **police,** the **public prosecutor** and the **courts.** In relation to corporate crime, the actual enforcement authorities also include the authority enforcing the corporate fine, i.e. the **enforcement authority for the punishment**. The roles of the different enforcement authorities are discussed in more detail below especially in relation to corporate crime and from the corporation's point of view.

As with all offences in Finland, the **police are usually responsible for conducting the pre-trial investigative phase of the criminal proceeding.** In a typical case, the investigation will be conducted by the local police. If the matter is unusually complex or serious, for instance involving organized crime, senior public officials or international connections, the investigation may however be assigned to the National Bureau of Investigation (NBI).[32] The NBI is a specialized police unit whose primary duty is to fight and investigate international, organized and serious crime. Therefore, the NBI might conduct the investigation of bribery and corruption, money laundering and securities crime. If the case is handled by the NBI, the role of the local police department is limited to the preceding identification of the offence as serious. The NBI is also responsible for taking measures provided in the Finnish Act on Detecting and Preventing Money Laundering 503, 2008 [Laki rahanpesun ja terrorismin rahoittamisen estämisestä ja selvittämisestä].

[32] Matti Joutsen – Juha Keränen, *Corruption – and the Prevention of Corruption in Finland* (published by the Ministry of Justice, 2009),
<http://oikeusministerio.fi/material/attachments/om/tiedotteet/en/2009/6AH99u1tG/Corruption.pdf>, 15.

Furthermore, there is a special Financial Intelligence Unit (FIU) within the NBI, which is responsible by law for matters pertaining to the prevention and detection of money laundering and terrorist financing and to the preliminary investigation of the related offences.[33]

Once an investigation has been completed, the case is referred to the **prosecutorial service for consideration of charges**. The prosecutorial service is a two-tier structure that consists of the General Prosecutor's Office (GPO) and 11 local prosecution offices. Most criminal matters are handled by the local units while the GPO deals mainly with matters with greater significance to the society as a whole. If there are probable grounds (i.e. sufficient evidence) to support that an offence has been committed in the operations of the corporation and if the Criminal Code provides for a corporate fine for the offence in question, the public prosecutor must as a rule prosecute and request the court to impose such a sanction on that corporation. However, the public prosecutor possesses a certain amount of discretion as to whether to bring charges in the specific case. The waiving of the bringing of charges is discussed in detail below in connection with question 10 in this report. Furthermore, no corporate fine shall be imposed for a complainant offence (an offence where charges may be brought only if the injured party so requests) that is not reported by the injured party so as to have charges brought, unless there is a very important public interest for bringing the charges. In relation to individual crime, the public prosecutor's discretion over the bringing of charges seems to be more limited.[34]

At the request of the public prosecutor, it is then **for the court to decide the case**. In relation to corporate crime, the court must therefore decide whether corporate liability can be established for the act or omission in question on the basis of the given evidence. The court is as a rule responsible for sentencing the corporation to a corporate fine if the offence can be deemed to have been committed in the operations of the corporation and if the necessary prerequisites for corporate liability provided by Chapter 9 of the Criminal Code are met. However, the court seized to decide

[33] Finland's National Bureau of Investigation, 'NBI Mission' (NBI homepage) <https://www.poliisi.fi/en/national_bureau_of_investigation/nbi_mission> accessed 3 February 2017.
[34] OECD Working Group on 16 March 2017: Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Finland, 28.

the charges also has certain discretion over the matter, as it is entitled to waive the imposition of a corporate fine under the conditions set out in Chapter 9 Section 4. These conditions for waiving the punishment are also discussed in more detail in connection with question 10 below. The court is obviously entitled to similar kind of discretion over the matter in the case of an individual offender. At the request of the prosecution, the court can also impose and enforce bans on individual directors from engaging in commercial activities within Finland if the prerequisites set out by the Finnish Act on Business Prohibitions 1059, 1985 [Laki liiketoimintakiellosta] are met.[35]

Under certain circumstances governed by the Finnish Coercive Measures Act 806, 2011 [Pakkokeinolaki], the officials conducting the criminal investigations or the court deciding over the charges may also order **coercive measures** determined by the seriousness of the offence. These measures include a prohibition of transfer of funds, confiscation of property for security (seizure) and attachment of property.[36] Especially in relation to an investigation on the aggravated form of an offence, it may also be possible to use technical surveillance and telecommunications interception. In accordance with Chapter 10 of the Criminal Code, the assigned prosecutor may also seek confiscation (forfeiture) in court.

If the **corporation** is sentenced to a corporate fine, the fine will be enforced in the manner provided in the Finnish Enforcement of Fines Act 672, 2002 [Laki sakon täytäntöönpanosta]. According to the Enforcement of Fines Act, the duty to enforce a fine lies primarily with the Finnish Legal Register Centre (*Oikeusrekisterikeskus*). An unpaid fine will eventually be collected by execution. If **a natural person** is sentenced to imprisonment, the relevant enforcement authority for the punishment is the Finnish Criminal Sanctions Agency operating under the direction of the Finnish Ministry of Justice.

[35] Jukka Mähönen – Seppo Villa, *Osakeyhtiö III – Corporate Governance* (Talentum 2010), 520.
[36] Jussi Tapani – Matti Tolvanen, *Rikosoikeus – Rangaistuksen Määrääminen ja Täytäntöönpano* (Talentum, 2016), ch 7.1., [Finnish]

6.2 Administrative authorities and the Finnish Corporate Governance Code for listed companies

Administrative sanctions, such as conditional fines or administrative fines, may be imposed on a corporation by **administrative authorities** if the respective special legislations provide for that. Specific provisions allowing administrative authorities to impose administrative sanctions are included for instance in securities market law and competition law. In these cases, the particular authority that is responsible for ordering the sanction is also prescribed by respective legislation. Administrative authorities usually have certain discretion over the matter, but they never have general authority to impose sanctions.

In respect of financial markets, for example, the Finnish Financial Supervisory Authority (FIN-FSA) may impose administrative sanctions, including administrative fines, public warnings, and penalty payments on its supervised entities. Furthermore, the FIN-FSA may exercise its supervisory powers to order a temporary prohibition from holding a managerial position in a supervised entity and request a police investigation.[37]

In Finland, all listed companies are as a rule obliged to comply with the recommendations of the **Finnish Corporate Governance Code** (cg-code, latest one from the year 2015) published and updated by the Finnish Securities Market Association (*Arvopaperimarkkinayhdistys ry*). The aim of the cg-code is to ensure good and transparent corporate governance in the companies confirming with it. The cg-code is also in its entirety part of the rules of Helsinki Stock Exchange and therefore binding on Finnish listed companies. Other companies may choose to voluntarily apply the cg-code in part or in full. However, like in most EU-countries, the Finnish cg-code is also based on the so-called comply or explain principle, which allows for the corporation to depart from an individual recommendation of the cg-code if the corporation discloses such departure and

[37] Finnish Financial Supervisory Authority, 'Administrative sanctions and other supervisory measures' (FIN-FSA homepage) <http://www.finanssivalvonta.fi/en/Supervision/Administrative_sanctions/Pages/Default.aspx> accessed 6 February 2017.

provides an explanation for it. In practice, Finnish listed companies have made very few departures from the recommendations.[38]

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

The Finnish Criminal Investigation Act 805, 2011 [Esitutkintalaki], which regulates rights and obligations of suspects, is also applicable to the representative of the corporate body's management. The question of legal representation is further regulated by special legislation.[39] The legal representation of limited companies is for instance regulated by the Limited Liabilities Companies Act 624, 2006 [Osakeyhtiölaki].

The investigative phase of corporate crime differs from many other criminal investigations, as the preliminary investigation often starts with information from a previous or on-going insolvency or administrative –procedure. In addition, it is also possible to withhold information through coercive measures such as confiscation according to the Coercive Measures Act 806, 2011 [Pakkokeinolaki]. The enforcement agencies however lack the power to compel production of information due to the privilege against self-incrimination.

The privilege against self-incrimination means a right for the suspect to remain silent and also a right not to contribute to the clarification of the offence. [40] The right against self-incrimination is although not clear-cut, as corporations during insolvency-procedures are obliged to contribute to the clarification of the insolvency, still bearing in mind the privilege to self-incrimination. It is to

[38] Finnish Securities Market Association, 'The Finnish Corporate Governance Code' (SMA homepage) < http://cgfinland.fi/en/recommendations/the-finnish-corporate-governance-code/> accessed 6 February 2017.
[39] HE 222 (Government bill) 2010 vp, ch 2:5, [Hallituksen esitys eduskunnalle esitutkinta- ja pakkokeinolainsäädännön uudistamiseksi]
[40] Law n. 4 (Code of Judicial Procedure) 1734, ch 17 Section 18 [Oikeudenkäymiskaari]; Act 805 (Finnish Criminal Investigation Act), 2011, [Esitutkintalaki]

say the least, hard to distinct which information the corporation can withheld on the basis of the privilege against self-incrimination during an insolvency-procedure.[41]

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self-incrimination)?

The Act on Detecting and Preventing Money Laundering and Terrorist Financing 503, 2008 [Laki rahanpesun ja terrorismin rahoittamisen estämisestä ja selvittämisestä], later the AML Act, provides that notwithstanding the provisions on the secrecy of information subject to business and professional secrecy or information on the financial circumstances or financial status of an individual, corporation or foundation, the Financial Intelligence Unit has the right to obtain, free of charge, any information and documents necessary to detect and prevent money laundering and terrorist financing from an authority, a body assigned to perform a public function or a party subject to the reporting obligation.[42] Thus, the provisions on the secrecy of information do not prevent the Financial Intelligence Unit from obtaining the information.

Legal professional privilege is regulated in the Code of Judicial Procedure 4, 1734 [Oikeudenkäymiskaari], the Criminal Procedure Act 689, 1997 [Laki oikeudenkäynnistä rikosasioissa] the Act on Advocates 496, 1958 [Laki asianajajista] and in the Licensed Legal Counsel Act 715, 2011 [Laki luvan saaneista oikeudenkäyntiavustajista]. For the present purposes it is not necessary to differentiate the advocates and licensed legal counsels. Furthermore, as the subject matter is withholding information from the enforcement authorities, further examination of the judicial function is delimited from the scope of this answer. According to the Section 5c of the Act on Advocates, an advocate or his assistant shall not, without due permission, disclose the

[41] Erkki Havansi, Korkea-aho, Emilia, Koulu, Risto, Lindfors, Heidi & Niemi, Johanna, *Insolvenssioikeus* (e-version, WSOYpro 2004- Sanoma Pro Talentum Media), ch 1.4. Perusoikeuksien merkitys kasvaa [Finnish].

[42] The Act on Detecting and Preventing Money Laundering and Terrorist Financing, 37§, Finlex translations, Laki rahanpesun ja terrorismin estämiseksi.

secrets of an individual or family or business or professional secrets which have come to his knowledge in the course of his professional activity.[43] Moreover, the Section 17 of the Chapter 15 of the Code of Judicial Procedure provides that (1) An attorney, a counsel or an assistant thereof or an interpreter may not without permission disclose a private or family secret or a commercial or professional secret that he or she has learned; (1) in attending to a task related to the court proceedings; (2) in providing legal advice on the legal position of his or her client in the criminal investigation or in other proceedings prior to the court proceedings; (3) in providing legal advice on the initiation of or the avoidance of court proceedings. As laid down before, the reporting requirements derived from the AML Act may override the above mentioned obligations for legal professional privilege.

The privilege against self-incrimination stems from the Constitution and it is regulated in the Code of Judicial Procedure. Chapter 17 Section 18 of the Code of Judicial Procedure provides that any person has the right to refuse to testify to the extent that the testimony would subject him or her or a person related to him or her[44] to the risk of prosecution or would contribute to the investigation of his or her guilt or of the guilt of a person related to him or her in said manner.

Regardless of the fact that companies can act as defendants in criminal proceedings, the rights of the suspect are not applied to the companies as such. However, the provisions regarding the rights of the accused person are applicable on a company's statutory governing body or other members of management in criminal investigation.[45] Thus, when a company is being investigated and a possibility of a corporate fine exists, the above mentioned persons have the right to refuse to assist in the investigations.[46]

[43] The Act on Advocates, 5c§ [Laki asianajajista], Finlex translations.
[44] The present or former spouse of a party or his or her present co-habitant, sibling, direct ascending or descending relative or a person who is in a corresponding close relationship to a party that is comparable to cohabitation or kinship. The Code of Judicial Procedure Chapter 17 Section 17 Subsection 1, [Oikeudenkäymiskaari]. Finlex translations.
[45] Criminal Investigations Act (629/1997) §44 and The Government Proposal (HE) 222/2010 p. 35.
[46] Criminal Liability of Companies Survey, Finland – Roschier, Attorneys Ltd. Lex Mundi Publication 2008, p. 9-10.

However, in a cartel case (441/2007) ruled by the Market Court[47], the court decided on the privilege against self-incrimination in regards to employees right to refrain from answering questions which could inflict on the investigation of their employer's participation in cartel activities. In the case in question the court decided against the right to refrain from answering. The court reasoned the decision on the grounds that the witnesses could not be personally liable following from their responses. It must be taken into account that the court noted that the employer was not a defendant in the on-going proceeding and therefore a definitive guidance cannot be derived from this decision on whether or not companies may rely on principle against self-incrimination. Nonetheless, the ruling suggests a restrictive approach.[48]

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

9.1 Act on the Protection of Privacy in Working Life

In Finland the right to privacy and data protection is uphold and protected in several legislative acts. First of all the right to privacy is safeguarded in Chapter 2 Section 10 of the Constitution of Finland 731, 1999 [Suomen perustuslaki]. Personal data protection is regulated generally in the Personal Data Act; however the Act on Protection of Privacy in Working Life, Act on the Openness of Government Activities and Information Society Code take precedence over that particular legislation.

Act on the Protection of Privacy in Working Life 759, 2004 [Laki yksityisyyden suojasta työelämässä] regulates personal data processing, employee testing and investigations, other related requirements, technical surveillance in the workplace as well as retrieving and opening of employer's electronic e-mails. The act also applies to public officials, and employees in a related

[47] 44, [2007], The Market Court, 19.12.2007, Dnro 94/04/KR - Kilpailuvirasto - Asfalttiliitto ry, Interasfaltti Oy / NCC Roads Oy, Lemminkäinen Oyj, Rudus Asfaltti Oy, SA-Capital Oy, Skanska Asfaltti Oy, Super Asfaltti Oy, Valtatie Oy, [Finnish]
[48] Antitrust Developments in Europe 2007 – Romano Subiotto, Robert Snelders, Kluwer Law International 2008, p. 107.

public service subject to public law and as appropriate to job applicants. According to the Data Protection Ombudsman compliance with the act is enhanced by Section 24 of Finnish penal provisions in addition to the labour protection authorities together with the Data Protection Ombudsman. [49]

Chapter 2 regulates general provisions on the personal data processing of the act. It is stated in Section 3 that an employer can only process information that is directly essential regarding the employment relationship. These would include the rights and obligations of the contracting parties as well as benefits provided by the employer, or specific nature of the employment tasks.

All the personal data must be collected directly from the employee; if this is done by using other sources, consent is needed.[50] However consent is not required in certain cases; when authorities share information to the employer in order to perform a statutory task, or when the employer obtains personal information relating to persons credit history or criminal record in order to determine the reliability of the employee. It is crucial to mention that in these kinds of cases the employer needs to inform the function and source of the mission.

Employer has the right to process information relation to one's health solely if that information has been gathered from the employee directly or from elsewhere with written consent and the processing is necessary.

According to Åström, Nyyssölä and Äimälä personal data can be transferred outside of a joint register of a group of companies if it is done on the basis of legislation, collective agreement, transfers for specific purposes as well as occasional transfers. The latter requires that the data

[49]Data Ombudsman, *´Työelämän tietosuojalaki'*, (October 31 2016), <http://www.tietosuoja.fi/fi/index/lait/tyoelamantietosuojalaki.html> accessed: 16 January 2017 [Finnish]
[50] Martti Kairinen, *´Työoikeus perusteineen'*, (Työelämän Tietopalvelu Oy, 2009), 277, [Finnish]

complies with the original purpose of data collecting, and that it is deemed normal regarding the employment relationship, and the employee can be considered aware of the transfer. [51]

9.1.1 Opening and Retrieving Employer's E-mails as well as Pre-employment Security Checks

According to Chapter 6 Section 18, employer has the right to retrieve and open e-mails that have been sent to the employee's e-mail address or from it, only if the employer has made necessary measures ensuring that the employee has the opportunity to send an automatic response of one's absence and duration of it to other individuals. Also opportunity must be provided for the employee to direct these messages to another employee e-mail account authorized by the employer[52], or to ensure that the employee has given consent that a person selected for this task can open these kinds of messages in order to find out if the messages contain relevant and essential information pertaining to the employer's operations or appropriate arrangement of working assignments.

The employer also has the right to retrieve electronic messages that the employee has sent or received immediately before her absence and which contain relevant information regarding negotiations at hand, customer service or to protect its operations. This is only permitted if the employee carries out duties independently on behalf of the employer and there is no appropriate information system by which the tasks and processing could otherwise be identified, or that it is evident, on account of the employee's tasks and matters pending, that messages belonging to the employer have been sent or received.

Moreover the retrieval can be performed if the employee is prevented temporarily from managing one's working duties and the messages are not made available even if the employer has taken care

[51] Markus Äimälä, Johan Åström and Mikko Nyyssölä, *Finnish Labour Law in Practice,* (Talentum Media Oy, 2012), 57.
[52] Minna Saarelainen, Annamaria Mattila, *´Finland, Employment and Labour Law 2017´*, [2017], International Comparative Legal Guides, ch 8.4

of his obligations or that employee's consent could not have been acquired in a sufficient amount of time and the issue at hand is urgent.

In case of a death or permanent prevention of an employee to carry out one's tasks, provided that the consent cannot be acquired, the employer has the right to find out if there are messages belonging to him on the basis of sender, recipient or title information and so that acquiring of this information or protecting the employer's operations is not possible by using other methods.

If it is clearly indicated that a message has been sent to the employer and which content is necessary to carry out negotiations, or to serve customers or to safeguard operations, and the sender or recipient could not be contacted with, the employer has the right to open a message, pursuant to Section 20, with the person using regulatory powers of the absent employee, provided that there is a third party present in these occasions.

One must draft a clearance of the opening of e-mails that identifies which of the messages have been opened, the purpose and date of the opening, who conducted the process and to whom information has been given of the opening. This must be done and given to the employee in question without delay. Moreover the opened message must be restored and its content or sender information must not be processed more extensively than what is deemed necessary, in addition people processing this information must not express it to third parties during the employment or afterwards.

Pre-employment security checks can only be carried out in a strict manner by the Finnish Security Intelligence Service. It is required that the inquiries are directly essential to the application process and that direct consent has been given. Background checks are usually permitted in order to prevent criminal offences or done for private interest of a financial nature. It is also stated that credit checks can be performed for employees that are financially responsible for the employer's

property or in a position of trust and criminal record can be obtained only if there is a statutory reason behind it such as working with minors.[53]

9.2 Act on the Openness of Government Activities

Act on the Openness of Government Activities 261, 1999 [Laki viranomaisten toiminnan julkisuudesta] states that documents of state's authorities remain public unless otherwise regulated by law. Chapter 1 Section 4 classifies what is meant by authorities. This would include state's administrative authorities and other government agencies and systems; court or other tribunal empowered to conduct a judicial review; state enterprises; municipal authorities, Bank of Finland including the Finance Supervision Authority, the National Pensions Institution of Finland and other independent institutions subject to public law. Moreover it applies to Parliamentary agencies and institutions; the State authorities of Åland; independent boards, consultative bodies, committees, commissions, working groups, investigators, as well as auditors of municipalities and federations of municipalities, and other comparable organs appointed for the performance of a given task on the basis of an Act, a Decree or a decision of an authority referred to in Subsection 1, 2 or 7. This also refers to corporations, institutions, foundations and private individuals appointed for the performance of a public task on the basis of an Act, a Decree or a provision, or order issued by virtue of an Act or a Decree, when they exercise public authority. Separate provisions apply to access to the documents of the Evangelical Lutheran Church.

When an official document by an authority is classified secret by law it shall remain as thereof if provided by law, or other act or it has been declared secret by another authority on the basis of an act or if it contains information covered by the duty of non-disclosure. An authority can derogate from this rule pursuant to general principles on disclosure of secret information covered by

[53] Minna Saarelainen, Annamaria Mattila, *´Finland, Employment and Labour Law 2017´*, (International Comparative Legal Guides, 2017, ch 8.3) <https://iclg.com/practice-areas/employment-and-labour-law/employment-and-labour-law-2017/finland#chaptercontent8> accessed 6 June 2017, Seppo Havia, *´The International Comparative Legal Guide to: Employment and Labour Law 2015´*, (Dittmar & Indrenius, 2015, ch 8.3), <http://www.dittmar.fi/sites/default/files/articlefiles/2015_03_ICLG_Employment2015_fin.pdf> accessed 6 June 2017

Chapter 7 Section 26. Access to a secret document can be granted if it has been explicitly regulated by law, or consent has been given by the one whose interest the obligation of professional secrecy safeguards.

Moreover an authority can give information if deemed necessary, on an individual's financial status, business secrecy, healthcare's or welfare's client relationship or granted benefits, or information concerning person's private life or comparable information that is secret under another Act, if access is necessary to achieve the legal obligation to provide information for a private individual or to another authority, or to produce a payment or other claim by an authority to whom the duty has been given. Furthermore an authority can give information on a secret document to perform administrative assistance and performance or otherwise carry out a duty that is regarded essential. However classified information can only be accorded in these specified cases when the removal of these documents would not be practical due to large quantity of the data or other related reason. The authority has to ensure in advance that the arrangements for maintaining the secrecy and the protection of the information is appropriate.

Furthermore a classified document can be given to another authority if it is deemed necessary when dealing with prior information, preliminary ruling, appeal or a complaint made against the authority's decision, an appeal for nullification or a submission regarding a measure taken by an authority, or a complaint made to an international body for the administration of justice or investigation, or the information is necessary in order to carry out a single supervisory or investigative task.

Pursuant to Section 30 Finnish authorities may grant access to a classified document to a foreign state's authority or to an international body if cooperation between competent national authorities have been concluded in a binding international treaty or it has been regulated in a binding instrument, and the information could be given, according to the law, to a collaborating authority performing its duty here in Finland.

9.3. Information Society Code and Personal Data Act

The objective of Law n. 917 (Information Society Code) 2014 [Tietoyhteiskuntakaari] is to establish a satisfactory level of protection concerning right to privacy as well as guarantee confidentiality in the field of electronic communications.

Electronic messages and traffic data can only be processed in so far as it is regarded necessary in order to convey a message, to carry out a service or to ensure a sufficient level of data protection. Operator under the retention obligation must preserve information for the use of Ministry of the Interior to investigate crimes and considering charges of criminal acts.

Chapter 40 states grounds for transferring information regarding communications and data location to other authorities. According to Section 316 Finnish Communications Authority and Data Protection Ombudsman have the right to obtain traffic and location data as well as other messages that are necessary for the investigation of serious breaches or threats of security provided that there is reason to suspect some of the following elements of crime to be fulfilled: data protection infringement on electronic communications, unauthorized use, endangerment of data processing, possession of a data network offence device, criminal damage, secrecy offence, interference with communications, petty interference with communications; data hacking; offence involving an illicit device for accessing protected services, data protection offence.

These authorities have also the right to disclose traffic data and other information, pursuant to Section 319, that has been gathered in relation to security breach investigations, to authorities operating in another state, or to another body whose task is to prevent and investigate breaches of security regarding communication networks and services.

In addition police, coast guard and the customs are allowed, in accordance with Section 322, to receive identification data in order to prevent, detect and investigate criminal offences.

The Personal Data Act 523, 1999 [Henkilötietolaki] acts as a general law regarding data processing. It is stated in Chapter 1 Section 3 Subsection 2 that processing of personal data comprises of collection, recording, organisation, use, transference, **disclosure**, storage, alteration, combining, securing, removing, destroying and other action regarding personal information.

Chapter 2 Section 8 sets out the general principles regarding processing of data. It can only be processed with an unambiguous consent of the data subject; by way of ordering or fulfilling a contract by the data subject where one is involved or to carry out activities prior to the enforcement of the contract; or the processing is crucial in an individual case to safeguard vital interest of the data subject; or if there are provisions regarding processing laid down by law or if it is derived from a legal assignment or obligation; or if the data subject has an appropriate connection with the controller's activities due to customer or employment relationship, membership or any other related relationship. Subsection 6 concerns information regarding the clients or employees of an economic interest group and processing of this information, which is inside the current economic group, can only be disclosed if it pertains as a normal part of the business operations, provided that the objective to which the information is being given complies with the purpose of data processing and the data subject can be presumed to have known of this sort of disclosure. Furthermore processing can be carried out if it is paramount for purposes of payment traffic, computing or other related tasks undertaken on the assignment of the controller, or if it concerns person's status, assignment or performance of a person in a public corporation or business and this information is being processed in order to protect either the data subjects or a third party's rights and interests, and lastly if the Data Protection Board has given its consent.

According to Chapter 3 Section 11 it is forbidden to process sensitive data which encompasses racial or ethnic origin; person's association to social, political or trade union as well as religious belief; criminal offence, punishment or other sanctions; person's sexual orientation or behavior; or the need for social welfare or acquired social services, welfare supports and other social benefits. By way of derogation from Section 11 it is permitted to use sensitive information if the data subject has given consent; one has made the information public; information processing is fundamental to safeguard someone else's vital interest, if the subject has not given consent; processing is crucial for drafting, presentation, protection and solving of a legal claim; processing is governed by law

or it results directly from a legal duty of the controller; or the processing is carried out for a historical or scientific research purposes or for statistics. Moreover processing is acceptable if information concerning religion, political or social belief is being used in an association or corporation with such affiliation and when there is a regular link to their operations and this kind of information is not made public without the data subject's consent. It is also expressed in the unofficial translation of the Personal Data Act that the processing relates to trade-union membership in the operations of a trade union or a federation of trade unions, where the data relates to the members of the union or federation or to persons connected to the union or federation on a regular basis and in the context of the stated purposes of the union or federation, and where the data is not disclosed to a third party without the consent of the data subject; or information regarding trade union membership if it is deemed necessary for the controller, in the field of labour law, to abide specific rights and obligations.[54]

Moreover information acquired from the operations of health service sector unit or healthcare personnel is not hindered regarding state of health, illness, disability or directed treatment and related functions of the insured person or the claimant. This also includes information concerning the insured person's, claimant's or the injuring party's criminal act, punishment or other criminal sanctions that are required to establish the responsibility of the insurance company.

Furthermore it does not preclude a social welfare authority or other authority, institution or private producer of social services granting social welfare benefits from processing data collected in the course of their operations and relating to the social welfare needs of the data subject; or the benefits, support or other social welfare assistance received by the person or otherwise indispensable for the welfare of the data subject; or processing of data where the Data Protection Board has issued permission if required by general interest.

[54] NB: Unofficial translation (Personal Data Act 523, 1999), <http://www.finlex.fi/fi/laki/kaannokset/1999/en199905230>, accessed 15 January 2017, 4

According to Chapter 5 Section 22, personal information can only be transferred outside of the European Union or European economic area, **if sufficient level of data protection has been guaranteed**. The level of protection shall be assessed regarding the nature, purpose and duration of the processing of data, country of origin and the final destination, the general and sectoral provisions as well as professional rules and security measures that are in force in the country concerned. It is also stated that the transfers should be built on competent decision from the European Commission or be subjected to the European Commission's standard contractual clauses.[55]

According to Section 30 the data subject has the right to refuse the controller to process any personal information that will be used for direct marketing, distance selling and other forms of direct marketing in addition to market and public opinion polls, public registers of persons connected by the same profession, education, membership of a community, achievements in sports and culture etc., as well as genealogical investigation.

The controller has a duty, pursuant to Section 36, to inform automated processing of personal data to Data Protection Ombudsman by sending an opening order of the file. Also the controller is bound to inform any transference of information outside the territory of European Union member states or the European economic area if it is done pursuant to Section 22 or under Section 23 Subsection 6 or 7 and the transmitted information has not been regulated by law and what is regulated under Section 31 concerning automated data processing system.

Moreover anyone who operates as a debt collector; conducts market or public opinion polls; or for the account of a third party participates in recruitment, aptitude assessment tests or processing of information and uses or handles information containing to personal registers, is bound to make a notification to the data protection ombudsman.

[55] Jesper Nevalainen, *´Collection, storage and transfer of data in Finland´* (Bird & Bird, 8 February 2017), <http://www.lexology.com/library/detail.aspx?g=a889b12b-c4f1-4a3b-bfc5-875f58be94ad> accessed 5 June 2017

Chapter 9 Section 38 states that Data Protection Ombudsman and Data protection Board act as national data protection authorities which in turn collaborate with other data protection authorities of European Union member states. According to the website of Data Protection Ombudsman international cooperation also comprehends membership in joint supervisory boards such as Europol and the Schengen Agreements.[56]

Data Protection Ombudsman's is an independent authority operating in connection with the Ministry of Justice of Finland and its duty is to guide and supervise the processing of personal information and have the competence to use decision making power as regulated by this law. Data Protection board handles issues that are of principal importance and exerts decision making power as stated in this act.

Data Protection Ombudsman is entitled to obtain personal and all sort of relevant information regarding the monitoring of the legitimacy of the supervision. The Ombudsman has the right to inspect personal registers and gain access to localities, where these kinds of registers are being held as well as to necessary information and equipment relating to the data.

10. If relevant, please set out information on the following:

10.1 Defences to the offences listed in question 2;

No specific defences besides the general ones.

[56] Data Protection Ombudsman, *'International Co-operation'* (28 August 2013) <http://www.tietosuoja.fi/en/index/tietosuojavaltuutetuntoimisto/duties/kansainvalinenyhteistyo.html> accessed 14 January 2017

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement);

10.2.1 Introduction

The public prosecutor must as a rule prosecute and request the court to impose a corporate fine on the corporation, if such sanction has been provided by the Criminal Code as a sanction for the alleged offence. However, the public prosecutor does possess a certain amount of discretion as to whether to bring charges in the specific situation. Chapter 7 Section 7 of the Finnish Criminal Code 39, 1889 [Rikoslaki] provides for waiving of bringing the charges against a corporation if certain conditions are met.

10.2.2 Waiving of Bringing the Charges

Firstly, that the public prosecutor may waive the bringing of charges based on the alleged offences seriousness and the participation in the alleged criminal activity. The Criminal Code states that if the **omission has been of minor significance** the charges can be waived. When evaluating the significance of the omission, the court considers how much the corporation's conduct has differed from the expected care and diligence. In the evaluation, same grounds are used as in the calculation of a corporate fine. [57] This means that the court will take into consideration facts such as the nature and seriousness of the offence, the status of the perpetrator as a member of the organs of the corporation and whether the violation of the duties of the corporation manifests heedlessness of the law or the orders of the authorities. For instance, an omission can be seen as less blameworthy if it as has been unpredictable or conducted by a person in position without sufficient supervision by the management.[58]

Also, if the **participation of the management or of the person exercising actual decision-making power in the corporations has been of minor significance** the charges can be waived.

[57] HE 95 (Government bill) 1993, ch 9.7, [Hallituksen esitys Eduskunnalle oikeushenkilön rangaistusvastuuta koskevaksi lainsäädännöksi]
[58] HE 95 (Government bill) 1993, ch 9.7, [Hallituksen esitys Eduskunnalle oikeushenkilön rangaistusvastuuta koskevaksi lainsäädännöksi]

Generally, omissions are seen as more blameworthy if it they have been conducted by the corporate's management or by a person of leading position in the corporation. However, when the link between the offence and corporate's management is weak or only bound to one person with a less important role in the corporation's management, it may serve as a reason to waive the punishment. Especially if it's difficult for the management to prevent the omission in question, the offence will usually be seen as less blameworthy.[59]

Secondly, the Criminal Code states that waiving of charges may occur when the offence has only caused **minor damage or danger**. The damage or the danger is evaluated in relation to the essential elements of the omission. This means for instance that an alleged fraud must be evaluated in relation to the consequences caused by a typical fraud. If the omission's consequences clearly are graver as usual, this decreases the chances for waiving bringing of the charges.

In all above cases the waiving of bringing the charges requires that the **corporation has voluntarily taken the necessary measures to prevent new offences**. Voluntariness does not require that the measures have been taken on the corporation's own initiative, however the measures are not considered as voluntary if the corporation acts only upon the authorities' demand or with the knowledge of a future order. It is required that the corporation takes clear actions, although the type of measures can vary widely.[60]

Thirdly, the Criminal Code states that the bringing of charges may be waived if the offender, who is the member of the corporation's management, has already been **sentenced to a punishment** and it is to be anticipated that the corporation for this reason is not to be sentenced to a corporate fine. The regulation is meant for those unique situations where the question of corporate fine is raised first later on.[61]

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[59] HE 95 (Government bill) 1993, ch 9.7, [Hallituksen esitys Eduskunnalle oikeushenkilön rangaistusvastuuta koskevaksi lainsäädännöksi]§
[60] HE 95 (Government bill) 1993, ch 9.7, [Hallituksen esitys Eduskunnalle oikeushenkilön rangaistusvastuuta koskevaksi lainsäädännöksi]
[61] HE 95 (Government bill) 1993, ch 9.4, [Hallituksen esitys Eduskunnalle oikeushenkilön rangaistusvastuuta koskevaksi lainsäädännöksi]

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

10.3.1 Introduction

At the request of the public prosecutor, it is then for the court to decide whether corporate liability can be established for the act or omission in question on the basis of the given evidence. The court is as a rule responsible for sentencing the corporation to a corporate fine if the offence can be deemed to have been committed in the operations of the corporation and if the necessary prerequisites for corporate liability provided by Chapter 9 of the Criminal Code are met. However, as is the case with the public prosecutor and the bringing of charges, the court seized to decide the charges also has some discretion over the matter as it is entitled to waive the imposition of a corporate fine under the conditions set out in Section 4 of the Criminal Code. These conditions for waiving the punishment are to a great extent in line with the aspects the prosecutor is allowed to take into account when deciding whether to bring the charges. If there is a civil claim for the compensation for damages resulting from an offence, such claim is normally decided by the court in the same proceeding as the corporation's liability. Also, the court has some discretion in ruling the amount of the corporate fine.

10.3.2 Corporate Fine

The Criminal Code states that a corporate fine is imposed as a lump sum between 850 - 850,000 euros. The Act presents three grounds for determining the amount. Firstly, the amount of the corporate fine is determined in accordance with the nature and the extent of the omission or the participation of the management, and the financial standing of the corporation. This means that the Court has to take into account the extent of which the corporation has differed from its expected care and diligence. The management's participation in the omission is usually considered more blameworthy. Also, the financial condition of the corporation has to be taken into account, so that the corporate fine is higher for a corporation with a strong financial holding. Although the

fine should be from the lower scale, if the omission has barely exceeded the limit for corporate criminal liability.[62]

Secondly, the Criminal Code states that when evaluating the significance of the omission and the participation of the management, consideration shall be taken of the nature and seriousness of the offence, the status of the perpetrator as a member of the organs of the corporation, whether the violation of the duties of the corporation manifests heedlessness of the law or the orders of the authorities, as well as the grounds for sentencing provided elsewhere in the law. In evaluating the nature and the seriousness of the omission, it is foremost important to consider the corporation's lack of care and diligence instead of the perpetrator's conduct. The seriousness of the crime is not necessarily dependent on the crime in question, but rather on the degree of absence of care and diligence. The extent of the omission will consequently have an effect on the corporate fine's amount, where large-scaled criminal activity will lead to an increased fine. The extent can be measured for instance in the number of perpetrators, but also in the number of actions that lead up to the crime. A single fraud, which consists of several independent actions, can give reason to a higher fine. The fine's amount will arguably also be higher, the more the corporation's management is involved in the criminal activity or if the management has chosen not to interfere in the on-going criminal activity. The closer the crime is to the corporate core the more reason there is to hold the corporation responsible for the crime, instead of an individual perpetrator. Furthermore, the evaluation of the corporation's heedlessness of the law or the orders of the authorities is a consideration of the corporation's attitudes towards the legal system. A divergence from the authorities' direct order is considered more blameworthy.[63]

Finally, when evaluating the financial standing of the corporation, consideration shall be taken of the size and solvency of the corporation, as well as the earnings and the other essential indicators of the financial standing. The purpose is that the corporate fine should stand in proportion to the

[62] HE 95 (Government bill) 1993, ch 9.6, [Hallituksen esitys Eduskunnalle oikeushenkilön rangaistusvastuuta koskevaksi lainsäädännöksi]
[63] HE 95 (Government bill) 1993, ch 9.6, [Hallituksen esitys Eduskunnalle oikeushenkilön rangaistusvastuuta koskevaksi lainsäädännöksi]

financial situation of the corporation, so that the burden will be equally independent of the corporation's economy. However, the fine is not intended to risk the continuity of the corporation. In evaluating the financial situation several factors shall be taken into consideration such as the size of the company as well as earnings and loans. The estimation of the company's financial standing is to be taken at the time of the verdict.

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance)

In general, there are few special means for cost mitigation in relation to the investigation and proceedings concerning bribery and corruption, fraud or money laundering. Criminal conduct usually involves an aspect of moral disapproval, which is perhaps why the typical means of cost mitigation are often unavailable for expenses incurred due to such condemnable behaviour. For example, costs related to legal criminal proceedings are usually not tax-deductible and they are also excluded from the cover of typical insurance products on the market. To some extent, an adequate compliance program can be seen as a way of actual cost mitigation, since an effective compliance program and internal guidelines may help the corporation both to prevent the emergence of new risks and to mitigate the severity of possible sanctions.[64] The typical means of cost mitigation and their applicability to criminal proceedings are briefly discussed below.

11.1 Insurances

A corporation is entitled to pay the insurance fees of **directors' and officers'** *(D&O)* **insurance,** but taking of such insurance is not as such required by any common practice. There are different kinds of insurance products on the market the terms of which vary from company to company. Put simply, the purpose of a D&O insurance is to reimburse the economic loss for which the

[64] Ari-Matti Nuutila: *Corporate Criminal Liability in Finland – An addition to individual criminal responsibility* (In Antonio Fiorella & Alfonso Stile (eds.): Corporate Criminal Liability and Compliance Programs, Rome 2012), Chapter 7, Matti Tolvanen, *Trust, Business Ethics and Crime Prevention – Corporate Criminal Liability in Finland,* University of Eastern Finland Legal Studies Research Paper No. 2 (Fudan Law Journal No. 4, 2009), Chapter 2.3.

insured person is **liable in damages** due to his managerial position in the corporation. Typical concise D&O insurance is often confined to the liability provisions set out in Chapter 22 of the Finnish Limited Liability Companies Act 624, 2006 [Osakeyhtiölaki]. Therefore, a D&O insurance normally covers the insured person's liability in damages for the loss caused to the corporation, a shareholder or a third party when the liability is based on the Companies Act. Some broader insurances do not necessarily differentiate between different laws, but the starting point is that any damage caused while performing managerial duties is covered. The D&O insurances usually cover the board members, the managing director, the chairman of the general meeting and the members of the supervisory board (if the company has one). The corporation itself is normally not insured. Furthermore, damage that has been caused intentionally or by gross negligence is almost always excluded from the coverage (e.g. damage caused by a criminal offence).[65]

Since the coverage of a D&O insurance is usually limited to **liability in damages**, the terms of a typical D&O insurance often explicitly exclude **fines, taxes, punitive damages, liquidated damages** and **legal expenses resulting from a summary penal order** from the coverage.

Legal expenses are excluded at least in case the criminal proceeding results in a conviction. The defence costs may be partially reimbursed under some insurance terms in the case of acquittal or non-prosecution.[66] However, insurance terms often contain significant limitations of liability and many terms exclude all criminal proceedings.[67] Therefore, a **typical concise D&O insurance** would most likely **not** cover the costs arising from investigations of or proceedings related to bribery and corruption, fraud or money laundering offences, at least if the proceedings result in a conviction. Nevertheless, and as already stated, the terms of different D&O insurances vary greatly

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[65] Ari Savela, *Vahingonkorvaus Osakeyhtiössä* (3rd edition, Talentum, 2015), 476-478, Johanna Salonen, *Osakeyhtiön Hallituksen Jäsenen Yhtiöoikeudellinen Vastuu ja sen Taloudellinen Rajaaminen ja Kohdistaminen* (Master's thesis, Helsinki, 2013), 61-62 and 69, Esbjörn af Hällström – Hannu Iljäs, *Vastuuvakuutus* (2nd edition, Helsinki, 2007), 164-165 and 167.

[66] Antti Hannula – Matti Kari – Tia Mäki, *Osakeyhtiön Hallituksen ja Johdon Vastuu* (Talentum, 2014), 236-237, Johanna Salonen, *Osakeyhtiön Hallituksen Jäsenen Yhtiöoikeudellinen Vastuu ja sen Taloudellinen Rajaaminen ja Kohdistaminen* (Master's thesis, Helsinki, 2013), 70.

[67] Ari Savela, *Vahingonkorvaus Osakeyhtiössä* (3rd edition, Talentum, 2015), 478, Johanna Salonen, *Osakeyhtiön Hallituksen Jäsenen Yhtiöoikeudellinen Vastuu ja sen Taloudellinen Rajaaminen ja Kohdistaminen* (Master's thesis, Helsinki, 2013), 70.

(usually the so-called international D&O insurances providing the broadest cover) from company to company and therefore the terms and conditions should always be carefully reviewed.[68] For additional charge, some insurance companies may also offer **extra coverage** against, for example, legal expenses arising from criminal investigations or other authoritative investigations.[69]

A corporation can also have a **legal expenses insurance** to cover reasonable and necessary legal expenses arising from a civil or criminal process related to and caused in the operations of the corporation. In this case, the company itself is also insured. However, in relation to criminal matters, legal expenses insurances usually only cover the costs if 1) the insured is acting as the injured party or when 2) charges for **a complainant offence** are pursued against the insured. If the insured acts as a defendant in a criminal proceeding where the public prosecutor is pursuing the charges, the legal expenses are usually not covered. Furthermore, many legal expense insurances **explicitly exclude costs related to matters concerning corporate criminal liability** and charges pursued by the public prosecutor against the insured or civil claims made on criminal basis.[70] Intentional acts or acts caused by gross negligence or carelessness are often also excluded.

11.2 Taxation

In Finland, a corporation is only entitled to deduct costs related to the **generation or maintenance of income** in its taxation, as provided in Section 7 of the Finnish Act on the Taxation of Business Profits and Income from Professional Activity 360, 1968 [Laki elinkeinotulon verottamisesta], later the Business Profits Taxation Act. Section 16 Subsection 1 of the Business Profits Taxation Act explicitly stipulates that **fines, penalty payments and other financial sanctions** shall not be deemed as costs incurred due to the generation of income or the maintenance thereof. Therefore, a paid corporate fine is never tax-deductible for the corporation. The limitation provision per se only concerns sanctions for which the liability to pay is imposed on the corporate entity.[71] However, case law suggests that fines paid by the corporation **on behalf**

[68] Ari Savela, *Vahingonkorvaus Osakeyhtiössä* (3rd edition, Talentum, 2015), 478.
[69] Antti Hannula – Matti Kari – Tia Mäki, *Osakeyhtiön Hallituksen ja Johdon Vastuu* (Talentum, 2014), 233.
[70] Klaus Nyblin, *Riidanratkaisu – Käsikirja Yritykselle* (Talentum 2012), 198-199.
[71] Government Proposal 203/1992, Explanatory Memorandum, Chapter 1.1.

of its employees are not deductible as expenses related to the business operations of the corporation either (i.e. they are not deductible on the basis of Section 7 of the Business Profits Taxation Act).[72] If the corporation as an employer has paid sanctions imposed on its employee, the expenses are, however, usually deductible as **labour costs**, in which case they are also that employee's taxable income.[73]

Correspondingly, costs arising from **legal proceedings** are only deductible if they are genuinely related to the generation or maintenance of income. In many cases, legal expenses arising from a criminal proceeding where an employee of the company is suspected would probably not be tax-deductible (as income generation expenses), at least if the alleged offence lacks a sufficient connection to the business activities of the corporation.[74] This viewpoint is also supported by legal preparatory works, where the non-deductibility of all kinds of items of a penal nature resulting from illegal acts is emphasized.[75] For the same reasons, even damages ordered in connection with a criminal proceeding might be non-deductible, if they lack a sufficient connection to the generation of income.[76] However, the situation concerning the tax-deductibility of legal expenses is not completely unambiguous and therefore a corporation should consider turning to a tax expert or the Finnish Tax Administration with questions about taxation in any concrete case.

[72] E.g. the Finnish Supreme Administrative Court case KHO 1986 B II 588. See also Klaus Nyblin, *Riidanratkaisu – Käsikirja Yritykselle* (Talentum 2012), 286.
[73] Klaus Nyblin, *Riidanratkaisu – Käsikirja Yritykselle* (Talentum 2012), 286, Government Proposal 203/1992, Explanatory Memorandum, Chapter 1.1.
[74] Klaus Nyblin, *Riidanratkaisu – Käsikirja Yritykselle* (Talentum 2012), 287.
[75] Government Proposal 187/2005, General Explanations, Chapter 1.1, Government Proposal 203/1992, General Explanations, Chapter 1.3.11 and Explanatory Memorandum, Chapter 1.1.
[76] Government Proposal 187/2005, General Explanations, Chapter 1.1.

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

12.1 Personal Data Protection

According to Gioffre in "The Next Big Chance in Compliance", corporate compliance continues to evolve and expand to new organizational areas. It is expressed that two fundamental changes are emerging that need to be answered. These include providing an open corporate culture where compliance officers have to ensure transparency also in their communication methods, as well as further challenges brought by digitalization and cyber security, where corporations need to take into account that safeguarding their digital information is mostly fostered by the compliance professionals themselves. In the future stakeholders will also demand more transparency and novel ways of solving ethical dilemmas. Collaboration across the organization is also emphasized as key factors in building a more sustain corporate compliance. [77]

Gioffre also states that future challenges lying ahead are data integrity, privacy and cyber security. Fast development of technology brings about new challenges such as mobile world where according to Gioffre it is vital to assure the balance between the speed of delivering data and ensuring that it is not inappropriately shared. This will be enhanced by forming appropriate policies and protocols that simultaneously meet regulatory requirements and expectations. Also making distinction between customer and fraudulent operators becomes even more difficult in the future. As social media is growing faster by the minute corporate compliance officers need to exploit it in their work and communication with stakeholders.

According to Ashford, the new General Data Protection Regulation (GDPR) will come into force in all member states in 2018 and it will eradicate all the inconsistencies with national legislations regarding data protection. In his interview Room states that this will have a huge impact on all

[77] Aarti Maharaj, *'The Next Big Change in Compliance' (*Ethisphere, 14 April 2016), <http://insights.ethisphere.com/the-next-big-change-in-compliance/> accessed 17 January 2017

entities that either hold or use European personal data inside and outside of Europe.[78] This new regulation will introduce heavier financial sanctions, including notifying any breaches to the regulators or even to the people affected, in addition to enhanced tracking and monitoring of EU residents' digital activities. Room also affirms that organizations will have to arise to the challenge of not more than just compliance but to adopt exclusively a whole new approach on the way of collecting and using personal information. It is also important to mention that the new regulation puts companies that provide services for other companies also into the position of "data processors" and thus could face hefty fines as well. Room also asserts three key components which the companies need to confront in their strategy and approach that are; a new compliance journey, a new transparency framework and a new enforcement, sanctions and remedies framework.

Regulators and individuals will gain more power since the former can intervene to corporations' business operations and impose sanctions whereas the latter can exercise principles such as right to be forgotten and the right to demand the end of use of their data not to mention the right to sue for compensation in the case of non-compliance. Also American companies will also encounter major changes due to the new safe harbor agreement between EU and U.S. New framework for transatlantic data flows: EU-U.S. Privacy Shield obliges companies in the U.S. to safeguard personal data of Europeans more carefully and implementing stronger monitoring and enforcement policies by the U.S. Department of Commerce and Federal Trade Commission and European Data Protection Authorities. With this new agreement Europeans will have several rectification possibilities and it is for the first time that United Sates have given EU binding assurances regarding clear limitations, safeguards and oversight mechanisms of public authorities' access to national security purposes, says Commissioner Jourová.[79]

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[78] Warwick Ashford, *´EU data protection rules affect everyone, say legal experts´(*ComputerWeekly.com, 11 January 2016) <http://www.computerweekly.com/news/4500270456/EU-data-protection-rules-affect-everyone-say-legal-experts> accessed 10 January 2017

[79] European Commission, *´EU Commission and United States agree on new framework for transatlantic data flows: EU-US Privacy Shield (Press Release Database, 2 February 2016´*, <http://europa.eu/rapid/press-release_IP-16-216_en.htm > accessed 31 January 2017

During the next 5 years it could be assumed, as Rumyantsev and Lindgren state in their blog that personal data will become the new oil of our society and states and companies will introduce new mechanisms and policies as well as becoming more aware of transparency requirements and individual's data protection rights. [80]

12.2 Bribery and Corruption

According to "Five minutes on… anti-bribery and corruption laws in Europe" many countries are introducing for the first time anti-bribery laws which are stricter than those of US. This means that many companies will have to enhance and adopt more stringent compliance policies regarding their operations across the world. However there are various differences in the enforcement policies across the Europe which needs to be answered to, properly by the EU itself. [81]

According to Salminen there is a genuine threat of a structural corruption in Finland, which needs to be combatted by increasing transparency, assessing critically action measures as well as develop good governance and boost monitoring in high risk sectors.[82] In Finland "old boys' networks" will properly increase but these secret societies may also become revealed more easily due to these novel transparency requirements. Finland's reputation and status as one of the least corrupt countries in the world will most likely decline even more.

The OECD anti-bribery has issued a statement on Finland's failure to take action on implementing recommendations provided by the OECD Anti-Bribery convention and especially experiencing difficulties in enforcing laws against the bribery of foreign officials. It has also been stated by the

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[80] Stanislav Rumyantsev and Jaakko Lindgren, *´Personal Data is the New Oil´,* (Kumppaniblogit 5 May 2015) <http://dif.fi/blogit/kumppaniblogit/personal-data-is-the-new-oil/> accessed 3 February 2017

[81] Rob Elvin, Louise Roberts, Tim Wünnemann and Stéphanie Faber, *´Five minutes on... anti-bribery and corruption laws in Europe´*(Squire Patton Boggs, 10 July 2015)< http://www.lexology.com/library/detail.aspx?g=565a8bd6-7a4a-4017-a0bd-94bcfdbfecbc> accessed 29 January 2017

[82] University of Vaasa, *´Rakenteellinen korruptio lisää kansalaisten epäluuloa´* (21 May 2015) <http://www.uva.fi/fi/news/rakenteellinen_korruptio_lisaa_kansalaisten_epaluuloa/> accessed 22 January 2017 [Finnish]

OECD that Finland must implement all the recommendations without further delay or it may encounter additional measures taken by the organization.[83]

In addition there is a government proposal pending on Framework Agreement on Partnership and Cooperation between the European Union and its Member States and Mongolia where the contracting parties agree to collaborate on fields of protecting personal data, combatting against corruption and money laundering. This is addressed by fostering collaboration networks and information exchange as well as implementing and promoting relevant international standards and instruments. Moreover measures shall be taken to prevent and diminish financial systems and non-financial business and professions intended to be used for money laundering as well as providing technical and administrative assistance for the efficient functioning of relevant regulations and mechanisms.[84]

12.3 Whistleblowing

According to Transparency International specific legislation and official channels regarding whistleblowing do not exist in Finland[85]. Currently one can report a crime to the police or lodge a complaint to the Parliamentary Ombudsman and to the Office of the Chancellor of Finland but there is no particular body or agency established to deal with corruption suspicions or neither to support or give advice to informants. [86]However there has been a growing interest amongst some of the biggest companies to produce their own open programs for whistleblowing. Also there has been a constant pressure from international perspective for Finland to introduce a comprehensive

[83] OECD *´Statement of the OECD Working Group on Bribery on Finland's limited implementation of the Anti-Bribery Convention ´*<http://www.oecd.org/corruption/public-statement-on-finland-s-lack-of-implementation-of-the-anti-bribery-convention-2016.htm> accessed 29 January 2017,

[84] Parliament of Finland, *´ HE 61/2015 vp, Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and Mongolia, of the other part´*, <https://www.eduskunta.fi/FI/vaski/HallituksenEsitys/Sivut/HE_61+2015.aspx> accessed: 24 January 2017, 42

[85]Transparency International, *´ Whistleblowing in Europe: Legal protection for whistleblowers in the EU´* (5 November 2013) <https://www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/EU_Whistleblower_Report_final_web.pdf> accessed 8 February 2017, 44

[86] Finland's Ministry of Justice, *´Korruptioepäilyistä ilmoittavien henkilöiden suojelu´*, (Mietintöjä ja lausuntoja 25/2016, 17 June 2016) <http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/75133/OMML_25_2016_Korruptioepaily_84s.pdf?sequense=1> accessed 15 February 2017 [Finnish], 51-52

system for the protection of whistleblowers by the United Nations Convention against corruption and Transparency International. [87]Ministry of Justice has appointed in 2015 a working group on protection of people who "blow the whistle" on corruption. The working group emphasizes that there has to be a system in place where anyone can inform inside a workplace or to an outside source any suspicions on corruption. Therefore it suggests in establishing a particular communications channel where one can notify any wrongdoings anonymously, to set up a working group to plan the particular channel and to ensure issues such as resources, data security and capabilities concerning with anti-corruption and confidentiality. In addition to drafting guidelines on whistleblowing and incorporate them to education programs provided to the employers'. The protection of whistleblowers would be acquired by providing more information on national anti-corruption website, underlining the importance of anonymity as well as ensuring the sufficient competences of the public officials that participate into the protection process. [88] In addition the lead examiners of OECD Working Group on Bribery highly recommend Finland to introduce a dedicated whistle blower protection law which would be applied across public and private sectors.[89]

12.4 Enforcement Culture for Corporate Crime

In Finland there is a tendency to prosecute individuals even though the legal system recognizes the possibility to impose a corporate fine; however there have only been few conviction cases which have been centered mostly on labor and environmental offences. Also anonymous liability acts as an exception to the rule, where companies can be held liable e.g. in cases where the

[87] European Commission, *´Annex Finland to the EU Anti- Corruption Report´ (*Annex 26 3 February 2014), <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_finland_chapter_en.pdf> accessed 15 February 2017, 5

[88] Finland's Ministry of Justice, *´Korruptioepäilyistä ilmoittavien henkilöiden suojelu´*, (Mietintöjä ja lausuntoja 25/2016, 17 June, 2016) 2016http://julkaisut.valtioneuvosto.fi/bitstream/handle/10024/75133/OMML_25_2016_Korruptioepaily_84s.pdf?sequence=1, [Finnish], 5

[89] OECD, ´Implementing the OECD anti-bribery convention´ (Phase 4 Report: Finland, 2016), 15, <http://www.oecd.org/corruption/anti-bribery/Finland-Phase-4-Report-ENG.pdf> accessed 8 June 2017

perpetrator has died or cannot be identified, or one refrains from action or that bringing of charges has become time-barred. [90]

Currently there is a government proposal pending on extending legal persons criminal liability to aggravated accounting fraud, which would have a preventive and enhancing effect on combatting against corruption. [91] OECD has also recommended Finland to introduce a system of plea bargaining and thus extend it to cover legal persons as well.[92]

Judicial proceedings in Finland are characterized by excessive lengthy proceedings resulting from legalistic judicial culture and restricted possibility not to impose judicial measures in addition to the high percentage (over 60%) of solved crimes as well as wide right of appeal.[93] According to Kastula Finland has received 21 judgments regarding excessive lengthy proceedings from The European Court of Human Rights. Financial crimes have been seen as most problematic with regards to the types of crimes. [94]

According to Kastula fundamental problem derives from the coordination challenges in pre-trial investigation and prosecution of criminal offences as well as in the cooperation problems between authorities in charge of prosecution and pre-trial investigation. Excessive length has resulted from

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[90] Marianna Semi, *'Yhteisösakko - huomioita oikeuskäytännöstä', (21 March 2014),* <https://oikeus.fi/hovioikeudet/helsinginhovioikeus/material/attachments/oikeus_hovioikeudet_helsinginhovioikeus/julkaisut/painetutjulkaisut/rangaistuksenmaaraaminen2013/MyPG4GCUR/10_Yhteisosakko_-_huomioita_oikeuskaytannosta_Marianna_Semi.pdf> accessed 25 February 2017, [Finnish], 4

[91] Parliament of Finland, *'Hallituksen esitys HE 258/2016 vp'* (15 December 2016) <https://www.eduskunta.fi/FI/vaski/HallituksenEsitys/Sivut/HE_258+2016.aspx> accessed 1 February 2017, [Finnish]

[92] OECD, 'Implementing the OECD anti-bribery convention' (Phase 4 Report: Finland, 2016), 37, <http://www.oecd.org/corruption/anti-bribery/Finland-Phase-4-Report-ENG.pdf> accessed 29 May 2017

[93] Minna Rouhiainen, *'Oikeudenkäynnin viivästymisen hyvittäminen ja hyvityslaki erityisesti rikosprosessin kannalta'* (EDILEX, 8 May 2015, https://www-edilex-fi.ezproxy.utu.fi/opinnaytetyot/15177.pdf> accessed February 2017, [Finnish], 81

[94] Teemu Kastula, *'Rikosasioiden kohtuullinen käsittelyaikaja rikosoikeudnekäyntien viivästymistä vastaan olevat tehokkaat oikeussuojakeinot – erityisesti Euroopan ihmisoikeussopimuksen ja ihmisoikeustuomioistuimen oikeuskäytännön valossa'* (Helsinki University, Faculty of Law, November 2009), <https://helda.helsinki.fi/bitstream/handle/10138/21558/rikosasi.pdf?sequence=2> accessed 22 February 2017, [Finnish], 93 and 98

the need to acquire more expert statements, resorting to postponing the case due to complementing information regarding preliminary investigation and prosecution, subpoena other defendants as well as waiting for a verdict in a relating judicial proceeding. The European Court of Human Rights has also stated that the length of court of appeal proceedings in Finland, which varies from 2-3 years, does not meet the requirement of "within reasonable time". [95]

Rouhiainen asserts in her research that government of Finland put forward a proposal to the Parliament to reform legislation concerning plea bargaining and non-prosecution, which came into force on 2015. Its purpose is to expedite and strengthen criminal proceedings.

Regarding the future in 2012 the Ministry of Justice established an advisory board to prepare a program (*oikeudenhoidon uudistamisohjelma*) to shorten the length of judicial proceedings and enhance legal protection during the years of 2013 -2025. The suggested reinforcement measures include establishing a specific court agency (*tuomioistuinvirasto*), potentially unifying Finnish general and administrative courts (especially the Supreme Courts), reducing the number of serving lay jurors and in the long run eradicating the whole system. Furthermore aim is to introduce more video surveillance in the Court of Appeal hearings, expand the scope of court fees as well as increase the amount of fees.[96]

[95] Teemu Kastula, ´Rikosasioiden kohtuullinen käsittelyaikaja rikosoikeudnekäyntien viivästymistä vastaan olevat tehokkaat oikeussuojakeinot – erityisesti Euroopan ihmisoikeussopimuksen ja ihmisoikeustuomioistuimen oikeuskäytännön valossa´(Helsinki University, Faculty of Law, November 2009), <https://helda.helsinki.fi/bitstream/handle/10138/21558/rikosasi.pdf?sequence=2> accessed 22 February 2017, [Finnish], 102-103 and 108

[96] Minna Rouhiainen, *´Oikeudenkäynnin viivästymisen hyvittäminen ja hyvityslaki erityisesti rikosprosessin kannalta´(EDILEX, 8 May 2015, https://www-edilex-fi.ezproxy.utu.fi/opinnaytetyot/15177.pdf>* accessed February 2017, [Finnish], 82-83

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1. Identify the relevant anti-bribery and corruption, fraud, anti-money laundering and sanctions legislation in your jurisdiction

Georgia's anti-corruption legislation is largely contained within the Criminal Code. Georgian law does not make a clear exception for facilitation payments, so companies doing business in Georgia should assume these could be considered as bribery payments by local authorities. Georgia's Law of Georgia on the Conflict of Interests and Corruption in Public Service prohibits corruption among public servants and requires the disclosure of assets by public officials. Georgia is committed to international anti-crime cooperation and is taking the necessary steps to curb corruption. Georgia is not signatory to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions but has ratified the Council of Europe Civil and Criminal Law Conventions on Corruption; Group of States against corruption (GRECO); Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime Strasbourg; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism and the country's legislation complies with the United Nations Convention against Corruption (UNCAC).[1]

Fraud

Fraud is punishable by law. However, in fact, fraudsters are not often placed criminal liability on. The reason is that fraudsters are very skillful - they know very well how to break the law safely. If the plaintiff and defendant have signed the contract, or even if there is a simple agreement between them, it gives the opportunity to law enforcers to avoid this case legally. They declare there is no crime committed and those facts are only proving the party was acted in bad faith so it is the civil case not the criminal one.[2]

Appropriation or embezzlement

[1] According to Georgia Corruption Report

[2] Marika Kakhadze, 'Georgian word"https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0ahUKEwiGjajB5ODRAhUELZoKHbHDCDMQFggbMAA&url=http%3A%2F%2Fwww.for.ge%2Fview.php%3Ffor_id%3D40153%26cat%3D9&usg=AFQjCNEAOP5b10xDfVMSYRWBOFNB6RlIiQ&sig2=_YoHiZl8OHi71lqu5ZGZXw

It shall be punished by a fine or restriction of liberty or with imprisonment.

There are some criteria to distinguish appropriation from embezzlement. The first criterion is related to time. If there is no time interval between ownership and disposal of the property then it is embezzlement. According to another criterion there is embezzlement if the third party gets property free of charge while there is appropriation when the crime committer uses property or property rights for his own purposes or transfers them to the third party with payment. The third criterion is related to disposal of property. If the committer uses property or property rights on his own it is appropriation while if he disposes them and it does not matter whether this transfer was free of charge or with payment it is embezzlement. Among the financial offenses committed in 2004-2014 the highest number - 2155 cases of the misappropriation or embezzlement of the state funds were detected.[3]

Legalization of illegal income (money laundering)

It is interesting how to distinguish the crime committer of the first crime from the one of legalization of illegal income. Some people think that legalization of illegal income is a mean for hiding the committed crime, thus the crime committer of the main crime is not the one of legalization of illegal income. The main argument of this opinion is the principle " *ne bis in idem*".[4] This issue is very important for Georgian because there is not the list of predicate crimes in Georgian legislation and moreover legislator has not made any statements related to conventions about money laundering so the judges have a wide variety of opportunities to interpret this article. Establishment of criminal liability of legal persons was caused by international practice, because this kind of crimes are often committed by the name of or on behalf of legal persons. There is little number of cases where this crime is committed by natural persons.

Use, purchase, possession or sale of property acquired through the legalisation of illegal income.

This amendment was conditioned by the recommendations of FATF and MONEYVAL for

[3] Statistics of financial crimes (2004-2014) IDFI (Institute for development of freedom of information)
[4] Comments of Criminal Code, private part (Book 1), M. lekveishvili, N. Todua, G. Mamulashvili 2011, P.428-429

ensuring legislature improvement about legalization of illegal income and fighting against terrorism.[5]

Commercial bribery

While reading this article the questions arise: how can a legal person violate its official duties or should it be liable for breaching of obligations by a person working in the organization? According to 107[1] answers to these questions are positive.[6]

Abuse of official powers

It is necessary to have substantial violation of rights for components of crime. Whether there is substantial violation of rights or not should be established by taking into consideration all facts of the case.[7] It is worth to mention that the legislator does not give us the exact meaning of "another person". We should use wide approach for interpreting.[8]

Illegal participation in entrepreneurial activities

According to Georgian law about Public Services the official should not be engaged in entrepreneurial activity. He can only own stocks and shares. However, there is no crime when the official participates in entrepreneurial activities illegally but it is not related to the granting of unlawful preferences or privileges or any other form of patronage to him/her.[9]

Article 338 - Bribe-taking

Everything that has material value can be considered as "other assets". Whatever the committer gets without payment is considered as pecuniary gain.[10] What will be the qualification of a crime when the crime committer works at mixed joint-stock company and the owners of this company

[5] The same book, p 429
[6] The same book, p.515
[7] Comments of Criminal Code, private part (Book 2), M. lekveishvili, N. Todua, G. Mamulashvili 2011, p 140
[8] The same book, p 141
[9] Comments of Criminal Code, private part (Book 2), M. lekveishvili, N. Todua, G. Mamulashvili 2011, p 154
[10] The same book ,p 158

are the state as well as natural persons. There is qualification of crime should be official misconduct – bribe taking if the shares of the state are at least 50 %.[11]

Bribe-giving

Influence peddling

Influence peddling should be distinguished from bribery (taking and giving a bribe). Taker of bribe resembles influence peddler but committer of bribe -taking may only be an official or a person equal thereto whilst influence peddler is a private person claiming or confirming that he/she can exert an unlawful influence on the decisions of an official or a person thereto by means of his professional or social status, for which the influence peddler demands or receives a material benefit or some kind of other unlawful advantage. Besides this, in case of taking a bribe official or a person equal thereto commits some kind of action or refrains from doing this in return for the bribe himself, whilst influence peddler is not capable of making any kind of decisions on his own but he wrongfully exploits his actual or presumable influence on public officials. Taker of a bribe offers or confers unfounded advantages on official or a person equal thereto whilst a person wishing to make influence (active influence peddler) promises, offers or confers unlawful advantages on someone who claims or confirms that he can exert an unlawful influence on the decisions of an official or equal thereto. Therefore, while two aspects are present in case of a typical bribery, in case of influence peddling threefold corruption relation is present. [12]

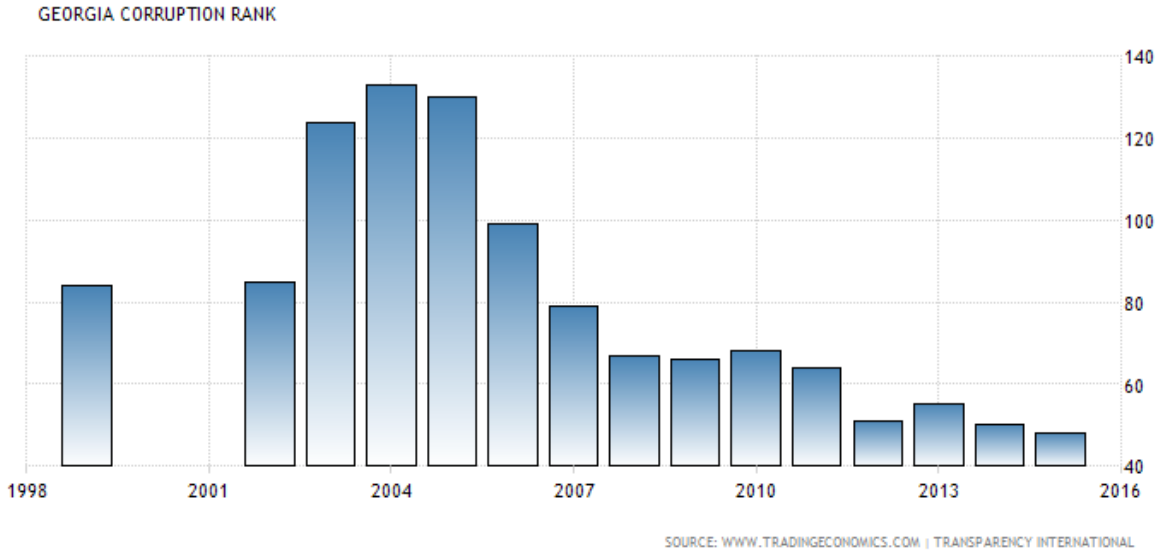
Accepting gifts prohibited by law

To have the right qualification of this crime we should use the Law of Georgia on the Conflict of Interests and Corruption in Public Service. We should distinguish this article from bribe taking. When the official takes bribe, he knows this is given for some purpose, whereas when he accepts gifts prohibited by law his acts are not conditioned with this gift.

[11] The same book, p 165
[12] The same book, p.179

Forgery by an official

The compulsory element of this crime is that it should be committed by an official against public interest by using an official position.[13]



In the Soviet period, Georgians played a major role in organized crime groups and the shadow economy operating throughout the Soviet Union, and in the post-Soviet period, Georgia continues to be an important source of international crime and corruption.[14] By the beginning of the new millennium the impact of this corruption was pervasive and devastating. When the Transnational Crime and Corruption Center's (TraCCC) Georgia office began to study corruption, even the limited pensions of the elderly, totaling seven dollars a month were not paid because the administrators of the Georgian postal bank that distributed pensions had embezzled the money. No amount of complaints by these needy elderly citizens resulted in the enactment of any controls or the arrest of any of the embezzlers. Impunity was the rule of the Shevardnadze administration. Many others besides the pensioners suffered from the pervasive corruption. Georgia, which once prided itself on its highly educated and cultured population, faced a total deterioration of its educational system as a result of corruption. Students at Georgia's top universities routinely had

[13] Comments of Criminal Code, private part (Book 2), M. lekveishvili, N. Todua, G. Mamulashvili 2011, p.183
[14] Organized Crime and Corruption in Georgia , edited by Louise Shelley, Erik R Scott and Anthony Latta, p

to pay large bribes for admissions and university funds were embezzled to such a degree that fundamental repairs were not made, classroom furniture collapsed and classrooms were not heated in Tbilisi's cold winter.[15] This corruption of the state bureaucratic structure allowed members of the Shevardnadze government to hide expenditures and costs while enriching themselves and their subordinates. The direct result of this extreme inefficiency was a bureaucracy which was not linked to the Georgian citizens or the state. Its employees merely saw their employment as a means for personal enrichment. With salaries that were below the minimum level of providing for a family, bribery, embezzlement and other forms of abuse of office became the norm.[16]

Important changes have been made since the Rose Revolution in Georgia to address the organized crime and pervasive corruption. Changes are going on and fortunately, according to the Corruption Perception Index 2016 published by the Transparency International, Georgia has been given 57 points and has been ranked 44th throughout the world and 1st in the region.

2. Explain the nature of the main offences for companies under this legislation and any potential penalties.

2.1. Introduction

Civil Code of Georgia determines the freedom of entrepreneurship. By law, everyone has the right to pursue its business, according to Article 10 of the Civil Code parties of civil agreement have a right to implement actions that aren't prohibited by law including unintended actions.

By Law of Georgia on Entrepreneurs the business entity has a right to implement activities that are not concretized or prohibited by law and are directly or indirectly done to serve the public purpose.

[15] The same article, p 4
[16] Organized Crime and Corruption in Georgia , edited by Louise Shelley, Erik R Scott and Anthony Latta, p 5

Despite the fact that our state contribute the market economy through business development on the other hand it carries some control, which essential for the public safety and other important legal goods.

The control by state is done in various ways, for different purposes and means. For example, the business entity taxation by the state are directed for economic development and increasing state budget, to achieve these goals it is necessary to register business entities. This should be done with relevant norms and regulations.

According to the Law of Georgia on Entrepreneurs, business entity is legitimate, multiple, independent and organized activities that are done for profit.

The entrepreneurial activity of individuals and legal entities must be registered by state as it has constitutional meaning. The Law of Georgia on Entrepreneurs defines the special terms of registration.

2.2. Illegal Entrepreneurial Activities

According to Article 192 of the Criminal Code of Georgia the object of this crime is the financial interests of the state, as it cannot get a registration tax, permit or licensing terms and other taxes on business activities. As a result the state gets substantial damage or companies receive of large illegal income.

Objectively, this crime have three forms:

- Business activity without registration;
- Business activity without permit or license;
- Business activity which violates terms of license.

The first form of this crime is an entrepreneurial activity without registration. Registration is an imperative requirement of the law, as any business entity gets legal nature only after this procedure.

The second form of the offence is an entrepreneurial activity without a license or permit. As I noted entrepreneur has the right to carry out any action that is not prohibited by law, although there are exceptions that need a special permit or license to be done.

The third form of offence is an entrepreneurial activity that violates permit or license terms. For example the case when a license is for a certain business entity to be carried out but the legal entity carries another.

The penalty for this crime is a fine or imprisonment for a term of one to three years. If the same act that is committed jointly by more than one person or repeatedly or by a person convicted for this kind of offence is punished by a fine or imprisonment for a term of three to five years.

For the act specified in this article a legal person shall be punished by a fine, with deprivation of the right to carry out a particular activity or with liquidation and a fine.[17]

This offence is also prescribed in Administrative Offences Code of Georgia, where we have first and second forms of this crime: business activity without registration and business activity without license. The difference from criminal offence is that to qualify action as administrative offence we do not need any detriment or receipt of large income. The objective element of this crime is quite limited in Article 164 of the Administrative Offences code of Georgia. Thereby, punishment is lenient and includes a fine (minimum 700 GEL).

2.3. Pseudo-entrepreneurship

Pseudo-entrepreneurship, which is given in Article 193 of the Criminal Code of Georgia, involves the establishment of an enterprise without an intention to carry out entrepreneurial activities in order to borrow a loan or gain other kind of material benefit, or to conceal prohibited activities, which can result a substantial damage. The main aim of this regulation is to protect the interests of citizens as well as interests of the state and other organizations.

[17] Comments of Criminal Code, Private part (Book 1), M. lekveishvili, N. Todua, G. Mamulashvili 2016, p. 488 - 490

In this case, establishment of an enterprise is done in full compliance with the law, but after registration actions of the organization aim to borrow a loan or gain other kind of material benefit, thereby the interests of citizens – individuals, legal entities and the state are violated.

Main aim of this crime is gaining material benefits using illegal methods. Moreover, this purpose should exist while creating legal entity. Accordingly registration of this legal person has no aim of business entity, but gaining material benefits. If this special purpose doesn't exist then we will not have this crime.

The penalty for this offence is a fine or imprisonment for up to three years, with deprivation of the right to hold an official position or to carry out a particular activity for up to three years. [18]

2.4. Unlawful Actions in the Case of Insolvency

Sometimes entrepreneur activities cause financial difficulties for companies. In some cases, these difficulties are followed by bankruptcy.

According to Article 205 of the Criminal Code of Georgia main object to be protected by this regulation is the legitimate interests of creditor(s).The creditor is an individual to whom an obligation is owed because it gives something of value in exchange and the moment when the court starts bankruptcy proceedings creditor has a right to demand from a debtor. This crime is committed by almost bankrupt entrepreneur – the debtor.

One of the mandatory signs of the offence is condition of debtor who committed this crime. The debtor must expect insolvency and make inaccessible the part of the property that will have become trust property in the case of an institution of insolvency proceedings or damage or destruction of property in violation of the requirements for proper management of economic activities.

[18] The same book, p. 492 - 494

The penalty for this crime is a fine or imprisonment for up to three years.[19]

2.5. Tax Evasion

Criminal law establishes criminal responsibility for tax evasion**.** This regulation aims protection of financial interests of the state, as the most important source for formation state budget are taxes and fees.[20]

The Tax Code of Georgia provides six different types of taxes and twelve types of fees for legal entities. The amount and terms of fees and taxes are prescribed by law. According to Article 218 of the Criminal Code of Georgia, intentional evasion of taxes in large amount is punished by a fine or imprisonment for a term of three to five years. Under this article, large amount shall mean the payable amount exceeding 50,000 GEL and particularly large amount, when payable amount exceeding GEL 100 000.

This regulation has a preventing nature to keep individuals and legal entities paying fees and taxes, but it also, prescribes a punishment to an action that is committed by executor according to the nature of action.

To sum up, the nature of the main offences for companies under the Georgian legislation is quite severe and it is directed to protect interests of state, its financial interests and secondly interests of individuals and legal entities as they are the state itself.

The state has a lot of levers to stand up against these kind of offences. In the Criminal Code of Georgia there is a whole section for economic crime, which includes chapter XXV – Crime against entrepreneurial or other economic activities. Using these articles law enforcement authorities deal

[19] The same book, p. 539 - 541
[20] The same book, p. 568

with entrepreneurs that commit crime.[21]

DYNAMIC OF QUANTITY OF CONVINCED MINORS ACCORDING TO THE TYPES OF CRIME

Types of Crime	2012				2013				2014				2015			
	Total convicted	Among them charged %			Total convicted	Among them charged %			Total convicted	Among them charged %			Total convicted	Among them charged %		
		Deprivation of liberty	Conditional sentence	Fine		Deprivation of liberty	Conditional sentence	Fine		Deprivation of liberty	Conditional sentence	Fine		Deprivation of liberty	Conditional sentence	Fine
Tax Avoidance	42	57.1	42.9		12	33.3	41.7	8.3	13	46.2	7.7	46.2	23	26.1	47.8	26.1

[22]

3. Please explain whether and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

Corporate liability determines the extent to which a corporation as a legal person can be liable for the acts and omissions of the natural persons it employs.

[21] Tax Evasion and Criminal Liability, Comparative analysis, GSMEA, 2012, p. 25
[22] Statistics of Dynamic of Quantity of Convinced Minors According to the Types of Crime, http://www.supremecourt.ge/files/upload-file/pdf/2015-year-criminal.pdf

According to Law of Georgia on Entrepreneurs, limited liability companies and third parties are guided by the company's directors or officers, if not otherwise provided by the statute. All legal entities should have the charter of management bodies. In capital societies companies are managed and represented by the specially created body-Director. The obligations of the enterprise's director are defined by the legislation, the enterprise charter and agreements concluded with them. Thus, the director's responsibilities are divided into two main groups: 1) Legal obligations. 2) Contract obligations. The directors of the corporation are given somebody else's (public) property and their primary obligation is to protect the assets and prevent damage. Infringement of this obligation leads to internal corporate responsibilities.

The generous responsibility means the commitment of the director's duties to act as an honest leader. It is important that the responsible side makes decisions by fully understanding the general idea of the topic.

The liability can be violated if the decision-makers neglect the existence of the fact itself. The commitment responsibility requires adherence from the manager of the enterprise and to protect the company's best interests. It involves the director's independence from external factors and taking according measures in case of the interest conflict. The interest conflict is obvious if:

- The director is the head of transaction;
- He has particular interest in given transaction;
- He knows that the other side of the transaction has a particular interest in it.

In all of the given cases the director's unbiasedness is in danger.

The abuse of directorial responsibilities will be considered if the production of accounting books are not provided (accounting books provide information about property, assets). The usage of restriction responsibility forms is connected with confusion between public property and partner's contribution.

If the director does not fulfill his duties, he is obliged to compensate the public for damage. The

directors shall be jointly liable with all its assets, directly and immediately.

If the damage is established, the directors must prove that they have managed the business in accordance with paragraph 6 of Article 9. (Law of Georgia on Entrepreneurs) The public may not reject a claim for damages. This requirement may be applied to the public creditors, if they have been compensated for their claims. Directors shall establish the annual report and the business report, as well as profit distribution proposal to be submitted to the supervisory board. The persons and members of the supervisory board of public work in good faith; In particular, cared for the way it takes care of the same capacity and under similar conditions being the normal, sensible person, and acted in the belief that their action is in the best interests of the public. If they do not fulfill that obligation, the public shall be jointly liable for damages incurred by all their assets, directly.

According to the Georgian entrepreneurial law, statute 44, the limited liability company is a company whose liability to creditors is limited to its assets. Such society can be established by one person as well. This means that the public undertakings and public partners, especially the director, generally, are not responsible for personal property.

However, Law of Georgia on Entrepreneurs provides certain cases, where the responsibility for the company's obligations may be imposed on the company's directors and its partners. Such as:

1. Law of Georgia on Entrepreneurs, article 3(paragraph 6) -"A partnership, a limited partnership, limited liability companies, joint stock companies and cooperative partners of the lender shall be personally liable if they abuse the legal disclaimer forms."

This norm is widely defined and includes not only the abuse of corporate responsibilities, but misuse of the company's interests for personal profit. Abuse of limited liability Company by the partner is obvious, when its partner carries out activities aimed at evading taxes.

2. Law of Georgia on Entrepreneurs, article 9 (paragraph 6)-" Partners, directors, supervisory board members of public affairs should operate in good faith. In particular, they should act in

belief that their actions are in public's best interests. If they do not fulfill that obligation, the public shall be jointly liable for damages incurred by all their assets, directly and indirectly. Society's refusal to compromise or regressive compensation claims is void if the refund is necessary to satisfy the creditors. If compensation is necessary, the responsibility of leaders of the community shall not cease because they acted to perform partner's decisions." Director is responsible for the Company's specific duties. These duties are also known as fiduciary duties. Duty to care about minimizing the taxes is an integral part of director's activities and responsibilities. While evaluating the effectiveness of company's management, a very important criteria is the ability to plan and implement company's operations in the way that maximum tax optimization can be achieved. Criminal offence conducted by the heads of the company (especially corruption) transforms directors' obligations into the Company's obligation to care for an internal component. Company leaders have an obligation to increase the company's profits, but it should only be prescribed by law in the framework of the rules of conduct.

The company is obliged to claim damages from the Director if:

1. The enterprise has a tax liability;
2. The enterprise does not have the ability to fulfill the obligation;
3. There is a situation when it is necessary to pay the state as a creditor to satisfy its demands and if it is obvious that the enterprise's director liability claim will yield no results, its creditor may request reimbursement from the society director.

Criminal verdict against Company affiliates and Director is not sufficient to impose the disputed obligations on them, because according to the Georgian Code of Civil Procedure, article 106, the criminal case against them on the established facts of the case without an investigation cannot be considered as approved evidence. According to this article, the verdict of the criminal court in civil proceedings represents only one of important evidences and it needs assessment in accordance with other evidences.

3. Georgian Cassation Court noted, that Company partners and the Director shall be responsible for the unpaid principal amount of the tax, as well as part of the Tax Code of the fine. Their

responsibility towards the state of the company's obligations is subsidiary and jointly towards each-other.

According to Georgian Law on Entrepreneurs, Article 3(Paragraph 3), joint responsibility organizations, partnerships, personally responsible members of limited partnerships shall be jointly and severally towards creditors with all of its assets directly.

Public relations and civil-legal regulation of the process of its participants equip the subjective rights and obligations stipulated by the behavior of their legal relationship within the frame. According to Article 992 of the Civil Code, to be imposed on the obligation to compensate should be supported by a legal relationship with the subject of an unlawful act, guilt, the result - the damage and the causal link between the act and the result. The absence of the constituent elements of the norm is a precondition to refuse the compensation of the damages. Article 412 of the Civil Code establishes that the refund applies only to damages, that the debtor could have foreseen and causing the damages action and the result. In terms of the existence of the damage, Court of Cassation indicates on Article 102 of the Civil Procedure Code (third and first parts). According to these norms, each party must prove the circumstances that support its claims and arguments. The circumstances, that the law has established for certain types of evidence, cannot be confirmed by other evidence. Thus, the applicant is required to properly substantiate the validity of his claim, which he requests of this, adequate and reliable evidence in court by submitting to implement in a way that does not limit itself to verbal instructions.

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

Extradition is a formal process, a wanted person, an accused or the defendant's transfer from one state to another.

Typically, person extradition from one state to another requires the existence of an international agreement between the two countries. The Contracting Parties agree that the provisions and conditions laid down in the Convention, all persons against whom the requesting Party are proceeding for an offense or who are wanted by authorities for the verdict, detention order.

European Convention on extradition, says that extradition is not possible in any case. The restrictions vary is between states and certain international treaties and practices. However, most of the limitations are: Extradition is usually not possible for political, military or fiscal offense; It is prohibited to extradite a person to a country where they face the risk of torture, cruel, inhuman or degrading treatment or other violations of the basic rights of the danger; It is forbidden to extradite a refugee; Prohibits extradition if an appeal against the judgment violated the principle of double punishment ban. In all cases, the issue of transfer are deciding and implementing the competent authorities, a list of the persons' is kept in the deposit states. Such an authority could be the prosecutor's office, the Supreme Court, Ministry of Justice, and so on. The Convention provides for the initiation of the transfer rules, the required documentation, the transfer procedure, the native country of the rules of serving the sentence, and so forth. In Georgia extradition is based : on the constitution, foreign States and agreements on legal assistance, other international agreements on legal assistance, other international agreements and universally recognized principles and norms of international law. Citizens of Georgia and the status of a stateless person for criminal prosecution or for serving a sentence may not be extradited to another state.

According to the criminal code of Georgia, article 6.1 an offender who has a foreign country's citizenship, also stateless persons, who are in the territory of Georgia, international agreements for criminal prosecution or for serving a sentence may be extradited to another state or surrendered to the International Criminal Court.

Lodged person, offender, and being persecuted on political grounds, cannot be transferred from one to another state, as well as those who committed the action, which is not considered a crime by the legislation, or if the death penalty imposed for an offense committed in the State in which the program requires. Criminal liability of such persons shall be resolved under international law.

Great Britain recognized that extradition is not allowed if there is a political motive or somehow violated human rights, it is an internationally accepted standard that shares Georgia too. If this happens in accordance with the extradition of two reasons, this is unacceptable.

5. Please state and explain any:

5.1 Internal Reporting Processes Abstract (i.e. whistleblowing);

For developing countries like Georgia with little experience of state system, it is outstandingly important to increase role of private relations in society. It also effects on People's welfare and self-consciousness Strong private sector gives stronger state organization. Large companies as well as small ones, play significant role in formation of strong private sector.

Nowadays, as the structure of business organizations are becoming very complex, maintaining free market relations between the companies is what indicates how liberal the states is towards existing business regulations. Self-control and internal reporting are those alternatives, which can be used instead of governmental restrictions. Shareholders spend most of their time on employing effective control systems with the view to growing company fast. As already mentioned, role of inner control is upsurging on a daily bases. Law of Georgia on Entrepreneurs distinguishes five different types of societies are listed in Article 2, that reads as follow: General partnership companies (GP), limited partnership companies (LP), limited liability companies (LLC), joint-stock companies (JSC) and cooperatives (After general provision, there are separate chapters for of the above mentioned companies). Each has a status of a Legal Person, and operate individual methods of internal reporting.

One of the most common ways of internal reporting is Audit. Definition of audit is provided by the Article 13. The Following research concerns the methods which are used by the directors of companies to control their business entities when there is a risk to deviate from legal framework.

Thus, it is vital to draw a distinction between governmental and inner control methods. It helps

to observe how the inner reporting groups work in companies.

Domestic Law

The first and most general legal script of inner control method in companies is provided in the Article 3 of law of Georgia on Entrepreneurs. The 10th sub-point of this article prescribes, that:

Each partner shall have the right to obtain a copy of the annual report and all publications of the company. In addition, any partner may check the correctness of the annual report and may familiarize himself/herself with the company documents personally or through an auditor, and may request clarifications from the enterprise bodies upon submitting the annual report, but prior to its approval. If the annual report contains a substantial error or misstatement, the expenses related to the audit shall be borne by the enterprise. The rights of control and audit may be limited only by this Law, but may be broadened by the Charter of the company.[23]

From this wording it is easily visible that, each partner in a company has a horizontal relation with other partners and the whole system is based on equal rights, which give them identical access to the requested documents. This general record is reached in further legal provisions and the ways of reporting methods dependent on types of companies and their structure.

Moreover article 3 constitutes the framework for internal control as it stipulates that: "Accounting and auditing shall be carried out according to the respective laws governing financial relations".[24] By this record, the legislator wants to show that, besides private relations there is the state's interest to regulate the activities if the companies, which obliges companies to act as it is agreed in the special code. As mentioned in the beginning, it is important to discern private and public sectors, this article illustrates intersections of interests.

This case is one of the reasons why we need a clear record regarding presumable restriction, which

[23] Law of Georgia on Entrepreneurs . Article 3rd.
[24] Law of Georgia on Entrepreneurs , Article 13th.

supposed to be carried out by the government. Otherwise, the undertakings will no longer have the interest to stay on the market.

After have outlining general notion about mandatory legal obligations on companies' self-control, it becomes easier to draw line between different methods of internal reporting according to Georgian Law. All of them will be introduced and some comments will be added in order to make it clear how it works in Georgian reality.

General partnership is a kind of company, where several persons (partners) are gathered under one company name, to conduct entrepreneurial activity jointly, as it is stipulated in the first point of the article 20th in Law of Georgia on Entrepreneurs. It follows from the nature of this company that, all partners have the same rights and obligations. One of those rights is given in the Article 24.

Any partner (including one not participating in management of the company) may personally review and inspect the books and records of the company. The partner may request from other partners to fulfill their obligations to the company and personally lodge a suit to enforce the same.

By this record, it is clear, how inner reporting works in this case. Equality and accessibility are the key factors for this kind of companies. This attitude promotes saving different resources and increases confident indicator. Both of them are especially important for solid and long-term relations.

The next rule, with content connected with inner reporting system is article 36. This legal provision settles relations between limited partners. The very difference from general partnership, consists in limited nature. These incomplete rights are balanced by the court. In this way, government attempts to provide limited partners (*komandits*) with possibility to appeal to court, if material grounds exist. According to the law:

Limited partners (komandits) may demand a copy of the annual report and check its correctness according to the financial books and records of the company.

If material grounds exist, a court may, on application of one of the limited partners (komandits), demand the presentation of the balance sheet, annual report, other similar information and the financial books and records of the company at any time.

Ordering relation by this way is caused by structure of society. Limited partners cannot take part in management of company, also they cannot go against general partners, who represent the company. So without some legally guaranteed rights, this rule will be discriminatory, and will also contain risks of material manipulations.

Limited Liability Company, known as LLC, is one of the most outstanding company statuses in Georgia. There are a lot of LLCs, with multi profiles, producing different goods. The essence is that, LLC can be established and run by a single person; this distinguishes it from all other companies mentioned above. And 'its liability to creditors is limited to its assets.[25] When we discuss options of controlling LLCs, principal matter is Chapter of company, which must be recognized by partners agreement this document answers all questions which have already arisen or will arise in the future. In such Chapters each detail is examined step-by-step. In some cases, this document is used as a superior legal source. To make it more visible, how comprehensive this document can be, an example of a legal exclusion, which may take place only, when it is specified in a Chapter of the company. As there is not much information in Law of Georgia on Entrepreneurs about methods of inner control, it can be discussed some Chapters of companies, which are outcomes of practice, rather than theoretical discussion. After determination of rights and obligations of a partner, the analyses can be continued by studying the Management of an enterprise. The process of the management is guided by general meeting of partners, if in Chapter, there is no different record.

The next type of society which is organized by this law, is called Joint-Stock Company. In this case, like in previous one, Chapter of company plays a huge role in ruling and controlling. There

[25] Entrepreneurs Law of Georgia, Article 44th.

are three different type of structure, which are responsible for any error. Those are: General Meeting (for further information Article 54), Supervisory Board (Article 55) and The Directors (Article 56). All of them have special rights and obligations. They are focused on different issues inside the company, their structure and plan of work is defined either in this law, or by Chapter of company. Joint-Stock company is mostly huge cooperation where a lot of money and people are involved, so it is not surprisingly, that such difficult system is made for security and stability. The number of members for each group is individual, also there is significant difference between how these members are chosen for work and what are they supposed to do. For this format of research detailed examination will not be effective. At this stage, it is important to understand the difference which is between those companies, to use this knowledge in further level or research.

And the very last society, I would like to talk about, is called cooperative company. This is very special association, with the aim of developing its members' business and increase welfare of them. The main idea of this society is labour power. From this point cooperatives are connected with agricultural activities as well as with raw material industry. Each cooperative has four different group of people, who are allowed to take in to the consideration companies' inner processes. And those groups are: General meeting (Article 63), Meeting of representatives (Article 64), Supervisory Board (65) and the executive board. Directors (66). As we see, three out of four is the same as it was in a company above. From these groups of people one of the most under-pressure bodies are The Directors, most of questions will be asked to them if something in companies goes wrong.

Another famous way of controlling process in company is internal audit and state audit. The aim for both of them is the same_ study documents (mostly but not only), find problem, then plan solution and at the end fix it. Having internal audit is not a cheap pleasure. Strong and developed companies use this service time to time, to make themselves sure, that there is no any gap in their companies. But it doesn't mean that, everyone can start work at audit service, or can run separately organization like this. Beside other activities, main reason for internal audit is to promote best ideas in company and supply it with resources, also analyze the supposed risks and make special account about it.

Besides private service, state also has its audit company. Government has a will to help and protect small and large companies run their business freely. In this cases mostly aims are not divided separately.

It was very short and general review of Georgian legislation about inner reporting system, which provide brief information what challenges can arise during this process.

In 2010 primer-minister N.Gilauri legislated order # 1013, which was about guide principles of internal audit. From the very first sentence, it was clear that this profession was new in Georgia and it was important part of state governance. In 2011 Revenue Service launched pilot version of program "alternative audit".[26] By this program, owner was free to choose who would investigate documents, it could be Revenue Service, private audit company, or consulting company. In case, if owner chose private audit company, Revenue Service would recognize audit's legal opinion and would not examine business again. Such relation between state and private sector provided effectiveness and less loss of resources. This program was focused on improving experience of self-controlling. Today, stability and long-termed success of fast-growing organization, is impossible if there is no risk controlling in management system. This fact has already incorporated in many countries' corporative law.[27] In this case, internal audit, as independent service-function, is owe to use all its effort and resources to eradicate existent problems. As famous scholars of internal audit say: "internal audit was founded and developed to satisfy requirements of management."[28]

For more than 60 years, internal audit is recognized as self-regulated profession. Because of its importance in modern civilization, internal audit is gradually gaining upper level in state, private and non-government sector.[29] Internal audit is important part of organization, it makes critical

[26] http://for.ge/view.php?for_id=5087&cat=1
[27] https://www.nbg.gov.ge/uploads/journal/2014/2014_2/2.pdf
[28] https://www.nbg.gov.ge/uploads/journal/2014/2014_2/2.pdf
[29] https://www.theiia.org/chapters/pubdocs/343/IIA_Georgia_Flyer_1.pdf

analyze of practice and displays problems, supports introduction of advanced methods of practice and serves as catalyst for improvement.

5.2. External reporting requirements (i.e to markets and regulations) that may arise on the discovery of a possible offence

Corporations are subject to external reporting requirements as well. They are as follows:

- Paying taxes;
- Following the environmental protection regulations;
- Following the employment law regulations;
- Maintaining the employees' personal data as confidential;
- Following competition regulations;
- Obtaining license for operating certain types of business;

Paying taxes

This is obviously the primary external reporting requirement for any corporation in any civilised State. Taxes paid by corporations constitute the main source of the country's financial income and the population's welfare. According to Section V of the Tax Code of Georgia (hereafter-the Tax Code) the corporations are subject to income and profit taxes. If a corporation does not fulfil the obligations determined by the Tax Code, criminal liability arises next to the tax liability (imposing fine on the respective company). Corporation's chairman will be accused of tax evasion (Article 218 of the Criminal Code of Georgia, hereafter-the Criminal Code).

Following the environmental protection regulations

Environmental protection is a crucial priority for the government and population of Georgia. As a result, countless regulations exist concerning the environmental protection two of which are particularly relevant to the present research: Law on Environmental Protection and Waste Management Code. The former is a fundamental legal framework and imposes a general liability on corporations for environmental damage-they should pay a compensation. Waste Management Code regulates environmental damage caused by industrial and other kinds of waste and imposes

appropriate liability on corporations. In addition, the present issue is regulated by section 10 of the Criminal Code. Thus a misconducting corporation shall be subjected to criminal liability.

Following the employment law regulations

The Labour Code of Georgia (hereafter-the Labour Code) strictly observes the legal relationship between corporations and their employees, restricting the employers' behavior and at the same time balancing the interests of both parties. As a civilised European state, Georgia does not allow the corporations to exploit their employees. This is strictly prohibited by the Labour Code and the Criminal Code. In addition, Labour Inspection Agency will be introduced in Georgia in the nearest future. Existence of such a public body will more intensively guarantee the compliance of the corporations' employment policy with the relevant legislation of Georgia.

Maintaining the employees' personal data as confidential

Ensuring protection of the right to privacy which is one of the basic constitutional human rights, is essential for proper functioning of the State. Corporations as employers always have access to their employees' personal data to determine their suitability for job positions. However, Law on Personal Data Protection allows corporations to process their employees personal data "only to the extent necessary to achieve the respective legitimate purpose" (i.e to determine the employees' above mentioned suitability). If this principle is violated, pursuant to chapter VII strict measures are applied by the personal data protection inspector against the violating corporation.

Following competition regulations

Corporations are not only restricted in managing their internal affairs but they bear responsibility towards consumers as well. Economic cooperation between a group of companies might in some cases harm other corporations and consumers. In order to prevent this, Georgia has recently (in 2014) adopted the Law on Competition and the Competition Agency of Georgia was introduced. These two decisions were ultimately made after a great deal of discussion. Many economists believed that due to the small size of the Georgian market there was no need to introduce competition legislation and the Competition Agency. The Agency starts its investigation when the following wrongdoings are committed by colluding corporations: price fixing, output limitation,

market and customer sharing, abuse of the dominant position and illegal mergers of corporations. If these offences are proved, the Competition Agency imposes high fines on the colluding corporations.

Obtaining license for operating certain types of business

Corporations, business of which is "characterized by excessive hazard to human life or health, involve state or public interests of special importance, or are related to the use of state resources" (as Law of Georgia on Licenses and Permits stipulates), are obliged to obtain licenses and/or permits in order to legally operate their above mentioned business. However, merely once obtaining the license is not sufficient. Corporations are then subjected to a constant control over fulfillment of licence conditions (Article 21.1 of the Law on Licenses and Permits). Such a control is carried out by the license issuer (a public body). The license issuer makes random inspections and/or the license holder has to submit appropriate reports to the license issuer (Article 21.2). If the license-holding corporation violates the licence terms, the license issuer imposes a fine on the corporation and in the event the violation continues, the license is repealed. Finally, if corporation operates without obtaining a license when this essential, it will be subjected to criminal proceedings, in accordance with Article 192 of the Criminal Code (illegal entrepreneurship).

6. Who are the enforcement authorities for these offences?

Taking into consideration the above discussed topics, it is essential to define the enforcement agency, enforcement authorities and understand how it works in Georgia.

A law enforcement agency is a government agency that is responsible for the enforcement of the laws.

Law enforcement agencies have powers, which other government subjects do not, to enable the law enforcement agency to undertake its responsibilities. These powers exercised by law enforcement agencies include:

a. Exemptions from laws;

b. Intrusive powers, for search, seizure, and interception;
c. Legal deception;
d. Use of force and constraint of liberty;
e. Jurisdictional override;
f. Direction.

The enforcement agency can be discussed into several directions. As for Georgian regulations and above written offences, the enforcement authorities are presented as the Competition Agency, Prosecutor's Office and the National Bank of Georgia (for further information see below paragraph 7).

The Competition Agency of Georgia is a government agency, which is created under Georgian law of Competition and is a legal entity under public law, typically a statutory authority, which regulates and enforces competition laws. It's also called an Economic Regulator,that sometimes also enforces consumer protection laws. The competition Agency of Georgia is responsible for formulating competition policy.

Many nations implement competition laws, and there is general agreement on acceptable standards of behavior. The degree to which countries enforce their competition policy varies substantially.

Competition regulators may also regulate certain aspects of mergers and acquisitions and business alliances and regulate or prohibit cartels and monopolies (considered above paragraphs). Other government agencies may have responsibilities in relation to aspects of competition law which affect companies (e.g. the registrar of companies).

Regulators may form supranational or international alliances like the ECA (European Competition Authorities), the ICN (International Competition Network), and the OECD (Organization for Economic Co-operation and Development.

The Competition Agency of Georgia is leaded by chairperson, nominated by premier-minister of Georgia. The competition Agency is accountable for the premier-minister of Georgia and people.

The Law of Competition establishes the principles for protection of free and fair competition from unlawful restrictions providing basis for free trade and competitive market development. Moreover, it defines the actions unlawfully restricting free trade and competition, legal basis for the prevention of violations with respect of free trade and competition and relevant enforcement measures, as well as the competence of the authorized body. But this law shall not be applicable to:

a. Labor relations;
b. Relations related to the intellectual property rights, with the exception of cases where such rights are used for restriction and elimination of competition;
c. Relations specified by Georgian Law on Securities Market, with the exception of cases where such relations impact competition at the goods market of the country and/or limits it or may cause its substantial restriction.

Goal of the agency is to support the liberalization of Georgian market, promotion of free trade and competition, in particular:

a. Excluding of the administrative, legal and discriminative barriers to the market entry by the state government, government of the autonomous republic and/or local self-government authorities;
b. Ensuring proper conditions for free access to the market for economic agents;
c. Inadmissibility of unlawful restriction of competition between economic agents;
d. Compliance with the principles of equality in the activities of economic agents;
e. Inadmissibility of the abuse of dominant position;
f. Inadmissibility of granting to economic agents of exclusive rights by the state government, government of the autonomous republic and/or local self-government authorities that unlawfully distort competition;
g. Ensuring publicity, unbiasedness, non-discrimination and transparency of decision making by the authorized body to maximal possible extent.

The prosecutor is the chief legal representative of the prosecution in countries with either the

common law adversarial system, or the civil law inquisitorial system. In Georgia, The main principles of activity of the Prosecutor's Office of Georgia are as follows: Legitimacy; Protection of rights and freedoms of individuals, protection and respect of rights of legal entities; Professionalism and competence; Objectiveness and impartiality; Unity and centralization, subordination of all the subordinate prosecutors and other staff members of the Prosecutor's Office to the Minister of Justice of Georgia; Political neutrality.

The core directions of activity of the Prosecutor's Office of Georgia are following: In cases stipulated by the law, conduction of preliminary investigation in the full extent; Supervision on accurate and regular implementation of the law during the activity of the operational-investigative organs; For provision of criminal prosecution, implementation of procedural supervision on the stage of the preliminary investigation; Checking of the facts on violation of rights of imprisoned persons and procedural obligations in the institutions of arrest, pretrial-detention, imprisonment and suppression places, as well as, in other institutions, which execute a punishment or other coercive measures imposed by a Court; Participation as a party – public prosecution, in a criminal law case at a Court; Coordination of fight against a crime; Provision of implementation of measures on human rights protection; Conduction of investigative and other procedural actions on the territory of a foreign country and execution of such actions on the territory of Georgia with the request of the competent organs of a foreign country. As well, for the purposes of putting a criminal responsibility upon an individual and for serving his/her sentence, extradition of the citizen of Georgia from a foreign country, and for the same purposes, extradition to the foreign country of its citizen; Implementation of other authorities according to the Georgian law "On Prosecutor's Office" and Criminal Procedure Rules legislation. (Particular powers related to the business law, which the prosecutor's office has as the enforcement agency, are discussed in paragraph 7).

The National Bank of Georgia (NBG) is the central bank of Georgia. Its status is defined by the Constitution of Georgia. The main objective of the National Bank is to ensure price stability.

Georgia's first central bank was established in 1919. In its current form the National Bank of

Georgia has existed since 1991.

According to the Constitution of Georgia, the National Bank is independent in its activities. The members of Georgia's legislative and executive bodies do not have the right to intervene in the NBG's activities. The rights and obligations of the National Bank of Georgia as the central bank of the country, the principles of its activity and the guarantee of its independence are defined in the Organic Law of Georgia on the National Bank of Georgia.

The National Bank of Georgia implements monetary policy according to the main directions of the monetary and foreign exchange policy defined by the Parliament of Georgia. It holds, keeps and disposes the international foreign reserves of the country. Through its regulation and monetary instruments, the National Bank of Georgia is responsible for ensuring the fulfillment of the basic functions and objectives assigned to it by law.

The National Bank exercises supervision over the financial sector for the purposes of facilitating financial stability and transparency of the financial system, as well as for protecting the rights of the sector's consumers and investors. Through the Financial Monitoring Service of Georgia, a legal entity of public law, the National Bank undertakes measures against illicit income legalization and the financing of terrorism. In addition, the NBG is the banker and fiscal agent of the government.

The NBG is responsible for performing and disseminating financial and external sector statistics in accordance with international standards and methodologies, and also for the effective and proper functioning of payment systems. The Bank has the sole right to issue money units as legal tender in the territory of Georgia, as well as the right to mint commemorative coins for numismatic and circulation purposes.

The National Bank of Georgia may provide banking services to foreign governments, foreign central banks and foreign monetary authorities, as well as international organizations. The National Bank participates in the activities of international organizations that pursue economic stability in

the monetary sector through international cooperation.

Those authorities are important to be discussed, because they have special powers in order to enforce the entity to do or not to do legal actions, for example, compel the production of information.

7. What powers do those enforcement agencies have to compel the production of information (i.e documents, answers to questions)?

Freedom of information is one of the indivisible parts of legal and social sectors based on Article 24 of the Constitution of Georgia. 24.1 "Everyone shall be free to receive and disseminate information, to express and disseminate his/her opinion orally, in writing or otherwise." However, this right cannot be absolute. Consequently, there are some peculiarities connected with the sources and ways of receiving information.

What is "insider information"? – It is an information about the corporation that is available only to insiders and is not revealed to the general public.

The definition of the insider information is provided by Article 45 of the Law of Georgia on the securities' market (hereafter-the Law on the securities' market) according to which the insider information is private essential information regarding the plans or condition of a publicly listed company that could provide a financial advantage when used to purchase or sell shares of the company's stock.

It should be pointed out that due to the absence of regulations this problem is less urgent. Consequently, it demands the process to be solved.

Directives of the EU and the EU Parliament of 28 January 2003 on insider treaty and market manipulations/abuse of power of an insider information should be taken into consideration. This

Directive aims at preventing market abuse in order to preserve the proper functioning of the European Union's financial markets.

Term: Georgian legislation should be harmonized with the regulations of the above mentioned directives within the period of 5 years after the EU-Georgia Association Agreement (hereafter-the Association Agreement) enters into force.

Furthermore, it is essential to take into account the EU directive 2004/72/EC of 29 April 2004 which supports the enforcement of 2003/6/EC related to the relationship of product derivation, making the list of manufacturing insiders, information concerning officials' legal and illegal transactions.

Term: Georgian legislation should be harmonized with the regulations of the above mentioned directives within the period of 7 years after the Agreement enters into force.

The Agreement entered into full force on 1 July 2016 but the Georgian legislation is not yet harmonized with the directives mentioned in the previous paragraph since generally the process of harmonizing the Georgian legislation with the EU legislation has not finished up to date.

As regards the enforcement agencies, the National Bank of Georgia (hereafter-the National Bank) is one example of them. Article 55[1] of the certain law vests the rights and powers of the National Bank toward restrictions and sanctions. In the list of the National Bank rights and powers on managing sanctions on securities the point "e" is significant to be discussed. The power spreads over the breach of procedures on demanding secret/confidential information from the registrars of securities, broker companies, their staff and officials.

The article does not indicate the limit of sanction and the rule of its usage, but supports just its regulation, proved by the order 35/04 of the National Bank President from 14 February 2012. Conditions for the prohibition of market abuse and the amount of fines are given in the article.

Prosecution is appeared to be as an Enforcement Agency either as criminal code of Georgia prohibits collecting/spreading information which is not publicly available (insider dealing). Due to the dim norms some collision can be noticed: the Article 314 is somehow like the Article 202. Prohibition conditions are the same but the source of crime in the definite case is "privacy of bank insider information". According to the Article 45 this type of conduct can undermine the general principle that all investors must be placed on an equal footing. The Member States therefore prohibit any person possessing information from disclosing privileged information to any other person outside the scope of the exercise of their employment, recommending any other person to acquire or dispose of financial instruments to which that information relates, engaging in market manipulation. As "privacy of bank insider information" do not apply either to trading in own shares or to the stabilization of a financial instrument, but to the bank securities as national as private ones. The issuers of financial instruments must publish information which concerns the said issuers as soon as possible and post it on their website. If an issuer discloses privileged information to a third party in the exercise of his duties, he must make public disclosure of that information. In fact the Article 202 represents somehow the manufacturing spy article which is in contrast with the legislation.

Taking into consideration all the above mentioned we can easily come to the conclusion that Georgian legislation will pay more attention to the insider information, to the clarification of its regulations and rules.

8. In what circumstances may information be withheld from enforcement authorities (e.g legal privilege, privilege against self-incrimination)

There are certain circumstances under which information possessed by corporations may be withheld from the enforcement authorities. Two aspects are particularly worth mentioning:

- Legal privilege;
- Privilege against self-incrimination.

Legal Privilege

The legal privilege is formed by three aspects:

- Statutory protection of the communication between the accused and his/her defense counsel;
- Lawyer's obligation of confidentiality in civil law;
- Presence of particular sorts of secret information possessed by a corporation.

8.1.1 Statutory Protection of the Communication between the Accused and his/her Defense Counsel

Such a protection is guaranteed by Article 43 of the Criminal Procedure Code of Georgia (hereafter-the Criminal Procedure Code). This Article is particularly important as communication between the accused chairman of the corporation and his/her defense counsel largely entails discussing corporate affairs which are preferred to be maintained secret. Hence, such pieces of information are deemed confidential according to Article 43.1. In addition, Article 43.3 provides a crucial regulation pursuant to which "The communication of the detained or arrested accused person with his/her defence counsel may only be restricted by means of visual surveillance". This provision directly constitutes one of the circumstances under which a piece of information may be withheld from enforcement authorities, in this case-from the Prosecution Agency and the Court.

8.1.2 Lawyer's Obligation of Confidentiality in Civil Law

Such an obligation is generally laid down in Article 38.6 of the Law of Georgia on Lawyers (hereafter-Law on Lawyers), according to which "Any information received by a lawyer from a client or from another person seeking legal advice shall be confidential". Furthermore, pursuant to Article 4.1 of the Lawyers' Code of Professional Ethics of Georgia (hereafter-Lawyers' Ethics Code), any kind of information, disclosed to a lawyer during performance of his/her professional duties, is confidential. It must not be accessible to any third parties (including the enforcement authorities). Furthermore, Art. 4.2 stipulates that the lawyer's obligation of confidentiality is not limited in time (i.e, it is perpetual). In addition, when a corporation as a legal person is charged with a crime, the corporation's defence counsel can refuse to act as a witness and reveal

information concerning the corporation which became known to the lawyer when fulfilling the duties of a defence counsel in the given case. This legal privilege is granted to a lawyer by Article 50.1 "a".

8.1.3 Corporation's Secret Information

Nowadays an absolute majority of corporations possess pieces of information which are unique and essential in order to successfully carry out particular commercial operations. Sometimes such pieces of information are the sole guarantee of a company's financial viability. Consequently, those pieces of information are always kept secret by corporations and every employee, from the company's chairman to the other 'ordinary' workers have a contractual confidentiality obligation (i.e under no circumstances is any employee entitled by any means to disclose the confidential information in question). If the enforcement authorities were entitled to obtain the mentioned secrets, it would lead to business collapse in Georgia.

Such kinds of secret information are as follows:

- Commercial secrets;
- Professional secrets.

8.1.3.1 Commercial Secrets

In the opinion of many businessmen and business lawyers, this kind of secrecy is the most common and popular among corporations. However, there are certain statutory criteria for determining whether a piece of corporate information is a commercial secret. This issue is regulated by the General Administrative Code of Georgia (hereafter-the General Administrative Code), in particular Article 27^2 part 1. Pursuant to this provision, a commercial information may be an "information on a plan, formula, process, or means of a commercial value, or any other information used for manufacturing, preparing, processing of goods or rendering services, and/or is a novelty or a significant result of technical activity, as well as other information that may prejudice the competitiveness of a person if disclosed." This description once again affirms the vitality of commercial secrets. As can be deducted from this description, commercial secrets are connected with the entire running of a particular business.

8.1.3.2 Professional Secrets

The name of this type of secrecy hints that it relates to a specific knowledge possessed by a corporation's employees. And this is the case, definitely. The definition of a professional secret can be found in Article 27[3] of the General Administrative Code. This provision stipulates that "Information about personal data or a commercial secret of others that has become known to a person while performing his/her professional duties shall be a professional secret". This is quite logical since, for example, a corporation's commercial secrets would not be put into practice without letting the employees know about them. The corporation cannot run itself-its operations are carried out by people. Employees make a primary contribution to that process. Hence, employees perform various corporate operations with recourse to the above mentioned secrets. In light of all this Article 50.3 "c" of the Criminal Procedure Code demonstrates respect towards professional secrets and allows the court to discharge "a person who has been employed on the condition of non-disclosure of commercial or bank secrets" from the duty of a witness. Notably the commercial and bank secrets are particularly mentioned but they also fall into the category of professional secrets since they become known to an employee in the course of performing his/her professional duties. However, not only ordinary employees but also a corporation's lawyers are required by Article 3."g" of the Law on lawyers to respect a professional secrecy.

8.2 Privilege against Self-incrimination

This sort of privilege is tightly connected with criminal proceedings. To begin with, Article 42.8 of the Constitution of Georgia forms the general and fundamental legal basis for the privilege against self-incrimination. This provision sounds like the following: "No one shall be obliged to testify against themselves or against their familiars that are determined by law". On the other hand, for the purposes of the present research relevant legal provision of the Criminal Procedure Code is of particular importance. Article 15 of the Criminal Procedure Code lays down the right to refuse testimony-"No one shall be obliged to testify against oneself or other persons specified in this Code". The present right tightly relates to a corporation's chairman's right to withhold information from enforcement authorities. Consequently, the chairman cannot be forced to reveal the above mentioned relevant information regarding the corporation when criminal proceedings are initiated against him/her.

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

Law of Georgia on Personal Data Protection is being operated since 2012 and the Institute of the Personal Data Protection Inspector was established in 2013 on the basis of Georgian Law on the Personal Data Protection. The Inspector controls and supervises the implementation of the personal data protection legislation and legitimacy of personal data processing.[30]

First of all we should establish a legal definition of "labour relations" according to Georgian Legislation. According to Article 2.1 of Labour Code of Georgia "labour relations" is performance of work by an employee for an employer under organised labour conditions in exchange for remuneration. [31]

In terms of labour relations, submission of documentation containing different types of personal data is established by legislation. It should also be noted that according to Article 5.1 of Labour Code of Georgia an employer may obtain information about candidate that is necessary for making a decision to employ him or her besides according to Article 5.4 the information obtained by an employer about candidate and the information submitted by the candidate may not be available to other person without consent of the candidate, except as provided for by law. [32]

According to Article 2 "a" of Law of Georgia on Personal Data Protection "personal data" is any information connected to an identified or identifiable (a person shall be identifiable when he/she may be identified directly or indirectly in particular by identification number or by any physical, physiological, psychological, economic, cultural or social features specific to this person) natural person. [33]

[30] https://personaldata.ge/en/about-us/inspector
[31] https://matsne.gov.ge/en/document/view/1155567
[32] https://matsne.gov.ge/en/document/view/1155567
[33] https://personaldata.ge/manage/res/docs/unofficial%20translations/PDP%20LAW%20ENG%20%20-.pdf

Office of the Personal Data Protection Inspector prepared special recommendations regarding personal data protection in labor relations. Goal of this recommendations is to establish high standard of personal data protection in employment and labor relations, to protect rights of data subjects (employees), to raise awareness of data controllers (employees) regarding the issues of personal data protection, and to prevent improper and/or inconsistent interpretation of law. [34]

In certain cases the basis for data processing is the consent of data subject (employee), which must be obtained in a form established by the law. According to Article 2 "g" of Law of Georgia on Personal Data Protection "consent" – a voluntary consent of a data subject, after receipt of the respective information, on his or her personal data processing for specific purposes expressed orally though telecommunication or other appropriate means, which enables clearly establishing the will of the data subject. [35]

The employee has the right to refuse further processing of data processed upon his/her consent. It must be considered that the refusal on consent does not have retroactive effect. The employee has the right to have information about processing of his/her personal data; in particular, which data are processed, for what purpose and means, and whether personal data are transferred to third parties, etc.

In accordance with the law, inactivity cannot be viewed as consent, though provision of information containing personal data by applicant/candidate to the employer is considered as the consent of data subject.

Consent is given on:

- Data category;

[34] https://personaldata.ge/manage/res/docs/recommendation/Eng/Recommendations%20Regarding%20Personal%20Data%20Protection%20in%20Labor%20Relations%20%20%20.pdf , p.1
[35] https://personaldata.ge/manage/res/docs/unofficial%20translations/PDP%20LAW%20ENG%20%20-.pdf

- Purpose of data processing;
- Group of persons, to whom the data can be handed over;
- Conditions of data transfer to third person.

Personal data should not be transferred to the third party without employee's consent, with exception of grounds determined by the law. Employee's consent on personal data processing is not mandatory if there is other ground for data processing set forth in the Law of Georgia on Personal Data Protection, for instance, legal requirement to provide employee's payroll information to tax authorities. (a domestic enforcement authority).[36]

As the institute of the Personal Data Protection is quite new and don't have years of history and experience in Georgia, a lot of important work is being done every year. Many private institutions operating in Georgia transfer data abroad upon the request of foreign shareholders and partners. Existence of data protection guarantees in Turkey and three international organizations (the Commonwealth of Independent States, Interpol and Central Asian Regional Information and Coordination Centre for Combating Illicit Trafficking of Narcotic Drugs, Psychotropic Substances and their Precursors (CARICC)) was assessed during 2015.

If Relevant, Please Set out Information on the Following:

As it is clearly shown in the 2nd paragraph, 4 major offences done, by entrepreneur are against state interests. Because of the nature of offences, not everyone can find out about violations made in business. State with all its measures, is the main defender against mentioned offences. Ministry of Finance of Georgia is center figure in this case. Revenue Service, a legal entity of public law of mentioned Ministry, is founded to support and keep in order business in Georgia. They create tax system and give taxpayers information about their rights and obligations. As the goal, of this system is to establish flexible and just system for everyone. In this service, there is some

[36] https://personaldata.ge/manage/res/docs/recommendation/Eng/Recommendations%20Regarding%20Personal%20Data%20Protection%20in%20Labor%20Relations%20%20%20.pdf , p. 4-5

departments, which must be pick out as main guarantors of defending state interests, and those departments are: Tax Monitoring Department, Financial Department, Audit Department and Dispute Resolution Department. All of them are focused on monitoring business sector in Georgia, special mobile-groups are appointed to check entrepreneurs and their activities on-site, give useful recommendations, or if necessary make special order, which will be sent to proper department. Revenue Service, with its latest formation, is still new, but fast-growing entity, which supports recovery of business in Georgia.

To sum up, inculcated different types of electronic services made relations between Revenue Service and customers easier.

Besides this, modern technologies and proper attitudes gave state better control system, they can monitor all the registered businesses online, save time and increase effectiveness of their job.

Means and availability of and penalty reduction is plea bargain. The subject matter of plea bargain is provided in the Art. 209 of Georgian Criminal Procedure Code. According to the first part of the article the basis of passing a sentence without discussing the merits of the case by the court is plea bargain. According to it, the accused admits committing of the crime and agrees the prosecutor upon sentence, alleviating of the accusation or partly withdrawal of the charge. According to the Art 210 (concluding of plea bargain) - In special cases the Chief prosecutor of Georgia or his deputy has the right to file motions about fully or partly relieving of the accused from civil liability. The state bears the responsibility for civil liability. However, persons who have committed some specific types of crimes can be discharged from criminal liability in some cases. According to the note of Art. 221 - Commercial bribery (Georgian criminal code)- for the offence provided for by paragraph 1 or 2 of this article, criminal liability shall not apply to a person who has voluntarily notified this fact to the authorities conducting criminal proceedings. A decision to discharge a person from criminal liability shall be taken by the authorities conducting criminal proceedings. According to the note of Art.339 Bribe-giving (Georgian criminal code) a bribe-giver shall be discharged from criminal liability if he/she has voluntarily declared about it to the authorities conducting criminal proceedings. A decision to discharge a person from criminal liability shall be taken by the authorities conducting criminal proceedings. According to the note

of 339.1 influence peddling (Georgian criminal code) for the offence provided for by paragraph 1 of this article, criminal liability shall not apply to a person who has voluntarily notified this fact to the authorities conducting criminal proceedings. A decision to discharge a person from criminal liability shall be taken by the authorities conducting criminal proceedings.

11. If relevant, please set out information on means of cost mitigation

Cost reduction is the process used by companies to reduce their costs and increase their profits. Depending on a company's services or product, the strategies can vary. Every decision in the product development process affects cost. The stability of the business environment is a precondition to the stability of the tax legislation. In terms of stability, it is important for tax policy and its implementation that the most important instrument- tax legislation is stable. Tax is a mandatory, unreserved contribution to the budget, which is paid by a taxpayer. The types of taxes are of local and national importance. The overall state taxes are obligatory on the whole territory of Georgia.

From January 1st, 2011 the special tax regiment was enforced for micro and small entrepreneurs. Reformers estimated that these changes should have led to simplification for smaller operators, but in fact, regulations that were established, were quite complicated and unacceptable for entrepreneurs.

Namely: Micro Business status is given to an individual entrepreneur, whose annual income does not exceed 30,000 GEL. This means that his average daily income should not exceed 82 GEL, which is a rather small sum. Small business taxable income is taxed at a 5% rate. Income tax deductions by 5% for many entrepreneurs are much more than a lot of income after deductions - 20% income tax. Therefore, this mode is not attractive to many entrepreneurs.

At the same time, costs are not deducted in micro and fixed taxpayer purchased goods / services costs (Article 106). According to the Tax Code of Georgia, Individual income is taxed at 20% rate, regardless of the revenue amount. In addition, there is no tax-free minimum income and any

income is taxed (including Less than a living wage income). Proportional taxation, according to the social justice, can not be counted as the acceptable system, however, this kind of tax administration is much simpler. Obviously, fairly liberal (low) income tax rate operates in Georgia. Tax privilege shall be compared to other taxpayers of certain category of preference granted, In particular, the opportunity to pay less tax, or be tax exempt. According to the Tax Code of Georgia, the income tax is applied in any cases, even when its legitimacy is disputable. Special tax regimes apply to:

a. Micro business status individual;
b. Small Business Entrepreneur individuals;
c. Fixed taxpayer status holders.

Micro business is exempt from personal income tax. Small business taxable income, except for paragraph 2 of this Article shall be taxed at 5 percent. Small business taxable income is taxed at 3 percent, if the small business status to a natural person has a joint income-related expenses in the amount of 60 percent of gross income (except for accrued employee severance costs) documents.

Liability insurance is loaded with elements of fiduciary relationships. Fiduciary relationship is a relationship in which one party places special trust, confidence, and reliance in and is influenced by another who has a fiduciary duty to act for the benefit of the party called also confidential relationship fiduciary relation. A fiduciary relationship may be created by express agreement of the parties, or it may be imposed by law where established by the conduct of the parties. Typical fiduciary relationships exist between agents and principals, attorneys and clients, executors or administrators and legatees or heirs, trustees and beneficiaries, corporate directors or officers and stockholders, receivers or trustees in bankruptcy and creditors, guardians and wards, and confidential advisors and those advised. In legal literature, the contract of insurances is not considered as a type of a fiduciary relationship. However, there are exceptions. For instance, in this regard, it is interesting to consider the opinions expressed about the liability insurance. Liability insurance, in case of an injured third party insurer to defend the insured, should consider the insurer's primarily interests. During the negotiations, the insurer must agree to only a proposal, which will be the most favorable for the insured.

Directors and officers liability Insurance is liability insurance payable to the directors and officers of a company, or to the organization(s) itself, as reimbursement for losses or advancement of defense costs in the event an insured suffers such a loss as a result of a legal action brought for alleged wrongful acts in their capacity as directors and officers.

Directors and management of liability insurance protects directors and the senior management and other employees to criminal or civil charges for third parties from the decisions taken within their authority in return. These third parties include: The shareholders; employees; customers; competitors; etc. The policy covers: default of secrecy; mistakes; negligence (not professional duty); the actions of an insured company's directors or officers; violation of employment regulations. Independent directors, the company's Supervisory Board, equally share the responsibility and obligation of the company's management, which includes individual, reputation, and possibly, legal and financial risks. Naturally, independent directors will receive compensation for the risks. As for professional duty, it involves all the loss coverage for which the insured submitted a claim for damages caused by the violation of professional duties.

According to the Tax Code of Georgia, if a specific tax \ sanction exceeds the amount of assessed tax amount, in case of a taxpayer's request, the tax authority :

a. Will transfer the overpaid amount to the taxpayer in future tax account;
b. The overpaid amount of taxes will be transferred to the state budget.

If taxes and penalties paid exceed the sum of the accrued taxes and sanctions, in case of the request of the taxpayer or other liable person, the tax authority will return the remaining amount with the balance available on the frame no later than 3 months after the request.

Legislative Problems and Our Recommendations

A legislative gap refers to the following situation: Georgian market is often characterised by operation of a franchisor company and its franchisee. The problem is that the franchisee has to set exactly the same prices as the franchisor's as a part of the bilateral business policy. In order to

survive financially. If the franchisee sets lower price, then customers will consider the franchisee's products as inferior. However, the Competition Agency regards the franchisee's above mentioned behaviour as price fixing. Business freedom in Georgia gets harmed by this approach. Consequently, we think that an amendment should be made in the Law on Competition. Namely, we recommend introducing a further exemption for franchised businesses-part 1^1 in Article 9.1 which would sound like the following: "Price fixing shall be exempted if essential to run a franchise-based business." And as regards the 3rd part of Article 9, it should be removed as it hinders the free business development in Georgia.

First of all, problem is with the level of legal education of society, which develops into serious offences. Although regulation about forming structure of companies is easily perceivable, in reality it is mostly formally done and entrepreneurs have to face penal law. Cooperatives, which was mentioned in the 5th paragraph, are supposed to be founded in villages and places like that, to give local inhabitants possibility develop their country, but as we saw, structure of this company is quite composite, and can be hardly acquainted, so some legal reforms in this case will not be useless. As we see in both cases, state is nominated as one of the main characters, which tries regulate business in Georgia. Controlling relations between companies is absolute right of government. Revenue Service is still new-born entity and needs time for formation. They can not control all illegal businesses duly and also fines are disproportionally high in compare with offences.

Regarding the changes in Tax Code of Georgia about Micro Business, entrepreneurs' interest was caused by low taxes, however, those in favor of micro-business, ended up being in minority. Despite the facilitation of micro-business production, it will face some problems, in particular, none of the large enterprise will be able to purchase service or products from micro-business status entrepreneurs as far as it will be unable to subscribe to the invoice. Furthermore, micro business representative enterprise will face functioning problems as it won't even be able to manage costs and expenses involved in all elements of the production of such accounting, which is necessary for producing businesses. Instead of supporting business with such classification, it should be supported by alleviating tax. In case of any dispute, if the tax service is not in dominant position (For example, the tax service is free from judicial taxes) and vague and transitional provisions are

not used in favor of the tax office, it will create a precedent according to which the tax dispute will be solved in favor of the entrepreneur. The existence of such practices will lead to businesses desire to expand production and increase the trust of the tax system; Entrepreneurs will have a feeling of equality; Entrepreneurs will turn out to acquire the same legal status as a tax service.

While working on the specific problems we could think about the most presumable changes that are going to be make in the legislation of Georgia upcoming years.

Besides the importance of the insider information, it should be pointed out that due to the absence of regulations this problem is less urgent in Georgia. Consequently, it demands the process to be solved. Agreement entered into full force on 1 July 2016 but the Georgian legislation is not yet harmonized with the EU directives (discussed in the article N7) since generally the process of harmonizing the Georgian legislation with the EU legislation has not finished up to date. Besides the conditions for the prohibition of market abuse and the amount of fines are given in the law, it does not indicate the limit of sanction and the rule of its usage, therefore it needs to be defined concretely.

Second possible change is going to made reads as follows, generally, the law distinguishes between different categories of people according to their privileges. Only certain categories have a right not to give evidence about the matter. For example, Article N 50 (Georgian Criminal Procedure Code) states that a witness interrogation and investigation of important informational object, document, or other things transmission, is not required by the lawyer, clergyman, a close relative, and others (in appropriate circumstances),which puts them to a higher level. In other cases, the witness's refusal to testify, or not to appear for the trial is punishable by law.

Secondly, the serious problem is that the individuals, who are required to protect the secrecy of their official position, have the right to refuse to testify as long as they are not exempted from their duties. Consequently, there will be the risk their dismissal from the service in order to open the case. It puts them in unequal situation with the country's interests.

And finally, one of the main factor seems to be that the witness's testimony refusal may cause the case to fall, preventing the expected outcome, the impossibility of restoration of justice, which contradicts the principles of the Legal State.

Despite the achievements that have been made during these several years in legislation on personal data protection and in developing the institute itself, there are still lots of challenges related to privacy guarantees and implementation of personal data protection standards.

Every year office of the personal data protection inspector prepares an annual Report on the State of Personal Data Protection and Activities of the Inspector of Georgia. In the Report of 2016 year, have been analyzed problem connected with employee data and its processing In public and private organisations personal data processing is done according to labour legislation and with the consent of the employer. In some cases, organisations have a legitimate interest to process personal data in order to control the quality of service, but this shouldn't be done disproportionate with the employee's interests and rights.

During the reporting period, was done inspection of several large private organisations. It was revealed that organisations indefinitely kept different categories of personal data, even in the case, when there was no lawful purpose of processing such data. For example, it was revealed that organisations kept the employment data of candidates, who failed in the contest, for several years. Stored data included: resumes of candidates, their references, information about candidates' family members and the results of candidates' tests. The organisations failed to justify the purpose of storing personal data of candidates for an indefinite period.[37]

To solve the problem, legislation should be more specified and we should concrete period of time about storing personal data of employees in Law of Georgia on Personal Data Protection. We can clarify this flaw in legislation. There can also be done exception depended on the purpose of storing personal data for longer period than it is specified in law.

[37] https://personaldata.ge/manage/res/images/2017/angarishi/Annual%20Report-2016.pdf, p. 29-30

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- https://personaldata.ge/manage/res/images/2017/angarishi/Annual%20Report-2016.pdf
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- https://personaldata.ge/manage/res/docs/recommendation/Eng/Recommendations%20Regarding%20Personal%20Data%20Protection%20in%20Labor%20Relations%20%20%20.pdf

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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction.

1.1 Introduction

Under Greek law, criminal activity is punishable only when committed by human beings. As a result legal persons escape criminal responsibility. Nevertheless, it is of high importance to describe the framework and the limits of the sanctions regarding natural persons, as specified in the Greek Criminal Code (GCC), in order to be able to understand the severity of the crimes that are going to be examined.

The two main categories of sanctions are penalties and security measures (art. 50-76 of the GCC).[1] Penalties are further categorised into main penalties and ancillary ones, such as the deprivation of political rights by operation of law, the prohibition to practice and the publication of the condemnatory decision, which accompany the main ones. When it comes to the main penalties, these threaten the freedom and property of the person and not its life, given that the death penalty has long been abolished.

Penalties against personal freedom are divided into 5 categories as art. 51 GCC indicates. The ones relating to the crimes that are going to be examined are: a) incarceration (lifelong or temporal one with a minimum sentence of 5 years and a maximum of 20 years), b) imprisonment (with a minimum sentence of 10 days and a maximum of 5 years), and c) detention (with a minimum sentence of one day and a maximum of one month).

According to art. 57 GCC, the penalties on property are divided into pecuniary penalties (with a minimum penalty of 150 EUR and a maximum of 15,000 EUR unless differently provided for) and fines (with a minimum fine of 29 EUR and a maximum of 590 EUR).

[1] Maria Kaiafa-Gbandi, Nikolaos Bitzilekis and Elissavet Symeonidou-Kastanidou, *Law of Penal Sanctions* (Sakkoulas, 2008) 23-51.

1.2 List of Crimes

At the following paras there is a brief reference to the core relevant legislation connected with anti-bribery and corruption, fraud and anti-money laundering and their sanctions.

1.2.1 Anti-bribery and Corruption

Since 2012 the European Commission and the Greek authorities have been working on the drafting of a common strategy for the elimination of the phenomenon of corruption.[2] The current GCC was firstly introduced in 1951. Since then there have been many amendments to the legal framework resulting in critical changes and Law 4254/2014 is among the prominent. Its connection with the tackling of anti-bribery and corruption will be explained below.

Bribery in its basic form is regulated in art. 235 and 236 GCC which punish venality and bribery of a civil servant respectively. Par.1 of art. 235 imposes punishment on any civil servants who ask or receive an unfair benefit, whereas par.1 of art. 236 imposes punishment on anyone who offers, promises or provides a civil servant with such an unfair benefit. Both crimes provide the same sanction (imprisonment with a minimum sentence of one year and a pecuniary penalty of 5,000-50,000 EUR). Both crimes include a provision for aggravating circumstances. The incarceration in such case is increased to a maximum of 15 years (235 par.2 GCC) and 10 years (236 par.2 GCC), and the pecuniary penalty to 15,000-150,000 EUR. A difference between the 2 articles is that with regards to venality (passive bribery) of a civil servant more severe sanctions (incarceration up to 10 years and a pecuniary penalty of 10,000-100,000 EUR) can be imposed in cases the latter is committed by profession or habit. On the same line, art. 237 GCC imposes punishment for the active and passive bribery of a person in the judiciary or an arbitrator, providing incarceration and pecuniary penalties of 15,000-150,000 EUR.

[2] Report of the European Union on the Fight against Corruption, Annex for Greece, COM(2014) 38 final, Brussels 3/2/2014.

In addition, passive bribery of politicians and political officers is punished by a art. 159 GCC. The Prime Minister, Member of the Government, Vice Ministers, Prefects, Mayors, Members of Parliament or the local communities as well as any Member of the European Parliament who asks or receives an unfair benefit is punished with incarceration and a pecuniary penalty of 15,000-150,000 EUR. In 2014 Law 4254/2014 introduced a new article in the GCC, art. 159A, in order to specifically tackle the phenomenon of active bribery of politicians. As that article reads, anyone who promises or provides an unfair benefit of any kind, directly or via a third person to one of the persons mentioned in art. 159, is punished with incarceration and a pecuniary penalty of 15,000-150,000 EUR. para 2 of art. 159A also imposes imprisonment on the Director of a corporation or the person in charge of the decision-making, in case that he/she did not deter the person who committed the crime.

art. 237A and 237B GCC threaten those who commit venality and bribery and are engaged in the private and the entrepreneurial sector with imprisonment of at least one year and/or the pecuniary penalty of 5,000-50,000 EUR. It should be mentioned that in cases when the aforementioned crimes have international dimensions the applicable articles are 5 seq. of the GCC and not Law 4254/2014.[3]

art. 238 GCC is connected with art. 235-237B GCC as it additionally provides the imposition of confiscation of the gifts and all other benefits that the culprit received as a result of the crime.. If these products cannot be found, confiscation can be imposed on other properties of the same value owned by the culprit. Alternatively financial sanctions can be imposed by the Court.

In addition, there is a special provision regulating bribery and venality taking place in the field of sport and the relevant S.A. corporations. art. 132 of Law 2725/1999 regulates the matter, providing stricter penalties and additional disciplinary penalties to the culprits who are closely involved with athletic organizations.

[3] Christos Mylonopoulos, 'Issues of international criminal law in the legislation about corruption'<http://www.mylonopoulos.gr/publication/article/79/provlimata-diethnoys-poinikoy-dikaioy-sti-nomothesia-peri-diafthoras.html> accessed 10 March 2017.

1.2.2 Fraud

Fraud presupposes the exercise of deception.[4] art. 386 GCC regulates fraud in its basic form whereas art. 386A GCC regulates computer fraud. The central provision of art. 386 GCC reads: 'Anyone who, with the purpose of gaining or conferring to another economic benefits, damages the property of another by convincing a third person to commit an act, omission or forbearance, by knowingly presenting false facts as true ones or through impermissibly failing to disclose true facts, is punished by a minimum of three months' imprisonment'.

Another type of fraud is accounting fraud. Law 2523/1997 provides criminal penalties for false registrations in the accounting books of an enterprise or for failure to register transactions. In addition, art. 54-63d of Law 2190/1920, which is the fundamental regulatory framework regarding S.A. corporations, provides the imposition of criminal sanctions for inaccurate or false balance sheets and false or inaccurate declarations on the financial status of an S.A. company.

1.2.3 Anti Money Laundering

The previously valid Law 2331/1995 was replaced by Law 3691/2008, which transposes into national legislation Directives 2005/60/EC and 2006/70/EC. Its aim is to reinforce and improve the legislative framework on the prevention and suppression of money laundering. Important amendments to the anti money-laundering framework were introduced with Laws 3875/2010 (crime of terrorism funding), 3923/2011 (structure of the Anti money Laundering authority) and 4170/2013.

art. 45 of Law 3691/2008 lists the sanctions that can be imposed to people held responsible for money-laundering. The first paragraph of art. 45 provides imprisonment and the imposition of pecuniary penalties of very high value that can reach the amount of 2,000,000 EUR. Confiscation of the assets is also provided in art. 46.

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[4] Adam Papadamakis, *Εγκλήματα κατά περιουσιακών Αγαθών (άρθρα 386-406)* (SakkoulasPublications, 2000) 88-91 [Greek].

In the same vein, there is a special provision regulating the cases in which legal entities are involved. According to art. 51, in case any of the criminal activities of art. 2 of Law 3691/2008 are committed, then the following measures can additionally be imposed, cumulatively or alternatively:

a. Where the obligated person is a legal entity or a company listed in a regulated market, a decision of the competent authority referred to in art. 6 (Anti-money laundering Authority) shall impose:
    i. an administrative fine of 30,000 EUR to 3,000,000 EUR depending on the benefit acquired;
    ii. provisional or final withdrawal or suspension of authorisation or prohibition of carrying out its business;
    iii. prohibition of carrying out of specific business activities or of the establishment of branches or of capital increases for the same time period;
    iv. provisional or temporary exclusion from public benefits, aid, subsidies, award of public works and services, procurements, advertising and tenders of the public sector or of its legal entities for the same time period.

1.3 Additional Sanctions

Apart from the aforementioned legislation, Law 2190/1920 regulating the S.A. Corporation includes a number of penal sanctions in art. 54-63d, relating to illegal activities in the context of the administration of an enterprise. These sanctions are, cumulatively or alternatively, imprisonment and the imposition of pecuniary penalties.

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

2.1 Introduction

Greek criminal law is based on the principle societas delinquere non potest which derives from the fact that only human beings can be the subjects of a crime.[5] As a result of this, a legal person cannot bear the criminal responsibility itself, since a criminal action is a 'social phenomenon' closely connected with the principle of culpability and can only be attributed to the will of humans. Legal persons are legal constructions and, therefore, fictitious social entities, which cannot literally be punished. This is the reason that administrative sanctions, such as financial sanctions or other types of administrative measures, can be imposed to a legal entity, whereas penal sanctions are de jure intended for humans.

Legal persons do not have criminal responsibility themselves, only the individuals who hold a corporate position can be held responsible under the criminal legal framework. Had it been possible to impose criminal sanctions on legal entities would result in shifting the responsibility from the real responsible-individual person to a legal fiction-entity. Apart from that, such a possibility would also present considerable enforcement and implementation difficulties.

It should be noted from the outset that the following analysis is linked with the crimes when committed by natural persons and especially those who act from within a legal entity and mainly within a Greek S.A. corporation (limited company). Against this background, in this section we will be presenting the criminal behaviour constituting the following offences: money laundering, corruption, bribery, fraud, market abuse and tax evasion.

[5] Ioannis Manoledakis, Ποινικό Δίκαιο – Επιτομή Γενικού Μέρος (7η εκδοση) , revised in 2005 by Prof.Maria Kaiafa-Gbandi and Prof. Elissavet Symeonidou-Kastanidou, Sakkoulas Publications, 178-182 [Greek].

2.2 Money Laundering

In general, money laundering could be defined as 'any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources'.[6] Money laundering and terrorist financing are frequently carried out in an international context. Therefore, they are thought to be best addressed on international level. The relevant legislation for the prevention of money laundering in Greece is Law 3691/2008, as modified by Laws 3875/2010, 3932/2011 and 4170/ 2013.

Money laundering can usually be committed in three stages:

a. placement, that usually entails a deposit at a bank;
b. layering, the offenders perform multiple transactions in order to ensure their anonymity and conceal the origin of the money; and
c. integration, the money is being legitimized.[7]

Money laundering can be committed by multiple acts, anyone of which could constitute the crime. art. 2 provides the definition:

a. conversion or transfer of property;
b. concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to the acquisition or ownership of, property;
c. possession or use of property;
d. participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the actions mentioned above, knowing that such property derives from a criminal activity of from participation in such.

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[6] Interpol, 'Money Laundering' <https://www.interpol.int/Crime-areas/Financial-crime/Money-laundering> accessed 15 January 2017.

[7] Nestor E. Kourakis, *Τα οικονομικά εγκλήματα (vol. 2),* Ant. N. Sakoulas, 2007) 275 – 277 [Greek].

The commission of money laundering requires knowledge of the illegal origin of the profit and intent of concealing the latter. Therefore, each act has to be suitable for the achievement of that aim. According to case law, the constitution of the crime requires clear and extensive knowledge of the nature of the main offence.[8]

In the same vein, money laundering requires the previous commission of another crime (main offence) from which the laundered money derives. Some of these crimes are listed in art. 3 and include, among others, passive or active bribery, bribery of a foreign civil servant and facilitation or concealment of the commission of such crime, as provided for in art. 2 of Law 2656/1998, bribery of employees of the European Union (hereinafter EU) or of the EU Member States, as provided for: a) in art. 2, 3, and 4 of the Treaty on Combating bribery of employees of the EU or of EU Member States, which was ratified by art. 1 of Law 2802/2000 (Government Gazette 47 A) and b) in art. 3 and 4 of Law 2802/2000 as well as market abuse.

However, there is also a catch-all clause adding to the list of main offences any serious offence, meaning any crime punishable by over 6 months in prison, from which the perpetrator can derive monetary gain.

Since money laundering is linked to a main offence, its punishment depends on the status of the main offence in question. For example, in order for money laundering to be punishable when committed abroad, the main offence must be considered a crime in the forum where it was committed as well as be included in the list of main offences previously mentioned. Also, in case money laundering is committed after the statute of limitations has passed on the main offence, there would be no crime. Lastly, case law requires that in case money laundering is not tried at the

[8] Stefanos Pavlou, *Ο Ν. 3691/2008 για την πρόληψη και καταστολή της νομιμοποιήσεως εσόδων από εγκληματικές δραστηριότητες και της χρηματοδοτήσεως της τρομοκρατία. Η οριστικοποίηση μιας διαχρονικής δογματικής εκτροπής και η εμπέδωση της κατασταλτικής αυθαιρεσίας,* Ποινικά Χρονικά 2008, σ. 923 επ. [Greek].

same time as the main offence, speculation over the latter's existence is not enough – the court will have to adequately specify the relevant circumstances of its occurrence.[9]

As not all crimes are eligible for the subsequent constitution money laundering, accordingly not all benefits deriving from a crime are, solely the ones of clear monetary value. In addition, a direct and causal link is required between the main offence and the benefit.[10]

2.3 Corruption and Bribery

Law 4254/2014 codified the overlapping and fragmented legal landscape on corruption and expanded its reach, while incorporating the text of international conventions that Greece has adhered to.[11] Bribery can generally be defined as the act of providing a benefit to a person acting under a certain capacity in exchange for an act or omission relevant to their capacities.[12]

Bribery is punishable both in its passive as well as in its active form and can take place in the private and public sector. Active and passive bribery in the private sector is punishable but solely as a misdemeanor and only for acts contrary to the duties of the employee in question. Also, directors of companies that out of negligence did not prevent a subordinate to commit bribery that benefits the company are also liable.[13]

With regards to the public sector, art. 235 par. 1 punishes public employees that ask or receive any kind of illegal benefit, while par. 3 of the same article punishes public employees that solicit illegal benefits by taking advantage of their capacity. Accordingly, the supervisor of the public employee in question would also be liable for negligently not preventing the commission offence.

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[9] Polychronis. Tsiridis, *Ο Νεος Νομος για το Ξεπλυμα Χρηματος (Ν. 3691/2008)*, (Nomiki Bibliothiki, 2009) 80-86, 93, [Greek].
[10] ibid 90.
[11] Christos X. Mylonopoulos, *Προβλήματα διεθνούς ποινικού δικαίου στη νομοθεσία περί διαφθοράς* <http://www.mylonopoulos.gr/publication/article/79/provlimata-diethnoys-poinikoy-dikaioy-sti-nomothesia-peri-diafthoras.html > accessed 10 January 2017 [Greek].
[12] Kourakis, *Τα οικονομικά εγκλήματα* (vol. 2), Ant. N. Sakoulas, 2007) 335 – 341 [Greek].
[13] GCC, art. 237B.

Active bribery of public employees can be committed by the promise or offer of a benefit and is punishable for requiring in exchange acts or omissions in accordance with or contrary to their duties. In that regard, art. 236 of the GCC adopts a broad definition of 'public employee' and punishes as a felony bribery aiming at acts contrary to their duties. Bribery of government officials - including members of the parliament and European officials - and judges through the offering of a benefit in exchange for an act or omission related to their powers also constitutes a felony offence.

Furthermore, for acts of bribery with regard to public employees, art. 6 of the GCC does not apply when the crime was committed abroad. Consequently, the law of the country where the crime was committed is irrelevant to it being punishable in Greece. In addition, given the broad definition of the term 'employee' as mentioned above, the public employee in question may not even fall into the definition of employee according to the national law.[14]

Lastly, art. 237A also punishes middlemen. A middleman would be anyone asking or receiving a benefit by promising to exert influence over others to act against or according to their duties.

2.4 Fraud

2.4.1 Law 2190/20 & the Greek Criminal Code

Law 2190/20 includes articles regarding the criminal behavior of founders or members of the Board of Directors of public limited liability companies falsely representing the capital, the names of the shareholders and every other significant fact that could have an impact on the company and would aim at the fraud of the public.[15] Law 2190/20, however, does not target every criminal activity that could be committed in a public limited liability company. The rest is left upon the articles of the GCC, namely Art. 386 regulating fraud. The criminal activity punished by Law

[14] Christos X. Mylonopoulos, *Προβλήματα διεθνούς ποινικού δικαίου στη νομοθεσία περί διαφθοράς* <http://www.mylonopoulos.gr/publication/article/79/provlimata-diethnoys-poinikoy-dikaioy-sti-nomothesia-peri-diafthoras.html >accessed 10 January 2017[Greek].
[15] Law 2190 Law n.2190 (Regarding SA companies} 1920 [Νόμος περί Ανωνύμων Εταιριών] art. 55-58a

2190/20 is reminiscent of the criminal behavior of market abuse, with the exception of the former requiring the capacity of an investor or of a member of the Board of Directors as well as false written representations. The parallel application is explained by the fact that Law 2190/20 came into force before the establishment of the legal framework for the operation of the stock exchange. Today, however, these articles are rarely applied in practice.[16]

2.4.2 Tax fraud

According to Art. 66 of Law 4337/2015,[17] tax fraud is committed by an act or omission (submitting a false declaration of income or none at all) and can be committed by multiple acts, anyone of which can constitute the crime. According to par. 1(c), tax fraud can also be committed via illegal VAT offsetting and by deceiving the tax authorities in having the VAT returned. In this case, offenders already have in their possession the VAT that they embezzle. Tax fraud falls under the category of *delicta quasi propria* since the offender must act under the capacity of the taxpayer. The offence must lead to the concealment of taxable income and therefore, the commission depends on the offender achieving the result. Lastly, the commission requires any level of intent.[18]

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

3.1 *Societas delinquere non potest*: the principle of personal liability

Robert H. Jackson, chief prosecutor at the Nuremberg Trials, stated that 'this principal of personal liability is a necessary as well as a logical one if International Law is to render real help to a maintenance of peace. Only sanctions which reach individuals can peacefully and effectively be enforced. The idea that a state commits crimes is a fiction. Crimes always are committed only by

[16] Kourakis,. *Τα οικονομικά εγκλήματα (vol. 2),* Ant. N. Sakoulas, 2007) 133-136 [Greek].
[17] Law n. 4337 (Measures for implementing the agreement on budgetary targets and structural reforms) 2015 [Μέτρα για την εφαρμογή της συμφωνίας δημοσιονομικών στόχων και διαρθρωτικών μεταρρυθμίσεων].
[18] Ibid 41, 48

persons'.[19] In accordance with the above principle, as also explained above, no criminal sanctions can be imposed on legal entities under Greek law and, within this context, commercial companies cannot be held criminally liable.

Under Greek criminal law, a company cannot be prosecuted in a similar way as an individual offender, following the principle of *societas delinquere non potest*. According to Art. 7 of the Greek Constitution and Art. 1 of the GCC no criminal sanction may be imposed without a previous law providing for the elements of the criminal action in question. Therefore, the criminal sentence presupposes an action, i.e. the conscious activity of a human being. For the purposes of the Greek criminal system, an omission can also lead to criminal liability, on condition that the person involved was under a legal obligation but failed to act. On the other hand, Greek criminal law is based on the culpability principle and sets certain conditions, under which a sentence can be imposed. These conditions, most of which are constitutionally guaranteed, also presuppose an acting human being and are incompatible with the nature of legal entities, as legal fictions. Instead, legal entities are exposed to administrative and, sometimes, civil sanctions.

3.2 Administrative and Civil sanctions

Greece has ratified several treaties and conventions on corruption, which include obligations for the adoption of measures against legal entities in case that they benefit from the criminal actions of individuals empowered to act on their behalf or to make decisions in relation to the legal entity's activities (managers, directors etc.). Although criminal sanctions *stricto sensu* are not applicable under Greek law, administrative sanctions against legal entities are provided for as a rule for economic criminal offences, such as money laundering, tax evasion, insider trading and manipulation of the stock market, bribery of public officials and detriment to the financial interests of the European communities.[20] However, sometimes they also extend to other types of offences,

[19] Ioannis Manoledakis, *Ποινικό Δίκαιο – Επιτομή Γενικού Μέρος (7η έκδοση)* , revised in 2005 by Prof. Maria Kaiafa-Gbandi and Prof. Elissavet Symeonidou-Kastanidou, Sakkoulas Publications, 178-182 [Greek].
[20] See, for example, Law n. 3691/2008 concerning the money laundering and the terrorism financing [Πρόληψη και καταστολή της νομιμοποίησης εσόδων από εγκληματικές δραστηριότητες και της χρηματοδότησης της τρομοκρατίας και άλλες διατάξεις].

such as offences against the environment, violations of the data protection, the provisions concerning the consumer's protection and the protection of the free competition. Administrative liability may cover legal entities of both the public and the private sector.

These provisions are applicable mostly in the form of financial sanctions (fines etc.), but can also include temporary or permanent prohibition of the trade/business activity, exclusion from public benefits or assistance, revocation of licenses or registrations, ban from public tenders and investment programmes and other forms of sanctions. In any case, these sanctions are subject to the proportionality principle, which is recognized and guaranteed by the Greek Constitution Art. 25 par. 1). In most cases the above sanctions are so severe that can fall under the Art. 6 of the European Convention on Human Rights (ECHR), since they can be considered as criminal sanctions ("crypto-criminal").

Greek law does not require the conviction of an individual/natural person as a condition for administrative corporate liability, but as a rule it presupposes the perpetration of a criminal offence. In certain cases, the imposition of administrative sanctions presupposes the existence of a benefit (implicitly of financial nature) for the legal entity, on condition that it derives from a criminal offence and that it can be attributed to the behaviour of an official of the legal entity. According to settled case law of the Supreme Administrative Court of Greece, ie the 'Council of the State' (*Συμβούλιο της Επικρατείας*), sometimes the perpetration of the criminal offence by deception is also enough for the imposition of the sanction (for example, for customs offences)[21].

Contrary to the administrative liability, civil liability appears as a sanction only exceptionally. For example, such provisions can be found within the frame of the environmental protection legislation (see Art. 28 par. 4 of Law 1650/1986).

[21] Theodoros Papakyriakou, *Φορολογικό Ποινικό Δίκαιο – Η ποινική προστασία των φορολογικών αξιώσεων του Ελληνικού Δημοσίου και της Ε.Ε. στην ελληνική έννομη τάξη* (Sakkoulas, 2005) 105 [Greek].

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

4.1 Definition

Extradition constitutes the most important form of international judicial cooperation regarding penal issues.[22] Extradition is the tool which allows the extension of the national jurisdiction to the international area and has become crucial over the last few years due to the internalization of criminal phenomena. According to the definition mostly accepted by public international law scholars, extradition is the legal means according to which one state has to surrender a person who has resorted there, if that person has been convicted or accused in another state, in order for the latter state to prosecute the suspect or to send the condemned person to prison.[23]

4.2 General Principles

Traditionally, extradition has been accompanied by a plethora of conditions which are present in many international agreements. Thus we can safely talk about general principles of extradition, which serve as bars to the extradition of a person. These general principles are also present in the Greek legal order, and are presented in the present paper:

4.2.1 The Principle of Specialty

According to customary international law, a state may only prosecute and punish an extradited individual for the offenses agreed to with the sending state. Specialty serves as a guarantee against prosecutions for political offenses or infringements of other rules of customary extradition law,

[22] Ioanna L. Kyritsaki, *Το Ευρωπαϊκό ένταλμα σύλληψης και η αρχή του διττού αξιοποίνου,* Doctoral Thesis, Aristotle University, School of Legal, Political and Economic Sciences, Law Department, Thessaloniki, 2008, 33-34 <http://thesis.ekt.gr/thesisBookReader/id/25114#page/1/mode/2up>, accessed15 January 2007, [Greek].
[23] Ibid 33-34.

such as the principle of *non bis in idem*, i.e. the principle that protects someone from being punished/tried twice for the same crime.[24]

4.2.2 The Political Offence Exception

Most states refuse to surrender a person in cases that the crime for which the offender is sought is considered by the asking state a political one. The same exemption applies in cases that the asking state seeks an individual for a political crime under the caveat of a common crime. The Political Offence Exception raises many issues as to what is considered a political crime in each state, since there is no common international definition.[25]

4.2.3 The Case of Own Nationals – Jurisdiction

Even though not officially a principle of public international law, many states refuse to surrender their own nationals. This rule is present in many bilateral conventions and is justified mainly by recourse to the principle of the natural judge.[26] This principle is based on the equality of individuals in front of justice and is connected to the right to a fair trial. In short, the principle of the natural judge established that everyone must be judged by a judge who is competent, known ex ante and appointed through an impartial system.[27] Moreover, many states consider the surrender of their own nationals as relinquish of their penal jurisdiction, and thus refuse it.

4.2.4 The Principle of Double Criminality

This is the most important principle in the legal framework of extradition. According to the former, the extraditing state will refuse to surrender a person to the asking state, if the crime for

[24] Carolyn Forstein, *Challenging Extradition: The Doctrine of Specialty in Customary International Law,* <http://jtl.columbia.edu/wp-content/uploads/sites/4/2015/04/Forstein_53-CJTL-363.pdf> accessed 10 March 2017.
[25] Kyritsaki *The European Arrest Warrant* 37.
[26] Ibid 38.
[27] Jose Zeutine, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors,* International Commission of Jurists, < http://www.refworld.org/pdfid/4a7837af2.pdf> accessed 10 March 2017.

which the person is sought/condemned is not considered a crime by the legal system of the former state.

4.2.5 Death Penalty/Torture, inhuman or degrading treatment or punishment

Most European states will refuse to extradite an individual if there is a risk of submission to tortures or execution. The landmark decision of *Άρειος Πάγος* (the Supreme Court in the Greek legal order for penal and private law cases) about the 8 political asylum seekers who flew from Turkey to Greece after the coup in Turkey, was issued recently. The case was highly controversial within the political but also the legal order, as different judicial compositions reached different conclusions. However, despite the political pressure, complexity and sensitive nature of the issue, the Court reaffirmed the importance of democracy and human rights in the Greek legal order and refused the extradition of the 8 asylum seekers to Turkey. The Court reasoned its opinion on the fact that there was high probability that the 8 defendants would not face a fair trial in Turkey, but instead face tortures and humiliating treatment.

4.2.6 Incarnation of the Principles in the Greek Legal Order

The Greek Legal Order has adopted all of the aforementioned principles, which can be found at the first Part of the third Chapter of the Greek COde of Criminal Procedure (GCCP).

The GCCP in the first Part of its third Chapter analyses the procedure and the conditions of extradition. However, as art. 436 states, these provisions are relevant only in cases of absence of a bilateral or multilateral convention, which are introduced into the Greek legal order via Art. 28 of the Greek Constitution. Moreover, these provisions are complementary to those of the relevant convention only if they are not contradictory.

The bars to extradition in these cases are regulated in art. 438, which states the following:

'Extradition is prohibited in the following cases:

- If the individual was a national of the extraditing state at the time of the act (Case of Own Nationals),

- If the Greek courts have jurisdiction for the prosecution and punishment of the act (Jurisdiction),
- If the act for which the individual is sought by the asking state is considered by the Greek legal order a political, military, tax crime, a crime committed via the press, or it is prosecuted only after a relevant declaration of the victim, or when the asking state in reality seeks the individual for political reasons (Political Offence Exception), to either the Greek legal order or that of the asking state, there are legitimate grounds that either prevent the prosecution or the punishment of the offender or based on which the act is not considered culpable any more,
- If there is a risk that the individual will be prosecuted by the asking state for an act other than the one it is extradited for (Principle of Speciality).

4.3 The European Arrest Warrant in the Greek Legal Order

The Council's Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA) was introduced into the Greek legal order with Law 3251/2004 and dramatically changed the preexisting regime. In short, the European Arrest Warrant introduced a purely judicial procedure as opposed to the preexisting regime, in the context of which political power implications were also relevant. Moreover, it imposed short deadlines. In addition, it abolished the principle of double criminality for 32 crimes (art. 10 par. 2 of Law 3251/2004) leaving the extradition of the rest to the discretion of the member states. Most importantly, it abolished the political crime exception and, under conditions, the principle of specialty.

art.11 refers to the grounds of mandatory non-execution of the warrant, whereas art. 12 refers to optional non-execution.

art. 11

The judicial authority that decides upon the execution of the European Arrest Warrant shall refuse to execute the latter in the following cases:

- If the offence on which the arrest warrant is based is covered by amnesty according to the Greek penal law, in cases Greece had jurisdiction to prosecute the offence.
- If the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State.
- If the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the Greek penal laws.
- If the act or the penalty has lapsed under the Greek criminal laws and the act falls within the jurisdiction of Greek courts under Greek criminal law.
- If the European Arrest Warrant has been issued for the prosecution or punishment of a person on grounds relating to its gender, tribe, religion, origin, nationality, political convictions, sexual orientation or action for freedom.
- If the European Arrest Warrant has been issued for the purposes of execution of a custodial sentence or detention order of a person who is a Greek national and Greece undertakes to execute the sentence or detention order in accordance with Greek laws.
- If the European arrest warrant has been issued for an act which is considered, according to Greek criminal law, as (i) having been committed in whole or in part in the territory of Greece or in a place treated as such; or (ii) having been committed outside the territory of the issuing Member State and Greek criminal law does not allow prosecution for the same offences when committed outside its territory.
- If the person who is the subject of the European Arrest Warrant is a Greek citizen and is being prosecuted in Greece for the same action. If it is not prosecuted, the European Arrest Warrant is executed under the guarantee that after the hearing, it will be taken back to Greece in order to serve the sentence or detention that will be imposed against it in the issuing Member State.

art. 12

The executing judicial authority may refuse to execute the European Arrest Warrant in the following cases:

- If the person who is the subject of the European Arrest Warrant is being prosecuted in Greece for the same act as that on which the European Arrest Warrant is based;
- If the Greek judicial authorities have decided either not to prosecute the offence on which the European arrest warrant is based or to halt proceedings;
- If a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings;
- If the Greek executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country;
- If the European Arrest Warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a Greek national or a resident of Greece and Greece undertakes to execute the sentence or detention order in accordance with Greek law.

5. Please state and explain any: a. Internal Reporting Processes (i.e. Whistleblowing) and; b. External Reporting Requirements (i.e. to Markets and Regulators), that may Arise on the Discovery of a Possible Offence.

5.1 Introduction

Reporting mechanisms are seen as a vital part of any compliance program. A company can find itself in a position whereby a natural person closely related to it, eg a member of its Board of Directors breaches criminal law. Consequently, the company will have to face a series of actions, as previously described, administrative, civil or otherwise. As a result, not only is it crucial to have the knowledge and experience on the ways to deal with such a situation once it arises but also to be able to prevent them from occurring in the first place.

5.2 Existing reporting mechanisms in the Greek legal order

The Greek legislator has tried to regulate such cases and provide reporting mechanisms since the middle 90's with Law 2331/1995[28] regarding the Prevention and Repression of Money Laundering. The aforementioned law was amended with Law 3424/2005,[29] which mainly adopted changes in accordance with the provisions of Directive 2001/97/EC.[30] However, today both laws have been replaced by Law 3691/2008[31] (hereinafter "the Law"), which introduced the third EU Money Laundering Directive, namely Directive 2005/60/EC,[32] in the Greek legal order.

As a Member State of the EU, Greece has established a central national Financial Intelligence Unit (FIU) which cooperates EU-wide with the FIU network of all other Member States.[33] According to the aforementioned Law, it is provided that in the course of inspections carried out with regards to the institutions and persons covered by the Directive, when those authorities discover facts that could be related to money laundering or terrorist financing, they shall promptly inform the FIU. A fact worth mentioning is that the Law currently in force provides that the competent authorities of art.6 take measures for the continuous updating and training of their employees, especially the auditors and their employees, through educational programs, seminars, meetings and in any other way the Authorities consider suitable and relevant.[34] art. 6 §3 point h (η) clearly states that the Authorities shall conduct regular and random checks at the headquarters and the liable persons'

[28] Law n. 2331 (Prevention and Repression of Money Laundering and Other Criminal Provisions...)1995 [Πρόληψη και καταστολή της νομιμοποίησης εσόδων από εγκληματικές δραστηριότητες και άλλες ποινικές διατάξεις].
[29] Law n. 3424 (Modifications, Additions and Replacement of Provisions of Law n. 2331/1995 and Adjustment of the Greek Legislation to the Directive 2001/97/EC of the European Parliament and the Council on the prevention of the use of the financial system for the purpose of money laundering) 2005 [Τροποποίηση και συμπλήρωση και αντικατάσταση διατάξεων και προσαρμογή της ελληνικής νομοθεσίας στην Οδηγία 2001/97 / ΕΚ του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου για την πρόληψη της χρησιμοποίησης του χρηματοπιστωτικού συστήματος με σκοπό τη νομιμοποίηση εσόδων από εγκληματικές δραστηριότητες και άλλες διατάξεις].
[30] Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, available at <www.eur-lex.europa.eu> accessed 20 February 2017).
[31] Law n. 3424 (Prevention and Suppression of Money Laundering and Terrorist Financing and Other Provisions) 2008 [Πρόληψη και καταστολή της νομιμοποίησης εσόδων από εγκληματικές δραστηριότητες και της χρηματοδότησης της τρομοκρατίας και άλλες διατάξεις.].
[32] Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, available at www.eur-lex.europea.eu (last visited 21/02/2017).
[33] art. 7,Law No. 3424/2008.
[34] art. 6 par. 3 point z (ζ).

facilities, but also to branches and subsidiaries located or operating in Greece or abroad, if permitted by the laws of the host country, for the suitability of the measures and procedures that the obligors have adopted.

Further in art. 6 it is also provided that the competent national authorities shall proceed and take any appropriate measures (where internal and external reporting is included) directly or indirectly related with the data and information, transactions or activities that may be associated with the offenses described by the relevant Articles of this Law, in order to ensure good governance and observance but without prejudice to the maintenance of confidentiality. Moreover, it is expected that they will develop internal reporting and communication processes as a precautionary measure so as to avoid, as well as impede, money laundering and other illegal transactions in relation to such criminal activities in any sector. The means, the organs and the further details of those controls shall be defined by the responsible committees of those authorities. It is worth mentioning that those authorities send a detailed report to the central supervising authority every six months whereby they describe their activities, actions and controls. The report also includes the results of the conducted controls, the findings and any other type of evaluation of the (either natural or legal) persons controlled.

In addition, art. 7 introduced the creation of the main national authority, namely the 'Commission for Anti-money Laundering and Terrorist Financing', headquartered in Athens and supervised by the Minister of Economy and Finance, by order of whom the location of its headquarters is determined. Reporting shall be made to this Commission and further to any other competent public authority, if so regulated.

Chapter E consists of nine articles examines, exclusively, the issue of reporting illegal behavior and deals, inter alia, with the issues of 'High-risk transactions', 'Mandatory reporting to the competent authorities and market operators', 'Unreliable third countries' as well as with the Prohibition of disclosure and its exceptions.

With regards to the external mechanism, art. 26 provides an obligation of reporting to the abovementioned Commission, as soon as there are serious indications or suspicions that money laundering activities or terrorist financing are committed or attempted. [35] Branches and representative offices of Greek credit or financial institutions operating in another country can send the information to the Commission's corresponding foreign service or unit or authority and to their parent company.

Article 27 establishes a communication system which could be seen as a whistleblowing system, by way of a hierarchic control system within the directors and managers of an institution. The system proposes the nomination of an executive or director, which will be in charge of the whole process. Against this background all the other directors, managers and employees will be required to report only to this person any irregular activity which might raise suspicions. A special report shall always be conducted by the director and then a decision shall be made on whether reporting to the Commission is necessary or not. Consequently, the relevant reporting system is mixed, combining internal and external reporting. In the second paragraph of the article, interestingly enough, it is stated that the "obligated" persons need to refrain from the wrongful or suspicious activity, transaction or action in case of a report or even a suspicion of a report. Yet, if this cannot be the case or if in the absence of those actions the prosecution or the procedure itself will be hindered, the persons involved shall continue those transactions and/or actions while having contacted the Commission.

However, an exception is provided within this legal framework regarding to, inter alia, notaries and lawyers. Their obligation of reporting is suspended, when client privilege prevails. 'Notaries, independent legal professionals, auditors, external accountants and tax advisors with regards to information they receive from or obtain on one of their clients, in the course of ascertaining the legal position for their client or performing their task of defending or representing that client in,

[35] The same external reporting obligation to the Commission also applies to market operators, as described in art. 28.

or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings'.[36]

Lastly, there are two more very delicate points. In accordance with Directive 2005/60/EC, art. 29 of the Law makes a special reference to external reporting mechanisms of the offenses regarding the tax and customs legislation, as well as of other offenses falling within the specific competence of the Υπηρεσία Ειδικών Ελέγχων -ΥΠ.Ε.Ε. (Service of Special Controls) which are covered under predicate offenses. Article 30 on the other hand, enables the Ministers of Economy, Finance and Justice, by means of their joint decision or by decisions of the competent authorities, to establish measures to protect the employees of liable legal persons and individuals, who report either internally or to the competent committee or to the prosecutor their suspicions of the attempt or commission of any offenses falling within art. 2 of the Law, from being exposed to threats or hostile action.

6. Who are the enforcement authorities for these offences?

6.1 Introduction

The fighting against economic crime is a complex, intricate phenomenon due to its nature, as such crimes are difficult to detect, to prove and to subsequently condemn. For this reason, the investigation and the imposition of sanctions for the crimes described above is only possible through the cooperation of a system of authorities, agencies and institutions on both national and international level.

In the Greek legal order, plenty of authorities have been established which through the exchange of information, documents and data as well as though investigations conduct an ex ante preventive control for the dissuasion of economic crimes in the corporate frame, whereas, upon the

[36] art. 23 par. 2, Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, as introduced exactly as such also in Greek Law 3691/2008.

commission of such crimes they assume a repressive role through the imposition of sanctions against the offenders. In the following lines we will examine the most prominent among these agencies.

6.2 The Hellenic Capital Market Commission

First of all, the Hellenic Capital Market Commission exercises a supervisory role on listed companies with regards to their abidance with their obligations pertaining to corporate governance. In cases that corporate irregularities are ascertained, the Capital Market Commission can impose fines against the companies, the amount of which escalates based on the gravity of the violation, the repercussions on the operation of the market etc (art. 10 para. 1of Law 3016/2002, ar. 51 par. 1a i of Law 3691/2008). Moreover, the Committee of Capital Market can impose disciplinary (ar. 6 par. 3 ia) and adminstrative sanctions, such as conclusive or temporary deferment, repeal of the license of operation or prohibition of exercise -fully or partially- of the entrepreneurial activity(art. 51 para. 1 aii, iii Law 3691/2008). As a consequence of the above, one can come to the conclusion that the provisions of corporate governance are not strictly internal since violations thereof can lead to the imposition of sanctions by the abovementioned regulatory authority.[37]

6.3 The Anti-Money Laundering, Counter-Terrorist Financing and Source of Funds Investigation Authority

In addition, the Anti-Money Laundering, Counter-Terrorist Financing and Source of Funds Investigation Authority plays a fundamental role in the prevention and fighting against economic crimes. The Authority holds administrative and functional independence (new art. 7 Law 3691/2008as modified by Law 3932/2011). The Unit A of the aforementioned Authority' for the Investigation of Financing Information (new art. 7A Law 3691/2008 under the modification of Law 3932/2011) is responsible for the cases regarding of the legalization of income deriving from criminal activities. The role of the Unit A is unique due to the mixed type of its actions during the

[37]A. Diamantopoulou ,*Εισαγωγή στην εταιρική διακυβέρνηση εισηγμένων εταιριών* ', Report of the Tax Law, Issue 1462, 2022. 420.

investigation of the crimes. In particular, on first level this authority gathers, investigates and evaluates the suspicious reports that are submitted to it concerning the commission of a punishable action (art. 7A para. 1 c); its investigations are of administrative nature. However, this authority has on numerous occasions been critisised as constituting a parallel prosecuting system. Even though according to the new art. 7A and the explanatory memorandum of the new Law the employees of the Unit don't have the power to conduct preliminary examinations, arrest suspects and examine witnesses, however the Unit has the discretion to decide which cases it will report to the Advocate General and which it will place in the archive. Consequently, as Dr Kaiafa-Gkmpanti indicates 'via the power of filing it is clear that the Unit usurps the power of the Advocate General who, according the GCCP, is the sole authority entitled to make this decision, based on the degree of the suspicions that arose during the investigations'.[38]

6.4 The Advocate Prosecutor for Economic Crime

Another authority with a decisive role in the crackdown of the economic crimes is the Advocate Prosecutor of Economic Crime (Law 3943/2011) ,which is the person in charge of the order of a preliminary examination for economic crimes that raised in his competence(art.2 parag.5),but also of the supervision and overall coordination of all public agencies in the course of a preliminary examination as well as during investigations (art. 2 para. 3).The employees who assist the Advocate Prosecutor in its work are indicatively: the police officers of the Directorate of Economic Police (art. 24 Law 4249/2014), the employees of the Directorate for the Prosecution of Electronic Crime (Presidential Decree 178/2014) as well as the employees of the Body for the Prosecution of Economic Crime, known as (S.D.O.E),(Law 3842/2010) whose duties are the research, detection and repression of severe economic violations against the State.

[38] M.Kaiafa-Gkmpanti *'' Ποινικοποίηση της νομιμοποίησης εσόδων από εγκληματικές δραστηριότητες: Βασικά χαρακτηριστικά του ν. 3691/2008 και δικαιοκρατικά όρια*, Ποινικά Χρονικά (Penal Chronicles), 2008 ,931 [Greek].

6.5 The Advocate Prosecutor for Corruption

According to art. 74 and 75 of Law 4139/2013 (which modified art. 1, 2 of Law 4022/2011), the ad rem competence of the Public Prosecutor of Economic Crime is in some point overturn by that of the Advocate Prosecutor of Corruption, who in charge of the handling of felonies in the jurisdiction of the Three-Member Court of Appeal committed by chairmen of administrative councils or directing or commissioned advisers of legal entities of public sector, public enterprises and legal entities of private sector whose administration is defined directly or indirectly by the State and whose activities are of serious public concern or major public good. Within the duties of the Advocate Prosecutor for Corruption are the supervision of the employees that conduct the preliminary examination and the initiation of the prosecution process (art. 43of the GCCP).

6.6 Other authorities

The list of authorities and bodies that contribute to the fighting against economic crime doesn't stop here. It is continuously modified and upgraded in order for a complete and powerful system of enforcement to be formed. The catalogue of enforcement authorities also includes the following:

a. The General Secretariat for Fighting Corruption (art. 6 of Law 4320/2015), a public agency under the supervision of the Ministry of Justice. Its powers include the guarantee of cohesion and effectiveness of the national strategy against corruption, and especially the coordination of the controlling bodies and the effectiveness of their actions through the provision of relevant directions and recommendations.
b. The Hellenic Accounting and Auditing Standards Oversight Board[39]. This institution is supervised by the Hellenic Ministry of Finance and is the supervisor of the Institute of Certified Public Accountants of Greece. Its goal is to introduce the best accounting practices and to implement them.

[39] Founded by the law 3148 (Accounting Standardisation and Audit Committee, replacement and supplementation of the provisions on electronic money institutions, and other provisions) 2003 [Επιτροπή Λογιστικής Τυποποίησης και Ελέγχων, αντικατάσταση και συμπλήρωση των διατάξεων για τα ιδρύματα ηλεκτρονικού χρήματος και άλλες διατάξεις].

c. The Court of Audit[40] that, via its seven Echelons, plays an important role in matters of control of transparency in the funding of all public sectors. According to art. 98 of the Hellenic Constitution and Law 4129/2013 the budget of the general government, the prefectures and municipalities are checked thereby. The Court of Audit's control is also obligatory with regards to the budget of every public work and the award of every public contract.[41]

d. Other agencies of the Ministry of Finance under the supervision of which fall some of the authorities that were previously mentioned (e.g the Hellenic Capital Market Commission).

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

7.1 Introduction

As mentioned above, there is a plethora of Agencies in order to prevent and to combat these offences. For that reason those Agencies have a full armored legal framework, with means in order to achieve their purpose. The most prominent Law is 3691/2008, voted by the Greek Parliament so as to combat the laundering of money and property acquired by criminal acts and funding of terrorism.[42]

In order to fully display those means, a two phase description is considered necessary. First, there will be a presentation of the pro actioni toolkit and subsequently there will be one for the post actionem toolkit.

[40] One of the three High Courts of Greece, along with Council of the State and Areios Pagos. The Court of Audit has responsibilities of administrative nature as it started as such.
[41] A new law was voted in 23.02.2017, removing the authority of the Court of Audit to control the expenses of all the public sector starting from 01.01.2019!
[42] Adopted in order to harmonise with the European legislation. For the first time in Greece there is both official and practical recognition of the importance of the Financial Action Task Force (FATF).

7.2 The *pro actioni* and the *post actionem* toolkits.

As far as the pro actioni toolkit is concerned, a very essential institution is **the Internal Control Service.** It is one very important instrument that according to articles 6, 7 and 8 of Law 3016/2002[43] is compulsory for any private company that is registered to the stock market. As a special agency inside a private company, it consists of full time personnel, mostly accountants and lawyers, with whom the Board of Directors of the company is obliged to cooperate. The agency is fully independent[44] and its powers are very broad, pertaining to a wide array of issues. Its special agents can demand to check every book, file and transfers they choose anytime and anywhere. They can also demand to open and check every bank account and portfolio of the company. After the checks, the Agency is obliged to write reports and inform the board within three months. In case of a submitted written request by the Competent Authorities, the Agency is obliged to provide the requested information. This Agency cooperates with the Hellenic Capital Market Commission and they coordinate their actions.

The most vital institution is the **Anti-Money Laundering, Counter-Terrorist Financing and Source of Funds Investigation Authority,**[45] which is under the general guidance of the Ministry of Finance [46] (General Secretariat of Economic Policy). This Authority has substantial responsibilities pertaining to both the pro actioni and post actionem toolkits. The Authority[47] is a

[43]With this law, for the first time all private companies had to accompany their application to be registered to organized stock markets, with proof that they have created and organised internally an Agency of Internal Control.

[44] According to articles 7 and 8 the Board cannot get involved in the functioning of the Agency and for any change in the Agency there has to be an announcement to the Hellenic Capital Market Commission within ten days.

[45] By law 3932/2011 which amended law 3691/2008 the Anti-Money Laundering, Counter- Terrorist Financing Commission was renamed the "Anti-Money Laundering, Counter-Terrorist Financing and Source of Funds Investigation Authority".

[46] Special Secretariat for Financial and Economic Crime (known as SDOE) , Unit General Secretariat of Information Systems and Administrative Support are two Secretariats of the Ministry of Finance, that are responsible for fighting corruption. The two Secretariats are both collecting and comparing data but also have other authoritites. SDOE, called informally "Rambo", receive individual complaints for tax evasion, whistleblowing and are responsible for controls in any business with authorized public servants.

[47] The Authority has been restructured into three (3) individual units as follows:

- The Financial Intelligence Unit (FIU). In addition to the President, the FIU comprises seven (7) Board Members of the Authority. At the end of each year, the FIU submits an activities report to the Institutions and Transparency Committee of the Hellenic Parliament and the Ministers of Finance, Justice, Transparency & Human Rights and Citizen Protection.
- The Financial Sanctions Unit (FSU). In addition to the President, the FSU comprises two (2) Board Members of the Authority. At the end of every year, the Unit submits an activities report to the Ministers of Foreign

national unit aiming at the combating of the legalisation of proceeds from criminal activities and terrorist financing, assisting in securing and sustaining fiscal and financing stability. Its mission, according to Law 3691/2008, as amended by Laws 3932/2011 and 4389/2016, is the collection, the investigation and the analysis of suspicious transactions reports (STR's) that are forwarded to it by the obligated legal entities and natural persons[48] as well as every other information that is related to the sources of funds and to the crimes of money laundering and terrorist financing in general. The Authority is acting via its three Units. Its powers are: a) obtaining full access to any database of the Public Sector, or of any other legal entity that collects or processes data as well as and the database of 'Tiresias',[49] b) investigating possible actions and violations and requiring the assistance of any investigation authorities, courts, individuals, legal entities (of both the public and private sector). During its investigations, no information is considered to be classified[50]

Another important institution is the **Hellenic Accounting and Auditing Standards Oversight Board**[51]. This institution is supervised by the Hellenic Ministry of Finance and is itself the supervisor of the Institute of Certified Public Accountants of Greece. Its goal is to introduce and implement the best accounting practices. This institution has powers of both administrative and criminal ratio. As far as the administrative aspect[52] of this institution is concerned, some of its most important powers are, a)the authority to recall, temporarily or permanently, the license of an individual accountant or of a legal entity in case of an accounting law violation, b)the authority to

Affairs, Justice, Transparency & Human Rights and Citizen Protection.

- The Source of Funds Investigation Unit (SFIU). In addition to the President, the SFIU comprises four (4) Board Members of the Authority. At the end of every year, the Unit submits an activities report to the Institutions and Transparency Committee of the Hellenic Parliament and the Ministers of Finance and Justice, Transparency & Human Rights.

The president is an acting Public Prosecutor to the Supreme Court appointed by a Decision of the Supreme Judicial Council and serves on a full –time basis.

[48] All obligated individuals and legal entities are listed in article 5 of Law 3691/2008.

[49]Tiresias was formally founded in September 1977 as a non-profit organisation, and has been operating as a joint stock (SA) company, yet fully maintaining the philosophy of a genuine non-profit organisation while securing the necessary preconditions for its further development. Today, Tiresias specialises in the collection and supply of credit profile data of corporate entities and natural persons and the operation of a risk consolidation system regarding consumer credit. In addition, the company develops interbanking information systems and provides information and communication services to all parties concerned.

[50] Bearing in mind the limitation of articles 212, 261 and 262 of the GCCP.

[51] Founded by the Law 3148/2003.

[52] All the decisions of the HAASOB can be appealed to administrative courts within 60 days from day of notification.

impose fines.[53] In a similar vein, it is also involved in the criminal procedure. The members of the HAASOB have the authority to: a) access every document, book and information that are not classified by law, b) confiscate any documents, books and other aspects, c) receive testimonies from witnesses, under oath or not, as specialized investigators.[54] With the recent enactment of Law 4449/2017 HAASOB's role has been upgraded,[55] as there are now new powers and instruments available, such as a single public registry for chartered accountants.

The **General Secretariat for Fighting Corruption**[56] was founded by Law 4320/2015 and is supervised by the Hellenic Ministry of Justice. This Authority is responsible for the overall coordination of all public agencies. Its purpose is, according to art. 7-9 of the above mentioned law, to provide the best practices as well as control the transparency in the fields of public contracts and private partnerships with the public sector. It has the power to collect and process data deriving from any source, e.g. from whistleblowing and to subsequently provide all available data to the Advocate General.

The **Advocate Prosecutor for Economic Crime**[57], is a public prosecutor responsible to initiate all legal processes upon notice of a suspicious act by one of the above agencies.. Apart from the coordination of agencies, such as SDOE, this Authority is responsible to initiate preliminary examinations,[58] by an order to the de jure responsible investigators (general or specials). The powers of the Advocate are broad, as it can have access to any data, regardless of their characterization as classified or not.

[53] For individuals the fines can be up to 200.00 euros and for legal entities until 2.000.000 euros.
[54] Bearing in mind the limitation of article 212 of the GCCP.
[55] According to Explanatory Report of law 4449/2017, for the adoption of Directive 2006/43/EC.
[56] AFCOS in compliance with "REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EU, EURATOM) No 883/2013, as regards the secretariat of the Supervisory Committee of the European Anti-Fraud Office (OLAF)"
[57] Introduced to greek legal system with law 3943/2011.
[58] According to article 31 par. 1 of GCCP and article 17A par. 5,6 of law 2523/1997.

The **Advocate Prosecutor for Corruption**[59] is also a public prosecutor. The Advocate has the same powers as the Advocate for Economic Crime, with the main difference that the former is responsible for cases of corruption of public servants, MPs', Heads of Public Companies or Heads of Private Companies that are involved with the public sector.

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self-incrimination)?

8.1 Introduction

Legal professional privilege is fundamental to the proper practice of the legal profession. It is recognised and protected both by general constitutional rules (in particular art. 20 para. 1 of the Greek Constitution concerning the legal judicial protection, art. 5 par. 1 concerning freedom of personal development and art. 19 regarding privacy of correspondence and communications) as well as by special rules, whether legally binding (such as the Code of Lawyers) or simply of an ethical nature (such as the Code of Ethics of the Athens Bar Association).

8.2 Legal privilege under Law 3691/2008

With Law 3424/2005 adapting the Greek legal system to Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC [60] lawyers were for the first time included within the people obliged to assist the authorities in suppressing money laundering.[61] The same provision was also repeated in Law 3691/2008,[62] which

[59] Founded with law 4022/2011

[60] Law 3424 (Adapting the Greek legal system to Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering and other provisions) 2005 [Τροποποίηση, συμπλήρωση και αντικατάσταση διατάξεων του ν.2331/1995 (ΦΕΚ 173Α) και προσαρμογή της ελληνικής νομοθεσίας στην Οδηγία του Ευρωπαϊκού Κοινοβουλίου 2001/97/ΕΚ και του Συμβουλίου για την πρόληψη της χρησιμοποίησης του χρηματοπιστωτικού συστήματος με σκοπό τη νομιμοποίηση εσόδων από εγκληματικές δραστηριότητες και άλλες διατάξεις].

[61] Symeonidou- Kastanidou E.,*Δικηγόροι: Υποχρεώσεις συνδρομής στην αντιμετώπιση της νομιμοποίησης παράνομων εσόδων και χρηματοδότησης της τρομοκρατίας και ποινική ευθύνη* [2008] Ποινικά Χρονικά 933 [Greek]

[62] Law 3691 (Prevention and suppression of money laundering, terrorism financing and other provisions) 2008 [*Πρόληψη και καταστολή της νομιμοποίησης εσόδων από εγκληματικές δραστηριότητες και της χρηματοδότησης της τρομοκρατίας και άλλες διατάξεις*].

incorporated in the Greek legal system Directives 2005/60 / EC and 2006/70 / EC and replaced Law 3424/2005.

According to the current provision of art. 5 para. 1 of Law 3691/2008[63], 'For the requirements of this Law the following natural and legal persons should be considered obligated persons:

a. Credit institutions,
b. financial institutions,
c. venture capital companies,
d. statutory auditors, the auditors of companies, accountants not associated with an employment relationship and private auditors,
e. tax consultants and tax consulting companies,
f. Real estate agents and companies,
g. casino companies and casinos on ships flying the Greek flag, as well as businesses, organizations and other bodies of public or private sector who organize or conduct gambling and agencies related to these activities,
h. auction houses,
i. high value dealers, when payments are made in cash in an amount of no less than fifteen thousand (15,000) EUR, whether this is carried out in a single operation or in several, which appear to be linked[64],
j. the auctioneers, and
k. the pawnbrokers. Moreover, as obliged persons should be considered participating notaries and lawyers , whether by acting on behalf of and in the interest of their client in any financial or real estate transaction, or by assisting in the planning or execution of transactions of their client concerning the:

[63] Tsiridis *Ο Νέος Νόμος για το Ξέπλυμα Μαύρου Χρήματος* 142 [Greek].
[64] The criteria for determining dealers in high value goods which fall into this category are set out By joint decision of the Ministers of Economy and Finance and Development, art. 5 para. 1 point i, Law 3691 (Prevention and suppression of money laundering, terrorism financing and other provisions) 2008.

i. buying and selling of real property or businesses,
ii. financial management, securities or other client assets,
iii. opening or management of bank, account savings or securities accounts,
iv. organization of contributions necessary for the creation, operation or management of companies,
v. creation, operation or management of companies, trusts (trusts) or similar structures.

The legal advice remains subject to the obligation of professional secrecy unless the lawyer or notary is taking part in money laundering activities or financing of terrorism activities or if the legal advice is provided for the commission of the offense or with knowledge of the fact that the client is seeking legal advice in order to commit the above offenses.

So when lawyers conduct one of the activities listed in art. 5 para. 1 (13) of Law 3691/2008, they are required by law to abide by certain obligations. More specifically, obligations mentioned in Law 3691/2008] are as follows:

a. taking measures to establish the perpetration of the crimes of money laundering or terrorism financing,
b. keeping records and data to use in any search or investigation for the perpetration of the aforementioned crimes,
c. reporting suspicious transactions to authorities on their own initiative and providing information about them when requested by the enforcement authority,
d. not disclosing information concerning the investigations into unfair acts, and
e. providing services to their customers even if they know or suspect that the transactions are related to money laundering or financing of terrorism.[65]

[65] Symeonidou- Kastanidou *Δικηγόροι: Υποχρεώσεις συνδρομής στην αντιμετώπιση της νομιμοποίησης παράνομων εσόδων και χρηματοδότησης της τρομοκρατίας και ποινική ευθύνη* [2008] Ποινικά Χρονικά 933 [Greek]

According to art. 26 of Law 3691/2008, in cases lawyers are obligated persons, they have to:

a. promptly inform the Anti-Money Laundering, Counter-Terrorist Financing and Source of Funds Investigation Authority[66] on their own initiative when they know or have serious indications or suspicions that acts of money laundering or terrorism financing are committed, attempted, have been committed or attempted,
b. provide if requested without delay, the Authority, the competent authority and other public authorities responsible for suppressing money laundering or terrorism financing, with all the necessary information and data in accordance with the procedures laid down in the provisions.

In the aforementioned article the legislator properly equated the obligation to report with the obligation to provide information to the authorities at their request. It should be noted at this point that the provision of data at the request of the authorities according to the new law must be in accordance with the procedures laid down by the general provisions. Therefore, when there is no rule of law that allows for data search, such is prohibited.

An exception is introduced by the second paragraph of art. 26, under which lawyers have no obligation to report or provide information to the authorities:

i. that they receive from or about the client, during the phase of determining the client's legal position,
ii. when defending or representing on trial, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after the trial.

[66] Article 7 Law n. 3691/2008 "Committee for Combating Money Laundering and Terrorist Financing and Control of Property Status Declarations". The aim of the Authority is to take and implement the necessary measures to prevent and combat money laundering and terrorist financing and control of property status declarations of the persons mentioned in cases o f up to par . 1 of Article 1 of Law. 3213/2003.

Thus lawyers are covered by legal professional privilege with regards to all the information they receive over a case, regardless of whether the process has started or not and of the time when the information (before, during or after) has been acquired.

Therefore, legal professional privilege is valid and applies to any activity which is inherent in the context of legal duties. A lawyer not only has no obligation to report or provide information to the authorities on what it was informed while exercising its duty, but also if the obligation of confidentiality is violated, the lawyer is criminally liable for the violation of professional secrecy in cases private secrets are revealed and there are no grounds for lifting the unfair nature of the act according to art. 371 par. 4 of the GCC.

The obligation to report and provide information concerns only lawyers who provide services outside of their legal duties. Nonetheless, the border between legal and non legal activity can be quite difficult to distinguish. Therefore, in all cases that confidentiality is waived, the principle of proportionality must be applied. The introduction of this exemption makes the adjustment fully consistent with the provisions of Articles 6 (right to a fair trial) and 8 (Right to respect for private and family life) ECHR[67].

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

9.1 Constitutional provisions

The Greek Constitution explicitly recognizes the right to privacy (art. 9), the right to protection of an individual's personal information (art. 9A), as well as the right to secrecy of correspondence (art. 19). Under art. 9, given that everyone's home is a sanctuary and the private as well as family life of the individual are inviolable, no home search shall be carried out, except when and as specified by law and always in the presence of representatives of the judicial power. In accordance

[67] Polychronis Tsiridis, *Η Ποινική Διαχείριση της Δωροδωκίας* (Nomiki Bibliothiki,2013) 495 [Greek].

with the latter, art. 9A underlines that all persons have the right to be protected from the collection, processing and use, especially by electronic means, of their personal data, as specified by law. The protection of personal data is ensured by an independent authority, the Hellenic Data Protection Authority (henceforth HDPA) which is constituted and operates as specified by law. In combination with the two afore-mentioned articles, art. 19 highlights that secrecy of letters and all other forms of free correspondence or communication shall be absolutely inviolable. The guarantees, under which the judicial authority shall not be bound by this secrecy for reasons of national security or for the purpose of investigating especially serious crimes, shall be specified by law. Under para. 3 of art. 19, the use of evidence acquired in violation of the present article and of art. 9 and 9A is prohibited. Both theorists and the jurisprudence consider art. 9 in combination with art. 2 par.1 (dignity of the person) and art. 5 par.1 (right to free development of personality) as the legal grounds for the recognition of a 'right to informational self-determination'.[68] Moreover, Article 57 of the Greek Civil Code, which constitutes the general clause for the protection of personality, an aspect of which is the right to privacy can serve (and has served) as a ground of liability for any impermissible processing of personal data.

9.2 Legislative provisions

9.2.1 Law 2472/1997

The legislator enacted what is considered constitutionally acceptable processing of personal data, via Law 2472/1997[69], transposing the Data Protection Directive (95/46/EC) into national law. To begin with, the qualitative controls on that processing include the principle of feasibility, established by the Greek legislator as the core principle for personal data protection, according to which such collection is allowed exclusively for those purposes directly related to the employment relationship and on condition that such acts are necessary for fulfilling obligations of both parties founded on this relationship, either legal or contractual. art. 4 par. 1a of Law 2472/1997 prescribes

[68] Greek Law Digest, *The official guide to Greek Law, Personal Data Protection*, written by Dryllerakis and Associates, date :08/07/2016, used by researcher in 22/02/2017 http://www.greeklawdigest.gr/topics/data-protection/item/111-personal-data-protection.
[69] Law 2472 (on the protection of the individual with regard to the processing of personal data) 1997 [Προστασία του ατόμου από την επεξεργασία δεδομένων προσωπικού χαρακτήρα].

precisely the determined purposes for such processing , while it's stressed that the employees' consent for that purpose should be freely given, specific, informed and unambiguous(art. 5 par.1 and 2). Another fundamental principle is that of proportionality, as established in art. 4 par.1b of the aforementioned Law and art. 25 par. 1 of Greek Constitution, in combination with the constitutionally protected human dignity, under art. 2 par.1 of Greek Constitution, as well as under art. 31 par.1 of the Charter of Fundamental Rights of the EU that lays down that personal data should be adequate, relevant to the employment relationship, not excessive in relation to the purposes for which they are processed as well as accurate and, where necessary, kept up to date. Besides, Law 2472/1997 prohibits the collection of sensitive personal data as a rule, whereas the aforementioned processing is legitimate and lawful only on condition that the type of these data is directly related to the specific employment status and they are (the data) absolutely necessary for an employer to reach a decision, either in order to hire an employee or to dismiss it. For instance, it's crucial for the employer to be informed of the employee's criminal record when the latter is going to manage pecuniary transactions at the company, as a cashier.

It's worth mentioning that the Hellenic Data Protection Authority, based on its reports, its decisions following a grievance filed by an individual employee or their collective associations or following an article in the press, issued Directive 115/2001[70] (On interpreting the legal framework set by the provisions of laws 2472/1997 and 2773/1999, regarding the protection of the individual against the processing of personal data and the protection of personal data in the telecommunications sector respectively, in regard to the implementation of these provisions in employment relations), which grants more powers to HDPA (these powers are described in detail under art. 19 of Law 2472/1997, also specifies the provisions and conditions of the lawful processing of the employees' data in the workplace and provides useful guidelines on the implementation of all general rules of privacy in the field of company- employees relations. As a result of that Directive the commands of Law 2472/1997 were implemented with greater ease and clarity intending to effectively protect employees' personal data. At this point, it's necessary to

[70] Report issued by Ms E.Mitrou dated 10.06.2001 and by Hellenic Republic Authority for the Protection of Personal Data on Directive No. 115/2001.

clarify that the term 'personal data'[71] includes any information that could identify a natural person by reference to its physical, physiological, mental, economic, cultural or social identity, by means of biometric methods, for instance. Personal Data may be lawfully collected if the processing is based on the consent of the data subject (employee) or if its vital interests require this processing of data or if such processing is based on legitimate interests (art. 8 par.4) of others/third parties, but only as long as this processing is not overridden by interests in protecting the fundamental rights of the data subjects.[72]

The employees' rights during the processing of their personal data, in particular, are clearly stated in art. 11-14 of Law 2472/1997. art. 11 enshrines their right to information which means that the employer must inform the employee on the purpose of the data processing as well as of the latter's right of access thereon irrespective of whether data forwarding to third parties is lawful or not. Therefore, art. 12 of that Law explicitly includes the employees' right of access, i.e. the employees' right to know the content of their personal file and which of their personal data are or have been subject to processing. More specifically, the right to access refers to everyone's right to know whether data related to oneself are being processed or have been processed. As to this, the Controller must answer in writing (para. 1, art. 12, Law 2472/1997. The controller[73] is one of the parties involved in the personal data processing and can be the natural or legal person, public authority, agency or any other party which (alone or jointly with others) determines the purposes and means of that processing. What is more, the controller is in charge of observing the principle of proportionality, obtaining the consent of the employee, taking all necessary, additional and

[71] Frank Hendrickx *'Employmennt Privacy Law in the EU: Human Resources and Sensitive Data,* page 143, (Social Europe Series) First Edition published in October 2002, used by researcher in February 2017 https://books.google.gr/books?id=5R-H-HidKCgC&pg=PA143&lpg=PA143&dq=directive+115/2001&source=bl&ots=CT4lIYVCH6&sig=dmdQ_WAZlgHSrGpJmFC0804KeXQ&hl=el&sa=X&ved=0ahUKEwjjusfOjqbSAhWIDRoKHZbuCjoQ6AEIWjAJ#v=onepage&q=directive%20115%2F2001&f=false

[72] EU Agency for Fundamental Rights in association with the Council of Europe, *Handbook on European Data Protection Law*,(Publications Office of the EU 2014), pages 57-59 and 63-65 ,visited by researcher in January 2017.

[73] Greek Law Digest, *The official Greek Law Guide, Personal Data Protection*, written by Dryllerakis and Associates on 08/07/2016, used by researcher on January 2017.http://www.greeklawdigest.gr/topics/data-protection/item/111-personal-data-protection

specific precautions whenever sensitive personal data are involved and complying with confidential obligations.

According to para. 2 of art. 12 of Law 2472/1997, the data subject (usually the employee) shall be entitled to request and obtain from the Controller information concerning all the personal data relating to the employee as well as their source, the purposes of data processing, the notification to third parties, to whom the data have been announced and the correction, deletion or locking of the data. What is more, the employees' right to object, included in art. 13, consists of the right of the employees to ask the employer to withdraw or remove or not take into consideration any data acquired unlawfully. Consequently, the right concerns any data processing that takes place beyond lawful and contractual purposes. Moreover, the employees have the right to provisional judicial protection (Article 14) as a result of which they have the opportunity to appeal before a competent civil or administrative court requesting the immediate suspension or the non-application of an act or decision affecting them, irrespective of whether other prerequisites for judicial protection exist.

What is more, Law 2472/1997 stipulates that transborder flows of personal data to EU countries are permitted (art. 9 (1)), whereas the transferring of personal data to non-EU countries presupposes a special permission by the Hellenic Data Privacy Authority (HDPA) unless the EU Standard Contractual Clauses or Binding Corporate Rules (BCR)[74] are complied with. In each company the BCR must contain privacy principles (such as transparency, data quality, security), tools of effectiveness (complaint handling system, audit, training) and a suitable provision at the statute of the company guaranteeing that the BCR are binding in order for the company to comply with them.

With respect to the personal data protection requirements, they also appear in cases of monitoring employees or when it comes to internet and e-mail usage policies implemented by the companies

[74] Website of European Commission, Section of Data Protection, 'Overview on Binding Corporate Rules, used by researcher:January2017.http://ec.europa.eu/justice/data-protection/international-transfers/binding-corporate-rules/index_en.htm.

within the framework of their relations with their personnel. According to various texts, recommendations and decisions (issued by the HDPA, Working Party of art. 29, International Labor Office) one can draw the conclusion that monitoring the Internet and e-mail usage of employees is not considered legitimate unless the employer has taken all the necessary measures in order to protect the employees' privacy (for instance, by continuously warning them about the monitoring).[75]

9.2.2 Law 3691/2008

Another useful tool is provided by Law 3691/2008[76]. First, art.30 thereof outlines the protection of reporting employees' data, by virtue of a joint decision of the Minister of Economy and Finance and the Minister of Justice, which may specify measures to protect the obligated natural persons reporting suspected cases of committing or attempting to commit the offences set out in art. 2, from threats or hostile acts. Second, art. 31 thereof, on prohibition of disclosure, prescribes that the obligated persons and their directors and employees must not disclose to the customer concerned or to other third persons the fact that information has been transmitted or shall be transmitted to the Anti-Money Laundering, Counter-Terrorist Financing and Source of Funds Investigation [77] or other public authorities or that an investigation is being or shall be carried out in relation to the offences of Article 2 and 3 thereof.[78] Natural persons that intentionally violate their duty to observe secrecy are punished by imprisonment for not less than three months and a pecuniary penalty.

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[75] Greek Law Digest, *The official Greek Law Guide, Personal Data Protection*, written by Dryllerakis and Associates on 08/07/2016, used by researcher on January 2017.
http://www.greeklawdigest.gr/topics/data-protection/item/111-personal-data-protection

[76] Law 3691 (Prevention and suppression of money laundering, terrorism financing and other provisions) 2008 [Πρόληψη και καταστολή της νομιμοποίησης εσόδων από εγκληματικές δραστηριότητες και της χρηματοδότησης της τρομοκρατίας και άλλες διατάξεις].

[77] See para. 5, Article 4 of Law n.3691(prevention of money laundering and terrorism financing and other provisions) 2008[Πρόληψη και καταστολή της νομιμοποίησης εσόδων από εγκληματικές δραστηριότητες και της χρηματοδότησης της τρομοκρατίας και άλλες διατάξεις] on the word's definition.

[78] See Articles 2 and 3 of Law n. 3691 (prevention of money laundering and terrorism financing and other provisions) 2008 [Πρόληψη και καταστολή της νομιμοποίησης εσόδων από εγκληματικές δραστηριότητες και της χρηματοδότησης της τρομοκρατίας και άλλες διατάξεις].

Under art. 40 thereof, implementation measures were enacted on the cooperation and exchange of confidential information. It's worth mentioning that under para. 1, during an administrative investigation carried out by the Commission into any case, the Prosecutorial Authority and the investigating judge may request confidential information. The Commission can transmit and exchange confidential information, collected in the context of fulfilling its investigating obligations, following either a justified request by the authorities referred to in para. 2 of art. 40 or upon the Authority's initiative. The competent authorities may exchange confidential information about the fulfillment of their obligations under this Law and shall inform each other about the results of the relevant investigations. Bilateral or multilateral memoranda of understanding may specify the modalities for such exchange of information.[79] The information referred to in this article[80] include any information which the transmitting or exchanging agencies have obtained in the context of their international cooperation with their foreign counterparts, provided that this is permitted by the terms and conditions of such cooperation. In conclusion, for the purposes of the implementation of the provisions of this Law, confidential information means any information about business, professional or commercial behaviour of legal or natural persons, data and facts regarding their transactions and activities, or tax records and information on criminal offences and breaches of tax, customs or other administrative laws and regulations.[81]

[79] See para. 4, Article 40 of Law n. 3691 (prevention of money laundering and terrorism financing and other provisions),2008[Πρόληψη και καταστολή της νομιμοποίησης εσόδων από εγκληματικές δραστηριότητες και της χρηματοδότησης της τρομοκρατίας και άλλες διατάξεις].
[80] See para. 8, Article 40 of Law n. 3691 (prevention of money laundering and terrorism financing and other provisions),2008[Πρόληψη και καταστολή της νομιμοποίησης εσόδων από εγκληματικές δραστηριότητες και της χρηματοδότησης της τρομοκρατίας και άλλες διατάξεις].
[81] See para. 9, Article 40 of Law n. 3691 (prevention of money laundering and terrorism financing and other provisions),2008 [Πρόληψη και καταστολή της νομιμοποίησης εσόδων από εγκληματικές δραστηριότητες και της χρηματοδότησης της τρομοκρατίας και άλλες διατάξεις.]

10. If relevant, please set out information on the following:

10.1 Defences to the offences listed in question 2;

10.1.1 General defenses:

Lack of intent, ignorance of facts and ignorance of law can be defenses against any criminal charge.

10.1.1.1 Ignorance of facts

The defendant may wish to defend itself by claiming that it acted unintentionally or that it did not act with the required kind of intent. Intent is one of the basic elements of the crime. In principle all crimes (felonies and misdemeanors) must be committed intentionally unless the law explicitly stipulates as crimes acts or omissions which were committed by negligence.[82] All the crimes presented by the present report require intention and some of them require a specific kind of intent for the commitment of the crime (direct – indirect intention). It should be clarified that the burden of proof of the intent or the certain level or intent, rests on the prosecution. This is because in the Greek Criminal System, it is the Prosecutor's obligation to gather all the necessary evidence, including proof that the circumstances establish the defendant's intent, in order to refer a case to trial. For a guilty verdict, the Court has to be satisfied that the defendant's intent has been proven beyond a reasonable doubt.[83]

In the same vein, the defendant may claim that it was ignorant of the factual elements constituting a criminal act. This possibility is provided by art. 30 of the GCC. As a defense ignorance of facts concerns the lack of a basic element of the crime and does not constitute a special defense that could, for example, justify the criminal act or forgive the offender. The main argument regarding ignorance of facts is that whilst the defendant was acting, it was ignorant of the facts that constituted the factual basis of the act, therefore it cannot be claimed to have committed the crime intentionally; ignorance of facts stipulates lack of intent on the defendant's behalf. For instance, in the case of money laundering, ignorance of facts could constitute a situation whereby the offender

[82] art. 26 par 1 of GCC.
[83] See about the principle "In dubio pro reo" in Greek Criminal Procedure at: Adam Papadamakis, *Ποινική δικονομία (4* Sakkoulas 2008) 7 [Greek].

whilst acting it was ignorant of the fact that the money it received was the proceeds of a crime. If the defendant manages to prove such ignorance or if the court discovers on its own that such ignorance is applicable in a given case, the crime is not attributable to the defendant[84] and it shall be found not guilty.

10.1.1.2 Ignorance of law

art. 31 of the GCC stipulates the 'ignorance of law'. The defendant may present as a defense the fact that it erroneously believed that it was acting lawfully. It must be highlighted from the outset that plain ignorance of a legal provision which punishes an act is not enough to meet the criteria of ignorance of law.[85] The ignorance of law in the Greek criminal system means that the offender was not aware or that it was confused with regards to the unfairness of its act. In other words, the offender did not realize that its act could ever be considered unfair or unlawful. It must be also clarified that the crime is not attributable to the defendant only in case it is proved that its erroneous belief was excusable.[86] The burden of proof rests on the defendant. In order to prove that its belief was excusable, the defendant must prove that it did whatever it could given its personal capacities and capabilities and that it took all reasonable steps to establish that it was acting in accordance with the law.[87] For this reason, in cases that criminal liability is associated with special capacities and knowledge on the part of the defendant (e.g. executive of a corporation regarding corporation's tax or transparency and reporting obligations) it is uncertain whether a defense based on ignorance of law will be accepted by the court.

10.1.2 Specific Defenses

A specific defense is available for the crime of money laundering. Although the prosecution and conviction of the accused for money laundering is not dependent on the prosecution and

[84] art. 30 par 1 of GCC.
[85] art. 31 par 1 of GCC.
[86] art. 31 par 2 of GCC.
[87] See more for the excusable belief at: Manoledakis I., *Ποινικό Δίκαιο – Επιτομή Γενικού Μέρους (7η έκδοση)* , revised in 2005 by Prof. Maria Kaiafa-Gbandi and Prof. Elissavet Symeonidou-Kastanidou, Sakkoulas Publications, 178-182 [Greek].

conviction of the accused for the basic crime,[88] art. 45 para. 3 of. 3691/2008[89] stipulates that in cases that the basic crime is not punishableas well as in cases of acquittal of the defendant of the basic act due to the lack of filing a complaint on behalf of the victim or due to the fact that the defendant fully compensated the victim (in cases of crimes where this possibility is applicable) the accused of money laundering shall also also found innocent or be freed of charges.[90]

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement);

In the Greek criminal system there is no legislative provision regarding the obtaining of immunity from prosecution. In the same vein, there is also no mechanism for a suspect to agree with the prosecution to meet certain requirements in return for a deferred prosecution. The Greek legal system doesn't stipulate the possibility of a deferred prosecution. The lack of mechanisms for deferred prosecution agreements, settlement agreements and immunity from prosecution is relevant to the role of the Public Prosecutor in the Greek criminal system. The Public Prosecutor is only entitled to prosecute, with no additional power to impose compliance rules in order to grant a suspect immunity from prosecution.[91] This is explained by the fact that the Public Prosecutor in the Greek criminal system is not a judge but rather a judicial official with a right and duty to prosecute in the name of the State.[92] Furthermore, the fact that Public Prosecutor prosecutes in the name of the State does not mean that it is obliged to support all the charges and to always plead against the defendant. The Public Prosecutor is not a party in trial, it is not a plaintiff.[93] It shall seek the truth not only against, but also in favour of the defendant. In other words, the Greek criminal system is more of an inquisitorial rather than of an adversarial nature. In such a system,

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[88] Art 45 par 2 Law n.3691 (Prevention and suppression of money laundering, terrorism financing and other provisions) 2008 [Πρόληψη και καταστολή της νομιμοποίησης εσόδων από εγκληματικές δραστηριότητες και της χρηματοδότησης της τρομοκρατίας και άλλες διατάξεις].

[89] 3691 (Prevention and suppression of money laundering, terrorism financing and other provisions) 2008 [Πρόληψη και καταστολή της νομιμοποίησης εσόδων από εγκληματικές δραστηριότητες και της χρηματοδότησης της τρομοκρατίας και άλλες διατάξεις]

[90] ibid art. 45 par 3.

[91] Euaggelos Kroustalakis "*Ο ρολος του Εισαγγελέα στη σύχρονη κοινωνία θεσμικό πλαίσιο και προοπτικές*",(1.Sakkoulas Publication 2005),72 Greek.

[92] See about the Role of the Public Prosecutor: Adam Papadamakis, "*Ποινική δικονομία",(*Sakkoulas Publications 2008),116 Greek.

[93] Idem

proposals and efforts for the establishment of mechanisms regarding deferred agreements and immunity from prosecution (also regarding plea bargaining mechanisms) have been criticised by scholars.[94]

However, art. 263B[95] par 1 of the GCC, which aims to facilitate anti-corruption legislation, provides the perpetrators of active bribery with the following possibility: If the perpetrator of active bribery reports to the authorities the criminal act as well as the bribed official on its own free will and before being questioned and examined by the authorities in any way, it will not be punished for the criminal act.

Furthermore, it is worth noting that relatively recently[96] the GCCP has made available a mechanism which depicts a direction towards the forms of restorative justice. art. 308B of the GCCP renders the 'criminal reconciliation' as an alternative justice procedure.[97] Nevertheless, in order for this procedure to be applicable an already initiated prosecution is required. Moreover, this possibility is available only for certain crimes. Regarding the crimes analysed in the present report, the mechanism of criminal reconciliation is applicable only in the case of fraud.

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

First of all, it should be clarified that in the Greek legal system there is no statutory provision for the reduction of the sentence in case of early guilty pleas or cooperation with the authorities.

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[94] See: N.Androulakis '*Αλλαγή παραδείγματος στην ποινική δίκη*'[July 2016] Ποινική Δικαιοσύνη Τεύχος 7ο [Greek]

[95] was added in GCC by art 15 par 1 Law n. 3849 (Ammending law 3213/2003, amending provisions of the GCC regarding crimes of civil servants against the Service and other provisions) 2010 [Τροποποίηση του ν. 3213/2003, διατάξεων του Ποινικού Κώδικα που αφορούν εγκλήματα σχετικά με την Υπηρεσία και άλλες διατάξεις] and replaced later by subparagraph I.E 13 of art. 1 of the lLaw n. 4254 (Measures to support and develop the greek economy implementing Law n.4046/2012 and other provisions) 2014 [Μέτρα στήριξης και ανάπτυξης της ελληνικής οικονομίας στο πλαίσιο εφαρμογής του ν. 4046/2012 και άλλες διατάξεις] 2014.

[96] Law 3904 (On streamlining and improving the dispensation of criminal justice and other provisions) 2010 [Εξορθολογισμός και βελτίωση στην απονομή της ποινικής δικαιοσύνης και άλλες διατάξεις

[97] It takes place during the main investigation between the victim and the defendant under the guidance of the prosecutor with the purpose of the defendant satisfying the victim. The reconciliation is successful if the victim and the defendant reach an agreement.

However, such acts can work the defendant's advantage. The explanation is as follows: In the Greek penal system, although the minimum and maximum range of the sentence of every crime is stipulated by the criminal provisions, the final sentence is unique in every case as it is ultimately determined by the Judge. [98] When the Judge determines the final sentence it takes into consideration any existent mitigating factors from those stipulated in article 84.2 of the GCC.

These mitigating factors may lead to a reduction of the sentence.[99] Cooperation with authorities and early guilty pleas can be considered such mitigating instances under art. 84.2(d)[100]of the GCC. Furthermore, there are provisions which stipulate penalty reductions for certain crimes. Such a provision is art. 263B of GCC which has already been examined in a previous question. By virtue of art. 263 B par. 2 the perpetrator and any participant in both active and passive bribery can receive a lighter sentence by reporting the crimes to the authorities and by disclosing substantial information with regards to the criminal acts and the official's criminal conduct. In order to receive such lighter sentence, the offender must report a participant in bribery that has the status of a public official. The term 'public official' is defined separately in the General Part of the GCC. art. 13 thereof defines the term as 'a person lawfully assigned with the exercise of public service, or stemming from mayoral or local authority or related to [the functions of] any other public legal person, even if such assignment is temporary'. In addition, art. 263a of the GCC specifies that, for the purposes of all articles of the GCC under the Chapter concerning Offences Related to Public Service, the term also includes mayors, presidents of communes, and those persons serving either permanently or temporarily and in whichever capacity in:

- enterprises or organizations belonging to the State, organizations of local government or public or private legal persons supplying to the public either exclusively or in a privileged manner water, electricity, heat, energy, or means of public transportation, communication or information b) banks based in Greece by virtue of the law or of their statute.

[98] The judges take into account among others: The way the crime was committed, the method used, the gravity of the act, the equipment used, the caused damage etc.
[99] art. 84(1) of GCC.
[100] Mitigating circumstance of 84.2 d: "*The defendant demonstrated sincere regret and he tried to reduce the consequences of his action.*"

- private legal persons founded by the State or by public legal persons or by any of the abovementioned legal persons, if their founding entities participate in the management or, in the case of S.A.s, in the capital or if the founded legal persons have been assigned with the execution of State programmes of economic reconstruction or development.
- private legal persons which the State, public legal persons or the abovementioned banks may subsidy or finance.

Therefore, if someone wishes to reach a penalty reduction, it must report a public official who belongs in the aforementioned categories. Lastly, it is noteworthy that a public official, who is an offender or participant in these acts, can also receive a lighter sentence on condition that it reports another public official who participated in such acts as long as the other public official holds a significantly superior position compared to its own position.

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance)

As mentioned above, in the Greek legal system, no criminal liability is foreseen for legal entities; thus, the prosecution of any potential violations and the imposition of the designated administrative sanctions belong to the administrative authorities and especially to the Revenue Service.

Moreover, as Greece has ratified the Civil Law Convention on Corruption by enacting Law 2957/2001,[101] other means of punishment are also acknowledged, as for example the rights of compensation and annulment of agreements that were the result of bribery act(s). It is worth noting that under the same Law civil servants are protected through specific provisions against disciplinary punishment when reporting corruption practices to higher officials.

[101]Law 2957 (Ratification of Council of Europe Civil Law Convention on Corruption) 2001 [Κύρωση της Σύμβασης του Συμβουλίου της Ευρώπης για θέματα Αστικού Δικαίου περί Διαφθοράς].

The aforementioned measures cover all forms of participation in an act of corruption (perpetrators, accessories and instigators). However, the imposition of a sentence on corporations depends on certain factors, namely: the size of the entity and its annual turnover; the importance of the committed offence; any damages caused; the benefit amount; and possible prior 'criminal' misconduct.

Due to the costs that are associated with the imposition of suppressive measures in cases of law violations, it is in a company's best interest to adopt compliance procedures to deal effectively with corrupt practices. National and international standards concerning best practices and transparency are useful to this effect, as there are no specific models when it comes to stipulating what constitutes an effective compliance programme. According to these standards, a successful compliance programme should include:

- **internal controls.** These procedures constitute a process that is executed by an entity's board, management and other personnel and is designated to provide reasonable assurance as regards to the effectiveness and efficiency of operations, reliability of financial reporting and compliance with applicable laws and regulations.
- **proper record keeping and regular audits.** The Code for Registration of Tax Records, the Code for Taxation and the Regulation on Money Laundering lastly amended by [102] contain the relevant rules. Corporate books and records must be kept in a legally defined way. Specific provisions stipulate what may be regarded as a questionable transaction and what may be recorded in accounts. Financial statements are filed with the Revenue Service annually. Statements of value added tax are filed monthly (for large corporations). Internal auditors co-sign the annual financial statements, which are verified by an external auditor (who bears responsibility for the accuracy of filed statements).

[102] Law 3691 (Prevention and suppression of money laundering, terrorism financing and other provisions) 2008[Πρόληψη και καταστολή της νομιμοποίησης εσόδων από εγκληματικές δραστηριότητες και της χρηματοδότησης της τρομοκρατίας και άλλες διατάξεις].

- **standard procedures in respect to payments** (e.g., required documentation and authorisations). All kinds of payments or expenses that cannot be justified under the scope of a certain financial activity or market rules can be reviewed as suspicious.
- **regular review of internal procedures and employees' compliance with these procedures.** There is no general rule set out by anti-corruption legislation expressly demanding disclosure of violations by a company/legal entity for violations there. However, there are specific requirements for disclosure of irregularities related to other aspects of a company's activities, such as the obligation to report suspicious transactions in the context of money-laundering regulations or tax criminal law. Following an amendment of the relevant regulations, auditors and accounting officers have increased responsibility for the accuracy of entries in the financial records.

Lastly, Greece has enacted an express prohibition on the tax deduction of bribes since 2006, when Greece added art. 31(16) to its Income Tax Code[103] which states that 'Payments in case or in kind are not considered deductible expenses from the gross income when such payments constitute a criminal offence, even when payable abroad'. Similarly, the new Income Tax Code[104], which applies to income and expenses since the 1st of January 2014, states in art. 23(f) that 'the provision or receipt of remuneration in case or in kind that constitutes a criminal offence is not a deductible expense'.

Nevertheless, the aforementioned prohibition against tax deduction of bribes in the Income Tax Code does not apply to shipping companies, since the Income Tax Code itself does not apply to profits from the operation of ships flying the Greek flag that are obtained by Greek companies, cooperatives or unions of co-operatives (Income Tax Code art. 103(1)(g)).

[103] Law 2238 (Ratification of income taxation code) 1994 [Κύρωση του Κώδικα Φορολογίας Εισοδήματος].
[104] Law 4172 (Income taxation, urgent implementation measures of Laws 4046/2012, 4093/2012, 4127/2013 and other provisions) 2013 [Φορολογία εισοδήματος, επείγοντα μέτρα εφαρμογής του ν. 4046/2012, του ν. 4093/2012, και του ν. 4127/2013 και άλλες διατάξεις].

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

The Greek legal system on corporate compliance is a complex one; there are many laws and many individual agencies that have, in many occasions, overlapping powers. As a result sometimes there can be confusions as to which authority is the competent one to intervene in a given case, thus leading to delays and inefficiencies in the regulatory mechanism. In addition, due to the financial crisis that has been tantalising Greece over the past few years, the enforcement agencies are underequipped and lack the necessary personnel so as to effectively fulfill their regulatory duties. Therefore, the concentration of all regulatory powers in one single Authority, fully equipped in order to effectively exercise all necessary checks and impose the relevant sanctions is imminently called for.

In the same vein, it is crucial to promote the enactment of internal, self-regulatory mechanisms within the corporate structure as well as provide companies with incentives in order to boost compliance with the existing legal framework. Promoting the 'carrot' instead of the 'stick', i.e. ex ante deterrence instead of ex post suppression would significantly cut down on regulatory costs as well as increase the effectiveness of the regulatory mechanism, allowing regulatory authorities to make better use of their limited resources and human capital. Furthermore, self-regulatory mechanisms would allow companies a greater degree of flexibility and discretion as to develop systems that would better suit their individual needs and address any particular problems present in their businesses.

Insofar as the legal framework on corporate responsibility is concerned, given that the imposition of criminal responsibility on corporations is becoming more and more common in the international legal order, it is not unlikely that the current trend will also be transplanted into the Greek legal system. Abstaining from the principle of personal liability could increase corporate compliance and work as an effective alternative in cases deterrence practices and self regulatory mechanisms fail to produce the wanted outcome.

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- Greek Code of Criminal Procedure.
- Greek Civil Code
- Hellenic Constitution
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- Law n.2472 (on the protection of the individual with regard to the processing of personal data) 1997 [Προστασία του ατόμου από την επεξεργασία δεδομένων προσωπικού χαρακτήρα], art 4, par 1a.
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- Law n. 3424 (Adapting the Greek legal system to the Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering and other provisions) 2005 [Τροποποίηση, συμπλήρωση και αντικατάσταση διατάξεων του ν.2331/1995 (ΦΕΚ 173Α) και προσαρμογή της ελληνικής νομοθεσίας στην Οδηγία του Ευρωπαϊκού Κοινοβουλίου 2001/97/ΕΚ και του Συμβουλίου για την πρόληψη

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- Law n. 3424 (Prevention and Suppression of Money Laundering and Terrorist Financing and Other Provisions) 2008 [Πρόληψη και καταστολή της νομιμοποίησης εσόδων από εγκληματικές δραστηριότητες και της χρηματοδότησης της τρομοκρατίας και άλλες διατάξεις.].
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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction.

1.1 Anti-bribery/ Corruption

Ireland has signed and ratified several international anti-bribery and anti-corruption conventions. [1] Ireland has three primary sources for its' anti-bribery laws:

- The Public Bodies Corrupt Practices Act 1889, as amended by the Prevention of Corruption Acts 1916 and the Ethics in Public Office Act 1995 (the Public Bodies Acts);
- The Prevention of Corruption Act 1906, as amended by the Prevention of Corruption (Amendment) Act 2001 and the Prevention of Corruption (Amendment) Act 2010 (the Prevention of Corruption Acts); and
- The Ethics in Public Office Act 1995, as amended by the Standards in Public Office Act 2001 (the Ethics Act.)[2]

Currently in Ireland, the main offences related to bribery are laid down in the Prevention of Corruption Acts 1889-2010 (the "PCA".) A company itself can be convicted of bribery as well as imposing liability on an officer of the company, under the PCA. This can occur in instances where:

- An offence is committed by the company and;
- The offence occurs with the consent or commission by any officer of the company, or;
- The offence has occurred due to the willful neglect of the officer.

Although, the company will not be held accountable in instances where the offence is committed by a person acting for the company, even when the company has failed to set out clear procedures

[1] • Council of Europe Criminal Law Convention on Corruption, 2003;
• Additional Protocol to the Council of Europe Criminal Law Convention on Corruptio, 2005;
• UN Convention against Corruption, 2011;
• OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, 2003;
• Convention of the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, 2005;
• EU Convention on the Protection of the European Communities Financial Interests (and Protocols), 2002; and
• UN Convention against Transnational Organized Crime, 2010.

[2] Carina Lawlor and Bríd Munnelly, *Anti-Corruption Regulation*, Getting Through the Deal, 2014.

and policies in relation to corruption and bribery. The Irish Government in 2012, published the proposed Criminal Justice (Corruption) Bill to update Ireland's bribery laws. The key change proposed in this Bill was to make a company criminally liable for people acting on the company's behalf committing an offence, where the company has failed to take reasonable supervisory steps to prevent such offences occurring. Despite the Bill being proposed in 2012, we are yet to see one consolidated piece of legislation on the matter and it is unknown when it will be completed as it is still in the drafting process.[3]

European Convention on Human Rights Act 2003, s 2.

1.1.2 The Public Bodies Acts

The Public Bodies Acts sets down the principal offences dealing with corruption in Irish public office. It is an offence for a person to:

Corruptly, give, promise or offer, solicit, receive or agree to receive, for himself, or for any other person, any gift, fee, loan, reward or advantage whatsoever as an inducement to, or reward for, one of the specified public officials above, doing or refraining from doing, anything in which the public body is concerned.[4]

The Public Bodies Acts offered no definition for the term "corruptly". This was later defined in the Prevention of Corruption (Amendment) Act 2010 as:

"Acting with an improper purpose personally or by influencing another person, whether by means of making a false or misleading statement, by means of withholding, concealing, altering or destroying a document or information, or by another means."[5]

[3] McCann Fitzgerald, *Irish Anti-Bribery Law: Change is Coming*, June 2016.
[4] n2
[5] A&L Goodbody, *The Law on Bribery and Corruption in Ireland*, 2012.

1.1.3 The Prevention of Corruption Acts

Under this Act, there are three prohibited offences. The first offence is corruptly accepting a gift. It is an offence for an agent or any other person to:

Corruptly accept, agree to accept, or agree to obtain, a gift, consideration, or advantage, for himself or any other person, as an inducement, reward or on account of the agent doing any act, or making any omission, in relation to the agent's office or position, or his principal's affairs or business.[6]

The second offence is corruptly giving a gift. In this instance, it is an offence for a person to:

Corruptly give, agree to give, or offer, a gift, consideration or advantage, to an agent or any other person, as an inducement to, or reward for, or otherwise on account of the agent doing any act, or making any omission in relation to his office or his principal's affairs or business. [7]

The word "agent" has a broader scope than its common law understanding. It can include not only domestic but foreign nationals working or acting on behalf of any public or private body. [8]

The third offence consists of making a false statement. A person will be guilty of an offence if they knowingly give to any agent, or an agent knowingly uses with intent to deceive his or her principal,

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[6] n2
[7] ibid
[8] (a) an employee or person acting for another; (b) an office-holder or director in a public body or any other person employed by or acting on behalf of the public administration of the Irish state; (c) a member of the Irish parliament or an Irish elected member of the European Parliament;
(d) the Attorney General, the Comptroller and Auditor General, and the Director of Public Prosecutions;
(e) a judge of the Irish courts;
(f) a member of government, or regional or national parliament of any other state;
(g) any member of the European Parliament, the Court of Auditors of the European Communities, or the European Commission;
(h) a public prosecutor or judge in any other state;
(i)a judge of any court established under an international agreement to which Ireland is a party;
(j) a member of an international organisation to which Ireland is a party;
(k) any person employed by or acting on behalf of the public administration of any state; or
(l) any member or person employed by an international organisation to which Ireland is not a party.

any receipt, account, or other document which contains any statement which is false or erroneous or defective in any way, and which to that person's knowledge is intended to mislead the principal.[9]

1.1.4 The Ethics Act

The Ethics Act puts obligations on Irish public office members and those within the Irish public service. These obligations require them to surrender and report any gifts or payments that surpass EUR 50. The Ethics Act requires those is office to declare any financial gains or interests to combat potential corruption.

1.1.5 Other legislation

As per the First Protocol to the EU Convention of the Protection of European Communities Financial Interests, the Criminal Justice (Theft and Fraud Offences) Act 2001 protects against offences of active or passive corruption within Irish Law.

1.1.6 Foreign Bribery

In instances that bribery occurs outside of Ireland, they will only be prosecuted in Ireland if the offence is completed by Irish persons or companies or if the offence has partially taken place in Ireland. In the case of an Irish person committing an offence outside Ireland, which, if had been committed in Ireland, would amount to a corruption offence, that person will be found to be liable. This applies to those who are:

Irish citizens, persons who are ordinarily resident in Ireland, companies registered under the Irish Companies Acts, any other body corporate established under Irish law, or certain defined public officials. In addition, a person may be tried in Ireland for an offence under either the Public Bodies Acts or the Prevention of Corruption Acts if any of the acts constituting the offence were partly committed in the state and partly committed outside Ireland. [10]

[9] ibid.
[10] n2

1.1.7 Common Law

By way of vicarious liability, a company can be found responsible under common law for any criminal acts carried out by its employees. Although, these acts must remain the acts of the employees through regular course of employment, not the acts of the company.

1.1.8 Anti-Money Laundering

Under the Criminal Justice Act 1994, money laundering is treated as a very serious criminal offence. Irish anti-money laundering law was updated with the Criminal Justice (Money Laundering and Terrorist Financing) Acts 2010 and 2013. Section 7 of the Act outlines a *money laundering offence* in terms of property that is due to the "proceeds of criminal conduct". [11]

Money laundering offences occur where a person, knows or is recklessly unaware that the property in question was gained through criminal conduct and the person was involved in:

- Concealing or disguising the true nature, source, location, disposition, movement or ownership of the property;
- Converting, transferring, handling, acquiring, possessing, or using the property or;
- Removing the property from, or bringing the property into, the State.[12]

The Act places an onus on "designated persons" to protect against their businesses being used for money laundering purposes. "Designated persons" is defined as any person working in Ireland that falls under the following:

- A credit or a financial institution (this includes funds and fund service providers, money lenders and money transmission or bureaux de change businesses) unless specifically excepted;
- An auditor, external accountant, or tax adviser;
- A relevant independent legal professional;

[11] Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, s 7.
[12] ibid.

- A trust or company service provider;
- A property service provider;
- A person who directs a private members club at which gambling activities are carried out;
- A person trading in goods in respect of transactions involving the receipt of cash of at least EUR 15,000;
- Any other person of a prescribed class. [13]

A number of authorities are mentioned in the Act as to secure compliance:

- The Central Bank of Ireland for credit institutions or financial institutions
- The designated accountancy bodies for auditors, external accountants, or tax advisers
- The Law Society of Ireland for solicitors
- The General Council of the Bar of Ireland for barristers
- The Minister for Justice and Equality for any other designated person

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

2.1 Enforcement

While there have been no cases against Irish companies for bribery of foreign public officials, the OECD has made note that three allegations of bribery of foreign officials are at the pre-investigation stage. There is one allegation that is currently being investigated by Irish authorities.

Only a small amount of domestic bribery law enforcement has taken place in Ireland, placing a heavy emphasis on domestic public bribery of Irish public officials and employees for corruption. Under the Prevention of Corruption Acts, between 2005 and 2008 there were 17 prosecutions, with four imprisonments, six suspended prison sentences, and fines for the remainder. Recently

[13] ibid, s 25.

there have been increased actions taken against politicians. A former councilor and mayor, Fred Forsey, was convicted of corruption offences in June 2012.

2.2 Prosecution

The law on bribery in Ireland does not offer for the prosecution of foreign companies for bribery outside the Irish state. Instead, as per the Prevention of Corruption Acts, emphasis is place on the concept of territoriality – only if connections can be shown to Ireland can those acts committed outside Ireland be prosecuted. If for example, an offence having involved the bribery of an Irish official, or the person carrying out the bribe being an Irish citizen or company.

2.3 Criminal Sanctions

2.3.1 Prevention of Corruption Acts

Under the Prevention of Corruption Acts, a person guilty of either a corruption offence or the discrete offence of corruption in office, is liable on summary conviction to a fine not exceeding EUR 4,000 and/or imprisonment for a maximum of 12 months. A person convicted on indictment is liable to an unlimited fine or imprisonment for a term not exceeding 10 years or both.an employer summarily convicted of an offence under the whistleblower protection in the Prevention of Corruption Acts can be fined up to €5,000 and imprisoned for up to 12 months.[14] An employer can be fined up to €250,000 upon conviction on indictment, and imprisoned for up to three years. Under the Theft and Fraud Act any person or official who is convicted on indictment of committing either active or passive corruption can be subject to an unlimited fine or imprisonment for a term of up to five years, or both. If an auditor fails to report an indication of corruption as per the Theft and Fraud Act to the Irish police, they will be guilty of an offence and will be liable on summary conviction to a fine of €2,500 or imprisonment to a term not exceeding 12 months.[15]

[14] n2
[15] ibid.

2.3.2 Civil

In some instances, an employer may have a civil cause of action to recover damages from an employee who has been bribed and has subsequently caused loss to the business. A person who gains a benefit by reason of a fiduciary relationship may also be required to account on trust for the unauthorised profit made by him. The Department of Enterprise, Jobs and Innovation has offered guidance that a company in violation of Irish bribery law may be prevented from bidding on any public contract in the European Union. Where a breach of Irish bribery law is committed by a company in connection with a project funded by the World Bank and other international financial institutions, such companies may be debarred from bidding on contracts funded by the World Bank, International Monetary Fund and other international financial institutions, and publicly named.[16]

2.3.3 Public Bodies Acts

Under the Public Bodies Acts, on summary conviction for an offence an individual may be liable to a fine not exceeding €2,500 or imprisonment for up to 12 months, or both. An individual, on indictment may be liable to conviction or a fine of up to €111,102.08 or imprisonment for up to seven years, or both. In some instances, the court can also direct the convicted person to pay to his or her employer the amount or value of any gift, loan, fee or reward received by him or her. In extreme cases, an employee or officer of a public body may have to forfeit his or her right and claim to any compensation or pension to which he or she would otherwise have been entitled.

2.3.4 Ethics Act

An individual on summary conviction is liable to a fine of up to €2,500 or imprisonment for up to six months, or both. Whereas for a conviction on indictment, a person will be liable to a fine of up to €44,450 or imprisonment for a term of up to three years, or both.

[16] ibid.

2.3.5 Anti-Money Laundering

A conviction on charges of money laundering carries a maximum penalty of 14 years' imprisonment. Anyone found to provide advice or assistance to anyone engaged in money laundering will be guilty of an offence. While there have been few convictions, or prosecutions, pursuant to Irish anti-bribery and anti-corruption laws, this is likely to change with the renewed focus on corruption and bribery law in Ireland, due to the passing of the recent legislation in this area.[17]

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

Within the UK, the actions of directors or top management officials can impose corporate liability in numerous situations. This is relevant to the discussion of corporate liability within Ireland, since the legal view is similar in nature. Under the UK legal system, the main principle behind corporate liability is that if it can be proven that the 'directing mind and will of the company knew about, actively condoned or was involved in the criminal conduct" liability will be imposed on the organization.[18] This concept, "directing mind and will has usually been interpreted to mean a natural person at or close to board level, i.e., a director, senior officer or other person who exercises autonomous control over the company's management functions.' [19] It should be noted, however, that in January of 2017 the UK Government issued a formal "call for evidence" in regards to corporate liability for economic crimes.

[17] n5
[18]Karolos Seeger, Alex Parker and Andrew Lee, "Debevoise Looks at UK's Initial Move to Expand Corporate Criminal Liability" (February 2, 2017).
<http://www.debevoise.com/~/media/files/insights/publications/2017/01/20170117a_corporate_liability_for_economic_crime.pdf> accessed 19 February 2017.
[19] ibid.

According to Chapter 19 of the Corporate Manslaughter and Corporate Homicide Act of 2007, "senior management can impose liability for activities which are managed or organised- cause a person's death, and amount to gross breach of a relevant duty of care owed by the organisations to the deceased." A senior management is the person "who play significant roles in- the making of decisions about how the whole or a substantial part of its activities are managed or organised, or the actual managing or organising of the whole or a substantial part of those activities."[20]

The Identification Doctrine

The Identification doctrine has been expanded in the UK to legitimise the theory that 'liability of a crime committed by a corporate entity is attributed or identified to a person who has a control over the affairs of the company and that person is held liable for the crime or fault committed by the company under his supervision.'[21] Under *H.L. Bolton Company v. T.J. Graham & Sons* Lord Denning held:

> 'The state of mind of these mangers is the state of mind of the company and is treated by law as such…So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offense, the guilty mind of the directors or the managers will render the company themselves guilty.'[22]

The Irish legal framework has encompassed the Denning rational and included 'corporate liability for the acts of the controlling mind of the corporation.'[23] It should be noted, that this principle within the UK is not applicable to employees who are not within the decision-making power. The court in *R v. Redfern & Dunlop Ltd.*, held that "employees who were not in the decision-making level could not be 'identifiable' with the company and therefore were not deemed to be the controlling mind of the company." In Ireland, the Supreme Court has accepted the common-law

[20] Corporate Manslaughter and Homicide Act, 2007, s (4)(c)(i-ii).
[21] N. Meihra, "Corporate Criminal Liability- Doctrine of Identification" (Company Law, January 6, 2011), <http://www.legalservicesindia.com/article/article/corporate-criminal-liability-doctrine-of-identification-488-1.html> accessed 19 February 2017.
[22] ibid.
[23] Raymond J. Friel, 'Corporate Criminal Liability: A Comprehensive Analysis- Part II' *Commercial Law Practitioner* (1999) <Westlaw> accessed 8 March 2017.

identification principle, with reservation in its applicability. Ireland's use of this doctrine is limited to the imposition of civil liability on a corporation and no reported decision of the Irish Superior court has been made, regarding whether or not this doctrine extends to the criminal sphere.[24] "In theory, corporations may be prosecuted for corporate manslaughter under the common law offense of manslaughter by gross negligence, however, as it was in the UK, this is virtually impossible."[25] In Ireland, the situation is further complicated, as stated previously by the lack of precedent. The present regulatory body of the Health and Safety Authority can issue prohibition notices under the Safety, Health and Welfare at Work Act 2005, but this act only applies to work-related fatalities and does not cover instances of fatality through the sale of dangerous products or services.[26] 'There are three main areas in Ireland regarding criminal liability which include, statutory liability imposed on directors or other officers of the company in defined circumstances, *mens reas* if found by the actions of senior management or in policy considerations of a crime and personal criminal liability where they act as the controlling mind of the corporation and use it as a medium to perpetrate a crime.'[27]

[24] Corporate Killing (Consultation Paper) (LRC CP 26 - 2003) [2003] IELRCCP26 (October 2003) (Lawreform.ie, 2017). <http://www.lawreform.ie/_fileupload/consultation%20papers/cp26.htm#__RefHeading__2493_1425233419> accessed 8 March 2017.
[25] Rody O'Brien, 'Criminal Corporate Manslaughter- A Step Closer to Reform' *Irish Law Times* (2008) <Westlaw> accessed on 8 March 2017.
[26] ibid.
[27] Raymond J. Friel, 'Corporate Criminal Liability: A Comprehensive Analysis- Part II' *Commercial Law Practitioner* (1999) <Westlaw> accessed 8 March 2017.

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

4.1 Extradition between Ireland and EU States

4.1.2 Framework

Extradition of individuals between Ireland and other European Union member states is governed by the European Arrest Warrant Framework Decision,[28] which was implemented in the Irish jurisdiction by the European Arrest Warrant Act 2003[29] (EAWA). The central authorities in Ireland which are allowed to issue or respond to a European Arrest Warrant, are the Minister for Justice and Equality, who applications are made to for an individual's extradition, and the High Court through whom all extradition proceedings are then dealt with. The usual rules in relation to criminal trials apply to extradition proceedings although there are some issues with the compatibility of the rules of procedure of the common law in this jurisdiction and civil law of mainland European states.

The European Arrest Warrant Act 2003 has since been amended three times by the Criminal Justice (Terrorist Offences) Act 2005, the Criminal Justice (Miscellaneous Provisions) Act 2009 and the European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Act 2012, but no new restrictions to the extradition process have been added in that time. These decisions, acts and amendments work together to create the framework of how the extradition process between Ireland and EU member states operates. Within these pieces of legislation there are a lot of bars on the extradition of an individual aiming at protecting them from prejudiced reasoning behind the issuing states arrest warrant. There are also a few potential issues being raised, particularly with respect to the constitutional status of certain parts of the framework as well as the compatibility between Irish and civil law jurisdictions.

[28] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).
[29] European Arrest Warrant Act 2003.

4.1.3 Restrictions

There are numerous grounds upon which extradition between Ireland and other EU member states can be postponed or barred altogether.

Section 18(1) of EAWA allows for the postponement of surrender on humanitarian grounds indefinitely, until such date as the High Court, in its own opinion, those circumstances no longer exist. Following the reinstatement or granting of the arrest warrant there are time limits also in place to be respected contained in 18(4), which requires the transfer of the individual within 10 days from the lift of the postponement in s18 to the issuing state.

While Art 40.4.2 of the Irish Constitution as used regarding Section 18(5) and Section 16(6), protects individuals from being unlawfully detained in Ireland and potentially suffering further as a result of that and being sent to another state, these protections are also being used quite regularly by individuals to delay their extradition.

This protection is often abused by individuals as a delay tactic and to postpone their surrender to the issuing state, as highlighted in recent comments by Mr Justice Michael Peart, in Lanigan v. Governor of Cloverhill Prison [2016] IECA 293,

'It is difficult to escape the conclusion that in this case the use of Article 40.4 of the Constitution was simply a device to delay surrender, given the effect of s. 16(6) of the Act and that in truth the appellant had no case to legitimately make that his detention was not in accordance with law.'[30]

These comments were also echoed in another recent case, Jaroslaw Owczarz v Governor of Cloverhill Prison.[31] It should be noted that these cases have highlighted and argued the

[30] *Francis Lanigan v Governor of Cloverhill Prison, minister for Justice and Equality, Ireland and the Attorney General* [2016] IECA 293.
[31] *Jaroslaw Owczarz v Governor of Cloverhill Prison* [2016] IECA 388.

constitutionality of s16(11) of the EAWA 2003, claiming that it, 'fails to respect constitutional norms by:

- allowing the High Court judge to decide in effect whether or not there should be an appeal from her own judgment, thus infringing the rule against objective bias, and
- by curtailing the right of appeal in a manner which amounts to a disproportionate interference with the right of access to the courts, thus negating the substance of any constitutionally conferred right of appeal.'[32]

There is also an issue where Irish common law procedures do not yet match the civil law procedures of mainland EU. 'The United Kingdom, unlike Ireland, extradites people to other EU member states at an investigative stage of a possible prosecution.'[33] One main case that highlights this issue is the Minister for Justice v Tobin case.[34]

4.2 Extradition between Ireland and non-EU States

4.2.1 Framework

While extradition of individuals from one EU state to another has been harmonised since 2004 and serves as 'a concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the "cornerstone" of judicial cooperation,'[35] extradition to non-EU countries is governed in the Irish jurisdiction by the Extradition Act 1965 and its various amendments.

4.2.2 Restrictions

Much in line with the same protections afforded to individuals in Ireland to EU member states extradition procedures.

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[32] ibid para 7.
[33] Eugene Reagan, '*Ireland is out of line on European Arrest Warrant*', The Irish Times, (Dublin October 1st 2012)
[34] Minister for Justice v Tobin 2012 IESC 37
[35] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

5. Please state and explain any:

a. internal reporting processes (i.e. whistleblowing) and;

b. external reporting requirements (i.e. to markets and regulators), that may arise on the discovery of a possible offence.

When the Government introduced the Protected Disclosures Act 2014 (the Act), a new standard was set for the process of whistle-blowing in Ireland. The introduction of this new legislation brought a new and highly anticipated transformation to the process of whistle-blowing in Ireland. This revolutionary Act now ensured that both private and public sectors had whistleblowing policies which met the requirements of the new legislation and ensured full compliance with its aims. Previously there had been legislation in place but this was only applicable to certain sectors and the Act sought to incorporate all workers in all sectors of society. Protected disclosure has been defined as the disclosure of relevant information which in the reasonable belief of the worker tends to show one or more relevant wrongdoings and came to the attention of the worker about their employment. The Act is retrospective in effect which means that any disclosures made before the commencement of the Act, 15 July 2014, may fall under the protection of its articles.

5.1 The Act has set out five procedures by which a disclosure may be made:

5.1.1 Internal disclosure to an employer or other responsible person

A protected disclosure may be made to an employer when a worker feels that the information shows wrongdoing regarding the conduct of another person or there is a legal responsibility to act, if this is the case then a disclosure can be made.

5.1.2 Disclosure to a prescribed person

At the discretion of the Minister for Public Expenditure and Reform, a list of "Prescribed persons" whose positions are defined by law and are, per the Minister, appropriate to receive and investigate potential wrongdoing relating to any disclosures that are made. A disclosure that is made through this system must be identified by the worker as being considerably true.

5.1.3 Minister

If a worker is employed in a public body, the funding Department may protect any disclosure rather than to their employer.

5.1.4 Legal Advisor

Any disclosure made whilst obtaining legal advice from a barrister, solicitor, trade union or an official of an excepted body is protected.

5.1.5 Other disclosures

The last process identifies disclosures made in other circumstances such as through media in which the standard for report is pointedly higher. Certain conditions mark this process to ensure that the disclosure is protected:

- Reasonably believe that the information disclosed in substantially true;
- That disclosure is not made for personal gain; and
- The making of the disclosure is in all the circumstances reasonable.

In addition, **one of more of the following conditions must be met;**

- at the time of making the disclosure the worker reasonably believes that he/she will be subject to penalisation and detriment by his /her employer if the disclosure is made to the employer;
- in a case where there is no prescribed person in relation to the relevant wrongdoing, the worker reasonably believes that evidence will be destroyed / concealed if a disclosure is made to the employer;

There are several factors that will be taken into consideration in determining whether the disclosure is reasonable, such as, the identity of the person to whom the disclosure is made, the seriousness of the relevant wrongdoing, whether the wrongdoing is continuing or likely to occur in the future and whether disclosure is made in breach of a duty of confidentiality.
The Act also serves to provide protection for whistle-blowers with the following protections:

- Protection is available from dismissal after having made a protected disclosure.
- Protection for penalisation from the employer;
- Civil immunity from actions for damages and a qualified privilege under defamation law;
- A right of action in tort where a whistle-blower or a member of his family experiences coercion, intimidation, harassment, or discrimination from a third party;
- Protection of his/her identity; and
- It will not be a criminal offence to make a whistleblowing report which is a protected disclosure under the Act.

5.2 External Reporting Requirements

The Central Bank of Ireland (the "Central Bank") has set out on its website the clear enforcement procedure to be taken when there has been suspected fraud.[36] The Central Bank is charged with regulating financial services providers and markets and is also tasked with ensuring the consumers are protected. When a firm does not comply with regulatory requirement, enforcement is used as a tool to effect deterrence, achieve compliance, and promote the behaviour that the Bank expects.

The Central Bank's actions with regards to enforcement can be divided into two categories: pre-defined and reactive enforcement. Although as noted on their website, not all actions taken might fall into these two areas. The Central Bank makes use of the PRISM ("The Probability Risk and Impact System") engagement model which focuses on the low to high impact rating spectrum. This method serves to use firms as an example to deter other firms from negating the regulations.

PRISM stands for the Probability Risk and Impact System which is a risk-based framework used to supervise and regulate firms operating in the industry. It focuses on high risk firms which have the most risk to stability and consumers are placed under intense supervision and structured

[36] Financial Regulation, The Central Bank of Ireland Website <http://www.centralbank.ie/regulation/processes/EnfI/Pages/Introduction.aspx> (accessed on 11th of February 2017).

engagement plans. The idea behind this is to identify risks and intervene early to mitigate their potential outcomes. Those firms that are designated to have a low risk threshold are dealt with through reactive and thematic assessment.

The crucial part of this operation is focused around the **reporting requirements processes** that serve as the Central Bank's main identifiers of risk:

- Annual Returns - An annual return will be collected from all regulated investment brokers.
- Breaches - Investment Intermediaries are required to report any material breaches of legislative or supervisory requirements to the Central Bank of Ireland.
- Statutory Duty Confirmations -Auditors must make a written report to the Central Bank of Ireland stating whether or not circumstances have arisen that require the auditor to report a matter to the Central Bank of Ireland.

These reporting requirement processes are applicable to most institutions and firms that are operating in the industry in both public and private sectors.

6. Who are the enforcement authorities for these offences?

Section 393 of the Companies Act 2014 provides for reporting requirements in respect of the discovery of a broad range of possible offences.[37] The Section applies to Category 1 and Category 2 offences set out in Section 871 (1) and (2) of the Act – the two most serious categories of offences under the Act.[38]

The enforcement of offences under the Companies Acts was the subject of a significant review in 1998,[39] when – after various tribunals of enquiry in the 1990s, following decades of widespread non-enforcement of many corporate breaches – the Irish government took the decision to adopt

[37] Companies Act 2014, s 393.
[38] Ibid, s 871.
[39] Thomas B. Courtney, *The Law of Companies* (3rd edn, Bloomsbury Professional 2012) para 28.001.

a stricter approach to corporate enforcement.[40] A *Working Group on Company Law Compliance and Enforcement* was established and produced its report later that year, leading to the passage of the Company Law Enforcement Act in 2001 ('CLEA 2001').[41]

One of the most significant reforms brought about by the CLEA 2001 is the establishment of the Office of the Director of Corporate Enforcement ('the Director'), which now forms the principal agency of enforcement of the Companies Acts and the prosecution of company law offences, along with the Registrar of Companies and the Director of Public Prosecutions ('DPP'), as well as private parties who may have *locus standi* in specific cases.[42] The Registrar of Companies has retained a power of enforcement of the Companies Acts in relation to companies' filing obligations.[43] The means of enforcement available to the Registrar include the prosecution of offences relating to the registration of companies and the imposition of on-the-spot fines for offences within its scope, as well as the power to strike-off non-compliant companies.[44]

Part 2 of the CLEA 2001 establishes the Office of the Director of Corporate Enforcement and Section 12(1) of the Act sets out the functions of the Director.[45] Among other powers, Section 12(1) grants the Director the power to investigate instances of suspected offences under the Companies Acts,[46] to enforce the Companies Acts by prosecution of offences by way of summary offences and to refer cases to the DPP where he or she has reasonable grounds for believing that an indicatable offence under the Acts has been committed.[47] Section 12(2) allows the Director to do all such acts 'as are necessary or expedient for the purpose of the performance of his or her functions', which are concentrated on the Companies Acts.[48] This includes investigation through

[40] ibid.
[41] Company Law Enforcement Act 2001.
[42] n39, para 28.005.
[43] ibid 28.006.
[44] Ibid 28.008.
[45] Company Law Enforcement Act 2001, S 12(1).
[46] ibid, (c).
[47] ibid, (a), (d).
[48] ibid, (2).

the appointment of inspectors, criminal investigation, and prosecution on-the-spot fines and civil sanctions.[49]

The Director can be said to have supervisory functions insofar as certain individuals and bodies are obliged by various sections of the Acts to report to him or her instances where possible offences under the Acts come to their attention. This includes company auditors[50] and professional bodies and disciplinary committees[51]. The Director's civil enforcement functions are also significant – he or she has the standing to apply under Section 371 of the Companies Act 1963 for an injunction to require a defaulting company officer to make good his or her default, even where the default involves the commission of an indictable offence.[52] Section 55 of the CLEA 2001 confers upon the Director the power to apply for an injunction to freeze the assets of a company.[53] The Director is also accorded the power to apply under Sections 150 and 160 of the Companies Act 1990 to have a person restricted in respect of or disqualified from having certain roles in companies.[54]

This latter civil power of the Director was transferred from the DPP by the CLEA 2001, meaning that the DPP no longer enjoys this power, though he or she continues to hold the exclusive power to fully prosecute indicatable offences and the Director's power in this regard is merely supplementary;[55] the Director's power extends only to investigating possible indicatable offences and referring them to the DPP where the Director finds reasonable grounds for believing that such an offence under the Companies Act has been committed.[56]

[49] n 39, para 28.013.
[50] Companies Act 1963, s 194.
[51] Company Law Enforcement Act 2001, s 58.
[52] Companies Act 1963, s 371; Thomas B. Courtney, *The Law of Companies* (3rd edn, Bloomsbury Professional 2012) para 28.023.
[53] Company Law Enforcement Act 2001, s 55.
[54] Companies Act 1990, ss 150 and 160; Thomas B. Courtney, *The Law of Companies* (3rd edn, Bloomsbury Professional 2012) para 28.023.
[55] Thomas B. Courtney, *The Law of Companies* (3rd edn, Bloomsbury Professional 2012) paras 28.025 and 28.027.
[56] Company Law Enforcement Act 2001, S 12(1)(d).

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

As mentioned above, Section 12(1) of the CLEA envisages that the Director shall have a supervisory function over the activity of receivers and liquidators in the discharge of their duties under the Companies Acts.[57] This function is provided for by Section 323A of the Companies Act 1963 and Section 57 of the CLEA 2001, which accord the Director power to direct the production of receivers' and liquidators' books for inspection.[58]

As well as this, the Director also enjoys the broad suite of investigative powers enjoyed by official liquidators, as well as some additional powers.[59] The Director may seek an order for the delivery to him or her of company records for inspection where a company is being would-up, either in the case of an official liquidation[60] or a voluntary liquidation.[61] He or she may also seek an oral examination of officers in the case of a company being wound-up.[62] Although there is a scarcity of Irish judicial pronouncement on the application of this power, the English case of *Re Adlards Motor Group Holding Ltd* is authority for the suggestion that the courts will refrain from granting such an order where it would be oppressive to the respondent to do so, such as, as in that case, where a long period of time has elapsed since the respondent was appointed as receiver.[63]

The Director can also seek an order for the civil arrest of a company officer or contributory either where such a person fails to attend their examination under Section 245 or where there is proof of probable cause for believing that such a person is about to otherwise abscond.[64] The court, in granting such an order, can direct that the absconding person's books, papers and moveable

[57] Ibid (e).
[58] Companies Act 1963, s 323A; Company Law Enforcement Act 2001, s 57.
[59] Thomas B. Courtney, *The Law of Companies* (3rd edn, Bloomsbury Professional 2012) para 28.019.
[60] Companies Act 1963, s 245A.
[61] ibid, s 282A.
[62] ibid, s 282B and 245.
[63] *Re Adlards Motor Group Holding Ltd* [1990] BCLC 68 (Chancery Division); Thomas B. Courtney, *The Law of Companies* (3rd edn, Bloomsbury Professional 2012) para 25.030.
[64] Companies Act 1963, s 245(8); Thomas B. Courtney, *The Law of Companies* (3rd edn, Bloomsbury Professional 2012) para 28.019.

property be seized and retained for a time at its discretion.[65] Similarly, Section 247 of the Companies Act 1963 also appears to give the court the power to order the absconding person's detention for a time at its discretion, without any apparent limit provided for in the Section.[66] The Director also has standing to petition the court for such orders.[67]

As far as criminal conduct is suspected of a company officer who is being investigated by the Director, the Gardaí seconded to the Director's office have the power to arrest the suspect and detain him or her for up to 12 hours,[68] in accordance with the normal provisions for arrest under Section 4 of the Criminal Justice Act. [69]

8. In what circumstances, may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self-incrimination)?

As a Common Law system, the doctrine of privilege is long-established in case law but is not explicitly set out in legislation. The circumstances in which privilege can be invoked in order to withhold information and documentation from law enforcement authorities or regulatory bodies are fairly limited and can be abridged by statute to a certain degree. At the time of investigation, privileged materials are *prima facie* protected from enforcement authorities but during a seizure or raid, it may transpire that the examination of whether privilege has been appropriately asserted will be done so at a later date using the mechanism set out in the relevant statute.[70]

For the purposes of the benchmark, there are a number of important private privileges to be examined including the legal professional privilege, the privilege against self-incrimination and without prejudice statements, along with other miscellaneous privileges.

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[65] Companies Act 1963, s 247.
[66] ibid.
[67] Thomas B. Courtney, *The Law of Companies* (3rd edn, Bloomsbury Professional 2012) para 25.029.
[68] ibid, 28.022.
[69] Criminal Justice Act 1984, s 4.
[70] Carina Lawlor, "Ireland" in Judith Seddon, Eleanor Davison, Christopher J. Morvillo, Michael Bowles QC and Luke Tolani (eds), *The Practitioner's Guide to Global Investigations* (Law Business Research Ltd, 2016) 619.

8.1 Legal Professional Privilege

This privilege can be divided into two categories: legal advice privilege and litigation privilege. Both legal professional privileges can be waived by the client[71] and can be done so in a limited manner so as to prevent the complete loss of the privilege so long as no unfairness arises out of the non-disclosure of the whole material.[72] Privilege will automatically lost when it is used to hide communications in furtherance of crime or fraud[73] or amounts to conduct which is injurious to the interests of justice.[74] Where privileged materials are deployed in an interlocutory application or at trial, privilege will be lost.[75] Common interest privilege exists in Ireland as long as it is expressly asserted and the third party does not disclose the privileged material to anyone outside of the common interest connection.[76]

8.2 Legal Advice Privilege

In order to assert legal advice privilege there are a number of conditions[77] which must be satisfied:

- The material must amount to or refer to a communication between a lawyer and their client;
- The communication must arise out of the professional lawyer-client relationship;
- The communication must be confidential;
- The purpose of the communication must be giving or receiving legal advice.

Regarding the first condition, a 'communication' can constitute any written or oral material (recorded by way of notes or memoranda) passing between the lawyer and their client.[78]

[71] *Gallagher v Stanley* [19980 2 IR 267 at 271.
[72] *Great Atlantic Insurance v Home Insurance* [1981] 2 All ER 485
[73] *Williams v Quebrada Railway, Land and Copper Co.* [1895] 2 Ch 751.
[74] *Murphy v Kirwan* [1993] 3 IR 501, [1994] 1 IRLM 293.
[75] *Byrne v Shannon Foynes Port Company* [2007] IEHC 315, [2008] 1 IR 814, [2008] ILRM 529.
[76] *Moorview Developments Ltd. & Ors. v. First Active plc. & Ors.* [2008] 1 IEHC 274
[77] Abrahamson, W., FitzPatrick, & A., Dwyer, J., (2013) *Discovery and Disclosure.* Round Hall: Dublin at para. 39-13.
[78] *Hurstrige Finance Ltd v Lismore Homes Ltd*, unreported, High Court, 15 February 1991 at 4.

In terms of the second condition, it is important that there is a professional lawyer-client relationship at play for privilege to arise. In *Buckley v Incorporated Law Society*[79], communication between the two parties were not privileged as the complainant was not engaging the Law Society in their capacity as a legal advisor. Although in Irish law, a 'lawyer' includes anyone who is a member of the legal profession (solicitor or barrister), salaried in-house lawyers, foreign lawyers[80] and the Attorney General, according to the judgment of the Court of Justice of the EU in the *Akzo Nobel Chemicals Limited*[81] case, communications with in-house lawyers will not be privileged during the court of EU competition law investigations.

The third stipulation of confidentiality was explored by the Supreme Court who held that a letter which contained instructions from the client to his solicitor to relay certain information to another party cannot be classified as confidential due to the express intention to disclose the material to the respondent[82].

The fourth condition was established in the *Smurfit Paribas Bank Ltd*[83]. As such, information like the identity of a client cannot be withheld from enforcement authorities by way of legal advice privilege as it is a 'mere collateral fact'[84].

8.3 Litigation Privilege

Litigation privilege may be invoked over communications between either a client or their lawyer and third parties or over 'work product' (material other than communications) carried out in contemplation of litigation.[85] In order for litigation privilege to be asserted, there must be a reasonable prospect of litigation, meaning that litigation is apprehended or is threatened.[86]

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[79] *Buckley v Incorporated Law Society* [1994] IR 44.
[80] R. *(Prudential Plc) v Special Comr of Income Tax* [2013] UKHL 1, [2003] 2 AC 185.
[81] *Akzo Nobel Chemicals Limited v The European Commission* C-550/07.
[82] *Bord na gCon v Murphy* [1970] I.R. 301.
[83] *Smurfit Paribas Bank Ltd v AAB Export Finance Ltd* [1990] 1 I.R. 469, [1990] I.L.R.M. 588.
[84] Caroline Fennell, *The Law of Evidence in Ireland* (3rd edn, Bloomsbury Professional, 2009) 324.
[85] Liz Heffernan, *Evidence: Cases and Materials* (Thomson Round Hall, 2005) 436.
[86] *Silver Hill Duckling Ltd v Minister for Agriculture* [1987] IR 289.

The 'dominant purpose' test, which was developed by the House of Lords in *Waugh v British Railways Board*[87] , has been endorsed in the Irish jurisdiction.[88]

This test states that in order for litigation privilege to be asserted over material, the dominant purpose of creating it must be for litigation (either anticipated or pending). The dominant purpose will be objectively determined by the court if its privilege is called into question[89] but it must be acknowledged that there is some criticism that the test can be carried out in such a way as to achieve a desired result.[90]

8.4 Privilege Against Self-incrimination

This privilege is described by McGrath[91] as that which allows persons subject to questioning to withhold information that may incriminate themselves. A distinction can be drawn between this and the 'right not to give evidence' of the accused at their trial as well as the 'right to silence' of a criminal suspect to refuse to answer questions, although this is not always done in the case law.[92] The right not to incriminate oneself was elevated to a constitutional right in the seminal case, *Heaney v Ireland*[93], whereby the Supreme Court ultimately grounded the right in Article 40 (freedom of expression), overruling the assertion by the High Court that the right fell within Article 38 (the right to a fair trial). The Supreme Court asserted that since an Article 40 right could be restricted on the grounds of 'public order or morality' if it was proportionate to do so.[94]

In the subsequent European Court of Human Rights' judgment in the *Heaney* case[95], the Court expressed that legislation which so strongly compelled an individual to provide information may

[87] [1980] AC 521.
[88] *Silver Hill Duckling Ltd v Minister for Agriculture* [1987] IR 289.; *Davis v St Michael's House* (25 November 1993, unreported), HC, Lynch J.
[89] *Woori Bank v KDB Ireland Ltd* [2005] IEHC 451
[90] Declan McGrath, *Evidence* (2nd edn, Round Hall, 2014).
[91] ibid 821.
[92] ibid.
[93] *Heaney v Ireland* [1994] 3 IR 593, [1994] 2 ILRM 420 (HC), [1996] 1 IR 580, [1997] 1 ILRM 117 (SC)
[94] The proportionality test set out in *R v Chaulk* [1990] 3 SCR 1303 at 1335-1336 applied.
[95] *Heaney v Ireland* (2001) 33 EHRR 12.

infringe Article 6(1) of the European Convention on Human Rights, the right to a fair trial. Although the impugned legislation in *Heaney* was deemed to breach Article 6 of the Convention, the ECtHR has since confirmed that not all legislation compelling the provision of information to enforcement or regulatory authorities will constitute a breach, even if criminal sanctions are threatened.[96] Therefore, the right against self-incrimination may still be curtailed by statute and information may be compelled, especially in the course of regulatory investigations.[97]

The privilege can be broadly applied to both civil and criminal proceedings, but may also be invoked during both formal and informal investigations.[98] It seems, however, that where information is required pursuant to general regulations in a non-adversarial context, persons will not be allowed to withhold this information.[99]

8.5 Without Prejudice Privilege

This type of privilege attaches to communications in furtherance of a settlement where there is a *bona fide* attempt to settle a dispute between parties and where there is in an intention of non-disclosure if settlement fails, unless consent is given by the parties to do so.[100]

8.6 Miscellaneous Privileges

Other circumstances whereby information may be withheld from enforcement authorities in Ireland include marital privilege, sacerdotal privilege, journalistic privilege, informant's privilege, parliamentary privilege and statutory privilege, all of which are not absolute. [101]

[96] *O'Halloran and Francis v United Kingdom* [2007] ECHR 544, (2007) 46 EHRR 397.
[97] Lawlor (n 1) 619.
[98] n 90
[99] ibid.
[100] ibid.
[101] ibid, 793-814.

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

Employee data has the same standard of protection as personal data in Irish law. The law that applies is the *Data Protection Act,* 1988 and the *Data Protection Directive*, 95/46/EC (which was partly implemented by Statutory Instrument 626 of 2001 and fully) implemented by the *Data Protection (Amendment) Act*, 2003. The *Data Protection Act,* 1988 was enacted to give effect to the Council of Europe' Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.[102] Note that the *General Data Protection Regulation* (GDPR) will come into force on the 25th May 2018, replacing the existing data protection framework under the EU *Data Protection Directive*. There are three concepts regarding personal, or an employee's, data: the data subject, the data controller, and the data processor. There is an overlap between the three, please see a definition for each below.

The *Data Protection Act*, 1988 (hereinafter the 1988 Act) defines personal data as "data relating to a living individual who is or can be identified either from the data or from the data in conjunction with other information that is in, or is likely to come into, the possession of the data controller".[103] This applies to an employee's data. An employees' personal data will be supplied when required by an authority.[104] Regarding foreign companies, they are treated as residing in Ireland if the data controller is registered as so. The data controller can be an individual or legal entity who holds the subjects' data and, either alone or with others, controls the contents and use of personal data. A data controller must register with the Data Commissioner.[105] Exemption from registering apply for educational establishments including private establishments, politicians, advocates and those who process personal data of customers or suppliers about 'normal business activities'. However, the GDPR is likely to change the latter. A data processor refers to whom uses this data but is not responsible for it, those who require the data, such as accountants. A Data Processor is defined in the act as "a person who processes personal data on behalf of a data controller but does not include

[102] Council of Europe European Treaty Series No. 108 Strasbourg, 28.I.1981.
[103] Data Protection Act, 1988, s 1.
[104] ibid, s 8.
[105] ibid, s 17(1).

an employee of a data controller who processes such data in the course of his employment."[106]

Transnational transfer of employees data must meet the data quality principles, which reflect fair obtaining and processing.[107] These principles are: data must be accurate, be obtained for the intended purpose, be specific for the requirement, be sufficient, be reasonably up to date and secured from non-intentional access.

9.1 Domestic Authorities

The 1988 Act states that data can be shared when required by domestic enforcement authority. There is no restriction stated in the act. S.8. Any restrictions in this Act on the disclosure of personal data do not apply if the disclosure is:

- in the opinion of a member of the Garda Síochána not below the rank of chief superintendent or an officer of the Permanent Defence Force who holds an army rank not below that of colonel and is designated by the Minister for Defence under this paragraph, required for safeguarding the security of the State,
- required for preventing, detecting or investigating offences, apprehending or prosecuting offenders or assessing or collecting any tax, duty or other moneys owed or payable to the State, a local authority or a health board, in any case in which the application of those restrictions would be likely to prejudice any of the matters aforesaid,
- required in the interests of protecting the international relations of the State,
- required urgently to prevent injury or other damage to the health of a person or serious loss of or damage to property,
- required by or under any enactment or by a rule of law or order of a court,
- required for the purposes of obtaining legal advice or for the purposes of, or during, legal proceedings in which the person making the disclosure is a party or a witness,
- made to the data subject concerned or to a person acting on his behalf, or

[106] ibid, s 1.
[107] ibid, s 2.

- made at the request or with the consent of the data subject or a person acting on his behalf.

9.2 Foreign Enforcement

The law that applies to transferring individual, or employee, data to a foreign enforcement is section 11 of the 1988 Act, which reads as follows:(2) The Commissioner, when considering whether to prohibit a proposed transfer of personal data from the State to a place in a state bound by the Convention, shall have regard to the provisions of Article 12 of the Convention.[108] The Convention referred to is the Convention for the Protection of Individuals with Regard to Automatic Processing.[109]

Article 12 of the Convention states:

"The following provisions shall apply to the transfer across national borders, by whatever medium, of personal data undergoing automatic processing or collected with a view to there being automatically processed:

- A Party shall not, for the sole purpose of the protection of privacy, prohibit or subject to special authorisation transborder flows of personal data going to the territory of another Party.
- Nevertheless, each Party shall be entitled to derogate from the provisions of paragraph 2:
    - insofar as its legislation includes specific regulations for certain categories of personal data or of automated personal data files, because of the nature of those data or those files, except where the regulations of the other Party provide an equivalent protection;
    - when the transfer is made from its territory to the territory of a non-Contracting State through the intermediary of the territory of another Party, in order to avoid such

[108] Data Protection Act, 1988 s 11(2)
[109] The Convention for the Protection of Individuals with regard to Automatic Processing, Treaty Series No. 108 Strasbourg, 28.I. 1981

transfers resulting in circumvention of the legislation of the Party referred to at the beginning of this paragraph." [110]

9.3 Restrictions to Foreign Enforcement

The 1988 Act, S.11(4) states: In determining whether to prohibit a transfer of personal data under this section, the Commissioner shall also consider whether the transfer would be likely to cause damage or distress to any person and have regard to the desirability of facilitating international transfers of data.[111]

S.11(10) This section shall not apply to a transfer of data if the transfer of the data or the information constituting the data is required or authorised by or under any enactment or required by any convention or other instrument imposing an international obligation on the State. [112]

9.4 International Transfer of Data

The law in Ireland is that the data being transferred must go to a country that has adequate security to protect the data. In Europe, this permits EEA countries. The European Commission has identified the following countries as having the standard level of protection of personal data; Andorra, Argentina, Canada (commercial organisations), Faeroe Islands, Guernsey, Israel, Isle of Man, Jersey, New Zealand, Switzerland and Uruguay as providing adequate protection. The 'Safe Harbour' rule, relating to the USA, was found to not be adequate by the CJEU. The EU-US Privacy Shield now applies which was adopted July 12, 2016. However, this is also being challenged for the same issue that was held by the 'Safe Harbour' rule, as there is no independent review of the security from non-intended access.

[110] The Convention for the Protection of Individuals with regard to Automatic Processing, Treaty Series No. 108 Strasbourg, 28.I. 1981, Article 12
[111] Data Protection Act, 1988 s.11 (4)
[112] Data Protection Act, 1988 s.11 (10)

Transnational transfer of data to the USA used to rely on the 'Safe Harbour' rule. This has since been discredited due to an Irish case, Maximillian Schrems v Data Protection Commissioner, heard in the CJEU .[113] It was held that data subject was not guaranteed to be secure in the U.S. under the data principles. The case is currently being heard again in the Irish High Court. The recent update on the 20th February is additional amicus curia have been added to the respondents to give evidence, in the interest of data being transferred to U.S. The case is ongoing and is predicted to be concluded by April 2017, which will possibly identify the direction of a new policy regarding the transfer of data to the United States, be it employees or independent persons.

Safe Harbour Privacy Principles apply only to corporations, not the US government. Safe Harbour does not require the US government to police and enforce compliance. Safe Harbour has exemptions for conflicting US laws. There are no provisions for limiting the interference of the US government with data of EU citizens. EU citizens have no legal recourse against the US government.

The Data Protection Acts, which have transposed the EU Data Protection Directive, provide a common basis on which personal data may be transferred from Ireland to any other country in the EEA (EU members plus Norway, Iceland and Liechtenstein), in accordance with the common data protection standards set out in the Directive. Where personal data is to be transferred to a country outside of the EEA, one of the following additional conditions must apply:

- Transfer is to one of the following countries/territories: Andorra, Argentina, Canada, Faroe Islands, Guernsey, Isle of Man, Israel, Jersey, New Zealand, Switzerland, Uruguay.
- Transfer is of advance airline passenger(PNR) data in accordance with the EU-approved arrangements for such transfer to the border authorities in the USA, Canada and Australia.
- Transfer is within a group of companies covered by EU-approved Binding Corporate Rules
- Transfer is made using one of three EU-approved Model Contracts.
- Transfer has the clear and unambiguous consent of the individual data subject(s).

[113] *Maximillian Schrems v Data Protection Commissioner*, Case C-362/14

- Transfer is either: authorised by law or by the Data Protection Commissioner; from a public register; necessary for reasons of substantial public interest; necessary in relation to certain contractual and legal proceedings; necessary to protect the vital interests of the individual.

10. If relevant, please set out information on the following:

10.1 Defences to the offences listed in question 2;

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement); and

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

In Ireland, there have not been specific changes to legislation regarding the enforcement of Irish anti-corruption legislation in recent years, however, in terms of common law, we have seen an increase and willingness to hold directors personally liable, leading to the imposition of custodial sentences and heavy fines. These are very rare cases due to the vague legislation, the discretion of the court and the criminal standard on the prosecution of proving the case beyond a reasonable doubt.

The Criminal Justice (Corruption) Bill 2012 (hereafter The Corruption Bill) was approved by the Government in summer 2012, as of yet there is no formal indication as to the publication timeframe.[114] The bill is intended to modernise and strengthen Irish bribery laws, including through the consolidation of the existing bribery offences and also new offences not yet set out in the Prevention of Corruption Acts 1889 to 2010.[115] Many of these new offences come on foot of

[114]Rachel Spencer, 'Complying with Irish Anti-Corruption Laws' <http://www.ifsc.ie/feature.aspx?idfeature=167393> accessed 26 Feb 2017.
[115] Megan Hooper, Sean Barton, 'Anti-Corruption and Bribery in Ireland' <http://www.lexology.com/library/detail.aspx?g=a41995c3-da80-412e-ae4b-f9e795e0034d>accessed 26 February 2017.

recommendations made by the final report of the Mahon Tribunal published in 2012.[116] Under the Prevention of Corruption Acts 1889 or 1906 a person guilty of an offence is liable to a fine or imprisonment up to 10 years. After Quinn v IBRC[117] there is now pressure on the Irish government to ensure safeguards against multinational companies engaging in fraudulent and reckless behaviour. The aim of The Corruption Bill will coincide with The Companies Act 2014 and the Freedom of Information Act 2014 to produce a more transparent and accountable society. Under the legislation Irish businesses will be required to take "all reasonable steps" and exercise "all due diligence" to prevent bribery and corrupt practices. It is noteworthy that corrupt practices by employees and agents of the business will be automatically imputed to the business, placing more obligations on management in the private sphere.[118]

It is an imperative part of every business to take risks, the law recognises this fact by means of legal personality and limited liability. It very rarely seeks to penalise such risk taking. The threshold of a guilty finding in relation to fraud or reckless trading is quite high as found in Re USIT World PLC[119] and as it tends to be a criminal offence the broad statute allows the courts a high level of discretion to evaluate the circumstance of each individual case and of course much like a criminal case, the intention of the accused.[120] An example of this would be the law in relation to bribery and gifts, which states that gifts are acceptable given proper procedure, however even small gifts may be subject to a finding of bribery if they are intended to influence one in their decision making. There is no definition for corrupt however the term 'corruptly' is widely defined by the Corruption Bill and also current law under The 1906 act to include "acting with an improper purpose, personally or by influencing another person, whether by means of making a false or misleading statement, by means of withholding, concealing, altering or destroying a document or by any other means".[121]

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[116] Rob Ennis, 'Using a Carrot to Catch a Crook: Part 1—An Overview of Whistleblower Protections and White Collar Enforcement Trends in Ireland' [2016] Commercial Law Practitioner 108.
[117] *Quinn v IBRC* [2012] IEHC 510
[118] n113
[119] *Re USIT World PLC* [2005] IEHC 28
[120] Irene Lynch Fannon, 'Reckless Trading: Good and Bad Risk-taking in Irish Companies' [2017] Commercial Law Practitioner 8.
[121] n113

Because of the broad description of the law and the laws willingness to take into consideration circumstance, there are no specific defences to a corruption allegation.

In accordance with the definition of corruptly the only defence available will be to show that the business took "all reasonable steps" and practiced "due diligence" to avoid the commission of the offence. There is no guidance as to what constitutes "all reasonable steps" or "all due diligence", though it appears likely that the Irish legislature will follow the "adequate procedure" guidance issued by the UK Ministry of Justice.[122]

There is however, because of the criminal penalty, an importance placed on due process rights, meaning the right to a fair trial is of the upmost importance. For example, the prosecution of less serious summary offences is subject to time limits, these time limits do not apply to more serious offences which are being prosecuted on indictment.[123] However, if a considerable amount of time has elapsed since the commission of an offence, the courts will not permit a trial to go ahead if this elapse will prejudice the accused's right to a fair trial.[124]

One of the most significant changes proposed in the Corruption Bill is the introduction of a new 'failure to supervise 'offence, which provides that where a corruption offence is committed by a director, secretary, officer, employee, subsidiary or agent of the corporate body with the intention of obtaining or retaining an advantage for the corporate body, the corporate body will itself be guilty of an offence.[125] It will be a defense for the corporate body to prove that in such circumstances it has taken "all reasonable steps" and exercised "all due diligence" to avoid the commission of the offence.[126]

The basis for imposing criminal liability on a company under Irish law is currently not entirely clear, although it is likely that the Irish courts would be prepared to hold a company liable for the

[122] ibid.
[123] n 113, Hooper, Barton.
[124] ibid
[125] ibid
[126] ibid

actions of an officer once it could be established that he or she represented the directing mind and will of the company.[127] However, unlike individual accountability, this could only be a civil penalty by means of fines and confiscations of the proceeds of such conduct.[128]

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement)

A company that has in place effective anti-bribery and corruption compliance procedures will able to rely on these procedures to show that the actions of a particular officer do not represent its directing mind and will.[129]It would be that individual alone, who faces potential prosecution. The key message for Irish businesses is to put in place anti-corruption policies and procedures as soon as possible to avail of the defence.[130] To do so the following requirements must be met.

10.2.1 Due Diligence

It is the responsibility of Irish businesses to ensure that third parties are compliant with the highest standards of anti-corruption requirements; otherwise the Irish business could be exposed to liability for the shortfall in their trading partner's anti-corruption policies.[131]

10.2.2 Anti-Corruption Policies and Procedures

Put clear and unambiguous written anti-corruption policies and procedures in place, including an acceptable code of conduct and ethical behaviour guidelines. This should be implemented by top-level management and communicated fully throughout the organisation.[132]

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[127] n 113, Hooper, Barton.
[128] Karyn Harty, *'Ireland to Consolidate Anti-Corruption Law'* http://www.mccannfitzgerald.com/mcfgfiles/knowledge/5092-ireland%20to%20consolidate%20anti-corruption%20law%20by%20karyn%20harty,%20mccann%20fitzgerald.pdf accessed 26 February 2017.
[129] ibid.
[130] n 113, Spencer.
[131] ibid.
[132] ibid.

10.2.3 Contractual Provisions

Your contractual arrangements should contain full and accurate anti-corruption provisions. It should also highlight particular risk factors, such as gifts, hospitality, entertainment and expenses, as well as third-party due diligence.

10.2.4 Know the Laws that Apply to You

Understand the laws that apply to your business, particularly if your business is part of a larger group or companies or has multi -jurisdictional business interests.[133]

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

While cooperation with investigating authorities can be taken into account as a mitigating factor by a court during sentencing, plea bargaining with prosecutors or the court is not permitted and would be constitutionally suspect. However, the Judge does have the power to take co-operation into account as they have the responsibility of deciding the penalty. This is due to the fact that within the Irish Constitution, justice must be administered in public and the courts have exclusive jurisdiction over sentencing matters. The DPP has limited discretion under the Criminal Procedure Act 1967 to direct that a matter be disposed of summarily in the District Court, where the accused pleads guilty. This would result in a lower penalty being imposed.[134]

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance)

Found to be irrelevant

[133] ibid
[134]Carina Lawlor, 'Anti-Corruption Regulation' http://www.matheson.com/images/uploads/documents/Anti-Corruption_Regulation_2014_Ireland.pdf accessed 26 February 2017.

12. Looking forward, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

There are two political ideas regarding the enforcement of European Union competition law. On the left is the protection of the consumer through private retributive justice and on the right, is the economic idea of free and open markets. Surprisingly the EU has traditionally been on the right in contrast to the United States on the left, where private citizens can seek compensated for the harm suffered due to anti-competitive behaviour. The US is the leader of competition law enforcement, where prison sentences are imposed on those found to be in breach of competition law. Ireland is in a unique position geographically, known colloquially as the gate way to Europe, and as a result we take an approach that reflects both sides of the Atlantic Ocean. The European Union, through the Council and the commission, legislates to correct corporations and to bring defaulters back into compliance. Ireland is one of the few European countries, along with the United Kingdom and Estonia, to criminalise anti-competitive behavior. The Competition Act, 2002 introduced criminal sanctions in Ireland for corporate fraud. So far, the courts in Ireland have been slow to apply these penal sanctions.

The act incorporates TFEU Article 101 and Article 102 into national legislation, this means that companies and individuals are subject to criminal proceedings. The leading authority on breaches of competition law is Duffy [135] where McKechnie J. stated custodial sentences should be imposed to implement deterrence, 'if the first generation of carteliers have escaped prison, the second and present generation almost certainly will not.'[136] The Organisation for Economic Cooperation and Development (hereinafter OECD) recognises that criminal punishment would be useful to enforce competition law against cartels.[137] The OECD has also suggested a separation between the investigative and decision making function of the Commission. Using Ireland as an example, cartels exposed through the National Authority, the Competition, and Consumer Protection Commission, would be pursued and prosecuted through the Competition Act.[138] Companies doing

[135] *Director of Public Prosecutions v Duffy* [2009] 3 I.R. 613
[136] ibid, para 67
[137] Peter Whelan, 'The Criminalization of European Cartel Enforcement' (1st edn, Oxford University Press 2014)p4.
[138] Competition Act, *2002*

business in Ireland are subject to this law also, and can be extradited in order to be prosecuted. As McKechnie J. stated in Duffy139 those found to be partaking in cartels will be prosecuted and face imprisonment. The OECD reports that since the enactment of the revised Companies Act, 2014 there have been 18 individuals and companies under investigation with a view to refer cases to the Director of Public Prosecution for consideration. It is likely that in the near future there will be criminal sanctions against those found to be in breach of European Competition law.

12.1 Proposed Legislation

Current legislation that is in the secondary stage of parliamentary debates is the Competition (Amendment) Bill, 2016. It is to address the issue that traditionally artists, actors and other self-employed individuals have acted collectively to reach agreements with powerful organised groups such as broadcasters and advertisers. However, from a competition law point of view, where entertainment trade unions enter into agreements recommending minimum prices for the hiring of services of their members, this is no more than a price fixing agreement to which the competition legislation applies. The bill proposes that such individuals should not be classed as "undertakings" for the purposes of competition law. However, self- employed individuals would continue to be prohibited from price fixing against consumer interests.[140]

Another bill that is proposed is the Companies (Accounting) Bill 2016 which intends to transpose Directive 2013/34/EU to give effect to the provisions in the Accounting Directive relating to the annual financial statements and related reports of companies.[141]

12.2 Corporate Criminal Liability

In November 2016, the Law Reform Commission released the issue paper on Regulatory Enforcement and Corporate Offences. It identified a number of issues, and repeated findings from

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[139] *Director of Public Prosecutions v Duffy* [2009] 3 I.R. 613 para 67.
[140] Companies (Accounting), Dáil Bill, (2016) <http://www.oireachtas.ie/documents/bills28/bills/2016/7916/b7916d-memo.pdf> Accessed March 2017.
[141] Companies (Accounting), Dáil Bill, (2016) <http://www.oireachtas.ie/documents/bills28/bills/2016/7916/b7916d-memo.pdf> Accessed March 2017.

previous reports and bills dating from 2005. It is difficult to predict what will be successful in being legislated for when previous bills of the same title have been unsuccessful, such as introducing corporate manslaughter. There is a 2016 bill in parliament on this topic to create the indictable offence of corporate manslaughter by an undertaking, to create the indictable offence of grossly negligent management causing death by a high managerial agent of the undertaking, and to provide for related matters. There has been suggestion for this offence since 2005, where there was a bill with the same title. Perhaps the climate in Ireland has changed since the bill was first drafted, since the effect of the economic recession in 2008, and the legislative is prepared to criminalise those found to be breaching competition law.

12.3 Coordination of Regulators

Currently there are over 300 pieces of statutory provisions for obtaining and executing search warrants.[142] The ODCE has the strongest authority as it includes a member of the Irish police, the Gardaí.[143] The ODCE rectifies and remediates certain infringements of company law. This saves on the costs of going to court. The Law Reform Commission recommended that there should be one consolidated act, a search warrant act, which would give investigatory powers regarding corporate criminal offences. The variation and subtly of provisions to various authorities can result in an error in obtaining evidence which would result in a case dismissal. The overlapping remits and legislation for various regulatory bodies is confusing and dilutes authority power.

12.4 Jurisdiction for Regulatory Appeals

A number of government agencies have published papers from 2001 – 2013, identifying the need and the benefit for a specific avenue for Regulatory Appeals. A view has emerged that the current framework and processes for appeals in the Irish regulatory system is unsatisfactory, resulting in less than optimum confidence in the regulatory appeals process. There is no standard process or procedure for appealing a regulatory decision in Ireland. Depending on which regulatory body has made the decision that is being appealed, there are significant differences in the appeal processes

[142] Issues Paper on Regulatory Enforcement and Corporate Offences, November 2016, p 115
[143] Company law Enforcement Act, 2001. S.3(1)

available. A number of common law jurisdictions have this independent body for appeals. In the UK, the Enterprise Act 2002[144] set up a Competition Appeals Tribunal, which has the authority of a High court. It can hear appeals dealing with government and non-government bodies. In Ireland, this means appeals could be heard relating to the ODCE, the Central bank or the Broadcasting Authority Ireland.

12.5 Reckless Trading Offence

There is no general provision in Irish criminal law, which create the offence of reckless trading. This has been identified in the ODCE Submission on White Collar Crime in 2010. The Company Law Act 2014 has omitted the criminal offence of reckless trading. Criminalising reckless trading was broached during the Oireachtas debates on the Companies (No.2) Bill 1987, the current 2014 act create a civil offence.145 The difficulty in creating a criminal offence along with the current civil offence, is a different standard of proof would be required, one that is more difficult to prove, beyond reasonable doubt. Nevertheless, the criminal offence has been proposed for as long as there has been company law in Ireland. Perhaps now is the time to legislate considering the creation of the ODCE. Currently there is a criminal offence for Fraudulent trading in the Companies act.146 Fraudulent intent requires that a person is knowingly a party to the fraud, whereas reckless intent is usually defined as engaging in conduct which involves taking an unjustifiable risk, of which the accused was aware, of causing harm to others. Reckless intent is the easier to prove than fraudulent. The result of creating the offence would be a dissuasive piece of legislation as criminal sanctions are more likely to prevent a crime than civil sanctions.

It is difficult to predict what will be legislated for, as numerous issues have been identified regarding criminal sanctions and the benefit these would have for implementing European competition law. However, legislation is affected by politics, where bills that took years of thoughtful review are left in the 'parliamentary graveyard' as a result of a new government being

[144] The Enterprise Act 2002
[145] Companies Act 2014, s 610.
[146] Companies Act 2014, s 722.

elected. It seems Ireland is moving in a direction where the legislative and judiciary are ready to impose criminal sanctions against those in breach of competition law. It must also be noted that current international trade deals will be transposed into Irish law, such as the successful CETA trade deal (which took eight years to draft and reach it favourable conclusion) and the likely TTIP trade deal. However, it is unclear if there will be criminal sanctions brought against offending parties through these international trade deals.

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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction.

1.1 Anti-Bribery and Corruption Legislation

The Italian anti-bribery and corruption provisions, originally provided for in Law n. 86/1990, were modified by Law n. 190/2012 and Law n. 69/2015. Bribery consists in a *pactum sceleris* between a public official[1] or a person entrusted with a public service[2] and a private citizen, constituting a crime in which it the intervention of more than a single person is essential in order to define the offence as existent.[3] Its criminalization is envisaged to protect the principles of impartiality and good practice of the Italian Public Administration. The mental element required is criminal intent.

1.1.1 Domestic Bribery

The Italian Criminal Code (CC) regulates Domestic bribery with the provisions contained in Articles 318, 319, 319-*ter,* 319-*quater,* 322 and 346-*bis*.[4] Bribery for the exercise of the function (Article 318 CC), considered as a function-related offence,[5] occurs when a public official unduly receives money or other advantages or accept the promise of it in order to perform his functions or powers. In such a case, the public official shall be sentenced to imprisonment from one to six years. Bribery for an act contrary to the duty of the office (Article 319 CC) punishes any public official who receives or accepts the promise of money or other advantages, to fail or delay, or for having failed or delayed, an act related to his office, or to perform or for having performed an act which is contrary to his official duties. In these circumstances, the public official shall be sentenced

[1] "Pubblico ufficiale", as is to say whoever exercise a legislative, judicial or administrative public function (art 357 CC).
[2] "Incaricato di pubblico servizio", meaning whoever provides a public service, in other words an activity governed by the same forms of the public function but not sharing its same powers (art 358 CC).
[3] Bribery should be differentiated from the Extortion by illegal abuse of quality or powers ("Concussione", art 317 CC), in which the public official or the person entrusted with a public service, by abusing of his quality or powers, compel another person to unduly give or promise money or other benefits.
[4] Arts 318, 319, 319-*ter,* 319-*quater* are sanctioned with the compulsory confiscation of the product or the profit of the crime and, if it is not possible, of goods whose value is equivalent to the profit ("confisca per equivalente"): art 322-*ter* CC.
[5] This is because the act of the public official is supposed to fall within the sphere of competence of his own office.

to prison from six to ten years.[6] When the facts covered by Articles 318 and 319 are committed in order to favor or damage a party to a civil, criminal and administrative procedure, bribery in judiciary acts (Article 319-*ter* CC) arises, to which a term of imprisonment from six to twelve years shall apply.[7][8] Induced bribery (Article 319-*quater* CC), introduced by Law n. 190/2012, punishes both the public officials and the people entrusted with a public service, who induce someone else to unduly give or promise them money or other advantages, by abusing of their powers or office: unless the act constitutes a more serious offence, induced bribery is sanctioned with a term of imprisonment from six to ten years and six months. Finally, dealings of unlawful influences (Article 346-*bis* CC), sanctioned with a term of imprisonment from one to three years, occurs when a person, by taking advantage of his relationship with a public official or a person entrusted with a public service, unduly make giving or promising money or other economic advantages, as a compensation for his unlawful mediation, or to remunerate the public official or the person entrusted with a public service for having performed an act contrary to the duty of his office or for having failed or delayed an act of his office. The above-mentioned offences are relevant as predicate offences ("reati presupposto").[9]

[6] The two above-mentioned offences may also be committed by a person entrusted with a public service. In this event, a reduction amounting to no more than one third applies to each of the previously described sanction regimes (art 320 CC, Bribery of people entrusted with a public service). Penalties referred to into arts 318, 319, 319-*bis*, 319-*ter* and 320 apply also to the briber, pursuant to art 321 CC.

[7] If an unjust prison sentence derives from this offence, either an imprisonment from six to fourteen years or from eight to twenty years will be deemed applicable, depending on whether the unjust conviction exceeds five years.

[8] Italy also criminalizes whoever offers undue money or other advantages to a public official or a person entrusted with a public service, in the same circumstances provided for by arts 318 and 319, even if the offer or the promise is not accepted: the same punishment specified in arts 318 and 319, reduced by one third, applies to this offence, named Solicitation to bribery (art 322 CC).

[9] Pursuant to art 25, Legislative Decree n. 231/2001, the sanctions are as follows: a pecuniary sanction up to 200 quotas, in relation to the offences stipulated for in arts 318, 321 and 322, paras 1 and 3, CC; a pecuniary sanction from 200 to 600 quotas and disqualifications pursuant to art 9, para 2, Legislative Decree n. 231/2001 (for a period of no more than one year), with reference to arts 319, 319-*ter*, para 1, 321, 322, paras 2 and 4, CC; a pecuniary sanction from 300 to 800 quotas and disqualifications pursuant to art 9, para 2, Legislative Decree n. 231/2001 (lasting no more than a year), in relation to arts 317, 319 (if a relevant profit derived to the corporate entity from the crime), 319-*ter*, para 2, 319-*quater* and 321. The above-mentioned sanctions are also relevant if the crime is committed by people entrusted with a public service, pursuant to art 320 CC.

1.1.2 Foreign Bribery

Pursuant to Article 322-*bis* CC (Bribery related to foreign public officials) Articles 318, 319, 319-*ter*, 319-*quater*, 320 and 322 CC shall be deemed relevant for criminal law purposes also if the crime implicates members of institutions and bodies of the European Union, European officials and agents and judges of the International Criminal Court. In this case, both active and passive bribery are sanctioned.[10] Bribery related to foreign public officials is also relevant for corporate criminal liability.[11]

1.1.3 Private Commercial Bribery

Pursuant to Article 2635 of the Italian Civil Code (Private bribery), company managers[12] who perform or fail acts, violating their office responsibilities and loyalty duties and having caused a damage to their company, because they received or accepted the promise of money or other advantages, shall be imprisoned from one to three years. Corporate criminal liability may also arise.[13]

1.2 Fraud Legislation

Whoever, through artifices[14] or deceptions[15], obtains for himself or others an unjust profit and damages others, by misleading someone, is sanctioned with a term of imprisonment from six months to three years and a fine ranging from Euro 51 to 1,032.[16] An aggravated fraud for the

[10] Arts 319-*quarter*, para 2, 321 and 322, paras 1 and 2, CC also apply when money or other advantages are given, offered or promised to the above-mentioned officials or to people who carry out the same functions of public officials or people entrusted with a public service in other States or in International Organizations: only active bribery is punished.
[11] The previously described pecuniary sanctions are also applicable to foreign bribery (art 25, Legislative Decree n. 231/2001).
[12] Including directors, general directors, executive officers responsible for the balance sheets of the company, auditors, official receivers and people who act under their control or guidance.
[13] Pursuant to art 25-*ter*, Legislative Decree n. 231/2001, only active private bribery is punished, with a pecuniary sanction spanning from 200 to 400 quotas.
[14] Artifices consist either in the simulation of non-existing circumstances or in the concealment of existing circumstances.
[15] Deceptions are ingenious words aimed at convincing and misleading the mental representation and/or others' decision.
[16] General Fraud, art 640 CC.

attainment of public funds[17] and others fraud criminal offences specifically related to either the functioning of information and telematics systems, insurance contracts or public supplies are also stipulated for.[18] Articles 640 par. 2 n. 1, 640-*bis* and 640-*ter* are also relevant for corporate criminal liability.[19]

1.3 Anti-Money Laundering Legislation

1.3.1 Money Laundering

Pursuant to Article 648-*bis* CC, the substitution or the transfer of money, goods or other benefits deriving from intentional crimes, or the fulfilment of other operations aiming at preventing the identification of their provenience, are sanctioned with a term of imprisonment from four to twelve years and a fine from Euro 5,000 to 25,000. Other criminal offences are provided for by the CC,[20] Law n. 356/1992[21] and Article 55 of Legislative Decree n. 231/2007. The latter sanctions: the failure to perform an adequate due diligence of customers; lacking or false indications[22] by the executor of the operation; the violation of registration obligations; the omission of certain communication requirements related to supervisory bodies; the missing, late or incomplete communication related to registration duties; the breach of the prohibition to communicate certain information related to the reporting of suspicious transactions; the unduly use of credit or debit

[17] Art 640-*bis* CC. In this event, a term of imprisonment from one to six years applies.
[18] Computer Fraud (art 640-*ter* CC), Insurance Fraud (art 642 CC), Fraud Involving Public Supplies (art 356 CC).
[19] Pursuant to art 24, Legislative Decree n. 231/2001, corporate entities may be punished with a pecuniary sanction up to either 500 quotas or ranging from 200 to 600 quotas (depending on whether the corporate entity gained a relevant profit or a serious damage derived from the criminal offence). In addition, the disqualifications stipulated for art 9, para 2, letts. c), d) and e), the Legislative Decree n. 231/2001 apply.
[20] Pursuant to art 648-*ter* CC (Use of Money or Goods Deriving from Crimes in Economic or Financial Activities) whoever uses, in economic or financial activities, money, goods or other benefits deriving from a serious offence is punished with the same sanctions provided for by Article 648-*bis*.
[21] In compliance with Article 12-*quinquies* of Law n. 356/1992 (Fraudulent Transfer of Money), whoever falsely attributes either the ownership or the availability of money, goods or other advantages aiming at circumventing the provisions related to smuggling or patrimonial prevention, or at facilitating the commission of a money laundering related criminal offence, is sanctioned with a term of imprisonment from two to six years.
[22] Referred to the personal details of the person for whom the operation is carried out or of the aim and the nature of their relationship.

cards.[23] Corporate criminal responsibility may occur for certain money-laundering related criminal offences.[24]

1.3.2 Self-Money Laundering

In compliance with Article 648-*ter*.1 CC, whoever, after having committed an intentional crime, either uses, substitutes or transfers money, goods or other benefits originating from the crime in economic, financial, business or speculative activities, in order to impede the identification of their illegal origin, is sanctioned with the imprisonment from 2 to 8 years and a fine spanning from Euro 5,000 to 25,000.

1.4 Other Offences Relevant for Corporations

1.4.1 False Accounting

It is an offence for managers[25] of both unlisted[26] and listed companies,[27] in order to obtain an unjust profit, either consciously stating false material facts in balance sheets, reports or other corporate communications provided for by the law, or omitting material facts whose communication is compulsory, so that others are deceived. Corporate criminal liability could also occur.[28]

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[23] The majority of these crimes are sanctioned only with a fine, whereas some of them are punished also with a term of imprisonment. The customer due diligence requirements, the registration requirements, the reporting requirements, the restrictions on the use of cash and the prohibition of anonymous accounts and passbooks are provided for in arts 15, 36, 41, 49 and 50, Legislative Decree n. 231/2007 respectively. Pursuant to art 51, the above-mentioned violations must be reported to the Ministry of Economy and Affairs and to the Financial Police. Other administrative offences are provided for by art 57.

[24] Arts 648-*bis*, 648-*ter* and 648-*ter*.1 are also relevant as predicated offences and are sanctioned with a pecuniary sanction ranging either from 200 to 800 quotas or from 400 to 1.000 quotas (if the crime from which the money or other advantages derive is punished with a term of imprisonment amounting to more than five years). Before 2007, arts 648-*bis* and 648-*ter* were regarded as relevant for corporate criminal liability only if the crime was trans-national, pursuant to art 10 paras 5 and 6 of Law n. 146/2006, now repealed.

[25] Including directors, general directors, executive officers responsible for the balance sheets, auditors and official receivers.

[26] Art 2621 CC, to which a term of imprisonment from one to five years applies.

[27] Art 2622 CC, sanctioned with the imprisonment from three to eight years.

[28] Pursuant to art 25-*ter*, Legislative Decree n. 231/2001, corporate entities may be sanctioned with a pecuniary sanction ranging either from 200 to 400 quotas (art 2621) or from 400 to 600 quotas (art 2622). The sanction is increased by one third if the company gained a significant profit from the commission of the crime.

1.4.2 Financial Crimes and Administrative Offences stipulated by the Codified Law on Finance

Insider trading and market manipulation are punished both as criminal offences [29] and administrative offences.[30] With regard to insider trading, it is a criminal offence for anybody (who owns privileged information for being a member of an internal body of the company or for having performed a work, a profession, a function or an office), to: buy, sell or carry out another operation using the privileged information; recommend to or induce others to carry out one of the above-mentioned activities; communicate the privileged information to others, beyond the ordinary exercise of his activity.[31] As for market manipulation, whoever either spreads false information or carries out simulated operations or other artifices, concretely suitable to provoke a considerable alteration in the price of financial instruments, commits a crime.[32] These financial crimes are also relevant as predicated offences.[33]

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

2.1. Introduction and Nature of the Offences Ascribable to the Companies

Legislative Decree no. 231/2001, following the OECD campaign against foreign officers corruption, introduces, for the first time, regulation for the liability of the companies, which provides for a *numerus clausus* of offences.[34]

When the Decree was introduced in 2001, it provided just two crimes in its Articles 24 and 25, related to corruption and bribery and over the last 16 years followed numerous amendments,

[29] Arts 184 (sanctioned with the imprisonment from two to twelve years and a fine from Euro 40.000 to 6.000.000) and 185 (punished with the imprisonment from two to twelve years and a fine from Euro 40.000 to 10.000.000).
[30] Arts 187-*bis* (punished with a fine ranging from Euro 100.000 to 15.000.000) and 187-*ter* (sanctioned with a fine spanning from Euro 100.000 to 25.000.000). Additional fines are provided for in relation to the above-mentioned administrative violations (art 187-*quinquies*).
[31] The same conduct is also relevant under art 187-*bis*, but the latter does not necessarily require criminal intent and applies also to people who do not acquire the privileged information first-hand ("secondary insiders").
[32] Under art 187-*ter*, the diffusion of false or misleading information, rumours or news that could provide false or misleading guidance regarding financial instruments is relevant instead.
[33] The corporate entity is sanctioned with a pecuniary sanction ranging from 400 to 1000 quotas that could be increased up to ten times the value of the product or the profit of the crime.
[34] Alessandra Rossi, *Reati Societari* (UTET giuridica, 2005) 511 [Italian].

introducing new crimes ascribable to the companies.[35] In fact, the legislator did not provide for a pre-established and coherent legal framework to follow in order to introduce the crimes to be ascribed to the companies, but he decided to choose the technical method of the *numerous clausus*. In this way the crimes over the years were introduced in a piecemeal, episodic and casual manner in accordance with the political-criminal contingencies of the moment.[36] And this is also the reason for the difficulty to identify common nature among all the offences listed in the Decree.

That is why it is very difficult to identify common nature among all the offences listed from Article 24 to Article 25 *duodecies* of the Decree. Nevertheless, it can be said that the true nature of almost all of these crimes is their intentionality (in Italy it is called "*dolo*"), even if there are some exceptions to this rule for those crimes which are in fact negligent (for example the Article 25 *septies* anche the Article 25 *undecies* of the Decree).

An interesting feature of the Italian corporate liability for crimes is that only individuals can commit crimes, but also corporations can also be punished in certain cases[37]. The above mentioned Decree identifies only some offences called "*reati-presupposto*", the commission of which by an individual belonging to the corporation is the condition to attribute an offence to a legal entity[38].

[35] This is mainly due to the fact that the original Decree provided for just two offences (Arts 24 e 25): corruption and fraud to the public bodies, See Giuseppe Amarelli, *Il Catalogo dei reati presupposto del D.Lgs. n. 231/2001 quindici anni dopo. Tracce di una razionalità inesistente*, (2016), 5 <www.lalegislazionepenale.eu/wp-content/uploads/2016/05/approdondimenti_amarelli_052016.pdf> accessed 7 March 2017 [Italian].

[36] Part of the doctrine calls the method used by the legislator in this sector as the "gradually developing exhaustive list". Giuseppe Amarelli, *Il Catalogo dei reati presupposto del D.Lgs. n. 231/2001 quindici anni dopo. Tracce di una razionalità inesistente*, (2016) <www.lalegislazionepenale.eu/wp-content/uploads/2016/05/approdondimenti_amarelli_052016.pdf> accessed 7 March 2017 [Italian].

[37] It is important to highlight the cases in which the author of the crime cannot be punished or individuated, but the corporation can be prosecuted; despite the fact that it is an informed choice of the legislator, part of the doctrine and case-law underline that it may be seen as a regulatory failure that should be fixed. See Alessandra Rossi, *Reati Societari*, (UTET giuridica, 2005) 511. and Ronco, *Responsabilità delle persone giuridiche/I Diritto Penale*, (EGI, IX upd., 2003), 5 of the abstract [Italian].

[38] As described hereby, answering to question 3, there are some conditions to be met in order to attribute a criminal conduct of an individual to the company as corporate liability.

Some scholars found that the general nature of the offences ascribable to the companies is that they are all committed in the company's interest or for its benefit.[39] In this regard, part of the doctrine[40] highlighted that not all the offenses called "*reati-presupposto*" are truly committed in the interest of the company. A clear example of the last statement is the crime provided for by the Article 25 *septies* on the involuntary manslaughter, serious or very serious personal injuries committed in breach of health and safety regulations at work, which (following this *ratio*) shall not involve the liability of the companies since it is not committed in the interest or for the benefit of them.

As far as the imputability of the crimes to the companies is concerned the Organizational Models introduced by the above mentioned Decree necessitates a special mentioning. Despite the fact that adoption is not mandatory, a properly implemented 231 Model and an effective compliance should allow the company to mitigate or exclude the commission of crimes by certain of its managers or employees and the administrative liability of the company.[41]

Another important aspect of the responsibility of the companies in Italy concerns the application of the above-mentioned Decree. It can be applied not only to Italian companies, but also to foreign ones operating in Italy and, on the other hand, according to its Article 4, it also applies to foreign secondary establishments of companies registered in Italy even if the crimes are committed abroad.[42]

In conclusion, it has to be stressed that Legislative Decree no. 231/2001 does not provide with all the necessary provisions to prosecute and judge a corporation, so it refers to the Italian Code of Criminal Procedure that is so applicable also to corporations. For example the principles of effective participation and advocacy in the different phases of a criminal procedure that dominate

[39] See Question 3 in order to delve into this aspect.
[40] See Stefano Putinati, 'Commento all'art. 3 (responsabilità amministrativa delle società) del D. Lgs 61/2002 in Alessio Lanzi and Alberto Cadoppi (eds.) *Responsabilità amministrativa delle società* (CEDAM, 2007) 369 [Italian].
[41] See Question 10. a. in order to delve into this aspect.
[42] It has to be stressed that it is an exceptional application of the Italian Decree, in fact art 4, Legislative Decree n. 231/2001 states that the legislation of the State in which the crime is committed prevails on the Italian one.

the proceedings against individuals are granted also to companies. Consequently, corporations have almost the same rights granted to the individuals.

2.2 Offences and Relative Penalties[43]

The offences of anti-bribery, corruption, fraud and anti-money laundering are provided for by Legislative Decree no. 231/2001 in its Articles 24, 25 and 25 *octies*.[44]

First, it has to be stressed that the penalty system, introduced by the Decree, provides for the following administrative sanctions against the legal entity as a result because of an offence:

- Pecuniary fines: based on a quota system; the fine may vary between 100 and 1000 quotas. In the case of multiple crime through the same action, the overall fine may amount to up to three times the fine issued for the most serious of the crimes.
- Prohibitory measures (listed in Article 9 section 2 of the Decree):[45] these measures can last from three months to two years.
- Seizure: this may affect the price, profit or the equivalent deriving from the offence.
- Publication of the judgment: notably in one or more newspapers.

As far as the offences above mentioned are concerned, the Articles 24, 25 and 25 *octies* specifically provide for a pecuniary fine and prohibitory measures. The latter, in relation to fraud, is limited to the ban from contracting with the public administration (except for obtaining the performance of a public service), the exclusion from benefits, loans, grants or subsidies and the possible revocation of those already granted and the prohibition on advertising goods or services; while in relation to

[43] The offences triggering the company's liability were initially limited to crimes to the detriment of public finances, such as corruption and misappropriation of public funds. Over time the Decree has been extended to encompass the following crimes, including: crimes to the detriment of the State or public funds; corruption and misappropriation of public funds; falsification or counterfeiting of money, public credit cards and tax stamps; money laundering; corporate crimes; market abuse; crimes pertaining to terrorism and subversion of the democratic order; crime against industry and trade and crimes against infringements of copyright and data treatment; homicide and serious injuries through violation of the rules on safety in the workplace; environmental crimes; and employment of illegal immigrants.
[44] See para. 2.1 and question 1 for a wide description of these offences and the history of the relative legislation.
[45] See footnote 16.

anti-bribery, corruption and anti-money laundering it includes all the provisions of Article 9 of the Decree.[46]

Moreover, under Article 18 of the Decree the judgment can be published when the prohibitory measure applies and the seizure, according to its Article 19, may be applied in relation to the price or profit derived from the offence or to an equivalent measure.

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

3.1 Introduction

The issue regarding the possibility the director that its crime may lead to a corporate liability is extremely sensitive since Article 27 of Italian Constitution forbids the liability for "someone else's act". For this reason, the corporate liability for people's acts has to be justified by certain circumstances that lead to a relation of identification.

Analysing the following rules, it is important to highlight the *ratio* under the Legislative Decree:

- the entity, a part from anthropomorphic concepts is considered the real instigator, executor or beneficiary of the criminal conduct committed by the person employed in it. Even though the responsibility created by the rule has to e considered has a tertium genus between administrative responsibility and the principles of the criminal responsibility, the criminal sanction requires an objective requirement: that the offense has been committed in the interest of the company and by people employed in it, with the exclusion of crimes

[46] Art 9, Legislative Decree n. 231/2001 literally provides that: "*the prohibitive measures are: a) the prohibition on the exercise of the activity; b) the suspension or revocation of permits, licenses or concessions functional to the commission of the offence; c) the ban from contracting with the public administration, except for obtaining the performance of a public service; d) the exclusion from benefits, loans, grants or subsidies and the possible revocation of those already granted; e) the prohibition on advertising goods or services*."

committed in their own interest, for personal purpose. In sum, with conducts unrelated with the enterprise policy.[47]

Article 5 of the Legislative Decree 231/2001 states that the company is liable for any offence committed in its interest or to its advantage by people who are representatives, directors or managers of the company or one of its organizational units with financial and functional autonomy as well as by people who exercise, even *de facto*, management and control thereof or by people subject to the direction or supervision of one of the aforementioned people. On the other hand, the company is not liable if the individuals referred to in paragraph 1 acted exclusively in their own interests or on behalf of third parties.

First of all, the offense has to be committed by "individuals who are representatives, directors or managers" of the company, as defined by the Legislative Decree 231/2001 Explanatory Report, where it is clarified that only the performing of direction and supervision activities are relevant in order to constitute the liability.

With regards to the representative functions, there could be a difference, based on a proxy, between agency and power of representation. Both of them are relevant under the aforementioned decree: the former is ruled under Article 5 letter a), being connected with the apical position, whereas the latter is ruled under the article 5 letter b), since it implies a submission to someone else.[48]

Can be defined as "directors" those entitled of the power to promote decisions in the shareholder's meeting and to execute them, unless they are invalid or are harming interests of third parties and who represent the society[49]. Managers are the most difficult to be identified, because of the lack of a precise legal definition. Italian doctrine[50] usually refers this function to the General Manager, who has the task to perform the decision of the board of directors.

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[47]Explanatory notes to Law n. 231/2001(The administrative liability of legal representation, companies and associations without legal representatives) [Responsabilità amministrativa delle società e degli enti].
[48] Giorgio Lattanzi, *Reati e Responsabilità degli enti*, (Giuffrè, 2005), 48 [Italian]
[49] Giorgio Lattanzi, *Reati e Responsabilità degli enti*, (Giuffrè, 2005), 49 [Italian]
[50] *Idem*, p.52

In addition, the entity's liability also arises when the crime is committed by a subject who performs this activities in one of the company's organizational unit with financial and functional autonomy (such as the plant manager) or by those who have *de facto* management or supervision duties, such as (i.e. a *de facto* director who, according to article 2369 CC).

Liability may also arise when the offense is committed by people subject to the direction or the supervision of the mentioned individuals. In these cases, according to Italian jurisprudence[51] they can be considered liable only if the commission of the crime is due to the violation of the direction and supervision duties the company has to observe (i.e. employed people pursuant to arts. 2094 and 2095 CC).

What has to be underlined is that, according to the requirements settled by the law, no liability may arise for conducts of the statutory auditors.

The qualification of those who commit the crime is not sufficient. The crime is attributed to the Company, according to the Decree, when is made in the interest or the advantage of the company. With regard to this requirement, recent decisions have clarified that it is not an hendiadys, but there is a distinction between the interest (which exists upstream and is identified with an undue enrichment that may not have been effectively obtained) and the advantage obtained through the commission of the crime, that may not have been planned but has to be effective[52]. The same attitude was confirmed in the decision by the Supreme Court of Cassation 24697/2016, in which the Court has clarified that there is an "interest" of the company when the omission lead to a saving and an "advantage" has lead an increase of the production[53].

[51] Trib. Milano, 27 April 2004
[52] Cass. Pen., Sez. II, 3615/2006, accordingly Trib. Trani, Sez. Molfetta, 11th January 2010 <www.rivista231.it> accessed 14 February 2017; Trib. Novara, 1st of October 2010 <www.rivista231.it>, accessed 14 February 2017, in which the Court has also clarified that the presence of an interest or an advantage has to be verified on a case by case basis.
[53] Cass. Pen., Sez. IV, 2544/2015

The possibility to identify an interest or an advantage of the company in case of culpable offense has been discussed in a recent decision of the Assize Court of Turin where it was discussed if could be considered so the death of an employee due to the omission of measures to prevent work-related injuries, could be considered as such. The Court in this case has identified the interest or the advantage in the omission of the needed measures (rather than in the death of the employee) and in the related economic saving.

Furthermore, it is required that the perpetrators have not acted 'in their own exclusive interest or in the interest of third parties'.

3.2 The Organisational, Management and Control Model

The Legislative Decree adopts a system of self-management of criminal risk that imposes to the company the implementation of an Organisational, Management and Control Model. In addition, the system also considers two different criteria for the subjective liability, which would be different if the crime has been committed by a manager, as stated by Article 6, or by an employee as stated by Article 7.

3.3 Individuals Covering Top Positions and Organisational Models

Article 6 of the Legislative Decree 231/2001 statues that if the crime is committed by the people indicated in Article 5, paragraph 1, letter a) the organization is not liable if it proves that the governing body has adopted and effectively implemented, before the offence was committed, an organizational and management model capable of preventing offences of the type occurred.

The task of supervising the functioning and observance of the models and their updates is entrusted to a body with independent powers of initiative and control. Once the Company has adopted and implemented the model, it would be liable only if the people have committed the offence by fraudulently eluding the models of organization and management or there was any or insufficient supervision by the body referred to in point b).

In this case, there is an "identification" between the company and its managers, which are seen as an "invisible hand" managing the company's performance.[54] Nevertheless, the identification cannot be considered as "full", since the legislators only considers a *iuris tantum* presumption[55].

An important element in order to exclude the liability of the entity is the effectiveness of the adoption of the model, which becomes crucial in the new system: the burden of proof lies with the company and the reason under this choice is to facilitate the proof, since it is the company in itself to have approved the model[56]

The model, indeed, has to meet the following requirements:

a. identify the activities where offences may be committed;
b. foresee specific protocols aimed at planning the formation and implementation of decisions in relation to the crimes to be prevented;
c. identify procedures for managing financial resources suitable to prevent the commission of offences;
d. provide information duties to the body liable for supervising the functioning and observance of the models;
e. introduce a disciplinary system to punish non-compliance with the measures indicated in the model[57].

The organizational and management models can be adopted, guaranteeing the criteria referred to in paragraph 2, based on codes of conduct prepared by associations representing companies, submitted by the Ministry of Justice, in accordance with the relevant Ministries, within thirty days,

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[54] Also according to art 2 of the OECD Convention on Combating bribery of foreign Public officials in International Business Transactions
[55] G. De Vero, *Societas puniri potest, la responsabilità da reato degli enti collettivi*, (Cedam 2003) 267 [Italian]
[56] T.E. Epidendio, *Il modello organizzativo 231 con efficacia esimente* (2010) 4, 256 in <www.rivista231.it> accessed 14 February 2017 [Italian]
[57] A. Frignani, P.Grosso, G.Rossi, La responsabilità amministrativa degli enti e i modelli di organizzazione e gestione di cui agli articoli 6 e 7 Dlgs. 231/2001 (2003) Riv. Dir. Comm., I, 170 [Italian]

on the suitability of the models to prevent crimes.

The law also statues, in order to avoid any advantage for the entity, that any profits the organisation has made from the offence are viable to be confiscated regardless of their worth. This clearly shows how the exemption from the sanctions is incomplete.

3.4 Individuals Subject to Direction Functions and Organizational Models

The adoption of an appropriate organisational system is required pursuant to Article 7 of the Legislative Decree in order to safeguard the respect by the managers of the direction and supervision duties.

Article 7 seems to identify a complex case close to the facilitation of the crime's commission by the employee: in the case provided for in Article 5, paragraph 1, letter b), the company is liable if the commission of the offence was made possible by the failure of management or supervisory obligations.

While in Article 6 there is an identification of the author with the crime and the entity, in Article 7 the facilitation ascribed to the entity is not objected to the people that should have guaranteed the supervision.

In any case, the non-compliance of the management and supervisory obligations if the organization, before the offence was committed, adopted and effectively implemented an organizational, management and control model capable of preventing offences of the kind that occurred.

The model provides, according to the nature and size of the organization as well as the type of business conducted, measures to ensure that business is run in compliance with the law. It also deals with the discovery of potentially risky situations and their swift elimination.

The law also sets the requirements for the effective implementation of the model, including: a periodic review and possible amendment of the same when significant violations of the rules were discovered or when changes in organizational activity were involved and a disciplinary system to sanction non-compliance with the measures indicated in the model.

If the crime has been committed by individuals who hold representative, administrative or functional autonomy, or by individuals who manage and control, even if only de facto, this entity ("senior management"), the entity shall not be liable if it can prove that the executive body had adopted and effectively implemented a Model to prevent such crimes from occurring before the offence was committed; the task of supervising the implementation, compliance and updating of the Model was entrusted to a board within the entity with independent powers of initiative and control ("Supervisory Board" or "SB"); the perpetrators committed the crime by fraudulently circumventing the Model or that there was no missing or insufficient supervision by the Supervisory Board in relation to the Model.

However, if the crime was committed by individuals subject to the management or supervision of one of the aforementioned individuals, the entity shall be held liable if it was possible to commit the crime due to any failure of management and supervision1 obligations (Article 7 of the Decree). In all cases, this failure would be ruled out if the entity had adopted and effectively implemented a Model to prevent such crimes from occurring before the offence was committed.

3.5 The Role of the Judge

The liability for an administrative offence resulting from a crime shall be assessed during criminal proceedings (Article 36 of the Decree).

The company's liability shall be determined verifying that the alleged crime under the company's liability has actually been committed and the suitability of the adopted organisational models (if implemented).

The evaluation on how suitable the model was to prevent any crimes under the Decree shall be assessed on an *ex ante* basis, whereby the judge will put himself in the company's position at the time when the offence occurred to test the adequacy of the adopted model (known as "posthumous prognosis"). It is clear that the evaluation made by the judge would be discretionary[58].

This means that in order to identify if the model would have been effective the judge has to imagine which was the situation before the implementation of the model. In case of a negative result, the crime shall be shaped only as responsibility of the physical person[59].

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

4.1 Bars to Extradition

4.1.1 Unfulfilling Dual Criminality

Double criminality is a traditionally recognized principle that aims to prevent unbalanced sanctions, provided for by Italian Criminal Code, Article 13: 'Extradition is not allowed, if the fact consistent with the request of extradition, is not provided as a crime according to Italian and foreign law'. According to the Italian Supreme Court[60] regarding the Treaty on Extradition between USA and Italy that prescribes the principle of dual criminality[61], it does not require the exact correspondence of the type of offence, but the right to apply sanctions in both legal orders.

[58] Giorgio Lunghini, 'L'idoneità e l'efficace attuazione dei modelli organizzativi' in C. Monesi, *I modelli organizzativi ex Dlgs 231/200, Etica d'impresa e punibilità degli enti*, (Giuffrè, 2005), 1256 [Italian]
[59] T.E. Epidendio, *Il modello organizzativo 231 con efficacia esimente*, (2010) 4, 256 <www.rivista231.it> accessed in February 14th, [Italian]
[60] Cass. Pen., Sez. IV, 42777/2014.
[61] Art 2, Bilateral Treaty on Extradition between Italy and USA.

Moreover, the Supreme Court also stated that the presence of different sanctions is not an obstacle[62].

The principle of dual criminality is widely recognized at an international level. 181 Parties signed the United Nations Convention against Corruption (UNCAC) which entered into force on December 3 2009 in Italy thanks to domestic ratification n. 116. It recognizes the principle of dual criminality in accordance to its Article 43, providing UNCAC as a legal basis for extradition ex Article 44.

The aforementioned principle is also affirmed in Article 2 of the European Convention on Extradition (ECE) promoted by the Council of Europe. Nowadays, European Arrest Warrant (EAW) overcame this principle according to Article 2, which states that there are cases that do not imply dual criminality e.g. fraud, corruption, laundering. Accordingly, Italy adopted a coherent legislation with the provisions under Article 7 Law n. 69/2005. Therefore, bars to extradition based on unfulfilling dual criminality have decreased their power.

4.1.2 Unfulfilling Rule of Specialty

Article 699 Italian Criminal Code denies extraditions if the requesting State restricts extradites' freedoms for previous facts not related with the reasons of their extraditions. The European Convention on Extradition includes this rule, too. The lawful interpretation of Article 14 ECE has been widely discussed by jurisprudence.[63] Finally in 2001 the Supreme Court declared that the rule of specialty is a condition of admissibility and so it is a bar to extradition although at the same time it does not prevent preliminary investigations.[64]

[62] Cass. Pen., Sez. VI, 15927/2013.
[63] Cass., Sez. Un., 19/05/1984
Cass., Sez. Un., 28/02/1989
[64] Cass., Sez. Un., 28/02/2001

Ratifications of international provisions recognize the rule of specialty: Article 26 par. 1 of Law 69/2005 provides:

- Delivery is always subject to the condition that, for a previous fact and different from the one related to the granted delivery, the person cannot be put on criminal trial, neither deprived of personal freedom in execution of a judgment or security measure or otherwise subject to any other measure involving deprivation of personal liberty.

Moreover, Article 4 par. 1 lett. d) n. 5 of Law 149/2016 ratifies the Convention on Mutual Assistance in Criminal Matters between EU Member States providing the aforementioned rule.[65]

4.1.3 Ne Bis in Idem

This principle is a bar to extradition provided as a domestic principle of law by Article 705 of Italian Criminal Code and art. 8 and art. 9 of the European Convention on Extradition. This Convention defines two situations and allows to refuse the extradition ex art. 8 ECE in case of pending proceedings for the same offences while the refusal is mandatory in case of prevention of *ne bis in idem* as provided for by Article 9 ECE. The European Arrest Warrant also recognizes this principle based on Article 3 pars. 2, 4 par. 3 and 5, heading "Grounds for mandatory non-execution of the European arrest warrant".

4.1.4 Statute of Limitation

The respect of the statute of limitation finds its ground on Article 13 of the Italian Constitution concerning personal freedom. Article 10 of the European Convention on Extradition provides the same scenario, reported "Lapse of time", endorsed by Law 300/1963, stating that 'Extradition shall not be granted when the person claimed has, according to the law of either the requesting or the requested Party, become immune by reason of lapse of time from prosecution or punishment.

[65] Triggiani, *In divenire la disciplina dei rapporti giurisdizionali con autorità straniere: appunti sulla L. 21 luglio 2016, n. 149*, in penale contemporaneo <www.penalecontemporaneo.it/d/4936-in-divenire-la-disciplina-dei-rapporti-giurisdizionali-con-autorita-straniere-appunti-sulla-l-21-lu> accessed 27 February 2017

Concerning the applicable law, the Supreme Court stated the "*tempus regit actum*" rule: the applicable law is the one in force at the time of the offence.[66] Moreover, the Supreme Court stated that expired period of limitation does not prevent the extradition of an individual for fraud.[67]

4.1.5 Political Reasons, Discriminations and Prevention from Punishment

The political offence exception is a bar to extradition, even if not recognized worldwide. The Italian legal order embrace it: Article 10 par. 4 and Article 26 par. 2 of the Italian Constitution prohibit foreigners' extradition for political reasons. Moreover, the European Convention on Extradition (Article 3) endorses this bar including also any 'purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion'. The UN Convention against Corruption, which entered into force in 2009 recognizes to the same extent the mentioned bars due to Article 44 pars. 4, 5. On the other hand, the 2005 implementation[68] of the European Arrest Warrant system entirely removed he political offence exception to extradition among Member States of the European Union.

4.2 European Arrest Warrant

The Council Framework Decision 2002/584/JHA on the European Arrest Warrant (EAW) can be applied throughout the European Union's territorial jurisdiction since it replaces the previous procedure of extradition. In Italy the EAW and the surrender procedure between Member States, amended by 2009/299/JHA, has been receipted by Law 69/2005. This legislation can be applied to extraditions requested after it entered into force (14/05/2005) concerning those offences that have been committed after 7/08/2002. Nowadays different rules can be applied in Italy: EAW in the European Union, Criminal Procedural Code, international conventions and treaties with non EU Members, international principles with States that did not signed a legal framework.

[66] Cass. Pen., Sez. VI, 11495/2013.
[67] Cass. Pen., Sez. VI, 33594/2012.
[68] Law n. 69/2005 on European Arrest Warrant and delivery procedures between EU Member States.

Concerning the European Arrest Warrant, it introduced new grounds: according to Article 2 par. 2 of the aforementioned decision, the extent of dual criminality principle has been reduced e.g. in case of corruption, fraud and laundering. The following Articles describes grounds for mandatory and also optional non-execution of the EAW, not considering the bar of extradition based on the grounds of nationality for EU Members which continues to be provided for Member States of the Council of Europe by Article 6 ECE. Article 26 of the Italian Constitution opens a breach in the rule of non-extradition of nationals by stating that this immunity is subjected to international agreements in which Italy is a party. As a consequence extraditions of nationals is the standard procedure although the refusal to extradite is possible.

Furthermore, the EAW does not include the political exception and it remarks the purpose on improving a simpler and faster collaboration between EU countries' judicial systems. The obvious consequence is a restriction of bars regarding extradition.

4.3 Legal Basis for Extradition Concerning Bribery and Corruption

The analyzed bars to extradition find their grounds on international legal basis e.g. European conventions or bilateral treaties. Italy has contracted several extradition treaties with Albania, Argentina, Australia, Austria, The Bahamas, Bolivia, Brazil, Canada, China, Costa Rica, Cuba, Germany, Kenya, Lesotho, Montenegro, New Zealand, Paraguay, Peru, Singapore, Sri Lanka, The United States of America, United Mexican States, Uruguay and The Vatican.

Since bribery and corruption are no-borders crimes, as of May 2014, 41 States signed the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention), which entered into force in Italy in 2000. According to Article 10 of the Convention, bribery is an extraditable offence and the Convention has to be regarded as a legal basis for extradition.

On the other hand, the United Nations Convention against Corruption (UNCAC) entered into force in Italy in 2009 on behalf of Law n. 116/2009. Article 43 of the UNCAC recognizes the dual criminality principle and according to Article 44 it serves as a legal basis for extradition.

5. Please state and explain any: a. internal reporting processes (i.e. whistleblowing) and; b. external reporting requirements (i.e. to markets and regulators), that may arise on the discovery of a possible offence.

5.1. The Italian Legislation on Compliance

The Italian main legislation regarding corporate compliance liability, the legislative decree 231/2001, does not provide much about internal and external reporting. The related section, Article 6, only contains general principles regarding the sense and the 'identity' of compliance programs - named by the decree "organization and management models"– and of the equivalent of the anglo-saxon compliance officer, named in Italian *organo di sorveglianza* (co. 1); in addition, there is general information about the internal reporting processes (co. 2). Particularly provisions regarding the external reporting are bare, therefore it appears necessary to provide an interpretation, based on some sections rules of the Civil Code (particularly art. 2381), and other laws.

Within the Legislative Decree 231/2001, the only important provision for our analysis is the one of Article 6, co. 2 lit. d), that states quite generically about the institution of information commitments to the compliance officer. Such a provision should also mean that, in the organisation of the model, the instituted compliance officer should be also provided with those necessary related powers in order to collect information about implementation of the Model, risks of an offence, areas of intervention and integration of missing rules to be filled with the required upgrade of the Model itself. For the same reason, the board of directors should also provide enforcement mechanisms in case of agents or offices not complying with the collection of information[69].

In order to find the applicable law a general reference to the fifth book of the Italian Civil code is largely accepted: the proposed solutions may indeed be various.

[69] Italian Ministry of Justice, *Relazione ministeriale al d. lgs. n. 231/2001* [Italian], § 3; Anna Salvina Valenzano, *Information systems* (English), in Antonio Fiorella (ed.), *Corporate criminal liability and compliance programs- Vol. I: Liability "ex crimine" of legal entities in member states*, Napoli, 2011, 43-47.

A part of the doctrine focused on Article 2381 of the Civil code: the 3rd comma of this section indicates the board of directors as responsible for gathering information in order to evaluate the appropriateness of the corporative organization. The power of reporting directly to the board of directors is also regarded as a way of implementing the requisites of autonomy and independence required by Article 6 Legislative Decree 231/2001[70]. Such a solution arises a possible logical fallacy: the essential objective of the compliance-related regulation aims to prevent the crimes committed by the highest officers of the corporation, meaning that the board of directors is both entitled to data reporting as an evaluated body, and, at the same time, as a control authority with the purpose of evaluating the same provided data, as previously affirmed.[71] Other interpreters affirm that the *dominus* of internal reporting should be individuated in the shareholders' meeting, as the assembly of the real 'owners' of the corporation;[72] others propose that it should be the board of statutory auditors, as the main office with control functions within the corporation itself.[73]

Paying attention to a conjunction between Article 2381 Civil Code and Article 6 of Legislative Decree 231/2001, the best solution could be a 'waterfall solution': as a first option, reporting to the directors; if not possible, reporting to the shareholders' meeting; if not possible, reporting to the statutory auditors; external reporting to the public enforcement authorities is regarded as *extrema ratio*.[74]

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[70] Vincenzo Mongillo, *The supervisory body ("Organismo di vigilanza") under Legislative Decree no. 231/2001. Substantive requirements*, in Antonio Fiorella (ed.), *Liability "ex crimine"*, (Jovene, 2012) 62.
[71] Antonella Gargarella Martelli, *L'organismo di vigilanza tra disciplina della responsabilità amministrativa degli enti e diritto societario,* (2009) Giurisprudenza commerciale, I, 762-788 [Italian]; Valenzano, 'Information systems systems' in Antonio Fiorella (ed.), *Corporate criminal liability and compliance programs- Vol. I: Liability "ex crimine" of legal entities in member states*, (Jovene, 2012) 53; V. Mongillo, 'The supervisory body ("Organismo di vigilanza") under Legislative Decree no.
231/2001. Substantive requirements' in Antonio Fiorella (ed.), *Corporate criminal liability and compliance programs- Vol. I: Liability "ex crimine" of legal entities in member states* (Jovene, 2012) 62
[72] Enrico Mezzetti, 'Spunti di riflessione su composizione e requisiti dell'organismo di vigilanza ai sensi del d. lgs. n. 231 del 2001' in Antonio Fiorella – Alfonso Maria Stile (eds.), *First Colloquium*, (Jovene, 2012) 421- 426 [Italian]
[73] Antonio D'Avirro, I modelli organizzativi. L'organo di vigilanza, in Antonio D'Avirro – Astolfo D'Amato (eds.), *Trattato di diritto penale dell'impresa*, Vol. X, (CEDAM, 2009) 187-228. [Italian]
[74] Gargarella Martelli, 'L'organismo di vigilanza tra disciplina della responsabilità amministrativa degli enti e diritto societario' (2009) Giur. comm., I, 762 – 790.

External reporting is not mentioned in Legislative Decree 231/2001. One more time, in order to find some legal provisions in the general legislation, it is necessary to look at the Civil Code: a duty of external reporting could be assumed *a contrario* on the basis of the felony provided by Article 2638, entitled "obstacle against the exercise of supervisory functions by public control authorities".[75] In relation to compliance programs and compliance officer, this duty cannot achieve a general application: it is linked to submission to the control of a public authority. Moreover, material object of the external reporting is indicated in those documents intended as a display of the economic, patrimonial and financial situation of the corporation. Typical behaviour of the offender is the exhibition of false facts or the fraudulent concealing of true facts; but a recent decision of the Italian Supreme Court assumed a violation of the recalled law provision also in case of omission of relevant information.[76]

In order to deepen the questions related to both internal and external reporting, it appears then necessary to analyse the common frame provided by *Confindustria*'s Guidelines - the most conspicuous and authoritative sector guidelines, which usually overpass the 'borders' of their industrial sector to become generally applicable - and some special legislation.

5.2 Confindustria's Guidelines. Internal Reporting and Whistleblowing

To know some more information about compliance, it is therefore useful to watch at the 4th part of the here named Guidelines.[77]

In this part of the Guidelines, considering the bare legal provisions on this theme, the entitlement of the compliance officer as the central organ for reporting is vigorously underlined.[78]

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[75] Irene Gittardi, *Caso MPS: la sentenza del Tribunale di Siena in materia di ostacolo all'esercizio delle funzioni delle autorità di vigilanza*, Diritto penale contemporaneo, <www.penalecontemporaneo.it/d/4620-caso-mps-la-sentenza-del-tribunale-di-siena-in-materia-di-ostacolo-all-esercizio-delle-funzioni-del>, accessed 25 February 2017 [Italian]
[76] Cass. Pen., Sez. V, 49362/2012.
[77] Confindustria, *Linee guida per la costruzione dei modelli di organizzazione, gestione e controllo ai sensi del decreto legislativo 8 giugno 2001, n. 231*, approved 7 March 2002, revised March 2014, 60 ff. <www.confindustria.it/wps/wcm/connect/www.confindustria.it5266/cae2de6a-d86f-49b4-8691-5d2c51e78017/Linee+Guida+231+Confindustria+-+P.+generale.pdf>, accessed 31 January 2017 [Italian]
[78] Ibidem, 61 and 68.

It is recommended to organise an internal reporting activity directed *to* the compliance officer containing (a) the individuation of the areas that appear to be directly exposed to the risk of crime commission and (b) the aberrations emerging from the gathered information, paying some special attention to the "recurring" anomalies. As a sample of characteristic manifestation of this set of problems, the Guidelines enumerate the request for public funds, forensic activities commissioned by corporate agents or judiciary investigations directed to them, internal proceedings and controls.[79]

It is then described the reporting coming *from* the compliance officer, mainly directed to the board of directors or – in some particular cases – to the board of statutory auditors. The Guidelines specify that a punctual and "absolute" commitment to report is not the duty of compliance officer: peculiarity of this position is rather the discretionary power in selecting the information that appears relevant and worth of forwarding, considering at any case that a correct exercise of this power is generally foreseen by Civil Code (Articles 2104 and 2105) as a commitment for all the employees, and that an arbitrary choice could be the basis for a criminal accuse.[80]

In relation to the functioning of internal reporting to the compliance officer, whistleblowing – described as a way for collecting information through rumours - is mentioned as one of the non–favourite methods in order to implement compliance. The Guidelines affirm that it is rather to prefer some kind of "information system" that allows employees to overpass internal hierarchies in order to comply about violations.[81]

Anyway, whistleblowing is regarded as a measure in order to implement the Codes of Ethics and Conduct described in the third part of the Guidelines. This kind of practice is then presented as a possible incentive for the collaboration in discovering individual misconducts.[82]

[79] Ibidem, 69.
[80] Ibidem, 69-70.
[81] Ibidem, 70.
[82] Ibidem, 51.

5.3 Jurisdictional Principles About Reporting

The decisions of the Italian courts – especially of the Supreme Court of Cassation – are nowadays quite bare, particularly those ones focusing on reporting.

The first conspicuous decision on this theme has been released in 2007 by the Judge for preliminary inquiries (*Giudice per le indagini preliminari*, *GIP*) of Naples[83]. In this decision, it is affirmed that the provision of an adequate reporting system and proper sanctions for those who violate is to be considered a symptom of the effectiveness and of the quality of the organisational model.

The theme was incidentally considered in the authoritative decision on the *ThyssenKrupp* case: it is affirmed the importance of the reporting system with regard to the personal liability of corporate managing agents and directors. If the reporting is not directly headed towards them, their personal criminal liability falls, because they do not have the necessary power in order to the avoidance of the crime- as required by Article 40, comma 2 Criminal Code.[84]

5.4 Special Legislation about Reporting: External Reporting and Whistleblowing

As previously affirmed, provisions regarding external reporting – specifically the practice of whistleblowing, with provisions built in order to help other agents of the corporation to externally report, without the risk to be exposed to any kind of revenge by colleagues and superiors, through the protection of their identity - have been recently introduced in the Italian legal system through sectorial legislation.

The recent act containing the anti-bribery reform (Law 190/2012) amended Article 54-bis of the Legislative Decree 165/2001 (*Testo Unico sul Pubblico Impiego*, Unitary Act on Public Employment).

[83] M. Cardia, 'I Modelli Organizzativi e la nozione di profitto del reato: le considerazioni del G.I.P. di Napoli' (2007) La responsabilità amministrativa delle società e degli enti, 4, 163 ff.
[84] Cass., Sez, Un., 38343/2014, especially pt. 11.4.

This provision protects the position of those public officers who report to judiciary authority, to the National Anti-Corruption Authority and to superior officers the misconducts available to their knowledge because of their work, against the risks of retaliation.

The protection is pursued through the identity secrecy - if its disclosure appears not to be strictly necessary – during the proceedings, through the administrative protection against discriminatory measures and through the protection against the access to the documents of the proceedings (otherwise permitted under the provisions of the general act on administrative proceedings, Law 241/1990). Some interpreters criticised the examined provision for not being 'courageous enough' in binding report and disciplinary sanctions used against the whistleblower as a revenge and in offering incentives for whistleblowing.[85]

The problem underlined by the doctrine lies in the fact that the application of such provisions is limited to the public sector, even if a wider application is recommended by many interpreters. In this direction, there is a parliamentary discussion about a draft legislation that, if approved, will regulate whistleblowing in the private sector.[86]

In any case, all the most relevant economic and financial sectors – banking (regulated by the Unitary Text on Banking, *TUB*, contained in the Legislative Decree 385 of 1993), financial intermediation (regulated by the Unitary Text on Financial Intermediation, *TUIF*, contained in Legislative Decree 58 of 1998), anti-money laundering and anti-terrorism (regulated by Legislative Decree 231 of 2007) – have been provided with a valid regulation for reporting.

The "protocol" is almost the same in banking and financial sector: there is a first phase to be implemented through whistleblowing resorting to the internal control organs (Article 52 *bis TUB*,

[85] Valerio Antonio Belsito, *Il whistleblowing. Tutele e rischi per il soffiatore*, (Cacucci, 2013), particularly 42-44. [Italian]
[86] Draft Act C3365, *Disposizioni per la tutela degli autori di segnalazioni di reati o irregolarità di cui siano venuti a conoscenza nell'ambito di un rapporto di lavoro pubblico o privato*, presented by On. Businarolo and approved by the Chamber of Deputies on 21 January 2016 and presented on 22 January 2016 at the Senate of Republic as DDL S 2208. More information at <http://parlamento17.openpolis.it/singolo_atto/59972>, accessed 25 February 2017. [Italian]

Article 8 *bis TUIF*); the second phase is based on the communication of the detected breaches to the Administrative authority supervising the sector, namely Bank of Italy (Article 52 *ter TUB*) and the National Commission for Companies and the Stock Exchange (*CONSOB*, Article 8 *ter TUIF*). Both those public authorities regulate the information "channels" going to them, and can use their information in order to an administrative enforcement.[87]

The regulation is partly different in the Legislative Decree 231 of 2007. Article 52 provides the internal control organ of the specific duty of supervising the entities they are instituted in order to prevent or repress money laundering and terrorism financing, but does not tell anything about information systems. The second comma of the recalled norm foresees duties of information towards administrative authorities (administrative independent authorities supervising the economic sector, litt. *a* and *d*; Minister of Economy and Finance, lit. *c*) and towards the board of directors (lit. *b*); the violation of this duties is sanctioned as a felony by Article 55 comma 5, and can be punished cumulatively with imprisonment up to a year or with a criminal fine between 100 and 1,000EUR.

5.5 Anti – Bribery Compliance and Reporting

The institution of a national Anti-bribery independent authority (*Autorità Nazionale Anticorruzione*, *ANAC*)[88] brought to the development of a specific anti-bribery compliance together with its own reporting. The *ANAC* legislation (Legislative Decree 90/2014) is applicable to the public administration, to the public economic entities and to the private law companies held by the public sector.

In the field of compliance and reporting, the most important provision is the triennial anti-bribery program, intended in order to prevent bribery-related practices.[89] This program needs to be

[87] See below, 6.2.
[88] See below, 6.2.
[89] Mariastefania De Rosa, Francesco Merloni, 'Le funzioni in materia anticorruzione dell'ANAC', in Raffaele Cantone – Francesco Merloni (eds.), *La nuova autorità nazionale anticorruzione*, (Giappichelli, 2015) 63. [Italian]

integrated in the existing compliance system, also if the aim appears to be partly different; the Legislative Decree foresees then the duty of the institution of a responsible officer for the bribery-related breaches in order to drive at his direction the internal reporting. Special regulatory provisions regarding the institution of reporting channels and the choice of the responsible officer have to be revised each year by the "political guidance offices".[90]

The *ANAC* itself acts as enforcement authority, which means it has to be considered the *dominus* of the anti-bribery external reporting[91].

6. Who are the enforcement authorities for these offences?

6.1 Criminal Jurisdiction

Although the Legislative Decree 231/2001 does not qualify the corporate liability as "criminal" liability, but rather as "administrative/regulatory liability", in Articles 34 ff. identifies the criminal jurisdiction as the principal cognizant for the offences committed by corporate agents. The choice of the criminal jurisdiction is related to two important reasons:[92]

1. The preliminary powers of the Public Administration in order to impose an administrative fine – particularly those ones provided for by the general act of legislation about administrative/ regulatory offences - are much less incisive than the ones related to the criminal trial;

[90] Mara Chilosi, *L'aggiornamento dei piani triennali di prevenzione della corruzione da parte delle società pubbliche in attuazione del nuovo PNA e delle linee guida dell'ANAC sulle partecipate*, La responsabilità amministrativa delle società e degli enti, 2/2016, 173 ff. [Italian]; Gaetano Aita, Aureliano Aita, Valentina Stilla, Zoe Patsis, *Le determinazioni dell'ANAC inerenti all'aggiornamento 2015 del Piano Nazionale Anticorruzione e al regime applicabile agli enti di diritto privato in controllo pubblico*, La responsabilità amministrativa delle società e degli enti, nr. 1/2016, 307 ff. [Italian];
[91] Barbara Neri – Vittorio Scaffa, 'Le nuove sanzioni dell'ANAC e la relativa giurisdizione' in Raffaele Cantone, Francesco Merloni (eds.), *La nuova autorità nazionale anticorruzione* (Giappichelli, 2015), 85 ff. [Italian]; Nicoletta Parisi, Salvatore Vitrano, 'Cultura della legalità e formazione dei dipendenti pubblici', Raffaele Cantone, Francesco Merloni (eds.), *La nuova autorità nazionale anticorruzione*, (Giappichelli, 2015) 131-134. [Italian]
[92] Italian Ministry of Justice, Relazione ministeriale al d. lgs. n. 231/2001, pt. 3, para 15 [Italian]; A. Presutti – A. Bernasconi, *Manuale della Responsabilità degli Enti* (Giuffré, 2013), 219 – 223 [Italian]

2. As it is provided for by Article 35, it is the most direct way to let the corporation to share, within the criminal trial, the same position of its agent, *scilicet* of the person that plays the role of a "prerequisite" for the indictment of the corporation itself: this means that also the guarantees related to indictment are extended to the corporate entity.

Both Articles 34 and 35 refer to the Criminal Procedure Code, but at the same time specify that its provisions are applicable "if compatible". The compatibility shall be measured to the circumstances that the "person" charged is in fact a corporate entity and that the penalties – as provided for by Article 9 of Legislative Decree 231/2001 - are mainly non-criminal penalties under the provisions of Article 17 of Criminal Code.

The corporate entity itself is to be represented, in the criminal proceeding against it, through its legal representative (Article 39), similarly to the rules applicable to the civil proceedings. The legal representative, in most cases, will be a new administrator succeeding the previous one accused of a crime – and acting as a prerequisite for the criminal trial of the entity - or a commissioner.

6.2 Administrative independent authorities

In some particular cases related to the activity in peculiar economic sectors (such as brokerage) or in relation to some peculiar acts, special acts foresee the regulatory cognition either of governmental departments or of independent administrative authorities (also known in Italy as "Authorities"), often provided with their own regulatory powers.[93]

[93] See e. g. Bank of Italy, <www.bancaditalia.it/compiti/vigilanza/normativa/archivio-norme/disposizioni/pro-sanz/index.html>, accessed 25 February 2017; Giuseppina Gandini – Francesca Gennari, *Funzione di compliance e responsabilità di governance* (Università degli Studi di Brescia, 2008) 6-11 [Italian]

Peculiar aim of the activities performed by the administrative authorities is the prevention of pathological phaenomena that could occur in their own special sectors and the repression of illicit conducts, especially when those conducts do not integrate criminal liability.[94]

An interesting enumeration is contained in Legislative Decree 231/2007 about anti- laundering activities: Minister for Economic Affairs and Finance (Article 5), the specialised section of the Bank of Italy named Financial Intelligence Unit (*UIF*, Article 6), the National Commission for Companies and the Stock Exchange (*CONSOB*, Article 7, expressly mentioned between the more general "control authorities supervising the relevant sectors"), Police forces and professional associations (Article 8, comma 1 and 2), the *Antimafia* Investigation Department (*DIA*) and the Special Currency Police Unit of the Financial Guard (*NSPV*) (Article 8 comma 3).

That means that, with regard to anti-laundering enforcement, it is provided a sort of "net" of administrative authorities based on their own expertise and 'jurisdiction': the legislator takes note of the complexity of those offences related to money laundering and terrorism financing, requiring in fact a multi-angular visual on the markets and on the financial movements. It is then possible to affirm that the Minister is chosen for the 'high supervision' because of its political legitimacy and general competence; the Authorities operate as an independent and technically specialised control agency, particularly through those specialised unities like UIF; police units work as 'operational terminal' collaborating with the mentioned authorities.[95] The necessity of networking is, again, underlined by Article 9.

We need now to consider the case of the Anti-Bribery National Authority (*Autorità Nazionale Anti-Corruzione*, *ANAC*), instituted with the Legislative Decree n. 90 of 2014 and legally indicated as the 'substitute' for a previous entity, as the most important case of Authority linked with

[94] *Inter alia* Mariastefania De Rosa – Francesco Merloni, 'Le funzioni in materia anticorruzione dell'ANAC', Raffaele Cantone – Francesco Merloni (eds.), *La nuova autorità nazionale anticorruzione*, (Giappichelli, 2015) 63 [Italian]
[95] Giuliano Amato, *Autorità semi-indipendenti ed Autorità di garanzia*, Rivista trimestrale di diritto pubblico, 1997, 662 ff. [Italian]; Sabino Cassese, 'Negoziazione e trasparenza nei procedimenti davanti alle Autorità indipendenti' in Giuliano Amato et al. (eds), *Il procedimento davanti alle Autorità indipendenti*, Quaderni del Consiglio di Stato, (manca editore Torino, 1999) 37 [Italian]

compliance. The institution of this Authority is linked with the fact that nowadays in Italy there is a strong and common feeling of urgency in relation to bribery in both private and public sector.

As previously mentioned[96], the Legislative Decree itself contains the commitment, especially provided for the public administrations, for the public economic entities and for the private companies held by the public property, to implement a triennial program dedicated to anti-bribery measures. Against those subjects not respecting this duty Article 19, comma 5, lit. b) provides the power for *ANAC* to apply an administrative fine.[97]

The sanctioned entity has the faculty to appeal those measures in front of the ordinary jurisdiction (Article 133 of the Administrative Process Code in the light of the Constitutional Court's decisions 162/2012 and 94/2014; Article 19, comma 5-bis Legislative Decree n. 90/2014). The choice of the legislator is strictly linked with the idea that the sanctioning activity is a mandatory (and not discretional) activity, even if linked with the discretional control function.[98]

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

7.1 Ministry of Economic Affairs and Finance

Under Article 56 of the Consolidated Law on Banking, the Ministry of Economic Affairs and Finance carries out analysis, surveys and studies on the National and International tax system. It also carries out a thorough check on the operating results of tax agencies with full respect of their management autonomy. As confirmed by Articles 59 and 60 of the Consolidated Law on Banking,

[96] See above, point 5.4.
[97] Barbara Neri, Vittorio Scaffa, 'Le nuove sanzioni dell'ANAC e la relativa giurisdizione', Raffaele Cantone – Francesco Merloni (eds.), *La nuova autorità nazionale anticorruzione*, (Giappichelli, 2015) 85 ff. [Italian]
[98] This is explained both by authoritative doctrine and by the Supreme Cassation Court: Francesco Goisis, 'Le sanzioni amministrative pecuniarie delle Autorità indipendenti come provvedimenti discrezionali ed autoritativi: conseguenze di sistema e in punto di tutela giurisdizionale', in Miriam Allena, Salvatore Cimini (eds.), *Il potere sanzionatorio delle Autorità amministrative indipendenti*, Il diritto dell'economia, nr. 1/2013, 451 ff. [Italian]; Cass. viv., Sez. Un., 21.5.2004 n. 9730; 22.7.2004, n. 13703; 11.2.2003, n. 1992; 11.7.2001, n. 9383.

the Ministry ensures the transparency, impartiality and the lawful application of the rules with particular regard to taxpayers' relations.

The above-mentioned sanctioning powers are included in the same legislative decree. Whenever an agency acts on tax statutes, regulations and decisions, it is obliged to transmit the related information to the ministry. Once examined all the documents within ten days from the reception, the Ministry can suspend the enforceability of those resolutions, if it finds irregularities. The Ministry has the power to request a second new deliberation from tax agencies regarding the matters deemed to be irregular.

7.2 The Bank of Italy

The Bank of Italy is the central bank of the Italian Republic.

The powers of this authority include the possibility to issue regulations, take action and give instructions. According to Article 65 of the Consolidated Law on Banking, the Bank of Italy owns a supervisory power on specific subjects (e.g. companies, banking and financial companies, groups of banks). Moreover, Article 66 of the aforementioned Law states that the Bank of Italy has the power to require these entities periodically transmit situations, data and any other useful information. Of these transmissions, the Bank of Italy sets the timing and manner and, in case of necessity, it emanates specific provisions towards these subjects. These supervisory powers are not limited to the national territory but are also applicable to companies with activities abroad but registered in Italy.

The Bank of Italy may carry out inspections at economic realities that have outsourced important business functions. After the inspection, the authorities may require additional documents not previously transmitted.

These powers shall be exercised directly and indirectly abroad. In fact, if the Bank of Italy finds out that it is necessary to obtain documents and information from companies with headquarters

in the European Union, the Italian authorities may request to the competent authorities of the country concerned: 1) to carry out inspections on behalf of the Bank of Italy; 2) to authorize inspections in their state by Italian officers.

In accordance with the principle of cooperation, which binds EU Member States, it is possible that one foreign authority requests inspections in the Italian territory. In this case, the Bank of Italy will have the discretion to authorize or reject the request.

7.3 The Italian Financial Intelligence Unit (UIF)

The Italian financial intelligence unit (UIF) was established at the Bank of Italy by Legislative Decree n. 231 of 21 November 2007.

Article 47 of the same Decree identifies the powers that the unit has like to acquire additional information from responsible the parties; to make use of the archives (their access is based on the law or protocols previously agreed with other authorities or national administrations); to exchange information with foreign counterparts anti-money laundering authorities (other UIFs).

In this context the Italian UIF has powers of inspection in respect of the recipients of the anti-money laundering obligations; inspections aim to investigate suspicious transactions reported or not reported (Legislative Decree 231/2007, Article 47, paragraph 1, letter a), as well as to verify compliance with the active cooperation obligations (Legislative Decree 231/2007, Article 53, paragraph 4).

Concerning the analysis of the UIF, the Italian unit transmits messages deemed worthy of an investigation to the Italian antimafia investigation department (DIA) and to the special currency police unit of the financial guard (NSPV). The UIF communicates the facts with possible criminal relevance to the judicial authority and it archives all the reports that considers unfounded.

The cooperation and exchange of information both nationally and internationally is important for

the effective performance of the functions assigned to the UIF, furthermore this exchange is a real prerequisite for efficiency and effectiveness in the worldwide anti-money laundering system.

7.4 The National Commission for Companies and the Stock Exchange (CONSOB)

CONSOB is the supervisory authority for the Italian financial market; its aims are to protect investors and the efficiency, transparency and development of the market.

From what can be seen from the Consolidated Law on Finance (TUF) and the internal regulations of this authority, Consob has extensive powers that can be divided into six different categories:

a. Regulatory power;
b. Power of authorization;
c. Power of control;
d. Supervisory powers;
e. Sanctioning power;
f. Assessment power.[99]

The new version of the TUF, as amended further to the Market Abuse Directive, regulates the regulatory power by the Consob on the correctness of the information disclosed to the public by listed issuers. Articles 120 and 122 of the TUF in fact, attribute to this insightful agency full power to require information in order to achieve this purpose.[100]

In addition, Article 187 octies of the TUF, amended by the Law 62/2005, authorizes Consob to:

1. require already existing telephone records;
2. carry out inspections or searches;

[99] Wladimiro Troise Mangoni, *Il potere sanzionatorio della Consob: profili procedimentali e strumentalità rispetto alla funzione regolatoria*, (Giuffrè Editore 2012) 14 [Italian].
[100]Carla Rabitti Bedogni, Lenuovi Funzioni e I Nuovi Poteri di Vigilanza della CONSOB (ASTRID), <www.astrid-online.it/static/upload/protected/Rabi/Rabitti_Bedogni_gruppo-AI.pdf> accessed on 27 February 2017 [Italian].

3. require personal data beyond the limit of the Privacy Act, only for criminal investigation;
4. to proceed to seizures;
5. be assisted on the field by Financial Guard (GdF), that during these occasions has powers of investigation.

All these powers may be exercised by the Authority against any person.

The Law 262/2005, with regard to information, granted additional powers to Consob. Its Article 14 introduced Article 118-bis in the Consolidated Finance Act, providing that the Commission shall be required to determine the manner and the terms for the periodic review of the information communicated to the public, by listed issuers.

In addition, other legal sources refer to the Consob the enforcement to compel the production of information. The Article 115 letter A of TUF, give it the power of the request for information and letter C of same Consolidated Law, covers the power of inspection to find them. Article 157 regards the possibility of challenging the financial reports, including the corporate budget.

According to the Articles 162 and 163 of TUF, in implementation of Legislative Decree 303/2006, the powers to request and verifying the information, may be requested also from the audit companies. During those procedures, if the test result makes it necessary, the Commission may require the adoption of corrective measures or the applications of established sanctions.

7.5 The National Anticorruption Authority of the Republic of Italy (ANAC)

The Italian National Anti-Corruption Authority (ANAC) is an independent regulatory body set up in 2009. It is empowered to inspect offices and confiscate documents.

The Authority has three types of instruments to exercise fully its responsibilities: it can exercise a power of inspection and supervision, request information, documents and records to interested parties; it may order the adoption of documents and records requested by other sources to ensure

transparency; lastly, it can request to remove conducts likely to hinder transparency and anti-corruption plans.

Its power of inspection and supervision, by far the most relevant, is also regulated by the Regulation of 18 December 2015, 'Guidelines for the conduct of inspections'. It has reached two purposes: first, to institute a new office, the Inspection Office, exclusively competent on the exercise of this power and second, to make the procedure of inspection homogeneous.

The Authority in the exercise of the inspection function represents the Italian Republic and each of the officials involved in the procedure, perform the role of a Public Official.

Since the inspections also include the exercise of powers of inquiry, it must necessarily be built on explicit legal sources: Article 6 paragraph 9, letters A and B of Legislative Decree n. 163/2006, that gives the power to the Authority to request documents, information, explanations of works, services, furniture underway or to start and design commissions, to all recipients (e.g. contracting authorities or any natural or legal person who is in possession).

The power to order inspections, following a reasoned request and in collaboration with other bodies of State, is provided for by the same Article.

Moreover, *ex* Article 71 paragraph 1 of the Decree of the President of Republic n. 207/2010, the ANAC confers the power to conduct inspections above-mentioned parties, without previous notice.

7.6 The Revenue Agency, the Financial Guard (GdF) and the Special Currency Police Unit of the Financial Guard (NSPV)

Article 33 of the D.P.R. n. 600/1973, entitled 'Access, Inspections and Tax Audits', governing powers of which the tax office may be used in order to obtain useful information for the assessment of income and for the suppression of violations of tax law.

In order to achieve this objective, the tax authorities have the right to access its employees' data, with a special authorization, regarding public administration and the administrative bodies mentioned in Article 32 of the same legislative text.

Therefore, tax authorities are entitled to request the communication of data and news information relating to individuals or categories of State administration, public corporations, insurances and companies that carry out receipts and payments on behalf of third parties. Furthermore, its power of access is even more penetrating since the revenue agency may also require companies and insurance companies, data and information concerning the duration of the insurance contract with the insured, the amount and the premium.

Under paragraph 7 of Article 32, the power of control and information retrieval can be incisive. In fact, the revenue agency may ask, with the approval of its central or regional director, all data, information and documents relating to business conducted by banks, commercial companies, Italian Post S.p.A., insurance companies, financial intermediaries, investment firms, asset management companies and trust companies. In addition, the revenue agency may ask to the trust companies and to all financial intermediaries to communicate the identity of the persons on whose behalf they work. The request should be addressed to the manager of the centralized body, or to the responsible home or office which is the addressee, who shall immediately notify the person concerned; its response must be sent to the holder Prosecuting Office.

The revenue agency employs the financial guard for the inspection and for the field verification. Under Article 12 of the Law n. 212/2002 every access, inspection and verification towards the taxpayer, must necessarily be 'justified by actual needs of investigation and control on site' and effectively documented.

The agency is authorized by Article 52, if in need to open, even with coercive force, sealed envelopes, bags, safes, furniture, software closets password protected and the like. This procedure is necessarily subject to the authorization of the public prosecutor or judicial authority. The tax office, provided with authorization by the prosecutor of the republic, proceeds, through the

financial police, to personal searches and access taxpayers' home or a relative's or a shareholder of the company, even.

Speaking of financial police' operations to fight money laundering and terrorism, the ability of the body to examine the contexts shall be highlighted, taking into account all aspects which can emerge in the course of investigations, which substantiate the execution of investigations leading to the adoption of different measures, such as the seizure and confiscation of assets of illicit origin.

In performing such activities, the department of "Special Currency Police Unit of the Financial Guard" delegated by the financial police, operates analyzing cash flows and directs the attention on financial transactions with abnormal connotations.

In accordance with the Legislative Decree n. 231/2007 art. 8 paragraph 4, letter A the members of this department in addition to tax police, they also gain the powers held by law enforcement agencies.

They may also use specific powers provided for by the current legislation, in order to be able to push autonomously the limits of banking secrecy and to request data to the registry office.

This gives the opportunity to have a complete list of transactions by the subjects to undergo without investigation, allowing the department to make targeted requests against intermediaries.

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self-incrimination)?

8.1 Introduction

There are different stages in Italian criminal proceeding and different roles that a person may play. For each of these situations the same person is subject to a specific discipline regarding silence, duty to tell the truth and privilege against self-incrimination.[101]

8.2 Preliminary Investigations

The criminal proceeding begins when the public prosecutor, by formal or informal means, gathers a piece of information about a possible criminal offence and transcribes it in a specific register. At that moment preliminary investigations begin and the public prosecutor, assisted by the police, collects further information about facts with criminal relevance and persons involved.[102]

8.2.1 The Person of Interest

The person of interest is someone that knows something relevant about criminal facts on which the authority is investigating. The public prosecutor can question such person under Article 362 of the Italian Code of Criminal Procedure. The person of interest has the duty to appear before the public prosecutor and to tell the truth, and he is also entitled of the privilege against self-incrimination as he can withhold information from which might arise in his criminal liability according with the principle *nemo tenetur se detegere,* which result from Article 24 of Italian Constitution. Under Article 63 CCP when a person that is neither the suspect nor the defendant tells the authority information that might be self-incriminating,[103] the officer or the public prosecutor must interrupt the questioning, alert the person of interest about the possible

[101] Aniello Nappi, *Guida al codice di procedura penale* (Giuffrè 2007) [Italian]
[102] Francesco Caprioli, 'Indagini preliminari e udienza preliminare' in Vittorio Conso, Giovanni Grevi, and Marta Bargis (eds), *Compendio di Procedura Penale* (CEDAM 2014), 511 [Italian]
[103] Cass. Pen., Sez. IV, 1 June 1994, n. 6425 in Cass pen 1995, 655 [Italian]

investigation on information he disclosed and his right to appoint a lawyer.[104] Information already told cannot be used against him, but they are valid against third parties.[105]

In case of false declarations before the public prosecutor, or information intentionally incomplete or when the person of interest is reluctant to cooperate with the authority, sanction under Article 371 *bis* of the Italian Criminal Code will apply.[106] The public prosecutor may delegate the questioning of the person of interest to the police officers under Article 370 CCP.[107]

When the person of interest is a defendant in a connected or related proceeding, he might be questioned. He has the right to remain silent, but if he chooses to declare something, he is informed under Article 64 paragraph 3 c) CCP that he will be questioned as a witness during the trial.[108]

8.2.2 The Suspected Person

The public prosecutor is not obliged to question the suspected person during the investigation, while the suspect can spontaneously ask to be heard. The relevant discipline applicable to the questioning of the suspect is essentially the same of the one provided for the questioning of the defendant during the trial (see below) under Article 61 CCP. According to Article 64 CCP the suspected person cannot be questioned with instruments or techniques that might alter his freedom of self-determination or his cognitive capability, this is a reference to the polygraph and similar devices. Moreover the suspect is warned about the possible use of his declaration against him during the trial, the right to remain silent (*ius tacendi*),[109] and the assumption of the role of witness whether from his declarations arise the criminal liability of third parties. The only exception to the right to remain silent is the provision of Article 66 paragraph 1 CCP that sets out the duty

[104] Giorgio Spangher, *La pratica del processo penale*, vol I (CEDAM 2012) 115 [Italian]
[105] Cass. Pen. V Sez.., 7 January 2013, n 238 in CED Cass rv, 258105 [Italian]
[106] Paola Corvi, 'Informazioni false o reticenti nel corso delle indagini preliminari' [2000] Riv it di dir e proc pen, 131 [Italian]
[107] Loris D'Ambrosio and Piero Luigi Vigna, *La pratica di polizia giudiziaria* (CEDAM 2003) [Italian]
[108] Carlotta Conti, *L'imputato nel procedimento connesso. Diritto al silenzio e obbligo di verità* (CEDAM 2003) [Italian] 358
[109] Massimo Nobili, 'Giusto processo e indagini difensive' [2001] Dir pen e proc, 490 [Italian]

for the suspect to reveal his true personal identity, since a false identification is sanctioned under Article 496 CC. [110]

When the suspect takes advantage of the right to remain silent, under Article 65 CCP the choice must be noted down in the record. It is not possible to derive a liability from this behaviour, still the judge might freely evaluate the circumstance.

8.3 During the Trial

8.3.1 The Witness

The deposition of the witness is about facts that might constitute an evidence under Article 187 CCP. [111] Before the testimony begins, the judge warns the witness on the duty to tell the truth (and not to omit anything) stated by Article 497 paragraph 2 CCP and on the consequences of false declarations. In the latter case Article 372 CC entails a criminal liability punished with the imprisonment from two to six years.[112]

The witness cannot remain silent, except for the privilege against self-incrimination provided for by Article 198 paragraph 2 CCP, which permits him not to tell facts that can reveal his criminal liability. [113] Moreover, if the witness is not warned about his *facultas tacendi* in case of self-incrimination, his declarations cannot be lawfully used against him.[114] During the hearing of the witness, the judge has to ensure that the questions are appropriate and the answers authentic, in a general context of fairness of the examination. Therefore, when the judge suspect the witness is not telling the truth he shall immediately warn the witness again about the content of Article 497 CCP.[115]

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[110] Cass.a pen., Sez, I, 9 December 2002, n 41160 in Cass pen 2003, 3550 [Italian] and Cass. Pen., 23 Semptember 2009, n 37095 in CED Cass rv, 246578 [Italian]
[111] Laura Scomparin, 'Testimonianza' in Enrico Marzaduri (ed) *Le prove* (UTET 1999) 58 [Italian]
[112] Guido Piffer, 'I delitti contro l'amministrazione della giustizia. I delitti contro l'attività giudiziaria', *Trattato di diritto penale. Parte speciale* vol IV (CEDAM 2005) [Italian]
[113] Delfino Siracusano and Fabrizio Siracusano, 'I mezzi di prova', in Giuseppe Di Chiara, Vania Patanè, and Fabrizio Siracusano, *Diritto processuale penale* (Giuffrè 2013) [Italian]
[114] Gilberto Lozzi, *Lezioni di procedura penale* (Giappichelli 2014) [Italian]
[115] Francesca Ruggieri, 'I testimoni falsi o reticenti' in Novella Galantini and Francesca Ruggieri (eds) *Scritti inediti di procedura penale* (Università di Trento 1998) [Italian]

Persons involved as defendants in a proceeding for the same offense or for a strictly connected offense[116] could be summoned to testify under Article 210 paragraph 1 CCP, they must be assisted by a lawyer and they have the right to remain silent. Those who are involved in a non-strictly connected[117] or related proceeding as defendant can testify according to the procedure set out in Article 197 *bis* or Article 210 paragraph 6 CCP[118]: a lawyer must assist the witness, who is entitled to both the privilege against self-incrimination and the faculty to remain silent for what concern his personal liability in circumstances that are object of his proceeding.[119]

8.3.2 The Defendant

The defendant has the right to be heard if he asks to under Article 208 CCP, or in case other parties request his examination and the defendant accepts. Article 209 paragraph 1 CCP recalls a set of rules applicable, such as Article 198 paragraph 2 CCP on the privilege against self-incrimination.[120] Nevertheless, under the same Article 209 paragraph 2 CCP if the defendant refuses to answer a specific question, this circumstance should be mentioned in the hearing report, because the choice between a "simple" silence and the silence because of the *nemo tenetur se detegere* principle brings different consequences.[121] Actually in Article 209 CCP there is no reference to the right to remain silent, still the Italian Constitutional Court[122] held that the reference to Article 64 CCP should be considered implicit.

The defendant can refuse to be examined or revoke in any moment the consent to be examined. Nevertheless, under Article 513 paragraph 1 CCP his declarations made during preliminary investigations will be assumed as an evidence into the trial and will be evaluated by the judge.

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[116] Art 12, para 1, a) D.P.R. 22.09.1988, n. 447, CCP
[117] Art12, para1, c) D.P.R. 22.09.1988, n. 447, CCP
[118] It depends whether they were heard as person of interest (art 197 bis CCP) or not (art 210 CCP), see Giorgio Spangher, Antonella Marandola, Giulio Garuti, Luigi Kalb, *Procedura penale - Teoria e pratica del processo* vol II (UTET 2015) [Italian]
[119] Alessandra Sanna, *L'interrogatorio e l'esame dell'imputato nei procedimenti connessi. Alla luce del giusto processo* (Giuffrè 2007) [Italian]
[120] Franco Cordero, *Codice di procedura penale* (Giuffrè 1990) [Italian]
[121] Vittorio Grevi, 'Prove' in Giovanni Conso and Vittorio Grevi (eds) *Compendio di procedura penale* (CEDAM 2010) [Italian]
[122] Corte Cost, 23 May 2003, n. 191

In order to protect the right of the defendant to remain silent, Article 62 CCP forbids to testify about declarations made by the defendant and/or the suspect during the proceeding and/or the preliminary investigations (so called *de relato* testimony).[123] The Supreme Court of Cassation[124] pointed out that such prohibition includes all the acts for which the assistance of a lawyer is required as guarantee, but it is not binding for declarations made by the defendant outside the context of the proceeding and the preliminary investigation, which can be referred and assumed as ordinary piece of evidence.

8.4 Proceedings before Independent Authorities

Administrative proceedings before authorities such as Consob and the Bank of Italy are not considered as being equivalent to ordinary jurisdiction proceedings. Consequently, also guarantees are not the same, thus the right to remain silent and the privilege against self-incrimination are not awarded to parties of such trials. With respect to Consob the Supreme Court[125] explicitly rules that the absence in the Consolidated Law on Finance (TUF) of a specific reference to Article 198 paragraph 2 CCP did not permit its application. In the same judgement the Court held that the constitutional principle *nemo tenetur se detegere* provided for by Article 24 of the Italian Constitution is only mandatory for ordinary (and full) jurisdiction proceedings, and the subsequent jurisprudence confirmed such interpretation.[126]

Each authority drafts its own procedural rules, and unless the hierarchical intervention of the legislator or an overturning in the jurisprudence, it is up to them to amend the current regulations in order to provide a full set of rights for parties in administrative proceedings.

[123] Antonio Balsamo and Angela Lo Piparo, *La prova "per sentito dire": la testimonianza indiretta tra teoria e prassi applicativa*, (Giuffrè 2004) 158 [Italian]
[124] Cass. Pen., I Sez., 2 December 1998, n. 1495 in Cass. pen 1999, 3506 [Italian]
[125] Cass., Sez. Un. 30 September 2009, n 20936
[126] Corte app. Milano, Sez. I, 13 November 2013, n 9885

8.5 The role of the Lawyer and the Legal Privilege in Italy

For the full implementation of the constitutional right of defence set out under Article 24 of the Italian Constitution, a legal privilege is acknowledged to lawyers, as they can keep secret facts and information heard in the exercise of their professional activity. The same right is extended to professional detectives authorized by public authorities, who can be employed for defensive investigations. One of the main consequence of lawyer's legal privilege in criminal justice is the lawful refusal to testify under Article 200 paragraph 1 b) CCP that provides the list of professionals who cannot be forced to testify. Anyway, according to paragraph 2 of the same article, if the judge considers that the refusal is unsubstantial, he can oblige the lawyer (or other professionals) to testify.

Also during investigations a legal privilege under Article 103 CCP applies for the protection of communications secrecy between the lawyer and his client: it includes private conversations, correspondence, and wiretapping. The same article provides limits to inspection, search and seizure of documents related to the defence activity stored in lawyer's office. [127]
In the Italian system, a qualified lawyer cannot work as a subordinate employee in a company, except for companies held by the State. According to the legal professional law (Law n. 247/2012) there is no recognition for in-house lawyers, and consequently they cannot benefit of any form of legal privilege.[128]

[127] Franco Della Casa, 'Soggetti' in Giovanni Conso, Vittorio Grevi, and Marta Bargis (eds), *Compendio di Procedura Penale* (CEDAM 2010) 162 [Italian]
[128] Cons. Stato, Sez. VI, 24 June 2010, n 4016; TAR Lazio, Sez. I, 20 June 2012 n 7467

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

9.1 Applicable Legal Framework for Employees' Cross-border Personal Data Transfer

Rapid and ever changing technological innovations alongside the unstoppable increase of data collection and automated analysis of our daily life are constantly putting a strain on the existing notions of privacy, security and intimacy of the people in the digital environment.[129]

However, there may also be cases in which such interferences by public authorities can be considered justifiable and even necessary for the purpose of crime prevention, anti-money laundering and fraud investigations on a cross-border scale. Consequently, due to their relevance and possible impact on individuals' fundamental rights and freedoms, such conditions, although extreme, had to be specifically disciplined both on a national and international scale by competent legislators.[130] As a general principle, personal data is subject to a regime of free circulation within the European Union: data controllers may transfer personal data among EU Member States without particular restrictions (*e.g.* free circulation of information is the base of the four fundamental freedoms of the EU)[131], as long as all the obligations set forth by applicable data protection laws are met, thus including all the privacy principles enshrined by Directive 46/95/EC and the subsequent Legislative Decree n. 196/2003 (hereafter the 'Data Protection Code'), which implemented the European data protection legislative framework in the Italian legal system. In particular, the conditions required for the transfer and, more in general, their lawfulness under the Italian applicable laws shall be both evaluated taking into account the following legislative framework:

- Article 15 of the Italian Constitution, governing the freedom and the secrecy of any kind of correspondence.

[129]Christopher Kuner, *European Data Privacy Law and Online Business* (Oxford University Press, 2003) 1
[130]Viola de Azevedo Cunha M. 'The Protection of Personal Data: Evolution and Standards in Europe, Market Integration Through Data Protection' (2013) *Law, Governance and Technology Series* pp. 1
[131]See Consolidated version of the Lisbon Treaty, art. I-4 and subs. on free movement of persons, goods, services and capitals within the Union, strictly prohibiting any discrimination on grounds of nationality.

- The Data Protection Code, with particular reference to Articles 25 and 43;
- The "Code of ethics and conduct applying to personal data processing carried out for defence investigation purposes", Annex A.6 to the Data Protection Code;
- the "Guidelines applying to the use of e-mails and internet in the employment context" issued by the Italian Data Protection Authority (hereinafter the "Garante"), on March 1st, 2007;
- Law n. 300 of May 20th, 1970 – "Rules on the protection of workers' freedom and dignity and trade union freedom and activity in the workplace and rules on public employment service" (the "Workers' Statute"), with regard to Article 4 therein; and
- All relevant provisions of the Italian Code of Criminal Procedure;
- EU Regulation 679/2016 on the free circulation and the protection of individuals' personal data (so-called General Data Protection Regulation);
- The new Directive 2016/680/EU on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, coming into force as of May 6th, 2018.

9.2 Data Processing Conditions and Relevant Safeguards under Italian and EU Law

In light of the above and with regard to the processing activities of employees' records and personal data performed by employers upon requests coming from domestic or foreign enforcement authorities, special attention should be given to the following elements:[132] (i) the legal grounds for the processing in accordance with the guarantees of our legal system and the international framework of enforcement tools; (ii) the likeliness that a request for personal data from any sort of authority could cause a company or an institution to breach EU data protection requirements and other laws implemented by Member States, with particular reference to the Italian scenario; and (iii) the risks of non-compliance to transfer requests, triggering subsequent

[132] Kuner C., 'The European Union and the Search for an International Data Protection Framework', (2014) Groningen Journal of International Law 56

sanctions under national laws and regulations, and the need to carefully weigh what a failure to comply with the request could mean for the data controller or processor.[133]

In fact, although there are certain legal guarantees for this kind of processing applicable to employees' personal data, even if they may be found involved in crimes or frauds on a cross-border scale, a data subject who suffered damages or distress shall still have a right to seek compensation from a company disclosing personal data by means of exceptional circumstances.[134] To this extent, here are some practical recommendations on the steps and legal guarantees that applicable data protection laws and regulations would suggest adopting in anticipation and response to such events:[135]

- Drafting a comprehensive data minimization, anonymization and retention policy only aimed at retaining information required for business or regulatory reasons, while implementing destruction policies, which ensure that only necessary information is retained;
- Drafting and adopting standard contractual clauses or binding corporate rules, as a mean to implement a private law framework allowing intra-group personal data transfers, which may prelude to transfer requests from enforcement authorities and therefore locate the territorial jurisdiction over request in an easier and less time-consuming manner. The above, always in accordance with current data protection laws and regulations applicable to the Italian legal system (i.e. the Data Protection Code and the upcoming General Data Protection Regulation[136]).

[133]OECD, *Report on the cross-border enforcement of privacy laws* (2006) 10 – 15.
[134]Article 29 Working Party, *Working Document Setting Forth a Co-operation Procedure for Issuing Common Opinions on Adequate Safeguards Resulting from "Binding Corporate Rules"*, WP 107, April 14th, 2005.
[135]Jerker D. e Svantesson B., 'A "layered approach" to the extraterritoriality of data privacy laws' (2013) International Data Privacy Law 278 – 286.
[136]Regulation (EU) 2016/679 of April 27th 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, repealing Directive 95/46/EC (General Data Protection Regulation).

9.3 Global Governance of Data Flows and Surveillance Powers: Drawing the thin red line

With data travelling faster than ever between different parties communicating worldwide and fostering nowadays' data-driven economic system, it became somehow important to circumscribe the limits within which such data processing activities could be performed by private and public entities for the most different range of purposes and reasons, thus including enforcement and judicial investigations issues.[137] A fair and strong global governance of international personal data flows becomes therefore a strategic turning point for strengthening data protection awareness and developing a risk-based approach culture also for enforcement authorities requesting the disclosure of individuals' personal data.[138] In general terms, the EEA countries, with particular reference to all EU Member States, have laws of general application that generally reflect the contents of EU Directive 95/46/EC[139] and that, in any case, provide for the obligation to put in place appropriate legislation consistent with the standard of Convention 108[140], when it comes to privacy enforcement requests.[141] In general terms, the EEA countries, with particular reference to all EU Member States, have laws of general application that generally reflect the contents of EU Directive 95/46/EC[142] and that, in any case, provide for the obligation to put in place appropriate legislation consistent with the standard of Convention 108[143], when it comes to privacy enforcement requests. In particular, it is important to underline that the powers available to police and judicial authorities when conducting investigations are surely extensive but at the same time not unlimited: in fact, most authorities can require a data controller to provide information and documents and they may also have a similar power with regards to third parties, however this is a

[137] United Nations *Guidelines Concerning Computerized Personal Data Files* adopted by the General Assembly on 14 December 1990.
[138] Christopher Kuner, *European Data Privacy Law and Online Business* (Oxford U. Press 2003), 1 ff.
[139] Council Directive 95/46/EC on the Protection of Individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive).
[140] Council of Europe (CoE) (1981) The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Strasbourg, CoE, European Treaty Series No 108.
[141] Christopher Kuner, *European Data Privacy Law and Online Business* (Oxford U. Press 2003), 1 ff.
[142] Council Directive 95/46/EC on the Protection of Individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive).
[143] Council of Europe (CoE) (1981) The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Strasbourg, CoE, European Treaty Series No 108.

power which often requires judicial warrant and the general compliance with the principles enshrined in national data protection laws and regulations relevant to:

i. data quality and necessity;
ii. security safeguards for the retention and subsequent use of such collected information;
iii. subject access to those data, as in the case of defence investigations performed on behalf of an individual whose digital data have been accessed by competent authorities;
iv. trans-border data flows, in case the request come from a foreign authority.

In conclusion, effective privacy enforcement practices shall be designed in order to allow digital growth to advance and prosper while not limiting the importance of judicial intervention when it comes to request access to data in possess of private entities.[144]

9.4 Final Overview: between Existing Regulations and Future Legal Challenge

In addition to the above, also the European advisory body for data protection, known as Article 29 Working Party (so-called "WP29"), underlined which could be the criteria for selecting privacy enforcement targets subject to national investigations by domestic and foreign authorities in the most appropriate and data protection compliant way. In fact, the WP29 suggested that arrangements surrounding requests and exchange of information for criminal and judicial investigation purposes shall not only be based on appropriate models of international co-operation (*e.g.* such as the ones drafted in accordance with Council of Europe's Convention 108 or OECD's recommendations, duly transposed into regulations and directives by EU legislators) but that they should also reflect the necessity to directly foresee a specific role for bodies such as Europol and Interpol, working side-by-side with national enforcement authorities.

To this extent, the upcoming General Data Protection Regulation and the implementation of Directive 680/2016/EU on judicial co-operation between police and judicial authorities in

[144]OECD, *Report on the Implementation of the 2003 OECD Guidelines for Protecting Consumers From Fraudulent and Deceptive Commercial Practices Across Borders*, 2006, <www.oecd.org/dataoecd/45/53/37125909.pdf> accessed 12 February 2017

Member States, will pose an enormous challenge for Italian and European legislators willing to strengthen their role in the investigations of fraud and wrongdoings.

10. If relevant, please set out information on the following:

10.1 Defences to the offences listed in question 2;

The principal and most important defense to the offences listed in question 2 is the adoption of an organizational, management and control model adequate to prevent commission of offences. If the company can prove that it had adopted and effectively implemented this Organizational Model, before the commission of the offence, according to Legislative Decree n. 231/2001, it cannot be held liable for that offence. The implementation of an Organizational Model is not mandatory, but it is the only way for a company to avoid its liability under Legislative Decree n. 231/2001.

However, before analyzing such models, it is important to remember what stated above on the Articles 5, 6 and 7 of the Legislative Decree. In this section it has to be highlighted the news of last October in corruption's field.

In fact, the last release (15th October), of the international certification ISO 37001:2016 for corruption-prevention systems, and the consequences of its adoption need to be considered.

ISO 37001:2016 specifies the requirements and provides guidance for establishing, implementing, maintaining, reviewing and improving an anti-bribery management system. The system can be stand-alone or integrated into an overall management system. ISO 37001:2016 addresses the following in relation to the organization's activities:

- bribery in the public, private and not-for-profit sectors;
- bribery by the organization;
- bribery by the organization's personnel acting on the organization's behalf or for its benefit;

- bribery by the organization's business associates acting on the organization's behalf or for its benefit;
- bribery of the organization;
- bribery of the organization's personnel in relation to the organization's activities;
- bribery of the organization's business associates in relation to the organization's activities;
- direct and indirect bribery (e.g. a bribe offered or accepted through or by a third party).

ISO 37001:2016 is only applicable to bribery. It sets out the requirements and provides guidance for a management system designed to help an organization to prevent, detect and respond to bribery and comply with anti-bribery laws and voluntary commitments applicable to its activities. It does not specifically address fraud, cartels and other anti-trust/competition offences, money-laundering or other activities related to corrupt practices, although an organization can choose to extend the scope of the management system to include such activities. The requirements of ISO 37001:2016 are generic and are intended to be applicable to all organizations (or parts of an organization), regardless of type, size and nature of activity, and whether in the public, private or not-for-profit sectors.

It is yet uncertain whether the fact that a company has been certified with such standard will have a direct impact on hypothetical investigations or criminal proceedings towards it. In fact, it is unlikely, considering that the criminal courts are independent in their judgment, and not bound by external inputs. However, the ISO 37001:2016 could be a useful tool (a) to better set up the proceedings and (b) in the event of a committed crime, to allow the company to prove that it had done everything in its power to prevent the crime.

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement);

10.2.1 The Implementation of of Organization, Management and Control Models: an Opportunity for the Company to Avoid to Be Convicted

In the analysis of the opportunities available to a company in order to obtain immunity from or prevent prosecution, article 112 of the Italian Constitution must be considered as a basis, which obliges the public prosecutor to prosecute for crimes, unless the crime claim is unfounded. The constitutional rule is specified within the CCP, where article 50 specifies that public prosecutor has to prosecute on his motion, unless prosecution is subject to conditions. Under these circumstances, it is clear that legal devices like the Anglo-Saxon "Deferred Prosecution Agreement" would be admitted with difficulties within the Italian legal system, since it is an agreement between public prosecutor and companies that restricts the prosecution in exchange of the payment of a fine by the company.

Article 6 of Legislative Decree 231/2001 provides that implementing before the beginning of the trial an effective and suitable Organization, Management and Control Model could only avoid the conviction of the company, without prejudice to the criminal trial. Anyway, a fair interpretation of article 58 of the Legislative Decree obliges public prosecutor to dismiss the prosecution if, already during preliminary investigations, appears clearly the existence of an effective and suitable Organization, Management and Control Model capable of preventing crimes of the type that occurred (if the crime has been committed by directors) or clearly appears that surveillance duties has been properly fulfilled (if the crime has been committed by employees subject to other employee's direction).[145] After all, different solutions would contradict the "non-superfluity of the trial" principle – stated by the Constitutional Court since Judgment 88/1991, which should lead public prosecutor's choice on whether the crime claim is unfounded or not.[146] If the existence of an effective and suitable Model is not established during the preliminary investigations, companies

[145] Gaetano Ruta, 'Archiviazione' in Marco Levis, Andrea Perini (eds), *La Responsabilità Amministrativa delle Società e degli Enti* (Zanichelli Editore, 2014) 1192 [Italian].
[146] According to art 125 of CCP actualization rules, crime claims unsustainable in the trial are unfounded.

will have to deal with a trial, without prejudice, during the trial, to the proof of the implementation of a Model with the features provided for by Article 6 of the Legislative Decree before the crime commission. Such a proof, together with the demonstration of a fraudulent evasion of the Model by the director – or the lack of proofs by the prosecutor of surveillance duties violation in the case provided for by Article 7 – would represent an exemption from criminal liability for the company, which would avoid to be convicted at the trial end. With these premises, appears clearly the importance for any company to implement a Model provided with the features laid down by article 6 of the Decree 231 - even if the implementation is not mandatory – considering the utilities the implementation could offer during possible criminal proceedings.

10.2.1.1 Implementation of Organization, Management and Control Models as a Tool to Prevent Crimes Commission

In a more general perspective, it is clear that the primary aim of implementing Organization, Management and Control Models is just preventing crimes commission, thus obviously preventing any prosecution. By analysing the Models features provided for by Article 6 of the Legislative Decree, we understand that these features, in most cases, should be a deterrent to the commission of crimes by employees of the company. First of all, through a specific risk assessment with regard to the concrete situation of the company. Then, through a specific risk management, laying down an Ethical Code and regulating activities and financial resources management in the risk area. Lastly, spreading the knowledge of the Model to the employees and providing a punitive system against the transgressors. Moreover, duties of updating constantly the Model and the establishment of a neutral e independent Supervisory Body, in charge of monitoring the proper implementation of the Model, should be both a deterrent to the commission of crimes by employees of the company and a tool to nip the commission of the crime in the bud.

10.2.2 Cooperative Compliance and Financial Risk Prevention

With the provision 54237, issued on the 14th of April 2016, the Italian Revenue Agency (IRA) has defined the procedure of the cooperative compliance regime, introduced by Legislative Decree 128/2015, which laid down provisions about certainty in the relationship between IRA and taxpayers. The importance of this legal device with regard to the offences listed in question 1 can

be understood only indirectly: through a constant and transparent dialogue between IRA and taxpayers on the situations that could generate tax risks, it is possible to prevent the commission of Self-Money Laundering of the tax crimes revenues, ensuring the paper trail of companies assets. It is worth pointing out that, differently from Self-Money Laundering, tax crimes committed by employees cannot lead to corporate liability.

This legal device is addressed to large business taxpayers: in order to access the regime, company must have financial turnovers or operating revenues equal to at least € 10.000.000.000 or, if they have applied for the 2013 pilot project, financial turnovers or operating revenues equal to at least 1,000,000,000EUR; moreover, can access the regime companies giving execution to the IRA's opinion in reply to *advance tax rulings* on new investments. Concerning objectives requirements, the regime is based on the adoption by companies of an effective Tax Control Framework (TCF), which is a system – that can be integrated in the Model *ex* Legislative Decree 231/2001 - for detecting, measuring and controlling tax risk. The TCF task is self-assess tax risk, in order to provide to the IRA a transparent assessment on the situation of the company and to immediately detect critical situations. Tax risk is meant to be the risk of operating in violation of fiscal system principles and purposes or in violation of tax law.[147] From its point of view, IRA will have to analyse in advance potential risks, providing simplifications of the tax performances procedures of the company.

10.2.2.1 Rewarding Benefits of the Cooperative Compliance Regime

Article 6 Legislative Decree 128/2015 provides several rewarding benefits for companies who join the regime. First, taxpayers may apply for a shortened advance tax ruling, with regards to applications of tax provisions to specific cases, with a commitment of the IRA to reply within 45 days. Furthermore, potential tax penalties are reduced by half and, in any case, not exceeding the minimum provided (suspending the tax collection until the final assessment, if there is a dispute with regard to the risk assessment made by the company). Lastly, in case of suspected crimes, the

[147] Pietro Boria, *Diritto Tributario* (Giappichelli Editore Torino 2016) 492 [Italian].

IRA will have to inform the public prosecutor that the company supplied any required information about its task risks and the allocation of roles in the TCF. Therefore - also promoting within the company a culture based on honesty, fairness and tax compliance – should be possible to prevent both controversies with the IRA and crimes commission. It is not to be underestimated that through this regime companies may avoid invasive tax audits by the IRA, and on the other hand the IRA may focus mostly on disputes with uncooperative taxpayers.

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

10.3.1. Late Implementation of Compliance Programs and Reparation of Crime Outcomes: Article 17 and Article 12 Legislative Decree 231/2001

The reparation of crime outcomes and the adoption of repairing and restoring behaviours represents the last chance for the company to prevent, at least, disqualifications. The entirety of the behaviours provided for by article 17 of the Legislative Decree 231/01 is a unique exemption from criminal liability in the Italian system: it exempts only from disqualifications, without prejudice to other types of penalties – except for the pecuniary penalties reduction *ex* article 12 - and to the existence of the crime of the company.[148]

Article 17 a), b) and c) provides three conditions to be fulfilled concurrently. Article 17 a) requires companies to compensate entirely the damages and to remove crime damaging or dangerous outcomes otherwise to effectively strive to that effect. It is important to focus on the meaning of the concrete opportunity to perform these activities: if there is an impossibility of a whole fulfilment of the repairing, restoring and compensating duties by the company (e.g. because of an adverse economic state), there will be an obligation for the Court to assess the actual adequacy of an incomplete compensation or, even, only attempted (in case of an actual and complete

[148] Mariolina Panasiti, 'Riparazione delle Conseguenze del Reato' in Levis, Perini (eds), *La Responsabilità Amministrativa delle Società e degli Enti* (Zanichelli Editore, 2014) 358 [Italian].

impossibility of the performance).[149] At the same time, the compensation has to be carried out only by the company itself and not – for example – by the defendant as physical person.[150] Article 17 b) requires a late implementation of an Organization, Management and Control Model suitable for preventing crimes of the type that occurred. It has to be underlined the difference between compliance programs implemented before the beginning of the trial (provided for by Articles 6 and 7 of the Decree) and compliance programs implemented *ex-post*, in order to prevent disqualifications (or to obtain pecuniary penalties reductions *ex* article 12): in the first case has to be precluded a general, abstract and predictable crimes commission risk, in the second case it has to be implemented a model suitable for solving the specific organizational deficiency, which led to the commission of the crime.[151] Lastly, Article 17 c) requires to hand back the crime profits, to be confiscated. The confiscation of the profits would occur in any case, nevertheless giving back the profits spontaneously means tangibly participation in order to reinstate legality. The opportunity to realize the above-mentioned behaviours is limited in time: they must take place before the hearing opening statement. Companies have two eventual possibilities: Article 65 of the Decree provides the trial stay - if requested by the company before the hearing opening statement – in order to let the company fulfil the undertakings, which were impracticable before. During the execution – but within 20 days from the judgment notification - Article 78 allows the conversion of disqualifications in pecuniary penalties, for the late completion of the behaviours laid down in Article 17.

Article 12, second paragraph, provides two cases of repairing behaviours, which can lead to pecuniary penalties reductions. These provisions follow Article 17 a) and b), to which references shall be made. It is not necessary that both conditions exist concurrently in order to benefit of the reduction: nevertheless, the simultaneous presence of both compensation and late implementation of a compliance program affect the *quantum* of the reduction (from a half up to two thirds; instead of from one third up to a half). Even though Scholars are not unanimous, provisions contained in

[149] Stefania Giavazzi, 'Riparazione delle Conseguenze del Reato' in Angelo Giarda, Enrico Maria Mancuso, Giorgio Spangher, Gianluca Varraso, *Responsabilità "Penale" delle Persone Giuridiche* (IPSOA 2007) 161 [Italian].
[150] Cass. Pen., Sez. VI, 36083/2009
[151] Florenzo Storelli, *L'Illecito Amministrativo da Reato degli Enti nell'Esperienza Giurisprudenziale* (Ita 2005) 74 [Italian].

Articles 12 and 17 can be enforced concurrently. After all, neither the Decree, nor the Ministerial Report show opposite indications, which would be an unjustified *in malam partem* interpretation against companies that try – through repairing, restoring and compensating activities - to redress the balance altered by the commission of the crime. Article 17 aside ("with no prejudice to the pecuniary penalties") means only that pecuniary penalties are mandatory: nevertheless, they must be reduced if the company meets Article 17 conditions (in which are included Article 12 second paragraph provisions).[152]

10.3.2 Preliminary Measures Revocation

There is a link between Article 17 and 49 of the Decree, which regulates cases of preliminary measures suspension. Since disqualifications could produce such an irreparable harm for companies - even if enforced only as preliminary measures -, if the rewarding device laid down by the Article 17 was not adequate to prevent disqualifications as preliminary measures as well, it would not be entirely satisfying. This is why, if the company requires to accomplish the activities provided for by Article 17, the Court – with the counsel of the prosecutor – can accept the solicitation; suspending the preliminary measures, providing a time for the accomplishment of repairing behaviours and requiring a deposit as warranty. If the Court judged the undertakings suitable, Article 49 fourth paragraph provides the revocation of preliminary measures. The Supreme Court stated that not only through the activities laid down in Article 17 companies can achieve preliminary measures suspension and revocation: even if the company chooses different pursuits, the Court has to assess them deeply, in order to decide if they could effectively remove the need of a preliminary measure (coherently with Article 50 first paragraph).[153]

[152] Panasiti, 'Riparazione delle Conseguenze del Reato' in Levis, Perini (eds), *La Responsabilità Amministrativa delle Società e degli Enti* (Zanichelli Editore, 2014) 375 [Italian].
[153] Cass. Pen., Sez. VI, 18634/2015

10.3.3 Special Proceedings and Penalty Reductions: Plea Bargain and Abbreviated Trial Procedure

Articles 62 and 63 of the Decree regulate "Abbreviated Trial Procedure" and "Plea Bargain": considering their efficiency and the procedural time savings they offer, these proceedings grant an automatic penalty reduction. Both articles provide, if compatible, the application of the general rules contained in the Italian Criminal Code. Abbreviated Trial Procedure consists of a request pursuing the resolution of the trial at the preliminary hearing. It has to be noted that Article 62 forbids opting for Abbreviated Trial Procedure if the Court believes that the penalty for the crime committed by the company will consist in permanent disqualifications in order to avoid a penalty "gender transformation", as permanent disqualifications can be seen as an actual death penalty for the company.[154] Opting for Abbreviated Trial Procedure offers a fixed penalty reduction (one third). Only temporary disqualifications and pecuniary penalties will be reduced, whereas confiscation of the profits will be enforced entirely. Plea bargain is an agreement on the penalty, between the prosecutor and the defendant, with the consent of the Court. The agreement can be reached even before the trial start, since preliminary investigations, but by the time of the preliminary hearing conclusion. It is subject to two alternative conditions: either only pecuniary penalties have to be provided for the crime or the defendant physical person has opted or could opt for Plea Bargain. Again, however, Plea Bargain is forbidden if the Court predicts the enforcement of permanent disqualifications. Opting for the Plea Bargain grants a penalty reduction up to one third, but only pecuniary penalties and disqualifications can be reduced: it is not allowed any agreement between the parties on the seizure of the profits. With regard to the other rewarding systems provided for by the CCP, it is generally applicable the exemption from the costs related to the proceedings, the issuing of a gag order and a limitation of the effects of the sentence only to the criminal proceeding itself.

[154] Massimo Ceresa-Gastaldo, *Procedura Penale delle Società* (Giappichelli Editore, 2015) 168 [Italian].

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance)

11.1 Cost Problems: some Data on Companies' Worries

In September 17 2015, DAS Italia, a company specialized in legal defense, submitted a questionnaire[155] to an insurance broker panel at the Conference "Emerging risks for companies", one of whose speakers was Raffaele Guariniello, Deputy Public Prosecutor at the Court of Turin.

The analysis conducted by Das Italia showed that Legislative Decree 231/2001 is the biggest worry of companies because of the sanctions provided, above all disqualifications and confiscation, and the huge legal cost related to its implementation.

From the survey's results emerges that, according to 40% of the respondents, the problems from which the Italian companies want to protect themselves are mainly those related to Decree 231.

According to 50% of the brokers surveyed, the introduction of Decree 231 increased the legal costs for the companies of one third at least. The most involved sectors are constructions (29%), industry (24%), trade and professionals (both 9%); the most fragile types of companies are the medium-sized ones (42%) and the small-sized ones (35%), compared to those of larger dimensions.

Directors are the company positions deemed to be most at risk of legal action (43%), followed by security managers (29%) and managers (25%).

According DAS Italia's survey, the alleged violations are mostly criminal in nature (44%), rather than civil or administrative (28%).

Since October 15 2016, a new item of cost may apply to the companies: indeed, in that date ISO

[155] Alessia Argentieri, *Rischi legali: la legge 231 sulla responsabilità d'impresa terrorizza le aziende italiane* http://italiaassicurazioni.com/Rischi-legali-la-legge-sulla-responsabilita-d-impresa-terrorizza-le-aziende-italiane.php accessed 18 January 2017 [Italian].

37001:2016 was released. This standard 'specifies requirements and provides guidance for establishing, implementing, maintaining, reviewing and improving an anti-bribery management system'[156], which can be certified. Obtaining ISO 37001:16 certification does not protect, in absolute, the company from possible proceedings by both Italian and foreign investigative bodies: however, an international independent certification body will check if the corporate structure has taken a number of actions that lead naturally to mitigate risk and, therefore, the level of responsibility. As a consequence, the effective implementation and certification ISO 37001:16 will minimize the chances of facing problems related to corruption within the organization itself. The downside is certainly the cost of the certification, considered very expensive.

11.2 Insurability of Economic Loss Resulting from Administrative Sanctions

The above-mentioned worries pushed many companies to look for safeguard and protection, trying to minimize the huge costs deriving from Decree 231. This fact made an old discussion in doctrine and jurisprudence come back to the surface: is the economic loss resulting from administrative sanctions insurable?

The insurability problem exists mainly in relation to fines. In that case, the insured risk seems to get out of boundaries of legality, whether it is regarded as the cause of the contract, whether it is taken in the object of the contract.[157]

Unanimous jurisprudence has answered in a negative way to the question since 1984, when the Supreme Court of Cassation, with sentence n. 5437 (October 25 1984) denied the insurability of that risk: 'The obligation with which anybody assumes a monetary penalty imposed on the guilty is contrary to the civil norms and so if the obligation arises either before or after the consummation of the offense'.

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[156] Official website, *ISO 37001:2016 Anti-bribery management systems - Requirements with guidance for use* http://www.iso.org/iso/catalogue_detail?csnumber=65034 accessed 20 February 2017 [Italian].
[157] Marco Fratini, *L'opposizione alle sanzioni amministrative* (Giuffrè Editore 2008) 24 [Italian].

This view was also shared by ISVAP (now IVASS), acronym for Institute for the supervision of private insurance and collective interest. In its circular n. 246, May 22 1995, ISVAP stated:

- Administrative offenses have not, unlike torts, a nature of compensatory damages, and therefore they should not be linked to the amount of damage caused to a right by the harmful behavior, but they have a clear personal and afflictive nature, intended to deter, in the public interest, the addressees […]. These offenses are therefore similar in many aspects to the criminal ones […].
- In light of this, the insurance contract to protect the insured from financial loss constituted by the application of administrative fines shall be considered as having an illicit cause and, therefore, an illicit social-economic function, contrary to Article 1343 Italian Civil Code. In fact, in this way, the above-mentioned principles of personality and afflictively would be violated with undeniable negative consequences in relation to the deterrent power of the fines regarding the future behaviour of addressees.
- Consequently, the contract […] will be considered invalid based on the provision contained in Article 1418 Italian Civil Code.
- The risk of the applicability of administrative fines is, therefore, non-insurable considering, among other things, that in the case in question the financial loss does not constitute a simple indirect consequence of the administrative penalty, but it is identified with the administrative penalty itself and that an agreement as the one in question would render meaningless the reaction power of the government against administrative offences […].

The "Insurance code", Legislative Decree n. 209, September 7 2005, stated the non-insurability of administrative sanctions and the invalidity of the relative contract in a very strong way with Article 12 "Forbidden operations".

Regulation n. 29, March 16 2009, of ISVAP, which substituted the above-mentioned circular, reaffirmed its principle.

11.3 Insurability of Civil Obligations under Article 197 Criminal Code

In case of criminal fines inflicted to directors or officers of the company, if the convict is insolvent, the company has a civil obligation to pay the fine under Article 197 Criminal Code. This economic risk is insurable by the company.

In such case, indeed, no economic burden shift, connected to the administrative sanction, is realized, because the infringer retains that charge. Through the insurance contract, the subject jointly liable to pay the fine does nothing more than protecting his interest, in order to cover the risk related to the possibility that the offender does not pay the fine and found to be insolvent at the time of recourse. This position is shared by ISPAV in the above-mentioned circular n. 246 of 1995.

11.4 Insurability of Disqualification's Risk

The issue of the lawfulness of the administrative sanctions' insurance arises not only with regard to fines, but also with regard to disqualifications. The analysis of the problem has to be developed keeping in mind that the punitive function of this type of sanctions provides for interdiction of a person from carrying out certain activities.[158]

The perpetration of the offense is considered by law as a manifestation of the inappropriateness of the offender to perform certain activities, to hold certain positions of responsibility or to become part of some, even contractual, relationships. This arises issues with the protection of collective interest; therefore, these considerations are relevant in order to find a solution to the insurability issue.

The following is the relevant hypothesis: upon payment of an insurance premium, it is provided for the payment of a certain compensation for the prejudicial financial consequences resulting by

[158] Roberto Giovagnoli, Marco Fratini, *Le sanzioni amministrative. Raccolta completa commentata con dottrine e giurisprudenza* (Giuffrè Editore 2009) 177-180 [Italian].

the imposition of a disqualification that produces a damage for loss of earnings in the assets of sanctioned subject, because of the impossibility of carrying out the prohibited activities.

In this case, the personal and afflictive function of disqualification is not compromised by the insurance coverage, since this sanction's purpose, unlike in case of fines, is first of all to keep the sanctioned subject far from a certain activity, not to cause him an economic damage.

Such damage is merely an indirect, secondary and, in some respects, eventual consequence of the sanction, so it is not covered by typical punitive purpose of the rule, which provides for the disqualification.

Insurance coverage of such damage, therefore, does not cause any displacement of the punitive risk, but it serves as a tool to protect the sanctioned subject from greater risks arising by the imposition of disqualification. Therefore, such a risk is insurable by the company.

11.5 Insurability of Confiscation's Risk

The last profile to be analyzed concerns the insurability of the risk resulting from the confiscation of the sanctioned subject's goods. In this regard, the contractual provision for an obligation on the insurance company to pay the infringer a sum equivalent to the value of the confiscated property or to confer in nature a good that is identical to the one confiscated appears in stark contrast with the punitive and special-preventive function that jurisprudence recognizes to confiscation itself.[159]

This insurance, indeed, would allow the sanctioned subject to regain possession, directly or indirectly, of the good that the legal system wanted to definitively keep out from the assets of the infringer.

[159] Roberto Giovagnoli, Marco Fratini, *ibidem*

It is therefore evident the illegality, and subsequent invalidity, of such an insurance contract.

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

12.1 Legislation

12.1.1 Reform of the General Act on Corporate Quasi-Criminal Liability, Legislative Decree 231/2001

Considering that the current "crimes catalogue" provided for by Legislative Decree n. 231/2001 caused many regulatory gaps, there are tendencies, in doctrine and jurisprudence, pushing for a reform that aims to fill those gaps in a more pragmatic prospective, providing the punishment for those financial crimes not yet addressed by the legislation. Indeed, this reform shall cover the European Financial Interests in fighting fraud and money- laundering.[160]

Moreover, compliance programs are expected to become mandatory for every company, as they are, *de facto*, in many economic fields (e. g. in the Stock Exchange market).

It is predictable that the system set out by Legislative Decree n. 231/2001 will be implemented in a comprehensive framework in which companies are requested to adopt cooperative compliance measures in a wide range of areas (e.g. tax control framework, anti-corruption, work health and safety, environmental system).

[160] Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM/2012/0363.

12.1.2 Relevance of a General Law Provision about Whistleblowing, Internal and External Reporting

Doctrine and Praxis aim to reform Article 6 of Legislative Decree n. 231/2001, improving, among other elements, the legislative regulation on internal reporting, in order to provide a general rule that avoids the uncertainties on the best-considered practices. On the other hand, external reporting and whistleblowing are widely considered by the Draft Act[161] approved by Chamber of Deputies, now being discussed by the Senate, implementing, for the whistleblower, a pecuniary reward and data protection, in order to promote self-reporting and cooperation during investigations by the companies themselves, broadening the provisions regarding whistleblowing also to the private sector.

12.1.3 Directive on Anti - Money Laundering

The Council of Ministers has given a preliminary green light concerning the Legislative Decree n. 389 of 23 February 2017 that transposed the Fourth Directive on Anti-Money Laundering (2015/849/EU), which would introduce a new Financial Security Committee, the establishment of the register of effective holders of legal entities, the central register of trusts, and simplified bureaucratic procedures. The Legislative Decree will be then discusses by both Chambers.

12.2 Enforcement: General framework for proceeding in front of Independent Authorities

Considering that the current legal framework appears excessively complex, and gave rise to conflicting case-law, the future scenario should be more transparent and efficient, with harmonised procedural regulations (e.g. amending Law n. 262/2005) and granting a full set of defensive rights to defendants.

[161] Draft Act C3365, *Disposizioni per la tutela degli autori di segnalazioni di reati o irregolarità di cui siano venuti a conoscenza nell'ambito di un rapporto di lavoro pubblico o privato*, presented by On. Businarolo and approved by the Chamber of Deputies on 21 January2016 and presented on 22 January 2016 at the Senate of Republic as DDL S 2208

12.3 Penalties: Probation Regime to Companies' Proceedings

Scholars foresee that the development of the legislation of proceedings against companies through the expansions of the probation regime to these proceedings will actually be effective.

If enforced during preliminary investigations, probation could lead companies to recover legality under the supervision of the judge, who could assess the active repentance of the company and its effective adjustments under a profile of legality.[162]

[162] Giorgio Fidelbo, Rosa Anna Ruggero, 'Procedimento a carico degli enti e messa alla prova: un possibile itinerario', (2016) La Responsabilità amministrativa delle società e degli enti, 4, 3 ff.

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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction.

Satversme (the Constitution of the Republic of Latvia) sets out the basic principles and safeguards in regards to criminal liability and criminal proceedings. Sentence 2, Article 92, states as follows: 'Everyone shall be presumed innocent until his or her guilt has been established in accordance with law'. The Constitution therefore guarantees the presumption of innocence in criminal proceedings alongside Section 2, Article 6 of European Convention on Human Rights which is also applicable in the Republic of Latvia[1], as well as other widely accepted safeguards and guarantees developed in criminal law theory[2] (clarified and explained in more detail in the Criminal Law).

The only law that concerns specifically criminal offences in the Republic of Latvia is the Criminal Law as it is laid down in Section 1, Article 1 of the Criminal Law, and which elaborates on the basic principles of criminal proceedings (presumption of innocence, *nullum crimen sine culpa*, *nullum crimen sine lege, nulla poena sine lege*):

'Only a person who is guilty of committing a criminal offence, that is, one who deliberately (intentionally) or through negligence has committed an offence which is set out in this Law and which has all the constituent elements of a criminal offence, may be held criminally liable and punished'.

Therefore, in the Republic of Latvia it is impossible to hold a person criminally liable if the offence is not set out in the Criminal Law.

However, it must be noted that, taking into account the criteria set forth in case-law of the European Court of Human Rights[3], *Satversmes tiesa* (the Constitutional Court of the Republic of

[1] Ratified by *Saeima* (the Parliament of the Republic of Latvia) on June 4 1997. and come into force on June 27 1997.
[2] *Latvijas Republikas Satversmes komentāri. VIII nodaļa. Cilvēka pamattiesības* (Riga: Latvijas Vēstnesis 2011) 119 – 164 [Latvian]
[3] Specifically, European Court of Human Rights Judgment in case '*Engel and others v. The Netherlands*'. June 8 1976.

Latvia) has ruled that Section 2, Article 6 of European Convention on Human Rights[4] is also applicable to administrative violations for which the sanction is either a monetary fine or administrative arrest[5], both having similar character to sanctions imposed for criminal offences and therefore may be regarded as criminal sanctions.[6]

Accordingly, while the only law dealing specifically with criminal offences in the Republic of Latvia is the Criminal Law, some offences which are defined as 'administrative violations' under Latvian law (Latvian Administrative Violations Code) may fall within the scope of criminal offences as defined by European Convention on Human Rights under criteria set forth by the European Court of Human Rights[7] and reiterated by the Constitutional Court of the Republic of Latvia. Nevertheless, Latvian legislation does not impose criminal liability for administrative violations but guarantees similar (but not the same) safeguards. The processes of criminal and administrative proceedings are not in the scope of this research, thus we will not elaborate any further on the aforementioned matters. As aforesaid, the Criminal Law is the main source of criminal offences and criminal liability in the Republic of Latvia. The Criminal Law sets out sanctions for offences of bribery, corruption, fraud and money laundering. Latvian Administrative Violations Code does provide with sanctions for some violations in relation to fraudulent activity[8], corruption[9], and

[4] Section 2, Article 6 of European Convention on Human Rights states: 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law'.
[5] Administrative arrest as prescribed by Latvian Administrative Violations Code (Section 1, Article 31) is defined as arrest (deprivation of liberty) for a period from one to 15 days.
[6] *Case No.2001-17-0106*. [2002] Constitutional Court of the Republic of Latvia. Translation available at: http://www.satv.tiesa.gov.lv/wp-content/uploads/2001/12/2001-17-0106_Spriedums_ENG.pdf
[7] European Court of Human Rights cases: '*Engel v. Netherlands*'. [1976]; '*Ringvold v. Norway*' [2003]; '*Philips v. the United Kingdom*' [2001].
[8] For example, illegal use of trademarks, other distinguishing marks and designs is deemed an administrative violation (Article 166.[17] of Latvian Administrative Violations Code) unless substantial harm has been caused thereby to interests protected by law of a person in which case it is deemed a criminal offence (Article 206 of the Criminal Law). Similarly, evasion of tax payments as well as concealing or reducing income, profits and other items subject to tax is deemed an administrative violation (Article 159 of Latvian Administrative Violations Code) unless losses on a large scale are caused thereby to the State or local government in which case it is deemed a criminal offence (Article 218 of the Criminal Law).
[9] For example, violation of restrictions of earning of income from commercial activities performed by a state official is deemed an administrative violation (Article 166.[30] of Latvian Administrative Violations Code) unless substantial harm has been caused thereby to the interests of the State or of the public, or to interests protected by law of a person in which case it is deemed a criminal offence (Article 325 of the Criminal Law).

money laundering[10] that are deemed less harmful to public. Usually the main criteria which defines whether illegal activity is considered to be an administrative violation or a criminal offence is the magnitude (gravity) of consequences (harm) of the illegal activity. As there is a vast amount of codified violations and offences, one must consult the relevant provisions to determine whether illegal activity is qualified as an administrative violation or a criminal offence.

While the Criminal Law and Latvian Administrative Violations Code state the sanctions for criminal offences and administrative violations, these statutes do not usually provide positive regulations which are to be observed, eg, the Criminal Law does not explicitly state that it is prohibited to bribe someone. Instead, the Criminal Law sets forth a sanction if the act of bribery is committed. Therefore, if a sanction is provided by the Criminal Law, one must conclude that the activity for which the sanction is present bears criminal liability. However, there is a considerable amount of legislation that sets out specific positive regulations and requirements in the fields of bribery, corruption, fraud and money laundering as described (very generally) further.

Requirements and regulations in the field of anti-money-laundering are inscribed in detail in the Law On the Prevention of Money Laundering and Terrorism Financing which is the main source of rules in the relevant field and defines money laundering, as well as consequently indirectly defines what is deemed as a criminal offence by the Criminal Law. The law sets forth specific requirements for the state institutions, companies (including banks) and private citizens in the field of anti-money laundering, *inter alia* implementing provisions of several directives of the European Union. The Cabinet of Ministers of Latvia[11] has enacted several regulations detailing requirements of the Law. The Financial and Capital Market Commission[12] has enacted a considerable amount of rules and regulations in the field of anti-money-laundering, which are binding to the entities,

[10] For example, failure to introduce internal control system for the prevention of money laundering, failure to ensure training of employees in the prevention of money laundering, failure to notify the State Controlling Authority on unusual or suspicious financial transactions is an administrative violation (Article 165.[8] of Latvian Administrative Violations Code) while the money laundering itself is a criminal offence (Article 195 of the Criminal Law).

[11] The executive branch of the government of Latvia.

[12] The Financial and Capital Market Commission is the supervising authority of Latvian banks, credit unions, insurance companies and insurance brokerage companies, participants of financial instruments market, as well as private pension funds, investment funds, alternative investment funds, payment institutions and electronic money institutions.

which the Commission is tasked to supervise by Law. The Bank of Latvia[13] has also enacted regulations dealing with anti-money-laundering in the field of sale and purchase of foreign currency using cash. Several institutions have also developed non-binding guidelines in the field.

In the field of corruption in relation to public officials, the main piece of legislation is the Law On Prevention of Conflict of Interest in Activities of Public Officials. The main purpose of the law is laid down in Article 3, which specifies that the main function of the law is to provide for restrictions and prohibitions upon public officials and prevention of conflict of interest in actions of public officials encouraging prevention of corruption and bribery. Several regulations of the Cabinet of Ministers of Latvia exist, detailing some of the requirements set forth by the Law. Corruption and bribery in regards to private individuals and companies is regulated mainly by the Criminal Law, again, as stated before, in a passive way – by providing sanctions for particular activities.[14]

The Criminal Law (Articles 177 – 178) sets forth the general definition of fraud and provides criminal sanctions for fraud. However, some activities which do not fall under the definition of fraud, as defined by the Criminal Law, may still be criminalized. For example, some fraudulent activities in relation to consumer rights protection are not considered fraud *per se,* but nevertheless are considered as an administrative violation or a criminal offence.[15] Thus, in the field of fraud one must consider both - Consumer Rights Protection Law and Law On the Safety of Goods and Services, as well as a considerable amount of regulations of the Cabinet of Ministers of Latvia enacted pursuant to these statutes providing more specific requirements on these matters. Another field which may fall under the general definition of fraud, but is not recognized as fraud *per se* by the Criminal Law, is Tax Law. Currently in the Republic of Latvia 16 state taxes exist, each being

[13] The central bank of Latvia – an independent institution and a participant of the Eurosystem.
[14] For example, the use of and exceeding authority in bad faith (Article 196), unauthorized receipt of benefits (Article 198), commercial bribery (Article 199).
[15] For example, offering or selling goods or services non-complying with the quality or safety requirements specified in regulatory enactments is deemed an administrative violation (Article 166.[9] of Latvian Administrative Violations Code) unless substantial harm has been caused thereby to the health of the consumer, his or her property or the environment in which case it is deemed a criminal offence (Article 202 and 203 of the Criminal Law).

regulated by its own piece of legislation. The "umbrella" law in the field of taxation is the Law On Taxes and Fees which lays down general principles of Tax Law in the Republic of Latvia. Specific requirements are found in the designated law for each tax. There is also a considerable amount of regulations issued by the Cabinet of Ministers, which all deal with further detailed requirements in the field of Tax Law. As stated, non-compliance with the enacted laws and regulations in the field of Tax Law may lead to administrative or criminal liability.

Another piece of legislation which does not directly fall under any of the fields under review in this paper is Competition Law which aims at protecting, maintaining and developing free, fair and equal competition in all economic sectors. Failure to comply with the requirements of the Law may lead to criminal liability as prescribed by Articles 211 and 212 of the Criminal Law.

The Constitution of the Republic of Latvia and the Criminal Law provide basic safeguards in criminal cases, among them the impossibility of criminal liability without specific provisions of law (*nullum crimen sine lege, nulla poena sine lege*) as stated in Section 2, Article 1 of the Criminal Law: 'To be found guilty of committing a criminal offence and to impose a criminal punishment may be done by a judgment of a court and **in accordance with law**'. Consequently, it is also impossible for the judicial branch of the government (the courts) to interpret the law in such a way as to 'find uncodified offences' for which there are no definitive provisions in the Criminal Law. The Criminal Law prohibits application of the law by analogy in criminal proceedings, as stated in Section 4, Article 1: 'An offence shall not be considered criminal, applying the law by analogy'. Therefore, the case law may be used only as means of interpretation of provisions of the Criminal Law, not as a substantive source of law or criminal offences.

Failure to comply with any supranational legislation which the Republic of Latvia has agreed to comply with (including that of the European Union) may lead to criminal liability if it falls under regulation of the Criminal Law as stated above.

As a final note of this general overview we would like to point out that all legislation enacted by the legislative branch (the Parliament – *Saeima*) and executive branch (the Cabinet of Ministers –

Ministru kabinets) as well as other institutions tasked with enacting binding regulations by Law (e.g., The Financial and Capital Market Commission – *Finanšu un kapitāla tirgus komisija*, the Bank of Latvia – *Latvijas Banka*) is public and accessed electronically in an official publication in the Official gazette of the Republic of Latvia '*Latvijas Vēstnesis*'.[16]

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

Before October 1 2005, it was impossible to hold a company (legal entity) liable for criminal conduct and the criminal theory, as well as the Criminal Law of Latvia did not provide any means to impose any criminal sanctions on legal entities. The reasons behind it are found in the Constitution of the Republic of Latvia, Article 92, which states that 'Everyone shall be presumed innocent until his or her **guilt** has been established in accordance with law'. Hence, to be able to prosecute, impose liability and sanctions for criminal conduct, one must establish "guilt" of the perpetrator, which by definition is subjective – it is a mental attitude and therefore cannot be attributed to legal entity which is a legal fiction.[17]

Therefore, after lengthy legal theoretical discussions in several work-groups the Parliament enacted amendments in the Criminal Law introducing **coercive means,** which may be applied to legal entities for criminal conduct instead of a direct criminal liability. The direct criminal liability is still applied only to natural persons as Article 12 of the Criminal Law provides:

'A natural person **who has committed a criminal offence** acting in the interests of a legal person governed by private law, for the benefit of the person or as a result of insufficient supervision or

[16] Available at www.vestnesis.lv. All systematized (consolidated) legislation of the Republic of Latvia is available free at the legislation website 'www.likumi.lv'. An access to a translation in English for some of the legislation available is also provided by the website.

[17] See further: D. Rone. *On institute of criminal liability of legal entities in eight countries – nordic countries (Finland, Sweden, Norway, Iceland and Denmark) and Baltic countries (Latvia, Lithuania And Estonia).* Ministry of Justice of the Republic of Latvia. 2006. <http://at.gov.lv/files/uploads/files/7_Resursi/Petijumi/lv_documents_petijumi_LEGAL_SCIENTIFIC_RESEARCH_07_03_2006.doc> accessed 16 February 2017.

control thereof **shall be held criminally liable**, but the legal person **may be applied the coercive measures** provided for in this Law'

Therefore, as mentioned before, criminal offence from the point of view of theory of criminal justice of Latvia and the Criminal Law, can be committed only by a natural person and only a natural person can be held criminally liable. Thus, in order to impose a coercive measure to a legal entity, firstly, a natural person must be found guilty of a criminal offense. In addition, according to Article 70.[1] of the Criminal Law, it must be found that the natural person committed the offence either (a) in the interests of the legal person, (b) for the benefit of the legal person or (c) due to insufficient supervision or control of the legal entity. And, finally, in order to apply coercive measures to a legal entity, the natural person who committed the criminal offence must have acted in one of the three capacities:

a. on the basis of the rights to represent the legal entity or act on behalf thereof;
b. on the basis of the rights to take decisions on behalf of legal entity;
c. while exercising control within the legal entity. Therefore, in theory **any** criminal offence committed by a natural person can bear coercive measures for legal entity if the natural person committed the crime in the interests or for the benefit of the legal entity or due to insufficient supervision or control of the legal entity.

As stated before, Latvian Administrative Violations Code also provides sanctions for the violation of rules and regulations enacted in the Republic of Latvia. Nevertheless, due to administrative violations being different from criminal conduct by being less harmful to the public, the Code does not require proving "guilt" of the legal entity (in the sense of criminal justice theory) as a precondition for application of administrative sanction. The Code provides: 'In special cases provided for in this Code and binding regulations issued by local government councils (parish councils) legal persons shall be subject to liability for administrative violations'. A vast majority of administrative violations can be committed by legal entities, therefore, in majority of cases, the Latvian Administrative Violations Code provides for sanctions applicable to legal entities.

Penalties

Naturally, the Criminal Law provides the harshest measures imposable on legal entities. Article 70.[2] provides a list of such coercive measures:

a. liquidation;

b. restriction of rights;

c. confiscation of property;

d. monetary recovery.

The Law states that one or more coercive measures may be applied simultaneously, except in case of liquidation when no other measures may be applied. The Law further elaborates on each of coercive measures. Thus, Section 1 and 2, Article 70.[3] states that **liquidation** constitutes a coercive dissolution of legal entity and it may be imposed only if the legal entity was established with an intention to commit a criminal offence or if a severe or extremely severe crime[18] has been committed.

Section 1, Article 70.[4] provides that **restriction of rights** is deprivation of specific rights or permits of the legal entity or imposition of such a prohibition which prevents the legal entity from exercising certain rights, receiving State support or assistance, participating in State or local government procurement procedures, or performing a specific type of activity. The term of coercive restriction of rights may be set from one and up to ten years.

Section 1, Article 70.[5] provides that **confiscation of property** is a compulsory expropriation without compensation into State ownership of the property owned by legal entity. The Law also states that property owned by a legal entity, but that has been transferred to another person, may

[18] The Criminal Law distinguishes four groups of criminal offences depending on the severity of sanction prescribed by Law for the offence. The four groups (as stated in Article 7) are: (1) criminal violation (offence for which the Law provides for deprivation of liberty for a term exceeding 15 days, but not exceeding 3 months or a type of lesser punishment); (2) less severe crime (deprivation of liberty exceeding 3 months but not exceeding 3 years if the offence is intentional and up to 8 years if the offence is committed through negligence); (3) severe crime (deprivation of liberty exceeding 3 years but not exceeding 8 years if the offence is intentional and exceeding 8 years if the offence is committed through negligence); (4) extremely severe crime (deprivation of liberty exceeding 8 years or life sentence).

also be confiscated. The courts have a duty to precisely indicate property to be confiscated.

Section 1, Article 70.[5] provides that **monetary recovery** is a sum of money, which is imposed upon legal entities to be paid to the State within 30 days. The amount of sum that may be imposed varies upon the severity of crime (see previous footnote) from 5 up to 100 000 minimum monthly wages,[19] specified in the Republic of Latvia. The Law provides that the monetary recovery must be paid from the funds of the legal entity and in case the entity does not comply with the order, the monetary recovery is performed by compulsory procedures.

The Criminal Law also provides for measures targeted at individuals holding official positions in companies, namely, **restriction of rights** which is the deprivation of specific rights of an individual or imposing such a prohibition, which precludes an individual from executing specific rights, taking up a specific office,[20] performing a specific professional or other type of activity,[21] visiting of specific places or events. This measure may be imposed only as additional penalty (i.e. it cannot be imposed as a "standalone" or the only penalty, it can only be imposed along with one of the basic penalties[22] as prescribed by Law) and is usually served as a penalty for criminal offences of economic nature (Chapter XIX of the Criminal Law) and may be imposed for crimes such as copyright infringement, smuggling, use of and exceeding authority in bad faith, illegal activity in the field of competition Law, unauthorized receipt of benefits, commercial bribery, prohibited entrepreneurial activity, violations of building regulations etc. The length of the penalty may be up to 10 years and the specific offices and specific fields of commercial activity that are covered by these prohibitions are further explained in the Commercial Law (Articles 4., 4.[1] and 4.[2]). The penalty may also be imposed if the Law does not specifically provide for it but the court deems it

[19] Minimum monthly wage of the Republic of Latvia is changing almost every year and it is confirmed by issuing of regulation of the Cabinet of Ministers. For the year 2017 the minimum monthly wage is set at 380 EUR.
[20] For example, office of member of the board of directors or council, office of liquidator, company controller, proctor of company etc. Specific restrictions are provided in detail in Article 4.[2] of the Commercial Law.
[21] For example, prohibition to perform specific or any kind of commercial activity, including deprivation of rights to hold any office in a company, be the founder of a company etc. Specific restrictions are provided in detail in Article 4.[1] of the Commercial Law.
[22] The Criminal Law distinguishes between basic and supplementary penalties. The basic penalties are deprivation of liberty, community service and fine. Supplementary penalties are confiscation of property, deportation from the Republic of Latvia, community service, fine, restriction of rights and probationary supervision.

necessary on case-by-case basis.

Article 23 of Latvian Administrative Violations Code provides for penalties that may be imposed for administrative violations; they are:

1. warning;
2. fine;
3. confiscation of the object of administrative violation or the instrument which was used to commit the violation;
4. restriction of special rights assigned to a person;
5. prohibition to obtain the right to drive a means of transport;
6. prohibition to obtain a license to drive a recreational craft;
7. restriction of rights to hold particular offices;
8. administrative arrest.

The main tool to bring legal entities under compliance with the Law is monetary fine which can range from two up to 14 000 EUR for each violation. In some cases the fine may be imposed as a percentage from turnover of the company for the previous fiscal year and can reach up to 5% (for example, if the violation is in the field of anti-money-laundering).[23] The Code also provides one type of restriction applicable to commercial activity – **restriction to hold particular offices** – which is similar to the restriction prescribed in the Criminal Law (see above). The restriction imposed for administrative violations may range from one up to three years.

Competition Law provides for hefty fines if the Law has been breached – reaching up to 10% from turnover of the company for the previous fiscal year. As stated before, violations in the field of Competition Law may also bear consequences of criminal liability for the perpetrator (natural person), which in turn may bring consequences for the company in the form of coercive measures. Moreover, the Commercial Law which provides general rules and regulations for all commercial

[23] Article 165.[4] of Latvian Administrative Violations Code.

activity in the Republic of Latvia, also provides that in some instances the court, the Office of Commercial Register (Enterprise Register) and the Tax Authority (State Revenue Service) may impose a forced termination of operations of legal entity (company) if the company fails to comply with particular regulations in the field of Tax Law or the Commercial Law.[24] In such cases, the company is liquidated according to provisions of the Commercial Law.

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

3.1 Introduction

Article 12 of the Criminal Law states:

'A natural person who has committed a criminal offence acting in the interests of a legal person governed by private law, for the benefit of the person or as a result of insufficient supervision or control thereof shall be held criminally liable, but the legal person may be applied the coercive measures provided for in this Law.'

According to Section 1, Article 70^2 of the Criminal Law the aforementioned coercive measures which may be applied to legal persons include liquidation, restriction of rights (for example, the right to participate in a public procurement),[25] confiscation of property or monetary recovery. However, it should be noted that the aforementioned legislation is applied on legal persons in private law and partnerships which are not considered to be legal persons.

[24] Article 314. and 314.[1] of the Commercial Law. For example, the board of directors of the company has not had the right of representation for more than six months; the company has not submitted the declarations for the time period of six months, provided for in tax laws, within one month after administrative punishment was imposed; the documents of incorporation of the company are in contradiction to law; the equity capital of the company does not comply with the requirements of law etc.
[25] See: Section 1, Article 70.[4] of the Criminal Law

Up until adoption of this legislation it was possible to impose criminal liability on natural persons only while the legal person was not held criminally liable and was able to continue its activities both - legal and criminal. Thus, justice was not ensured in its entirety.[26] As Article 1 of the Criminal Procedure Law provides the fair resolution of relations between the subject involved in respective criminal proceedings and the state to be one of the core purposes of criminal proceedings, the *Saeima* (the Parliament of the Republic of Latvia) deemed[27] it necessary to change the existing legislation. Therefore, the aforementioned Amendments to the Criminal Law and the Law on Execution of Coercive Measures[28] were adopted.

3.2 Material Prerequisites for Corporate Liability

In accordance with Article 70[1] of the Criminal Law the activities performed by a natural person shall lead to corporate liability, namely, imposition of coercive measures on a legal person, if:

- the respective crime was committed by a natural person who acted alone or as a member of a collegial institution of the respective legal person[29] on the basis of the right to represent a legal person or act on its behalf thereof, on the basis of the right to make a decision on behalf of a legal person, or in implementing control within a legal person;
- and the respective crime was committed in the interests of a legal person, for the benefit of a legal person or as a result of insufficient supervision or control.

3.2.1 'A Natural Person Who Acted Alone or as a Member of a Collegial Institution' and 'the Right to Represent the Legal Person or Act on its Behalf thereof'

Section 2, Article 1410 of the Civil Law[30] establishes that legal persons shall conclude transactions through their legal representatives who according in their competencies manifest the will of a legal

[26]See: Annotation of the Draft Amendments to the Criminal Law<http://www.saeima.lv/bi8/lasa?dd=LP0699_0> accessed February 23 2017
[27]Amendments to the Criminal Law 2005 [Grozījumi Krimināllikumā] <https://www.vestnesis.lv/ta/id/108851-grozijumi-kriminallikuma> accessed February 23 2017
[28]Law on Execution of Coercive Measures 2006 [Piespiedu ietekmēšanas līdzekļu izpildes likums]
[29]Legal person in private law
[30]Civil Law 1937 [Civillikums]

person and conclude transactions binding to a respective legal person.[31] The right to represent a legal person or act on its behalf may derive from the laws itself, namely, Articles 91, 126, 223 and 303 of the Commercial Law (regarding partnerships, limited partnership, limited liability companies and joint-stock companies respectively), Article 44 of the Associations and Foundations Law[32] (regarding associations) and Article 47 of the Cooperative Societies Law[33] (regarding cooperative societies) envisages that the Management Board of a respective legal person or members of a respective partnership shall be its legal representative. Furthermore, the aforementioned legal norms set out whether it shall be possible for members of a Management Board (or members of a partnership in case of partnership) to represent the respective legal person individually or jointly. However, the representation rights may also derive from a power of attorney or a procura[34] which may grant to a natural person the right to represent a respective legal person or partnership in regard to a specific assignment. Consequentially, there are many forms and legal grounds based on which a natural person may represent or act on behalf of a legal person or a partnership, so the scope of the terms 'natural person' provided in the Criminal Law hall to be sufficiently wide. In addition, it should be noted that a person should be deemed duly authorized to represent a legal person or partnership or act on its behalf regardless of the fact as whether the aforementioned information has been registered in the Commercial Register or not as long as a respective person actually represents a legal person or acts on its behalf.[35]

3.2.2 'The Right to Make a Decision on Behalf of the Respective Legal Person'

Traditionally a Management Board or duly authorised persons are also subjects entitled to make decisions on behalf of the respective legal person. However, in some situations a General Meeting (namely, the meeting attended by shareholders) of a limited liability company is entitled to make decisions which traditionally are made by a Management Board.[36] Similarly, a General Meeting of a members of an association may decide upon matters falling under the competence of a

[31]SKC-10/2012 [2012] Supreme Court of the Republic of Latvia
[32]Associations and Foundations Law 2003 [Biedrību un nodibinājumu likums]
[33]Cooperative Societies Law 1998 [Kooperatīvo sabiedrību likums]
[34] See: Article 34 of the Commercial Law
[35] SKA-741/2008 [2008] Supreme Court of the Republic of Latvia
[36]See: Section 2, Article 210 of the Commercial Law

Management Board.[37] Thus, criminal activities performed by shareholders of a limited liability company or members of an association in accordance with aforementioned authorization may lead to corporate liability.

3.2.3 Implementation of 'Control within a Legal Person'

The question of implementation of control within a legal person may arise if a shareholder (or shareholders) of a respective legal person is also a legal person, for example, there is a subsidiary and a parent undertaking. In this situation, shareholders of a parent undertaking which are natural persons may be deemed persons implementing control within the subsidiary. Furthermore, in accordance with Section 1, Article 2 and Sections 1 and 2, Article 3 of the Group of Companies Law[38] it is also possible that control is implemented on the basis of a management contract, namely, the subsidiary has concluded a management agreement with a parent undertaking and a management agreement subjects a subsidiary's management to a parent undertaking.

3.2.4 A Criminal Offence Committed 'in the Interests of the Legal Person' or 'for the Benefit of the Legal Person'

The Criminal Law does not specify what crime shall be committed in the interests of a legal person or for its benefit. However, acts performed in the interests of a legal person have been analysed in regard to administrative offences proceedings. As to administrative offences proceedings, the process of determining whether an administrative offence has been committed in the interests of a legal person includes assessment of the facts established in a respective case, especially indirect evidences. In order to impose administrative liability on a legal person, it usually is not enough to find that an offence has been committed with the means or tools of a respective legal person or that it has been committed by its employee.[39] These principles are related to closely criminal

[37] See: Section 2, Article 35 of the Associations and Foundations Law
[38] Group of Companies Law 2000 [Koncernu likums]
[39] Edvīns Danovskis 'Problems of Determination of Person Liable for Administrative Offence' The Effectiveness of Law in Post-modern Society. Papers of the 73rd Scientific Conference of the University of Latvia (University of Latvia Press 2015) 53

matters,[40] therefore they accordingly should be attributed to comparable criminal proceedings.

3.2.5 'A Result of Insufficient Supervision or Control'

Supervision of a legal person is usually carried out by a supervision institution,[41] for example, a supervisory board. Supervision or control shall be deemed insufficient if the supervisory institution does not comply with its obligations (for example, approval of documents prepared by a Management Board)[42] set forth by the law or articles of associations.

3.3 Procedural Prerequisites for Corporate Liability

The Criminal Procedure Law[43] provides the procedural prerequisites to impose coercive measures on a legal person. Article 440 of the Criminal Procedure Law establishes that in pre-trial proceedings for the application of coercive measures on a legal person the following should be found:

- circumstances under which a criminal offence has been committed;
- a status of a natural person, if known, in a legal person;
- actual activities performed by a legal person;
- nature of operations performed by a legal person and consequences caused by such operations;
- measures performed by a legal person in order to prevent the commission of a criminal offence;
- size, type of occupation and financial situation of a legal person.

Furthermore Section 1, Article 548 of the Criminal Procedure Law provides that upon examination

[40] See: Edvīns Danovskis 'Problems of Determination of Person Liable for Administrative Offence' The Effectiveness of Law in Post-modern Society. Papers of the 73rd Scientific Conference of the University of Latvia (University of Latvia Press 2015) 53
[41]See: Section 1, Article 42 of the Cooperative Societies Law, Section 2, Article 220 and Article 291 of the Commercial Law, Article 51 of the Associations and Foundations Law
[42]See: Section 1, Article 292 of the Commercial Law
[43]Criminal Procedure Law 2005 [Kriminālprocesa likums]

of materials of proceedings regarding an application of coercive measure on a legal person on court must decide:

- whether a criminal offence has been committed;
- whether circumstances referred to in Article 440 of the Criminal Procedure Law have been ascertained;
- whether a criminal offence has been committed in the interests or for the benefit of or due to insufficient monitoring or control of a legal person;
- which coercive measure shall be applied.

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

4.1 Introduction

Due to the fact that the Republic of Latvia, hereinafter – Latvia, is a member state of the European Union, and an active member of the international community, the extradition legislation consists of multiple levels of applicable norms. On the national level extradition proceedings are regulated in *Satversme* (the Constitution of Latvia), and the Criminal Procedure Law. However, international legislation on extradition shall be taken into account; this includes the Council Framework Decision of June 13 2002 on the European arrest warrant and the surrender procedures between Member States,[44] hereinafter – the Council Framework Decision, and international treaties. Thus, the potential bars for extradition may vary according to the applicable legislation.

4.2 Satversme

Article 98 of *Satversme* establishes that a citizen of Latvia may not be extradited to a foreign country, except in the cases provided for in international agreements ratified by the *Saeima* (the Parliament

[44] Council Framework Decision of June 13 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)

of Latvia) if by the extradition the basic human rights specified in Satversme are not violated. It is essential that the cases mentioned above include not only the 'cases provided for in international agreements ratified by the *Saeima'*, but also cases deriving from 'international agreements ratified by the *Saeima'*[45]. This particularly goes for the Council Framework Decision.

More of the potential bars for extradition are prescribed in the Criminal Procedure Law.

4.3 Relations with non-European Union Member States

4.3.1 National Legislation

Article 696 of the Criminal Procedure Law sets forth prerequisites that are to be met for a person to be extradited. A person may be extradited if:

- this person is located in the territory of Latvia;
- the Latvian authority has received a temporary arrest request or a request from a foreign state to extradite a person regarding an offence that, in accordance with the law of Latvia and the foreign state, is criminal.

Furthermore, there are more prerequisites to be fulfilled depending on whether the extradition is requested for criminal prosecution, trial or execution of a judgement. Accordingly, a person may be extradited for criminal prosecution, or trial, regarding an offence the committing of which provides for a punishment of deprivation of liberty the maximum limit of which is not less than one year, or a more serious punishment, if an international treaty does not provide otherwise. However, a person may be extradited for execution of a judgment to the state that rendered the judgment and convicted the person with a punishment that is related to deprivation of liberty for a term of not less than four months, if an international treaty does not provide otherwise.

Section 1, Article 697 of the Criminal Procedure Law sets forth the cases when refusal of

[45] Inese Nikuļceva, 'Latvijas Republikas Satversmes 98. pants' prof. R.Baloža zinātniskā vadībā *Latvijas Republikas Satversmes komentari. VIII nodaļa. Cilvēka pamattiesības* (Latvijas Vēstnesis 2011) 314 [Latvian]

extradition is optional, while Section 2, Article 697 states when refusal of extradition is mandatory. Thus, extradition may be refused in the following cases:

- a criminal offence has been completely or partially committed in the territory of Latvia;
- the person is being held as a suspect, is accused, or is being tried in Latvia regarding the same criminal offence;
- a decision has been taken in Latvia not to commence or to terminate criminal proceedings regarding the same criminal offence;
- extradition has been requested in connection with political or military criminal offences;
- a foreign state requests the extradition of a person for the execution of a punishment imposed in a judgment by default, and a sufficient guarantee has not been received that the extradited person will have the right to request the re-trial of the case;
- extradition has been requested by a foreign state which has not signed an agreement with Latvia regarding extradition.

Extradition must be refused in the following cases:

- the person is a Latvian citizen;
- the request for the extradition of the person is related to the aim of commencing criminal prosecution of such person or punishing such persons due to his or her race, religion affiliation, nationality, or political views, or if there are sufficient grounds to believe that the rights of the person may be violated due to the referred reasons;
- a court judgment has entered into effect in Latvia in relation to the person regarding the same criminal offence;
- the person may not, in accordance with the laws of Latvia regarding the same criminal offence be held criminally liable, tried or punished due to a limitation period, amnesty or due to another legal basis;
- the person has been granted clemency in accordance with the procedures laid down in laws regarding the same criminal offence;
- the foreign state does not provide a sufficient bail that such state will not impose and execute the death punishment on particular person;

- the person may be threatened with torture in the foreign state;
- the execution of the request for extradition of the person may harm sovereignty, security or public order of Latvia or other substantial interests.

It should be taken into account that Section 3, Article 697 of the Criminal Procedure Law establishes that different reasons for refusal of extradition may be set forth in an international treaty.

4.3.2. International Treaties

As regard to the relations with non-European Union Member States, the extradition procedure is also regulated by conventions and bilateral treaties. Latvia is a member state of the European Convention on Extradition of December 13 1957, [46] thus prohibition of an extradition set forth in the Extradition Convention shall apply. It should be noted, that pursuant to Section 1, Article 6 of the Extradition Convention Latvia defines, that within the meaning of the Extradition Convention the term "nationals" relates to the citizens of Latvia and non-citizens, who are subjects of the Law on the Status of Former USSR Citizens and who are not Citizens of Latvia or any other state.[47] It should also be noted that Latvia has declared that it shall have the right to refuse extradition on the ground that the prosecution or punishment of the person claimed would be statute-barred according to the law of the requested party, if the domestic legislation of the requested party explicitly prohibits extradition when the prosecution or punishment of the person claimed would be statute-barred according to the law of the requested party.[48] Due to focus on the national scope and limits of the Benchmark, more specific analysis regarding application of the

[46] European Convention on Extradition (Extradition Convention of December 13 1957 and the Additional Protocols of October 15 1975, March 17 1978, November 10 2010 and September 20 2012)
[47] Reservations and Declarations for Treaty No.024 - European Convention on Extradition, Declaration contained in a Note Verbale from the Minister of Foreign Affairs of Latvia (April 17 1997) <https://www.coe.int/en/web/conventions/full-list/- /conventions/treaty/024/declarations?p_auth=cklR1Sl8> accessed February 20 2017
[48] Reservations and Declarations for Treaty No.212 - Fourth Additional Protocol to the European Convention on Extradition, Reservation contained in the instrument of ratification deposited on 24 February 24 2014 <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/212/declarations?p_auth=cklR1Sl8> accessed February 20 2017

Extradition Convention will not be provided.

However, Latvia has concluded several bilateral treaties regarding extradition:

Treaty/Date of conclusion	**Commentaries**
Extradition Treaty between the Government of the Republic of Latvia and the Government of the United States of America[49] (December 7 2005)	The treaty sets out potential bars to extradition due to political and military crimes, a previous conviction or acquittal in regard to the same crime and death penalty. It also explicitly states that the citizenship of the requested person shall not serve as a basis for refusal to extradite.
Agreement between the Republic of Latvia and the Republic of Kyrgyzstan on Legal Assistance and Legal Relations Regarding Civil, Marital and Criminal Matters[50] (April 10 1994)	The agreement provides potential bars to extradition due to citizenship or refugeehood, the victim's private Accusation, inability to execute the criminal prosecution or penalty due to limitation period or other legal reason, a previous judgement or acquittal in regard to the same crime.
Treaty on Extradition between the Republic of Latvia and Australia[51] (July14 2000)	The treaty sets out potential mandatory limitations to extradition regarding political and military crimes, prosecution due to race, religion, ethnicity or political opinion, a previous judgement, inability to execute the criminal prosecution or penalty due to

[49] Extradition Treaty between the Government of the Republic of Latvia and the Government of the United States of America [Latvijas Republikas valdības un Amerikas Savienoto Valstu valdības līgums par izdošanu] (December 7 2005) articles 3, 4, 5 and 6

[50] Agreement between the Republic of Latvia and the Republic of Kyrgyzstan on Legal Assistance and Legal Relations Regarding Civil, Marital and Criminal Matters [Latvijas Republikas un Kirgizstānas Republikas līgums par tiesisko palīdzību un tiesiskajām attiecībām civilajās, ģimenes un krimināllietās] (April 10 1994) article 62

[51] Treaty on Extradition between the Republic of Latvia and Australia [Latvijas Republikas un Austrālijas līgums par izdošanu] (July14 2000) article 3

	limitation period or possible proceedings or execution of penalty at a special court or tribunal. It also sets out potential optional bars to extradition regarding citizenship, a decision not to commence criminal proceedings in the requested state, death penalty, the place of the crime, parallel criminal prosecution in the requested state, potential imposition of a cruel, inhuman or human dignity tampering punishment or potentially injustice, cruelty, inhuman or overly severe punishment.
Agreement between the Republic of Moldova and the Republic of Latvia on Legal Assistance and Legal Relations Regarding Civil, Marital and Criminal Matters (April 14 1993), [52] Agreement between the Republic of Latvia and the Russian Federation on Legal Assistance and Legal Relations Regarding Civil, Marital and Criminal Matters[53] (February 3 1993)	These agreements stipulate potential bars of extradition due to citizenship or refugeehood, the victim's private accusation, inability to execute the criminal prosecution or penalty due to limitation period or other legal reason, a previous judgement or acquittal in regard to the same crime.
Agreement between the Republic of Latvia and the Republic of Uzbekistan on Legal Assistance and Legal Relations	These agreements set out potential restrictions on extradition due to citizenship or refugeehood, the place of the crime, inability to execute the criminal

[52] Agreement between the Republic of Moldova and the Republic of Latvia on Legal Assistance and Legal Relations Regarding Civil, Marital and Criminal Matters [Līgums starp Moldovas Republiku un Latvijas Republiku par tiesisko palīdzību un tiesiskajām attiecībām civilajās, ģimenes un krimināllietās] (April 14 1993) article 61

[53] Agreement between the Republic of Latvia and the Republic of Belarus on Legal Assistance and Legal Relations Regarding Civil, Marital and Criminal Matters [Līgums starp Latvijas Republiku un Krievijas Federāciju par tiesisko palīdzību un tiesiskajām attiecībām civilajās, ģimenes un krimināllietās] (February 3 1993), article 62

Regarding Civil, Marital, Labor and Criminal Matters [54] (May 23 1996); Agreement between the Republic of Latvia and the Republic of Belarus on Legal Assistance and Legal Relations Regarding Civil, Marital and Criminal Matters[55] (February 21 1994)	prosecution or penalty due to limitation period or other legal reason, a commenced criminal prosecution or a previous judgement or acquittal concerning the same crime, the victim's private accusation, inability to execute the criminal prosecution or penalty due to limitation period or other legal reason and disturbance of the public order.
Agreement between the Republic of Latvia and Ukraine on Legal Assistance and Legal Relations Regarding Civil, Marital, Labor and Criminal Matters [56] (May 23 1996)	The agreement sets out potential bars to extradition due to citizenship or refugeehood, the place of the crime, inability to execute the criminal prosecution or penalty due to limitation period or other legal reason, a previous judgement or acquittal in regard to the same crime, the victim's private accusation, political and military crimes and disturbance of the public order.

4.4. Relations with Member States of the European Union

Latvia is a member state of the European Union and therefore is subjected to the European Arrest Warrant, hereinafter – EAW, procedure deriving from the Council Framework Decision. Thus, in relations with European Union Member States the grounds for non-execution of EAW deriving from the Council Framework Decision shall apply.

[54] Agreement between the Republic of Latvia and the Republic of Uzbekistan on Legal Assistance and Legal Relations Regarding Civil, Marital, Labor and Criminal Matters [Līgums starp Latvijas Republiku un Uzbekistānas Republiku par tiesisko palīdzību un tiesiskajām attiecībām civilajās, ģimenes, darba un krimināllietās] (May 23 1996) article 55
[55] Agreement between the Republic of Latvia and the Republic of Belarus on Legal Assistance and Legal Relations Regarding Civil, Marital and Criminal Matters [Līgums starp Latvijas Republiku un Baltkrievijas Republiku par tiesisko palīdzību un tiesiskajām attiecībām civilajās, ģimenes un krimināllietās] (February 21 1994) article 60
[56] Agreement between the Republic of Latvia and Ukraine on Legal Assistance and Legal Relations Regarding Civil, Marital, Labor and Criminal Matters [Līgums starp Latvijas Republiku un Ukrainu par tiesisko palīdzību un tiesiskajām attiecībām civilajās, ģimenes, darba un krimināllietās] (May 23 1996) article 55

Accordingly, Section 1, Article 714 of the Criminal Procedure Law establishes that a person domiciled on the territory of Latvia may be extradited to another Member State of the European Union for the commencement and performance of criminal prosecution, trial and the execution of a judgment, if the foreign state has issued an EAW in relation to such person, and the grounds for extradition exist under Article 696 of the Criminal Procedure Law (see Section 4.3.1.).

In accordance with Section 4, Article 714 of the Criminal Procedure Law an extradition of a person may be refused, if:

- the reasons referred to in Clauses 1-3 of Section 1, Article 697 of the Criminal Procedure Law exist;
- the person may not in accordance with the laws of Latvia regarding the same criminal offence, be held criminally liable, tried, or have a punishment executed due to a limitation period;
- the offence has been committed outside the territory of the state that has issued an EAW, and such offence in accordance with Latvian law is not criminal.

Section 5, Article 714 of the Criminal Procedure Law establishes that an extradition of a person shall not be admissible and, therefore, shall be refused, if:

- in accordance with the laws of Latvia, the person may not be held criminally liable, tried, or punished, because the amnesty has been granted;
- the person has been convicted regarding the same criminal offence and has served or is serving a punishment in one of the Member States of the European Union, or such punishment may no longer be executed;
- the person has not reached the age of criminal liability under the laws of Latvia;
- the extradition of a Latvian citizen is requested for the execution of a punishment imposed by a Member State of the European Union.

5.2 External reporting requirements (i.e. to markets and regulators), that may arise on the discovery of a possible offence.

The whistleblowing law is currently only in progress in Latvia. It was expected to take force already at the end of 2016; however, currently it seems more likely to be adopted at the earliest in the middle of 2017, since only on February 6, 2017 it was reviewed by the Committee of the Cabinet of Ministers.[1]

As far as it is known by now, the law would provide the regulation both for internal and external whistleblowing in the competent institution of the state, competent NGOs or in the contact point for the whistle-blowers – the State Chancellery.[2] According to the Section 3(1) of the Draft Law on the Protection of Whistle-blowers employees would be expected to do the whistleblowing regarding unlawful wasting of financial resources or property of a public entity, omission, negligence or use of authority in bad faith by the responsible employees, threats to the health of society, fraud, corruption (also bribery of foreign officials), threats to environment, threats to food safety, threats to construction safety, infringements regarding public procurement, infringements in connection with occupational safety, avoidance of taxes, infringements in financial and capital market and other irregularities.

The first step for whistleblowing accordingly should be the internal mechanisms made by every public institution and legal person, which is governed by private law and which has more than 50 employees.[3] However, if the certain prerequisites are fulfilled – the persons involved in an infringement are responsible employees, an infringement has to be eliminated immediately in order to avoid danger to life, health or environmental safety, the whistle-blower has a reason to believe that due to internal whistleblowing system he can suffer unfavourable consequences, the report has already been given to the internal mechanism, but there has been a refuse to eliminate the infringement or no answer at all or an internal whistleblowing mechanism does not exist - the employee is expected to inform relevant public institutions.[4]

The external reporting requirements are regulated by the Criminal Law of Latvia[5] and other national regulations.

Firstly, Section 315 of the Criminal Law provides for the criminal liability of a person who fails to inform the relevant institution, where it is known with certainty that preparation of or commission of a severe or extreme severe crime is taking place. According to the Criminal Law, commercial bribery on a large scale, acceptance of a bribe, giving of a bribe, intermediation in bribery, fraud, if it is committed by a group of people pursuant to a prior agreement; computer fraud, if it is committed by a group of people pursuant to a prior agreement; laundering of criminally acquired financial resources or other means of property if it is committed by a group of people pursuant to a prior agreement are classified as severe crimes. Furthermore other crimes - the acceptance of a bribe, if it is committed on a large scale or is committed by a group of people pursuant to a prior agreement; demand of a bribe; the intermediation in bribery by a public official; giving of a bribe if committed by an organised group; fraud, if is committed on a large scale or in an organised group or committed, by acquiring narcotic, psychotropic, powerfully acting, poisonous or radioactive substances or explosive substances, firearms or ammunition;, computer fraud, on a large scale or if committed in an organised group and the laundering of criminally acquired financial resources or other property if commission thereof is on a large scale, or the act has been performed in an organised group - are recognized as extreme severe crimes. In those cases relevant public institutions such as the Corruption Prevention and Combating Bureau (regarding corruption and the financing of the political organisations (parties) and associations)[6], the Office for Prevention of Laundering of Proceeds Derived from Criminal Activity[7] or the police shall be informed.

Secondly, the Regulation No. 139 of August 17 2016 issued by the Financial and Capital Market Commission provides the procedure for the reporting to the Commission on the actual or potential infringements of the Regulation No. 596/2014 on market abuse.[8]

Additionally, specific subjects such as credit institutions, financial institutions, tax advisors, external accountants, sworn auditors and commercial companies of sworn auditors, sworn notaries, sworn lawyers and other persons in the specific cases set by law are obliged to inform the Office for Prevention of Laundering of Proceeds Derived from Criminal Activity, in particular when there are doubts about the legality of the financial resources of their clients.[9] Also, it is a duty to inform the State Revenue Service about the criminal offences in the sphere of the state

taxes, fees and other mandatory payments.[10] Specific subjects such as lawyers have to inform not only the previously mentioned institutions, but also their inner institutions, for example, the Latvian Council of Certified Lawyers.

In case of failure to notify the Office for Prevention of the Laundering of Proceeds from Crime Service regarding unusual or suspicious financial transactions or the State Revenue Service regarding a suspicious transaction if it had been done by any of the subjects of the Law On the Prevention of Laundering of Proceeds Derived from Criminal Activity apart from the credit institution, the person gets the administrative penalty.[11] If failure to inform has happened by a subject whose turnover or commercial revenues in the previous accounting year had been more than one million euros, the fine can even be up to 5 per cent from those revenues.[12]

6. Who are the enforcement authorities for these offences?

One of the main legal acts in the Republic of Latvia that regulate supervision and the activity of enforcement authorities regarding anti-money laundering is the Law on the Prevention of Money Laundering and Terrorism financing [Noziedzīgi iegūtu līdzekļu legalizācijas un terorisma finansēšanas novēršanas likums]. Supervision over different subjects of the Law is performed by a number of institutions, depending on their sphere of activity:

- The Financial and Capital Market Commission, FCMC [Finanšu un kapitāla tirgus komisija, FKTK] – over financial, insurance and payment institutions;
- The Latvian Council of Sworn Advocates [Latvijas Zvērinātu advokātu padome] – over sworn lawyers;
- The Latvian Sworn Notaries Council [Latvijas Zvērinātu notāru padome] – over sworn notaries;
- The Latvian Association of Certified Auditors [Latvijas Zvērinātu revidentu asociācija] – over auditors and commercial companies of auditors;
- The Ministry of Transport [Satiksmes ministrija] – over joint-stock company 'Latvian Post' [AS 'Latvijas Pasts']

- The Bank of Latvia [Latvijas Banka] – over companies licensed by the Bank of Latvia for foreign currency exchange (buying and selling);
- The Lottery and Gambling supervisory Inspection [Izložu un azartspēļu uzraudzības inspekcija] – over organisers of lotteries and gambling;
- The State Revenue Service, SRS [Valsts ieņēmumu dienests, VID] – over tax advisors; external accountants; independent lawyers (if their activity is connected with transactions); providers of services related to creation and provision of operation of a legal arrangement; real estate agents; other persons (natural or legal) trading (or being as agents) in immovable property or in precious metals and stones.

It can be concluded that the FCMC and SRS have the widest area of supervision. In fact, any directly non-mentioned financial institution should fall under the supervision of SRS. Practically, it would be considered to be logical, due to the fact that a lot of enforcement authorities (in financial sphere) are under administration of SRS. These authorities, for example, are: National Customs Board [Muitas pārvalde], Customs police Department [Muitas policijas pārvalde] Financial Police Department [Finanšu policijas pārvalde]. Nowadays, the mass media does not provide any information about the initiated public discussions on closer merger between SRS and police departments. On contrary, it raises distrust to national policy in some business fields, because of the focus on sanctions by tax authority, but not on prevention of offences and cooperation with authorities.

Such a complicated and cleft system cannot exist without its own supervision. The Legal status of Control Service [Kontroles dienests] is determined by Section 50 of the Law. The Control Service executes the supervision over the aforementioned institutions, which are entitled to supervise over compliance with anti-money laundering legislation. Legal status of Control Service is complying by 5 main criteria (all these criteria are prescribed by Section 50 of the Law):

1. The first subsection defines that the Control Service is established by State, to exercise control over unusual and suspicious financial transactions to prevent or detect money laundering and terrorism financing;
2. The second subsection prescribes supervision over the Control Service. This supervision is

performed by Prosecutor's Office;

3. The third subsection specifies that financing of Control Service is provided by State budget, and establishing procedure of inner structure of the Control Service done by Prosecutor General;
4. The fourth subsection prescribes office-terms for Head of Control Service (4 years), possibility for dismissal of Head of the Control Service which can be performed by Prosecutor General; subordination of employees to the Head of Control Service (who is also responsible for recruitment and dismissal);
5. The last subsection specifies that Head and employees of the Control Service must comply with requirements on processing of classified information.

Some of the prescribed requirements, probably, are related more to organisational measures (like terms, compliance with requirements on classified information) rather than to legal status of Service at whole, but nevertheless they are quite important and specifying.

The existing system of supervision can be emphasized as follows: people who are working in different areas of activity exist, and specific organisations (FCMC, SRS, and Associations) are supervising over them. These specific organisations are supervised by the Control Service, which on the other hand, is supervised by the Prosecutor's Office. It is quite important to mention that all these subjects are not performing the same activity, but they are enforcement authorities in some manner, due to their powers granted by legislation.

Most of previously the provided information concerns the anti-money laundering legislation. But on other offences, like bribery and corruption, a separate institution which is directly related to investigation of the offences exists – The Corruption prevention and combating bureau, CPCB [Korupcijas novēršanas un apkarošanas birojs, KNAB]. The Bureau's activity is regulated by 'Law on Corruption prevention and combating bureau' [Korupcijas novēršanas un apkarošanas biroja likums].

Bureau is an official institution under the supervision of the government – the Cabinet [Ministru Kabinets]. The supervision of the Cabinet is quite wide – Prime Minister [Ministru Prezidents] possesses the right to inspect, and to repeal if necessary, administrative rulings of Head of Bureau. And even more, Prime Minister has right to direct the course of administrative decisions. It is important to note that the aforementioned authority is not related to direct functions of the Bureau. In other words, the Prime Minister cannot give any orders to the Bureau on prevention and combating corruption, especially in areas related to politics (like fundraising of parties and pre-election campaigns).

In addition, the Bureau is the subject to the performance of the investigation activity. So, it means that any regulation related to investigation activity has its direct force to the Bureau.

To conclude, it is necessary to emphasize that the Bureau's activity is mostly related to public service area, while SRS and FCMC authorities (which has been mentioned before) operate and supervise the private areas of economics.

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

Latvian legislation provides us with several results during its enforcement, it is drastically vital to think over how it will work 'in practise', in connection with standing legislation in other spheres. Actually, the Control Service has the right to request and receive information from the subjects of Law on the Prevention of Money Laundering and Terrorism financing . And at the same time, any subject of the Law must comply with obligation to provide information to Service.

Regarding authorities (like Financial and Capital Market Commission (FCMC), Latvian Council of Sworn Advocates and so on) who perform supervision over different categories of subjects some rights should be mentioned. To perform supervision they exercise they have right to:

- visit the premises, owned or used by the subjects;
- request information from the subjects of the Law that is related to compliance with the

requirements of the Law; to request that they present the original documents, to examine and receive copies or certified copies of such documents; to receive relevant explanations, as well as to perform activities for the prevention or reduction of the money laundering and terrorism financing possibility;

- draw up inspection reports attesting to violations of the requirements of the Law;
- specify for the subjects of the Law a deadline for elimination of the violations of this Law determined, and to control the implementation of the violation elimination;
- publish statistical information regarding the violations of the requirements of this Law and the sanctions applied;
- request any information from the State authorities and authorities of derived public persons, which is at the disposal thereof, for performance of the obligations specified in this Law;
- issue proposals to the subjects of the Law for the performance of the obligations specified in this Law.

In addition, FCMC has the right to issue normative regulations on the supervision and control of the prevention of money laundering, as well as terrorism financing. The Bank of Latvia has the right to issue regulations regarding money exchange procedure in credit-institutions and financial institutions.

Regarding the prevention of corruption the 'Law on corruption prevention and combating Bureau' provides a specific, wide list of the Corruption prevention and combating bureau, CPCB [Korupcijas novēršanas un apkarošanas birojs, KNAB] activity (which contains areas of activity on corruption prevention), such as:

- developing a corruption prevention and combating strategy, and coordinating cooperation among the institutions referred to the programme;
- supervising over implementation of the Law On Prevention of Conflict of Interest in Actions of Public Officials;
- preparing and coordinating projects of financial assistance by foreign countries and international authorities, and so on.

- On contrary, combating of corruption the Law provides only:
- to hold public officials administratively liable and apply sanctions for administrative violations in the field of corruption prevention in the cases provided by the law; and
- to carry out investigative and operational actions to discover criminal offences provided in the Criminal Law in the service of State authorities, if they are related to corruption.

In other words, the Bureau is acting as a competent authority (both enforcement and investigative) in combating corruption. Nevertheless, due to the fact that the Bureau holds a status of a subject that performs investigation activity, the list of activities is much wider. Examining the Operational Activities Law [Operatīvas darbības likums], a list of investigatory measures can be found, that include:

- inquiring;
- surveillance (tracing);
- inspection;
- acquisition of samples and investigatory research;
- examination of a person;
- entry;
- experiment;
- controlled delivery;
- detective work;
- account transactions monitoring in credit-institutions or financial institutions;
- monitoring of correspondence;
- acquisition of information expressed or stored by a person through technical means;
- wiretapping of conversations;
- Video-surveillance of a place not accessible to the public.

Undoubtedly, each of the aforementioned measures can be performed only in accordance with standing provisions and regulations. For instance, most cases of wiretapping and video-surveillance require permission given by a specially authorised judge.

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self-incrimination)?

The Republic of Latvia has various law enforcement authorities, which are endowed with different functions and competences, therefore, initially the system of the law enforcement authorities in the Republic of Latvia must be inspected. Overall, nine groups of the law enforcement authorities should be distinguished:

1. judicial authorities;
2. judicial administration;
3. prosecutors;
4. investigation authorities;
5. attorneyship;
6. notary;
7. bailiffs;
8. the Ombudsman;
9. other institutions.

Judicial authorities. Four types of judicial authorities have been formed, namely, the first instance or courts with general jurisdiction; the second level or appellate courts; the third level or cassation courts and the Constitutional Court. According to Article 17 of the Law on Judicial Power one of the fundamental principles of court hearing is openness, which stipulates that the duty of the court is to determine the objective truth substantiated with lawfully obtained and verified evidence. Therefore, the courts are able to examine only information, which is included into case materials. Regarding extraction, in civil cases courts ex oficio do not inquire parties to withhold information; the courts settle disputes on the basis of adversarial principle and according to Article 8(1) and

Article 10 of the Civil Procedure Law also on lawfully gained evidence. Nevertheless, Article 91 of the Civil Procedure Law obliges parties to express to a court only an accurate information. In case of a necessity to protect the State secret or commercial secret, private life of individuals or secret of correspondence, parties on the basis of Article 11(3) are entitled to enquire to the court to organise a closed hearing. Before the hearing and examination of the case materials, which contains the State secret or commercial secret, the court requests to the participants of the hearing, who have the right to acquaint themselves with the materials of the State secret or commercial secret, to sign a written notification, reminding of an obligation to keep the State secret or commercial secret and regarding liability provided for disclosing it. Considering the aforementioned, in civil cases parties stipulate, which information may be withheld, thus the law does not specify any other exceptions besides impossibility to provide the requested information according to Article 112(3) and Article 116(4) of the Civil Procedure Law.

In administrative cases the principle of an objective investigation prevails. According to Article 107(4) of the Administrative Procedure Law the court ex officio obtains necessary information to examine the case or provides recommendations and instructions to the parties. If the necessity to examine case materials, which contains the State secret, the court may prescribe a closed hearing. Besides, in order to protect the State secret, professional and commercial secret, on the basis of Article 145(4), the parties are entitled to request or the court may restrict others from acquaintance of that information. Furthermore, according to Article 163 2) the person, who because of the profession or position is not allowed to disclose trusted information, must not testify about this information, but in accordance with Article 164 4) the person may refuse to testify, if the testimony can be brought against it. The Law does not define any specific preconditions about those rights, which, subsequently, mean that the person without a concrete substantiation may refrain from testifying. However, as stated in Article 227(2) before a testimony, the court must notify the witness, explaining that for unreasonable withhold from testifying or for provision of false information, the witness may be held criminally liable. Thus, the grounds for withdrawal of testifying must be as such as to convince the judge.

In comparison, in criminal cases the abdication criteria is explicitly stated. Article 110(3) 2) of the Criminal Procedure Law confers rights not to testify against self or relatives; Article 111(1) clarifies

that those rights possess only persons mentioned in the Constitution of the Republic of Latvia , this law and binding international agreements. Furthermore, Section 8 'Immunity from Criminal Prosecution' develops more specific criteria, stating that the grounds for immunity from criminal proceedings is the special legal status of a person, information or a place specified, which guarantees the rights for a person to completely or partially not fulfil a criminal procedural duty, or that restricts the rights to perform specific investigative actions. Overall, the immunity from criminal proceedings of a person arises from the following:

1. the criminal legal immunity of such person that is specified in the Constitution or in international treaties;
2. the office or profession of such person;
3. the status of such person in the particular criminal proceedings;
4. the kinship of such person.

A person has the right to immunity from criminal proceedings, if the information requested from such person is:

1. the State secret protected by the law;
2. professional secret protected by the law;
3. commercial secret protected by the law;
4. confidentiality of the private life protected by the law.

The immunity of a person includes: Diplomatic Immunity (Article 118), Consular Immunity (Article 119) and Immunity from Criminal Proceedings of State Officials Guaranteed by Law (Article 120). Regarding the per se immunity, which derives from the status of information injunction with the status of the person:

1. a clergyman, regarding information that has been discovered in a confession (Article 121 1));
2. a defence counsel and an advocate, who has provided legal assistance in any form, regarding information the confidentiality of which has been entrusted to him or her by a defendant (Article 121 2));
3. an interpreter, who has been invited by a person directing the proceedings or a person, who

has the right to defence, or an advocate for ensuring the right of defence, if they have notified the person, directing the proceedings, thereof in writing, indicating the following necessary information regarding the interpreter: the given name, surname, personal identity number, the place of practice or the declared place of residence (Article 121 3)).

Therefore, in criminal cases no specific restrictions for the court as process facilitator are precluded; stated limitations more pertain to investigation authorities rather than to the court. For instance, according to Article 192(3), examining a criminal case, the judge or the court panel may request that a merchant of electronic communications discloses and issues the data to be stored or that the owner, possessor or keeper of an electronic information system discloses and issues the data stored.

To summarise, depending on the type of the process, the courts are entitled to inquire to withheld or examine almost any kind of information either ex officio or provided by the parties, otherwise the courts would not have been able to realise one of the basic principles in the course of justice, stipulated in Article 17 of the Law on Judicial Power - to ascertain the objective truth.

Judicial administration, namely, the Ministry of Justice of the Republic of Latvia , the General registry Offices , Courts Administration , State Probation Service are not endowed with functions to investigate and detect offences, which could trigger corporate liability.

Office of the Prosecutor according to Article 2 of the Office of Prosecutor Law not only supervise, but also organise, manage, and conduct pretrial investigations. Exercising assigned functions, prosecutors must comply with the presumption of innocence. Besides the aforementioned, in line with Article 16(3) prosecutors also pursue inspection about violations of the rights of individual mentioned in received application. In these cases according to Article 17 prosecutors are entitled to request and receive regulatory enactments, documents and other information from the State administrative institutions, banks, the State Audit Office, local governments, undertakings, authorities and organisations, as well as to, without hindrance, enter the premises of such institutions.

Pertaining to investigation functions, the prosecutors must respect the rights of individuals to withdraw from testifying as well as provisions of the immunity from criminal proceedings mentioned before. In addition, according to Article 121(5) only with the permission of an investigating judge the inspection and withdrawal of secret or top secret documents containing the State secrets, as well as confidential information or documents, which contain such information and are at the disposal of credit institutions or financial institutions during precourt investigation, can be disclosed. Furthermore, according to Article 110(3) 4) a witness has a rights to submit a complaint to an investigating judge regarding the unjustified disclosure of a private secret, or to request that the court withdraw a matter regarding a private secret, and to request that the request be entered in the minutes of the session if such request is rejected. In addition, depending on the type of the immunity from criminal proceedings, the Law grants the prerogatives:

1. completely discharges a person from the duty to participate in criminal proceedings;
2. determines special procedures for holding a person criminally liable;
3. prohibits or restrict the application of compulsory measures to a person, or determines special procedures in relation to such person;
4. prohibits or restricts the control of the means of communication and correspondence of such person;
5. discharges a person from the provision of testimony completely or in a part thereof;
6. determines special procedures for the withdrawal of documents.

The special legal status of premises shall:

1. completely exclude the entry into, and the performance of investigative actions in, such premises;
2. determine the special procedures, in accordance with which a permit is being received for entry into, and the performance of investigative actions in, such premises;
3. restrict the objects to be viewed and seized in such premises.

On the contrary, information, which might be inquired to divulge, includes not only information on the facts, but also information, which per se is not categorized as evidence, but is used to find

the connection with other facts. That kind of information pertains to biometric and genetic data, namely, for instance, fingerprints and biological samples, which according to the Law on Development and Use of the National DNA Database are being used to create DNA profile in order to include it in the DNA database to compare it with the other samples. According to Article 67(1) 4) of the Criminal Procedure Law suspects are obliged to permit that he or she be subjected to the study of an expert, and to submit samples for comparative study or to permit such samples to be obtained. The identical duty is stipulated also for the accused (Article 74). According to Article 209 a detained person, a suspect and an accused have a duty to allow the taking of samples from him or her for comparative study, but from persons, against whom criminal proceedings have been commenced, and from a witness and victim the samples necessary for a comparative study may be taken by force only with a decision of an investigating judge. Although, the presumption of innocence is one of the core principles in criminal proceedings, however the principle does not pertain to genetic or biometric data samples. That has been approved in Recital 29 of the Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings and in case law.

Therefore, the stated data is treated as identification elements and not as self incriminating evidence per se, despite the fact that it can be a decisive element to prove the guilt. Hence, individuals are not entitled to withhold this information – their samples, their property -, even if the aforementioned restrictions are enshrined in the Criminal Procedure Law regarding the entry to closed property . Furthermore, the argument of the necessity to store the samples is also not relevant, due to the fact that the purpose is not to detect the specific crime, but to combat and detect criminal offences as a whole.

In addition, according to Article 190 of the Criminal Procedure Law the process facilitator is entitled to request from an individual or a legal person, in writing, objects, documents and information regarding the facts that are significant to criminal proceedings, including in the form of electronic information and document that is processed, stored or transmitted, using electronic information systems. In case of a refusal, the process facilitator shall conduct a seizure or search. The heads of legal persons have a duty to perform a documentary audit, inventory, or departmental

or service examination within the framework of the competence thereof and upon request of a person directing the proceedings, and to submit documents, within a specific term, together with the relevant additions regarding the fulfilled request. Besides, according to Article 191 and 192 the process facilitator may assign, with a decision thereof, the owner, possessor or keeper of electronic information system to immediately ensure the storage, in unchanged state, of the totality of the specific data necessary for the needs of criminal proceedings that is located in the possession thereof, and the inaccessibility of such data to other users of the system. During the pre-trial criminal proceedings an investigator with the consent of a public prosecutor or the data subject and a public prosecutor with the consent of a higher-ranking prosecutor or the data subject may request that the merchant of electronic information system discloses and issues the data to be stored in the information system in accordance with the procedures laid down in the Electronic Communications Law.

According to Article 386 of the Criminal Procedure Law the investigation authorities in the Republic of Latvia are:

1. State Police;
2. Security Police;
3. Financial Police;
4. Military Police;
5. the Latvian Prison Administration;
6. the Corruption Prevention and Combating Bureau;
7. customs authorities;
8. the State Border Guard;
9. the captains of seagoing vessels at sea;
10. the commander of a unit of the Latvian National Armed Forces located in the territory of a foreign state;
11. the Internal Security Office.

Investigating criminal offences and inquiring information, the investigation authorities are obliged to consider the aforementioned principles. Depending on the competence, the investigation authorities have lex specialis competence to enquire information, for instance, according to Article 10 of the Law on the Corruption Prevention and Combating Bureau it have rights to:

1. request and receive free of charge information, documents and other material from the State administration and local government institutions, companies (undertakings), organisations, officials and other persons, regardless of the secrecy regime thereof;
2. to request and receive free of charge information from credit institutions in cases and in accordance with the procedures specified in the Law On Credit Institutions ;
3. to have free access to all information stored in registered databases, the registration of which is specified in regulatory enactments, regardless of the ownership thereof;
4. to obtain, receive, register, process, compile, analyse and store information necessary for the performance of the functions of the Bureau, the procedures for use of which shall be determined by the Head of the Bureau. Similar rights to request the disclosure of information are stipulated for the other law enforcement authorities.

Nevertheless, the fact that the additional rights are stated, does not necessarily mean that these rights automatically bind an individual with the subsequent duties. Only explicitly defined normative duties bind persons to submit to them. Therefore, if the request to disclose information is substantiated with the law, which only stipulates the legal grounds of the rights of the authority, an individual has the rights to withhold from the law enforcement authorities. Although the authority has the rights to consider it as an administrative offence and to penalize an individual according to Article 1752 of the Latvian Administrative Violations Code , however individuals have the rights to appeal the decision. Besides, another striking aspect is the grounds to disclose information. If the offence does not qualify as criminally liable, consequently, the only grounds for investigation authorities left are either the Investigatory Operations Law or as police departmental inspection according to Article 141 of the Law on Police. In those cases disclosure of information is entirely dependent on the will of a carrier. In addition, even in cases if the law entitles the law enforcement authority to obtain information, simultaneously, the law stipulates the conditions under which an information may be maintained. For instance, Article 841 of the Law

on Aviation an air carrier is obliged to provide passenger data on the basis of a request from the State Border Guard. However, the State Border Guard has a duty within 24 hours after the arrival of the passenger and performance of border controls to destroy the data, if the necessity to use such data to ensure public order or the protection of the State security interests does not appears.

Therefore, information may be withheld from investigation authorities: in cases of the immunity from criminal proceeding; in case if the request to disclose information is substantiated only with the reference to the rights of an authority; in case of no legal grounds and in case of the lack of proper prior authorisation.

Regarding attorneyship, notary, bailiffs and the Ombudsman, only an attorneyship may be involved in investigating operations of the offences. The notary according to Section C of the Notariate Law exercise their functions, using information provided by a client, witness or included in the public registers, whereas the bailiffs according to Article 41 of the Law on Bailiffs are entitled to inquire additional information, which, although not expressis verbis stated, are restricted with the status of bailiff as executor per se. Nevertheless, according to Article 551(1) of the Civil Procedure Law requirements and orders by a bailiff, when executing court judgments and other decisions, are mandatory for all individuals or legal persons.

The Ombudsman is endowed with the rights to provide legal opinion, assessment, initiate a verification procedure for the clarification of circumstances, within which the Ombudsman is entitled to request and receive free of charge from an institution the documents necessary for a verification procedure (administrative acts, procedural decisions, letters), explanations and other information; to visit institutions in order to obtain the information necessary for a verification procedure; to request documents, explanations and other information from any private individual regarding the issues of fundamental importance in a verification procedure, upon termination of a verification procedure and establishment of a violation, to defend the rights and interests of a private individual in court, if that is necessary in the public interest. Although according to Article 25(4) of the Ombudsman Law the assessment of a verification procedure has a advisable legal force, Article 27(3) the amount and time period for the provision of information within verification

procedure, determined by the Ombudsman, may not be contested and appealed.

An attorney, according to Article 79 of the Criminal Procedure Law is the only subject, which is entitled to represent a person in criminal proceedings, therefore according to Article 86 has the rights to request and receive, in accordance with the procedures laid down in laws and regulations, information necessary for the defence of a person. Furthermore, an attorney has the right to obtain information, which includes the state secret and pertains to the case according to Article 48 2) of the Advocacy Law of the Republic of Latvia.

Other institutions related to investigation of offences are state security authorities, the Service on the Prevention of Money Laundering and Terrorism Financing, the Financial and Capital Market commission and others. According to Article 19 of the Law on State Security Institutions the state security institutions are entitled within the scope of their competence, to receive the necessary information, documents and other materials from the State and local government institutions, irrespective of the ban of the use thereof. Information, documents and materials shall be issued in the requested form and free of charge.

On the grounds of Article 28 (1) of the Law on the Prevention of Money Laundering and Terrorism Financing the subject of the Law is entitled to request its customers, and the customers have an obligation to provide true information and documents necessary for the customer due diligence, including information on the beneficial owners, transactions executed by the customers, economic and personal activity, financial position, sources of money or other funds of the customers. If the subject of the Law has not received true information and documents, necessary for the compliance with the requirements of the Law, in the amount enabling it to perform a compliance check, the subject of the Law shall end the business relationship with the customer and request early fulfilment of obligations from the customer. In such cases the subject of the Law shall consider to end the business relationships also with other customers, having the same beneficial owners, or requesting early fulfilment of obligations from such customers.

Therefore, although the legal opportunity for individuals to avoid to withhold information is stipulated, however the consequences are burdensome and, frankly, do not leave a choise. Moreover, according to Article 54 all the State and local government authorities have an obligation to provide information requested by the Control Service for the implementation of the functions. Hence, although an individual per se may not disclose information, this does not necessarily mean that an institution, to which an individual has expressed information, is equally privileged not to reveal information.

The Financial and Capital Market Commission according to Article 7(1) 2) of the Law on Financial and Capital Market Commission is entitled to request and receive the information, including printouts of telephone conversations and data transfer records, necessary for the performance of the relevant functions from participants of the financial and capital market. The Commission may also exercise such rights against other persons if there is a reason to believe that they are related to a possible violation of the requirements of laws and regulations or they may have access to information at their disposal necessary for clarification of the circumstances of the violation. In case of non - fulfilment of those duties, the Commission shall initiate an administrative case.

In addition to the aforementioned remedies to disclose information to the law enforcement authorities, individuals may also refer to Article 10(8) of the State Administrative Structure Law , which states that, if the information, which is necessary for taking an administrative decision governing public legal relationship with a private individual, is at the disposal of another institution, the institution shall obtain it itself, without requesting it from a private individual. Therefore, information may be withheld from the law enforcement authorities in case of the special status of information or person from whom the information is required; in case of presumption of innocence; in case if information is already at disposal of the State authorities and in case of lack of prior procedural authorisation.

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

According to Article 7 of the Personal Data Protection Law personal data may be processed only under regulated principles, within which one of them is the principle of the legality, which states that data may be processed for other purposes only if an individual has given consent or on the grounds of a law. However, Article 10(4) stipulates that, derogating from general principles, data processing for the purposes other than those originally intended is permissible in the field of criminal law:

1. to prevent, detect, investigate criminal offence and carry out criminal prosecution or enforce criminal penalty;
2. to use personal data in legal proceeding of an administrative or civil matter, as well as in the activity of officials of State institutions authorised by a law, if it is related to prevention, detection, investigation or criminal prosecution of criminal offences, or enforcement of criminal penalties;
3. to prevent immediate significant threat to public security. Similarly, the principle of minimality must be considered.

The principle precludes that processed data should be as minimum as possible. For instance, data about trade union membership of a person is sensitive data and according to Article 11 only in explicitly stated exceptional cases the aforementioned data may be processed:

1. the data subject has given his or her written consent;
2. processing of personal data is necessary to achieve the lawful, non-commercial objectives of public organisations and their associations, if such processing of data is only related to the members of these organisations or their associations and the personal data are not transferred to third persons;
3. the processing concerns such personal data as necessary for the protection of rights or lawful interests of natural or legal persons in court proceedings;
4. processing of personal data is necessary to protect the life and health of the data subject or another person, and the data subject is not legally or physically able to express his or her

consent and others.

Therefore, data about an employee may not be disclosed to the law enforcement authorities if the purpose is contrary to the data protection principles or the requested data exceeds the minimum necessary data.

Furthermore, according to Article 10(8) of the State Administrative Structure Law if information, which is necessary for taking an administrative decision, governing public legal relationship with a private individual, is at the disposal of another institution, the institution shall obtain it itself, without requesting it from a private individual. Therefore, if the law enforcement authority inquires information also about an employee, which already is at the disposal of the State, that information may be withheld. Besides, according to Article 28(1) of the Personal Data Protection Law personal data may be transferred to another state, other than a Member State of the European Union or European Economic Area, or an international organisation, if that state or international organisation ensures such level of data protection as corresponds to the relevant level of the data protection in effect in Latvia.

Regarding the public sector, according to Article 5 of the Freedom of Information Law restricted access information is such information as is intended for a restricted group of persons in relation to the performance of their work or official duties, which has been granted such status by law; which is intended and specified for internal use by an institution; which is a commercial secret; which concerns the private life of natural persons. According to the Cabinet of Ministers Regulations No.887 'List of Official Secrets Objects' adopted on 26 October 2004 the State secrets are:

1. information regarding the structure of the National security authorities, arms (Article 2.5.1.);
2. information regarding the lists of positions of the National security authorities and the actual number of employees (Article 2.6.1.);
3. information regarding the employees of the National security authorities sent on missions to work in other countries (Article 2.6.2.);
4. information regarding investigatory surveillance, personnel and dislocation (location) of

special procedural protection departaments (Article 2.6.3.);

5. files of those persons taking up employment with the National security authorities (Article 2.6.4.);
6. information regarding the identity of covert assistants located in foreign states and their undercover co-operation with the investigatory operative subject (Article 2.7.2.);
7. information regarding the identity of covert assistants located in Latvia and their undercover collaboration with the investigatory operative subject (Article 2.7.6.);
8. information regarding cover undertakings, organisations and authorities of the investigatory operative subjects and the identity of the officials working therein (Article 2.7.10.).

Therefore, the law enforcement authorities to have an access to that information, they must receive a special permission.

In addition, in private sector the information about employees may not be disclosed in case if that kind of information is being conducted as a commercial secret stipulated by law (for instance, about private detectives) or pertains to adoption secret or witness protection programs.

Nevertheless, the possibility to reveal information about employees from the law enforcement authorities must be evaluated on case by case basis.

10. If relevant, please set out information on the following:

10.1 Defences to the offences listed in question 2;

As previously mentioned, there is no criminal liability for legal persons under the law of Latvia. Therefore the part b will only be looked at from the point of view of individuals, the part a will be analysed regarding the possibility of coercive measures applied to legal persons and in the part c both reduction of criminal liability and coercive measures will be discussed.

a) According to the Section 708 of the Criminal Law, in determining the type of coercive measure, the nature of the criminal offence and the harm caused shall be taken into account. In determining the extent of the coercive measure due regard shall be payed to the following considerations:

1. actual activities of a legal person;
2. nature and consequences of the acts of a legal person;
3. measures performed by a legal person in order to prevent the commission of a criminal offence;
4. size, type of activities and financial position of a legal person;
5. measures performed by a legal person in order to compensate for the losses caused or prevent the damage caused to a victim;
6. whether a legal person has reached a settlement with a victim.

Arguing with those conditions could be used as a defence before the court against the coercive measures.

b) The grounds to be granted an immunity from criminal proceedings, as stated in the Section 116(1) of the Criminal Procedure Law, are the special legal status of a person, information or a place specified in the Constitution, Criminal Procedure Law, other laws and international treaties, which in specific cases tolerates complete or partial nonfulfillment of a criminal procedural duty, or restrict the right of a relevant institution to perform specific investigative actions. The immunity from criminal proceedings for a person arises from the following:

1. criminal legal immunity of a person that is specified in the Constitution or in international treaties;
2. occupation or profession of a person;
3. status of a person in particular criminal proceeding;
4. kinship of a person.

For example, foreign consular officials as provided in international treaties have the consular immunity, the State President and a member of the Saeima (the Parliament of Latvia) have an immunity from criminal proceedings as specified in the Constitution etc. Nevertheless, it is also

possible to held most of the immunity-bearing persons criminally liable in accordance with the procedures laid down in the law.

There is no possibility to obtain immunity during the investigation or other proceedings.

However, the Criminal Law states that there are cases when a person can be released from the criminal liability.

Section 58 regulates the general rules of the release from criminal liability. It states that, firstly, if a person has committed a criminal offence in regards to which the elements set out in the Criminal are present, but which has not caused such harm as requires that a criminal punishment be adjudged, he or she may be released from the criminal liability. Secondly, a person may also be released from criminal liability in particular cases provided for in the Special Part of the Criminal Law, or if it is established that his or her rights to the termination of criminal proceedings in reasonable term have not been observed, or if he or she has committed a criminal offence during a period when he or she was subjected to human trafficking and was forced to commit it. However, the most important conditions for the possibility to be released from the criminal liability are that:

1. a person has committed a criminal violation or a less severe crime, except criminal offences resulting in death of a human being, and there is a settlement effected with the victim or with his or her representative and within the last year the person has not been released from criminal liability for the commission of an intentional criminal offence by reaching a settlement and has completely eliminated the harm caused by the criminal offences committed or has reimbursed for the losses caused, or that
2. a person has given substantial assistance in the uncovering of a severe or extreme severe crime, which is more severe or dangerous than the crime committed by the person himself or herself.

The last provision though does not apply to person who are held criminally liable for extremely severe crimes provided for in Sections 116, 117, 118, 125, 159, 160, 176, 190.1, 251, 252 and 253.1 of the Criminal Law or to a person who has established or managed himself or herself an organised

group or a gang.

The next Section of the Criminal Law – 58.1 - regulates the conditional release from the criminal liability. A person who has committed a criminal violation or a less severe crime, may be conditionally released from criminal liability by a public prosecutor if, taking into account the nature of the offence and the harm caused, information characterising the accused and other circumstances of the matter, there is acquired a conviction that the accused will not commit further criminal offences. Also a person who is accused of committing a severe crime and has given substantial assistance in the uncovering of a severe or extreme severe crime, which is more severe or dangerous than the crime committed by the person himself or herself, may be also conditionally released from criminal liability by a prosecutor in accordance with the procedures laid down in the Law. This provision shall not apply to persons who are held criminally liable for serious crimes provided for in Sections 125, 159, 160, 176, 190.1, 251, 252 and 253.1 of the Criminal or to a person who has been an organiser of a crime.

If a person who has been conditionally released from criminal liability, during the period of probation commits a new intentional criminal offence or does not perform the imposed duties or the conditions of the settlement, his or her criminal prosecution shall be continued. It must be stressed that in the conditional release the prosecutor can still apply duties to the accused person.

Additionally, there are special regulations regarding the bribery and the possible releases from criminal liability. Section 199.1 of the Criminal Law stresses that a person who has unlawfully offered or given material values, property or benefits of other nature may be released from criminal liability if he or she, after committing of the criminal offence, voluntarily informs of the occurrence and actively furthers the disclosure and investigation of the criminal offence. Similarly, also a person who has given or intermediated a bribe may be released from criminal liability in certain conditions. Firstly, the release can happen if this bribe is extorted from this person. Secondly, person who has given or promised a bribe may be released from criminal liability if he or she voluntarily informs of the occurrence and actively furthers the disclosure and investigation of the criminal offence. Thirdly, an intermediary or abettor of a bribe may be released from criminal liability if, after commission of the criminal acts, he or she voluntarily informs of the occurrence

and actively furthers the disclosure and investigation of the criminal offence. Identically also a a person who has unlawfully offered or given material values, property or benefits of other nature (not to an official, but any other person in an important position) may be released from criminal liability if he or she, after committing of the criminal offence, voluntarily informs of the occurrence and actively furthers the disclosure and investigation of the criminal offence, if the benefit has been demanded or extorted from the person or if he or she voluntarily notifies regarding commission of criminal acts after commission thereof and actively furthers the disclosure and investigation of the criminal offence.

It can be seen that for both release and conditional release from the criminal liability there must have been the cooperation from the side of the accused person (assistance in the uncovering of a severe or extremely severe crime) or the mitigating circumstances that both are important factors also for the reduction of penalty.

c) The penalty reductions can happen in two ways – through the cooperation or through the existence of the mitigating circumstances.

If a court, taking into account various mitigating circumstances and a personality of an offender, considers it necessary to impose a punishment, which is less than a minimum limit for a relevant criminal offence provided for by the Law, it may reduce the punishment accordingly, setting out reasons for such adjudication in a judgment. That means that a penalty could be reduced or at least it is possible to avoid the most severe punishment as provided by the Law if certain circumstances were present at the time when a crime was committed or if the guilty person had cooperated with the investigative bodies.

According to the Section 47 of the Criminal Law, the following circumstances shall be considered as circumstances which mitigate the liability:

1. a perpetrator has admitted his or her guilt, has freely confessed and has regretted the criminal offence committed;
2. an offender has actively contributed to the disclosure and investigation of the criminal

offence;

3. an offender has voluntarily compensated the harm caused by the criminal offence to the victim or has eliminated the harm caused;
4. an offender has facilitated the disclosure of a crime committed by another person;
5. a criminal offence was committed as a result of unlawful or immoral behaviour of a victim;
6. a criminal offence was committed exceeding the conditions regarding the necessary self-defence, extreme necessity, detention of the person committing the criminal offence, justifiable professional risk, the legality of the execution of a command and order;
7. a criminal offence was committed by a person in a state of diminished mental capacity.

In determining punishment, circumstances which are not provided for in the Criminal Law, but are related to the criminal offence committed, may be considered as circumstances mitigating the liability.

The second way to reduce a penalty is cooperation with a prosecutor. Cooperation has already been mentioned as one of the mitigating circumstances, however, as explained by the Supreme Court of Latvia, when it is in such a level that through the cooperation the case can get ended faster and with a lighter penalty by the prosecutor (as explained later), the cooperation does not count as a "double" mitigating circumstance that could be used to reduce the penalty even more. This cooperation can exist in a form of an agreement or an injunction.

A public prosecutor may enter into an agreement, on the basis of his or her own initiative or the initiative of an accused or his or her defence counsel, regarding an admission of guilt and a punishment. The prerequisites for that are that the circumstances that apply to an object of evidence have been ascertained, and the accused agrees to the amount and qualification of his or her incriminating offence, an assessment of harm caused by such offence, and an application of agreement proceedings. Upon initiative of a public prosecutor or a legal person, also an agreement regarding application of a coercive measure to a legal person can also be concluded during the proceeding , if the circumstances, which relate to an object of evidence, are ascertained and the legal person recognises a fact of committing a criminal offence and agrees to the amount,

qualification of the offence, in relation to which the coercive measure is applied, evaluation of the harm caused and application of the agreement.

After entering into an agreement, a public prosecutor shall send the materials of a criminal case together with minutes of the agreement to a court, proposing the court to approve the agreement. In cases the prosecutor and the accused or the representative of the legal person sign the agreement expressing mutual consent to the applicable punishment, the punishment is usually lower than the maximum provided by the law and either equal or lower than could be applied by the court, since an accused has showed good will and has contributed to the efficiency of the process.

If a person has committed a criminal violation or a less severe crime, and a public prosecutor, taking into account nature of an offence and a harm caused, personal characteristics and other circumstances, is of the opinion that deprivation of liberty should not be applied to such person, yet such person may not be left without a punishment, he or she may end the criminal proceedings, drawing up a penal order in accordance to the Criminal Procedure Law, section 420(1). A public prosecutor shall draw up a penal order, if an accused admits his or her guilt, has compensated the harm caused to a victim, has reimbursed a compensation disbursed by the State and agrees to the completion of criminal proceedings by applying a punishment to him or her. In cases the possible penalty could have been a deprivation of liberty for more than 5 years, there also has to be an accept from a supervising prosecutor and a case has to be marked in the criminal proceedings register.

The same system applies to legal persons – Section 441.1(1) of the Criminal Procedure Law states that if a criminal offence or a less severe crime has been committed and a representative of a legal person recognises a fact of committing a criminal offence, a damage caused to a victim has been compensated and a representative agrees to terminate a proceedings by apllying a coercive measure to a legal person, the public prosecutor may terminate the proceedings by drawing up an injunction regarding a coercive measure. In the injunction regarding a coercive measure the public prosecutor may determine restriction of the rights or recovery of money in accordance with the Criminal Law. A punishment or a coercive measure provided in the injunction by the public prosecutor shall also

be reduced in comparison with the one possibly applied by the court. Until 2016, the Criminal Law stated that a public prosecutor, in his or her penal order, may apply a fine or community service to an accused person, yet not more than half of the maximum fine or duration of community services provided for in the Criminal Law, as well as additional punishments – restriction of rights or probationary supervision. Currently punishments are left to the discretion of a prosecutor, however, it is still expected that due to the reasons mentioned in agreements measures will be lighter.

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance)

Regarding costs incurred by a company due to criminal conduct committed by its members of the Management Board or officers of the respective company, Latvian legislation does not stipulate means of cost mitigation through taxation.

Members of a Management Board and officers liability insurance is not mandatory in Latvia. Thus, members of a Management Board and other officers may choose whether to insure their liability against third parties and the company or not. Furthermore, in accordance with Article 1 of the Law 'On Insurance Contracts' a company itself may choose to insure liability of its members of the Management Board or other officers. Since there is no mandatory obligation to insure liability of members of a Management Board or officers, terms and conditions of the respective insurance contracts may vary on a case by case basis.

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

Over the next five years it is expected that the legislation in the field of corruption, fraud and anti-money laundering will develop and become more precise and preventive; the penalties will increase as well.

Previously mentioned Law on the Protection of Whistle-blowers is expected to come in force in 2017, thus, encouraging employees to report on infringements. This could be an important step for the further development of the legislation and can lead to elimination of such crimes in the institutions and firms since till now the protection of whistle-blowers has been practically non-existent leading to a low level of activity.

Additionally, amendments of the Law On the Prevention of Money Laundering and Terrorism Financing, that will provide a stricter system for the customer due diligence attempting to identify possible risks at the earliest stage of business relationship, are currently in progress. Those amendments will implement the European Union Fourth Anti-Money Laundering Directive and it is planned to be finished till May 2017.

Through the amendments more information will be acquired both from natural and legal persons. The scope of law will get widened by including also the non-bank credit institutions and the virtual money services as well as introducing the Consumer Rights Protection Centre as the control institution. Also the list of possible risks has been widened showing tendencies to adapt greater amount of control through mandatory legal obligations. Finally, new requirements are developed for the recognition of the data acquired by other subjects of the law in order to provide more effective ways for the control institutions to acquire the information.

It is expected that tendency mentioned at the beginning of this chapter will remain due to expected directive of the European Parliament and European Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and the possible consequences of it, through which also the mentioned increase of penalties will come in force.

To sum up, preventive measures and penalties regarding corruption and tax fraud are currently in focus; therefore enforcement of the legislation is expected to be stricter. Nevertheless it can also be said that due to severe problems in some of the institutions proper enforcement of legislations can still be doubtful.

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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction.

The development of a legal framework on anti-bribery and anti-corruption has gained momentum since 2001. **The law of 15 January 2001** implementing the **OECD Convention of 21 November 1997 on Combating Bribery of Foreign Public Officials in International Business Transactions** resulted in the introduction of several significant Articles in the Luxemburguish Penal Code[1]. Sanctions were established, with fines up to 7.5 million euros and up to ten years' imprisonment for bribing public officials; up to 5 million euros and up to five years imprisonment for persons requesting/receiving bribes.

The ensuing **law of 23 May 2005** introduced in the Penal Code the distinct offences of « direct » and « indirect » corruption, with the prohibition to accept from, or give benefits to, national and foreign officials[2]. The use of bribery within the business sector was also targeted, with imprisonment sentences of up to five years in case of infringement.

The **law of 1 August 2007** saw the setting up of an inter-ministerial committee, the Corruption Prevention Committee, in order to coordinate the fight against corruption, tackle challenges and raise awareness in the concerned sectors through publications and seminars. New specific bookkeeping requirements were added in accordance with the **2003 United Nations Convention against Corruption**[3]. The **law of 18 December 2007** proceeded to the implementation of the **2000 United Nations Convention against Organised Crime and its Protocols**[4].

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[3] United Nations Convention against Corruption dated 31 October 2003.
[4] United Nations Convention against Transnational Organised Crime and the Protocols Thereto, dated 15 November 2000.

2011 corresponded to a significant reinforcement of the fight against corruption in Luxembourg, with the country trying to bring an adequate response to the recommendations highlighted by the OECD, through the Financial Action Task Force (« FATF ») and the Council of Europe's Group of States against Corruption[5]. It was a pivotal year as well for whistleblowing. New rules were added in the Labour Code, the law on public service and the Penal Code and Code of Penal Procedure (hereafter, CPP) in order to ensure protection of whistle-blowers reporting to superiors or to the competent authorities facts of corruption or undue influence[6]. **Article 10(3) of the Law of 16 April 1979** concerning the general status of public officers and employees already stated that public employees cannot solicit, accept or be promised by any source – directly or indirectly – any material advantages which are likely to put them in conflict with the obligations imposed on them by law. It explicitly refers to Articles 240 onwards of the Penal Code[7].

The **Decree-Law of 28 December 2015** was added to provide a coordinated behavioural code for government members. Section 8 deals with gifts, offers of hospitality and honours and distinctions given to government employees. It makes a clear distinction between gifts and donations received by public nationals or foreign entities and gifts and donations received by private entities.

Article 15 of the decree-law prescribes that gifts and offers of hospitality addressed to members of the government can be accepted when they:

- originate from public, national or foreign entities
- except for persons or public entities whose activity is mainly based in a competitive sector according to private law regulations; and
- are consistent with the common practice and general rules of diplomatic courtesy.

[5] J. NIES, "La Confiscation en Droit Luxembourgeois, Une Peine en Pleine Evolution", in *Quo Vadis droit luxembourgeois: Réflexions sur l'évolution des sources et techniques normative*, Barreau du Luxembourg, Primento, 25 juin 2013 - 200 pages.
[6] Whisteblowing has been addressed again by EU legislation with the 2014 Secret Trade Directive, which will not be treated here.
[7] Provisions concerning misappropriation and embezzlement.

- This authorisation does not account for gifts and offers of hospitality, which are likely to influence government members or their decision-making.
- Article 16 provides that gifts or offers of hospitality addressed to members of the government can be accepted when they:
- originate from persons, private entities or public entities active in a competitive sector according to private law regulations;
- are consistent with the general rules of courtesy; and
- have an approximate value that does not exceed €150.

This authorisation does not include gifts and offers of hospitality, which are likely to influence government members or their decision-making.

The decree-law specifies that if a gift or offer of hospitality which does not fulfil those criteria has been accepted or is to be accepted, the prime minister must be notified of the donor's name and the date of the occasion on which the government member received the gift.

Government members remain free to accept gifts or offers of hospitality in the scope of their private relations and from their usual close entourage, which have no connection with their public function.

1.1 The European Anti-Money Laundering Directives

The impact of EU legislation has to be mentioned, even more so as its role seems bound to augment in the upcoming years. It impacts a broad range of actors of the financial sector and beyond, including the legal profession.

EU's intervention is based on the fact that the creation of the Single Market does not only serve legitimate business, but also facilitates opportunities for money laundering and the funding of further crime.

The European Union Anti-Money Laundering and Financing of Terrorism Directives[8] were designed to protect the financial system from being misused for money laundering and financing of terrorism purposes.

1st AMLD

The First Directive to combat money laundering remounts to 1991[9]. The First Directive provided the initial framework that would be subsequently updated to adjust to the FATF's Recommendations. It established key preventative measures such as customer/client identification, record-keeping and central methods of reporting suspicious transactions. It was passed to ensure a universal approach was adopted by Member States to combat the problem of money laundering, thus protecting the EU Single Market[10].

The First Directive requirements stated that due diligence checks must be carried out by all credit and financial institutions before entering into any business relationship or before conducting any transaction over a certain threshold; all collated identification documents, evidence and existing records collected as part of the due diligence checks must be kept for at least five years by credit and financial institutions; there must be close international co-operation and harmonisation between credit and financial institutions and their supervisory authorities and the establishment of a mandatory central system of reporting; the confidentiality rules regarding customer information should be toned down in relation to disclosing suspected money laundering offences to the authorities; and special protection should be afforded to credit and financial institutions, their employees and their directors who have to breach confidentiality rules in order to make the disclosure.

[8] Transpositions of the successive Directives were made through the laws of 12 Novembre 2004 and of 27 octobre 2010 and Regulation CSSF N°12-02 of 14 December 2012.
[9] Council Directive of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering (91/308/EEC).
[10] IBA Anti Money Laundering Forum, 'History of the European Union Anti-Money Laundering and Financing of Terrorism Directives', available at: https://www.anti-moneylaundering.org/Europe.aspx, last access on 31/05/17.

2nd MLD

The Second Directive[11] amended the First Directive. It adopted a broader definition of money laundering, taking into account underlying offences such as corruption and thus expanding the list of predicate offences. It also made explicit that currency exchange offices, money transmitters and investment firms were included within the scope of the Directive as they were susceptible to money laundering transactions. An essential clarification, the Second Directive indicated the authority that should identify, trace, freeze, seize and confiscate any property and proceeds linked to criminal activities.

3rd MLD

The major innovation of the Third Directive was the taking into account of Designated Non-Financial Businesses and Professions, from now on encompassed within the purview of the Directive. Thus, the Third Directive makes the regime applicable to lawyers, notaries, accountants, real estate agents, casinos and encompassing trust and company services, exceeding €15,000. It also included measures against the financing of terrorism. The Third Directive also enhanced customer due diligence measures for politically exposed persons (persons holding a public office such as judges) and their immediate families or close associates, while simplifying customer due diligence procedures for low-risk transactions (Member State assessed) involving public authorities or public bodies if their identity and activities are publicly available, transparent and certain and on-going monitoring of such transactions[12].

4th MLD

A Fourth Directive has been adopted, to be implemented by 26 June 2017, next to the updating of the Regulation EU 2015/47 on Information Accompanying Transfers of Funds. The list of "obliged entities" now comprises credit and financial institutions, auditors, external accountants and tax advisors; notaries and other independent legal professionals, trusts or company service

[11] Directive 2001/97/EC of the European Parliament and of the Council of the European Union of 4 December 2001.
[12] IBA Anti-Money Laundering Forum, ibid.

providers, estate agents, traders in goods making or receiving payments above €10,000 (threshold lowered from previous €15,000), providers of gambling services (from now on, including Internet gambling services).

The Directive also displays a precise list of the "risk factors" that have to be taken into account by obliged entities when assessing internal risk, in particular when determining the application of simplified or enhanced due diligence measures. Guidelines should be provided by European Supervisory Authorities in that regard.

Apart from the internal risk assessment, the Directive envisages an assessment by the Commission at the EU Level and a national risk assessment. It also provides for the possibility for Member States to waive most of the customer due diligence requirements for certain low value non reloadable e-money products subject to risk-mitigation conditions (such as sufficient transaction monitoring).

Increased transparency in the identification of beneficial owners is expected, with Member States being obliged to collect their information within their territory in a national central register (such as the Luxemburguish "Registre de Commerce et des Sociétés") open to access to competent authorities, obliged entities and any person demonstrating "a legitimate interest".

Furthermore, the Directive marks the instauration of a 3rd country policy. With a view to establish a common approach towards non-EU countries that have deficient anti-money laundering and counter-terrorist financing regimes ("high-risk third countries"), the European Commission is now specifically empowered to identify (i.e. to point out) these countries. Beyond a foreseeable "name and shame" effect, the presence of customers originating from a country in this list may put significant burden on obliged entities by requiring additional controls[13].

[13] Domenico Siclari, *The New Anti-Money Laundering Law: First Perspectives on the 4th European Union Directive*, (Springer, May 9 2016) 20.

Although not implemented yet, the 4th Directive has already been subject to a proposal of amendment, whose vote is still pending[14].

1.2 International legislation with legal effects in Luxembourg

US FCPA

The Foreign Corrupt Practices Act (FCPA) dates back to 1977[15] but is still the most important international and extraterritorial applicable law against bribery and corruption. It addresses foreign corruption of officials, whether committed by firms or individuals, American or not, established in the US or simply listed on the American soil, or participating in some way to a regulated financial market in the United States. A new 2008 International Anti-Bribery Act introduced stricter provisions.

US FATCA and the Automatic Exchange of Information Agreements trend

Regarding exchange of information, the 2014 Foreign Account Tax Compliance Act (FATCA) is deemed to be a trailblazer leading to the adoption of the OECD's Standards for Automatic Exchange of Financial Account Information (« Common Reporting Standards »), although the US has not signed up to CRS so far. FATCA requires all non-U.S. financial institutions (FFIs) to search their records for indicia indicating U.S. person-status and to report the assets and identities of such persons to the U.S. Department of the Treasury. Under CRS, each country will annually automatically exchange with the other country the following information: the name, address, Taxpayer Identification Number and date and place of birth of each Reportable Person ; the account number ; the name and identifying number of the Reporting Financial Institution; the account balance or value as of the end of the relevant calendar or, if the account was closed during such year or period, the closure of the account[16]. A rule book specifies, in thorough details, how the the totality of the information shall be delivered.

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[14] See question 12.
[15] *Foreign Corrupt Practices Act Compliance Guidebook: Protecting Your Organization from Bribery and Corruption,* Martin T. Biegelman, Daniel R. Biegelman, John Wiley & Sons, 7 avr. 2010 - 384 pages, p. 37.
[16] *US Withholding Tax: Practical Implications of QI and FATCA*, R. McGill, Springer, 30 oct. 2013 - 334 pages; p. 315.

UK Bribery Act

The UK Bribery Act 2010 is the most stringent anti-bribery and anti-corruption legislation in vigour. It covers a broad extraterritorial reach[17] and creates a corporate offence for failing to prevent bribery. In order to defend companies against this offence, it becomes crucial to demonstrate adequate procedures to avoid significant consequences for the company and the acting individuals. It became effective in July 2011.

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

Legal entities are criminally liable for the offences committed on their account by their corporate bodies (managers, directors, shareholders, statutory auditors or the de facto managers acting in the name and in the interest of the legal entity).

The criminal liability of legal persons extends to any natural persons who are perpetrators or abettors to the same act.

Legal persons that have committed a misdemeanour or an offence, including extortion, bribery, influence peddling and corruption offences, may be subject to one or more of the following penalties, in addition to the compensation of damages to the person who has suffered due to the fraudulent act:

- a fine, in the conditions and modalities provided for in Article 36 of the Penal Code;
- specific confiscation;
- disqualification from public tenders;
- dissolution, in the conditions and modalities provided for by Article 38 of the Penal Code.

[17] *Anti-Bribery Laws in Common Law Jurisdictions*, Stuart H. Deming, Oxford University Press, 17 juin 2014 - 496 pages, p. 129.

- In addition to these penalties, if sufficient elements evidence the criminal liability of a legal entity, the judge may order :
- the suspension of proceedings entailing the liquidation or the dissolution of the legal entity (including a merger);
- the prohibition of any specific asset transaction that could lead to its insolvency;
- a request for the deposit of a warrant.

The **maximum amount of the fine applicable to legal persons** having committed extortion, bribery (active or passive), trading influence and corruption (in the public and private sectors) offences is **€750,000**.

Under Article 253 of the Penal Code, various additional penalties, particularly ineligibility, can be applied in corruption cases even with regard to lesser offences and circumstances in which recategorisation of the offence occurred.

Main Offences Provided by the Penal Code

Articles 246 to 259 of the code are dedicated to the characterization and sanctions applicable to the following corruption offences and related:

- corruption and influence peddling;
- the corruption and bribery of judges;
- the intimidation of persons in charge of a public service or administration; and
- the abuse of authority.

Other Penal Code provisions concern money laundering or other offences which are primarily associated with corruption or bribery. Importantly, according to caselaw[18], the same facts cannot

[18] Arrêt N°61/11 X du 2 février 2011, Cour d'appel du Grand-Duché du Luxembourg, dixième chambre

lead to the double qualification of misappropriation of funds and bribery, and the benefit that is derived from the illegal action is not a condition of the offence but only a description of the interest that drives a person to offer a bribe, or the consideration a public officer may think he or she can obtain from a person[19].

Active and Passive Bribery

Articles 246 to 249 of the Penal Code concern active and passive bribery. The instigating party is considered to have committed active bribery, whereas the receiving party is considered to have committed passive bribery.

Corruption and bribery provisions apply to public offices and persons holding public authority, including public officials or agents entrusted with an elective public mandate (ie, politically exposed persons) or public service mission, including from another state; individuals managing or working in a private sector entity ; EU officials and institution staff and international organisations and magistrates[20].

Article 247 of the Criminal Code characterises 'active bribery'. Thus, according to Article 247, a bribe consists of an offer, promise, donation or gift or an advantage of any kind, directly or indirectly given to (active bribery) or received by (passive bribery) the persons described in the Article. Under this Article, **imprisonment for five to ten years** and a fine of **€500 to €187,500** shall apply to any person unlawfully proposing or giving a bribe to a person holding public authority, or carrying out a public service mission, or to a person holding a public electoral

siégeant en matière correctionnelle (unpublished), case concerning a public servant, assigned to the tax administration, who was accused of having unduly granted tax advantages and a favourable advance ruling to a company. The civil servant received a four-year suspended jail sentence and a fine of €10,000.

[19] See the Article of Maître May Nulepa, https://www.legavox.fr/blog/maitre-may-nalepa/%C2%AB-affaire-siecle-%C2%BB-luxembourg-4524.pdf, last access on 31/05/17.

[20] On foreign officials, see Article 252 of the Penal Code. 'Community officials' includes 'any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the conditions of employment of other servants of the European communities' and 'any person seconded to the European Communities by Member States or by any public or private body who carries out functions equivalent to those performed by European Community officials or other servants'.

mandate. The objective of active bribery is to force a person to carry out or abstain from carrying out an act relating to his or her office, duty, or mandate, or facilitated by his or her office, duty or mandate; and abuse his or her real or alleged influence with a view to obtaining from any public body or administration any distinction, employment, contract or any other favourable decision. A person is considered to have committed passive bribery if it can be proved that they carried out the above.

Article 310-1 of the Penal Code also provides that active bribery is committed if the target of the bribe is a director or manager of a legal entity, or favourable proxyholder or agent for a legal entity or natural person, whose actions are carried out without the knowledge and the authorisation of the board of directors or managers, the shareholders, the principal or the employer. The same applies under Article 310 for passive bribery, when the director or manager, or any aforementioned, solicits or accepts the bribe.

Passive bribery is foreseen by Article 246 of the Penal Code. Under this Article, the unlawful solicitation or receiving of a bribe when made by a person holding public authority or carrying out a public service mission, or by a person holding a public electoral mandate, is punishable by imprisonment for **five to 10 years** and a **fine of €500 to €187,500**.

The offence of bribery applies whenever the following persons are involved: a any person holding a legislative, administrative or judicial office, whether appointed or elected; any person, agent or representative of public authority, in charge of a public service mission, or holding a public elective mandate for Luxembourg; any person exercising a public function for a foreign country, including for a public agency or public enterprise; d community officials and members of the European Commission, the European Parliament, the Court of Justice of the EU and the Court of Auditors of the EU; e any official, agent or member of a public international organisation; and a company or organisation's managing bodies.

Article 248 of the Criminal Code deals with **influence peddling**, which entails soliciting or receiving a bribe to abuse real or alleged influence in order to obtain an advantage from a public

entity or administration. The key components of this offence are similar to those regarding bribery defined in Article 247. Under Article 248 of the Penal Code, any person who unlawfully solicits or receives a bribe, in order to abuse his or her real or alleged influence with a view to obtaining from any public body or administration any distinction, employment, contract or any other favourable decision, will be punished by imprisonment for **six months to five years and a fine of €500 to €125,000**. The same provisions shall apply to persons proposing or giving a bribe.

Under Article 249 of the Criminal Code, any person **holding public authority** or carrying out a service mission, or any person holding a public electoral mandate, who unlawfully solicits or receives a bribe from a person who benefits from the improper act will be punished by imprisonment for **five to 10 years** and a **fine of between €500 and €187,500**. The same provision applies to persons offering or giving a bribe.

Article 250 of the Criminal Code applies bribery provisions to **judges, arbitrators, experts and, in general, any person sitting in judicial matters** appointed by a court or the parties. Sanctions consists of **imprisonment for 10 to 15 years** and a fine of **€2,500 to €250,000**. The same provisions apply to persons proposing or granting the bribe.

Characterizing Facts of Bribery – The Application of the Penal Code Provisions

The constitutive elements for offences related to corruption are:

- active or passive behaviour aimed at influencing an official;
- the intention of the person committing the act to misuse his or her influence;
- the role of the person (any agent or representative of public authority, in charge of a public service mission, or holding a public elective mandate, any foreign public official, as well as any person (including a legal person) who proposes or grants the promises, gifts or presents) as an element of the infringement;
- an improper advantage to be obtained for oneself or another party, whether or not the intended result is achieved and whether or not an intermediary is used.

The existence of the offence is established if the facts evince both « psychological » and « material » elements that compose the offence (« mens rea » and « actus reus »).

The willingness to corrupt or to be corrupted is the pyschological element of the offence. A link has to be demonstrated between the advantage required or offered and the action expected from the receiver of the bribe.

The solicitation, or acceptance, of an advantage (passive bribery) or the offering of an advantage (active bribery) and the aim of the solicitation or offering (i.e., to carry out or abstain from carrying out an action or the abuse of influence) are the material elements of the offence.

Money laundering

The predicate offence that may give rise to a money laundering offence used to be limited only to the public or private passive corruption of the persons committing forgery (referred to above), including Politically Exposed Persons (« PEPs »), given that it is the concealment by the corrupt party of the source of the corruption's proceeds that constitutes money laundering.

Money laundering is foreseen by **Article 506-1 of the Penal Code** and is punishable by **15 to 20 years' imprisonment** and a fine of **€1,250 to €1.25 million.**

Financial record-keeping

According to the law dated 19 December 2002[21], as amended, regarding the trade and companies' registry and the accounting and annual accounts of companies, companies and legal entities shall keep up-to-date accounts covering all their activities, assets and liabilities. There are no specific provisions in this law regarding anti-bribery or anticorruption but criminal sanctions apply to

[21] Law of 19 December 2002 on the Register of Commerce and Companies and the Accounting and Annual Accounts of Undertakings and Amending Certain Other Legal Provisions (« Loi du 19 décembre 2002 concernant le registre de commerce et des sociétés ainsi que la comptabilité et les comptes annuels des entreprises et modifiant certaines autres dispositions légales »).

persons who have committed forgery in the annual accounts of a company either by false signature, by forgery or alteration of records, or by fabrication of agreements, provisions, obligations or discharges or by alteration of clauses, declarations or facts.

Foreign Bribery And Associated Offences

Corruption offences and related offences may also be prosecuted in Luxembourg if the offence, or an act that constitutes one of the elements of the offence, is deemed to have been committed in Luxembourg territory. The courts in Luxembourg have jurisdiction to hear cases involving offences committed abroad without the dual criminality requirement[22].

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

For several years, the courts have focused on the issue of criminal charges against corporations as a result of criminal conduct by directors and officers. In many countries, corporations are already subject to liability under the Penal Code. In Luxembourg, the liability of the corporations is defined at its Article 34[23]. When a crime or an offence is committed in the name and in the interest of a corporation by a legal body or by one or more of its officers of law or of fact, the Corporation may be declared criminally liable and incur the penalties established by the Articles 35 to 38. The criminal liability of legal persons does not exclude that of individuals authors or accomplices of the same offences.

[22] OECD, Rapport sur la Mise en Oeuvre et L'application de la Convention sur la Lutte contre la Corruption d'agents Publics Etrangers dans les Transactions Commerciales Internationales et des Recommandations De 2009 Visant A Renforcer La Lutte Contre La Corruption, June 2011, p. 12, available at : http://www.oecd.org/fr/investissement/anti-corruption/conventioncontrelacorruption/48277203.pdf, last access on 31/05/17.
[23] Penal Code of Luxembourg

The maintenance of national internal security is an attribute of State sovereignty. As a result, variations in the legal and judicial systems from one Member State to another are to be expected within the Union. Judicial cooperation is crucial so that justice at the criminal level can function unhindered between the different countries of the European Union.

The entry into force of the Maastricht Treaty established in 1992 the principle of mutual recognition of the various judgments and judicial decisions between the Member States of the European Union. Following this principle, there was in 2000 the Convention on Mutual Assistance in Criminal Matters, which simplified and supplemented the shortcomings of previous Conventions, namely the European Convention on Juridical Assistance in Criminal Matters of the Council of Europe[24] and the Convention implementing the Schengen Agreement[25], on the strengthening of cooperation between the judicial authorities and the customs authorities.

Subsequently, the first system to adopt the principle of mutual recognition was the European Arrest Warrant, which entered into force in 2004. The European arrest warrant is a cross-border judicial procedure, which is generally valid in the territory of the European Union. A Member State shall ask another to obtain an individual for the purpose of prosecuting or executing penalties. An essential condition is that the individual who has committed a criminal offense be punished with a maximum penalty is at least one year of imprisonment or if his offense has been sentenced to a term of imprisonment of At least four months.

Finally, the entry into force of the Treaty of Lisbon in 2009, the importance of the Union increases, mainly at the criminal level. As regards corporate liability, the proposals suggested the application of criminal penalties to natural and legal persons, ie legal persons but also individuals. The sanctions most often imposed on legal persons are fines, which vary from country to country.The law of 3 March 2010 in Luxembourg on criminal liability will mainly be based on a cumulative responsibility, both of legal persons and of natural persons. The legal person will be held liable for

[24] of 1959 and the Protocol of 1978
[25] Convention of 1990

a crime or offense committed by one or more natural persons on its behalf and on its behalf. This principle has been formulated primarily to prevent natural persons from committing offenses or crimes and use the corporate veil as a shield to exempt themselves from criminal responsibility. It will be up to the court to determine in each case the different criminal liabilities.

As to the question of the penalties to be paid, it is necessary to distinguish between those which may be incurred by companies or legal persons and subsequently those of natural persons, namely the statutory bodies or bodies. As far as natural persons are concerned, it is essentially the managers of the companies that interests us.

The latter have certain obligations within the company. These obligations are mainly in the interest of the company. The personal responsibility of leaders after committing a crime or offense in the criminal field will benefit society. Many offenses within a company are committed in the management sector. We have those that are common law, namely, breaches of trust or any kind of fraud.[26]

Amounts will be multiplied by five when criminal liability of a legal person is incurred for crimes and offenses expressly provided for by law[27]. This regards crimes and offenses against the security of the State, acts of terrorism, money laundering, trafficking in narcotic drugs, criminal organisations, trafficking in human beings, or even stolen goods.

In the case of money laundering, where a natural person will be fined € 1.25 million, the legal person will see it multiplied by five, up to a maximum of twice the applicable fine, which will make a total of 12.5 million euros of fine to pay[28]. Legal entities are therefore subject to heavier sanctions than those of natural persons, and may even go beyond fines, such as special confiscations or the

[26] Alain Steichen, *Responsabilité pénale des dirigeants de sociétés*, p.234.
[27] Article 37 of the Luxembourgish Penal Code
[28] Article 36§3 of the Penal Code of Luxembourg

prohibition of directing a company. Individuals are held liable under the Penal Code, the Societies' Code or by laws expressly provided for.

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

Extradition shall not be confused with the European Arrest Warrant[29]. The latter has deadlines or extensions that are much shorter than those of the extradition, namely between two and fifteen days in case of consent and between fifteen and twenty days in case of absence of consent of the individual, versus nine months with consent for the extradition and in the absence of consent twelve in eighteen months of the individual.

Extradition is the procedure by which a State, which is called the required State, agrees to deliver a person who is situated on her territory, which is called the requiring territory, whom she protests to judge it for the commission of a crime or to make him execute a punishment for the commission of a crime or an offense.

The extradition is a duality of sources, which puts in touch at least two States. There is a whole common series of extradition agreements which are signed by countries. The latter are from two orders; either they can be bilateral, agreements or conventions which organise some sort of mechanism between them. Luxembourg signed several agreements or conventions, in particular with Greece[30], with Israel[31], France[32] and many of the others. They may be multilateral agreements, the most important is the one of December 13th, 1957 of the Council of Europe, come into effect

[29] « Transposé par la loi du 17 mars 2014 relative au mandat d'arrêt européen et aux procédures de remise entre Etats membres de l'Union européenne ».
[30] Law of 27 May 1938 approving the Convention of extradiction and judicial assistance in criminal matters.
[31] Law of 14 December 1964 approving the Convention on extradition.
[32] « Arrêté du 20 janvier 1876 qui ordonne la publication du traité d'extradition conclu entre le Grand-Duché de Luxembourg et la France, le 12 septembre 1875 ».

in the 1980s and which includes 4 protocols. The agreements or conventions of extradition do not exist with all the countries. It is necessary to have a certain trust in regard of the other State to whom or we intend to deliver an individual, or we intend to demand the individual. Numerous countries admit proceeding to extraditions in the absence of any convention, but it is not the case of all the countries.

Passive extradition may be requested in the Grand Duchy of Luxembourg. Before the extradition commences, the individual must be provisionally arrested. The arrest phase allows the arrest of an individual sought by another State and allows the requesting State to prepare a file and send it to the Luxembourg State. In the case of extradition, contrary to the European arrest warrant, the file and the follow-up of the proceedings are made through the diplomatic way. In urgent cases, however, the state prosecutor orders the arrest.

During the first phase, there is the intervention of the judicial authority acting as a member of the Ministry of Justice, control of the most obvious elements. They forward the file to the General Attorney, who is territorially responsible. At this stage, either the individual has already been arrested because of other offenses, he is provisionally detained and will be brought before the General Attorney. Either he is not detained, in this case there will be no convocation. The General Attorney examines whether this is the right person. Thereafter, the individual will be asked whether he waives the rule of specialty, rule that the individual can be judged only for what the state claims him for.

Then, in the second phase, it is the investigating chamber. It does not pass judgments at this stage but opinions. Time limits vary from 5 days with consent to 10 days without consent. The investigating chamber renders its opinion. At this exact phase we are situated in an advisory procedure. The investigating chamber acts as an adviser. When it is favorable, it does not impose itself on the government.

The government executes the last phase. The government has received the request, it is the interlocutor of the foreign state. First, the government proceeds with the internal proceedings

before having to answer the government of the foreign state. When the opinion is unfavorable, the government must inform the foreign State and the latter can make a denunciation. However, if the opinion is favorable, there is no obligation for the government.

But finally, in order for extradition to become effective, it is necessary to take decree. Another big difference from the European arrest warrant.

Turning now to the various barriers that may exist in the extradition of an individual, the main cases of refusal of extradition, which are to be expected to arise, should be examined.

There may be cases of refusal of extradition that are related to the very offense, namely an obstacle offense. These are cases where extradition is requested for an offense not charged in that particular territory. There is a certain requirement for double criminality[33]. In no case may extradition be permitted, if the offense is not incriminated within the two territories concerned. This can be seen as a requirement of reciprocity, a state is not going to hand over an individual, if he is not going to get anything from the other.

A second barrier to the extradition of an individual is when the offense is of a political nature[34]. As with the absence of dual criminality, any political offense still excludes the possibility of extradition. This is a fundamental principle, a constitutional value, and prohibition of surrendering an individual to a state when it is a purely political offense. Another barrier to the extradition of an individual is military offenses[35], which are not retained either. Extradition shall not be granted if the person claimed is a Luxembourg national[36] or if he is a foreigner but resides permanently in the Grand Duchy of Luxembourg.

[33] Article 3 of the law of 20 juin 2001 on extradition (Official Journal of the Grand-Duchy of Luxembourg).
[34] Idem, article 4.
[35] Article 5 of the law of 20 june 2001
[36] Idem, article 7

Another barrier to extradition exists when the facts have been committed in the territory of the Grand Duchy of Luxembourg, even partially[37]. It is an absolute refusal, which defines priority jurisdiction. Extradition only takes place if the State claims jurisdiction, which Luxembourg also claims, whether in a territorial or extraterritorial way.

The extinction of public action constitutes another obstacle[38]. Assessment will be made in relation to the Luxembourg law and in relation to the law of the requesting State. Although, generally Luxembourg law will be used for appreciation, reciprocity will be taken into account. For many years, many jurisdictions (including the French jurisdictions) were not concerned with the law of the requesting State.

Finally, the extradition of an individual is not granted and thus sets a barrier when the offense or fact is punishable by measures contrary to Luxembourg public policy. A frequent question was still the case after the abolition of the death penalty, was it still possible to extradite, but the Council of State refused this, since it is contrary to public order. For example, it must be verified that the person to be extradited does not incur an imputation charge, as is sometimes the case in Saudi Arabia following a theft.

In conclusion, the prohibition of re-extradition should also be addressed. The requesting State may not re-extradite to a third State for previous acts.

[37]Idem, article 8
[38] Idem, article 10

5. Please state and explain any:

a. internal reporting processes

b. external reporting requirements (to markets and regulators), that may arise on the discovery of a possible offense

The Law Of 5 April 1993 On The Financial Sector, as amended, which is applicable to credit institutions and to other professionals in the financial sector, imposes that credit institutions and investment firms 'shall have robust internal governance arrangements, which include a clear organisational structure with well defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks they are or might be exposed to, and adequate internal control mechanisms, including sound administrative and accounting procedures as well as control and security arrangements for information processing systems'. The adequate internal control mechanisms include 'remuneration policies and practices allowing and promoting a sound and effective risk management'. A professional financial service (PFS), with the exception of an investment firm, must provide evidence that it 'has a sound administrative and accounting organisation and adequate internal control procedures.

Such robust internal governance arrangements or sound administrative and accounting organisation and adequate internal control procedures imply that there is a compliance system. A clear compliance policy must be established to guarantee the rights of employees who want to report an offence or fault internally. Luxembourg soft law provides clear rules regarding compliance and internal audits, especially for credit institution and investment firms. The internal governance arrangement shall include, in particular, the implementation of a management information system, incorporating risk factors, as well as internal communication arrangements, including a whistle-blower procedure that enables the staff of the institution to inform those responsible of their legitimate concerns regarding the internal governance of the institution. Such a system shall respect the confidentiality of the persons who raise a concern outside the established reporting lines as well as with the board of directors. The warnings, given in good faith, shall not result in any liability of any sort for the persons who issued them. There is no legal obligation for commercial companies or other legal entities to have a compliance system but it is common to find that companies have corporate governance rules in place. At the end of the day, compliance

procedures revolve around a few obligations for professionals.

5.1. Due diligence with regards to customers

Identification and verification of the client's identity must be done **before** performing any services and / or performing any assignment. It has to be based on relevant documents and reliable sources of information for physical and moral persons. It will be necessary to check whether the persone is a PEP "politically exposed person" and if the customers are the subject of negative opinions on Internet.

In the case of a simple customer, in a bank for example, proof of identity must be required. You will also need to complete an analysis document, assessing the risks represented by the person. In addition, this document should be updated annually. A person can be safe at first and get into illegal trafficking afterwards. The more the person seems to be at risk and the more regularly the check should be done. After verifying their family names, it is necessary to check their country of origin, as well as the countries with which they maintain a financial link (foreign account, origin of funds, import-export). It is sufficient to check if the country is on the list of countries at risk, the only official lists are: the FATF list; the one of the OECD (tax havens); and the one of Transparency International.

The procedure of investigation continues taking into account the:

- Customer risk;
- Country risk;
- Type of business risk;
- Intermediaries risk;
- Corporate structure risk;
- Service providers risk.

The more a client is at risk, the more information, documents and follow-up is required. All documents must be kept at least 5 years after the end of the business relationship. At the end of all searches, once each document has been duly completed, and evidences printed, the person in charge determines the level of risk:

- Low;
- Normal;
- High.

But due diligence does not stop there, indeed, within each establishments only one person has the capacity to refuse or accept a client, to fill in the necessary documents and to declare it suspicious. The otherwise referred to as "The Responsible Person" must also maintain regular contact with clients, ask questions and monitor all transactions, and pay particular attention to the source of funds.

But it is not only the risk of the customer that is assessed, the risk of the business also. In other words: the company itself must be the subject of a risk analysi.

Until 2004, few professions were affected, then the procedure was extended to many professions. The professionals concerned are: banks, financial institutions, all professionals in the financial sector now, investment funds, pension funds, life insurers and insurance brokers, notaries, lawyers, accountants, realtors, auditors enterprises, casinos and gambling, merchants of goods of great value.

5.2 Obligation of adequate internal organisation

A person responsible for this matter must be appointed and his name communicated to the public prosecutor's office at the district court in Luxembourg. This compliance officer remains under the control of the "domain registration authority". In addition, he is the only person authorized to complete the client forms and to decide whether an existing business relationship should stop or not. If the compliance officer decides to stop a business relationship for money laundering, he

must make a suspicious transaction report to the public prosecutor's office. A certain procedure must be followed: the compliance officer is obliged to sign a mission letter before performing the services and / or missions requested by the client. A standard contract must be written when performing assignments and indicate the methods of intervention, the content of the mission and the obligations of the parties to the contract.

In banks, the function is entrusted to a Chief Compliance Officer, in investment firms it is entrusted to an Investment Services Compliance Officer (RCSI) or a Compliance and Internal Control Officer (RCCI) Depending on whether it is a broad investment service provider (transmission and execution of stock exchange orders, custody of securities, investment on your own account, etc.) or a portfolio management company. In large establishments, often with multiple activities, the function is performed by a Compliance Department, with a large number of staff. Finally, in smaller entities, it can be concentrated in the hands of board manager, who can delegate execution to an external provider. In certain cases, this delegation may be encouraged or even imposed by the "Autorité des Marchés Financiers", which sees it as an assurance of professionalism and independence.

Finally, the procedure ends with a duty to inform the court in case of any suspicion. This last criterion is not the least important.

5.3. Obligation to cooperate with the competent authorities

What is a suspicious transaction?

- Client's refusal to provide additional information and documents requested;
- If the information given by the client is confusing;
- If the invoices present an anomaly;
- If the client has financial transactions inconsistent with his professional activities;
- If the source of his funds is inconsistent with his professional activities;
- All transactions in cash are inherently suspicious; Any use of anonymous bank accounts;

- Realization of an undervalued real estate transaction;
- Use of a screen company having its registered office in a tax haven according to the OECD criteria.

In other words, the company is obliged to cooperate fully with the public prosecutor's office and the judicial police mandated for this purpose. In case of suspicion of insider trading or market manipulation, the CSSF must be notified in writing. Professional secrecy of the professional is not opposable to the public prosecutor's office. Finally, the company does not have the right to inform the client or third party of the declaration or investigation in progress.

6. Who are the enforcement authorities for these offences?

6.1 The Financial Action Task Force:

The extension of the obligations related to combatting money laundering and the financing of terrorism to professionals outside the financial sector is fully justified in light of the exposure of many professional sectors to the risks of money laundering as well as the multiplication and complexity of the violations.

In this context, the Financial Action Task Force ("FATF"), an intergovernmental organisation created in 1989 by the G7, developed standards to contribute to the application of legislative, regulatory and operational measures notably with regard to combatting money laundering. Thus, a series of recommendations were worked out in order to offer a coordinated response to threats to the integrity of the financial system and to contribute to harmonising the rules on the international level.

6.2 The Administration Of Domain Registration:

Following the introduction of these recommendations at the national level, Luxembourg´s Administration de l´Enregistrement et des Domaines («AED», Land Registration and Estates Department) has - since the Act of 27 October 2010 amending the Act of 12 November 2004 on

combatting money laundering and the financing of terrorism - notably strengthened the legal framework for combatting money laundering and the financing of terrorism and modifying. The AED has authority to monitor and supervise a number of categories of professionals, namely:

- Real estate brokers established or doing business in Luxembourg;
- Accounting professionals within the meaning of Article 2 section (2) point d) of the Act of 10 June 1999 on the organisation of the accounting profession ;
- Persons who professionally exercise in Luxembourg an activity of tax consulting, economic advising or one of the activities described under a) and b) of point 12 of Article 2, chapter 1 of the Act of 12 November 2004, as amended, and who are not covered by points 1 to 12 of the Act of 12 November 2004, as amended ;
- Persons who professionally exercise in Luxembourg an activity of provider of services to companies and fiduciaries and who are not covered by points 1 to 13 of Article 2, chapter 1 of the Act of 12 November 2004, as amended;
- Natural persons and legal entities trading in goods, only insofar as the payments are made in cash for an amount of at least 15,000 Euros, whether the transaction is performed at one time or in the form of split-up operations that appear to be related.

More precisely, the Anti-Money Laundering Unit of the AED is responsible for introducing and monitoring the efforts of the AED in strengthening the procedures for combatting money laundering and the financing of terrorism. The primary objective is to guide professionals in successfully incorporating and fulfilling the obligations that are incumbent upon them.

Finally, the AED is careful to maintain a good cooperation with the Financial Investigation Unit of the Public Prosecutor´s Office associated with the District Court of Luxembourg, as well as with the associations of the professional sectors concerned and the other supervisory authorities (Insurance Commission, Financial Sector Supervisory Commission).

6.3 The FIU (cellule de renseignement financier du parquet auprès du tribunal d'arrondissement):

The financial intelligence unit ("FIU") of the public prosecutor's office at the district court in Luxembourg shall bear the offense. The FIU / Procurator's website includes the procedure for making a suspicious transaction declaration and the files to be sent.

The function of the FIU is to:

- receive reports of suspicion of money laundering and / or terrorism financing from professionals subject to the amended law of 12 November 2004 relating to the fight against money laundering and the financing of terrorism (AML / CFT) or carried out In accordance with Article 23 (3) of the Code of Criminal Procedure;
- analyse them;
- if a primary offense is retained, to disseminate information to national prosecution authorities or to foreign counterparts.

As part of the analysis of suspicious transaction reports, the FIU cooperates with its foreign counterparts in accordance with the principles developed by the Egmont Group and, for cooperation at European level, in accordance with the Council Decision 2000/642 / JHA of 17 October 2000.

The FIU receives and analyses reports of suspicious transactions made under the Act of 12 November 2004 on the fight against money laundering and the financing of terrorism and publishes periodic reports providing an overall feedback and including statistics, typologies and indications on its activities.

The Financial Sector Supervisory Commission

The CSSF is responsible for the prudential supervision of credit institutions, professionals of the financial sector, alternative investment fund managers, undertakings for collective investment, pension funds, SICARs, authorised securitisation undertakings, fiduciary-representatives having

dealings with securitisation undertakings, regulated markets and their operators, multilateral trading facilities, payment institutions and electronic money institutions. It also supervises the securities markets, including their operators.

The CSSF is in charge of ensuring compliance with professional obligations as regards the fight against money laundering and terrorist financing by all the persons subject to its supervision.

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

Effective prudential supervision of credit institutions is a major asset of any financial center[39]. Prudential supervision consists of subjecting all financial institutions to the supervision of a supervisory authority in order to maintain a healthy financial center.

The CCSF has been active since 1 January 1999, taking over certain powers formerly exercised by the Luxembourg Monetary Institute (IML), which became the Central Bank of Luxembourg (BCL) on 1 June 1998, as well as the responsibilities of the former Commissariat on the Exchanges.

The **objectives** of the CSSF are to:

- Promote a prudent business policy that meets regulatory requirements;
- Protect the financial stability of monitored enterprises and the financial sector as a whole;
- Ensure the quality of the organisation and internal control systems;
- Strengthen the quality of risk management.

[39] Guy Ludovissy, *la surveillance du secteur financier*, p.17.

Section 2 of the Law of 23 December 1998 Establishing a Financial Sector Supervisory Commission[40] delineates the mission and powers of the Commission: "*The Commission is the competent authority for the prudential supervision of credit institutions, FSPs within the meaning of the amended Law of 4 April 1993 on the financial sector, undertakings for collective investment, pension funds in the form of Sepcav or assep, accredited securitization bodies, fiduciary representatives acting with a securitization body, SICARs and payment institutions within the meaning of the law of 10 November 2009 on payment services*".

The Commission is the competent authority for the supervision of the markets for financial instruments, including their operators.

The Commission is the competent authority to ensure compliance with professional obligations in the fight against money laundering and the financing of terrorism by all persons subject to its supervision, without prejudice to Article 5 of the Law of 12 November 2004 on combating money laundering and the financing of terrorism.

It shall also ensure that natural or legal persons who are known to maintain, directly or indirectly, relations other than strictly professional with the organised crime community, may take control, directly or indirectly, of the persons subject to its supervision only Either as beneficial owners, by acquiring significant or controlling participants, by holding a management position or otherwise. Part of the implementation of this mission is an assessment of the suitability and good repute of executives, including their competence and integrity. To this end, the CSSF may request the opinion of the State Prosecutor of the Luxembourg District Court and the Grand Ducal Police.

In case of non-compliance, the CSSF may inflict companies fines from 250 to 250 000 €, prohibited them to carry out any activity for a certain amount of time, emit a warning, or a professional prohibition, temporary or permanent, on the directors or officers of the bank.

[40] Code of the financial place, first edition 2011

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self incrimination)?

On the international level, as well as on the internal level, deontological rules were elaborated by professionals being part of associations, like l'"*Association des Banques et Banquiers Luxembourg*" (hereafter ABBL). Several professional obligations deriving from the legislation on the financial sector and more precisely from "*circulaires*" established by the authority of surveillance of the financial sector, "*la Commission de surveillance du secteur financier*" (hereafter CSSF).

Article 42 of the Law On The Financial Sector of 5th of April 1993 states that: *The CSSF shall be the competent authority responsible for the supervision of credit institutions and "PFS" and, where applicable financial holding companies and mixed financial holding companies" (…);*

The CSSF is responsible for the cooperation and exchange of information with other authorities, bodies and persons within the limits, under the conditions and according to the terms laid down in this law " and in Regulation (EU) No 575/2013". It shall be the Luxembourg contact point for the purposes of Directive 2004/39/EC.

The CSSF shall inform the competent authorities of the other Member States responsible for the supervision of credit institutions and investment firms that it is designated to receive requests for exchange of information or cooperation pursuant to this Law "and Regulation (EU) No 575/2013".

The (un)availability of the privilege against self-incrimination and the right to silence can substantially impact defence strategies available to corporations. If they cannot rely on these rights when confronted with a demand for incriminating evidence by prosecuting authorities, the choices available to corporations are limited. Corporations can have good reasons for deciding to cooperate with prosecuting authorities in an effort to obtain the most favourable outcome, for example because they want to avoid the stigma that can come with criminal conviction. They are likely to cooperate, for example by handing over evidence of any wrongdoing. Conversely, a corporation may decide that it does not want to cooperate with the prosecuting authorities. In such cases, the right to silence and the privilege against self-incrimination are particularly relevant.

The question about whether a corporation can rely on the privilege against self-incrimination and the right to silence has been answered differently in different jurisdictions. The variety of approaches can be particularly challenging in the context of cross-border corporate wrongdoing,

such as bribery of foreign public officials.[41]

*Professional rules contained in the **law of the 5th of April 1993***[42]

Two Articles are here relevant concerning our question:

- Article 40 concerning the obligation to cooperate with the authorities, which states that : "*Credit institutions and "PFS" shall be required to provide the fullest possible response to, and cooperation with, any lawful demand which may be made to them by the authorities responsible for applying the law in the exercise by those authorities of their powers".*
- Article 41 concerning the obligation of professional secrecy states that : " *Natural and legal persons, subject to the prudential supervision of the CSSF pursuant to this Law, as well as all administrators, members of managing and supervisory bodies, directors, employees and other persons at the service of these natural and legal persons or natural and legal persons having been granted authorisation pursuant to this Law and in liquidation and all the persons designated, employed or mandated for any function in the framework of a liquidation procedure of such persons, shall be required to keep secret any information confided to them in the context of their professional activities or mandate. Disclosure of such information shall be punishable by the penalties laid down in Article 458 of the Penal Code."*

The obligation to maintain secrecy shall cease to exist where disclosure of information is authorised or required by or pursuant to any legislative provision, even where the provision in question predates this Law.

The obligation to maintain secrecy shall not exist in relation to the national and foreign authorities responsible for prudential supervision of the financial sector where those authorities are acting in the exercise of their legal powers for the purposes of such supervision and the information communicated is covered by the rules of professional secrecy governing the supervisory authority

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41 http://oecdinsights.org/2016/11/25/a-corporate-right-to-silence-and-privilege-against-self-incrimination/, accessed on 4 March 2017.

42 https://www.cssf.lu/en/supervision/pfs/inv-firm/regulation/laws-regulations-and-other-texts/, accessed on 1 March 2017.

by which it is received. The transmission of the requisite information to a foreign authority with a view to prudential supervision shall be effected through the intermediary of the parent undertaking, shareholder or partner involved in the supervision in question.

The obligation to maintain secrecy shall not exist in relation to shareholders or partners whose status or capacity is a precondition for authorisation of the institution in question, in so far as the information communicated to such shareholders or partners is necessary for the proper and prudent management of the institution and does not fall directly within the ambit of the obligations owed by that institution to any customer other than a professional of the financial sector.

"By way of derogation from the preceding subparagraph, credit institutions and PFS forming part of a financial group shall guarantee to the group's internal control bodies, where necessary, access to information concerning specific business relations, to the extent that this is needed for the global management of legal risks and risks to their reputation in connection with money laundering or the financing of terrorism within the meaning of the laws of Luxembourg."

"The obligation to secrecy does not cover credit institutions and support PFS where the information communicated to those professionals is provided under an agreement for the provision of services."

The law of the 5th April 1993 enlarges the professional secrecy to all the professions of the financial sector and not only to the banks.[43]

8.1 Update on the concept of professional secrecy in the banking area

8.1.1 Sphere of the necessary confidants

If it has always been conceded that the banker has a duty of discretion towards third parties concerning the business of his customers – a duty sanctioned at tort-, questions arise when

[43] Alex Schmitt et Elisbeth Omes, *La responsabilité du banquier en droit bancaire privé luxembourgeois,* p. 63.

deciding if the Penal Code measures governing the professional secrecy of lawyers, doctors, and other necessary confidants are applicable to bankers. In other words, it is a question of determining if the revelations made by the banker can give rise to the opening of criminal proceedings, and if the banker was to be classified among the professions subject to professional secrecy.

Bankers did not formally appear among the professionals protected until 1993. They were then integrated to the sphere of the necessary confidants, namely: " the people having been the object of a nomination with public character, exercising officially a profession in which the law, in a general interest and of public order, gave them a professional and secret character ". For bankers to be classified among the necessary confidants bestows upon him (her) simultaneously a right and an obligation:

- A right for the secret intended to protect the relationship of trust between the agent of the secret and his (her) customers; this relationship of trust being considered as essential for the social order;
- A legal obligation to respect a measure of the public order punished penally but also contractual according to what both parties have set out between them.

8.2 The professional secrecy as public order

When a customer enters into business with a bank, despite the contractual aspect of the relation, the professional secrecy remains subject to public order (public policy).

The aspects of the professional secrecy will have to be agreed by the customer based on the following criteria:

- The consent is emitted in the exclusive interest of the customer;
- The consent of the customer has been enlightened by disclosure of relevant information;
- The consent should also specify the addressee of the information;
- The consent should have to specify the duration during which it will prevail.

8.3 Legal exceptions concerning the professional secrecy in the banking field

Although the banker has the obligation to keep the information confidential within the framework of his (her) professional activity, the professional secrecy can be however set aside in a growing number of scenarios, including:

- Request of information on behalf of the national or foreign authorities in charge of the surveillance of the financial sector,
- Demand emanating from the Luxemburgish judicial authorities (e.g. « ordonnance de perquisition »),
- Demand of international judicial cooperation.

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

The Constitution of Luxembourg provides in its Article 11 that « the State guarantees the protection of privacy, but for the exceptions fixed by law »[44].

A National Commission for Data Protection (CNPD), an independent authority, was established in that regard by the Act of 2 August 2002 on the Protection Of Individuals With Regard To The Processing Of Personal Data, Fundamental Rights And Freedoms Of Natural Persons, Including Their Private Lives. Its mission is also to ensure compliance with the provisions of the amended law of 30 May 2005 on the protection of privacy in the electronic communications sector.

The law of 2 August 2002, which transposes a European directive on data protection[45] aims to protect the privacy of natural persons (and even the interests of legal entities) with regard to the processing of their personal data by third parties.

[44] www.gouvernement.lu, accessed on 7 March 2017.
[45] Directive 95/46/CE du 24 octobre 1995

Administrations, businesses and other professionals, associations and other bodies that collect, record, use and transmit personal data can not do so without restrictions.

They must inform the person concerned and communicate to him the intended purpose of what the law calls « the processing of personal data ».

This treatment must be limited to what is necessary and proportionate to the aims initially set. Each use of the data must therefore be carried out in compliance with the strict rules, which are monitored by the National Commission for Data Protection[46].

In the interests of transparency, any file containing information relating to persons must also be declared to the supervisory authority or authorized by it (depending on the type of data or processing) before it can be exploited.

The legislation on the protection of personal data is not restricted to computer files, but concerns any type of medium (paper files, audio and video recordings).

The protection of privacy is a fundamental right, as is the inviolability of the home, secrecy of correspondence, freedom of opinion and expression.

The same principles apply in all 25 Member States of the European Union and beyond (Switzerland, Norway, Liechtenstein, Island).

The CNPD has created 10 commands for the protection of personal data.
The person who processes data concerning other persons must respect the following principles:

1. The principle of legitimacy:

[46] www.cnpd.lu, accessed on 6 March 2017

The processing of personal data is only possible if there is a sufficiently legitimate reason to justify it. Anyone who wishes to process your data must, before you can do so, ask for your agreement.

2. The principle of purpose:

The use of your personal data (including images and sounds) must be strictly limited to an explicitly determined purpose.

3. The principles of necessity and proportionality:

The principle of proportionality implies that the treatment must be limited to your data for which there is a direct relationship with the initial purpose of the treatment.

4. The principle of accuracy of data:

Since inaccurate or incomplete information may affect the person to whom it relates, every effort must be made to ensure that the data processed is correct and current. If this is not the case, the personal data must be rectified or erased.

5. The principle of loyalty:

The collection, registration, use and transmission of your personal data must be done in good faith, and not without your knowledge.

6. The principle of security and confidentiality:

Your personal data must be treated confidentially and stored in safe places and on material.

7. The principle of transparency:

The law guarantees you the necessary information concerning the treatments to which data concerning you are subjected and ensures the possibility of a personal control.

8. Certain particularly sensitive data are subject to further protection:

The processing of information about you that reveals your opinions and beliefs or that is relevant to your health and sexual life, including your genetic data, is prohibited, except for a few exceptions listed in a restrictive manner by law.

9. The surveillance (audio, video, data) of identifiable persons is strictly limited by law:

An authorization from the National Commission for Data Protection is necessary before technical means can be used to monitor people, in particular by camera, video, computer plotting, etc. The processing of your personal data collected is only possible in specific cases, listed by law.

10. The use of your data for the purpose of advertising or direct marketing is subject to your express authorization:

You may at any time prohibit the use of your personal data for commercial purposes.

Data protection is now one of the fundamental values enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union. At the EU level, the Commission proposed in January 2012 an overall update of the regulatory framework for the protection of personal data, currently governed by Directive 1995/46 / EC on the protection with regard to the processing of personal data and the free movement of such data. This package included two instruments. **The Media and Communications Service** included the proposal for a regulation, which will establish the general regime in this area, and a proposal for a directive, so as to regulate respect for data protection in exchanges between police and judicial authorities. On 15 December 2015, the Luxembourg Presidency of the Council of the European Union reached an informal agreement in trilogues with the European Parliament on the Data Protection Package, which will define the new EU rules on privacy in the EU, The digital age. As from 25 May 2018, the new rules will be have to be made applicable in all EU Member States including Luxembourg and all actors active in the territory. The new regulation aims to give citizens more control over their personal data, increase corporate accountability while reducing administrative burdens, and strengthen the role of data protection authorities such as the CNPD.

10. If relevant, please set out information on the following:

10.1 Defences to the offences listed in question 2;

There are no exceptions to the liability principle under corruption regulations, except regarding hospitality payments to government officials.

Since there are no actual exceptions to the liability principle under corruption regulations, no other defence is available to defendants. However, mitigating circumstances can be argued, depending on the case at hand.

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement); and

In 2015, Luxembourg has enacted a law on a criminal settlement procedure known as a judgment upon consent.[47] This procedure, which mainly aims at reducing the workload of the judicial authorities dealing with criminal matters, allows for an agreement between the public prosecutor and the person suspected of having committed an offence which on the one hand establishes an admission of guilt and on the other hand determines the criminal sanctions to be applied, subject however to the review and approval of the criminal courts.

Such an agreement, if approved, always leads to a conviction: out-of-court settlements are not possible and such conviction will be entered in such person's criminal record. Whether or not this new regime will prove a success remains to be seen, and will most likely depend on how it will be applied in practice by the public prosecutor's office and the criminal courts. [48]

These new provisions do not provide for any type of out-of-court settlement. In all instances, the prosecution agreement will be subject to the review and approval of the criminal courts through a

[47] Articles 563 to 578 of the Code of Criminal Procedure. The law has been published in the Mémorial A, 2015, 33)

[48] http://www.arendt.com/publications/documents/newsflash/2015.03.26%20-%20luxembourg%20newsflash%20-%20jugement%20upon%20consent.pdf, accessed on 3 March 2017.

judgment rendered following an adversarial hearing. This hearing involves all the parties that can or must intervene in ordinary criminal proceedings and largely follows the line of such proceedings. The judgement approving (or disapproving) the prosecution agreement is thus rendered by an impartial tribunal that has in no way been involved in the negotiation of such agreement. It is important to note that this new regime can only be applied to misdemeanours and crimes which, due to mitigating factors, are procedurally treated as felonies and where the maximum prison term which can be applied does not exceed five years. Minor offences are excluded.

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

The judgment upon consent procedure allows for a prosecution agreement to be negotiated between the public prosecutor and the prosecuted person. This agreement specifies the factual matters on which the relevant criminal action is based and determines the sanctions to be applied. On the one hand, for the prosecuted person, it constitutes self-incrimination of the charged offences as set out in the agreement. On the other hand, it limits the prosecution to those soles offences specified as such in the agreement.

That consensual approach as to the charged offences, together with an agreement as to the (reduced) sentence to be applied, resulting in a common position adopted by the public prosecutor and the defendant, largely eliminates the need for lengthy and complex investigations (often taking many months, if not years) as well as court hearings which can sometimes stretch over weeks.

The practice is relatively new and therefore not as common as in Common Law countries.

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance).

Normally, a director of a Luxembourg company should not be exposed to personal liability, if he or she exercises his considerable powers carefully and responsibly. The duties and liabilities can be

summarised in terms of compliance and awareness- compliance with legal requirements and the company's articles and awareness of the extent and limitations to the director's powers, as well as awareness of what is going on in the company. Directors have a duty to keep themselves informed, a right and duty to ask for and receive information, hence they are in position to counter the allegation that they did not know what they could reasonably be expected to know.

Personal liability of directors remains an exception rather than the norm, provided they act reasonably, in good faith, with reasonable diligence and skill, within the scope of their powers, and in compliance with their duties and responsibilities. Directors can help to minimise the risk of personal liability by following certain principles, including:

1. Due diligence and being informed
2. Due process in the board and minuting of decisions and positions taken.
3. Discharge from shareholders on an (at least) annual basis.
4. Independence

Professional liability covers the company's legal liability towards third parties, insuring it against any claim made for financial loss resulting from negligence, error or omission on the part of one of directors, company officers or staff members.[49]

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

With a new proposal of amendment for the 4th AMLD before it reached its implementation deadline[50], it seems the EU is trying to speed up the pace in the fight against money laundering

[49] http://delano.lu/d/detail/news/risks-directors-luxembourg-companies/114124, accessed on 4 March 2017.
[50] Proposal for a Directive of the European Parliament and of the Council Amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC. Available at: http://ec.europa.eu/justice/criminal/document/files/aml-directive_en.pdf. Last access on 3/6/2017.

and corruption, meaning new changes in national law are to be expected in the upcoming months. It aims at moving the deadline of implementation from 27 June to 1 January 2017 (however, the vote of the amendment had to be postponed). More substantially, the Directives addresses risks posed by virtual currencies. Virtual currency exchange platforms (offering exchange services between virtual and real currencies) and wallet providers that allow the public to have access to virtual currencies, join the list of « obliged entities » under the AMLD Directive. Member States are to set up centralise information systems on banking/payment acconts in order to facilitate Financial Intelligence Units' (« FIUs ») access to the identity of holders of bank and payment accounts, Member States may decide to establish a centralised bank and payment account register or may resort to other centralised mechanisms (e.g data retrieval systems). EU FIUs should be able to request any information in the context of its functions from any obliged entity (e.g without preliminary suspicious activity report).

A distinction is established between structures engaged in profit making activities (subject to public disclosure) and those set for other purposes (use of family assets, charitable aims) for which the legitimate interest condition for accessing beneficial owner information would still apply. In the long run, EU National Central Registers shall work in interconnection.

Finally, the proposal also takes into account Directive 2011/16/EU on administrative cooperation in the field of taxation (« Common Reporting Standard (CRS) Directive »). The threshold triggering beneficial owner identification (required to report to central register) is lowered from 25% to 10% for entities presenting a specific risl of money laundering or tax avoidance (Passive Non Financial Entities under Directive 2011/16/EU, i.e intermediary structures not creating income on their own).

Finally, at the national level, the consequences of the Luxleaks appeal decision – still pending- remain unclear, major national – and possibly international – repercussions are expected for Luxembourg businesses and businesses registered in Luxembourg more generally.

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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering and sanctions legislation within your jurisdiction.

There is no one instrument that encapsulates all legislation regulating the crimes of bribery and corruption; however, the prime source is the Criminal Code. In terms of Article 112 of the said Code, if someone receives 'moneys or effects' which aren't allowed by law (if it exceeds the amount allowed or is received before it is due in terms of the law), he or she is committing an offence and is sanctioned with imprisonment, a term of between three months and one year. Then, Article 113 deals with extortion, by increasing the term of punishment if there are threats or abuse of authority involved.

Furthermore, Article 115 specifically deals with the offence of bribery, stating that if a public officer 'requests, receives or accepts' money or any valuables as a reward or through an offer that he or she is not entitled to, he or she is liable for punishment. The term of punishment is determined in accordance to the nature of the offence committed. The Maltese legislator here sought to specifically regulate bribery in an employment scenario.

Interestingly, Article 118 appertains to bribery of members of the House of Representatives. Similar to the above, it reads that if any member of the House 'requests, receives or accepts', in his favour or in the favour of someone else, money or other valuables as a reward or to satisfy a promise or offer, such member is liable to imprisonment (a term of between one year and eight years). This offence arises if the aim of the reward, promise or offer, is that of affecting the conduct of the person in his capacity as a member of the House.

Moreover, fraud is covered under both sub-title III of Title IX of Book First Part II of the Maltese Criminal Code and importantly under The Prevention of Financial Markets Abuse Act. Misappropriation arises when someone converts 'anything which has been entrusted or delivered to him under a title which implies an obligation to return such thing or to make use thereof for a specific purpose' in terms of Article 293 of the Criminal Code.

The Prevention of Financial Markets Abuse Act seeks to minimize the offence of fraud in the financial markets. When an individual or a body of individuals commit market abuse offences,

others suffer an unlawful disadvantage. This definitely puts the integrity of the financial markets at risk and investors start losing confidence in it. This Act deals with 'insider dealing', which refers to when someone uses inside information or attempts to do so in order to benefit in some way, or for the benefit of others. The said information can relate to private financial instruments that are not commodity derivatives or to derivatives on commodities. It may also be information on certain individuals who are charged with the executing certain orders connected with financial instruments.

Additionally, market abuse may arise through market manipulation, which may occur in many ways. The most popular manner is the distortion of prices and the spreading of deceptive information on financial instruments. For instance, price positioning, misleading transaction and the dissemination of false information all fall under the ambit of the offence of market manipulation.

The issuers of financial instruments and those responsible for arranging transactions must abide to the rules listed by the Act to ensure that there is a proper flow of information. This allows the MFSA to easily access such information.

The Internal Audit and Investigations Department (IAID) then seeks to provide the Maltese Government with an independent body which holds an investigative function to examine and recommend on government activities as a service to Government. This is in line with Internal Audit and Financial Investigations Act. Such functions include the carrying out of internal audits and financial investigations in order to protect the Government's financial interests.

On the other hand, money laundering is the flow of illicit money that harms the financial sector's integrity and stability. It is also seen as a threat to the Union's internal market that hinders growth on an international level. Malta has become an international hub for gaming companies and has acquired a reputation as an ideal centre for financial services. This being said, the Maltese legislator has sought to protect such role by introducing anti-money laundering legislation in its legal system. Anti-money laundering was initially introduced through the amendments made to Article 22(1C) of the Dangerous Drug Ordinance, in February 1994. This added the offence of money laundering

related to the proceeds of drug-related offences. In September of the same year, the Prevention of Money Laundering Act was introduced, with the aim of providing a proper legal framework for the prevention, investigation and prosecution of the offence of money laundering.

In 2005, a number of provisions were added under sub-title IV A of the Maltese Criminal Code. These dealt with the acts of terrorism, the funding thereof and other ancillary offences. The Criminal Code provides for the legal framework, while the Prevention of Money Laundering Act provides the substantive procedures. Individuals must adopt the provisions found here to be able to prevent their services becoming a subject of a criminal offence.

Furthermore, through the introduction of the Legal Notice 176 of 2005, the term 'criminal activity' now broadened its definition in a way that encapsulates money laundering as a criminal offence (thus, not being restricted to crimes such as fraud and theft). This being said, the handling of profits resulting from criminal activity leads to the offence of money laundering.

The recent publication of the Panama Papers has further demonstrated the shortcomings of the current standards combating money laundering on an international level. Even though the Fourth Directive on Money Laundering (on the European Union level) has improved the situation, it still leaves ambit room for doubt on the extent of the ameliorations. For instance, information is only required to be centralised for those trusts that produce tax consequences. Additionally, only the government and law-enforcement bodies have access to such information.

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties

2.1 Bribery and Corruption

The offence of bribery is referred to in Article 115 of the Criminal Code, Chapter 9 of the Laws of Malta, as the request, receipt or acceptance of any reward, promise or offer of any reward being either in money, any other valuable consideration, or any other advantage to which he is not entitled. Within the wording of this Article, such an offence only relates to public officers or

servants who commit such a crime. Article 121D of the Criminal Code however, asserts that corporate liability shall be found for offences under Sub-title IV, relating to the abuse of public authority, including unlawful exaction, extortion and bribery. Thus, a body corporate may also be found liable for the offence of bribery by means of this provision, provided that the cumulative conditions set out are satisfied.

Firstly, the offence is to be committed by a person who, at the time of the offence, is either a director, manager, secretary or other principal officer, or any other person having the power of representation or authority to take decisions on behalf of the company. Secondly, the offence must necessarily be committed for the benefit, in part or in whole, of that body corporate and not for any personally derived benefit.

Where these requisites are fulfilled, such person shall 'be deemed to be vested with the legal representation of the same body corporate which shall be liable to the payment of a fine (multa) of not less than EUR 20,000 and not more than EUR 2,000,000'. This fine may be recovered as a civil debt, and the sentence of the Court shall constitute an executive title for all intents and purposes of the Code of Organization and Civil Procedure. The Article also states that 'where legal representation no longer vests in the said person, ... legal representation shall vest in the person occupying the office in his stead' or any of the other persons referred to as having the power of representation of the body corporate. Thus, even where such person has vacated his position within the company following the commission of the offence, the company's liability for the crime vests in that person occupying such title.

In addition, Article 121E of the Criminal Code lays down that any person guilty of any of the offences under Sub-title IV, referred to above, are also subject mutatis mutandis to the provisions of Article 248E(4) of the same Code. This article provides that a person shall be found guilty of an offence where i) at the time of the offence they are an 'employee or otherwise in the service of a body corporate', ii) the offence is committed 'for the benefit, in part or in whole, of that body corporate', and iii) the offence was rendered possible due to the 'lack of supervision or control' by any of the persons referred under Article 121D. Therefore, where an act of bribery is committed by an employee or other person who works for such company, has derived a benefit for the

company, and has succeeded in committing such act by reason of a lack of proper supervision or control, the employee or other person is 'deemed to be vested with the legal representation of the same body corporate' and shall be held liable to the payment of a fine of not less than EUR 10,000, but which shall not exceed EUR 2,000,000. Therefore, where an employee is guilty of bribery, although the fine has a lower established minimum, the company may nonetheless be subject to an equally high maximum threshold as found in Article 121D, relating to senior positions within the company.

Article 6 of the Permanent Commission Against Corruption Act provides a list of the corrupt practices considered as such under the same Act, which refer to the acts or omissions in the Criminal Code under Articles 112 to 118, 120 and 121, 124, 126 and 138 of Sub-title IV referred to above, as well as Articles 41 and 41 of the Criminal Code which concern attempted crimes and complicity in crimes, where they are conducted by either i) a public officer or ii) a person who is, has been entrusted, or has functions relating to the administrations or a partnership or other body, 'in which the Government of Malta, or any one or more of any authority of the Government, a local government authority, a statutory body, or a partnership' has a controlling interest or effective control. The offence of bribery referred to in Article 115 of the Criminal Code therefore falls within the ambit of corrupt practices under this Act where the company is of interest or controlled by another body, may be subject to the investigative scrutiny of the Commission set up by the same Act, as is part of their function.

Under the Criminal Code, Article 121 refers to embracery and corruption of other persons by stating that the provisions of Sub-title IV are to apply to persons entrusted with, or have functions relating to, the administration of a statutory or other body corporate, or to a person who is employed with the company enjoying a distinct legal personality. Article 121(3) provides that in relation to the offence of bribery, the provisions shall apply to any employee, or other person, working for or on behalf of a natural or legal person in the private sector, who knowingly conducts himself in any manner provided in the relevant articles, either directly or indirectly.

2.2 Fraud

Fraud is tackled under Sub-Title III of the Criminal Code which firstly makes reference to misappropriation. This refers to the act of a person who is entrusted with a thing 'under a title which implies an obligation to return such thing or to make use thereof for a specific purpose' which results in the conversion of such thing to his own, or another person's, personal benefit. Article 310A of the Criminal Code, Chapter 9 of the Laws of Malta, provides that the provisions of Article 121D, as well as Articles 121C, 248E(4) and 328K, are to also apply to Sub-title III. In regard to Article 121D, this means that where a person holding title of director, manager or secretary, or any person acting in their stead, personally benefits from a thing delivered or entrusted to him by virtue of such title, or benefits any other person, corporate liability may arise upon the complaint of the injured party. Where such thing is entrusted or delivered to such person 'by reason of his profession, trade, business, management, office or service or in consequence of a necessary deposit', the term of imprisonment is aggravated. Where a person holding a senior position within a company commits fraud, on which corporate liability is found by virtue of 121D, it would thus be very difficult to prove that the offence is not aggravated on account of their trade, business, management or office which they hold. With regard to Article 348E(4), this means that legal representation of the body corporate shall be deemed to be vested in the employee or other low level positions as referred to in section 2.1.

2.3 Potential Penalties for Fraud

A person found guilty of misappropriation shall be liable to a term of imprisonment of three months to a maximum eighteen months. However, where the offence is deemed to be aggravated 'by reason of his profession, trade, business, management, office or service or in consequence of a necessary deposit', criminal proceedings are to be instituted ex officio and the punishment is extended to a term of imprisonment of seven months to a maximum of two years.

In addition, Article 328K, applicable by reason of 310A, provides that, without prejudice to any other penalties imposed, where an offence is committed by a body corporate, … the Court may, at the request of the prosecution, order:

a. the suspension or cancellation of any licence, permit or other authority to engage in any trade, business or other commercial activity;
b. the temporary or permanent closure of any establishment which may have been used for the commission of the offence;
c. the compulsory winding up of the body corporate.

2.4 Money Laundering

Article 2 of the Prevention of Money Laundering Act, Chapter 373 of the Laws of Malta, provides a list of interpretation for certain terms, including 'money laundering', which refers to the conversion or transfer, the concealment, or retention of property, knowingly or suspecting that such property is derived from criminal activity, or assisting any person involved or concerned in criminal activity. The subsequent paragraphs also encompass any attempts of the foregoing, as well as being an accomplice to such crimes, as governed by Article 41 and Article 42 of the Criminal Code, Chapter 9 of the Laws of Malta, respectively.

In turn, property is to be interpreted as 'property and assets of every kind, nature and description, whether movable or immovable, whether corporeal or incorporeal, tangible or intangible, legal documents or instruments evidencing title to, or interest in, such property or assets'. This is to include currency, bills, securities, bonds, negotiable instruments or any instrument capable of being negotiable, cash or currency deposits or accounts with any bank, credit or other institution which carries or has carried on business in Malta, cash or items of value and land or any interest therein. Article 3(2) of the Prevention of Money Laundering Act, Chapter 373 of the Laws of Malta, establishes that where an act of money laundering is committed by a body of persons, being corporate or unincorporate, 'every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such body or association, or was purporting to act in any such capacity, shall be guilty of that offence'.

2.5 Potential Penalties for Money Laundering

Article 3(1) of the Prevention of Money Laundering Act provides that any person found guilty for a money laundering offence shall be liable to a fine (multa) not exceeding EUR 2,500,000 or to

imprisonment for a period not exceeding eighteen years, or to both. The law also sets difference in the parameters of the penalties awarded depending on the Court before which a person brought. A person convicted by the Criminal Court may be subject to a minimum prison term of four years and/or a minimum fine of EUR 50,000. Alternatively, a person convicted before the Court of Magistrates, whether in Malta or Gozo, may be subject to a minimum prison term of one year but not exceeding nine. The fine, in this instance, is also lessened, bearing a minimum of EUR 20,000 and a maximum of EUR 250,000.

By way of Legal Notice 180 of 2008 Maltese law implemented Council Directive 2005/60/EC by means of a subsidiary legislative instrument titled the Prevention of Money Laundering and Funding of Terrorism Regulations. This Act sets out the obligations and procedures that subject persons are required to fulfil and implement for the purposes of preventing and prohibiting money laundering and terrorist financing and contains a similar provision to that of the Prevention of Money Laundering Act with regard to such offences committed by a body corporate. However, this Act also provides that where the offence is committed by a body corporate or other person for the benefit of a body corporate as a result of 'the lack of supervision or control that should have been exercised' an administrative penalty shall be awarded to the body corporate, being not less than EUR 1,000 and not more than EUR 46,500, either as a one-time fixed penalty or as a daily cumulative penalty.

The Prevention of Financial Market Abuse Act refers to market manipulation which may refer to one of four activities. Firstly, Article 8(4)(a) speaks of the 'entering into a transaction, placing an order to trade or any other behaviour which gives false or misleading signals ... or secures the prices ... at an abnormal or artificial level'. Similarly, Article 8(4)(b) speaks of 'entering into a transaction, placing an order to trade or any other activity or behaviour which affects the price ... which employs a fictitious device or any other form of deception or contrivance'. Alternately, Art. 8(4)(c) and Article 8(4)(d) criminalise the transmission of false or misleading information, which in the case of the former relates to 'signals as to the supply, demand, price or related spot commodity contract or other financial instrument at an abnormal or artificial level, from which a benefit or advantage is derived by the person disseminating such information, or in the latter relates to' and 'manipulating the calculation of a benchmark.'

The Act also criminalises any attempts of the acts mentioned above, as well as the acts of inciting, aiding and abetting in their regard. The Act also provides investigative powers to the competent authority in order to promote compliance, and ensure that breaches are detected. These include the power to demand access to documents and other information, and the power to conduct inspections. The Competent Authority may also, where it believes the provisions of the act have been breached, refer the matter for criminal investigation by the Attorney General with an attachment order.

Any legal person found guilty of an infringement of the prohibited acts or fails to comply with the obligations imposed by the competent authority with regard to cooperation and providing correct information is 'guilty of an offence' and 'liable on conviction to a fine (multa) ranging from EUR 5,000 to EUR 15,000,000 or alternately up to three times the profit made or loss avoided by virtue of the offence, whichever is the greater amount'. Alternatively, the legal person may be liable to a series of restrictive legal measures, namely:

- exclusion from entitlement to public benefits or aid;
- temporary or permanent disqualification from the practice of commercial activities;
- placing under judicial supervision;
- judicial winding-up;
- temporary or permanent closure of establishments which have been used for committing the offence;
- or to a combination of any or all the above measures in conjunction with the criminal fine.

Article 24(5)(c) stipulates that corporate entities, or rather, legal persons, may be liable for infringements related to this Act when they are, firstly, committed for the benefit of the company, either individually or as part of an organ of the company, and secondly that such act is committed by a person having a 'leading position'. In the latter scenario we refer to persons who either have the power of representation of the company, the authority to take decisions on its behalf, or the authority to exercise control within it. Article 24(5)(d) further provides that a legal person may also be held liable if it transpires that those persons having the power of representation, decision

making, and control have failed to adequately supervise, and ultimately prevent, the prohibited use of inside information, unfair disclosure, and market manipulation.

2.6 General

As a general provision, Article 23B of the Criminal Code states that:
"The court shall ... in addition to any penalty to which a body corporate may become liable under the provisions of article 121D, order the forfeiture in favour of the Government of the proceeds of the offence or of such property the value of which corresponds to [that] value of such proceeds whether such proceeds have been received ... by the body corporate."

Under this same Article, property refers to any property, whether corporeal or incorporeal, movable or immovable, tangible or intangible, whether situated in Malta or outside of its jurisdiction and which is or may fall under the control of a body corporate. All such property shall be deemed to be a result of the relevant offence and subsequently be liable to forfeiture and confiscation, unless the opposite is proved.

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK)

According to the identification doctrine, which originates from the UK, acts taken by certain employees are considered to be taken by the company itself. Interestingly, Article 13 of the Interpretation Act 1975, states that any offence against a provision in any Act is committed by a body of persons, any director or similar officer, is deemed guilty of the said offence. Such individual will only be able to escape liability if he successfully proves that he had no knowledge of the offence and that had acted diligently to ensure the prevention of such commission.

The notion of corporate criminal liability was initially introduced in the Maltese Criminal Code through Article 29 of Act III of 2002, which amended article 121 of the said Code. As a result, as it stands today, Article 121D of the Criminal Code deals with corporate liability. It states that an

offence that is committed by someone who holds the position of a director of company, or who has the power of representation and the authority to take decisions on behalf of such company, for the benefit of that company, the said individual is liable to a fine of up to EUR 2,000,000. Therefore, this provision creates corporate criminal liability, and thus follows the elements of the identification doctrine above.

Since in terms of Article 2 of the Companies Act, a body corporate is 'an entity having a legal personality distinct from that of its members', in order for there to be a conviction there must firstly be the conviction of a natural person. Only then can a legal person incur liability.

Any individual who occupies the position of a director, regardless of the name he is carrying out the functions formally vested with a directorship. Thus, the Companies Act suggests that all those who exercise managerial functions and has control over the company are directors. Moreover, since directors are mandatories representing a company, their liability extends also to negligent actions (and thus is not limited to fraudulent actions).

In order to be held responsible at law, the director must have necessarily performed wrongly one of his duties, or else failed to fulfil such duty. The person alleging a breach of law must have suffered a loss to be able to bring forward such allegation, and thus there must exist a nexus between the breach of law and damage suffered.

The Maltese Criminal Court and the Court of Criminal Appeal have repeatedly held that if the prosecution proves that someone, or a body of persons, have committed a criminal offence, then the presumption is of guilty until proven innocent. For instance, in 'Police v. Andrew Ellul Sullivan et.' endorsed the principle of the presumption iurus tantum of guilt.

Moreover, the courts qualify culpa (negligence) into three levels, namely culpa lata (gross negligence which leads to fraud), culpa levis (the lack of diligence held by a bonus pater familias) and culpa levissima (slight negligence that even an attentive person may perpetrate). The director is bound to act with the diligence of a bonus pater familias, and thus, in determining fault, culpa levis must be proven. The burden of proof for the directors' failure to perform the duties that they

are bound to perform at law lies on the person who alleges it. If the offence is of a criminal nature, the nature of proof must be beyond reasonable doubt. Additionally, being passive and refraining to take action does not exclude criminal responsibility on behalf of the director.

Apart from proving that the natural person is guilty, in terms of the above, the prosecution must also prove that the offence was so committed for the benefit of the body corporate. If the natural person is found guilty, the Court will then see whether the offence was committed for the benefit of the said natural person, or for the benefit of the body corporate. Thus, the prosecution must simultaneously prove the guilt of the body corporate. When this is successfully proved, corporate liability arises and if the body corporate is convicted, it is liable to the payment of a fine in terms of Article 121D. This process entails that the case must be filed against the director or any officer as mentioned in Article 121D in his name and on behalf of the company.

Nevertheless, if a director successful proves that the acted with the due diligence and continually sought to prevent the commission of the offence, he or she may escape criminal responsibility. If the natural person manages to do so, and is acquitted, corporate liability does not arise and the body corporate cannot be found criminally liable.

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

Extradition in Maltese law is mainly regulated through the Extradition Act. This act, which was enacted in 1982 and was majorly amended in 2002, is the instrument through which extradition is processed and regulated in the Maltese jurisdiction. The Extradition Act provides Malta's internal mechanisms for the practices of extradition and thus, is an important tool in this area.

Prior to examining the provisions of this act, a look into the Maltese Constitution helps us in understanding the spirit of the legislation in this regard. In Chapter IV of the Constitution of Malta, entitled 'Fundamental Rights and Freedoms of the Individuals', Article 43 deals with

'Prohibition of Deportation'. This article is relevant as it introduces a number of important elements in connection to extradition in Maltese legislation and indicates bars to extradition of an individual.

Firstly, the article states that extradition is only allowed where arrangements are made by treaty and under the authority of a law. This is the first indication of the importance given to treaties and thus, bilateral relations between countries for extradition purposes. In the Lockerbie case, the International Court of Justice claimed that no state is in fact obliged to extradite its own nationals unless there is a treaty obligation to the contrary. Bilateral treaties usually classify bilateral extraditable offences between countries. The Maltese Extradition Act generally adopts the eliminative approach in the case of designated foreign countries, by stating that the treaty applies to all crimes which are punishable in both countries by so many months or years of imprisonment and a mixture of both the eliminative approach and the enumerative approach. This is done by listing the extraditable offences in the case of designated commonwealth countries. From this point, it is essential to highlight that Maltese law differentiates between Commonwealth and non-Commonwealth countries. This is understood due to Maltese history as Malta has only been an independent state since 1964. Before this date, Malta was a British colony and this is the main reason for the focus on commonwealth countries – Malta's common heritage in common with such countries.

Article 43 also provides that no person shall be extradited for an offence of political character. This generally poses a common problem as to what can be defined as purely 'political'. The European Convention on Extradition, a Convention which was ratified by the Maltese state, does not define 'political' but simply states that extradition is not to be granted for an offence which 'is regarded by the requested party as a political offence or as an offence connected with a political offence'. One generally understands that offences such as treason and espionage are purely political offences in nature as they are built upon political convictions, a problem arises with regards to relative political offences which also include other non-political crimes. The European Convention on the Suppression of Terrorism, a treaty which has also been signed by Malta, by showcases an example of how states have gone around the problem of political offences. In this instance, certain acts of terrorism where excluded from the definition of political offences, paving

the way for extradition to generally be granted in such circumstances. The Convention states that airplane hijacking, kidnapping, hostage taking and unlawful detention are not to be considered as political offences for the purposes of extradition between states.

Sub-article 3 of Article 43 underlines that no Maltese citizen shall be removed from Malta except through extradition proceedings or any such law as is referred to in Article 44(3)(b) of the Maltese Constitution.

The final provision of this article makes direct reference to the Maltese Extradition Act in relation to Commonwealth countries. This sub-article entails an arrangement for the removal of persons from Malta to other Commonwealth countries to undergo trial or punishment in such countries. This is accomplished in respect of an offence committed in that country and any general arrangements for the extradition of persons between Commonwealth countries to which Malta for the time being adheres shall be deemed to be arrangements made by treaty. sub-article 2 (relating to political offences) shall not apply in relation to the extradition of a person under such provisions or arrangements.

As previously noted, the act creates a major distinction between the return of offenders to Commonwealth countries (falling under Part II) and the return of offenders to other foreign countries (falling under Part III). However, a number of provisions, such as those relating to circumstances where offenders will not be extradited are applicable to all offenders. Part IV of the Extradition Act, entitled 'Provisions applicable to the return of offenders to all countries' imposes general restrictions on all returns. Article 10 lists the circumstances for which the offender will not be extradited.

Sub-article 1 provides for a number of bars on extradition in the case of an offence of a political character. The law continues by stating that a person shall not be returned if the request for his return is in fact made for prosecuting him due to his race, place of origin, nationality, political opinions, colour or creed or that he would be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of these already mentioned qualities.

Sub-article 2 mentions the ne bis in idem principle. This is another general restriction on return; A person accused of an offence shall not be returned under this Act to any country, or committed to or kept in custody for the purpose of such return, if it appears that if charged with the offence in Malta, he would be entitled to be acquitted under any rule of law relating to previous acquittal or conviction.

Sub-article 3 contains another general restriction regarding the rule of speciality. The speciality principle connotes that an extradited person can only be tried for the offence for which he was extradited and no other offence unless he has been given a chance to leave the country to which he was extradited. The article prohibits extradition where it is not legally ensured that he will not be dealt with in that country for or in respect of any offence committed before his return other than the offence for which his return had been requested, any lesser offence proved by facts or any other offence being an extraditable offence in respect of which the Maltese Minister may consent to his being so dealt with.

The final element of this article serves as an exception to the rule that offences of political character shall not be extraditable. This applies in the case of an offence against the life or person of a head of state. Here, this offence shall not necessarily be deemed as an offence of a political character.

Another pivotal element of the Extradition Act when it comes to bars to extradition is Article 11, dealing with the Powers of the Minister responsible for Justice. Under this article, the Minister for Justice has the power to refuse extradition should certain circumstances exist. These circumstances include situations where the offence is subject to death penalty, unless the requesting country gives an assurance that the death penalty will not be awarded or will, if awarded, not be carried out; where the person whose extradition is required is a Maltese national; where the request is for a person unlawfully at large after conviction with a punishment of less than four months' imprisonment; where the request is for the return of a convicted person of an offence in his absence and the requesting state has not given the required assurance that such person would be granted a new trial if he requests; where the Government is under an obligation not to return such a person to another country; where an amnesty has been granted in respect of the related offence and the Maltese courts had jurisdiction to try the offence and where the offence in respect of

which extradition is requested is barred by prescription either according to the laws of Malta or according to the law of the requesting country.

The procedure for extradition is regulated from Article 14 onwards. Following a request for extradition, the Minister's authority to proceed is paramount for the initiation of proceedings. Without such authority, a magistrate may issue a provisional warrant of arrest. Such provisional warrant of arrest may also be invoked by the Minister. Persons whose extradition is requested must be brought before the court of committal not later than forty-eight hours after an arrest.

Another sector of Maltese legislation which features extradition is the Criminal Code. Chapter 9 of the Laws of Malta's Article 5 lists all the persons subject to prosecution and prosecution under the Maltese jurisdiction. Subsection (h) relates to extradition and states that a criminal action may be prosecuted in Malta in respect of whom an authority to proceed or an order for return is not issued or made by the Minister responsible on the ground that he is a Maltese citizen or that the offence is subject to the death penalty, even if there is no provision according to the laws of Malta other than the present provision in virtue of which the criminal action may be prosecuted in Malta. This provision deals specifically with extradition and mentions the issue of the death penalty. The death penalty appears to be extremely present in several aspects of Maltese legislation in relation to extradition. Here, a criminal action may be prosecuted in Malta where extradition is not granted because of Maltese citizenship, or the present element of a risk of the death penalty. Here, the person may be subject to Maltese penal laws under the Criminal Code. It is interesting to note that this provision makes it possible for a person to be prosecuted in Malta even in the event where there is no provision in Maltese law that would give rise to prosecution in Malta, other than these provisions.

It would be imperative to relate to jurisprudence to effectively analyse the way bars to extradition have played out in practice. In Schmitt v Prime Minister et the applicant was to be extradited to France after escaping a warrant of arrest issued by a French tribunal for a number of crimes including kidnapping and violence in a group. The extradition order was in turn confirmed by the Court of Appeal on the February 23 2010. The applicant complained that from his arrest, onwards, he suffered a breach of a number of fundamental human rights, including the violation of one's

privacy, French prison conditions and lack of contact visits since his arrest. Here, the court noted that the proof that the applicant should put forward in this regard is not relevant with regard to extradition procedure and emphasized that the applicant's complaints should not slow down the process of extradition, which in their own nature should be treated with a degree of urgency. In light of this, the court denied the applicant's request and decided in favour of the defendant.

Another case worth mentioning is Il-Pulizija vs. Fatiha. Khallouf was being accused by the Italian authorities for crimes of association to commit illegal acts through illegal entry into Italy according to the Italian Penal Code. In this case, the defendant argued that she was not in Italy when the offences were committed and thus, she does not fall under the jurisdiction of Italy. The court added that the fact that the accused persons are accomplices and are not physically present at the moment of committal of the offence and this does not essentially amount to a bar to extradition in itself. It does not remove the accomplice's responsibility and the accused may still be ordered to be extradited back to the original country.

5. Please state and explain any:

5.1 Internal reporting processes (i.e. whistleblowing)

5.1.1 The Protection of Whistleblowers.

In Malta, whistleblowers are protected by provisions under the Protection of the Whistleblower Act (Chapter 527 of the Laws of Malta) (the 'Act'). It came into force on the September 15, 2013. The Act aims to provide a framework in terms of which employees in both private and public sector administrations may disclose information regarding improper practices committed by their employers or other employees in the employ of their employers and to safeguard employees who make such disclosures from detrimental action.

According to the Second Schedule of the Act, the requirement to provide for internal procedures is currently restricted to any organisation in the private sector, as well as each ministry of the Government of Malta. Voluntary organisations are subject persons as well. In accordance with its last annual or consolidated accounts, the enterprise must meet at least two of the following criteria:

- A total balance sheet exceeding EUR 43,000,000;
- An annual turnover exceeding EUR 50,000,000;
- An average number of employees, during the financial year, of more than 250.

The employers who satisfy the above criteria are under the obligation to adopt the procedures when dealing and receiving information about any improper practices committed within or by that organisation. The organisation must then go on to identify the person or persons, who are referred to as the 'whistleblowing reporting officer'. A protected disclosure would have initially been made to said individual. A disclosure has to be made in good faith for one to be protected and, more so, a disclosure made for personal gain will also eliminate any possibility of one being protected by the Act.

Nevertheless, the Act grants the whistleblower the right to make a disclosure to the head of his organisation or to an external reporting unit set up within the authorities listed in the Act. However, this instance is only reserved to specific circumstances. This can be seen under Articles 14 and 16. The former provision, sets out the basis for an internal disclosure. It reads as follows: An internal disclosure may be made to the head or deputy head of the organisation, who is hereby deemed to be the whistleblowing reporting officer and subject to the provisions of Articles 6 and 13, if:

- the organisation has no internal procedures established and published for receiving and dealing with information about an improper practice; or
- the whistleblower believes on reasonable grounds that the whistleblowing reporting officer is or may be involved in the alleged improper practice; or
- the whistleblower believes on reasonable grounds that the whistleblowing reporting officer is, by reason of any relationship or association with a person who is or may be involved in the improper practice alleged in the disclosure, not a person to whom it is appropriate to make the disclosure.

Nevertheless, this is also highlighted in the First Schedule of the Act. Whistleblowers are furthermore encouraged to make disclosures as the Act provides that the whistleblower's identity

is to be kept confidential unless his consent, in writing, to reveal his or her identity is obtained. An important aspect of the Protection of Whistleblowers Act is that it provides that he or she may not be the subject of detrimental action on account of having made a protected disclosure. According to Article 2, a detrimental action is one which includes:

- an action causing injury, loss or damage; and, or
- victimisation, intimidation or harassment; and, or
- occupational detriment; and, or
- prosecution under Article 101 of the Criminal Code (Chapter 9 of the Laws of Malta) relating to calumnious accusations and, or;
- civil or criminal proceedings or disciplinary proceedings.

The Act goes on to provide an exhaustive list of what actions, or series of actions, would fall under the category of improper practices. Here, a restrictive interpretation is to be applied. Thus, this list excludes very minor or trivial matters. Nonetheless, according to Article 16 of the aforementioned Act, improper conduct is if:

- A person has failed, is failing or is likely to fail to comply with any law, and/or a legal obligation to which he or she is subject; or
- The health or safety of any individual has been, is being or is likely to be endangered; or
- The environment has been, is being or is likely to be damaged; or
- A corrupt practice has occurred or is likely to occur or to have occurred; or
- A criminal offence has been committed, is being committed, or is likely to be committed; or
- A miscarriage of justice has occurred, is occurring or is likely to occur; or
- A person abuses his authority; or
- Bribery has occurred or is likely to occur or to have occurred; or
- Information tending to show any matter falling within any one of the preceding paragraphs has been is being or is likely to be deliberately concealed.

However, a whistleblower shall not be afforded the protection provided by the Act, if s/he knowingly discloses information which s/he knows or ought to reasonably know is false. Further

reference can be made to Article 5 and Article 9(2) of the Act. Nevertheless, disclosures of information protected by legal professional privileges, as well as disclosures made anonymously, are not considered to be protected.

For better implementation of the Act, as well as to establish the internal procedures with which employers are to receive and deal with information about improper practices being committed within or by an organisation, it is expected that more is to be published in the future.

5.1.2 Anti-Money Laundering Legislation and Prevention for the Funding of Terrorism in Malta

The first legislative initiative to introduce an anti-money laundering regime in Malta dates back to February 1994, when Article 22(1C) of the Dangerous Drugs Ordinance was amended to introduce the offence of money laundering in relation to the proceeds of certain drug-related offences. Eventually, the Prevention of Money Laundering Act was enacted in September of the same year, together with the original regulations issued thereunder, which introduced a comprehensive regime for the criminalisation of money laundering in relation to predicate offences which are not merely drug-related, as well as the prevention, Prevention of Money Laundering Act and prosecution of money laundering. Concurrently with the enactment of the Prevention of Money Laundering Act, an amendment to Article 120A of the Medical and Kindred Professions Ordinance was made to introduce the offence of money laundering in relation to proceeds of offences related to other illegal substances beyond the scope of those provided for under the Dangerous Drugs Ordinance.

The Prevention of Money Laungering Act has also gone on to establish the Financial Intelligence and Analysis Unit (FIAU). The FIAU is a governmental agency with a distinct legal personality. It is responsible for the collection, collation, processing, analysis and dissemination of information of suspected money laundering or terrorist financing activities in order to combat money laundering and terrorist financing in Malta. These were established by the 2008 Prevention of Money Laundering and Funding of Terrorism Regulations (Subsidiary Legislation 373.01 of the Laws of Malta). It would also be within its border of responsibility to impose administrative sanctions. The Prevention of Money Laundering and Funding of Terrorism Regulations were enacted under the principal legislation of the Prevention of Money Laundering Act of 1994, as

subsequently amended. The following authorities are subject to the Prevention of Money Laundering and Funding of Terrorism Regulations and are obligated to report to the FIAU upon any suspicious acts relating to money-laundering. It is important to keep in mind that these authorities are not official regulators but, fall under the definition of 'supervisory authorities' under the Prevention of Money Laundering and Funding of Terrorism Regulations in case of the funding of terrorism as well as money-laundering instances. The list is as follows:

- The Malta Financial Services Authority (MFSA) is the single regulator for financial services. It is a fully autonomous public authority, which reports to the Maltese Parliament on a regular basis. In certain instances, the MFSA acts as an agent of the FIAU; it undertakes a number of on-site Anti-Money Laundering checks on its License Holders during its compliance visits. Indeed, on March 18 2014, the FIAU and the MFSA signed a Memorandum of Understanding which aimed to enhance the level of cooperation between them;
- The Central Bank of Malta - this is an independent, autonomous body, established by statute and answerable to Parliament;
- The Lotteries and Gaming Authority (LGA) is the single public regulator and supervisory body for all forms of gaming in Malta.

Nevertheless, other bodies which have the responsibility to regulate certain professions such:

- There is also a Money Laundering Unit established within the office of the Attorney General, which requests the courts to issue judicial orders (namely investigation and attachment orders, which are specifically designed to facilitate money laundering investigations and which could eventually be followed by freezing and confiscation orders).

5.2 External reporting requirements (i.e to markets and regulators)

External reporting requirements are looked over by the FIAU. The Market Abuse Directive (MAD), Directive 2014/57/EU of the European Parliament and of the Council of April 15 2014, focused on criminal sanctions for market abuse. However, this directive has since been repealed. The legislation, apart from insider dealing, also refers to unlawful disclosure of inside information and market manipulation. The Directive in itself was adopted by the European Commission in

2003, a year before Malta became a Member State within the Union. It is the Prevention of Financial Markets Abuse Act (Chapter 476 of the Laws of Malta), which regulates domestic law vis-à-vis external reporting requirements. Moreover, auditors and accountants are subject to the Quality Assurance Oversight Committee appointed by the Accountancy Board under the Accountancy Profession Act (Chapter 281 of the Laws of Malta) has been assigned to act as the supervisory authority, on behalf of the FIAU, for audit firms and sole practitioners.

It aims to be a comprehensive framework which addresses situations in which investors have been unreasonably disadvantaged. In 2014, a Market Abuse Regulation (MAR) was published as well as an amended Directive with respect to criminal sanctions, namely directive 2014/57/EU of the European Parliament and of the Council of April 16 2014 on criminal sanctions for market abuse (market abuse directive). Such amendments were inspired in the wake of several scandals throughout the Union, amongst which was the LIBOR scandal. This was a series of fraudulent actions connected to the London Interbank Offered Rate, and also the resulting investigation and reaction. The LIBOR, furthermore, is an average interest rate calculated through submissions of interest rates by major banks across the world. The MAD II was transposed into national legislation mid-2016, and soon after it was enacted.

The purpose of the MAD II and the MAR is to address abusive behaviour enabled by new technologies. Another observation, as analysed by the Larosière Group, was that Member State's sanctioning regimes are in general weak and heterogeneous. The MAD II and MAR nevertheless provide broader scopes than the MAD in that it applies to any financial instrument. Following the LIBOR manipulation news in 2012, the first MAR, first introduced in 2014, was amended to include benchmarks, and indices, abuse as well. Moreover, the MAD II covers cases of trading/platforms facilities as well as assisting in a criminal offence either directly or indirectly. Moreover, such procedures have been amalgamated into our domestic law and are indeed further strengthened under provisions within the Prevention of Financial Markets Abuse Act (Chapter 476 of the Laws of Malta). Indeed, Article 4 of the Act highlights this.

Considering that the Malta Stock Exchange is also a regulated market, it is subject to external reporting provisions, under the Bye-Laws Act enacted by the Malta Stock Exchange plc. itself. The

Board must in turn ensure that adequate and appropriate systems and controls are in place concerning its internal compliance requirement as set out in the Regulated Markets (Authorization Requirements) Regulations, 2007.

Furthermore, reporting must however be done to its sole regulating authority, that is, the MFSA itself, and not other external foreign institutions. For example, heavy pressure is put on banks to adhere to such legislations. Indeed, Chapter 371 of the Malta Banking Act gives authority to the local regulator to share its supervisory duties with other foreign competent authorities. This is of course, in the case of a credit institution or a branch operating in Malta which is fully or partially owned by a foreign entity. It is however, not limited to banks.

There is also an obligation on local banks and multinational banks located on the Islands to report externally as follows, in case of:

- Fraud - there should be potential reporting to the police (that is, the law enforcement) in instances of fraud or reported criminal activity;
- Suspicious transaction reporting - any such disclosures are to be made to the FIAU, especially breaches relating to the Anti-Money Laundering Act.
- External disclosures - referring back to Section I, such disclosures are to made within the provisions of the Whistleblowers Act
- Breaches or potential breaches - if these instances are material, they are to be reported to their respective regulator. Breaches relating to banking, for example, are reported to the MFSA, whilst payment breaches are reportable to the Central Bank of Malta.

Under Article 10 (1) of the Prevention of Money Laundering Act, external reporting vis-à-vis transparency of accounts within domestic public authorities or public bodies must meet the following criteria:

- the applicant for business has been entrusted with a public function pursuant to the Treaty on the European Union, the Treaties on the Communities or other Community legislation
- the identification of the applicant for business is publicly available, transparent and verified

- the applicant for business undertakes activities that are transparent, including any accounting practices and
- the applicant for business is either accountable to a Community institution or to a domestic relevant
- authority or to an authority of another member of the Community or, where appropriate and effective procedures are in place to control the activity of the applicant.

6. Who are the enforcement authorities for these offences?

Financial crime over the last 30 years has increasingly become of concern to governments throughout the world. This concern arises from a variety of issues because the impact of financial crime varies in different contexts. It is today widely recognised that the prevalence of economically motivated crime in many societies is a substantial threat to the development of economies and their stability.

Financial crimes include fraud, electronic crime, money laundering, terrorist financing, bribery and corruption, market abuse and insider dealing and information security.

The world economy is heavily affected by money that is illegally acquired and used for illegitimate purposes. Large sums of money are laundered every year, posing a threat to the global economy and its security.

In the wake of global terrorism, stringent measures are being introduced to trace and stop money movements which launder the proceeds of crime or finance terrorism.

Several jurisdictions have enacted laws an anti-money laundering legislations. Malta, a 'reputable financial service centre' followed suit. Stringent measures were introduced in an attempt to fight illicit criminal activity.

Two statutory instruments, the Prevention of Money Laundering Act (Chapter 373 of the Laws of Malta) and the Prevention of Money Laundering and funding of terrorism regulations (Subsidiary legislation 373.01) have established 'the foundations for the legal framework by introducing basic legal definitions, laying down the procedures for the investigation and prosecution of money laundering offences, and establishing the Financial Intelligence Analysis Unit'.

6.1 FIAU – National Central Agency

The Financial Intelligence Analysis Unit is a body corporate with a distinct legal personality is 'capable, subject to the provisions of understanding or other agreements with any foreign body, subject to the provisions of this Act, of entering into contracts, of concluding memoranda of understanding or other agreements with any foreign body, authority or agency as is referred to in article 16(1)(k) of acquiring, holding and disposing of any kind of property for the purposes of its functions, of suing and being sued, and of doing all such things and entering into all such transactions as are incidental or conducive to the exercise or performance of its functions under this Act, including the borrowing of money'.

This agency is mainly 'responsible for the collection, collation, processing, analysis and dissemination of information of suspected money laundering or terrorist financing related activities, thus supporting the domestic and international prevention of money laundering and financing of terrorism law-enforcement efforts'.

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

The Financial Intelligence Analysis Unit is tasked with publishing a yearly report with investigations. Its several functions are clearly outlined in Chapter 373 of the Laws of Malta, Article 16 section 1 paragraphs a to l.

The Financial Intelligence Analysis Unit receives reports of suspicious transactions and illicit activities, and it investigates any wrong doings and an analytical report is compiled at the end. Article 16(1)(a) enlists one of the Financial Intelligence Analysis Unit's activities as the following:
(a) to receive reports of transactions or activities suspected to involve money laundering or funding of terrorism or property that may have derived directly or indirectly from, or constitutes the proceeds of, criminal activity made by any subject person in pursuance of any regulation made under Article 12, to supplement such reports with such additional information as may be available to it or as it may demand, to analyse the report together with such additional information and to draw up an analytical report on the result of such analysis;

Under Maltese law, the Commissioner of Police has the final say over whether or not to prosecute in cases relating to money laundering, as per the subsequent subsection to the abovementioned:
(b) to send any analytical report as is referred to in paragraph (a) to the Commissioner of Police for further investigation if having considered the report received under paragraph (a), the Unit also has reasonable grounds to suspect that the transaction or activity is suspicious and could involve money laundering or funding of terrorism or property that may have derived directly or indirectly from, or constitutes the proceeds of, criminal activity;

Our law also stresses on the importance of monitoring compliance by subject persons:
(c) to monitor compliance by subject persons and to cooperate and liaise with supervisory authorities to ensure such compliance;

Supporting evidence is also provided to the Commissioner of Police:
(d) to send to the Commissioner of Police together with any analytical report sent in accordance with paragraph (b) or at any time thereafter any information, document, analysis or other material in support of the report;

Financial and commercial information is gathered for analytical purposes in order to detect any illicit criminal activity which might lead to money laundering or funding of terrorism.

(f) to gather information on the financial and commercial activities in the country for analytical purposes with a view to detecting areas of activity which may be vulnerable to money laundering or funding of terrorism;

Furthermore, statistics and records are compiled, and then data is disseminated, and the Minister is provided with guidelines and clear advice.

(g) to compile statistics and records, disseminate information, make recommendations, issue guidelines and advice the Minister on all matters and issues relevant to the prevention, detection, analysis, investigation, prosecution and punishment of money laundering or funding of terrorism offences;

Personnel employed with any subject person are duly given training.

(h) to promote the training of, and to provide training for, personnel employed with any subject person in respect of any matter, obligation or activity relevant to the prevention of money laundering or funding of terrorism;

Legal and physical advice and assistance are also offered to develop effective measures and programmes for the prevention of money laundering and funding of terrorism.

(j) to advise and assist persons, whether physical or legal, to put in place and develop effective measures and programmes of money laundering and funding of terrorism;

Information gathered by the Financial Intelligence Analysis Unit is shared with any foreign body, authority or agency where that information may be pertinent in the processing or analysis of information.

(k) upon request or on its own motion, to exchange information with any foreign body, authority or agency which it considers to have functions equivalent or analogous to those mentioned in this subarticle and with any supervisory authority in Malta or with any supervisory authority outside Malta which it deems to have equivalent or analogous functions as a supervisory authority in Malta, subject to such conditions and restrictions as it may determine, including the prior conclusion, if it deems so necessary, of any memorandum of understanding or other agreement, to regulate any

such exchange of information, where that information may be relevant to the processing or analysis of information.

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self incrimination)?

The Maltese legal system provides for the mechanism of protecting the right of individuals to withhold information from the authorities in certain circumstances. Whether this information relates to professional secrets, personal data or data relevant to the investigation of Money Laundering crimes, the authorities in question are not allowed free access to this information without having due consents and authorisation to access it. This shall be examined below in greater detail.

The professional secrecy is a fundamental right that the professionals exercising the powers and duties of their offices in Malta must uphold. When an individual becomes the depositary of a secret as defined by the Professional Secrecy Act, Chapter 377 of the Laws of Malta, they are exempt from the obligation of divulging this information to the authorities. Professional secrets consist of information which is to be considered secret under a specific provision of the law, information which is described as secret by the person communicating it to a person falling within the scope of the Criminal Code, particularly Article 257, and information which has reasonably to be considered a secret in view of the circumstances in which it was communicated and the nature of the information and the calling or profession of the person receiving the information as well as that giving it. Professionals falling under the umbrella protection of this clause are: members of the medical profession, the clergy, advocates, notaries, social workers, psychologists, accountants, auditors and employees or officers of financial and credit institutions, trustees, offices of nominee companies or licenced nominees, persons licenced to provide investment services, insurers, brokers and employees of the state. Due to the nature of these offices, these professionals require access rights to sensitive information.

Companies as well as Government authorities have in place procedures relating to such rights and the handling of such information. For instance, the Financial Intelligence Analysis Unit has issued

implementing procedures for companies to take on board in order to be compliant to these regulations. It is paramount that companies know the parameters within which they are expected to operate in insofar as privacy and the divulging of information is concerned. In order to be compliant to local and international regulations companies must appoint an MLRO to handle and report any potential money laundering suspicions. These are reported to the FIAU, which subsequently take the relevant steps once this report is made. By virtue of Regulation 15(10), auditors, accountants, tax advisors, notaries and members of the legal profession are exempt from the duty to report suspicious transactions to the FIAU in accordance with the provisions of Regulation 15(6) and the duty to inform the FIAU prior to carrying out a transaction that is known or suspected to be related to ML/FT in accordance with Regulation 15(7), if such information is received or obtained in the course of ascertaining the legal position for their client or performing their responsibility of defending or representing that client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings. This principle was upheld in a judgement by the European Court of Justice in 'Ordre des barreaux francophones and germanophones & Others vs Conseil des Ministres'.

Despite this right, the Criminal Code, also provides for exception under which the professional secrecy right is not applicable. Professionals must disclose information in circumstances related to drug offences, an offence related to a drug listed in the Code and an offence of money laundering as defined by the Prevention of Money Laundering Act. Therefore, the protection offered to the abovementioned professions are not applicable in these cases.

The idea that money laundering related offences must be reported is also highlighted in the Prevention of Money Laundering Act, Chapter 373 of the Laws of Malta. Investigation into a money laundering related offence requires the issuance of an investigation order. This order is issued upon the application of the Attorney General to the Criminal Code as a result of having reasonable grounds to suspect that a natural or legal person is involved in a money laundering offence. This order is intended to grant access to investigate material and information relevant to this investigation. Having said this, there is also the limitation whereby communications between advocates and legal procurators and their clients are protected and exempt from access despite the

existence of an investigation order. Furthermore, so are the confessions made to a clergyman. This sort of information has an added level of protection via the Criminal Code, Article 642(1) and the Code of Organization and Civil Procedure of Malta, Article 588(1). The latter article calls for the person providing the information to give consent for their advocate or clergyman to be questioned with reference to the cause. With regards to the rest of the professionals meaning accountants, medical practitioners, social workers, psychologists and counsellors may be questioned by court order.

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

Local employers are faced with the increasingly complex task of balancing local and foreign regulations relating to the protection of their employees' data. Essentially, the Maltese Data Protection Act seeks to introduce freedoms and protections governed by international legislation such as in the case of the freedom of expression. As a data controller, an employer is bound to respect the privacy of their employees which are classified as data subjects. Employers are allowed to process sensitive employee data if this is necessary for their compliance with duties regulating activities necessary for the operation of their activities. Hence, should an employee be the subject of money laundering investigation by an external source in possession of an investigation order, the employer is bound to give access to this information with or without the consent of the employee. Furthermore, should an employer accuse an employee of such a crime, the personal information of the employee is to be passed on to the authorities for an investigation to take place. Having said that, the employer is not bound to provide the entirety of the employee's data including that which is not directly important for the investigation. All in all, the Act protects an employee's sensitive data held by an employer if this doesn't hold significant value for the successful conduction of the investigation.

Article 17 states that information related to offences, convictions or security measures may only be processed under the control of a public authority. Despite having such information on file as part of an internal policy, an employer may not process such information without fulfilling the condition stated by law.

An element of personal data is an individual's identification number which is classified as a distinct piece of data. The law requires employers to process an employee's identity number having specific regard to the purpose for which this information is processed and ensuring that the process is done in a secure manner.

The employee is protected by being allowed access to the information processed by his or her employer. As with any data processor, the employer is required to provide information to the employee upon request. These freedoms and protections stop in various cases involving national security, defence, public security, the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions, an important economic or financial interest including monetary, budgetary and taxation matters, a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority.

10. If relevant, please set out information on the following:

a. Defences to the offences listed in question 2;

b. Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement); and

c. Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas)

10.1 General

Due to the infancy of the concept of corporate criminal liability in Malta, and subsequently the limited references and attribution of such liability under Maltese law, it follows that defences, immunities and penalty reductions are few and far between. Due to the fact that corporate criminal liability is nonetheless associated with the conviction of a natural person, acting on behalf of or representing the company in Malta, where the natural person is acquitted, the body corporate cannot be found liable.

10.2 Defences

That being said, since a legal person cannot be criminally liable without the conviction of a natural person, the defences, immunities and penalty reductions which may be raised by an individual are prudent to mention. Article 33 of the Criminal Code lays down that any person may be exempt from criminal liability where "at the time of the commission or omission such person - (a) was in a state of insanity; or (b) constrained thereto by an external force which he could not resist". Thus, defect of will is a basic defence which may be raised for any crime under Maltese law.

There are no defences currently specifically applicable to bribery and corrupt practices or fraud offences.

One possible defence to an offence which violates the provisions of the Prevention of Money Laundering Act by a corporate entity is the due diligence defence. This may be relied on by every individual person acting as director, manager, secretary or another similar office at the time of the commission of the offence, being unaware of the offence, and who have 'exercised all due diligence to prevent the commission of the offence'. Therefore, a legal person may escape criminal liability and conviction where it is satisfactorily proven to the Court that all reasonable and necessary measures were taken in order to prevent the commission of the offence by the individuals who represent such body corporate. This defence is also found in the Prevention of Money Laundering and Funding of Terrorism Regulations.

10.3 Immunities and Prevention of Prosecution

Article 19 of the Permanent Commission Against Corruption Act entitles the Attorney General to exempt 'any person' from criminal liability by means of a certificate, either upon a request by the Commission or if he deems it advisable or necessary to do so, on the condition of evidence related to the corrupt practice or other offence connected therewith which is brought before the Commission, established by Article 3 of the same Act. Such a request must be made in writing, contain all the details which may be requested by the Attorney General, and be sent in confidence. As a result, no proceedings before a court of criminal jurisdiction may be taken or continued against such person for the corrupt practice or related offence, and the certificate may be produced on the request of the witness in criminal proceedings against him. It thus follows that a person

charged with the representation of a company may be granted immunity from prosecution, which in turn alleviates the corporate criminal liability of the company.

There are no methods of obtaining immunity or prevention of prosecution currently specifically applicable to fraud or money laundering offences.

10.4 Penalty Reductions

As a general rule, where the offender(s) admit to the charges at an early stage in the proceedings and have cooperated with the police and judiciary, whereby the timeliness of the said plea and cooperation have saved the time and resources of the prosecution and the Court, these are taken into consideration by the Court when establishing the punishment to be ultimately awarded. In accordance with Article 453A the accused and the Attorney General may request the Court 'to apply a sanction or measure ... of the kind and quantity agreed between them ... to which the accused can be sentenced upon conviction' where he pleads guilty. If the Court is satisfied by such request, the Court shall proceed to pass sentence.

Deferred prosecution agreements do not currently exist under Maltese law in respect of corporate liability.

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance)

With Malta's ever-growing economy, the need for stringent laws with regards to fraud, corruption, and money laundering is quintessential. Hence one sees the Prevention of Money Laundering Act, 1994, the Permanent Commission Against Corruption Act, 1988, Articles 293 through to 310 of the Criminal Code, as well as several articles of the Companies Act, 1996. For the purposes of this paper, and for one to thoroughly understand the implications and consequences which such offences would have on a company, one must also understand the severity of the offences, as well as the laws which relate to them. This would allow one to better understand the laws which allow entities to mitigate the costs which breaches of such laws entail.

The Companies Act, in Article 148(2), allows both companies as well as individuals to obtain insurance against damages:

Nothing in this article shall be construed as preventing or restricting a company from purchasing and maintaining for any of its officers insurance against any such liability as is referred to in subarticle (1); or as preventing or restricting any officer or auditor of a company from personally purchasing and maintaining any such insurance.

Similar to the way in which the Companies Act allows entities to obtain insurance, The Accountancy Profession Act also allows those working in the field to acquire an indemnity insurance, protecting them from a certain amount of liability

Article 11(1) of the The Accountancy Profession Act, 1980 allows individuals employed as auditors to have indemnity insurance, such insurance covers professionals as well as companies from 'any liability which such person or firm may incur for compensation in respect of any loss or damage which a client or any other person may suffer as a result of any negligent act, error or omission committed by any such person or firm, or any principal thereof, or by any of their employees, in the carrying out of their functions as well as against any claim in respect of any loss or damage brought about or contributed by any dishonest, fraudulent, criminal or malicious act or omission of any of their employees.'

This being said, this insurance does not protect practitioners from dishonesty or serious misconduct. Such acts carry the maximum penalties of a five-year prison sentence, as well as a fine not exceeding sixty thousand euro.

It is to be noted that in Article 121D of the Criminal Code, it is stated so:
Where an offence under this title has been committed by a person who at the time of the said offence is the director, manager, secretary or other principal officer of a body corporate or is a person having a power of representation of such a body or having an authority to take decisions on behalf of that body or having authority to exercise control within that body and the said offence

was committed for the benefit, in part or in whole, of that body corporate, the said person shall for the purposes of this title be deemed to be vested with the legal representation of the same body corporate which shall be liable to the payment of a fine (multa) of not less than twenty thousand euro (EUR 20,000) and not more than two million euro (EUR 2,000,000), which fine may be recovered as a civil debt and the sentence of the Court shall constitute an executive title for all intents and purposes of the Code of Organization and Civil Procedure.

This article clarifies the point in which if a person was entrusted with the role of a principal officer within a body, and committed an offence in the name of said body, the aforementioned person shall be personally liable to the listed sanctions.

It is also stated in Article 147 (1) of the Companies Act, 1996 that:
The personal liability of the directors in damages for any breach of duty shall be joint and several: Provided that where a particular duty has been entrusted to one or more of the directors, only such director or directors shall be liable in damages.

This means that if the company is a director in another company within its capacity as a legal entity, and a breach of duty has occurred within a duty not entrusted to the former company, it shall not be liable in damages. This also means that a breach of duty of any particular director shall not make the company liable for damages, but rather that particular director.

This being said, Article 148 (1) of the same act states that a company can in no way indemnify any entity from liability if by virtue of any rule of law, the entity in question would have been liable of it as a result of negligence, breach of duty or any act of the sort.

Not much legislation with regards to the cost mitigation can be found within Maltese legislation, though companies and professionals are indeed allowed to own insurance with regards to liability. One would wonder whether such legislation requires more vigilance, in order to regulate the ways in which companies may mitigate both the costs of their trials, as well as the expenses which they might incur due to human error.

12. Looking forward, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

The ideal framework for corporate governance relies on a fine, all-encompassing balancing act between the creation and/or maintenance of each financial undertaking in a profitable manner and the regulation (and with it, the proper and efficient safeguarding and enforcement) in relation to said undertaking and the environment in which it is taking place, ensuring a more profitable and fair environment for all parties concerned. Whether or not one believes that the current state of affairs is too burdensome or too lax for its intended purpose does not decrease the number of changes and decisions that need to be discussed and taken on both a national and supra-national level, both in 2017 and beyond.

The past decade has given us its fair share of financial meltdowns which constantly query the existence and the efficiency of regulatory bodies: the collapse of Lehman Brothers and the immediate global recession that followed it, the crises hitting a number of financial institutions (including the collapse and nationalization of Northern Rock , and more recently, the crisis behind Deutsche Bank and in the US, the Wells Fargo scandal) as well as global financial scandals which had severe political and economic ramifications (including SwissLeaks, LuxLeaks and the Panama Papers leak.) Were such situations the reason of inefficient enforcement? What about the national or international laws in place, are they voluminous or encompassing enough to reach their intended breaches of law, or are they too-burdensome in the wrong aspects? Relatable questions are also being asked frequently here in Malta, and for plenty of reasons. A small number of local politicians have been amongst the many names mentioned in the aforementioned Swiss Leaks and Panama Papers controversies, and such controversies have only been brought even more forcefully to the public fora during the Maltese Presidency of the Council of Europe during the first months of 2017.

Steps have already been taken in this regard: The notion of Corporate Criminal Liability, which has previously been considered incompatible and incongruent with either the letter or the spirit of Maltese Criminal Code, until the 2002 Amendments finally gave rise to the notion of Corporate Criminal Liability, not only in the Maltese Criminal Code, but also in other areas including the

Official Secrets Act and the Press Act. Case law regards the matter goes even further, as Dr Jeanette Carabott noted in her thesis that 'relevant information regarding the corporate entity per se' appeared as far back in 1949, in the case of Strickland vs Scorey and touched again subsequently in Hedley vs Tabone. Carabott noticed that when it came to the introduction of the concept, 'there were two options: the notion could be introduced both from a criminal and civil law aspect as well as generally or specifically. However, the decision was to introduce the notion… from a criminal law aspect,' as well as "in a specific manner manner, and not in a general manner… Hence, the ultimate result was that the notion of corporate criminal liability was introduced both into our Criminal Code, in specific provisions providing for specific offences as well as in other specific legislations." Such a scattered approach towards its legalisation may have led to some incongruences in terms of both its substantive and punitive powers, so a harmonisation of the concept should definitely be on the cards for any further legislation related to the subject matter.

Carabott also noticed 'a variation in punishment' when it comes to the application of Corporate Criminal Liability between different crimes, specifically 'criminal liability arising under the offence of embracery, corruption and fraud, with… liability arising under the offence of terrorism…' As such, Carabott proposed further punitive measures to combat corporate criminal liability, "such as the temporary suspension of permit to continue trading. This is likely to act as a barrier for that body corporate which contemplates to commit embracery, corruption and fraud." The discrepancy between the punishment given to a body corporate and an individual also arises in relation to the Official Secrets Act: 'Since a company cannot be literally imprisoned, it is automatic that if the corporate incur [sic] liability under this Act the liability would consist of a fine… it is interesting to note that if a physical person commits a crime under the same Act, he or shall be liable to the same fine. Should the comparison and the individual be put on the same level of comparison?' Therefore, Carabott also recommends an increase in the fine allotted to the company or corporation, as well as the establishment of a minimum and maximum capping of the fine awarded. The same perverse situation also arises in relation to the Money Laundering Act.

When answering what could be done in the future to improve on the present legislation, Carabott suggested the creation of 'a special code specifying for the offence of corporate crime and giving rise for corporate criminal liability', which in turn would do away with all the present provisions

related to the matter. The drawback to this, however, is that according to Carabott, 'it seems that both the Maltese legislators, as well as the Maltese courts have no adequate experience in this subject, and this is due to the fact that this notion is still a very innovative notion in our legal system.'

It would be in the best interest of all parties combined (which in this case, include both the Maltese Government and the European Council, the financial stakeholders and the end-clients themselves) to not fall back on a self-defeating deregulation pattern. The harsh, terrifying consequences of the 2008 financial crisis, are still seen reverberating today, with an economic angst and political anger not seen in the global order in the past three decades. What needs to be done, rather, is an added focus on the proper enforcement of the existing laws: Work needs not only to be done, but rather it needs to be seen to be done. A more clear, open and transparent process in such a regulation would be of incredible benefit to governance, the economy and the common sharing of wealth as a whole.

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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction.

The Netherlands has several sections which hold the different kinds of corruption that we consider illegal. We can distinguish several sections in the Dutch Criminal Code (hereinafter: DCC) for bribery, fraud and money laundering.

- Article 177 DCC – 178 DCC: Active Bribery of a public official, punishable with up to 6 of 9 years of imprisonment or a fine of the fifth category, or the sixth category for legal entities;
- Article 363 DCC – 364 DCC: Passive Bribery of a public official, punishable with up to 6 of 9 years of imprisonment or a fine of the fifth category, or the sixth category for legal entities;
- Article 328ter DCC: Active and Passive Bribery of private persons, punishable with up to 4 years of imprisonment or a fine of the fifth category, or the sixth category for legal entities;
- Article 420bis DCC: Money Laundering, punishable with up to 6 years of imprisonment or a fine of the fifth category, or the sixth category for legal entities;
- Article 27 WWFT (Law to prevent money laundering and financing of terrorism):[1] Not reporting a remarkable transaction, administrative fine with a maximum of 4 million euros, or double within a repeated offence within 5 years;
- Article 1:80 WFT (Law on the Financial Supervision): Administrative fine for not following the guidelines in this law, administrative fine with a maximum of 4 million euros.

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

Active Bribery of a Public Official: At first it is necessary to state that the DCC doesn't give much information about what a public official is. Article 84 DCC states that public officials include members of general representative bodies, judges and those who belong to the armed services.

[1] Wet ter voorkoming van witwassen en financieren van terrorisme 2008 (Law to prevent money laundering and financing of terrorism). Accessible through http://wetten.overheid.nl/BWBR0024282/2016-08-11.

The Dutch Supreme Court considers a public official as 'a person who, under the supervision and responsibility of the government, has been appointed to a function which undeniably has a public character to carry out some of the powers of the kingdom or its agencies'[2].

Per the Dutch Supreme Court, a public official includes, under certain circumstances, employees of privatised organisations performing a public service.

Article 178a DCC adds that a public official includes officials of a foreign state or, when it comes to briberies in the past, a person who used to be a public official, for when it comes to active bribery of a public official.

Active bribery of a public official, per Article 177 DCC, includes offering a gift, promise or a service with the intention inducing him to act or to refrain from certain acts in the performance of his office, in violation of his duty (subsection 1), or as a consequence of certain acts he has undertaken or has refrained from undertaking in the performance of his current or former office, in violation of his duty (subsection 2). Per Article 178 DCC, this counts for bribing a judge as well. Because of Article 178a DCC, this includes gifts or promises given to persons who are becoming public officials of have recently been one.

Penalties for a violation of Article 177 DCC can be as much as 6 years of imprisonment (9 years when it is bribing a judge) or a fine as high as the fifth category, which is 82,000 euros. In case of legal or corporate entities, this can be raised to a fine of the sixth category, with a maximum of 820,000 euros in accordance with Article 23 DCC.

Passive Bribery of a Public Official: Passive bribery on the other hand, per Article 363 DCC (or 364 DCC when it concerns a judge), is only applicable if the public official knows or reasonably should have suspected that the gift, promise or service has been given (subsections 1 and 2) or asking for one of those (subsections 3 and 4) to induce him to act of refrain from acting in a given

[2] Dutch Supreme Court, 30 january 1911, W 9149

manner. In contrast to sections 177 and 178 DCC, it is of no account that the public official acted in breach of his duty. Moreover, the actual occurrence of the act or omission is not necessary for the conviction of this type of bribery. Also for this offence, it is punishable with a maximum of 6 years of imprisonment (9 years for a judge) or a fine of the fifth category. In case of legal or corporate entities, this can be raised to the sixth category.

Active and Passive Bribery of Private Persons: Commercial bribery is laid down in Article 328ter DCC. It involves bribing all persons, being employed by or acting as an agent, and not being public officials. It both includes passive (subsection 1) and active (subsection 2) bribery. Passive commercial bribery is punishable if the employee or agent conceals the advantages offered or gained from his employer. It also means that if the person gives full disclosure about this, his behaviour is not liable to punishment. The concealment of the gift, is considered to be the most important part for being liable for punishment. The Parliamentary Commission that drafted the proposition for the Article, considered that it would be only punishable if the gifts would be concealed and when it would be in violation with his good faith, to prevent influences in the decision-making within a company by someone from outside that company.[3] This all can be punished with a maximum of four years of imprisonment of a fine of the fifth category.

Money Laundering: Money laundering is punishable under Article 420bis DCC. Intentional money laundering is an offence, provided that the accused was aware of the fact that the object in question has been acquired by means of a criminal offence. The DCC speaks off two possibilities in this case. The first, that the suspect hides or conceals the true nature, the source, the transfer or the movement from the rightful owner, while he is aware of the fact that the object derived from a crime.

The other possibility is that the suspect obtains an object, has the object in his possession, transfers or converts the object, or makes use of the object, while he knows that the object derived from a crime. Only conditional content has to be proved for criminal liability. Subsection 2 states that an

[3] *Kamerstukken II*, 2012/13, 33685, 3, p. 4 (MvT).

object can be property of any description. In accordance with Article 420quater DCC, the act of negligent money laundering is also an offence. In this case, the prosecutor must prove that the suspect could have reasonable suspicions of the object having been acquired by means of a crime. For intentional money laundering, the maximum sentence is six years of imprisonment or a fine of the fifth category, or the sixth for legal of corporate entities. When money laundering becomes a habit, in accordance with Article 420ter DCC, the prison sentence can be raised to a maximum of eight years. For negligent money laundering, the maximum sentence is two years of imprisonment or a fine of the fifth category, or the sixth for legal or corporate entities.

WWFT (Law to prevent money laundering and financing of terrorism): When there is a breach of the WWFT, the Minister of Finance can give an administrative fine with a maximum of 4 million euros or double if it contains a repeated offence within 5 years. The WWFT contains several articles to prevent both money laundering and the financing of terrorism. This law is applicable to institutions as banks, insurance companies and tax advisors. Article 2a WWFT gives 2 different obligations to institutions. The first obligation is client research. This is defined in article 3 WWFT. This client research contains knowing his identity and verifying this identity (sub a), identifying the goal of his visit (sub c) and more.

The second obligation is the reporting of unusual transactions. As the term 'unusual transaction' is quite vague, art. 15 WWFT mentions that there is a list of indicators for when a transaction can be unusual. For banks for instance, a cash deposit for 15,000 euros or more on a credit card can be an indication. These indications can be found in the 'Uitvoeringsbesluit WWFT'

WFT (Law on the Financial Supervision): The main purpose of the Law on the Financial Supervision (WFT). It contains rules for all financial companies. The WFT also contains the rules from the MiFID,[4] the Markets in Financial Instruments Directive, from European Union.

[4] DIRECTIVE 2004/39/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [2004] OJ 2 145/1

The WFT basically sets rules for bonuses for employees, the height of severance payments and more. The maximum administrative fine for a breach of the WTF can be as high as 4 million euros, or higher for some companies (up to 5% of the company's net turnover).

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

The Dutch Criminal Code does not hold a specific provision concerning corporate, criminal liability in case of criminal conduct by directors or officers. There is only one general provision in the Dutch Criminal Code on corporate criminal liability. Article 51 paragraph 1 DCC states that offences can be committed by both natural persons and legal entities.[5] According to paragraph 2 of Article 51, if the offence is committed by a legal entity, the prosecution may be instituted and punishment may be imposed against (a) the legal person, (b) the person(s) that ordered the offence and/or 'factually directed' it, or (c) both. The public prosecutor is free to choose between these three options, dependant on the circumstances of case at hand.

The Dutch Criminal Code does not provide any criteria for this decision. The precise requirements for attribution to the legal person – the exact scope of the corporate liability in the Netherlands – follow from Dutch private law, criminal law and extensive case law.

Liability as a Legal Person: According to article 51, 'legal persons' may be held liable for their criminal behaviour. Whether a particular entity possesses this legal personality is laid down in Dutch civil law. In Articles 2:1, 2:2 and 2:3 of the Dutch Civil Code legal personality is attributed to several entities such as, but not limited to, associations, cooperatives, foundations, limited companies (*besloten vennootschap – BV)* and public limited companies (*naamloze vennootschap – NV).*

[5] Exceptions to this are criminal acts that require a certain quality (like motherhood, being a witness, et cetera) or that are by nature focused on a physical action (such as assault, battery, unlawful entry, et cetera) and acts). The latter is heavily debated in literature, though, as some scholars argue that legal entities could be held liable for those crimes in theory, regardless of the fact that this would never happen in reality

Paragraph 3 of Article 51 DCC however broadens the definition of legal personality when criminal law is concerned; several entities that would normally not be considered to have legal personality, are equated with legal persons.

The Dutch Supreme Court (*Hoge Raad*) mentioned in 2003[6] that the criminal liability must be assessed on a case-by-case basis, and that whether liability can be imputed to a legal person depends on whether the offence can 'reasonably' be attributed to that legal person. There is no hard criterion for this 'reasonable attribution', though an important factor is whether the conduct took place within the scope or sphere of the legal entity. The conduct is considered to fall within the scope of the legal entity if:

- the act was committed (or omitted) by a person working forthe legal entity, regardless of their formal contractual relation, or;
- the act was part of everyday 'regular business' for the entity, or;
- the legal entity gained profit from the act, or;
- the act was at the disposal of the legal entity.

Other important factors are the criterions that follow from the *IJzerdraad* case.[7] These criterions are met when the legal person had the power to decide whether or not the criminal behaviour would take place (relevant is the factual influence, not the legal relationship between parties) and the legal person accepted the behaviour, or has accepted similar behaviour in the past.

Not taking reasonable diligence to prevent the act even though the legal person had the power to do so also constitutes acceptance of the behaviour.[8] Whether adequate due care has been taken is assessed upon statutory obligations, requirements that emanate from contractual obligations and the specific circumstances of the criminal behaviour.[9]

[6] *Drijfmest/Zijpe* [2003] Dutch Supreme Court NJ [2006] 328 [Dutch]
[7] *IJzerdraad* [1954] Dutch Supreme Court NJ [1954] 278 [Dutch]
[8] *Slavenburg II* Dutch Supreme Court NJ [1987] 321 [Dutch]
[9] C. Kelk, revised by F. de Jong, *Studieboek Materieel Strafrecht* (6th edn, Wolters Kluwer 2013) 495-502

If the criminal act requires either intent or culpability, the legal person must also meet these requirements in order to impose punishment. If the article does not require either, the legal person cannot rely on the lack of intent or culpability to escape conviction.[10]

Liability as a Client/'Factual Director': Paragraph 2 of Article 51 DCC provides for secondary liability, if the offence can be attributed to the legal entity. The (legal or natural) persons within the entity that ordered the behaviour or had factual direction over the conduct may also be held liable in this case. Whether or not a certain individual will be held criminally liable is decided on the basis of the '*IJzerdraad*'-criterions mentioned in the previous paragraph. The liability is not limited to 'formal' directors or officers, so regular employees could also fall under the scope of Article 51.[11]

The *IJzerdraad*-case has cleared up the Dutch concept of corporate criminal liability, but the exact scope of this liability is still heavily discussed in literature. There is still uncertainty about how various circumstances ought to be weighed and what constitutes to 'reasonable attribution' in the legal doctrine of the Netherlands. Compared to other European approaches towards attributing criminal liability, the Dutch approach is a relatively 'open' one.

Theories like the 'Doctrine of Identification' of the United Kingdom, where only formal directors or highly placed officers can cause liability for the corporation, are not recognized in Dutch law. Any employee can cause a corporation to commit an offence, as long as their behaviour is reasonably attributable to the corporation.

The consequences of having such an open system are both positive and negative. Naturally, not having a strict theory to adhere to damages the legal certainty for corporations in the Netherlands.

[10] District Court of the Hague, 27 January 2015, NBSTRAF 2015, 54
[11] BF Keulen and E Gritter, 'Corporate Criminal Liability in the Netherlands' [2010] 14(3) ELECTRONIC JOURNAL OF COMPARATIVE LAW

It however also allows courts the freedom to weigh circumstances and give a judgement that is tailored to the case at hand.

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

The Dutch bars to extradition are primarily found in the applicable extradition treaties, due to the monist legal order in the Netherlands. Extradition must be distinguished from surrender. A request for transfer of persons within the EU, based on the Framework Decision on the European Arrest Warrant (hereafter: the EAW), [12] is called surrender. Mandatory grounds for non-execution of such a warrant are situations in which:

- the executing Member State has granted amnesty to the criminal offence that the warrant is based on, and the offence comes under jurisdiction of the courts of the executing Member State;
- the requested person has already been acquitted of the acts the warrant is based on, or the requested person has been convicted and has served the sentence imposed (if there is any);
- the requested person cannot be held criminally responsible in the executing Member State due to their age. These mandatory grounds can be found in Article 3 EAW, several facultative grounds for non-execution can be found in Article 4 EAW.

The transfer of people beyond the borders of the EU is called extradition. The Dutch national legislation, the Extradition Act (*de Uitvoeringswet*), is secondary to the extradition treaties.[13]

[12] Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States (European Arrest Warrant Framework Decision) [200 2] OJ L 190.
[13] W.H. van der Zweep-Dijkstra, *T&C Internationaal Strafrecht, commentaar op aanhef UW* (edn 2015) para 3.

It supports the treaties in two ways: optional grounds for refusal of extradition that follow from the treaties can be made mandatory through the Act and the Act also provides for bars to extradition that the treaties are silent on.

Capital Punishment: Article 8 of the Extradition Act forbids extradition to a country that still practices a death sentence for the crime(s) that the request is based upon. The Minister of Security and Justice (hereafter: the Minister) may however ask the requesting state for a guarantee that a death sentence will not be given, and if the state confirms this the extradition may still take place. Even if an extradition treaty does not provide for this exception, the Netherlands still has a duty to bar extradition based on Article 1 and 3 of the European Convention on Human Rights (ECHR) and the *Soering* case.[14]

Ne Bis in Idem (or: Double Jeopardy): The principle of *ne bis in idem*, which ensures that no legal action can be instituted twice for the same course of action, can be found in Article 9 of the Extradition Act. Several situations in which the principle of *ne bis in idem* would be compromised are listed in the Article, which then forbids extradition in those cases. For example, whenever there is already prosecution taking place in the Netherlands the Minister may not allow extradition.

Dismissal of prosecution in the Netherlands is also a mandatory ground for refusal of the request, unless new concerns are raised, the acts do not fall under Dutch jurisdiction in any way or when the decision to dismiss was made purely because prosecution in the other state was deemed more desirable.[15]

Dismissals by a Public Prosecutor, as opposed to dismissals by a judge, are only an optional ground for refusal. Related to the *ne bis in idem* principle is the ground for refusal mentioned in paragraph 1 sub e of Article 9.

[14] *Gaskin v UK* European Court of Human Rights [1989] NJ [1990] 158 [Dutch].
[15] Dutch Supreme Court, 23 December 2003, NBSTRAF 2004, 708.

When the Dutch statute of limitations expires for the criminal acts of the extradition request, regardless of the statute of limitations in the requesting state, the request will be refused. The Netherlands has not ratified the 4th additional protocol to the European Convention on Extradition yet, allowing them to maintain this ground for refusal.

Discrimination and Age

Article 10 of the Extradition act provides for two bars to extradition. Paragraph one prohibits extradition when the Minister has reasonable grounds to believe that the requested person will be prosecuted based on or due to their religion, beliefs, political opinion, nationality, race or membership of a particular social group.

Mere recognition of a refugee status in accordance with the Geneva Convention Relating to the Status of Refugees (CRSR) is not enough to warrant a refusal, there must also be the real threat of prosecution based on discriminatory grounds according to the criterions of Article 10, which are similar to the criterions of Article 33 CRSR on (non-)refoulement.[16] Paragraph two of Article 10 allows the Minister to take youth, old age or (physical or mental) health into account in the decision to refuse a request if and to the extent that is allowed by the relevant treaty.

The scope of this article is limited to those three grounds only, attempts to broaden the grounds based on Article 8 ECHR, the right to family life, have repeatedly been refused by the Supreme Court of the Netherlands.[17]

Political, Fiscal and Military Crimes: Article 11 paragraphs 1-3 of the Extradition Act requires the Minister to dismiss extradition requests that are based on purely political crimes, unless the relevant treaty forbids this ground for refusal. Acts that are of criminal nature, but have political connotations could be an optional ground for refusal, but only if a judge decides that the political goals outweigh the criminal nature of the act, making the act predominantly political. However,

[16] Parliamentary Papers II 15972, 10 [1981/1982] 5-7 [Kamerstukken II].
[17] District Court of the Hague, 27 January, 2015, NBSTRAF 2015, 54

the taking or attempted taking of the life of a Head of State or his family is not prejudiced by this as most treaties have inserted a clause for this purpose. With regards to terrorism, the same rules apply, despite the fact that the Netherlands have signed and ratified the European Convention on the Suppression of Terrorism.

A reservation was made by the Dutch government to allow the judge in charge of the extradition request to decide whether or not the act was political. Finally, genocide and war crimes have been 'de-politicized' without exception, and can therefore never rely on this ground for refusal.

In principle, the Netherlands does not extradite based on fiscal crimes, unless the relevant treaty states otherwise (Article 11 paragraph 4 of the Extradition Act). This provision has become relatively meaningless though, as nearly all extradition treaties contain articles that declare extradition for fiscal crimes to be allowed.

When an extradition request concerns a military crime, a distinction is made between 'pure' military criminal acts and 'mixed' criminal acts that are either part of general criminal law as well or have a *lex generalis* in common criminal law and a *lex specialis* in military criminal law. The mixed acts are not barred from extradition, whereas the military criminal acts are. The exception to this is the NATO Status of Forces Agreement of 1949, on the basis of which extradition for purely military acts can take place.

Human Rights: The Extradition Act does not contain any provisions that protect the human rights of the requested person, except the provisions discussed above. Any additional protection of human rights in the extradition procedure is provided by the legal force of international human rights documents themselves. The best example of this is the ECHR, which was the subject of a recent case before Court of Appeal of The Hague.[18] In first instance, the Dutch judge accepted the challenge of the requested Rwandan people, ruling that the extradition to Rwanda would constitute a flagrant breach of Article 6 ECHR. The court of first instance followed the case law

[18] The Hague Court of Appeal, 5 July 2016.

of the ECtHR[19] on which criteria to use, in absence of any national legislation governing the violation of human rights in extradition proceedings.

The Court of Appeal disagreed with the decision that the criteria were applicable to the case at hand, but did not contest the use of the criteria in and of themselves.

5. Please state and explain any:

5.1 Internal reporting processes (i.e. whistleblowing);

In the Netherlands, regulations on whistleblowing became the focus of increased political interest at the beginning of 2000, as an examination by the trade union Abvakabo FNV[20] highlighted 'loyalty problems among officials' and issues related 'to the whistleblower reporting line of the trade union confederation FNV (2000).'[21] Subsequently, relating both to the public and the private sector, initiatives aiming at providing better protection for whistleblowers were announced.[22]

As the Minister of Social Affairs[23] commissioned relevant research on the whistleblower issue, both the findings of the academic research and the FNV reporting line, clearly shew that 'both employers and employees were in need of guidelines for whistleblowing.'[24] In fact, very few regulations were in place, as the law provided some statutory policies for the public sector (included in the 'reporting suspected abuse within central government' and 'police organization decree and in the public official regulations for defense staff and for staff of provincialauthorities'). [25] Whereas, in relation to the private sector, the Dutch Corporate

[19] The Soering case, mentioned on the previous page.
[20] Federatie Nederlandse Vakbeweging
[21] Rik Van Steenbergen, 'Developments in whistleblowing protection in the Netherlands' (2014) 1(1) IVA Tilburg https://huisvoorklokkenluiders.nl/wp-content/uploads/2015/03/Developments-in-whistleblowing-protection-in-the-Netherlands.pdf accessed 10 February 2017
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Jurjan Geerstma, 'Overview on anti-corruption rules and regulations in the Netherlands' (2016) 31(1) Anti-Corruption in Europe http://www.ecba.org/extdocserv/projects/ace/20160131_ACE_CountryreportNL.pdf accessed 3 February 2017

Governance Code was the only source providing for a whistleblowing regulation, with limited applicability.[26]

Hence, a draft by the FNV was transformed in a Statement dealing with suspected malpractices in companies in the private sector[27], and containing a 'sample procedure' for doing so. The statement was soon applied by the Dutch Courts, as the case law, especially in *Stiekema v. Organon* showed.[28]

In fact, after the court of first instance 'declared that the whistleblower's behavior was not that of a good employee, because he had violated his duty of confidentiality'[29], the court of appeal, after the Statement was published, overturned the decision stating that 'this violation was justified by an overriding interest, namely the interest of the patients involved.'[30]

The practical impact of the Statement was analyzed,[31] underlining that 'approximately one out of ten of the Dutch enterprises [had] a whistleblower procedure.'[32]

Nevertheless, such were based on integrity codes, as implementation of the Sarbanes-Oxley Act or the Dutch Corporate Governance Code.[33] Hence, as such codes mainly refer to internal reporting of certain categories of financial malpractice, the majority of enterprises missed 'in their scheme the aspect of the possibility of an external report, which is essential for a whistleblower procedure.'[34]

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[26] Ibid.
[27] Ibid.
[28] *Stiekema v Organon* [2003] Court of Amsterdam, Jar 2003, 191
[29] R. Van Steenbergen (n 21)
[30] Ibid. The criteria applied by national Dutch courts reflect the criteria set forth by the European Court of Human Rights, i.e. *Guja v. Moldova* and *Heinisch v. Germany*. Compared to the national lower courts, the European Court usually requires a less stringent gravity of the public interest. Hence, Dutch judges might be less severe with respect to whistleblowing cases, given the relatively new European case law and the recent similar approach shown by the Dutch Supreme Court
[31] Coen Zoon et alia, 'Evaluatie zelfregulering klokkenluidersprocedures' [2006] Mistery of Social Affairs and Employment Final Report 25
[32] Joris Oster, 'Whistleblowing in the Netherlands' (2015) 1(1) Elexica http://www.elexica.com/en/legal-topics/employment-and-benefits/24-whistleblowing-in-netherlands accessed 15 February 2017
[33] C. Zoon et alia (n 31)
[34] J. Oster (n 32)

It was not until March 2016 that the Upper House 'accepted the proposed legislation regarding whistleblowers'[35], aiming at providing statutory protection and 'contribute to combating social abuses by amongst others introducing a new special independent administrative body called the "House for Whistleblowers".[36] The *Wet Huis voor klokkenluiders "Act"* came into force in July 2016.[37]

One of the most relevant changes regarded the compulsory establishment of internal whistleblowing policies for companies employing fifty or more employees.[38] In fact, companies are now required to set up rules regarding 'how notifications of suspected misconduct within the organization will be dealt with'[39]; as employees, freelancers, volunteers and interns have the right to know where exactly to report their concerns if they 'have reasonable grounds to believe that wrongdoing whereby the public interest is at stake exists.'[40]

Nevertheless, the act leaves companies with a recognized margin of maneuver concerning the specific policies they intend to enact.[41] It allows enterprises to tailor their own policies base on their diverse and specific needs, as only few mandatory information is required to be included.[42]

More specifically, the legislation demands businesses to specify how internal notifications will be dealt with; what would qualify as a suspicion of misconduct; the designated representative within the organization to whom the notification can be addressed; indication that the notification will be dealt with confidentially if requested; and of the possibility to confidentially consult an advisor.[43] Additionally, the employer must inform the employee when the misconduct is reported externally.[44]

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[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] Richard van Schaik and Robin de Wit, 'The Netherlands: change in whistleblowing legislation' DLA Piper Blog http://blogs.dlapiper.com/privacymatters/the-netherlands-change-in-whistleblowing-legislation/ accessed 20 February 2017
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] R. van Schaik and R. de Wit (n 38)
[44] J. Oster (n 32)

Organizations are further required to ensure that employees are 'properly informed about the content of the whistleblowing policy and the legal protections enjoyed by whistleblowers'[45]; and such proposed policy itself, before being adopted, must obtain the prior consent of the Works Council.[46]

Proceeding with a more in depth analysis of the discipline, it is necessary to underline that one of the most relevant changes introduced with the act, concerns the established protection from disciplinary measures for whistleblowers whose concerns were 'raised in good faith'.[47]

In fact, the act specifically states that 'the employee, who acted properly and in good faith by reporting a misconduct, cannot be disadvantaged in [his or her] legal position.'[48]

In addition, as noted throughout the relevant case law before the Dutch Courts[49], it is clearly established that 'an employee is entitled to disclose misconduct externally if the matter amounts to serious misconduct, the employee has attempted to bring the matter to the employer's attention and he/she discloses the matter externally in a way that is proportionate.'[50]

Such protection extends to those who are employed by smaller companies.[51] In fact, in the absence of a whistleblower procedure, employees are 'subject to the provisions of protection and cannot be disadvantaged in their legal position.'[52]

Moving to the circumstances in which the employee can disclose relevant information, the Whistleblowing Act states that such entitlement arises 'under reasonable grounds and in cases where the social interests are in dispute' or 'when the employee has attempted to bring the matter

[45] R van Schaik and R. de Wit (n 38)
[46] Ibid.
[47] Ibid.
[48] J. Oster (n 32)
[49] *X v Theodoor Gilissen Bankiers N.V. [2012] Dutch Supreme Court, LJN BW9244*
[50] J. Oster (n 32)
[51] Ibid.
[52] Ibid.

to the employer's attention first, but has not lead to a proper and timely approach by the employer.'[53] However, as pointed out by J. Oster,

'in some cases, prior notification to the employer may not be reasonably demanded and the employee may immediately disclose the misconduct to the House for Whistleblowers.'[54]

The House for Whistleblowers is another relevant change introduced by the Act. In fact, this new and external administrative body, established for the benefit of whistleblowers[55], is made up by two different departments: an advice department and an investigative one. Hence, the employees are enabled not only to seek advice on how best to behave, but they can also submit an application to the investigation department, reporting a misconduct.[56]

Subsequently, the department may decide to 'further investigate the matter and […] draw up an analysis of findings and recommendations for the organization at stake.'[57] It is true that, in principle, the employee is required to firstly report any suspected misconduct internally.[58] Nevertheless, they are allowed to consult the House when an 'internal reporting can reasonably not be expected or in case the internal report has not been adequately handled.'[59] In fact, it is necessary to note that the Act does not establish any statutory procedure on how disclosures should be made.[60] As previously stated, employees should rise their concerns internally, following the employer's policy in place. Furthermore, the Act does not set any rule regarding payment of employees in relation to a disclosure, leaving the option open.[61]

Along with the absence of statutory procedures, similarly there is no statutory protection in place. Therefore, it is necessary to turn to the provisions of the Dutch Civil Code, establishing that any

[53] Ibid.
[54] Ibid.
[55] R. van Schaik and R. de Wit (n 38)
[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] J. Oster (n 32)
[61] Ibid.

action taken against the employee, in cases of misconduct or misbehavior, must be proportionate.[62] The Courts have then developed further on the matter.

In fact, on one hand the Supreme Court has held that, in principle, an individual's freedom of expression cannot be limited by duties of secrecy, but: 'the courts have held that the fact that an individual has not followed internal procedures when making a disclosure was sufficient to justify a summary dismissal regardless of whether there was, potentially, a very significant public interest at stake.'[63]

However, simply following the procedures and requirements set by the whistleblowing policies, internally established within the company, does not entirely protect the employee against dismissal. In fact, the Court has 'rescinded the employment agreement of a whistleblower who failed to prove the allegations, because the basis of trust between employer and employee was irreparably damaged by the allegations.'[64]

Moreover, following the proportionality criteria, when the Court establishes that an employer has taken unproportionate action against an employee, 'the remedies available to the [former] will depend upon the specific action taken by the [latter].'[65]

Before moving to conclusion, it is necessary to have a look at the relevant European Union legislation on the issue of whistleblowing. In 2016, in fact, the EU Commission considered the issue of whistleblowing protection and started to assess the scope of any possible legislation.[66] The initiative mainly came from the socialist coalition, demanding further legal protection for

[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Martin Banks, 'EU Commission looking at legal protection for whistleblowers' https://www.theparliamentmagazine.eu/articles/news/eu-commission-looking-legal-protection-whistleblowers accessed 12 March 2017

whistleblowers and stressed the fundamental rights dimension of the issue, as 'whistleblowing should be encouraged as it is a form of free speech.'[67]

Therefore, the Commission considered a EU directive as 'one of the best possible tools in tackling wrong doing, which is not just about tax but a whole range of other criminal activities.'[68] In fact, it became clear through several leaks' cases that whistleblowing can successfully help expose the reality of crimes including arms trafficking and bribery.[69]

Additionally, as pointed out by Martin Jefflen, President of Eurocadres trade union, additional legal protection would encourage the reporting of wrongdoings and 'give people more confidence about coming forward'. [70] Subsequently, as several MEPs called for increased and uniform protection for whistleblowers, the Trade Secrets Directive was unanimously approved by the EU Council in April 2106, providing 'a common protection for trade secrets across EU Member States with the purpose to increase cross-border innovation activities and business competitiveness in the European Union.'[71]

The work done by the Commission, mainly focused on the 'need for offering protection to trade secrets due to inter alia increased risk of trade secrets misappropriation in the past 10 years, and the salience of this protection for improving EU internal market.'[72] As its proposal 'did not show significant regard to the interconnectedness and implications of trade secrets protection for freedom of expression and information as well as individuals who would disclose information in the public interest', the EU Parliament decided to improve recognized exceptions to trade secrets protection.[73] In fact, the Directive, in its final text, clearly establishes that an exception to the

[67] Ibid.
[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] Vigjilenca Abazi, 'Trade Secrets and Whistleblower Protection in the European Union'[2016] European papers A Journal of Law and Integration 1066 http://europeanpapers.eu/en/europeanforum/trade-secrets-and-whistleblower-protection-in-the-eu#_ftn6 last accessed 12 March 2017
[72] Ibid.
[73] Ibid.

secrecy of trade can be made 'for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest'.[74]

Hence, as pointed out by the scholar V. Abazi the EU parliament acknowledged that 'the revelations of whistleblowers, for example the recent 'Panama mega leak' and 'LuxLeaks' exposing tax heavens, are crucial for triggering accountability mechanisms and public debate on issues that otherwise could remain undetected or not reported, but they also contribute to better financial and organisational management.'[75]

In fact, if the market is further globalized and competitive, the know-how, and its subsequent confidentiality, are not the only necessity.[76] The individuals that decide to disclose information that prove to be of public interest, deserve a recognized legal protection. Moreover, as the scholar V. Abazi underlines, the EU Directive highlights the 'interlinks between protection of trade secrets and whistleblower protection'[77]. In fact, even if trade secrets and confidentiality of the know-how are in clear conflict with the whistleblowing practice, her analysis stresses out that in the European Union 'their rationale for improving the internal market is shared'[78], and 'across-the-board EU whistleblower protection alongside trade secrets protection'[79] is a necessity.[80]

Nevertheless, as previously outlined, the Dutch Whistleblowing Act does not provide for any sanction mechanism. Nevertheless, the introduction of the Act, obliged organizations to adjust their whistleblowing policies and, in case no procedure was in place, to establish an internal one, implement it and inform the employees about its content[81].

[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] Ibid.
[80] Ibid.
[81] R. van Schaik and R. de Wit (n 38)

In conclusion, the Whistleblowing Act does not provide for any sanction mechanism. Nevertheless, the introduction of the Act, obliged organizations to adjust their whistleblowing policies and, in case no procedure was in place, to establish an internal one, implement it and inform the employees about its content[82].

5.2 External reporting requirements (i.e. to markets and regulators), that may arise on the discovery of a possible offence.

Concerning the external reporting requirements that arise following the discovery of a possible offence, within the Dutch system, pursuant to the Money Laundering and Terrorist Financing (Prevention) Act, accountants have an obligation to report any unusual transaction.[83] This means that any 'natural person, legal person or company that, as external registered or external accounting consultant, independently carries out professional activities, including forensic accountancy, or a natural person, legal person or company that carries out similar activities in a professional or commercial capacity'[84] is required to submit relevant reports to the FIU-the Netherlands.[85]

Subsequently, FIU-the Netherlands will analyses the submitted reports and determine case by case which reports need to be delivered to the competent investigative authorities.[86] To provide guidance regarding the reporting obligations that arise in case of an unusual transaction, indicators were set up. Several are objective, meaning that if the report falls within one of those it is mandatory to submit it. Others are subjective, meaning that if the report does not fall under any of the objective indicators, the submission falls under the discretionary assessment of the accountant, that will decide whether one of the subjective indicators applies.

[82] Ibid.
[83] Financial Intelligence Unit the Netherlands, 'Accountants' <https://www.fiu-nederland.nl/en/group/accountants?page=1> accessed 3 March 2017
[84] Ibid.
[85] Ibid.
[86] Ibid.

Nevertheless, if, for example, the accountant does not deem necessary to report the transaction when he/she should have done so, he/she will be held responsible.[87]

For example, one subjective indicator is a transaction 'for which the entity has reason to believe that it might be related to money laundering or terrorism financing'; whereas an objective indicator is a 'transaction by or on behalf of a person or legal person resident, or with principal place of business, or with registered office in a designated State.'[88]

In relation to bribery allegations, it is necessary to note that in The Netherlands, facilitation payments 'are not prosecuted on the condition that these only represent small amounts, do not distort competition, are provided at the initiative of the official, represent payments to junior public officials, and are included in company's financial accounts.'[89] However, the Government Information Act, enables individuals, and the press, to ask for relevant information from both public and private entities conducting work for a public body.[90]

Concerning tax fraud, the Dutch system is based on voluntary disclosure. This means that, following the provisions of the Dutch Tax Code, the taxpayer has 'the opportunity to amend the tax return to the correct information before the tax authorities become aware of the errors, in which case no penalty will be imposed or the penalty will be reduced.'[91]

6. Who are the enforcement authorities for these offences?

Dutch Public Prosecution Office: Based upon Article 124 of the Dutch Law on the Judicial Body (*Wet op Rechterlijke Organisatie*), the Dutch Public Prosecution Office has the duty to carry criminal

[87] Ibid.
[88] Section 9 of the Dutch Whistleblowing Act
[89] Global Compliance News, 'Netherlands Corruption Report' [2014] GAN Business Anti Corruption Portal http://www.business-anti-corruption.com/country-profiles/netherlands accessed 21 February 2017
[90] Ibid.
[91] J. Geertsma (n 25)

prosecutions. All criminal prosecutions are carried out by the Dutch Public Prosecution Office. The Dutch Public Prosecution Office furthermore has the right to either decline to prosecute a certain case or either settle a case outside of court.

When deciding whether or not a case should be prosecuted, two main factors have to be take into account. First of all, an estimation should be made on whether there will be enough evidence for the case. Second, the public interest has to be taken into consideration. [92] Furthermore, it will also take into account:

- The seriousness of the act committed;
- The amount of negative publicity the company will receive when going into trial in relation to the crime committed;
- The way the company has evolved after committing the crime;
- The corporation of the company with regard to the investigation.

Prosecutions of fraud offenses such as embezzlement, corruption or money laundering will be executed by the regional sections of the Dutch Public Prosecution Office. Investigations will be carried out by local or national police force, whenever the Public Prosecution Office has decided to go through with the prosecution. [93] The Dutch Public Prosecution Office has several different sub-organisations which have been created for the investigation of different categories of crime.

For instance, the Functional Parket (*Functioneel Parket*) has as its task to investigate complicated fraud-cases. The Functional Parket is located in five different regions within the Netherlands[94] and mostly takes on fraud cases with regard to environment and economics and is assigned to carry out prosecutions of cases for which special investigation forces/bodies have carried out the investigative work. Those bodies are, among others, The Netherlands Food and Consumer

[92] J.A. van den Bosch, 'Criminal Liability of Companies' [2008] Lex Mundi, 7
[93] J. Tonino, J. Heurkens, J. Ouwehand & S. Peek, 'Corporate Liability in Europe' [2012] 24
[94] 'Functioneel Parket' (*Openbaar Ministerie*) https://www.om.nl/organisatie/functioneel-parket-0/ accessed on 7 February 2017

Product Safety Authority (*Voedsel- en Warenauthoriteit*) and the Inspection of Social Affairs and Employment (*Inspectie Sociale Zaken en Werkgelegenheid*).[95]

The Netherlands Food and Consumer Product Safety Authority has its own Intelligence and Search Team (*Inlichtingen- en Opsporingsdienst*). This team focusses on the prevention of fraud with regard to food.

In the sense of this research, this authority could be of importance with regard to subsidizing fraud. Furthermore, researches carried out by this authority also look into what the accused person(s) have actually gained. [96]

The Inspection of Social Affairs and Employment deals with fraud with regard to social allowances and benefits, job contracts, exploitation of workers and smuggling. Moreover, it deals with the investigation of illegal labour, malpractice of labour agencies and unjustified low wage payments.[97]

The Dutch Tax and Custom's Administration: The Dutch Tax and Custom's Administration (*Fiscale Inlichtingen- en Opsporingsdienst*, *FIOD*) carries out its own investigations with regard to tax- and financial fraud. This team coordinates its investigations with the regional Public Prosecution Office. Besides, the Dutch Tax and Custom's Administration cooperates with the Anti Money Laundering Centre (AMLC). Together, they carry out investigations with regard to money laundering.

The AMLC facilitates a platform for different kind of organisations working on the prevention of money laundering and financial fraud, such as the National Police Force, the Public Prosecution

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[95] 'Functioneel Parket' (*Rijksoverheid*) https://www.rijksoverheid.nl/contact/contactgids/functioneel-parket accessed on 8 February 2017
[96] 'NVWA inlichtingen en opsporingsdienst' (*Nederlandse Voedsel en Waren Authoriteit*) https://www.nvwa.nl/over-de-nvwa/inhoud/organisatie/opbouw-van-de-nederlandse-voedsel-en-warenautoriteit/nvwa-inlichtingen-en-opsporingsdienst accessed 12 March 2017
[97] 'Fraude of criminaliteit melden' (*Inspectie szw* , -)
https://www.inspectieszw.nl/contact/fraude_of_criminaliteit_melden/ accessed 12 March 2017

Office and the Financial Intelligence Unit. An investigations at the AMLC goes as follows: first of all, an intake takes place at a special department of the AMLC, where the "alarm bells" are being assessed. If it appears to be clear that money laundering is at stake, the Tax and Custom's Administration starts out an official investigation to collect evidence. If enough evidence has been collected to make a reasonable case, the Public Prosecution Office will carry out the prosecution.[98]

The Dutch Tax and Custom's Administration has also established a special team focussed on massive fraud-cases, bankruptcy-fraud and corporate tax fraud. This team is called Team Criminal Intelligence (*Team Criminele Inlichtingen*) and gathers information and evidence mainly through the use of informants. [99] There is also the possibility to call in information about a certain case, anonymized. Some cases might be very sensitive, therefore personal details will be protected by the Criminal Intelligence Team.[100]

Corruption and Bribery: A special enforcement agency has been created for the investigation of bribery involving high-ranked officials, politicians and judges. It also carries out investigations with regard to complaints about conduct of officials. Moreover, it investigates accidents due to police weapons.

This agency, the National Police Internal Investigations Department, is independent from all other investigation authorities. [101]Furthermore, a National Public Prosecutor on Corruption has been appointed to coordinate bribery cases. Even though 'usual' bribery cases can be investigated by the regional Public Prosecution Offices within their districts, the National Public Prosecutor on

[98] 'Wat wij doen' (AMLC) https://www.amlc.nl/nl/wat-wij-doen/ accessed on 8 February 2017
[99] 'Wat doet het FIOD?' (*Belastingdienst*) https://www.belastingdienst.nl/wps/wcm/connect/nl/fiod/content/wat_doet_de_fiod accessed on 8 February 2017
[100] 'Anoniem melden' (*Belastingdienst*) https://www.belastingdienst.nl/wps/wcm/connect/bldcontentnl/standaard_functies/prive/contact/fraude_misdaad_en_misstanden_melden/meld_misdaad_anoniem accessed on 8 February 2017
[101] 'Organization of the Public Prosecution Service' (*Openbaar Ministerie*, -) <https://www.om.nl/algemeen/english/about-the-public/organisation-the/> accessed 12 March 2017

Corruption is allowed to assist the regional forces. [102] Fraud with regard to judges, high-ranked officers and politicians are being investigated by an internal body of the institution concerned.[103]

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

Enforcement Powers: In order for evidence to be accepted by the court, the evidence obtained should be both 'legal' and 'convincing'. This entails that the evidence should have been obtained legally, meaning no provisions of the law should have been infringed. Furthermore, the judge at stake needs to be personally convinced of the guiltiness of the suspect. It is therefore of great importance that the search of evidence has been carried out with great care.[104]

As stated above, the National or Regional Police Force carries out the investigation with regard to cases that will be prosecuted by the Dutch Public Prosecution Office. When it comes to this matter, the police has lots of powers to search and seize information. For instance, it has the following powers[105]:

- Identification checks: every officer is able to halt a person and ask for his or her identification documents; [106]
- Arresting: the goal of arresting is to obtain information with regard to the investigation. Therefore, the suspect needs to be taken to the police station for interrogation. [107] Using (proportional) violence is allowed when the suspect does not carry out the orders of the officer. [108]

[102] A. Verbruggen & T. van Roomen, 'Anti-Bribery and Anti-Corruption Review' [2014] Law Business Review, 194-195
[103] J. Geertsma, 'Overview on anti-corruption rules and regulations in the Netherlands' [2010] ACE, 4
[104] D.S. Schreuders, 'Strafrechtelijke procedures: handel met voorkennis' [2004] Onderneming en Financiering, 52
[105] 'Politiebevoegdheden' (*Politie*) < https://www.politie.nl/themas/bevoegdheden-politie.html> accessed on 8 February 2017
[106] Article 52 Wetboek van Strafvordering
[107] Article 53 Wetboek van Strafvordering
[108] BF Keulen and G Knigge, *Strafprocesrecht (Criminal Procedures)* (12th edn, Kluwer 2010) 312

- Searching one's body and clothes: an officer is allowed to search the suspect's body and clothes. However, this measure is only allowed when a person is arrested and when it is beneficial to the investigation. Proportionality has to be taken into account; [109]
- Phone tapping: an officer is able to tap a suspect's phone or record conversation once this is ordered by the Prosecution Office. [110]
- Observing suspects: the definition given in Article 126g of the Dutch Code of Criminal Procedure (hereinafter: DCCP)(*Wetboek van Strafvordering*) is "observing ones behavior", implying that not only a suspect can be observed, but other people, beneficial to the investigation, as well.

Interrogation of a Suspect: Interrogation is one of the most important means to obtain information. The procedure of an interrogation is regulated in the DCCP, in particular within Article 29 of the DCCP. This Article stresses that all statements made during the interrogation should have been made freely. One cannot be forced to confess or make any statement whatsoever. This should be made clear by the officers before the start of the interrogation.[111]

Officers carrying out the interrogation cannot pressure the suspect in any shape or form.[112] This presumes that one cannot be verbally nor physically be threatened to make a certain statement. Manipulation is also forbidden. [113] However, a difference should be made between proper and improper compulsion. [114] [115] Officers should balance the rights of the suspect against the importance for society to find the truth.

The statements made by the suspect should be written down. It is important that the written report comes as close to the verbal statement as possible. No unreasonable changes can be made.[116]

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[109] Articles 95(2) jo 56 Wetboek van Strafvordering
[110] Article 126m Wetboek van Strafvordering
[111] BF Keulen and G Knigge, *Strafprocesrecht (Criminal Procedures)* (12th edn, Kluwer 2010) 198
[112] 'Getuigenverhoor' (*Politie*) http://politie-verhoor.nl/politieverhoor-algemeen/ accessed on 8 February
[113] BF Keulen and G Knigge, *Strafprocesrecht (Criminal Procedures)* (12th edn, Kluwer 2010) 199-200
[114] BF Keulen and G Knigge, *Strafprocesrecht (Criminal Procedures)* (12th edn, Kluwer 2010) 200-201
[115] EHRM John Murray v Great Britain, 8 February NJ 1996 725
[116] Article 29(3) Wetboek van Strafvordering

Search and Seizure: An item can be seized be an officer when the item is on the suspect or if the suspect will soon receive the item. Furthermore, the seizure needs to be connected to the investigation, as the seizure needs to contribute to one of the goals stated in Article 94 and Article 94a DCCP. If this is not the case, the seizure is ought to be unlawful and the item can therefore not be used as evidence during the prosecution.[117]

An officer is allowed to seize items in a certain area, for example one's home or car. However, a distinction should be made between search and seizure. When an officer is allowed to seize, he or she is allowed to walk around and can seize everything that is clearly visible. However, his or her hands should "be tied on the back".

This implies that items cannot be moved, shifted or opened in order to see more than is visible on first instance. [118] Moreover, even though the competence of seizing exists, a warrant is still needed if an officer wants to enter one's home.

A search can only be carried out if the Public Prosecution Office orders to do so. He or she is in charge of the search, as it is not allowed for officers to carry this out. An officer is allowed to carry out the search itself, however, the Public Prosecution Office should be there to make sure the search is carried out legally and proportional.[119]

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self-incrimination)?

Privilege Against Self-incrimination: The prosecution of corporate entities is based upon the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*). Chapter VI of Book IV deals exclusively with legal persons.

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[117] BF Keulen and G Knigge, *Strafprocesrecht (Criminal Procedures)* (12th edn, Kluwer 2010) 320
[118] BF Keulen and G Knigge, *Strafprocesrecht (Criminal Procedures)* (12th edn, Kluwer 2010) 326-327
[119] Article 96 Wetboek van Strafvordering

Article 528 DCCP describes that a corporate entity is represented by one of its directives in criminal proceedings. This Article also states when a corporate entity is deemed to show and who is empowered the exercise on behalf of the defendant. [120] The corporate entity has the power to decide which director will represent the company in court. The defendant does not only have procedural rights, it is also some sort of informational source. The Dutch Supreme Court has decided that, even though no such thing is stated within Article 528 DCCP, a statement made by a director representing the corporate entity is comparable to a statement made by a defendant. [121] The right to remain silent is encompassed in Article 29(2) DCCP.

In one of the Dutch Supreme Court landmark cases, it stated that the right to remain silent applies to a director of a corporate entity, as this right is possessed by a director representing the company. [122] Each director that appears in court to represent the corporate entity, has the right to remain silent. It could therefore be wise for the company, to send as many directors as possible. [123]

As goes for natural persons, the representative of a corporate entity cannot be called to testify against the corporation he or she represents. [124] Besides, legal persons can also call upon the privilege of non-disclosure. [125]

The right to remain silent granted to the representatives of a legal person is connected to the European Convention on Human Rights. The right to remain silent is derived from Article 6 of the European Convention on Human Rights. The Dutch Supreme Court has decided that legal entities also, have human rights that can be violated within court. [126]

[120] Article 528 Wetboek van Strafvordering
[121] B.F. Keulen & E. Gritter, 'Corporate Criminal Liability in the Netherlands' [2010] EJCL, 9
[122] Dutch Supreme Court, 13 October 1981, NJ 1982, 17
[123] B.F. Keulen & E. Gritter, 'Corporate Criminal Liability in the Netherlands' [2010] EJCL, 10
[124] Dutch Supreme Court, 25 June 1991, NJ 1992, 7
[125] Dutch Supreme Court, 29 June 2004, NJ 2005, 273
[126] Dutch Supreme Court, 19 June 2001, NJ 2001, 551

Legal Privilege: In accordance with articles 217-219 DCCP, Dutch law provides several kinds of legal privilege. Firstly, legal privilege for relatives of the suspect. Parents and children can rely on this, just as relatives in the collateral line up to and including the third degree of the suspects. Finally, the (former) spouse or (former) registered partner are also included in people who are able to benefit from legal privilege.

This all is in accordance with article 8 of the European Convention of Human Rights (ECHR), which states the right to respect for private and family life. The problem with this legal privilege, is that it does not give legal privilege in the situation that people are not married of registered partners. This was the case when a person who has been living together with the suspect, who was the father of their two children. The Dutch Supreme Court considered that the legislator made a fair choice, so it does not breach article 8 ECHR.[127]

Article 219 DCCP on the other hand gives legal privilege to people who are at risk prosecution. The concept of this article, is that witnesses can decline to answer questions, if he or the one of the relatives as stated in article 217 DCCP can be at risk of being prosecuted by his testimony. Then article 218 DCCP. This article contains the legal privilege for people covered by a form of secrecy, mainly because of their profession.

The concept of this is that people, so even when they are a suspect of a crime, should be able to get legal guidance without the fear of disclosure[128] or healthcare without his or her 'problems' entrusted to a doctor, being revealed to the public.[129] This legal privilege is limited to a certain amount of professions. These are lawyers, doctors, priests, notaries and probation officers, but only when it contains information they obtained due to their profession. This also includes people working for the professional, like a physician assistant.

[127] Dutch Supreme Court, 31 May 2005, NJ 2005, 531.
[128] Dutch Supreme Court, 20 February 2007, NJ 2008, 113.
[129] Dutch Supreme Court, 6 May 1986, NJ 1986, 813.

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

Employee data can be provided to enforcement authorities in accordance with art. 43 Wet Bescherming Persoonsgegevens (Law for the protection of personal information; further: WBP). Article 9 WBP states that the processing of personal information is limited to the purpose of the acquisition of the information.

In short, it means that if employee date is intended for the sole purpose of the use in a business, there is no way to use this information for anything else. On the other hand, article 43 WBP gives companies a possibility to provide enforcement authorities data of their employees on 4 grounds:

- Safety of the state;
- Prevention, detection and prosecution of criminal offenses;
- Important economic and financial interests of the state and other public bodies;
- Protecting the involved or the rights and freedoms of others.

All these criteria are stated as the Necessity-criteria. In a case concerning KLM Royal Dutch Airlines, the suspect of heroin smuggling, was under the opinion that KLM acted unlawfully by providing passengers list to the Royal Netherlands Marechaussee (KMar). The KMar requested these lists to find associates of a known smuggler. The Dutch Supreme Court considered that the provision by KLM was necessary for the KMar to prevent or detect these crimes so that it was not unlawful. [130]

10. If relevant, please set out information on the following:

10.1 Defences to the offences listed in question 2;

In the second question, the following offences were mentioned as being the main offences for companies under the Dutch Criminal Code with regard to bribery and money laundering.

[130] Amsterdam Court of Appeal, 12 May 2009, NJF 2009, 392.

- Article 177 DCC – 178 DCC: Active Bribery of a public official, punishable with up to 6 of 9 years of imprisonment or a fine of the fifth category, or the sixth category for legal entities;
- Article 363 DCC – 364 DCC: Passive Bribery of a public official, punishable with up to 6 of 9 years of imprisonment or a fine of the fifth category, or the sixth category for legal entities;
- Article 328ter DCC: Active and Passive Bribery of private persons, punishable with up to 4 years of imprisonment or a fine of the fifth category, or the sixth category for legal entities;
- Article 420bis DCC: Money Laundering, punishable with up to 6 years of imprisonment or a fine of the fifth category, or the sixth category for legal entities.

A possible defence for Articles 177-178 DCC could be that the payments at stake are "facility payments". The Dutch Prosecution Office does not feel the need to prosecute those who carried out facility payments in the sense of Articles 177 and 178 under those provisions.

Facility payments can be identified by the following features:[131]

- The act requested by the briber would be carried out by the judge anyhow, as he or she was obliged to act in that way; the payments are of a relatively low amount;
- The officials at stake are low-ranked;
- The foreign official must be the who took the initiative with regard to the payment.

The boundaries with regard to Articles 363-364 DCC are somewhat vague. Especially the requirements of what should be considered as a gift, are debatable. The provision itself considers a gift as anything that has value, especially towards the one receiving the gift. Only if the given object has no value to any person involved, there is no gift in the sense of Article 363 DCC. A possible defence to Articles 363-364 could encompass the fact that a gift does not have a the value as a gift described in the provision.

[131] 'Aanwijzing opsporing en vervolging ambtelijke corruptie in het buitenland (2012A020)' (*Openbaar Ministerie* , 2012)https://www.om.nl/organisatie/beleidsregels/overzicht-0/executie-afdoening/@86294/aanwijzing-opsporing-0/ accessed 11 March 2017

Attention should be given to the actual value of the object, to what the gift is applicable, whether a gift is socially acceptable in the certain case and in what frequency gifts are handed out the person at stake. [132] Furthermore, the consequences of the gift should be taken into account, as well as the position of the official at stake. [133] For Article 328ter DCC, the defence could claim that there was no intention in carrying out a bribe or committing fraud. [134] Moreover, a claim could be raised that the accused acted out of a legal obligation, according to Article 42 DCC. [135] With regard to Article 420bis DCC, the question should be raised whether the act committed can be qualified as money laundering as prescribed in the provision itself. If the accused only holds the object(s) which were used in the act of money laundering, this does not directly indicate that the accused is guilty of the act itself. More prove is needed. [136]

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement);

There are no provisions for immunity within the Dutch Criminal Code. Only Public Bodies enjoy full immunity with regard to the DCC, although this is broadly critiqued. [137] [138] With regard to prevention of prosecution, one could claim one of the penalty exclusions (*Strafuitsluitingsgronden*). These exclusions can either affect the legality of the crime, or the culpability of the accused. Legality exclusions (*Rechtvaardigingsgronden*) are described in Articles 40-43 DCC and are aimed at the legality of the crime. In some cases, the accused can invoke one of these grounds in order to justify the act that has occurred.

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[132] Eelke Sikkema, 'De vage grenzen van het misdrijf corruptie Overpeinzingen bij een fles wijn ' (*Utrecht Centre for Accountability and Liability Law*, 14 September 2015)http://blog.ucall.nl/index.php/2015/09/de-vage-grenzen-van-het-misdrijf-corruptie-overpeinzingen-bij-een-fles-wijn/ accessed 11 March 2017

[133] 'Aanwijzing opsporing en vervolging ambtelijke corruptie in Nederland' (*Overheid*, August 2011) http://wetten.overheid.nl/BWBR0030298/2011-08-01 accessed 11 March 2017

[134] 'Voormalig directeur van woningstichting PWS veroordeeld voor omkoping, belastingfraude en valsheid in geschrifte' (*Anti Corruptie*, 15 October 2015)http://www.anti-corruptie.nl/actualiteit/2015/voormalig-directeur-van-woningstichting-pws-veroordeeld-voor-omkoping-belastingfraude-en-valsheid-in-geschrifte accessed 11 March 2017

[135] W. de Vries, 'Spagaat in corruptiezaken: fiscale bewaarplicht versus vervalsen bedrijfsadministratie' (*Smeergeld*, 20 December 2013) http://blog.jaeger.nl/nl/tag/smeergeld/ accessed 11 March 2017

[136] Dutch Supreme Court, 26 October 2010, *NJ* 2010, 665.

[137] Dutch Supreme Court, 25 January 1994, *NJ* 1994, 598.

[138] Marian Groenouwe, 'Overheden in het strafrecht: over de houdbaarheid van immuniteit' (*Utrecht Centre for Accountability and Liability Law*, 2 June 2015)http://blog.ucall.nl/index.php/2015/06/overheden-in-het-strafrecht-over-de-houdbaarheid-van-immuniteit/ accessed 11 March 2017

- Article 40 DCC: describes ascendency as a ground for the exclusion of penalties;
- Article 41(1) DCC: mentions self-defense as a possible exclusion;
- Article 42 DCC: legal provisions can, in some cases, exclude penalties;
- Article 43(1) DCC: based upon an official order, penalties can be excluded as well.

Culpability exclusions (*Schulduitsluitingsgronden*) can be invoked to affect the culpability of the accused. These exclusions are listed in Articles 39-43 DCC:

- Article 39 DCC: insanity can be used as a ground to exclude the possibility of penalties;
- Article 40 DCC: mental ascendency could affect the culpability;
- Article 41(2) DCC: self-defense excess could be used as an exclusion of penalties;
- Article 43(2) DCC: an unjustified official order can be invoked in order to prevent penalties.

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

Within the Dutch Criminal Code, there is a general provision on penalty reduction. After two-third of the penalty, one is eligible for an early release. Tis possibility for early release applies to penalties longer than 1 year of imprisonment. For example, if one charged with 15 months of imprisonment, he or she is, after one year eligible for an early release, and could be released after 14 months. This is regulated in Article 15 of the DCC. [139]

Moreover, based upon Article 44a of the DCC, a penalty could be reduced based upon agreements made by the Public Prosecution Office and the accused. These agreements should find ground in Article 226h of the Dutch Code of Criminal Procedure (DCCP). Requirements of these agreements are mentioned in Article 226g of the DCCP. It states that the accused should:

1. Act as a witness in a case described in Article 67(1) DCCP, and;
2. Be connected with the case of the accused in the first place, and;

[139] 'Voorwaardelijke invrijheidstelling' (*Strafrecht Advocaten Netwerk*) http://www.strafrechtadvocatennetwerk.nl/advocaat/64-advocaat/214-voorwaardelijke-invrijheidstelling accessed 11 March 2017

3. The case at stake should be an infringement of the public order and morality.

Furthermore, it is of importance that the agreement has been written down. The crime at stake should be described in detail, as well as the accused to whom is testified. The crimes of which the witness is accused should be laid down and which of those accusations will be affected by the agreement. Also, the statement of the Public Prosecutor with regard to the agreement should be documented. [140] Moreover, a judge could take into account the fact that the accused has cooperated during the process and trial. This could resolve in a lower charge. However, this is not regulated by law as such. A judge is appointed to decide on the length of imprisonment or height of the penalty. [141]

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance)

In the Netherlands, especially if compared to other European countries, compliance is still in its infancy. During the 1980s, the first provisions to resemble a compliance system were laid down in *criminal* law, spurred on by anti-corruption and money laundering legislation with regards to profits of criminal organisations.[142] Several scandals on the Dutch stock market in the 1990s shed light on this lacuna in financial regulation, after which compliance-like regulations were adopted *en masse* during this decade.[143] Compliance in the Netherlands is to this day often viewed as purely 'regulatory' compliance and there is very little attention to soft law/commitment-based compliance programmes.[144]

[140] Article 226g sub 2 Dutch Code of Criminal Procedure
[141] Article 350 Dutch Code of Criminal Procedure
[142] Geert Vermeulen, 'Compliance wordt steeds belangrijker' [2015] 1(1) Compliance Instituut
[143] A Wellenga, 'Tien jaar compliance in de context van twintig jaar witwasbestrijding' [2010] 1(1) Compliance Instituut
[144] Eva Lachnit, 'Compliance Programmes in Competition Law: Improving the Approach of Competition Authorities' [2014] 10(5) Utrecht Law Review

The relevant Dutch authority, the Authority for Consumers and Markets (ACM), wishes to stay neutral regarding compliance programmes.[145] Aside from a leniency programme for voluntary reports of infringements, the ACM does not promote any mitigating measures for having such a programme in place, nor any aggravating sanctions if companies do not promote compliance.[146] In 2014 the chairman of the board of ACM took part in a seminar organised by International Chamber of Commerce, during which he spoke on ACM's view on mitigating fines.[147] He explained their belief that the ACM ought to stay neutral in this area, as corporations must commit to compliance programmes for 'the right reasons'. In their opinion, companies should not be rewarded for the mere adoption of a compliance programme: if the functioning of the company improves due to the adoption of the programme, this behaviour will be reflected in the height of the fines – that is, if the company is fined at all.

However, this does not mean that compliance programmes play no part in the ACM's fining.[148] Only on one occasion, one of its predecessors (OPTA)[149] increased a fine due to a lack of an effective programme, which was allowed by the Rotterdam District Court when the legitimacy of the level of the fine was questioned by the company.[150] As this has not happened again, and most importantly never in the area of competition law, literature considers it as a mainly theoretical possibility.[151] Another exception worth mentioning is a provision of proactive cooperation with

[145] Organisation for Economic Co-operation and Development Directorate for Financial and Enterprise Affairs COMPETITION COMMITTEE, 'ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE NETHERLANDS – 2013 –' 28-Nov-2014 DAF/COMP/AR(2014)40
[146] Ibid
[147] The complete speech can be found on the website of the ACM, in Dutch. https://www.acm.nl/nl/publicaties/publicatie/12571/Toespraak-Chris-Fonteijn-bij-International-Chamber-of-Commerce-over-compliance/
[148] ACM Fining Guidelines, Arts. 3.13 and 3.15 (Beleidsregels voor Boete en Clementie, Staatscourant 24 April 2013, no. 11214)
[149] OPTA, the Independent Post and Telecommunications Authority, joined forces with several other sector-specific regulators and consumer protection authorities in April of 2013, creating the ACM
[150] District Court of Rotterdam, 24 October 2013, JAAN 2014/38, paragraph 2.6
[151] Eva Lachnit, 'Compliance Programmes in Competition Law: Improving the Approach of Competition Authorities' [2014] 10(5) Utrecht Law Review 36

the investigation procedure of the ACM within a compliance program.[152] In fact, this collaboration is viewed as a mitigating circumstance with regards to the fine.[153]

In fact, as highlighted by I. Vandenborre and T. Goetz: 'The guidelines set up by the […] ACM do not mention compliance programmes. […] the ACM promotes compliance programmes as they may prevent an infringement, may limit the duration of an infringement, and/or the discovery of an infringement and may allow the company to file a leniency application.'[154]

In conclusion, even if specific aspects of the adoption of a compliance programme can have consequences that lead to mitigating or aggravating circumstances, the mere commitment to set and implement a compliance programme itself does not reap any 'rewards' in the Netherlands.

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

The Dutch Penal Code was recently (2015) changed, based upon recommendations given by the Organisation for Economic Co-operation and Development (OECD). [155] Among others, the provisions on bribery were amended. For instance, there is no longer a distinction between acting in a breach of duty or without a breach of duty. Moreover, maximum sentences have been raised up to 6 years of imprisonment for bribery and up to 12 years for the bribe of a judge. [156] However, the OECD also claimed that the Dutch legal framework lacked provisions with regard to foreign bribery laws and stated that it should engage more in the investigation of foreign bribe cases where Dutch nationals could be involved. [157]

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[152] I. Vandenborre and T. Goetz, 'Compliance Programmes and Antitrust Fines' retrieved from https://awards.concurrences.com/IMG/pdf/2_compliance_programmes_and_antitrust_fines.pdf last accessed 11 March 2017.
[153] Ibid.
[154] Ibid.
[155] OECD Foreign Bribery Report, *An Analysis of the Crime of Bribery of Foreign Public Officials* 2015
[156] Jurjan Geertsma, 'Overview on anti-corruption rules and regulations in the Netherlands' [2010] ACE, 5
[157] Aldo Verbruggen & Tessa van Roomen, 'Anti-Bribery and Anti-Corruption Review' [2014] Law Business Review, 200

Furthermore, the European Commission stated in 2014 that the Dutch legal framework had two points of action it should work on. First of all, more provisions should be created with regard to the possibilities of conflict of interest of elected officials, and second, the Dutch government should invest in the investigation capacities of foreign bribery cases involving Dutch nationals or legal persons. [158]

Moreover, the Netherlands is a party to many international treaties and agreements with regard to bribery and corruption, to which Dutch national law should comply: [159]

- the Convention drawn up on the basis of article K.3(2)(c) of the Treaty on European Union on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union;
- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;
- the Statute of the Group of States against Corruption (GRECO);
- the Criminal Law Convention on Corruption;
- the Civil Law Convention on Corruption;
- the United Nations Convention against Corruption.

Not all recommendations have been implemented, however, as changes have been made only two years ago, it is assumable that the legal framework will remain as it is for a while. Moreover, the Dutch Prosecution Office does not seem very willing to take on cross-border cases (yet). If the legal framework were to change, this would be the part that needs a revision. [160]

[158] European Commission, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organizedcrime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_netherlands_chapter_en.pdf , 3 February 2014
[159] A list can be found on this website: https://treatydatabase.overheid.nl/nl/Verdrag/ZoekResultaat?searchTerm=corruptie&pagina=1
[160] Aldo Verbruggen & Tessa van Roomen, 'Anti-Bribery and Anti-Corruption Review' [2014] Law Business Review, 203

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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction

1.1 Introduction

1.1.1 Criminal Law Protection of Correctness of the Business Trading

The abovementioned offenses undoubtedly concern the sphere of business trading. The activities of business trading participants are based on the principle of proper management. In case of disruption of this correctness, norms of the criminal law are used to restore it.[1]

In the Polish criminal law system, prohibited acts protecting the correctness of the business trading are specified as economic offences. This term does not have a unified and universally accepted definition, as a result of actual diversity in manifestations of the offences in the sphere of management. Therefore, the offences which are related to the business trading are called as economic offences.[2] The most typical and general economic offenses the Polish legislator has regulated in the Criminal Code[3] (hereinafter: C.C.) – in the Chapter XXXVI "Offences against the business turnover" and in Chapter XXVII "Offences against trading in money and securities". However, a large part of the provisions concerning criminal liability for economic offenses are regulated outside of the C.C. in several dozens of other acts, including the Act of September 15 2000 – Code of Commercial Companies (Consolidated text - Journal of Laws from 2016, Item 1578 with subsequent amendments), the Act of July 29 2005 on Trading in Financial Instruments (Consolidated text - Journal of Laws from 2016, Item 1636 with subsequent amendments) and the Act of April 16 1993 on Combating the Unfair Competition (Consolidated text - Journal of Laws from 2003 No. 153, Item 1503 with subsequent amendments).

From the economic offences we should distinguish offences of an economic nature which are related to any offence committed in connection with business trading. Their economic nature is not determined by the main generic subject of protection but by the facts specified in the individual

[1] Robert Zawłocki [w:] R. Zawłocki (red.) Prawo karne gospodarcze, t. 10, System prawa handlowego (red.) Stanisław Włodyka (C.H. Beck 2012) 36 [Polish].
[2] ibid 23.
[3] Ustawa z dnia 6 czerwca 1997 r. - Kodeks karny (tj. Dz.U. z 2016 r. poz. 1137 z późn. zm.). [Polish].

case. These provisions protect the correctness of the business trading only indirectly (eg. fraud from Article 286 of the C.C.).

1.1.2 Offences against business trading[4]

The share of offences against business trading accounts for about 10% of all offences committed in Poland. So far the scale of economic offences was steadily growing. However, in 2016, there were 17,400 fewer of the offences of this type than in the year before. The mightiest share of them are various types of fraud (about 40%), the number of which has also decreased compared to previous years.[5]

1.1.3 Other Forms of Counteracting Economic Offences

In order to counteract to negative phenomena in the sphere of business trading, in addition to instruments of the criminal law, the Polish legislator introduced a number of regulations of an administrative nature. These provisions contain many injunctions and prohibitions, imposing a number of obligations on business trading participants and financial institutions, and provide state authorities with tools to enforce them, whether through the system of penalties or by granting them control powers. As an example of this type of regulation we should mention, the Act of August 21 1997 on the Restriction of Running Business Activities by Persons Holding Public Offices (Consolidated text - Journal of Laws from 2006 No. 216, Item 1584 with subsequent amendments) which, among else: prohibits the persons indicated in it, from merging of the function exercised with holding certain positions related to the conduct of business activities, or obliges them to make statements about the status of their assets. As well as the Act of November 16 2000 on Money Laundering and Terrorist Financing (Consolidated text - Journal of Laws from 2016, Item 299 with subsequent amendments), which implements EU regulation in this area.

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[4] Robert Zawłocki [w:] R. Zawłocki (red.) Prawo karne gospodarcze, t. 10, System prawa handlowego (red.) Stanisław Włodyka (C.H. Beck 2012) 25 [Polish].

[5] Grażyna Zawadka, *„Mniej spraw za VAT. Efekt surowych kar?"* (Rzeczpospolita, 20 lutego 2017 r.) <http://http://www.rp.pl/Przestepczosc/302209878-Mniej-spraw-za-VAT-Efekt-surowych-kar.html/#ap-1> accessed 20 Febuary [Polish].

1.2 Selected Crimes Against Business Trading on the Grounds of the C.C.

1.2.1 Breach of trust

As already indicated, basic economic offences were included in the C.C. within the Chapter XXXVI "Crimes Against Business Trading", which opens with Art. 296 C.C. which concerns abuse of trust, otherwise known as mismanagement. This provision is a basic instrument for the protection of the business trading, as it refers to the most typical way of violating its rules, which involves damage caused by the manager to the entity which he manages.[6]

In Art. 296 Para. 1 of the C.C. the legislator described the basic type of the crime in question, in the form of causing substantial material damage.[7] It is punishable by depravation of liberty from 3 months to 5 years. In this case, based on Art. 37a of the C.C., the court may order the so-called alternative penalty consisting of a fine or restriction of liberty, instead of the deprivation of liberty which does not exceed 8 years.[8] There is also a possibility, according to the instruction of Art. 37b, of a so-called mixed penalty, consisting of two penalties – depravation of liberty for up to 3 months and the penalty of restriction of liberty for up to 2 years.[9] In Art. 296 Para. 1a of the C.C. a privileged type is defined, which result consists only of the immediate danger of causing substantial material damage, under the penalty of depravation of liberty for up to 3 years. Also in this case alternative penalty, fine, penalty of restriction of liberty, or mixed punishment may be applied. Discussed here offence has two qualified types. The first, due to the objective of obtaining a financial benefit, is punishable by depravation of liberty from 6 months to 8 years (Art. 296 Para. 2 of the C.C.). On the basis of the Art. 37a of the C.C. there is a possibility of sentencing a fine, restriction of liberty or mixed penalty instead of depravation of liberty. However, the second of them, because of the result in the form of great material damage,[10] is punishable by depravation of liberty from a year to 10 years (Art. 296 Para. 3 of the C.C.). In this case there is no possibility of sentencing an alternative penalty from the Art. 37a of the C.C., however, there is an eventuality of

[6] ibid 455.
[7] According to the legal definition from Art. 115 Para. 5 of the C.C., it is a damage, which value at the time of committing the offense exceeds 200,000 PLN.
[8] Alicja Grześkowiak [w:] Alicja Grześkowiak (red.) Kodeks karny: komentarz (Legalis/el. 2017) [Polish]
[9] ibid.
[10] According to the legal definition from Art. 115 Para. 6 of the C.C., it is a damage, which value at the time of committing the offense exceeds 1000,000 PLN.

sentencing a mixed penalty from the Art. 37b of the C.C. consisting of a penalty of depravation of liberty for up to 6 months and a penalty of restriction of liberty for up to 2 years. In case of conviction for an offence from the Art. 296 Para. 3 of the C.C., on the basis of the Art. 309 of the C.C., there is a possibility of cumulatively sentencing a fine of up to 3,000 daily-fine units. According to the Art. 296 Para. 4 of the C.C., if the perpetrator of the offence defined in Para. 1 or 3 acts unintentionally, he is liable to the penalty of depravation of liberty for up to 3 year, a fine or penalty of restriction of liberty resulting from the Art. 37a of the C.C., as well as is liable to a mixed penalty on the basis of the Art. 37b of the C.C. In the Art. 296 Para. 5 of the C.C. the legislator points to a circumstance excluding the punishment of the act. It applies when after the fulfilling of the act the damage is fully repaired before the initiation of the proceedings. In case of committing the offence of breach of trust, on the basis of the Art. 307 Para. 1 of the C.C. the court may exceptionally alleviate the penalty, which means that it can inflict a penalty below the lower limit of statutory penalty range or of a milder type (Art. 60 Para. 6 of the C.C.), and even refrain from imposing it on, provided that the perpetrator will voluntarily repair the damage in its entirety. In the case of voluntary reparation in a large part, there is a possibility of extraordinary alleviation of the penalty (Art. 307 Para. 2 C.C.).

1.2.2 Corruption

1.2.2.1 Passive Bribery

In Poland as well as in other European countries, the basis of penalizing the economic corruption is the classical construction of the offence of venality (so-called passive bribery) described in Art. 228 of the C.C., and the offence of bribery (so-called active bribery) described in the Art. 229 of the C.C. These provisions specify so-called corruption "in the office", as the perpetrator or the object of interaction (Art. 229 of the C.C.) can only be a person holding a public function, defined by the legislator in Art. 115 Para. 19 of the C.C.[11]

[11] Oktawia Górniok [w:] O. Górniok (red.) Prawo karne gospodarcze, t. 10, Prawo gospodarcze i handlowe (red.) Stanisław Włodyka (C.H. Beck 2003) 19-20 [Polish].

Art. 228 Para. 1 of the C.C. contains the basic type of the offence of passive bribery that contains accepting financial or personal benefit or its promise in connection with holding a public function, and is punishable by depravation of liberty from 6 months to 8 years. There is also a possibility of sentencing an alternative penalty in form of a fine or restriction of liberty (Art. 37a of the C.C.) and a mixed penalty in form of depravation of liberty for up to 3 months and restriction of liberty for up to 2 years (Art. 37b of the C.C.). The privileged type is described in Art. 228 Para. 2 and consists of fulfilling of the elements of the basic type in the circumstances, which allow to account it for a case of lesser significance, about which decides the assessment of the degree of social harm of the act in the context of the conditions laid in Art. 115 Para. 2 of the C.C. It is punishable by a penalty of a fine, restriction of liberty or depravation of liberty for up to two years. In this case there is a possibility of alleviating the penalty and imposing a penal measure, a forfeit or a compensatory measure, if by this will meet the purpose of the penalty on the basis of the Art. 59 of the C.C. The legislator predicated 3 qualified types of the offence of passive bribery. They contain fulfilling the elements of the offence of passive bribery by: behaviour constituting an infringement of the law (Art. 228 Para. 3 of the C.C), fulfilling an official action only if receiving a financial or personal benefit, a promise or a demand of such a benefit (Art. 228 Para. 4 of the C.C.) and accepting a financial benefit of a substantial value or its promise (Art. 228 Para. 5 of the C.C.). For the offences from Art. 228 Para. 3 and 4 a penalty of depravation of liberty from a year to 10, is foreseen. In this case there is a possibility adapting both the Art. 37a of the C.C., as well as the Art. 37b of the C.C. However, for the offence from Art. 228 Para 5 a penalty of depravation of liberty from 2 to 12 years, is foreseen.

1.2.2.2 Active Bribery

The basic type of the active bribery ie granting or a promise of granting a financial or personal benefit to a person holding a public office, in connection with holding this office, is described in Art. 228 Para. 1 of the C.C. It is a subject to the same principles of punishing as the offence from Art. 228 Para. 1 of the C.C. A privileged type of the offence of active bribery is also an identical case as the previously mentioned Art. 228 Para. 2 of the C.C. In Art. 229 Para. 3 and 4 of C.C the legislator defined 2 qualified types of the offence of active bribery, which consist of inducing a person holding a public office to violate the provisions of law, granting or promising to grant a financial or personal benefit for violating the provisions of law and granting or promising to grant

a financial benefit of a substantial value, in sequence they are a subject to a penalty of depravation of liberty from a year to 10 and depravation of liberty from a 2 years to 12. In Art. 229 Para. 6 of the C.C. the legislator concluded a clause of unpunishability, according to which a perpetrator of bribery is not a subject to penalty if he notified the investigative authorities about granting a financial or personal benefit, or its promise, before the authorities found out about this and before the benefit or its promise was accepted.

1.2.2.3 Managerial Bribery

Only in 2003 the Polish legislator decided to criminalize corruption in the private sector, introducing the offence of managerial bribery described in Art. 296 of the C.C. With this action the criminal liability of managers running private property was sanctioned, whose acts of bribery were not penalized before.[12] Discussed here offence, otherwise defined as "corruption in business trading" or "managerial bribery"[13], was essentially based on classical offences of passive and active bribery. In the Art. 296a Para. 1 and 2 of the C.C. its passive and active form is described in the basic type, which are punishable by the penalty of depravation of liberty from 3 months to 5 years, fine or restriction of liberty (Art. 37a of the C.C.), as well as mixed penalty from the Art. 37b of the C.C. The offence of managerial bribery, both in passive, as well as in active form, has a privileged type described in the Art. 296a Para. 3 of the C.C. It is a subject of evaluation under criteria used in the Art. 228 and 229 of the C.C. and it falls under the same penalty. However, in the Art. 296a Para. 4 of the C.C. the qualified type of managerial bribery was introduced, which contains creating a substantial material damage, and is penalized by depravation of liberty form 2 to 12 years. The clause of unpunishability introduced in the Art. 296a Para. 5 of the C.C. matches the construction from the Art. 229 Para. 6 of the C.C.[14]

[12] Robert Zawłocki [w:] Kodeks karny. Część szczególna. Tom II. Komentarz do artykułów 222–316 (red.) Michał Królikowski, Robert Zawłocki (Legalis/el. 2013).
[13] ibid.
[14] Małgorzata Gałązka [w:] Kodeks karny. Komentarz (red.) Alicja Grześkowiak, Krzysztof Wiak (Legalis/el. 2017) [Polish].

1.2.3 Fraud

1.2.3.1 Credit Fraud

Chapter XXXVI "Offences against business trading" includes two types of offences termed as "frauds". First of them is the described in Art. 297 of the C.C. economic fraud, also called as financial or credit fraud.[15] The offence contains of punishable disinformation of a financial institution in order to poses financial means from it.[16] The regulation includes two basic types, in form of action (Para. 1) and abandonment (Para. 2), which lead to gaining any of financial instruments described in the Art. 297 Para. 1 of the C.C. Both of these types are penalized by depravation of liberty from 3 months to 5 years, a fine or restriction of liberty (Art. 37a of the C.C.), as well as by a cumulative fine in the amount of 3,000 daily-fine units (Art. 309 of the C.C.). The Art. 297 Para. 3 of the C.C. contains a clause of unpunishability in case of a voluntary prevention of the use of financial support or instrument of payment, resignation of a subsidy or a public contract, or satisfaction of a victim's claims before criminal proceedings are instituted.

1.2.3.2 Insurance Fraud

Second of them is established in Art. 298 of the C.C. offence of insurance fraud, otherwise called assurance fraud[17], which is based on consciously causing events that are a base for payment of compensation, e.g. building arson. In is penalized the same as offences from the Art. 297 Para. 1 and 2 of the C.C.

Described here offences remain in cumulative or apparent coincidence with classic offence of fraud from the Art. 286 Para. 1 of the C.C. It is based on brining another person into disadvantageous disposal of property in purpose of gaining a financial benefit, and it is penalized by depravation of liberty from 6 months to 8 years, a fine, or restriction of liberty (Art. 37a of the C.C.). There is also a possibility of sentencing a mixed penalty consisting of depravation of liberty

[15] J. Bojarski, T. Oczkowski [w:] Sytem prawa karnego: przestępstwa przeciwko mieniu i gospodarcze, tom 9 (red.) Robert Zawłocki (2nd edn C.H. Beck 2015) 530-531 [Polish].
[16] Robert Zawłocki [w:] Kodeks karny. Część szczególna. Tom II. Komentarz do artykułów 222–316 (red.) Michał Królikowski, Robert Zawłocki (Legalis/el. 2013) [Polish].
[17] Oktawia Górniok Przestępstwa gospodarcze: rozdział XXXVI i XXXVII kodeksu karnego: komentarz (C.H. Beck 2000) 37 [Polish].

for up to 3 month and restriction of liberty for up to 2 years. According to the Art. 286 Para. 3 of the C.C., in case of lesser significance, perpetrator can be a subject to a penalty of fine, restriction of liberty or depravation of liberty for up to 2 years. In case of this offence, on the basis of the Art. 295 Para. 1 and 2 of the C.C., the court can also apply an extraordinary mitigation of punishment or even discharge the offence, under the condition of voluntary redress of damages in whole or in significant part by the perpetrator.

1.2.4 Money Laundering

Offences described in the Art. 299 of the C.C. commonly called "dirty money laundering", are considered exceptionally harmful for the society. The essence of this action consists of enabling the usage of profits from criminal activity and camouflaging their traces.[18] This offence was included into two basic types, described in the Art. 299 Para. 1 and 2 of the C.C. and it is penalized by depravation of liberty from 6 months to up to 8 years or restriction of liberty (Art. 37a of the C.C.), as well as by a cumulative fine in amount of 3,000 daily-fine units (Art. 309 of the C.C.). In this case there is also a possibility of sentencing a mixed penalty from the Art. 37b of the C.C. To every of them there are two qualified types related: because of the perpetrator acting in agreement with another person (Art. 299 Para. 5 of the C.C.) or because of the effect in form of gaining a financial benefit of a substantial value (Art. 299 Para. 6 of the C.C.). Both of the forms are penalized by depravation of liberty from a year to 10. On the basis of the Art. 299 Para. 6a of the C.C. the preparation for committing this offence in the basic type is also punishable by depravation of liberty for up to 3 years, a fine, or restriction of liberty (Art. 37b of the C.C.), or mixed penalty (art. 37b of the C.C.). In the Art. 299 Para. of the C.C. the legislator included an clause of unpunishability for the offence in basic type, under a condition of revealing to the investigative authorities information concerning persons involved in committing the offence, as well as circumstances under which it was committed, if it prevented the commitment of another offence. However, if the perpetrator endeavours to reveal this information and circumstances, the court applies extraordinary alleviation of the penalty (Art. 299 Para. *in fine*).

[18] ibid 47.

1.3 Additional Criminal Sanctions

In case of the perpetrators of all offences described in the Chapter XXXVI "Offences against the business turnover" there is a possibility of sentencing a cumulative fine in line with general principles, accordingly with disposition of the Art. 33 Para. 2 of the C.C. It is possible when, perpetrators of this offences, committed them in order to gain a financial benefit or if they gained such a benefit, no matter if it was not a mark of a particular type of an offence.

In case of the offences in question, because of their character and social roles of the offenders, there is a possibility to sentence in line with general principles, next to sentenced penalty, a compensatory measure in form of forfeit of item originating directly from the offence, or either serving or intended to serve to commit the offence (Art. 44 Para 1 and 2 of the C.C.), and also forfeit of financial benefit originating from the offence, even if indirectly, or its equivalent (Art. 45 of the C.C.), and a ban on holding a particular position, a particular profession or on running business activity (Art. 41 of the C.C.).[19] In case of sentencing perpetrators of these offences, court can rule, on the injured person's or another eligible individual's motion, applying the provisions of civil law, obligation to repair, in whole or in part, of the injury caused by the offence or compensation for suffered injury (Art. 46 Para. 1 of the C.C.), and if this would be significantly impeded, the court may order instead a duty of up to 200,000 PLN for the injured party.

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

As outlined in part one of this study, the Criminal Code is the basic source of law concerning rules on criminal liability for offences against economy (regulations of the chapters XXXVI-XXXVII). Penal sanctions are provided by over 60 other acts. Given the nature of this study an expanded analysis of the issue shall not be conducted, hence only illustrative behaviour qualified as an infringement of the interest of entrepreneurs is presented below – breach of trust, bribery and

[19] ibid 103.

unlawful disclosure or use of trade secrets.

A common feature of Code-regulations and those contained in other acts, is the economy's protection construed as establishment of set of rules which effectively sanctions and enforces the infringement of rules on production and trade in goods and services.[20] According to R. Zawłocki the business criminal law performs: safeguards, guarantees, regulations and compensatory functions.[21]

Art. 296 C.C. provides a penal sanction applicable to a person that is obliged under a statute, decision or an agreement, to deal with property or economic activity issues, of a natural, legal or *quasi-legal person.*[22] The offence consists in the abuse of conferred rights or breach of a duty, which result in a serious material injury. It is punishable by imprisonment from 3 months up to 5 years.

Art. 296 C.C. provides two types of the above-mentioned offence: an aggravated and a privileged offence.[23] The most severe is the aggravated type provided in Art. 296 Para. 3 C.C. which sanctions causing serious material injury (i.e. property which value, at the time of the offence, exceeds 1,000,000 PLN) with imprisonment from one up to 10 years.

The abuse of rights or breach of duties set out in Art. 296 Para. 1 C.C., which result in a damage, can not only consist in exceeding the authority given, but also in an action taken in conflict with the purpose for which the rights have been conferred. This offence is a result crime. It can be committed with a direct or contingent intent.[24] It is prosecuted ex officio.

Another relevant offence sanctioned by the Polish Criminal Code is the so called *manager's bribery*. The crime can be committed by a person that performs management tasks in a business entity and

[20]Robert Zawłocki, *System Prawa Karnego. Przestępstwa Przeciwko Mieniu i Gospodarcze*, pt IX 15 [Polish].
[21]ibid 16.
[22] In Polish law a *quasi-legal person* is an entity that does not have the status of a legal person but does enjoy legal capacity.
[23]In Polish criminal law a privileged type of an offence is treated less severely than the corresponding standard offence.
[24] Marek Kulik, *Kodeks karny. Komentarz,* comment on Art. 296a of the Criminal Code [Polish].

is its employee or contractor. The offence consists in the demand or acceptance of a personal or financial benefit or their promises, in exchange for abuse of rights or breach of a duty. A further feature of the crime is that the perpetrator's conduct causes damage, constitutes an act of unfair competition, or an inadmissible preferential treatment in favour of a purchaser or a recipient of goods, services or a consideration (Art. 296a C.C.). Such a conduct is punishable by imprisonment from 3 months up to 5 years. The legal form of the business entity is immaterial when looking at whether the crime was committed or not. The offence can be committed only intentionally with a direct or a contingent intent. The punishable act determined in Art. 296a C.C. consists in the acceptance of a financial or personal benefit, which can result in a damage suffered by the business entity, commission of an act of unfair competition or preferential treatment, and is a result of the perpetrator's abuse of rights or breach of duties.[25]

Attention should be given to illustrative regulations concerning *compliance* in acts other than the Code. Invaluable for economic activities is the protection of know-how as well as other information of economic value undisclosed to the public. The protection of this information is provided by Community and domestic acts, especially by the Act of April 16 1993 on combating unfair competition.

Pursuant to Art. 11 (4) of this Act "*trade secrets are undisclosed to the public technical, technological, organizational information of the enterprise or other information of economic value towards which the entrepreneur has taken necessary measures to preserve their confidentiality*". Unlawful disclosure or use of a trade secret is an act of unfair competition, which makes it possible for the entrepreneur whose interest was infringed or put at risk to seek redress by means of a civil claim (among other things reparation of the damage in accordance with the general rules).

However, the legislator has strengthened the protection of trade secrets by the means of a penal sanction. Art. 23 (1) of the Act on combating unfair competition provides a fine, a penalty of restricted freedom or imprisonment up to 2 years for the disclosure or use of a trade secret in own

[25] Marek Kulik, *Kodeks karny. Komentarz,* comment on Art. 296a of the Criminal Code [Polish].

business operations, if such an act causes serious damage to the entrepreneur and is committed by a person obliged towards the entrepreneur to maintain the secrecy of this information. Art. 23 (2) provides the same penalties for the disclosure or use in own business operations of an unlawfully obtained trade secret.

It is also appropriate to set out that, in the Polish legal order, there are a number of legal acts that impose on entrepreneurs numerous duties in the scope of activities of regulatory authorities. Business entities active in the Polish market should therefore adjust their internal policies on *compliance* to many regulations, especially those deriving from competition law, data protection or telecommunication law. However, this report does not aim to present those regulations in detail.

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

3.1 General Thoughts

The issue of responsibility of collective entities for criminal acts committed by persons acting within its organization is regulated by the Act of October 28 2002 on the liability of collective entities for acts prohibited under penalty - hereinafter referred to as the Act. This legislation includes both provisions of substantive law as well as procedural, allowing only the appropriate application of the provisions of the Code of Criminal Procedure, unless the law provides otherwise.[26]

Nature of the liability of a collective entity remains controversial among representatives of the doctrine and jurisprudence. Rarely we can find views recognizing it as a criminal liability in the strict sense. Two main currents of viewpoints are in favor of either recognizing the responsibility of collective entities for criminal liability in the broad sense (a kind of), or assuming that this is not

[26] Act on the liability of collective entities for acts prohibited under penalty 2002, Article 22

a criminal liability, although undoubtedly its character is repressive.[27] In this regard, also Constitutional Tribunal[28] commented stating that the "responsibility model adopted in the studied act does not have the character of criminal liability in the strict sense. (...) This responsibility [of a collective entity - et. al.] is a manifestation of repression of lawlessness under the title of insubordination against the law (...)." However the borders of this study does not allow for wider remarks on this issue.

It should be emphasized, that the liability of a collective entity under the Act does not exclude civil liability for caused damage, administrative liability or individual liability of a perpetrator of a prohibited act.[29]

3.2 Subjective Scope of the Act

The Act art. 2 Para. 1 introduces a legal definition of a collective entity. A collective entity is considered to be a legal person or organizational unit without legal personality, to which separate legislation grants the legal ability. To determine the full subjective extent of the Act we should refer to regulations of the Civil Code[30] - according to which, the legal entities are the State Treasury, organizational units to which specific provisions confer legal personality and above all share-holding companies - joint stock companies and limited liability companies.[31] The Act, however, excludes from this collection for its needs the State Treasury, local government units and their associations. From the subjective scope of the Act therefore we should rule out municipalities[32] or their associations,[33] even though they have legal personality.

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[27] Marian Filar, *Odpowiedzialność podmiotów zbiorowych za czyny zabronione pod groźbą kary (*[w:] *System prawa karnego. Zagadnienia ogólne.* 1st edn CH Beck) 427-428 [Polish]
[28] *Polska Konfederacja Pracodawców Prywatnych* [2004] Trybunał Konstytucyjny vol. OTK-A [2004] nr 10 position 103 K 18/03 [Polish].
[29] Act on the liability of collective entities for acts prohibited under penalty 2002, Article 6
[30] Civil Code 1964, Article 43[1]
[31] Code of Commercial Companies 2000, Article 12
[32] Act on Commune Self-government 1990 Article 2
[33] ibid Article 65

However, among organizational units that have no legal personality, yet have the legal ability conferred on the basis of separate regulations, we should enumerate personal commercial companies (general partnership, professional partnership, limited partnership and limited joint stock company),[34] a condominiums,[35] but not civil partnerships, which are only a contract relationship linking partners, the source of which creation is formed by articles of association.[36]

Under the subjective scope of the Act we should classify also commercial companies in which the State Treasury is one of the shareholders, local government units or association of such units, share-holding companies in organization, entities in liquidation and entrepreneurs who are not a natural person, along with foreign organizational units.[37]

3.3 Objective Scope

3.3.1 Features of a Natural Person Committing an Act Prohibited Under Penalty

The liability of a collective entity can be defined as in some way dependent on the criminal responsibility of a natural person. The law requires firstly finding if a person with specific features, committed an offense.

Art. 3 of the Act requires that a person alternatively:

- acts on behalf of or in the interest of a collective entity within the authorization or obligation to represent, make decisions on its behalf, exercise interior control, or either exceeds its powers or violates its obligations,
- has been authorized to act in the result of exceeding of powers or violating the obligation by the person mentioned in Para. 1,
- acts on behalf of or in the interest of the collective entity, with the consent or knowledge of the person mentioned in Para. 1,

[34] Code of Commercial Companies 2000, Article 8
[35] Act on Proprietorship of Premises 1994, Article 6
[36] Marian Filar, *Odpowiedzialność podmiotów zbiorowych za czyny zabronione pod groźbą kary (*[w:] *System prawa karnego. Zagadnienia ogólne.* 1st edn CH Beck) 429 [Polish]
[37] Act on the liability of collective entities for acts prohibited under penalty 2002, article 2

- was an entrepreneur who directly cooperates with a collective entity in achieving a objective that is legally allowable.

The same article, however, contains an additional requirement - the behavior of a person belonging to any of the categories above should at least potentially bring a benefit for a collective entity, even non-pecuniary (ie not directly leading to a financial benefit).

As Marian Filar correctly explains these categories "On behalf of a collective entity, this natural person acts, whose effects of a active behavior bring direct legal consequences for a collective entity. In the interest of a collective entity, however, works the one whose actions lead to a financial benefit for this entity. Both of the above cases, are based on activities within the scope law or obligation to represent the collective entity. As a rule, these will be the members of the collective bodies of the entity (...) whose actions can be identified as the action of the same legal entity. While the activities of a non-member of the body of the collective entity involving making decisions on its behalf in the legal sense (...), should be understood as the action of a duly authorized representative."[38]

3.3.2 Catalog of the Acts Prohibited Under a Penalty

Not all offences, however, will result in a liability of a collective entity. The Act in Art. 16 points an extensive catalog of offenses falling within the objective scope of the Act - it contains, inter alia, offences against business trading, offences against trading in money and securities, offences against protection of information and the credibility of documents, offenses against intellectual property, but also terrorist offenses, offenses against public order and offences against sexual freedom and morality (eg dissemination of pornographic material involving a minor). How J. Potulski and J. Warylewski states "regardless of the form of the act committed by natural person which is a criminal offense the legislature does not impose restrictions in scope of the gradual or phenomenal form of an offence".[39] Because of that it is not important whether a person only tried

[38] Marian Filar, *Odpowiedzialność podmiotów zbiorowych za czyny zabronione pod groźbą kary (*[w:] *System prawa karnego. Zagadnienia ogólne.* 1st edn CH Beck) 431-432 [Polish]
[39] Marian Filar, *Odpowiedzialność podmiotów zbiorowych za czyny zabronione pod groźbą kary (*[w:] *System prawa karnego.*

to commit a specific offense or acted as a single perpetrator, accomplice, steering or recommending perpetrator, nor if was only attempting to perform a specific offence.

The fact of committing the offense should be further acknowledged by.[40]

- lawful judgment of conviction,
- judgment of conditional discontinuation of criminal proceedings or proceedings in a case of a tax offense,
- court decision of authorization for voluntary acceptance of the responsibility,
- court decision to discontinue the proceedings because of the circumstances excluding punishing of the offender.

3.4 Fault of a Collective Entity

The last of the conditions that must be considered should be modified depending on to which category natural person whose conduct is the subject of the criminal law assessment belongs. In case when that person is:

- a person authorized to act in the result of the exceeding of powers, breach of a duty or acting with the consent or knowledge of body or representative of a collective entity - it is necessary to prove at least a lack of due diligence in the selection of a natural person who committed an act prohibited under penalty, or at least lack of proper supervision of the person - from the body or the representative of a collective entity.
- a person authorized or obliged to act on behalf of a collective entity or an entrepreneur directly cooperating with a collective entity - the Act requires that a criminal act took place in the consequence of such organization of activity of the collective entity, which did not provide avoidance of committing a offense by that person, while it could be provided by exercising due diligence required under the circumstances, by the representative body or collective entity.[41]

Zagadnienia ogólne. 1st edn CH Beck) 431-432 [Polish]
[40] Act on the liability of collective entities for acts prohibited under penalty 2002, Article 4
[41] ibid article 5

3.5 The Consequences of the Liability of a Collective Entity

According to the art. 7 of the Act on a collective entity, which will bear the liability under the Act, shall be imposed a court fine ranging from 1,000 to 5,000,000, however, no higher than 3% of the revenue earned in the financial year in which the offense underlying the liability of a collective entity was committed.

Towards the collective entity are also ruled as forfeiture[42]:

- objects even indirectly coming from the prohibited act or which served or were intended to serve in order to commit a prohibited act,
- financial benefits derived even indirectly, from a prohibited act,
- the equivalent of objects or financial benefits derived even indirectly from a prohibited act.

Optionally, the court may rule also i.a. prohibition of the promotion or advertising of the business, manufactured or sold goods, services or provisions provided; ban the use of grants, subsidies or other forms of financial support from public funds, a ban on the use of help of international organizations, of which Republic of Poland is a member or rule to announce the judgment to the public. Prohibitions are ruled for the period ranging from 1 to 5 years.[43]

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

4.1 Constitutional guarantees of protection against extradition

4.1.1 Introduction

In the Polish Legal System by 2005 extradition of Polish citizens was banned regardless of literal determination of that action. Original regulation concerning that case was statutory. On account

[42] ibid article 8
[43] ibid article 9

of that, in a case of different adjustment of that issue within any of international agreement signed by Poland it was possible to recognize the primacy of international treaties[44]. It was only with the adoption of the Constitution of the Republic of Poland of April 2 1997 (hereinafter called: the Constitution)[45], the ban on extradition of Polish citizens have been given constitutional status, by entering it in the original wording of Art. 55 Para. 1 of the Constitution. Moreover, in the Art. 55 Para. 2 of the Constitution the extradition of suspects of committing crime without the use of violence for political reason has been banned.

4.1.2 Constitutional issues of Polish citizens extradition in accordance with EU regulations

Because of the fact that Poland acceded to the European Union (hereinafter: EU) on May 1 2004 it has been found to be necessary to align polish law to Community legislation and to establish in its framework the European Arrest Warrant (hereinafter: EAW).[46] It is a simplified form of extradition in force between EU Member States. Regarding the compliance of national provisions implementing EAW with Constitution has been consideration of Constitutional Tribunal of the Republic of Poland. The Court has ruled in the judgement of April 27 2005[47] that Article 55 paragraph 1 of the Constitution (at that time) is incompatible with EU regulations. Constitutional Tribunal stated that EAW is a form of extradition. Even though there is many differences between these two institutions the aim is a identical because of the fact that they focus on somebody expulsion to other country. Thus, allowance on extradition of Polish citizens in accordance with EAW procedure is infringement of constitutional ban on extradition of Polish citizens.

4.1.3 Revision of article 55 of the Constitution

Given the sentence of Constitutional Tribunal, in 2006 amendment of the Constitution has been made in accordance with art. 55. Revision of the Constitution maintained ban on Polish citizens extradition, inserting two exceptions in art. 55 paragraph 2 and 3. Nowadays, extradition of Polish

[44] Grażyna Artymiak, Maciej Rogalski (red.) Proces karny: część szczególna (2nd edn Wolter Kluwer Polska Sp. z o.o. 2012) 346 [Polish].
[45] Dz.U. Nr 78 poz. 483 z późn. zm. [Polish].
[46] ENA ustanowiono na podstawie decyzji ramowej Rady z dnia 13 czerwca 2002 r. w sprawie europej-skiego nakazu aresztowania i procedury wydawania osób między Państwami Członkowskimi (Dz. Urz. UE. L 2002 Nr 190, str. 1) [Polish].
[47] Wyrok Trybunału Konstytucyjnego z dnia 27 kwietnia 2005 r. P 1/05 Legalis/el. nr 68295 [Polish].

citizen may be granted upon a request made by a foreign state or an international Judical body of such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by and international organization of which the Republic of Poland is a member, provided that the act covered by a request for extradition:

- was committed outside the territory of the Republic of Poland, and
- constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and the time of the making the request (art. 55 paragraph 2 of Constitution).

In accordance with art. 55 paragraph 3 of Constitution these restrictions do not apply to Permissable extradition of Polish citizen made by request of international Judical body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body. This rule relates as well as to transfer of Polish citizen to International Criminal Court.[48]

Additionally, in the frames of the art. 55 paragraph 4 of Constitution the extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens.

4.2 Statutory regulation of extradition

4.2.1 Conditions of inadmissibility of passive extradition

At the level of the statutory regulation regarding passive extradition (expulsion from the country) have been contained in Criminal Procedure Code (hereinafter: CPC) in chapter 65 "Requests of foreign states for the extradition or transportation of prosecuted or sentenced persons staying abroad, and for the delivery of material objects". Inadmissibility of extradition has been specified in Art. 604 CPC These rule relates not only Polish citizens.

[48] Barbara Nita-Światłowska [w:] M. Safjan, L. Bosek (red.), Konstytucja RP. Tom I. Komentarz do art. 1–86 (Legalis/el. 2017) [Polish].

In Art. 604 CPC Polish legislator marked out so-called absolute bar to extradition. Under those provisions the extradition is inadmissible if:

- the person to whom such a motion refers, is a Polish citizen or has been granted the right of asylum in the Republic of Poland,
- the act does not have the features of prohibited act, or if law stipulates that the act does constitute an offence, or that a perpetrator of the act does not commit an offence or is not subject to penalty,
- the period of limitation has lapsed,
- the criminal proceedings have been validly concluded concerning the same act committed by the same person,
- the extradition would contravene Polish law,
- there is a justified fear that in the state requesting the release of an extradited person may be imposed or carried out the death penalty,
- there is a justified fear that in the state requesting the release of an extradited person may violate her/his rights and freedom,
- it concerns a person prosecuted for committing a non-violent crime for political reasons.

Above enumerating is complete and it results mandatory non-execution of extradition. However, obstruction of relative have been specified in Art. 604 Para. 2 CPC. This regulation states that extradition may be refused if:

- the person to whom such a motion refers has permanent residence in Poland,
- the criminal offence was committed on the territory of the Republic of Poland, or on board a Polish Veesel or aircraft,
- a criminal proceedings in pending concerning the same act committed by the same person,
- the offence is subject to prosecution on a private charge,
- pursuant to the law of the State which has moved for extradition, the offence committed is subject to the penalty of deprivation of liberty for a term not exceeding one year, or to a lesser penalty or such a penalty has been actually imposed,
- the nature of the offence with which the motion for extradition is connected is military or fiscal, or political (different than in Para. 1 p. 9),

- the State which has moved for extradition, does not guarantee reciprocity in this matter.

In these cases, the refusal is optional. Moreover, it is not a closed enumeration, so extradition may be refused also due to other circumstances.[49] These provisions are subsidiary and are used when there is no extradition treaty binding Poland with the country in general and when such an agreement exists, but does not regulate the issue.[50]

4.2.2 Exemption of EAW

Extradition between EU countries is replaced by EAW. Its "passive" variety is regulated in Chapter 65b of CPC "Motion of a European Union Member State to surrender a requested person pursuant to a European arrest warrant". In Art. 607p of the CPC legislator specified the compulsory prerequisities for refusing to execute an EAW. Legal bas is contained in Art. 607p Para. 1 of the CPC concern Polish citizens as well as other countries.

Under this provision EAW shall be refused, if:

- the offence on which the European warrant is based, where Polish criminal courts have jurisdiction to prosecute the offence, is covered by amnesty,
- a final judicial decision was issued against the requested person in connection with the same offence and, in the case of sentencing for the same offence, the requested person is either serving or has served his penalty or, according to the laws of the State, where the sentence was passed, the penalty cannot be executed,
- a final and binding decision on surrender to a different Member State of the European Union was issued against a requested person,
- the person who is the subject of the European warrant may not be held criminally responsible for the acts on which the arrest warrant is based, owing to his age,
- it would violate human and citizen freedoms and rights,

[49] Barbara Nita-Światłowska [w:] Jerzy Skorupka (red.) Kodeks postępowania karnego: komentarz (Legalis/el. 2017) [Polish].
[50] Wyrok Trybunału Konstytucyjnego z dnia 21 września 2011 r., SK 6/10, Legalis/el. nr 370260 [Polish].

- the warrant was issued in connection with a political offence committed without the use of violence.

However, article 607p Para. 2 of the CPC relates only to Polish citizens and it mimics the terms of Art. 55 Para. 2 of the Constitution. Moreover, an EAW issued for the purpose of executing a penalty of imprisonment or other measure involving deprivation of liberty against a requested person who is either a Polish citizen or was granted the right of asylum in the Republic of Poland, shall not be executed, unless the requested person consents to the surrender (Art. 607s Para. 1 of the CPC). The CPC provides facultative reasons for denial of execution of the warrant described in Art. 607r of the CPC. All of these causes apply for both Polish and non-Polish citizens. Additionally, according to art. 607s Para. 2 of the CPC the judicial authority may also refuse to execute a European warrant if it was issued for the purpose of executing a penalty of imprisonment or other measure involving deprivation of liberty against a requested person who is either a Polish citizen or was granted the right of asylum in the Republic of Poland or the requested person either resides or permanently stays in the territory of the Republic of Poland. In any cause, the Supreme Court of Poland took the view that it is possible to refuse to enforce EAW, if the verdict was given against conditions of admissibility, under the internal rules of the applicant State which transposes regulations of the EU.[51]

4.2.3 Cooperation with International Criminal Court

Regulations contained in Chapter 66e "Cooperation with the International Criminal Court" fill the commitment of Polish obligations resulting from ratification of Rome Statute of the International Criminal Court[52], whereby International Criminal Court has been established (hereinafter: ICC). Main aim of these regulations is to provide in internal regulations legal and procedural institutions which allow to carry out all forms of cooperation provided for in the Statute.[53] This Chapter allows cooperation not only with ICC but also with international criminal tribunals *ad hoc* appointed

[51] Uchwała Sądu Najwyższego z dnia 20 lipca 2006 r., I KZP 21/06, Legalis/el. nr 75614 [Polish].
[52] Rzymski Statutu Międzynarodowego Trybunału Karnego przyjęty w Rzymie dnia 17 lipca 1998 r. [Polish]
[53] Piotr Hofmański, Elżbieta Sadzik, Kazimierz Zgryzek (red.), Kodeks postępowania karnego. Komentarz do artykułów 468-682. Tom III (Legalis/el. 2012) [Polish].

to judge infringement of international humanitarian law.[54]

According to Art. 611h Para. 3 of the CPC, when adjudicating on the admissibility of surrender of a person, Art. 604 (inadmissibility of surrender) does not apply. This means that refusal to surrender a person with referring to any of those reason, while cooperation concerning extradition with ICC is inadmissible.[55]

4.3 Summary

In terms of Polish law we can mark out 3 forms of extradition. In addiction to its classic varieties there is possibility to transfer person to other Member State of EU in the frames of EAW as well as to transfer person to ICC. Regardless of the name these institutions are varieties of commonly known procedure of extradition.

In Polish law we can divide prohibition of extradition on constitutional and statutory one. On the basis of the Constitution the extradition of a Polish citizen shall be prohibited, except in cases specified in Para. 2 and 3 of Art. 55 of Constitution. Implemented exception in conjunction with the Polish accession to the EU allows nearly unlimited possibility to transfer Polish citizens in general is impossible, unless in the frames of cooperation with ICC. Moreover, on the basis of the Constitution the extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of people personsizens. However, the prohibitions set out in the CPC in this regard, repeat and supplement constitutional guarantees. Restrictions on extradition may also derive from binding international agreements or in the absence thereof, the provisions of the c.p.c.

[54] Adam Górski [w:] Andrzej Sakowicz (red.), Kodeks postępowania karnego: komentarz (Legalis/el. 2016) [Polish].
[55] Barbara Nita-Światłowska [w:] Jerzy Skorupka (red.) Kodeks postępowania karnego: komentarz (Legalis/el. 2017) [Polish].

5. Please state and explain any:

5.1 Internal reporting process

The polish law doesn't have regulations which would clear-out point at obligation to inform of irregularities within a company. This kind of obligation is located in the Code of Criminal Procedure. An Art. 304 Para. 1 says that everyman who finds out about committing a crime which is being wanted *ex officio* has a social duty to inform about that fact the Police or an attorney.[56] However the Code of Criminal Procedure doesn't foresee sanction for violation of this principle except situations which are mentioned in it. In accordance with an Article 304 paragraph 2 from the Code of Criminal Procedure, national and council institutions, which in connection with its activities learnt about committing a crime which is being wanted *ex officio*, are obliged to inform instantly about this fact the Police or an attorney and undertake necessary actions until an arrival of an organ qualified to hunt for crimes or till that organ would not issue a proper regulation, in order not to allow to obliterate traces and proofs of crime.

5.1.1 Activities of company's organs

The Commercial Companies Code determines supervisors organs authorized to an internal supervision for company's activities, whereas it is worth to notice that according to an Article 212 paragraph 1 of this Code, this kind of an authorization is for every partner. For this purpose, a partner or a partner with an oneself authorized person may at any time view company's books and documents, make up a balance sheet for an own behoof or demand explanations form the administration. Further, a company agreement can establish supervisor's organs which are supervisory board and/or revision committee. In companies in which a share capital exceeds an amount of 500,000 PLN and there are more than twenty-five partners, there should be established both of these organs. Although supervisory board performs a supervisor for all company's activities, is not allowed to issue an administration binding company orders.[57] "Additionally beyond activities owing from the rules of law, supervisory board once a year makes up and presents an assessment of companies situation to an ordinary general assembly, having an assessment of

[56] An act from 6th June 1997 - the Code of Criminal Procedure
[57] An act from 15th September 2000 - the Commercial Companies Code

internal control' systems, risk management, compliance and function of an internal audit; this assessment covers all important control mechanisms, especially finance reporting and operational activities".[58] What is more, a legislator also has imposed an obligation[59] of creation an audit' committee in public interest units, which members are for example issuers of securities established in Poland admitted to trading on the regulated market of the European Union, excluding local government units, national banks, branches of credit institutions and foreign banks, cooperative savings and credit unions, insurance companies or open pension funds.[60] This committee is responsible eg for supervision of financial reporting process and internal control' systems, internal audit and risk management.

5.1.2 Legal status of informer

The polish law does not predict any special regulations about protection a person who is performing inside the company, informing about overuses in it. If an informer took part in committing a crime at any it is phenomenal form (perpetration, complicity, recommending authority or management power) or only tried to perform a crime, he have to count on incurring criminal liability on the basis of the Penal Code.[61] The same applies to liability of people who are inciting or helping in committing a particular crime – which according to the Penal Code commit a separate crime from that to which they committing they induce.[62] However, it should be noted that every man is punishable for cooperating in committing a crime within the limits of its own intentional and unintentional independently from other people's liability.[63] The Penal Code predicts also so called an active grief, which gives the court an opportunity to extraordinary lenience of punishment relative to a collaborator, who freely tried to prevent from committing a crime[64] and even excludes collaborator's liability if he truly freely prevented from committing a crime[65], which could be a sequence of reporting an abuse by an informer. Moreover, a similar

[58] Code of Best Practice for WSE Listed Companies
[59] An act from 7th May 2009 about statutory auditors and their self-governance, entities authorized to audit financial statements and the public supervision
[60] Ibid, article 2
[61] The Penal Code
[62] ibid article 18, 19
[63] ibid article 20
[64] ibid article 23
[65] ibid article 23

regulation occurs in case when a person only tried to commit a crime – it may avoid a punishment if freely waives from an accomplishment or prevents from effects constituting the mark of the forbidden act; if this person only freely tried to avert from the forbidden act, a court is allowed to extraordinary gentle a punishment.[66] According to the general clause, for the final size of the penalty would also be influenced by the directive from an Art. 115 of the Penal Code, ie the way and circumstances of committing an act, form of intention, motivation of the perpetrator. However, as a exception to the rule, the polish legislator predicts also a possibility to gentle a punishment by virtue of the special rule – for example – in a way of appliance institution of an extraordinary lenience of punishment to perpetrators of corruption crime, who informed an organ called for prosecution about a fact of a crime and its circumstances, before that organ did not find out about them[67] or too upon an act about a crown witness from June 25 1997 –primarily in order to break a solidarity of perpetrators on matters of a crime or a fiscal crime committed in an organized group.[68]

5.2 External reporting requirements

5.2.1 Duty to draw up financial statements

In an Accounting act from September 29 1994, Art.45 we can find an obligation to draw up financial statements by the entities listed in an Art. 2 of this law. To these entities belong eg trading companies which have in Poland its headquarters or place of management board, including in the organization, and also civilian companies, where in case of physical people, civilian companies of physical people, general partnership of physical people and a partnership – only when their net income from sale of goods, products and financial operations for a previous fiscal year was at least the equivalent in Polish currency of 1,200,000 €. A financial statement consists of: a balance, profit and loss account and an additional information covering an introduction to the financial statement and also additional information and explanations.[69] An Accounting Act imposes an obligation for an auditor to study annual reports of institutions, ie banks, insurance companies, investment and pension funds, joint-stock companies and entities, which in a previous fiscal year fulfilled at least

[66] ibid article 15
[67] ie The Penal Code, Art. 250a
[68] Turn state's evidence Act, Art. 1
[69] The Accounting Act, Art. 64

two of the following conditions:

- an average employment in conversion to full time job was at least 50 people,
- the balance sheet assets at the end of fiscal year was an equivalent in Polish currency of 2,500,000 €,
- net income from sale of goods and products and financial operations for a previous fiscal year was at least the equivalent in Polish currency of 5,000,000 €.[70]

An auditor evaluates if it has been drawn up according to correctly kept accounting books and if it is compatible in terms of form and content with the law, statue or an agreement, with which an entity is associated.[71]

The Commercial Companies Code[72] reserves consideration and approval of financial statements to the competence of a limited liability company's ordinary shareholders meeting[73] or an ordinary general assembly in a joint-stock company.[74] This report with the company's management's statement from entity's activity and approval resolutions is submitted in the Internal Revenue Service,[75] and reference about them is a subject to be disclosed in the National Court Register.[76] An Accounting act includes criminal provision towards entities which contrary to an obligation did not make financial statement, did not keep accounting book or which did not present them to an auditor, but also to an auditor, who made an illegal opinion about that documents.[77]

[70] ibid article 64
[71] ibid article 65
[72] The Commercial Companies Code
[73] ibid article 228
[74] ibid article 393
[75] The Legal Persons' Income Tax Act, Art. 27
[76] Act on the National Court Register, Art. 40
[77] The Accounting Act, Art. 77-79

6. Who are enforcement authorities for these offences?

6.1 General considerations

There is several Enforcement Authorities in Poland which have its active participation in preventing economic crimes. Economic crime is a major threat to Polish citizens, so that is why on the territory of Poland there are many formations looking on that subject. In this chapter I will characterize them.

6.2 Characteristic of the authorities responsible for combating economic crimes

6.2.1 Central Anti-Corruption Bureau (CBA)

A secret service appointed for combating corruption in public and economic life, especially in institutions of state and local governments as well as for combating activity affecting in economic interests of the state. CBA is a division of Polish government with which works a Head of CBA, who is public administration authority. Till the 31st of March the Head of CBA presents annual report to the Prime Minister as well as to Standing Committee on Special Services.

Main purpose of the CBA is combating corruption at the interface between the public and private sector. According to article 2 of Law on Central Anti-Corruption Bureau, Bureau is resposible for recognition, prevention and detection of crimes, prosecution of the criminals as well as carrying out control and inspection activities.

6.2.2 Internal Security Agency (ABW)

The secret service appointed to protect constitutional order of Republic of Poland. ABW handles to detecting and fighting of economic crimes. ABW cooperates with other institutions and national services and actively participates in drawing attention to the activities which aim to improve Polish energy security. One of the tasks of Internal Security Agency related with fighting corruption is prevention-action.

6.2.3 The Central Bureau of Investigations (CBŚP, CBŚ)

A lunatic fringe of Police investigative service, implementing tasks in accordance with

identification, prevention and fighting organised crime in the area of whole country. Till 9th of October, 2014, CBŚ as the Central Bureau of Polish Police was lunatic fringe of Polish Police Headquarters. Their main tasks has been to fight against organised crimes, cross border crimes, criminal crimes, drug-related crimes, offences linked to terrorist activity as well as identification and working out dangerous criminal groups. CBŚ is fighting against economic crimes (money laundering, banking scandal, stock market scandals, corruption etc.).

6.2.4 The Military Police

Enforcement body and specialized service of Polish Armed Forces. Activity of the military police is focused on ensuring respect of military discipline as well as on protecting public order and preventing crimes in the area of military units. Another duty of military police is detecting crimes and corruption infringements committed by soldiers and workers of military units. The military police analyses declarations of financial interests, submitted by soldiers, and presents conclusions to the Ministry of Defence.

6.2.5 National Tax Authorities

On the 1st of March entered into force National Tax Authority Law (KAS). According to that legislation Fiscal Control Office and the Custom.

Service were united. Newly-formed body is focused on executing taxes, duties, fees payable to State Treasury and other constitute assigned revenue. Moreover, KAS identificates, detects and prevents fiscal crimes as well as forgery crimes.

6.2.6 General Inspector of Financial Information

It is an individual body of state administration, after the Minister of Finance competent authority to prevent introduction into financial circulation property values derived from illegal or undisclosed sources as well as to prevent terrorist financing. It runs analytical procedure in order to control financial transaction, identify money laundering and terrorist financing. General Inspector of Financial Information can, inter alia block bank accounts on which suspicious operations are being made.

6.2.7 The Supreme Chamber of Control (NIK)

It is a top independent state audit body shall be subordinate to the Sejm (lower house of Polish Parliament) and functioning by principle of collegiality. According to the Constitution of the Republic of Poland NIK is subordinated to Sejm and The President of the Supreme Chamber of Control shall be appointed by the Sejm, with the consent of the Senate, for a period of 6 years, which may be extended for one more period only. NIK pays special attention in their audits to prevention and detection of irregularities which may foster corruption. It is one of the main NIK's task. Key importance for Chamber's work towards the issue of corruption has uncover of the corruption-generating mechanisms. It should be underlined that the Supreme Chamber of Control is not a law enforcement agency so that it does not have power to investigate. Most of the NIK's activities are focused on prevention and education.

6.2.8 Police

It is centralized, uniformed and military formation. The Head of the Police is the Chief Commissioner who is superior to commandant of capital and to 16 commanders of the provincial, whom supervise commanders of the city and county. In the frames of the Police structure there is Office of Internal Affairs (BSW), which focuses on prevention crimes committed by police officers and police workers, crimes affecting Police, its detection and prosecution. The mission of BSW is more and more effective reducing of corruption in Police and improving anticorruption system in the formation.

6.2.9 Department for Organized Crime and Corruption of the National Prosecutor

Department in the structure of National Public Prosecutor's Office taking care of coordination of investigations concerning money laundering. They collect and analyse informations and materials about corruption and organized crime on the basis of which they prepare numerous reports. Department is aimed at fighting corruption and money laundering as well as at international cooperation in the frames of development strategy of combating international organized crimes.

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

7.1

The Police Act allows the police to undertake "operational and exploratory, investigations well as administrative actions".[78] The term "operational actions" is not legally defined, therefore the way the police operates is determined by internal instructions of the National Police Commissioner.[79] In the performance of their duties, police officers can, among other things, check identity, detain, fingerprint and search persons, search rooms, observe as well as record events in public places. It is worth mentioning that the statute enables the police, within the scope of operational activities, to take secretly part in trafficking in prohibited good, and to give so called "controlled bribes".

A separate category of police activities constitutes the so called operational control that is e.g. wiretapping, secret control of correspondence, parcels as well as telephone and electronic communication.[80] The statute restricts the application of the operational control exclusively to situations in which other measures "has turned out to be unsuccessful or would be unhelpful". The authorisation for its use can be given only by a regional court, on application by the National Police Commissioner or Chief of the Central Bureau of Investigation of Police, with the approval of the General Prosecutor (that is the Secretary of State for Justice), or on application by a regional chief of police, with the approval of the competent regional prosecutor. Thus, required are the approval of national or regional police authorities, a prosecutor and a court of second instance in the Polish judicial system. If there is urgency, the approval can be given within 5 days after the actions have been ordered.

The operational control has been restricted to combating an exhaustive (but wide) list of intentional crimes, these include offences against economy, tax offences, bribery, money laundering as well as other crimes specified in ratified international agreements.

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[78]The Police Act, Art. 19, 19a.
[79] Aneta Łyżwa, Mirosław Tokarski, *Komentarz do ustawy o Policji* (LEX 2015), comment on Art. 19 of the Police Act [Polish].
[80] ibid.

According to an amendment to the Police Act, since February 7 2016, the police can "in order to prevent or detect an offence, to obtain and record evidence, to save human life or health, or to support search or rescue operations" gather telephone records, information about postal deliveries which include personal details of the sender and recipient, and some personal data of internet users (among other things: name, surname, address, ID number). This data can be collected without knowledge or consent of the affected persons, who are not to be informed about the performed actions even after their completion.

An another right of the police is to use the assistance of persons who are not policemen (Art. 22). Their identity is secret and their work can be financially rewarded.

7.2

The Central Anti-Corruption Bureau,[81] due to its range of activities, carries out, on a daily basis, control activities (Art. 31 et seq. of the CBA Act) directed at holders of public office, entrepreneurs as well as public finance sector units. Furthermore, CBA can carry out operational control on similar terms as the police. CBA officers can also detain and check identity, search persons and rooms as well as conduct observations.

7.3

The National Fiscal Administration,[82] created through the merger of the Tax Control Office and the Customs Service, has been provided with a wide catalogue of applicable measures. The customs and tax control, which verifies the compliance with tax law, can be carried out in the authority's office, at the company's premises as well as in the place where the things and documents to be inspected are located. The control can include search of rooms, request for access to documents and records, summoning witnesses. In addition, KAS can request delivering documents and disclosing data from other public authorities. At the written request of the Head of KAS, banks, insurance companies and investment fund managers must communicate to KAS

[81] Hereinafter referred to as CBA.
[82] Hereinafter referred to as KAS.

information concerning bank accounts, transaction history and concluded loan and insurance agreements as well as deposits.

7.4

Relatively wide powers have been given to the Polish financial market authority (Financial Supervisory Commission).[83] The Commission (including its employees) has access to confidential information concerning financial instruments and their issuers. It can request from telecom operators list of calls or other communication without the disclosure of their content. Furthermore, the President of KNF can request from financial institutions (investment fund managers, bailees, brokers, fund's managers, paying agents) records of telephone conversations, registers and communication that are "connected to the facts being examined". It is appropriate to set out that the Commission has these powers as early as at the investigation stage which is conducted without the participation of a prosecutor.

7.5

Moreover, operational actions, directed at soldiers and in cases laid down in the statute, can be undertaken by the Military Police. The nature of the tasks allows this unit to jam radio signals, detain soldiers and impose fines.

7.6

The Polish criminal procedure does not provide an exhaustive list of types of evidence that can be used in the proceedings. Another important principle is the rule of free assessment of evidence by the authority conducting the proceedings (that is the court, or in preparatory proceedings the prosecutor or police).[84] Witnesses are summoned by the body in charge of the proceedings and not by the parties to the proceedings. They are obliged to make an appearance in court and testify.[85] A representative of a body corporate (e.g. of an enterprise), in cases concerning this body, can be

[83] Hereinafter referred to as KNF.
[84] The Criminal Procedure Code, Art. 7.
[85] ibid Art. 177 et seq.

also summoned as a witness.[86]

7.7

Attention should centre on the amendment of the Criminal Procedure Code from April 2016, pursuant to which evidence cannot be found inadmissible "only for the reason that it was obtained in breach of procedural regulations or by committing an offence (…)". This constitutes a prohibition of exclusion of illegally obtained evidence (contradiction to the so called "rule of the poisoned tree").The only exception is obtaining evidence by committing murder, intentionally causing bodily injury, or false imprisonment. Currently, there are ongoing proceedings in the Constitutional Court to look whether this regulation is compliant with the Constitution.[87]

7.8

The Polish legal system provides wide possibilities for the public authorities to collect data and use it in criminal proceedings. At the same time, the supervision of the prosecution and courts over these actions is ensured. To the detriment of citizens works the general nature of the wording used by the legislator, especially when it comes to the interception of modern forms of communication.

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self incrimination)?

In the polish Code of Criminal Procedure (hereinafter: CCP) much attention have been put to such a sensitive object as rights of an economic operator to withheld information during procedure.

[86] The Act on liability of corporate bodies for acts prohibited under penalty, Art. 21.
[87] Signature K 27/16.

Enforcement authorities are competent under the law to turn to operators in order to get necessary informations to the proceedings which it initiates. Art. 15 Para. 3 of the CCP says, that legal persons and organisational units with no legal personality other than all state and local government institutions as well as natural persons, are obliged to assist the authorities conducting criminal proceedings at their request, within the limit and at the time indicated by said authorities, where the lack of such assistance would significantly hinder the conduct of the proceedings or make them impossible.

However, in many cases this kind of infomations may not be eagerly revealed by companies due to its vital, economic interest. This informations may be subjected to so-called business secret. It is worth pointing out that polish legislator defines that concept in a particular way. According to Art. 11 p.4 of The Suppression of Unfair Competition from 16th of April, 1993, company confidentiality is understood to include the entrepreneur's technical, technological organisational or other information having commercial value, which is not disclosed to the public to which the entrepreneur has taken the necessary steps to maintain confidentiality. As a consequence on the part of the operator there are doubts if he is allowed to provide these informations. This is undoubtedly a gesture of Polish legislator towards economic freedom and entrepreneurs' freedom. It must be emphasised that it is not professional secrecy as defined in CCP, so there is no grounds for refusal of releasing this information to authorities.

From the other hand, not giving requested information may be regarded as jeopardy to criminal proceedings.

But, what if the entrepreneur considers that the information may have a detrimental effect on the situation of the company? Of course, this would not happen by giving the informations to authorities but there is possible that it will spread outside. Depending on what state of the procedure is many people have access to the documents, for instance: parties, workers of police, courts or Prosecutor's office. Accordingly, there is the ability to refuse to testify.

According to Art. 180 of CCP Persons obliged to not disclose information classified as "privileged" or "confidential", or secrets related to their profession or function may refuse to

testify as to the information to which this duty extends, unless the court or the public prosecutor releases them from the duty of confidentiality and as long as the specific laws do not provide otherwise. Decisions concerning such a release are subject to interlocutory appeal. Code of Criminal Procedure does not contain similiar institution in requests for information under Art. 15 Para. 3 of the CCP. Exceptions are offices, institutions and entities operating in the postal sector or telecommunications business, customs offices and transport companies which are required to issue on demand to a court or prosecutor differently, correspondence and consignments and telecommunication or other communications, taking into account e-mail correspondence, including dates and other data from merged or transferred, not constituting the contents of a telephone call or other communications, if they are significant to status of the pending proceedings. Because of that, after receiving request for information and classifying them as "privileged" or "confidential", entrepreneur should inform law enforcement authorities, indicating, that they can be revealed at the hearing of one of the company's workers having first released the necessary steps.

It shouldn't be surprising that unjustified refusal to testify implies serious sanctions. Namely, a penalty of up to 10,000 PLN may be imposed on a witness, expert or a specialist who, without an adequate justification, fails to answer a summons of the agency conducting the proceedings or without its permission has departed from the place of procedure before the procedure is completed. In exceptional cases, this provisions apply accordingly to defence counsel or attorney due to their influence upon the course of a procedure. In preparatory proceedings, financial penalties are imposed upon request of the public prosecutor by the district court in whose circuit the proceedings are conducted. The penalty may be imposed in conjuction with not fulfilling the obligation in prescribed time limit. Entrepreneur, who would like to give informations, but because of various reasons is unable to do so within the prescribed time, should inform about delay and its reason. Entrepreneur should also indicate a new date for hearing. In such a situation there will be no grounds to impose penalty for breach of order. It should also be noted that imposing penalty does not have to be "one-off". If after imposing a penalty entrepreneur fails to respond to a demand, must reckon with further penalties.

Sometimes, a practice of that kind, not providing information despite many calls, may be qualify as obstruction of criminal proceedings, so a crime indicted in Art. 239 of Criminal Code of the Republic of Poland, be subject to imprisonment from 3 months to 5 years. The criminal law liability incures person responsible for informing.

By analyzing the circumstances under which the entrepreneur may refuse to provide information to the authorities, it is necessary to determine by what means the legitimate authorities may demand the data of interest. First, it is important to draw attention to the form of contact with law enforcement agencies. It seems clear that it should not be taken by telephone. Request for information by telephone may give rise to doubts. Since there is no possibility of verifying the caller, there is a risk that information may get into the wrong hands. Thereby, it may happen that entrepreneur fall victim of phising. Entrepreneur is not obligated to provide all information during phone call. General principle of criminal procedure is that such matters are proceed by letter notified by post or any other eligible entities, which is responsible for delivering letters, if necessary by police. It has to be noted that Art. 132 Para. 3 says that a writ may also be served by fax or e-mail. In such cases, proof of data transmission is treated as confirmation of delivery. So that, in case of simply queries, for instance, about personal address, e-mail or fax, it is acceptable. However, if authenticity raises doubts, it is a must to appeal to sending authority to get the original of the document. The same steps should be taken if the requested informations are important for the company, even if they are not confidental. In the case of professional secrecy must be a decision on the release of the secret, which may be object to appeal.

In my opinion, it is worth mentioning about extremely interesting institution in polish CCP is the right to silence of the accused. According to Art. 175 Para. 1 of the CCP "The accused has the right of providing explanations. However, without giving reasons, he may refuse to answer certain questions or refuse to give explanations. The accused should be advised of this right". This right can not take advantage of every stage of the criminal proceedings, it is therefore revocable character.

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

The Republic of Poland, as the European Union member state, not only profits from rights related to the membership, but also has to fulfill certain duties imposed on it. *The establishment and functioning of an internal market in which, in accordance with Article 7a of the Treaty, the free movement of goods, persons, services and capital is ensured require not only that personal data should be able to flow freely from one Member State to another, but also that the fundamental rights of individuals should be safeguarded*.[88] Accordingly, data transfer is one of the determinants of the constant development of the EU member states community and cannot be restrained by the assumptions considering the protection of the individual rights, as they should cooperate and not be opponent.[89] When it comes to the protection of individual rights, the Art. 8 of the Charter of Fundamental Rights of the European Union[90] states that every person's private life should be respected, hence the personal data should be respected likewise, also in the employee-employer relation.

9.1 Fundamental Legislative Acts in Polish and European law Concerning Providing Employee Data

In the EU legal system there is no specific legislation, which covers with its regulations the area discussed here, yet the EU Directive 95/46/EC (on the protection of individuals with regard to the processing of personal data and on the free movement of such data) should be applied here. From the national regulations the main legislative acts, which should be applied here, are the polish Act on the Data Protection[91] and the Code of Labour Law.[92] National law cannot in any way decrease the protection assured by the EU regulations, at most it can increase the protection granted. Also, it is very important *to point out that data protection law does not operate in isolation from labour law and practice, and labour law and practice does not operate in isolation from data protection law. This interaction is necessary and valuable and should assist the development of solutions that properly protect workers'*

[88] Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 24 October 1995, rec. 3 of the Preamble.
[89] ibid art. 1.
[90] Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Art. 8.
[91] Journal of Laws no 133 item 883 (The Act on the Data Protection).
[92] Journal of Laws no 24 item 141 (The Code of Labour Law).

interests.[93]

9.2 Basic Terms Related to the Restrictions on Providing Employee Data

First of all, we should define the basic terms related to the discussed issue. First of them will be the 'employee personal data'. At the beginning of the recruitment process, potential employer requires personal data of every person applying for a position. Art. 6 of the Act on the Data Protection defines them as any information concerning an identified or identifiable natural person.[94] In accordance to art. 22^1 of The Code of Labour Law, employer can require name and surname, parents' names, date of birth, address for correspondence, information concerning education and professional career. In addition to those already mentioned, it can also be information about employee's children or his social security number.

The Act on the Data Protection also defines the employer as the "data administrator", as he is a person or an entity, which decides about the purpose and the means of personal data processing, in conjunction with professional or economic activity.[95] [96]

Recipient of data is an entity, which receives the data.[97] However, in case of the domestic enforcement authorities they do not always perform this role, as they can be excluded from the definition of a "recipient of the data" as state authorities or local government authorities to whom the data is disclosed in connection with an ongoing legal proceedings.[98]

[93] <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2001/wp48_en.pdf> access 28 January 2017.
[94] Similar regulation and definition of this term can be found in art. 2 of the Directive.
[95] Journal of Laws no 133 item 883 (The Act on the Data Protection), art. 7 pt. 4.
[96] ibid art. 3 pt. 2.
[97] ibid art. 7 pt. 6.
[98] ibid art. 7 pt. 6 lit. e.

9.2.1 The Elements Excluding Domestic and Foreign Enforcement Authorities from the Definition of a "Recipient of the Data" in Polish and European Law and the Resulting Consequences

Conduct of a legal proceeding is therefore a necessary element to exclude those authorities from the term of a "recipient of the data". Usually, to apply for those information, those authorities need to submit a written form, and in accordance with the Art. 51 of the polish Constitution, the legal basis upon which the issue of such request should be based must have a rank of an act. Such authorization can be found for eg in the Art. 15 Para. 2 and 3 of the Criminal Procedure Code.[99] It requires all state and local government institutions to help authorities conducting the criminal proceeding, of course only in the scope of its activities and by the deadline set by those authorities. Moreover, legal persons, organizational entities without legal personality and natural persons are obliged to provide assistance when required by the authorities conducting a criminal proceeding in the required scope and time period, if without the aid provided, the conduct of a procedural action is impossible or severely hampered. On the other hand, the Art. 14 of the Police Act imposes an obligation on the data administrator (in this case an employer) to provide the personal data to the officer indicated in named authorization by the Chief of Police, Commander of the Central Bureau of Investigation (CBŚP), provincial commanders of the Police or an authorized officer, upon presentation of this authorization and service identity card.[100] In addition, *the consequence of the introduction of the discussed term (recipient of the data), or rather the exemptions in this area, is also the exclusion of responsibilities [defined in art. 24 par. 1 pt. 2 and art. 25 par.. 1 pt. 2, and the authorization from art. 32 paragraph. 1 point 5 (The Act on the Data Protection)] concerning informing the person, who is the subject of the data, about entities to which data is provided, if the entities are not the recipients of the data. In another words, data administrator does not have an obligation to inform the person, who is a subject of the data, about providing the data to entities not included in the category of the recipients of the data, or record the fact of providing data to those entities.*[101]

[99] Journal of Laws no 89 item 555 (Criminal Procedure Code), Art. 15 Para. 2 and 3.
[100] Journal of Laws no 30 item 179, Art. 14 Para. 4 and 5.
[101] J. Barta, P. Fajgielski, R. Markiewicz, *Ochrona danych osobowych. Komentarz* (Zakamycze 2004) 421 [Polish].

This issue was similarly decided in the art. 2 let. g of the Directive. Therefore, in the case of foreign enforcement Authorities from other EU Member States, in addition to compliance with the national law, they also have to abide the EU Directive. According to it, the 'recipient of the data' can be i.a. a public administration authority, to whom data is disclosed. However, art. 2 let. g of the Directive also states that those authorities which receive the data in relation to activities resulting from the proceedings carried out by it, shall not be considered as a recipient of the data. Art. 2 provides a definition of 'processing of personal data' and 'the data subject's consent'. When processing the personal data, certain rules must be followed and these are specified in art. 6 and 8, where the second one concerns 'sensitive data'. Thanks to the definitions set out in art. 2, we can recognize the difference between sharing and processing of the personal data. For data processing, in accordance with the definition, the consent of the person concerned is required. However, Art. 7 of the Directive provides an exception to this principle, ruling that the stated consent is not required if the processing of data is necessary in order to perform tasks associated with any public interest or related to the execution of the public authority.

9.2.2 Providing Employee Data within and outside the EFA

The national legislature has not regulated the transmission of data within the EEA countries, so it should be assumed that in this relations we should apply the same rules as those governing that issue in Poland. In contrast, a separate issue is the transfer of data to entities from countries outside the EEA, which Art. 7 pt. 7 of the Act on the Data Protection refers to as "third countries". In accordance with Art. 47 Para. 1 of the abovementioned act, such transfer can take place if the country of destination provides on its territory an adequate level of protection of the personal data. Similarly, Art. 25 Para. 1 of the Directive refers to 'an adequate level of protection', specifically listing in Para. 2 what is taken into account in determining its quality. An exception in the Polish system is the situation from Art. 47 Para. 2 of the Act on the Data Protection, when the submission of personal data results from the obligation imposed on the data administrator by provisions of law or ratified international agreement, ensuring an adequate level of protection of these data. In art. 47 para. 3 data administrator was given the ability to transfer the data to the state in several other cases, including when the subject of the data has given written consent to it or when it is necessary due to the public interest or for the establishment of legal claims. If a country does not provide adequate protection, then consent to the transfer of data can be given in the form of an

administrative decision by Inspector General for Personal Data Protection (GIODO - Polish DPA). This is one of the solutions mentioned in the Art. 48, which also determines when such consent is not required. Furthermore, this occurs when the controller ensures adequate safeguards for the protection of privacy and the rights and freedoms of the data subject, by (1) the standard contractual clauses to protect personal data, approved by the European Commission in accordance with Art. 26 Para. 4 of the Directive, and (2) a legally binding rule or policy of protection of personal data, which has been approved by the GIODO in accordance with the law. So far only a few countries outside the EEA, by the decision of the European Commission, were recognized as meeting the requirements of adequate level of the protection of personal data. They are Switzerland, Guernsey, Argentina, Isle of Man, Andorra, Faroe Islands, Jersey, Israel and New Zealand. Canada meets some requirements, while the United States did not receive the approval of the Commission on this issue.

9.3 Summary

Summing up, to share personal data of an employee to a Polish or foreign public authorities certain requirements must be met. The request for such data needs to be supported by the legal basis in rank of at least an Act, which is ensured by the Polish Constitution. In addition, the person to whom the personal data belongs, must be notified about his or her data being provided to the enforcement authorities, except when this occurs while exercising public authority by the national units or bodies. Then the condition of consent of 'data's subject' is replaced by the interest sanctioned by law and the Inspector General exercises the control over it. The third factor, which is an adequate level of the protection of personal data is an important part especially in the cases of regulating the relations with entities from outside the EEA countries.

10. If relevant, please set out information on the following:

a. Defences to the offences listed in question 2;

b. Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement); and

c. Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas)

10.1 Mitigation of Criminal Liability

There are 3 ways of mitigating criminal liability:

- Probation (eg a suspended prison sentence),
- Extraordinary mitigation of punishment (eg victim-perpetrator reconciliation and redress for the damage),
- Consensual resolution of criminal proceedings (eg conviction without submission and evaluation of the evidence).

As well as 3 circumstances in which the perpetrator shall not be subject to penalty and criminal liability:

- Justification defences,
- Excuse defences,
- Clauses excluding the imposition of a penalty, active repentance.

In cases where serious crimes, such as corporate corruption, were committed, it is possible to turn state's evidence.[102] The admissibility of this kind of testimony is subject to specific conditions set out in the statute.

10.2 Methods of obtaining immunity from punishment

Attention should centre on clauses excluding the imposition of a penalty. It should be noted that the term "shall not be subject to penalty" means that the court shall not convict a perpetrator if

[102] In Polish law a suspect who turns state's evidence is called a *crown witness*.

he/she fulfils specific conditions. In combating economic crime a fundamental role is played by the compensatory function of criminal law (reparation for the damage) and not only the retribution for the wrong done.

Applicable to a fraudster (Art. 286 Criminal Code) is the instrument of active repentance from Art. 295 CC. Pursuant to this regulation, where a perpetrator voluntarily compensates the damage in whole, the court can apply extraordinary mitigation to the penalty, or even renounce the imposition of the punishment. Where a fraudster compensates for a significant part, but not for the whole, of the damage, the court can apply the extraordinary mitigation of punishment. However, in either case such mitigation of criminal liability is facultative, which means that it is subject to conditions and the discretion of the court which ultimately decides whether the perpetrator should bear more lenient consequences. In cases listed below the mitigation of liability is compulsory; this means that it has to be applied by the court if the conditions are fulfilled.

When it comes to breach of trust (Art. 296 CC), an offence punishable by imprisonment, even when the company's assets aren't damaged (Art. 296 Para. 1a CC), to prevent prosecution the perpetrator should voluntarily compensate for the damage in whole before the initiation of criminal proceedings against them (Art. 296 Para. 5 CC).

When looking at the offence of bribery of a public official (Art. 229 CC) and the so called manager's bribery (Art. 296a CC), the perpetrator is not subject to penalty if the personal or financial benefit or their promises, were accepted and the perpetrator informs the law enforcement authority about it. However, the perpetrator must disclose all relevant circumstances of the crime before the authority becomes aware of them.

The perpetrator of a fraud, who aims to fraudulently obtain financial support (Art. 297 CC), is not subject to penalty if before the initiation of criminal proceedings he/she prevents the use of financial support or payment instrument obtained by means of a counterfeited or an unreliable document; withdraws from a grant or public procurement; or satisfies the aggrieved party's claims.

An insurance fraudster (Art. 298 CC) is not subject to penalty if before the initiation of criminal proceedings he/she voluntarily prevents the payment of the compensation (Art. 298 Para. 2 CC).

The perpetrator of money laundering under Art. 299 CC is, in principle, not subject to penalty if he/she voluntarily discloses to law enforcement authorities information on individuals who took part in the commission of the offence and on its circumstances, if this prevents an another crime. Where the perpetrator has made efforts to disclose such information and circumstances, the court is bound, and must apply the extraordinary mitigation of punishment.

10.3 Extraordinary mitigation of criminal liability

Extraordinary mitigation of criminal liability consists in a penalty below the minimum period or a more lenient form of punishment. The court can apply the extraordinary mitigation of punishment in duly justified cases laid down in the Criminal Code, these include:

- when the aggrieved party reconciled with the perpetrator, the damage has been compensated or the victim and perpetrator agree on a remedy (compensatory function of criminal law),
- the court may look to the perpetrator's behaviour, especially when he/she has made efforts to compensate or prevent the damage,
- and finally, when the perpetrator of an unintentional offence or a person closest to him/her suffered serious damage in connection with the committed crime.

Highly relevant in case of economic offences is the instrument known in legal writings as *the small crown witness* (Art. 60 Para. 3 CC). This instrument operates when, in return for providing information that law enforcement authorities hadn't been aware of (or which the law enforcement hadn't been aware of to the perpetrator's knowledge), the perpetrator takes advantage of the benefit of the extraordinary mitigation of liability or even suspension of the sentence.

In case of a suspended sentence the perpetrator is put on probation,[103] and 6 months after its end the conviction is spent as of right (the perpetrator doesn't show up in the criminal record any longer).

Irrespective of the "small crown witness" instrument, the court can suspend imposed sentences of imprisonment which do not exceed 1 year (Art. 69 CC). It should be noted that it is the most frequently imposed penalty in Poland, and is much more common than a fine, a penalty of restricted freedom or deprivation of liberty by the use of electronic surveillance.

It is worth mentioning that, in 1997, the Polish Parliament passed a separate Crown Witness Act. It consists of, among other things, corruption offences (manager's bribery) as well as other economic offences that are committed by organised criminal groups. Currently, the testimony as a crown witness is only admissible when the suspect disclosures his/her assets, as well as the assets of accomplices in the crime or tax offence that the crown witness is aware of.

10.4 Consensual resolution of criminal proceedings in the Criminal Procedure Code

Instruments of consensual resolution of criminal proceedings in the Criminal Procedure Code include: *conviction without a trial* (Art. 335 CPC), a motion for *conditional discontinuance of proceedings* (Art. 336 CPC) and a *voluntary submission to penalty* (Art. 387 CPC). These are the procedural measures that are most commonly used in order to mitigate criminal liability.

When the guilt of the defendant and the circumstances in which the offence was committed do not raise doubts, the prosecutor can, instead of an indictment, put forward a motion to court for conviction and imposition of penalties or other punitive measures provided for this offence that were agreed on with the defendant (conviction without a trial).

[103] When it comes to economic offences the probation period is generally 1-3 years since the sentence's validation.

The second alternative to an indictment consists in the prosecutor's motion for conditional discontinuance of proceedings. As in the case of a conviction without trial, the defendant's guilt should not raise doubts. Additionally, it is necessary to fulfill specific conditions set out in the Criminal Code. The conditional discontinuance of proceedings does not apply to offences punishable by imprisonment over 5 years. In the same way as a suspension of a sentence, the conditional discontinuance of proceedings is a probation measure, where the probation period is 1-3 years. The court orders the conditional discontinuance of proceedings along with imposing an obligation on the perpetrator to compensate for the part or for the whole of the damage.

The third possibility consists in the mitigation of liability for offences punishable by imprisonment up to 15 years (in practice it concerns every economic crime except for tax offences). In this instance even at the trial, up to the end of the examination of all accused, the defendant can put forward a motion for conviction without submission and evaluation of the evidence and an imposition of a specific penalty or punitive measure, forfeiture of property or a compensatory measure (voluntary submission to penalty).

The procedural instruments outlined above can, in a sense, be considered as plea bargaining; as a plea of guilty is a precondition. The difference between a conviction without a trial (Art. 335 CPC) and a voluntary submission to penalty (Art. 387 CPC) lies in the fact that these instruments are applied at different stages of the proceedings: the mode from Art. 335 CPC – in preparatory proceedings, the mode from Art. 387 CPC – in judicial proceedings. In either case the court has to assent to such an "agreement" between the defendant and the prosecutor.

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance)?

11.1 Agreements about non-competition clause

In the polish law there is a great importance of protection an employer's principles about non-competition clause. These agreements may be in force during an employment as well as after its cease. In the range which is being characterized in a separate contract, an employee is not allowed

to do competitive activities to an employer nor provide work within the confines of working conditions or based on a different basis in favor of entity leading this kind of activity (non-competition clause).[104] [105]An employer who was detrimented because of infringement employee's non-competition clause anticipated in the agreement, is allowed to assert a compensation of this evilfare from an employee.[106] An employee who as a result of its failure to perform or improper performance entrusted obligations with its fault caused an employer's detriment, bears material responsibility with the rules specificated in this chapter. Regulations from an article 101 Para. 1 of the Labor Code are being applied suitably when both an employer and an employee who have access to especially important facts, could endanger an employer for illfare through their disclosure. The period of non-competition clause's validity and the amount of a settlement owed to an employer and an employee are being specified in the agreement and the contract needs to be written under the rigor of invalidity. However the concept of an agreement should be understood as unanimous will of its parties.

In the polish law we can distinguish two types of non-competition clause contract – for employment's duration and after its ending. In agreements of non-competition clause during an employment it's prohibited to include penalties or any other rulings tightening employee's liability compared with regulations from the Labor Code. Polish law' regulations also don't have limitations in the context of the people who can reach these agreements. However the Labor Code has this kind of limitations in case of non-competition clause contract after the cease of an employment. This kind of an agreement may be concluded only with an employee who has an access to especially important facts and their disclosure could endanger employer for illfare. The Labor Code also imposes an obligation for employer of compensation when employment has been ended in case when he had previously signed an agreement with an employee about non-competition clause after the cease of an employment. This indemnity cannot be lower than ¼ of salary received before end of an employment and includes the whole time of non-competition clause. In an agreement there might be also specified penalties applied in case of infringement of the clause.

[104] The Labor Code, Art. 101§1
[105] The Labor Code, Art. 101§2
[106] The Labor Code, Art. 114

11.2 The employee's duties

The employee is also being protected by the polish law when it hasn't been signed an agreement with an employer about non-competition clause. Regulation from an article 100 Para. 2 p. 4 of the Labor Code specifies that independently of non-competition contract's validity, employees are obliged to take care about good workplace, protect its property and keep in secret facts which disclosure could endanger employer for illfare. In case of infringement of that clause an employer is allowed to terminate the employment with an employee.

11.3 Company secret's violation

The main source of company secret's protection is an act from April 16 1993 about fighting against unfair competition.[107] An act of an unfair competition is understood as transmission, disclosure or usage somebody else's facts which are company secrets or their acquisition from unauthorized person if this deed endanger or violate employer's interest. Company secrets are recognized as undisclosed to the public technical, technological or organizational company's facts or any other piece of information which has economic value on which an employer took the necessary steps to remain them confidential. Therefore, an employee who during an employment uses confidential facts eg to run a competitive business, commits a crime of unfair competition. This kind of doing is also an attempt to take over customers of former employer when an employee would persuade them to terminate the contract or/and encourage to sign a new one with its new employer or own business.

11.4 Sanctions

An employer which interest was endangered or violated in case of committing an act of unfair competition is allowed to demand: giving up prohibited actions, removing their results, making once or multiple statement in the right form, undoing inflicted harm, releasing groundless obtained benefits and also managing proper sum of money for specified social purpose. For breaking the law alike imminent for a perpetrator of the violate criminal responsibility, ie fine, restriction of liberty or its deprivation up to 2 years.

[107] An act from 16 April 1993 about fighting against unfair competition, Art. 11

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

12.1 General thoughts

Legislative actions which has been made recently by the legislative power present a strong tendency to sharpening penalization of crimes done by the people running a business. I am going to present three important changes, each of which is at a different legislation stage, whereas their entry into force would have a very strong influence on running a business as well as on punishment for possible infringements of the law.

12.2 Changes concerning Value Added Tax and regulations of the Penal Code

In experts opinion the most significant change connected with an enterprise is the amendment of a Tax on Goods and Services Act connected with the amendment of the Penal Code in terms of punishment for VAT's infringements. The change of a Tax on Goods and Services Act is one of the most serious amendment in its whole history of functioning. The first newness which has a significant influence on entrepreneurs is introducing a new form of accounting for this tax. This change is supposed to rely on obligation of sending monthly electronic declarations to the Internal Revenue Service. This duty would concern eg entrepreneurs registered as VAT EU taxpayers and also these, who make transactions in so called system of a reversed load. This kind of action is being motivated by the Ministry of Finance as a desire to eliminate irregularities and overuses in terms of settlement from Value Added Tax. The next step which is supposed to simplify supervision of international as well as domestic transactions is a liquidation of quarterly settlements and replacing them with monthly ones. To sum up, a specified group of business entities would be obliged to send every month electronic declarations to the control organs.

The second one and much more important change is connected with fight against wheedling out of Value Added Tax. The legislator acts here somehow double-track. The first step is introduction limitations connected with establishing companies and registering them as VAT taxpayers. So far these rules has been quite liberal which facilitated recording an economic activity as a taxpayer of this tax. The amendment assumes that it would be impossible to establish a company, which information given in an application are not truthful or when this entity does not exist. An

application would not also be possible if this entity or its representative would not report on the Internal Revenue Service's demand and when this entity would not exist at all. In short, this is a regulation which aim is to counteract establishing so called "straw man companies", which are used to run a business in order to wheedle Value Added Tax. The second stage of fight against exceeding this rules is increasing punishment of these actions. This change with definitely the biggest media overtone constitutes that besides amendment of a Tax on Goods and Services Act it is also planned to change the Penal Code. This Code is planned to be replenished by the definition of an invoice located in an Art. 115. A definition of this document is necessary because the Penal Code will foresee a crime of falsifying invoices. The punishment for wheedles resulting from using forged documents overdrawing the amount of 10,000,000 PLN is supposed to be up to 25 years of deprivation of liberty. In case of frauds above 5,000,000 PLN the upper limit will be 15 years of deprivation of liberty. A draft of an amendment implies introducing two new crimes – writing out fictional VAT invoices as well as forging and rewriting them in the aim of using them as authentic.

The change which may significantly reflect on entities not pretending to wheedle Value Added Tax and yet accounting honestly there is a regulation applying to sanction in the height 30% of an under pricing obligation's sum or 30% of an inflated return's amount. An amendment predicts also that in case of deducting a tax from so called "blank invoices" this sanction will be 100% of a declared sum. These changes may lead to punishing entrepreneurs which unconsciously would make mistakes in handed in declarations. New regulations impose on accounting entities a requirement of intensified precaution.

12.3 Extended confiscation and forfeiture of a company

The project of changes in the Penal Code in terms of extended confiscation refers to extend a directory of crimes for which may adjudicated this penal measure. This refers to all crimes endangered by a punishment above 5 years of deprivation of liberty. From the viewpoint of running a business there is a crucial project of a change referring to introduction the institution of forfeiture of a company. According to a project of the Penal Code's amendment, Art. 44a, the court may rule forfeiture of a company if it was used to commit a crime. A condition which makes this judgment possible to adjudicate is the fact that a perpetrator must reach even indirectly

financial gain of a significant value (more than 200,000 PLN) using for that its business. This forfeiture may be adjudicated even when a company is not a property of a crime's owner.

It is sufficient that an owner or an authorized person as a result of not keeping a caution required in circumstances of a particular case predicted or could predict that a company can be used to committing a crime. However this rule at a stage of a project arouses interest from a doctrine because of ambiguity of a "due care" circumstance. The problem is a definition what this due care is. This ambiguity of rules could cause that third party people' interests who act in a good faith would be unfair. For entrepreneurs which economic activity has been used by third party people to commit a crime there is a defense mechanism – no automatic adjudication this kind of forfeiture. It is going to be prohibited to rule a forfeiture when its adjudication would be incommensurate to the seriousness of a crime or a accused's degree of fault. A problematic element of this amendment is an aspect connected with a compulsory administration. According to the new rules on time of preparatory proceedings an administration over enterprise will be realized in thought of the Code of Civil Procedure's rules appropriate for execution by a compulsory administration, even before issuing a verdict of guilty. The aim of introducing a compulsory administration would not be execution of claims, but only protection of the status quo. However this situation generates a risk in form lack of proper management by made person in particular referring to a specialized company. It is worth to notice that this kind of situation may last even a few years – till issue a verdict. Although introducing this kind of regulations is a necessity which arises from Poland's commitment as a member of the European Union to implement a directive 2014/42/UE on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

12.4 A plan to restore an Art. 585 of the Commercial Companies Code

In 2011 the Commercial Companies Code's Art. 585 devoted to acting to the company's detriment was repealed and replaced by an Art. 296 Para. 1a of the Penal Code. Repeal of that article was motivated due to its too wide range. This article had allowed to reproach people who in fact had not made any damage and what's more their activity had been even focused on against a company. In an opinion of the Ministry of Justice rulings from an Art. 296 Para. 1a of the Penal Code are not sufficient enough to prevent from acting against a company, so that it is being postulated to restore to the law order an article 585 from the Commercial Companies Code. An Art. 296 Para.

1a of the Penal Code clearly determines that penalty is only for overusing given authorization or for duties non-fulfillment. According to this rule, an action damaging to a company, but not fulfilling one of these three circumstances is not being punished. Repealed Art. 585 of the Commercial Companies Code had more vague stated that a subject of a punishment is everybody, who acts against a company. According to that article authorities conducting the investigation had much more influence. To summarize, postulated and proceeded changes in the Polish law are showing tendency towards radical punishing for economic crimes, especially connected with wheedling in terms of Value Added Tax. These actions are motivated as an effort to seal tax system collecting and an improvement to efficacy its collection.

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1. Please identify relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction.

Since Macedonia has codified her criminal provisions in one Criminal Code, most of this offences are regulated primarily with the Criminal Code. In Article 357 and 358 are incriminated taking bribe and giving bribe (active and passive bribing). According to the definition provided, passive bribing is directly or indirectly requesting or receiving a gift or another benefit or a promise to receive a gift or another benefit (for yourself or another), in order to perform an official activity which should not be performed, or to not perform an official activity which should be performed.[1] Perpetrator of the offence may only be an official person.

Active bribing is actually directly or indirectly, giving, promising or offering a gift or another personal benefit to an official person, or benefit for another, in order for the official person to perform an official activity, which otherwise should not be performed, or not to perform an official activity which must be performed.[2]

Corruption, beside in the Criminal Code is also regulated with Law on preventing corruption. This Law sets down the measures for preventing corruption in the exercise of power and in the carrying out of entrusted public mandates, the measures for preventing conflict of interests, as well as the measures for preventing corruption while exercising tasks of public interest to the legal entities related to the realization of government. Also for implementation of the measures in this bill, a State Commission for the Prevention of Corruption is established.[3] As defined in this law, Corruption represents taking advantage of a function, public authorization, official duty and position for the purpose of any benefit for himself or another.[4] Related to this is the Law on protection of whistleblowers, which regulates protected reporting, rights of whistleblowers and also actions and duties of the institutions or legal entities related to protected reporting and

[1] Article 357, Criminal Code (Official Gazette of the Republic of Macedonia no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 87/07, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 42/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14, 196/15 and 226/15)
[2] Article 358, ibid
[3] Article 1, Law on preventing corruption (Official Gazette of the Republic of Macedonia no. 28/02, 46/04, 126/06, Decision of the Constitutional Court of Republic of Macedonia dated 10.01.2007, 10/08, and 161/08)
[4] Article 1-a, ibid

providing protection to whistleblowers.[5] The main purpose for this law is to encourage people to report corruption, which ultimately will help its elimination and prevention.

Fraud is regulated exclusively in the Criminal Code. The basic offence – Fraud as set out in Article 247 is misguiding another with the intent to obtain unlawful personal property by false presentation or by covering up facts, or to keep him misguided and herewith to induce him to do or not to do something which will cause damage to his own or another's property.[6]

The Code also contains separate, special types of the basic offence. There is Electoral deceit,[7] defrauding buyers,[8] fraud in receiving credit or some other benefit,[9] fraud to the detriment of the European Community funds,[10] Insurance fraud,[11] Computer fraud,[12] Securities and shares fraud,[13] Customs fraud,[14] Defraud in the service.[15]

Money laundering as stipulated with Article 273 of the Criminal Code, has several acts of perpetration.

The offence is committed by the person who will bring into circulation or trade, receive, take over, exchange or change money or other property obtained through a punishable crime, or by conversion, exchange, transfer or in any other manner covers up the origin, or the location, movement or ownership. [16]

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[5] Article 1, Law on protection of whistleblowers (Official Gazette of the Republic of Macedonia, no.196 dated 11.10.2015)
[6] Article 247, Criminal Code (Official Gazette of the Republic of Macedonia no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 87/07, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 42/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14, 196/15 and 226/15)
[7] Article 165, ibid
[8] Article 248, ibid
[9] Article 249, ibid
[10] Article 249-a, ibid
[11] Article 250, ibid
[12] Article 251-b, ibid
[13] Article 275, ibid
[14] Article 278-a, ibid
[15] Article 355, ibid
[16] Article 273, ibid

Another very important law that regulates the issue of money laundering is the Law on prevention of money laundering and financing of terrorism. It determinates the measures and activities for detection and prevention of money laundering, associated predicate offences and financing of terrorism, and the competence of the Financial Intelligence Office.[17]

When it comes to sanction legislation, the Criminal Code determinates the sanction that can be imposed for an offence. In this area also applicable are Law on sentence enforcement, which regulates the execution of sentences for crimes and misdemeanors and Law on determination of the type and length of the sentence, that regulates the determination of the type of the sentence and the determination of the length of the sentence, and the bargaining process between the public prosecutor and the defendant for reaching an agreement on the type and the length of the sentence.

In accordance with the Constitution of Republic of Macedonia, the Assembly has the power to ratify international agreements[18], which than become part of the domestic legal system. Macedonia has ratified a number of conventions in this areas such as United Nations Convention against corruption, Convention on transnational organized crime, Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism etc. Macedonian national legislation is in fully compliance with these conventions.

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

Before we can explain the main offences for companies, we need to define what a legal entity is. According to the Criminal Code, a legal entity refers to: the Republic of Macedonia, units of the local selfgovernment, political parties, public enterprises, trade companies, institutions, associations, foundations, unions and organizational types of foreign organizations, sports

[17]Article 1, Law on prevention of money laundering and financing of terrorism (Official Gazette of Republic of Macedonia, No. 130/14)
[18] Article 68, Constitution of the Republic of Macedonia, 17/11/1991

associations and other legal entities in the field of sports, funds, financial organizations, and other organizations specified by law and registered as legal entities and other associations and organizations being recognized the capacity of a legal entity. A foreign legal entity refers to: a public enterprise, institution, fund, bank, trade company or any other form of organization in accordance with the laws of a foreign country pertaining to the performance of economic, financial, banking, trade, service or other activities, with head office in another country or a branch office in the Republic of Macedonia or founded as an international association, fund, bank or institution.[19]

In Macedonian legislation criminal liability of legal entities was introduced with a Novel of the Criminal Code in 2004. Article 28-a defines the conditions when a legal entity has criminal liability. Those are: If the crime is committed by a responsible person within the legal entity, on behalf, for the account and for the benefit of the legal entity, if the crime is committed by an employee or by a representative, wherefore a significant property benefit has been acquired or significant damage has been caused to another, if the execution of a conclusion, or decision or approval of a governing body is considered commission of a crime, or if the commission resulted from omitting obligatory supervision from supervising body, or if the managing body has not prevented the crime, or has concealed it or has not reported it. Under this condition, criminally liable are all legal entities with the exception of the state. Foreign entities is also criminally liable if the crime is committed on the territory of the Republic of Macedonia, regardless whether it has its own head or branch office performing activity on the territory.[20]

Although, a legal entity can be executor to many different types of crimes, the most typical are those against property and against public finances, payment operations and the economy. Common crimes carried out by companies are theft of electrical energy, thermal energy or natural gas, fraud, defrauding buyers, fraud in receiving credit or some other benefit, fraud to the detriment of the European Community funds, Insurance fraud, computer fraud, purposeful

[19] Article 122 paragraph 6, Criminal Code (Official Gazette of the Republic of Macedonia no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 87/07, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 42/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14, 196/15 and 226/15)
[20] Article 28-a, ibid

creation of bankruptcy, abuse of bankruptcy procedure. These all belong to a wider group, crimes against property.

The most frequent and definitely most typical offences for companies are those known as economic crimes. They are all set out in the Chapter "Crimes against public finances, payment operations and the economy". Common object of protection for these incriminations is the economic system, its foundations, assumptions and forms of operation. Main offences are counterfeiting money, securities or marks of value, money laundering and other income from crimes, securities and shares fraud, abuse of a public call procedure, procedure for awarding public procurement agreement or public and private partnership, prohibited production, prohibited trade, smuggling, customs fraud, tax evasion, unfair competition in foreign trade, violation of industrial property rights and unauthorized use of another's company. Their liability for a specific crime, is always regulated in a separate paragraph in the Article, stating that if a legal entity committed the crime, shell be fined. The liability of a legal person, assumes fulfillment of the general conditions set out in Article 28-a of the Code.[21] There are some offence like money laundering and other income from crime, in which if the crime is performed in banking, financial or other type of business activity or by splitting of a transaction is considered as aggravating circumstance and this is a more severe offence.[22]

Before 2004, legal entities in Macedonia managed to avoid punishment because of lack of criminal liability. It is the existence of the autonomous will and criminal liability the main reason for imposing punishments for legal persons in the penal legislation. In accordance with their criminal liability, in the Criminal Code there is a separate Chapter for Sentencing a legal entity in which is established a new system of sanctions that consists of a main sentence and 9 supporting sanctions that affect the property, reputation of legal entity, prohibitions to perform certain operations, submitting applications for permits, licenses and other consequences.

[21]Article 28-a, Criminal Code (Official Gazette of the Republic of Macedonia no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 87/07, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 42/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14, 196/15 and 226/15)
[22]Article 273 paragraph 3, ibid

Fine is the only one that can be imposed as main sentence.[23] The fine is always imposed as a full amount, not penalties.[24] It cannot be less than 1,623 EUR nor more than 487,103 EUR. For crimes committed out of covetousness, as well as from crimes wherefore benefit is acquired or damage to greater extent is caused, a fine double the amount of the maximum of this fine can be imposed or in proportion with the amount of the caused damage, ie acquired benefit, but at most up to ten times their amount.[25]

When the court assessed that the legal entity has abused its activity and that there is risk for it to repeat the crime in the future, it can impose one or more of the secondary sentences. They are: prohibition to obtain a permit, license, concession, authorization or other right, or prohibition to participate in procedure for open calls for public procurement agreements and agreements for public and private partnership, prohibition to found new legal entities, prohibition to use subventions and other favorable loans, prohibition to use funds from the Budget of the Republic of Macedonia, revoking of a permit, license, concession, authorization, temporary prohibition to perform certain activity, permanent prohibition to perform certain activity and termination of the legal entity.[26]

The court can impose one or more secondary sentences, corresponding to the gravity of the committed crime and by that the legal entity will be prevented to commit such crimes in the future. They are imposed in addition to the fine. The court determinates the duration of the sentences, which cannot be shorter than one, or longer than five years. If the circumstances of the crime resulted in abuse of the given permit, license, concession, authorization or other right for its commission, the court can impose revoking of the permit, license, concession, authorization or other right determined with separate law in addition to the fine. If during the performance of the activity of the legal entity, a crime has been committed wherefore a fine or imprisonment sentence up to three years has been prescribed for the natural person, and from the manner of committing

[23]Article 96-a, paragraph 1, ibid
[24]Aleksandra Deanoska Trendafilova, Andrej Bozinovski, *Criminal Liability of Legal Entities - Current Conditions and Sentencing Policy*, 124
[25]Article 96-a, paragraph 2 and 3, ibid
[26]Article 96-b, ibid

the act comes a risk of repeated commission of such or similar act, the court can impose temporary prohibition for performing certain activity in duration of one to three years, in addition to the fine. If a crime wherefore an imprisonment sentence of at least three years is prescribed for the natural person, and from the manner of committing the act comes a risk of repeated commission of such or similar crime, the court can impose permanent prohibition for performing certain activity from among the activities performed by the legal entity, in addition to the fine. The court can impose this sentence also when a crime is committed after previous legally valid verdict wherefore the legal entity has been imposed temporary prohibition for performing activity. If a crime has been committed wherefore an imprisonment sentence of minimum five years is imposed against the natural person, and from the manner of committing the act comes a risk of repeated commission of such or similar crime, the court can impose a sentence termination of the legal entity, in addition to the fine. The court can impose this sentence also when a crime is committed after previous legally valid verdict wherefore the legal entity has been imposed permanent prohibition for performing certain activity. The sentence temporary or permanent prohibition to perform certain activity and termination of the legal entity cannot be imposed to a legal entity founded by law, as well as to a political party. Based on a legally valid verdict wherefore a sentence termination of the legal entity has been imposed, the court shall by a law initiate a procedure for dissolution of the legal entity in a period of 30 days as of the day of the legal validity of the verdict.[27]

As noted above, termination of the legal entity is the most severe secondary penalty which may be imposed on a legal entity together with fine. Its imposition is not bounded by the gravity of the offence, but by the business of the legal entity in general. For the court to impose this additional penalty, the business of the legal entity must be totally opposite of the aims why it was founded and registered, and the business shell be used to commit crimes, or the very existence of the legal entity to be a cover for achieving his criminal activities. Due to the nature and severity of the penalty, it is necessary to rethink its place in the system of punishments.[28]

[27] Article 96-c, ibid
[28] Aleksandra Deanoska Trendafilova, Andrej Bozinovski, *"Criminal Liability of Legal Entities - Current Conditions and Sentencing Policy"*, 126

When meting out the sentence, the court will consider the balance sheet and the income statement of the legal entity, the type of activity, the nature and the gravity of the committed crime. If the court determines a fine for two or more crimes in concurrence, the single sentence cannot be as high as the sum of the individually specified sentences, nor can it exceed the legal maximum of the sentence prescribed for the legal entity.[29] Also there are some cases when the court can impose the legal entity a more mitigative fine if the Code anticipates more mitigative sentencing, or if anticipates the possibility for sentence acquittal, yet the court does not acquit the legal entity from a sentence and if it assess that there are particularly alleviating circumstances and that the aim of the sentencing will be achieved as well with more mitigative sentence.[30]

Related to this system of sanctions, is also the question of confiscation. The provisions of the Code about confiscation of assets and property from an offender, also apply to the legal entity. If a legal entity acquires property and property benefit from a crime, that benefit is confiscated from it. If no property or property benefit can be confiscated from the legal entity since it has ceased to exist before the confiscation, the legal successor, ie successors, and in case there are no legal successors, the founder or the founders of the legal entity, ie the stockholders or partners in a trade company in the cases determined by law shall jointly oblige to pay the monetary amount that corresponds to the acquired property benefit.[31]

[29]Article 96-f, ibid
[30] ibid Article 96-h
[31], ibid Article 96-m

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK)

The criminal liability of the legal/corporate entities is enacted with the Criminal Code of 2004[32] and is in enforceable under the current Criminal Code.[33] In accordance with the provisions of the current Criminal Code, the legal/corporate entities have criminal liability when the terms set forth in the Special part of the Criminal Code or in another law that governs the criminal acts, are realized. The Change and Supplementation of the Criminal Code of the Republic of Macedonia from 2004, alongside with the enacting of the criminal liability of the legal/corporate entities, also enacts that the legal/corporate entity is liable for the criminal acts done by the responsible persons in the legal/corporate entity, in the name, for the account and in favor of the legal/corporate entity.[34]

The Macedonian legislation governs the criminal liability of the legal/corporate entities for criminal acts established with the Criminal Code under the principle of vicarious liability that are based on the execution or omission of the obligatory supervision by the managing bodies, the managing person or another representative of the legal/corporate entity. It enforces the parallel liability system, both for the natural doer and the legal person i.e. the criminal liability for the legal/corporate entity does not exclude the liability for the natural person as offender of the

[32] Criminal Code ("Official Gazette of the Republic of Macedonia" nos. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004) Decisions of the Constitutional Court of the Republic of Macedonia: U. no. 220/2000 dated 30 May 2001, published in the "Official Gazette of the Republic of Macedonia" no. 48/2001; U. no. 210/2001 dated 06 February 2002, published in the "Official Gazette of the Republic of Macedonia" no. 16/2002;.

[33] Criminal Code ("Official Gazette of the Republic of Macedonia" nos. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139/2008, 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 196/2015 and 226/2015). Decisions of the Constitutional Court of the Republic of Macedonia: U. no. 220/2000 dated 30 May 2001, published in the "Official Gazette of the Republic of Macedonia" no. 48/2001; U. no. 210/2001 dated 06 February 2002, published in the "Official Gazette of the Republic of Macedonia" no. 16/2002; U. no. 206/2003 dated 09 June 2004, published in the "Official Gazette of the Republic of Macedonia" no. 40/2004; U. no. 228/2005 dated 05 April 2004, published in the "Official Gazette of the Republic of Macedonia" no. 50/2006.

[34] Criminal Code ("Official Gazette of the Republic of Macedonia" nos. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004) Decisions of the Constitutional Court of the Republic of Macedonia: U. no. 220/2000 dated 30 May 2001, published in the "Official Gazette of the Republic of Macedonia" no. 48/2001; U. no. 210/2001 dated 06 February 2002, published in the "Official Gazette of the Republic of Macedonia" no. 16/2002;.

criminal act.[35] Taken the previous in consideration, the legal entity shall be liable for a crime even when there are factual or legal obstacles for determining the criminal liability of the natural person as offender of the crime.

If the crime is committed out of negligence, the legal entity shall be criminally liable under the conditions, unless a law anticipated sentencing for a crime committed out of negligence as the Criminal Code is.[36]

The legal corporate entity is liable for committing a criminal act if the following conditions are met:

- There has to be statutory criminal liability in the Separate Part of the Criminal Code regarding the committed criminal act. The Macedonian Criminal code has over 80 provisions that govern a criminal liability for the legal/corporate entity.[37]
- The criminal act has to be committed by a responsible person in the legal/corporate entity. The status of the person that committed is something that needs to be determined in every single situation in compliance with the legal regulations, general enactments and the legal definition of the term *responsible person* according to the provisions of the Criminal Code.[38]

35 Article 28-b - (1) The liability of the legal entity does not exclude the criminal liability of the natural person as offender of the crime.
36 Ibid, Article 28-b
37 Art.149, para.5; Art.149-a, para.3; Art.150 para.3; Art.151, para.6; Art.165, para.4; Art.153, para.3; Art. 156, para.2; Art.157, para.6; Art.162, para.3; Art.165, para.4; Art.166, para.2; Art.167, para.2; Art.170, para.3; Art.171, para.2; Art.191; para.5; Art.192, para.3; Art.193, para.6; Art.193-a, para.4; Art.204, para.4; Art.205, para.7; Art.206, para.2; Art.211, para.3; Art.212, para.3; Art.213, para.3; Art.213, para.3; Art.214, para.4; Art.215, para.5; Art.216, para.3; Art.218, para.5; Art.219 para.4; Art.220, para.4; Art.222, para.5; Art.223, para.4; Art.225, para.3; Art.225-a, para.3; Art.226, para.5; Art.229, para.4; Art.230, para.5; Art.231, para.6; Art.232, para.3; Art.247, para.7; Art.248, para.2; Art.249, para.2; Art.249-a, para.4; Art.250, para.4; Art.251, para.9; Art.251-a, para.5; Art.251-б, para.8; Art.254, para.2; Art.255, para.2; Art.256, para.4; Art.257, para.4; Art.261, para.4; Art.264, para.3; Art.266, para.2; Art.273, para.12; Art.274, para.5; Art.274-б, para.5; Art.275, para.5; Art.275-б, para.4; Art.275-в, para.4; Art.276, para.2; Art.277, para.3; Art.278, para.6; Art.278, para.6; Art.278-a, para.5; Art.278-б, para.3; Art.279, para.3; Art.280, para.3; Art.283, para.2; Art.284, para.3; Art.285, para.6; Art.286, para.5; para.289, para.3; Art.295, para.3; Art.358, para.5; Art.376, para.3; Art.377, para.6; Art.378, para.4; Art.379, para.2; Art.380, para.2 and Art.418-a, para.6.
38 Article 122 para.7 Criminal Code: A responsible person within a legal entity shall be considered to be a person within the legal entity, who considering his function or based on special authorization in the legal entity, is entrusted with a certain circle of matters which concern the execution of legal regulations, or regulations adopted on the basis of a law or a general act of the legal entity in the management, use and disposition of property, the management of the production or some other business venture, or other economic process and their supervision. An official person shall also be considered to be a responsible person, when this concerns crimes where a responsible person is found

- The criminal act has to be committed in the name, for the account and in favor of the legal/corporate entity. The criminal act is committed in the name of the legal/corporate entity when the doer of the criminal act acts as the representative person of the legal/corporate entity; for the account of the legal/corporate entity – when the legal/corporate entity bears the legal and material consequences (positive or negative) from the acting of the representative; and in favor of the legal/corporate entity – if the legal/corporate entity has any material or other benefit from the acting of the representative person.

The legal entity shall be liable as well for a crime committed by its employee or by a representative of the legal entity, wherefore a significant property benefit has been acquired or significant damage has been caused to another, if:

- the **execution** of a conclusion, order or other decision or approval of a governing body, managing body or supervising body is considered commission of a crime or
- the commission of the crime resulted from **omitting** the obligatory supervision of the governing body, managing body or supervising body or
- the governing body, managing body or supervising body has **not prevented** the crime, or has concealed it or has not reported it before initiating a criminal procedure against the offender.[39]

to be the offender, while the crimes are not foreseen in the chapter on crimes against official duty, i.e. crimes by an official person foreseen in some other chapter of this Code. When this Code specifically stipulates, a responsible person shall also be considered the person who performs a special function or an authorization or is entrusted to independent performance of certain operations within a foreign legal entity, as well as the person who is a representative of the foreign legal entity within the Republic of Macedonia.

[39] Article 28-a, para. 1 and 2, Criminal Code ("Official Gazette of the Republic of Macedonia" nos. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139/2008, 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 82/2013, 14/2014, 27/2014, 28/2014, 41/2014, 115/2014, 132/2014, 160/2014, 199/2014, 196/2015 and 226/2015). Decisions of the Constitutional Court of the Republic of Macedonia: U. no. 220/2000 dated 30 May 2001, published in the "Official Gazette of the Republic of Macedonia" no. 48/2001; U. no. 210/2001 dated 06 February 2002, published in the "Official Gazette of the Republic of Macedonia" no. 16/2002; U. no. 206/2003 dated 09 June 2004, published in the "Official Gazette of the Republic of Macedonia" no. 40/2004; U. no. 228/2005 dated 05 April 2004, published in the "Official Gazette of the Republic of Macedonia" no. 50/2006.

The Doctrine of Identification was promulgated so as to affix liability of the crimes committed by the people in charge of running the company. This theory states that the liability of a crime committed by a corporate entity is attributed or identified to a person who has a control over the affairs of the company and that person is held liable for the crime or fault committed by the company under his supervision.

By this doctrine of identification, those offenders are being held liable for the acts committed by the company. The main objective of the doctrine is to punish the people who are actually committing the crime who are the brain and mind of the company through which the crime is being committed.

Thus, the actions of an individual who is 'identified' with a company can be attributed to the company and considered to be actions of the company.[40]

All the legal/corporate entities are criminally liable for commission of criminal acts that are enacted with the law, except the State. The units of the local self –government municipalities are criminally liable for the criminal acts/crimes that are committed out of their public authorization/competence. When it comes to foreign legal entities, they will be criminally liable in situation where they have committed a crime on the territory of the Republic of Macedonia, regardless whether it has its own head or branch office performing the activity on its territory.[41]

4. What are the potential bars to extradition of an individual?

Having in mind that according to the Constitution foreigners in the Republic of Macedonia enjoy freedoms and rights guaranteed by the Constitution, under conditions specified by law and international agreements, this question will primarily be analyzed from the viewpoint of the

40 N.Meihra,*Doctrine of identification*,http://www.legalservicesindia.com/article/article/corporate-criminal-liability-doctrine-of-identification-488-1.html
41 Ibid, Article 28-a, para.3, 4 and 5.

Constitution, following up with the legislation provided by the law and the international agreements.

Fundamentally, article 4 of the Constitution[42] proclaims that no Macedonian citizen can be deprived of citizenship, expelled from the country or extradited to another country. However, this article has been subject to changes and the right of extradition is not absolutely alienated from the Macedonian citizens anymore. As stated in Amendment 32[43], the first part stays relevant declaring that a Macedonian citizen cannot be extradited to another state, but now it is accompanied by an exception making known that it is possible by virtue of a ratified international treaty followed by a decision from the courts. Moreover, the Constitution sets the basic principles in article 29[44] clearly stating that the Republic of Macedonia guarantees the right of asylum to foreigners and stateless persons exiled because of their democratic political convictions and activities. The same article continues that extradition of a foreigner may be carried out only on the basis of a ratified international agreement and according to the principle of reciprocity. The article ends with the assurance that a foreigner cannot be extradited for a political crime, although, it also points out that acts of terrorism are not considered as political crimes.

The Constitution sets the direction for further regulation by the law and the international agreements. The rules for extradition and the procedure in the Republic of Macedonia are regulated by the Law on International Cooperation for criminal matters[45] and the law is in synchronization with the international agreements in this field. The extradition is regulated with chapter number four of the Law on International Cooperation for criminal matters and it is divided into three parts. The first part defines the offenses for which the extradition is allowed, while the second and the third part explain the rules and the procedure in situations where the extradition is requested from the Republic of Macedonia and when the country is the one requesting the

[42] Article 4, Constitution of the Republic of Macedonia, 17/11/1991
[43] Amendment 32, Constitution of the Republic of Macedonia, 12/04/2011
[44] Article 29, Constitution of the Republic of Macedonia, 17/11/1991
[45] Law on International Cooperation for criminal matters (Official Gazette of the Republic of Macedonia no. 124/10)

extradition. For the purposes of the research and in order to answer this question, the following paragraphs will look over the first and the second part of the chapter number four.

According to article 50[46], extradition of a person based on international warrant is only allowed for crimes punishable by the national legislation with an imprisonment of at least one year. Furthermore, the extradition is permitted for the execution of a legally effective jail sentence if the person has to withstand a sentence of at least four months. The national legislation is always the Criminal Code of the Republic of Macedonia[47]. Taking into consideration the fact that the Law on International Cooperation for criminal matters is based on the principle of specialty,[48] the extradited person cannot be prosecuted and subjected to punishment or any other measure of restriction of liberty or extradited to another state for any crime committed before the extradition which is not subject to the extradition. Nevertheless, there are exceptions to this principle in cases when the competent authority gives approval and delivers the necessary documents, the extradited person does not leave the country 45 days after the final release or the extradited person leaves the country and enters it again.

When it comes to the second part of the chapter, it begins with the procedure and the requirements for extradition. Article 52[49] lists 9 assumptions that must be met cumulatively with no exceptions. In addition, the law once again confirms the Constitution commitment that the extradition cannot be granted for political crimes or offenses related to these crimes. The law also expands the definitions of what is not considered a political offense; assassination of a head of a state or a member of his family, terrorism and international crimes. Another exception when this law does not apply are the violations of military duties. Ultimately, if the legislation of the foreign country includes the death penalty as a punishment for the respective crime, extradition may be granted only if the foreign country gives sufficient guarantee that the death penalty will not be imposed.

[46] Ibid Article 50
[47] Criminal Code (Official Gazette of the Republic of Macedonia no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 87/07, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 42/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14, 196/15 and 226/15)
[48] Article 51, Law on International Cooperation for criminal matters (Official Gazette of the Republic of Macedonia no. 124/10)
[49] Ibid Article 52

The crimes related to violation of rules for taxes, duties and currency operations are specific and generally there are no exceptions for extradition. It is important to note that the law, through article 57,[50] also provides protection for the extradition of the person to a third country. Namely, the Minister of Justice at the request of a foreign country may allow the person to be extradited to the specific country for offenses committed before his surrender, except in cases when that is not possible due to the principle of specialty. Additionally, the law defines the needed documents and all the necessary information in order the extradition request to be complete.

In the end, article 71[51] makes clear the procedure for the deciding of extradition in the case of requests from several countries. If several countries demand extradition for same or different crimes, the Minister of Justice will decide which of the countries can extradite the person, based on previous court decision on the completion of the requirements for extradition. The Minister of Justice will take into account the nature of the crime, the place where the offense took place or whose territory was the ground for most of the incriminating actions in the case of continuous crime, the nationality of the person and the dates of the individual requests for extradition and whether they are submitted for the purposes of starting a criminal procedure or the motive is the execution of a sentence.

5. Please state and explain any:

5.1 internal reporting processes (i.e. whistleblowing);

Internal Audit as Internal Reporting

The audit can be defined as the inspection and verification of the accuracy of financial data and reports. It is a systematic process of objectively collecting evidence relating to the reports on economic developments and results. Internal auditors prepare a report on the basis of strategic and annual internal audit plan and individual audit plan.[52]

[50] Ibid, Article 57
[51] Ibid, Article 71
[52] Article 2, Rules for the manner of execution of internal audit and manner of reporting audit

The Strategic plan contains: Introduction, mission, analysis of the situation (weaknesses), priorities (main objectives) of the Internal Audit Unit, measures (programs and activities) and the necessary means to perform internal audit.[53]

The annual audit plan contains: kind of audit, a list of systems and processes planned for audit, clear objectives and possible indicators (available resources, time measure engagement of external experts).[54]

Engagement of external experts is planned for certain types of internal audit depending on the scope, the complexity of the audit.Also in planning the activities of the internal audit unit, under consideration is taken the time needed for preparation.

The audit begins with an initial meeting held between the management of audit organizational unit and the Head of Internal Audit Unit, accompanied by the head of the audit team and internal auditors. For each completed audit, internal auditors prepare a report in writing. In the report, internal auditors report to the managers, for the functioning of the audited systems and processes and the system of financial management and control and list all irregularities, inconsistencies and deficiencies. They also provide recommendations for improving the current situation and reduce vulnerabilities. All recommendations are based on law. In order to help the management to reduce risks, increase efficiency, effectiveness, improve quality.

Measures should be: specific, achievable, realistic, timely.[55]

[53] Article 3, Rules for the manner of execution of internal audit and manner of reporting audit, (Official Gazette of the Republic of Macedonia no.90/09)
[54] Article 4, Rules for the manner of execution of internal audit and manner of reporting audit

[55] Article 12, Rules for the manner of execution of internal audit and manner of reporting audit

5.2 external reporting requirements (i.e. to markets and regulators), that may arise on the discovery of a possible offence.

External audit in the public and private sector.

There are several types of audits that can be thoroughly inspected the work as financial operational, regulatory, audit performance, information systems, etc.

External audit in the private sector is carried out by independent statutory auditors would immediately reviewed the financial statements and an opinion on the work of company. The investors these instruments would not dare to invest money in business from one side and on the other hand expected credibility and reliability in the reports to be garantee.The third independent person by communicating their opinions contribute to the expansion of business activities.

Scope of the audit

Objectivity of reports on the financial condition, compliance with applicable legal and regulatory requirements, the use of accounting fundamentals and policies, and compliance with accounting records.

All the rules are the result of harmonization to the proposal for international standards of auditing in the EU that concerns with all kinds audit and compliance to represent ISA.During adoption of these standards in national progress.

External audit in the public sector is similar to private sector.Its have been few features which differs as follows: refers to bodies that are public officials and

- conviction the reliability and accuracy of published financial statements
- conviction the regularity of basic information

Assessment of cost-efficiency and effectiveness with which the body to perform its functions.

The entities are obliged to submit annual accounts and reports to the Central Registrar of Macedonia .The model comprising Balance Sheet, Income Statement and other data on state records.Although submits authorized applicant (accountant). That holds a license from the Treasury that gives detailed information on the structure of income and notes to the annual accounts.

6. Who are the enforcement authorities for these offences?

There are different types of sanctions, such as:

- **Fine** which is prescribed as a main sanction
- **Warning** is imposed instead of a fine for minor infringement
- **Prohibition of professional activity, profession or duties** are imposed only when the perpetrator is sentenced already fine

Sanctions that are imposed on legal entities as opposed to sanction individuals do not differ much. The fine for legal entities is 200 to 500 euros and temporary prohibition of activity, the court can impose from six months to five years.

Infringement procedure-set of procedural steps to punish the perpetrator of the offense taken by the competent authorities.

Authorities:

- Basic Court (single judge)
- Misdemeanor institution
    - administrative authority or organization with public authorities
    - any other body exercising public powers of supervision over the implementation of laws prescribed offenses
    - Appeal Court (the court of second degree misdemeanors)

- Administrative Court (the offense of second degree misdemeanor imposed by the Authority)

Infringement procedure can be conducted only by a competent court, however, for certain offenses by law that may keep state administration body or organization or other body exercising public powers of oversight of law enforcement (sanctioning authority) .All other state bodies and holders of public authority is obliged to court and other authorities that are responsible for conducting criminal proceedings, to provide free assistance and information about solving procedure[56].

Jurisdiction of misdemeanor institution:

- When A law attributed to the exclusive competence
- by all infringement that entail sanction:
  - fine in a particular amount
  - fine for a natural person 500 EUR
  - fine for legal entities to 1000 EUR[57]

In misdemeanor body form a committee to decide on offense, made by authorized persons with an appropriate level of vocational training and work experience, of which one of them is a law graduate with bar exam.[58]

Misdemeanor proceedings initiated misdemeanor institution ex officio, at the request of an authorized person or authorized body, or in some cases at the request of victim[59].If the misdemeanor authority determines that there are legal requirements for conducting, he is obliged to conduct the procedure and take a decision on the misdemeanor. In case the misdemeanor

[56] Article 53, Law on misdemeanors
[57] Article 54, Law on misdemeanors
[58] Article 6p, Law on misdemeanors
[59] Article 60,paragraph 1, Law on misdemeanors

institution will have jurisdiction for the misdemeanor, then he is obliged to submit a request to the competent court to conduct the legal proceedings. As previously mentioned if misdemeanor authority determines that the conditions for conducting, then he is obliged to conducted a procedure and decide. Unless legal conditions are met then the misdemeanor authority shall, within 30 days to notify the applicant of that will not make a decision on the offense, and that will not submit a request for initiation of infringement proceedings by the competent court also he should state the reasons for the decision[60].

Misdemeanor authority ex officio collect evidence and establish the facts necessary for deciding on prekrshokot.No before the decision,the misdemeanor authority is obliged to notify the offender and inform him that he has three days in which can declare the facts and evidence[61].

The decision of the misdemeanor body should contain the following elements: Introduction, dispositive, justification.

Introduction-name of the maker, the names of committee members, the name of the offender and the defense counsel, the infringement which is the subject of proceedings.

Dispositive- description of the offense, the sanction that is imposed or that the procedure is stopped depending on what the committe decides.

Justification- evidence and circumstances underlying the dispositive.[62]

[60] Article 61, Law on misdemeanors
[61] Article 63, Law on misdemeanors
[62] Article 64,paragraph 1,paragraph 2,paragraph 3,paragraph 4, Law on misdemeanors

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

In order to compel the production of information, there are certain powers given to the enforcement agencies and most of them are done by public prosecutor or judicial police during the stages of criminal procedure. As it is stipulated in the Criminal Procedure Code, the Financial Police Office, the Ministry of Interior and the Customs Administration are considered as part of the judicial police. When the public prosecutor and the judicial police find out about a committed crime receiving an oral or written crime report, the public prosecutor initiates a criminal procedure. All authorities, public enterprises and institutions and other legal persons have duty to report crimes which are prosecuted ex officio of which they have been informed or have learnt in other manner.[63] After receiving information about a committed crime the police is obliged to take the necessary measures in order to discover the perpetrator of the crime, to prevent the perpetrator from hiding or fleeing and to discover and secure evidence of the crime which can be used in the criminal procedure.[64] If the pre-trial procedure is successful then the public prosecutor will start the investigative procedure in order to collect all the evidence needed to prove that the suspect is the person who committed the crime.

After the investigation is complete, the public prosecutor determines whether there is enough evidence to pronounce the defendant guilty. If there is enough evidence than the public prosecutor will prepare and send the indictment to the competent court, which would be the Criminal Court.[65]

In order to find information about the committed crime and to collect evidence but also to prove that the defendant is guilty in front of the Court, the public prosecutor is allowed to undertake the following measures: search, temporary security and seizure of objects or property, interrogation of the defendant, examination of witnesses, expert opinion, inspection and reconstruction and special investigatory measures.

[63] Article 273, Criminal Code (Official Gazette of the Republic of Macedonia no. 150/10)
[64] Article 276, Criminal Code (Official Gazette of the Republic of Macedonia no. 150/10)
[65] Article 319, ibid

7.1 Search

Search is an action which involves investigating premises and persons under the conditions and in a manner prescribed by Code. The search is ordered by the court by means of a written and reasoned warrant at the request of the public prosecutor or in some cases, the judicial police.[66] The search of a home and other premises of the suspect or other persons may be conducted when it is possible to find evidence of the criminal offence. Also, the search can be conducted when it is expected to find the suspect in those premises in order to apprehend him. In some situations, in compliance with the rules stipulated in the Criminal Procedure Code, the search can be conducted without warrant.

7.2 Temporary security and seizure of objects or property

The public prosecutor and the police are authorized to temporarily seize some objects that may serve as evidence during the criminal procedure, along with the objects that are supposed to be seized in accordance with the Criminal Code. After seizing these objects, they will be handed to the body determined in special Code for their keeping or they will be secured in some other way. [67]The Criminal Procedure Code stipulates that letters, telegrams and computer data are objects that can be seized.

7.3 Interrogation of the defendant

In order to get answers to some questions which arise during the investigative procedure the public prosecutor is authorized to interrogate the defendant. During the criminal procedure the defendant can give his own statement, but that also means that the public prosecutor is once again allowed to exanimate the defendant.

7.4 Examination of witnesses

During the criminal procedure, the public prosecutor may suggest inviting witnesses to give their statement in front of the Court in order to collect more information about the criminal act or the

[66] Article 181, ibid
[67] Article 194, Criminal Code (Official Gazette of the Republic of Macedonia no. 150/10)

perpetrator of the act. However, the Code stipulates that some persons cannot be called in Court as witnesses and others are not obliged to give their statement. Also, even if the witness is not part of those two group of persons, he does not have to answer some question if he believes that the answer could expose him to serious embarrassment, significant material damage or criminal prosecution. [68]

7.5 Expert opinion

Depending on the stage of criminal procedure, the public prosecutor or the Court are authorized to order an expertise when it is needed to determine some important fact and it can be done only by a person who has the necessary expertise about the concrete fact.[69]

7.6 Inspection and reconstruction

The inspection is conducted by the public prosecutor or by the judicial police when immediate observation is needed in order to determine some important fact in the proceedings. Also, the body conducting the proceeding may order a reconstruction of the event in order to check the presented evidence or determine which facts are important for the case. The reconstruction is carried out by repeating the actions in the same conditions in which the event occurred according to the given evidence. [70]

However, other public bodies are also authorized to collect information on the abovementioned criminal offences and misdemeanors. The Public Revenue Office, the State Commission for Prevention of Corruption and the Financial Intelligence Office are also bodies with public authorities that have powers to collect information on the criminal offences.

The Public Revenue Office is authorized to control the companies and to make inspections into their offices in order to check if all of their documentation about finances and especially about

[68] Article 212, Article 213, Article 214, Article 216, ibid
[69] Article 236, ibid
[70] Article 233 and Article 234, ibid

taxes is legitimately. If there are any signs of unlawful acts carried by the company, the Public Revenue Office is authorized to take the appropriate measures. [71]

The Financial Intelligence Office is the body responsible for prevention of money-laundering.

In order to detect and prevent the money laundering, the Law on prevention of money laundering and financing of terrorism obliges legal entities to collect information and deliver the relevant information to the Financial Intelligence Office. Those legal entities are entitled to undertake the following measures: client due diligence, monitoring of certain transactions, collecting, keeping and submitting data about the transactions and clients that perform them, and introduction and application of programs.[72] The Office itself is authorized to collect, process, analyze, store and deliver data received from the abovementioned entities, to prepare and submit reports to the competent state authorities always when there is a suspicion for committed offence of money laundering, to submit an order to the entity for monitoring of the business relationship, to perform supervision of the entities regarding the application of measures and activities determined by the Law on prevention of money laundering and financing of terrorism. [73] The State Commission for Prevention of Corruption is authorized to raise an initiative before the competent bodies for the control of the financial and material work of the political parties, trade union and citizens' associations, make evidence of, and follows the property situation, changes in property situation and additional profitable and other activities of elected and appointed civil servants, officials and responsible persons in public enterprises and other juridical persons managing state capital, cooperate with other state bodies in the suppression of corruption and to make other controls in order to prevent corruption.[74]

[71] Vesna Pendovska, Aleksandra Maksimovska, Kiki Mangova- Ponjavik, *Financial law, 482*
[72] Article 4, Law on prevention of money laundering and financing of terrorism (Official Gazette of Republic of Macedonia, No. 130/14)
[73] Article 40, ibid
[74] Article 49, Law on preventing corruption (Official Gazette of Republic of Macedonia, No. 28/02, 46/04, 126/06)

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self incrimination)?

The source of information that is used for providing the basis of the evidence is actually the substantiating means (*media probandi*) used for the relevant legal facts to be proven. The provisions from the Criminal Procedure Code [75] govern the presentation of evidence by separate substantiating means: (examination of the defendant, examination of the witnesses and the expert witnesses, access to the case file, material evidence and documents).[76]

One of the most frequently used substantiating means in the criminal procedure is the witness examination.

Witness is a natural person summoned by a competent entity in a criminal procedure, likely to render information regarding the commission of the criminal act and the perpetrator including information about the other important circumstances that pertain to the criminal offense. The witness is obliged to respond to the summons and to give render any information it may have (unless governed otherwise with the Criminal Procedure Code) that pertain to all the fact that are subject to the establishment of a fact or that are important for the criminal act or the perpetrator.[77]

Having in mind the fact that the witness examination is the most common substantiating mean in the criminal procedure, the Criminal Procedure Code establishes an obligation to testify. It is a general obligation for everyone including for domestic and foreign citizens that reside on the territory of Republic of Macedonia, unless they are excused from this obligation in accordance with the Criminal Procedure Code.

[75] Criminal Procedure Code 2010
[76] Gordana Lazetikj-Buzaroska, Gordan Kalajdziev, Boban Misoski and Divna Ilikj-Dimoski,14 Criminal Procedural Law (Law Faculty Iustinianus Primus,2011)
[77] ibid 15.

There is an exception regarding the obligation to elide nothing by having the right not to answer to certain questions if it is likely by doing so, the witness would expose him or her or a close relative to formidable shame, significant material loss or criminal prosecution.[78]

Even though there is a general obligation for testifying, there is a specific category of persons that are excused from the duty to testify by a competent entity.[79]

The following persons shall not be witnesses:

1. A person who would violate the duty of keeping a state or a military secret if he or she gives a statement, unless the competent entity relieves him or her of that duty. It is in the interest of the community that the truth be established and for that to happen the witnesses are the usual substantiating mean of proving. Simultaneously, it is in the community's interest for the state and military secrets to be kept a secret, so that the state interests would not be violated.
2. The defense counsel of the defendant on anything confided by the defendant in him or her as counsel, unless the defendant himself or herself demands it.[80] An efficient defense can exist only if there is a complete trust between the defendant and the defense counsel. That will be so if the defendant is sure that everything that it confides to the defense counsel will be kept a secret. For that purpose, the Law on advocacy[81] establishes an obligation for the defense counsel to keep everything that was confide to him or her by the defendant a secret.
3. A person who would violate the duty of keeping a business secret if he or she gives a statement, regarding anything learned during the practicing of his or her profession (religious confessor, attorney and physician), unless the person has been relieved of such a duty by a separate regulation or by a written statement, i.e. or by a verbal statement given on record

[78] Criminal Procedure Code 2010Art. 216.
[79] Criminal Procedure Code 2010 Art. 213 para.1
[80] Criminal Procedure Code 2010 Art.213 para.2.
[81] Law on advocacy 2002

by the person for whose benefit the keeping of the secret was instituted, i.e. by such a statement by his or her legal successor[82];

4. A juvenile person who, bearing in mind, his or her age and mental development is not capable of understanding the significance of his or her right not to testify, unless the defendant himself or herself demands it[83]; and
5. any person who is not capable of testifying at all, due to his or her mental or physical illness or age[84]

The persons who, according to the Criminal Procedure Code, are excused from the obligation to testify are free to choose by their free will if they want to testify. In other word, if that person decides not to testify against the defendant there are no legal sanctions for it.

The following persons shall be excused from the duty to testify:

1. The marital and illegitimate partner of the defendant;
2. Any blood relatives of the defendant in a direct line, any relatives in an indirect line up to the third degree, as well as in-law relatives up to the second degree; and
3. An adopted child or a foster parent of the defendant.

The excuse not to testify compounds only the excuse from the obligation to give a testimony. The witnesses still has the obligation to respond to the invitation to testify.

The entity conducting the procedure shall be obliged to forewarn the persons that they must not testify, before they have been examined or immediately after their relationship with the defendant has been established. The forewarning and the response shall be put on the record.[85] If the

[82] Criminal Procedure Code 2010 Art.213 para.3.
[83] Criminal Procedure Code 2010 Art.213 para.4
[84] Criminal Procedure Code 2010 Art.213 para.5.
[85] Criminal Procedure Code 2010 Art.214 para.2.

previous is not conducted the testimony of that whiteness cannot be used as a basis for a court judgment.

The reasons that justify the excuse for the testifying by the relatives of the defendant are:

1. Principle of humanity. These people will be put in a position where they will have to testify against their own relative.
2. To avoid the possibility for the afore mentioned persons to give a false statement, whether in favor of, or against the defendant, bearing their relationship in mind, it is expected, which in fact is a criminal act according to the Criminal Code of the Republic of Macedonia.[86]

The statement given by the defendant is any given statement by the defendant pertaining to the criminal act that he or she is charged with and pertaining to all other question to the case that is subject to the criminal proceeding. According to the Criminal Code of Procedure in Republic Macedonia, it is up to the defendant to chose whether he or she will give a statement since he or she is entitled to a right to be silent thorough out the whole criminal proceedings.

The disclosing, gathering and the supply of the material evidence falls on the burden of the parties.

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

The Republic of Macedonia of its legal order tends to acquire the employees a certain amount of security onto the legal framework, where the argument is directed on the employees and their data, regardless whether they work in the public or the private sectors. The right to protection of personal data is regulated in the Constitution[87], thereby the highest legal act acknowledges the

[86] Gordana Lazetikj-Buzaroska, Gordan Kalajdziev, Boban Misoski and Divna Ilikj-Dimoski, 19, Criminal procedural Law, Law Faculty Iustinianus Primus,2011
[87] Article 18, Constitution of the Republic of Macedonia, (Official Gazette of the Republic of Macedonia no. 52/1991, 1/92, 4/92, 31/98, 91/01, 84/2003, and.107/2005)

providing of guarantees of security and confidentiality of personal data and protection if violation occurs when the dispute is provoked around the personal integrity of citizens.

Lex generalis in the area of human rights is the Code of Protection of personal information[88], which was adopted in 2005. In terms of the legal framework it must be taken into account the Code of ratification of Convention for the Protection of Individuals with Regard to the Automatic Processing of Individual Data[89], and the Law on Ratification of the Additional Protocol to the Convention for the Protection of Individuals with regard to automatic processing of personal data regarding supervisory authorities and trans-border data[90].

The Code of Protection of personal information regulates the protection of personal data as fundamental rights and freedoms of natural persons, and in particular the rights to privacy regarding the processing of personal data.[91] The Code itself defines the terminology as it follows the nomotechnical wording that it uses[92]:

1. **Personal data** is any information relating to identified natural person or legal entity that can be identified and the person You can identify a person whose identity can be determined directly or indirectly, especially based on the personal identification number or based of one or more characteristics specific to the physical, physiological, mental, economic, cultural or social identity;
2. **"Processing of personal data"** means any operation or set of operations performed on personal data, automatically or otherwise, such as: collection, recording, organization, storage, adaptation or change, withdrawal, consultation, use, disclosure by transmission,

[88] Code of Protection of personal information (Official Gazette of the Republic of Macedonia no. 7/05 and 103/08)
[89] Code of ratification of Convention for the Protection of Individuals with Regard to the Automatic Processing of Individual Data (Official Gazette of the Republic of Macedonia no. 07/05)
[90] Code of Ratification of the Additional Protocol to the Convention for the Protection of Individuals with regard to automatic processing of personal data regarding supervisory authorities and trans-border data (Official Gazette of the Republic of Macedonia no. 103/08)
[91] Article 1, Code of Protection of personal information (Official Gazette of the Republic of Macedonia no. 7/05 and 103/08)
[92] Ibid, Article 2

publishing or otherwise making available, aligning, combination, blocking, erasure or destruction;

3. **"Personal Data Collection"** is a structured group of personal data available according to specific criteria, whether centralized, decentralized or dispersed on a functional or geographical basis.
4. **"Subject of Personal data"** means any natural person out of which data is processed;
5. **"Controller of the Personal Data Collection"** is a natural or legal person, a body of the state government or any other body which alone or jointly with others determines the purposes and means of the processing of personal data (hereinafter referred controller). When the purposes and means of the processing of personal data established by law or other regulation, the same law or regulation determines the controller or the specific criteria for its determination;
6. **"Handler collection of personal data"** means a natural or legal person or legally authorized government authority which processes personal data on behalf of the controller;
7. **"Third Party"** means any natural or legal person, state power or other body which is not a personal data subject, controller, processor collection of personal data or a person under the direct authority of the controller or processor of the personal data collection is authorized to process the data;
8. **"User"** is an individual or legal entity, government authority or other body to whom the data are disclosed;
9. **"Consent of the data subject"** is freely and explicitly given statement of will of the personal data that agrees with processing of his personal data for previously determined purposes;
10. **"Special categories of personal data** 'shall mean personal data revealing racial or ethnic origin, political, religious, philosophical or other beliefs, trade union membership and data relating to health, including genetic data, biometric data or data related to sex or life;
11. **"Third country"** is a country which is not an EU member or not a member the European Economic Area.

The Code also instate the personal data processing, as it written that processing of personal data relating to criminal offenses and sentences, alternative measures and security measures for

committed criminal acts could be carried out in accordance with law[93], as well as the processing of personal data contained in judicial decisions are carried under conditions determined by law and in the manner prescribed by regulations adopted basis of that law.[94] These regulations create a scope of area regulations towards personal data processing, basely on regulations that *ante festum* subrogate towards this *lex generalis* Code.

As of the matter of Transferring personal data to other states, the Code implicitly denotes that Transfer of personal data to other countries can be carried out only if the other country provides an adequate level of protection of personal data[95]. The level of protection provided by another country, the Directorate evaluates it based on:

- The nature of the data;
- The purpose and duration of the proposed operation and processing operations;
- The state in which they are transmitted;
- Rule of law and;
- Security measures that exist in that country.

10. If relevant, please set out information on the following:

10.1 Defences to the offences listed in question 2;

Taking into consideration the fact that the Macedonian criminal law is based on the principle of **presumption of innocence**[96], the prosecution must prove the defendant's guilt **beyond reasonable doubt**. Therefore, the basic potential defence for all criminal charges is arguing that the prosecution did not manage to fulfil its burden of proof, i.e. the evidence does not necessarily prove the defendant's guilt.

[93] Ibid, Article 7
[94] Ibid, Article 7-a
[95] Ibid, Article 31
[96] Article 2, Code of Criminal Procedure, (Official Gazette of the Republic of Macedonia, no. 150/10 and 100/12)

Furthermore, **the right to a fair trial** enables the defence an opportunity to dispute the evidence used by the prosecution and present additional evidence, in order to prove that the facts and the circumstances regarding the particular case prove the defendant's guilt.[97]

Despite the defences regarding the factual situation itself, the law also stipulates several possible defences that pertain to situations in which despite the fact that the defendant has committed the crime that he/she is charged with, in the particular case his/her action do not constitute a crime because of extraordinary circumstances. Therefore, such actions shall not be deemed unlawful. Such defences include: act of minor significance[98], self-defense[99], extreme necessity[100] and mental competence.[101]

Due to the lack or insignificance of the harmful consequences and the low level of criminal liability of the offender, despite containing characteristics of a crime, an act shall not be considered a crime.

Acts shall also not be considered as crimes, if committed in self-defense (defense necessary for the offender to avert a simultaneous unlawful attack upon himself or upon another) or extreme necessity (in order for the offender to avert from him or from another a simultaneous obvious danger, which could not be averted in some other way and hereby the perpetrated evil is not greater than the threatening evil).

Lastly, an offender, shall not be considered mentally competent and therefore would not be liable for the committed crime, if when committing the crime he/she could not understand the significance of the act or could not control his/her actions due to a permanent or temporary

[97] Article 5, Criminal Code (Official Gazette of the Republic of Macedonia no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 87/07, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 42/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14, 196/15 and 226/15)
[98] Ibid, Article 8
[99] Ibid, Article 9
[100] Ibid, Article 10
[101] Ibid, Article 12

mental illness, temporary mental disorder or retarded mental development (or other especially severe impediments).

However, the most relevant institute and/or defense for crimes committed within companies is stipulated in the Criminal Code: responsibility for a crime committed on command from a superior.[102]

Within companies, which are based on hierarchy and the principle of subordination, 'the subordinate is under the authority of the superior and must enforce his/her commands'.[103] Due to this, according to article 352 of the Criminal Code a subordinate shall not be punished if he/she committed a crime on command from a superior while:

- That command concerned the official duty;
- Is not directed towards a war crime or some other grave crime;
- The subordinate did not know that the execution of the command represents a crime.

It can be concluded that 'this is a specific ground for excluding criminal liability, not unlawfulness, because the command in such circumstances can be considered as coercion'.[104] As such, if the above mentioned criteria are fulfilled, this institute can be used as a reasonable and effective defense in court.

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement); and

The Code of Criminal Procedure stipulates the **principle of legality of the criminal prosecution,** which means that the public prosecutor is obliged to undertake criminal prosecution, if there is evidence for a committed crime which is prosecuted ex officio[105]. However, the Code also

[102] Ibid, Article 352
[103] Gjorgji Marjanovikj, *Macedonian Criminal Law – General Part,* 151
[104] Vlado Kambovski, *Criminal Law – General Part*, 507
[105] Article 18, Code of Criminal Procedure (Official Gazette of the Republic of Macedonia, no. 150/10 and 100/12)

stipulates certain exceptions to the rule – the public prosecutor may, in cases defined by this Code or special laws, desist from prosecution until the termination of the penal procedure.[106]

Therefore, the Code of Criminal Procedure also contains provisions related to both the possibility of **not undertaking criminal prosecution** at all as well as to **conditional postponement of the prosecution.**[107]

The public prosecutor is **not obliged to undertake criminal prosecution or can abandon the prosecution** in cases where:

- It is stated in the Criminal Code that the court may release the criminal from punishment and the public prosecutor evaluates that a judgment without sanction is not necessary (considering the circumstances in the particular case);
- The crime is punishable by a fine penalty or a sentence of imprisonment of up to three years and since the suspect's repentance prevented the damaging consequences or the damage has been compensated, the public prosecutor evaluates that a criminal sanction would not be based on sound grounds (considering the circumstances in the particular case);
- The suspect, being a member of an organized group, gang or other criminal association, voluntarily cooperates before or after the detection, or even during the criminal procedure itself, if that kind of cooperation and the statement of that person is of crucial importance to the criminal procedure.

The public prosecutor may **conditionally postpone the prosecution** by issuing such decision, in cases where *cumulatively*:

- The crime is punishable by a sentence of imprisonment of up to five years;
- The damaged party agrees to the conditional postponement of the prosecution as well;

[106] Ibid, Article 42
[107] Ibid, Articles 44 and 43

- The suspect is willing to act in accordance with the instructions of the public prosecutor and meet the obligations defined by the public prosecutor.

The purpose of such obligations is to increase the chances for a successful reintegration of the suspect, by reducing or removing the harmful consequences from the criminal offence and putting an end to the disturbance resulting from the criminal offence.

Such obligation may include, but are not limited to: elimination of the damage or damage indemnification, returning of dispossessed objects, payment of a fee to the budget or another institution with public authorizations or charity.

If the suspect manages to fulfill the imposed obligations in the given time frame (which may not be longer than six months), the public prosecutor issues a decision for not undertaking criminal prosecution for the crime committed. For two of the obligations (undergoing treatment for curing addictions and undergoing psychosocial therapy for the purposes of overcoming violent behavior), taking into consideration the fact that they have medical implications, the duration of the conditional postponement is decided upon consulting a specialized Institution for curing addictions or the Center for Social Work. In any case, the duration may not be longer than one year.

On the other hand, if the perpetrator fails to fulfil the imposed obligations, the public prosecutor files a motion for instituting a summary proceeding.

Therefore, the conditional postponement of the criminal procedure is in line with the modern societies' striving towards restorative instead of punitive justice.

Apart from the fact that in such circumstances the defendant may prevent or obtain immunity from prosecution, the Criminal Code also elaborates the **possibilities to acquit a criminal from punishment.**

The general principle is that the court may acquit from punishment the offender only when the law foresees this explicitly.[108]

In light of this, the Code stipulates two relevant legal institutes: **voluntarily calling of** and **effective repentance.**

In order to stimulate prevention of crime, an offender who was preparing or attempted to commit a crime, but voluntarily called off its preparation may be acquitted from punishment.[109] However, the offender shall be punished for those activities that constitute some other independent crime.

On the other hand, effective repentance is a legal institute which is relevant after the commission of a certain crime. It is a facultative ground for the court to acquit the offender from punishment, if after committing the crime, he/she has returned the object, has indemnified the damages, or in some other way has removed the harmful consequences from the crime.[110] It can be also considered as a mitigating circumstance when measuring the punishment.[111]

However, there are several provisions which stipulate mandatory acquittal from punishment in cases of effective repentance, in order to stimulate prevention and suppression of serious and heinous criminal offences such as organized crime and terrorism.[112]

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

In relation to such crimes, and especially in regard of the possibilities for obtaining immunity from criminal prosecution and means for penalty reductions, based on the grounds provided in the

[108] Article 42, Criminal Code (Official Gazette of the Republic of Macedonia no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 87/07, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 42/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14, 196/15 and 226/15)
[109] Ibid, Article 21
[110] Ibid, Articles 43-a and 262
[111] Ibid, Article 39, paragraph 2, Criminal Code
[112] Ibid, Articles 324, paragraph 3, 394, paragraph 4, 394-a, paragraph 5

Code of Criminal Procedure, the Law on Witness Protection stipulates the existence of a specific type of witness – **"collaborator to justice".** Collaborator to justice is a person against whom an indictment is filled, is convicted, or member of criminal group, gang or other association, or has participated in committing a crime in the area of organized crime, but has agreed to cooperate with the bodies authorized to identify, prosecute and trial the criminal acts, particularly to give a statement in capacity of witness in the criminal procedure, related to the criminal group, band or other association or to any other criminal act connected with organized crime.[113]

This legal institute provides an opportunity for persons who are involved in organized crime to become useful for criminal investigations and prosecutions against organized crime. Due to this, collaborators to justice are a "hybrid" category – despite being criminals, at the same time they are crucial to preventing, surpassing and indicting organized crime, which is exactly why they can gain certain benefits, such as immunity from prosecution, penalty reduction or more convenient conditions while serving jail time.

The Criminal Code provides grounds for **penalty reductions** as well. The court may mete out a punishment for the offender under the limit prescribed by law or apply a more lenient form of punishment when:

- There is a draft settlement between the public prosecutor and the defendant;
- The accused pleads guilty during the main hearing.[114]

Provisions further elaborating draft settlements can be found in the Code of Criminal Procedure. Until the indictment is brought, the public prosecutor and the suspect may submit a draft settlement requesting from the investigating judge to impose a sanction determined by type and amount within the legally prescribed limits for the specific criminal offence. However, this

[113] Article 2, Law on Witness Protection (Official Gazette of the Republic of Macedonia, no. 38/05)
[114] Article 40, Criminal Code (Official Gazette of the Republic of Macedonia no. 37/96, 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 87/07, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 42/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 41/14, 115/14, 132/14, 160/14, 199/14, 196/15 and 226/15)

sentence may not be lower than the limits for mitigation of the sentence defined by the Criminal Code.[115]

If the judge of the pre-trial procedure accepts the draft settlement, a judgment pronouncing the very same sanction as the one contained in the draft settlement is brought.[116]

The recently adopted Law on the Determination of the Type of Sentence and the Determination of the Length of the Sentence, also contains specific provisions regarding draft settlements in terms of penalty reductions.[117] The maximum amount of the penalty reductions is based on the phase of the criminal procedure in which the public prosecutor and the defendant make the draft settlement. If it is made during the pre-trial procedure and the summary proceeding before submitting the indictment proposal, the penalty can be reduced up to 50% of the penalty which would be otherwise meted out in a regular procedure. Similarly, it can be reduced up to 40% during the phase of the evaluation of the indictment, and up to 30% during the main hearing if the defendant pleads guilty.

11. If relevant, please set out information on means of most mitigation (i.e. taxation, directors and officers insurance).

Political processes in the country when making laws, bylaws and other regulations carry the changes implemented in them in order to facilitate and encourage the activities of legal entities.So last few years especially actual means of reducing the cost of the legal entity through which believes will stimulate greater economic activity and actions.How a favorable measures for businesses that affects small and medium enterprises are the changes and amendments to the desk and filing of legal entities.Namely natural and legal persons (sole proprietors , craftsmen, companies ogrnaichena responsibility etc.) having up to 50 employees and 49 will be exempt from archiving

[115] Article 483, Code of Criminal Procedure (Official Gazette of the Republic of Macedonia, no. 150/10 and 100/12)
[116] Ibid, Article 510
[117] Articles 20 and 21, Law on the Determination of the Type of Sentence and the Determination of the Length of the Sentence (Official Gazette of the Republic of Macedonia, no.199/14)

and records in accordance Law.Those legal entities that employ more than 50 people will be obliged to keep to main records.Im Allow to choose whether to keep rules of procedure or electronic records according to the nomenclature of the State archive.This measure is provided as a small but important step in facilitating and reduction the duration of liabilities in the administration of company.Another current news reflects the expansion of the construction industry in recent years.Agency for energy announces new regulations for construction saying that in the future every new building prominently need to lay boards with a certificate which will have energy efficiency and energy class of the object.Of this measure will stimulate the demand side as well as supply and reduce electricity costs. Think about subsidizing VAT from 5% to 3%, with no intermediary sales tax of 3%, only administrative services etc. The certificate on the energy performance of buildings should contain information on the annual energy consumption and the share of renewable energy in total energy consumption, as well as recommendations for implementation of economically optimal or cost-effective measures to improve the energy performance of buildings or building units, unless there is sufficient potential for such improvement.All of this is the result of legislative activity in the adoption of amendments to the Law on energetisc.How other measures to stimulate youth employment in the country is reducing the cost of contributions for retirees insurance companies is expected in the short term will employ over 20,000 persons by 2018 year.Interested companies would apply to the Agency for youth and sports to hire persons who are registered as unemployed according to the Agency for recruitment.The tendency this measure to It covers all age categories in which employers would save 6000-10000 denars and will contribute to reduce unemployment to 5% of this.Consequently employers have a duty employees through her measure to retain at least a year which sees a double benefit and effect.

Corporations have died of the economic crisis and have fallen into current liquidity as a measure called the payment of outstanding contributions for disability and pension insurance "measure provides for debt in respect of unpaid contributions to 2008 and as of January 2009 by law to allow payment of the debt in installments. If you pay for 12 months, the debtor will be released up to 70 percent of the interest if paid in 24 installments, by 50 percent. The measure will include small businesses, farmers, traders. "By this means the state is giving the benefit of which will remain in the economy and will be expected their benefit.

Application and exemption from personal income tax

Personal income tax is paid annually for the sum of net income from all sources other than the revenues that are tax exempt under the Law on Personal Income Tax. A taxpayer of personal income tax is:

- A resident of the Republic of Macedonia - citizen who earns income in the country and abroad;
- Nonresident Macedonia - citizen who earns income in the territory of the Republic;
- Merchant - individual;
- A citizen who is engaged in agriculture, the craft and the person performing services or free activities, which is not considered a merchant (notaries, lawyers, executives, professors, artists, priests, etc.);
- A citizen who perform undeclared work and generate income subject to taxation.

Revenues raised promissory note tax during the calendar year, have an obligation to report to the Public Revenue Office (PRO) and submit the appropriate tax return within the legal deadline. Tax rate that is calculated personal income is 10%.

The tax base for calculating personal income tax varies depending on the type of income they realize taxpayer. As income taxable and should be reported to the IRS as follows:

- Personal income, income from self-employment, income from property and property rights, income from copyrights and industrial property rights, income from capital and capital gains, games of chance and other prize games and other income

Income tax is not paid on earnings for the following:

- Compesation of expenses for business travel, per diem allowance (accommodation, food) or separation from the family of employed persons in the lowest amount determined by the General Collective Agreement for the private sector of the economy, ie the employees in non economy in amount determined with the regulations of the state Administration; of the

costs for using personal cars for the needs of the employer in the amount of 30% of the price per liter of fuel used by the vehicle for every kilometer, up to 3,500 per month;

- organized transportation to and from work, and nutrition during the work stipulated by law, the general collective agreement for the private sector of the economy, ie the employees in non economy in amount determined by the regulations of the State Administration;
- Severance which provides for retirement in the amount of two average monthly net salary per employee paid in the Republic of Macedonia in the last three months;
- plan alone of persons employed taxpayer who is a beneficiary of Technological Industrial Development Zone for a period of ten years from the beginning of the activity in the area or the first month in which the user will make payment of salary, regardless of the number of employees the user, and under conditions stipulated by the law on technological industrial development zones;
- one-time allowance as severance pay for constant engagement of workers under conditions determined by law; and
- Compresation the costs of hotel accommodation, food and transportation for persons who are not employed by film producer involved in the production of a film intended for public display in the amount of actual costs, determined on the basis of a document of the costs.

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

The Macedonian Criminal Code should have the tendency to readapt some of the incriminations based within it, in order to redistribute the legal norms in such manners where the elemental carriers od general and special prevention would take its tall, argumentum a contrario of the static repression-approach. By that sort of diffuse diligence, the liberalistic, and in a sense the democratic aggravation that can vast hybrid spectrums by the enforcement compulsories notices, having in mind the adaptable corpus of human rights, the legislation should propitiate in such a manner

where the theory of adequate causation[118] would be, by instance, more recognizable by the subjects of law, whether it is a natural person or a legal entity, out of which they would have less contractions with the law to a large extend. Having this in mind, the Judicial branch and the enforcement institutions who practice the law on daily basis ex officio, should get a level of coherence of the practicing legislative opted by the legal foundations, including the Criminal Code. The penalties need to be assented based on human values and dignity, by which the element of retribution should not be reimbursed and called upon if the other means and resources prescribed by the legislation, of achieving justice, are not exhausted in such a manner that the preventive mechanisms incorporated in the legislations, including the Criminal Code, can give luminary and tendential ways by emancipating the subjects of law that has broken the law, out of which the element of reintegration in society, having in mind the current penalty policy, should be more profound than having the opposite process of reintegration, which is recidivism of penalty offences and criminal acts.

In other words, alternative measures of penalties and sanctions should be advanced in some areas of incrimination, and the same measures should be adapted in the present-day reality process, out of which that effectiveness can be included in the light of the Criminal Code and the overall legislation, by doing a national cost-benefit analysis that focuses the development of this branch of the law in the sense of imposing the national interests, having in mind the potential of the enforcement ability of institutions constituted for doing so, where the structuring of rule of law is needed there, where there is not structured the rule of consciousness. The fact that the Republic of Macedonia is a social state[119] and having in mind the extrapolating factors that majors the presence of the argument, consolidation of the legal codes should be enhanced, rather than having a collision of legal norms, structured in different codes that entangles the conformity which is expected from an operating legal system.

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[118] Turner, S.P., Factor R.A. (1981) *OBJECTIVE POSSIBILITY AND ADEQUATE CAUSATION IN WEBER'S METHODOLOGICAL WRITINGS*. Available at: https://www.researchgate.net/profile/Stephen_Turner12/publication/230546876_Objective_Possibility_and_Adequate_Causation_in_Weber's_Methodological_Writings/links/56b9f36608ae3b658a8a3842.pdf (Accessed: 3 February 2017)

[119] Article 1, Constitution of the Republic of Macedonia, (Official Gazette of the Republic of Macedonia no. 52/1991, 1/92, 4/92, 31/98, 91/01, 84/2003, and.107/2005)

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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction.

1.1 Corruption offences

The Romanian Criminal Code (Law no. 286/2009, in force as of November 12 2012), in articles 289 to 292 regulates four corruption offences: **taking a bribe**, **giving a bribe**, **influence peddling** and **buying influence**. The incriminating norms for these offences refer specifically to public officials. However, article 308 of the Criminal Code extends the applicability of these norms to all the 'persons who carry out, on a permanent or on a temporary basis, with or without remuneration, a duty irrespective of its nature (…) within any legal entity'. Legal literature concluded that this article provides the definition of the private official.[1] Moreover, when any of these offences is committed by a private official, the limits of the sanction prescribed by law decrease by one-third.

Given the fact that influence peddling and its corresponding offence, buying influence are, from a conceptual viewpoint, preliminary or preparatory acts which may be followed by either active or passive bribery,[2] the legislator incriminated in all these cases 'the promise, the supply or the giving' and 'soliciting, receiving or accepting of money or other undue benefits, directly or indirectly, for oneself or for another', respectively. Moreover, what is asked of the official, in the case of either taking a bribe or influence peddling is to fail to perform, speed up or delay the performance of an act that falls under the professional duties of the official or to perform an act contrary to such duties.

Under Romanian legislation, both giving and taking a bribe may be committed with respect either to 'an action which falls under the purview of their professional duties or (…) to the performance of an action contrary to their professional duties'. [3] The same applies to influence peddling and buying influence. Furthermore, the scope of active and passive bribery is rather broad, since they

[1] Sergiu Bogdan(coord.), Doris Alina Şerban, George Zlati, *Noul Cod penal. Partea specială: analize, explicaţii, comentarii. Perspectiva clujeană* (Universul Juridic 2014) 414 [Romanian].
[2] Ibid. 424, 429.
[3] Ibid. 411.

may be committed before, in the course of or after the official fulfilled their duties.[4] A bribe giver cannot be an accomplice to passive bribery; he/she will be sanctioned as the author to passive bribery.[5] In the case of influence peddling, the perpetrator must not only have the influence or allege to have it, but also promise they will persuade the official to perform, fail to perform, accelerate or delay the performance of an act.[6]

As far as sanctions are concerned, the main penalty for these four offences is imprisonment. If the perpetrator is a legal entity, it will be subjected to paying a fine. Moreover, it is mandatory for the court to ban the bribe-taker (whether a natural or a legal person) from exercising the profession or the activity in relation to which the violation was committed. If the bribe giver was constrained by any means by the bribe taker, they will be returned the money or assets that they gave. However, the bribe giver who reported the commission of the offence 'prior to the criminal investigation bodies be notified thereupon' will have the money or assets returned to them only if they were given following the denunciation (paragraph 4 of article 290 of the Criminal Code);otherwise, these means of bribery will be confiscated. Paragraphs 2 and 3 of article 292 contain identical provisions regarding buying influence. Confiscation of money or assets used in the commission of the offence is applicable in the case of both active bribery and influence peddling, without exception.

In addition to the provisions of the Criminal Code, Law no. 78 (for the prevention, discovery and sanctioning of corruption deeds) 2000 [pentru prevenirea, descoperirea şi sancţionarea faptelor de corupţie] targets corruption offences mainly in the public sector and with regard to the use of funds coming from the European Union. Moreover, it incriminates several offences assimilated to corruption offences.

1.2 Fraud

The Criminal Code regulates a rather vast array of fraud-related offences: abuse of trust, breach of a fiduciary by defrauding creditors, simple bankruptcy, bankruptcy fraud, fraudulent management,

[4] Ibid. 414-415.
[5] Ibid. 420.
[6] Ibid. 425.

misrepresentation, insurance fraud, diversion of public tenders (all of which fall under the category of offences against property by breach of trust), computer fraud, making fraudulent financial operations, accepting transactions made fraudulently, illegal monetary gain. Most of these offences are punishable by imprisonment; in several instances, the court may order a fine, which is prescribed as an alternative to imprisonment.

Law 241 (for preventing and combating tax evasion) 2005 fails to distinguish between licit means of minimising the tax burden (*evasion fiscale*, according to French legal literature) and violation of the law with the purpose of escaping taxation (what the French call *fraude fiscale*).[7] As a consequence, tax evasion is accidentally synonymous with tax fraud. However, if one can find a licit means to pay less tax, they will not be prosecuted under the aforementioned law. The most frequent and important tax evasion offences are regulated by article 9 of the aforementioned Law. The size of the prejudice may determine the aggravation of the legal limits of the penalty by either 5 or 7 years of imprisonment.

1.3 Money laundering

The objective element of this offence, as depicted by the Romanian legislator[8], is meant to cover all the means which may be employed in order to either benefit from money or goods obtained as a result of a crime or hide their illicit origin. Therefore, there are three alternative ways of committing this offence:

a. exchange or transfer of goods, knowing that they derive from the commission of a crime, with the purpose of hiding or concealing their illicit origin or with the purpose of helping the person who committed the offence from which the goods derive to avoid prosecution, being brought before a court or execution of penalty;
b. hiding or concealing of the true nature of the origin, location, disposition, circulation or property of these goods or of the rights pertaining to them;

[7] Cosmin Flavius Costaş, *Drept financiar* (Universul Juridic, 2016) 206 [Romanian]
[8] Article 29 of Law 656 (for the prevention and sanctioning of money-laundering, as well as for the establishment of certain measures for preventing and combating the financing of terrorism) 2002 [pentru prevenirea şi sancţionarea spălării banilor, precum şi pentru instituirea unor măsuri de prevenire şi combatere a finanţării terorismului]

c. acquirement, detention or use of goods, knowing that they derive from the commission of a crime."[9]

According to paragraph 4 of the aforementioned article, whether the presumed perpetrator was aware of the origin of the goods can be proved by means of a judicial presumption. The same means of probation can be used to ascertain the aim of the alleged offender who exchanged or transferred the goods. Money-laundering will be sanctioned under Romanian law even if the main offence (from which the money or goods resulted) was committed abroad (para 5).

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

2.1 Main Offences – Crimes

2.1.1 Criminal liability

The criminal liability of legal persons was regulated effectively for the first time through Law no. 278/2006, which amended the then-existing Criminal Code (Law no. 15/1968) by introducing the criminal liability of legal persons. Although the entry into force of Law no. 286 [of the Criminal Code] 2009 (hereafter the Criminal Code) in February 1, 2014 repelled Law n. 15/1968, the new legislation kept not only the fundamental principles of this form of liability[10], but also most of the provisions of the former regulation.

First of all, there are two categories of legal persons that can be held criminally liable:

i. private legal entities, recognised as such by the civil law[11], irrespective of their form of organisation or field of activity and

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[10] Ioan Lascu, '*Răspunderea penală a persoanei juridice în lumina noului Cod penal*' [2011] Papers of the Sibiu Alma Mater University Conference, Fifth Edition, 24–26 March 2011, Sibiu – Volume 2 58 [Romanian]
[11] Florin Streteanu, Radu Chiriţă, *Răspunderea penală a persoanei juridice*, (2nd edition, C.H.Beck, 2007) 392 [Romanian]

ii. public institutions, when they commit an offence in the course of an activity that can be performed by private legal entities. In Romania, from the analysis of the first decisions against legal persons, it can be noted that most of them were pronounced against limited liability companies.

Secondly, the Romanian legislator chose to establish the direct liability of the entity, not a form of objective criminal liability, which is completely unknown to our current legal system.[12] The criteria provided in article 135 of the Criminal Code suggest that **the actions of any natural person** (not only an organ, a representative, a proxy or a vicar of the legal person) **can be imputed to the company, so long as the former acts,** *de facto***, under the authority of the latter or those actions benefit the company**.[13] The Înalta Curte de Casație și Justiție (Supreme Court of Cassation and Justice) determined in one case[14] that the intent of the legal person resulted from the following circumstances: the bribe had been given by one of its administrators in the interest of the company (to a public official, in order to prevent hefty customs sanctions); the other administrator agreed to the deeds of the one who gave the money by showing no opposition to his illicit actions.

Thirdly, regarding the nature of the crimes that can be committed by legal persons under Romanian Law, it has been concluded that a legal person cannot be the author of crimes such as rape, incest and bigamy; however, it can be held liable as accomplice or instigator. It is therefore almost impossible to identify a crime which can totally exclude the implication of a legal person from its perpetration[15].

[12] Ibid. 391
[13] Ibid. 398
[14] Judgement delivered on March 28 2013, file n. 421/36/2011, as rendered in Alexandra-Roxana Ilie, *Răspunderea penală a persoanei juridice: jurisprudenţă rezumată şi comentată* (C.H. Beck, 2013) [Romanian] 79
[15] Andra-Roxana Ilie, *"Between the Principle of Specialty and the General Criminal Liability of Legal Persons. View on the New Criminal Code"*, 4 Curierul Judiciar, 234;

2.1.2 Penal Sanctions

The principal penalty for legal entities is represented by **a fine**, whose amount is determined through a fine-days system.[16] This imposes on the judge a double customisation process. Firstly, the number of days subject to the fine will be established in accordance with the general criteria for the customisation of the penalty.[17] The special limits are determined as intervals, taking into account the sanction applicable for each crime. Since corruption crimes, fraud and money-laundering are usually committed with the intent of obtaining a monetary benefit, the Romanian legislator established an aggravating circumstance taking into consideration such a motive – 'the special limits of the fine-days provided by law for the committed offence may be increased by one-third'.

The Romanian Criminal Code established a number of **supplementary penalties** to be enforced dependently on the principal penalty: dissolution of the legal entity, prohibition to perform the activity or one of the activities of the legal entity, during the performance of which the offence was committed, closure of operation locations, imposing a ban on taking part in public procurement tenders, placement under judicial supervision and posting or publication of the conviction sentence. In general, the need to apply them to a perpetrator is left to the appreciation of the court, who has to take into consideration 'the nature and gravity of the offences, as well as the circumstances of the case'. By exception, they are mandatory to the court when the law stipulates so. However, article 29 of Law 656 (on the prevention and sanctioning of money-laundering as well as the institution of certain measures of prevention and fighting against financing terrorist acts) 2002 [pentru prevenirea și sancționarea spălării banilor, precum și pentru instituirea unor măsuri de prevenire și combatere a finanțării actelor de terorism] stipulates that it is mandatory for the court to enforce one or more of the following supplementary penalties: dissolution of the legal entity, suspending its activity and closure of operation locations.

[16] Art. 137 paragraph 2 states that 'The amount corresponding to the fine-days, varying between RON 100 and 5,000, shall be multiplied by the number of days subject to the fine (between 30 and 600 days).'
[17] ART. 74 of the Romanian Criminal Code

2.2 Confiscation

In Romanian law, confiscation is not seen as a sanction, but as a security measure. The money or assets resulted from the crime, if they are not returned to the victim, are subject to what article 112 names **special confiscation**. This is applicable to the corruption offenses regulated by articles 289-290 of the Criminal Code.

Extended confiscation is also applicable in case of money-laundering, corruption offences or fraud. Its purpose is to ensure that the perpetrator is deprived of any illicit profit and does not benefit in any way from the offence. Unlike special confiscation, there is no direct cause-effect relation between the assets subject to confiscation[18] and the offence. Their illicit source is, in fact, a relative presumption based on the disproportion between the revenue of the company and its assets, corroborated with other circumstances of the cause.[19] Furthermore, article 112^1 paragraph 2 of the Criminal Code states that this measure must be limited 'within a time period of five years before and, if necessary, after the time of perpetrating the offence, until the issuance of the indictment'.

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

According to the Romanian Criminal Code, the criminal liability of corporations is distinct from the one of its legal representatives, such as its directors or officers (also meaning that the first one can be engaged without even being necessary to identify a responsible natural person). The Criminal Code into force provides for a general liability, meaning that corporations can be held liable for all crimes provided by the Criminal Code or by special laws.

[18] Paragraph 4 of article 112^1 of the Romanian Criminal code explicitly states that, under this article, 'sums of money may also constitute assets'.
[19] Mihail Udroiu, *Drept penal Partea generală. Noul Cod penal* (2nd edition, C.H. Beck, 2015) 440 [Romanian]

As previously stated in the answer to Q2, according to Romanian Criminal Code in force the actions of any natural person (not only an organ, a representative, a proxy or a vicar of the legal person) can be imputed to the company, so long as the former acts, de facto, under the authority of the latter or those actions benefit the company. The criminal liability of corporations cannot be however engaged by any person related to these entities, as the law requires other conditions.

Thus, there are **three criteria pursuant to which a legal person may be charged with an offence**, namely the perpetration of the offence when performing the object of activity, the perpetration of the offence to the benefit of the legal person or the perpetration of the offence on behalf of the legal person.

- The perpetration of the offence when performing the object of activity means that the offence must be closely connected to the performance of the object of activity of the legal person. Such offences are related to the general policy of the company or to the activities it performs (offences related to the work safety, competition, environment protection).
- The perpetration of the offence to the benefit of the legal person refers to those offences that fall outside the activities related to the performance of the object of activity, but considered to result in a benefit for the legal person. The benefit may take the form of a profit or of the avoidance of a loss.
- The perpetration of the offence on behalf of the legal person refers to those crimes perpetrated within the process of organizing the activity and operation of the legal person without it being directly connected to its object of activity.[20]

As mentioned before (answer to Q2) Romanian criminal code provides for the direct liability of the legal person. Therefore, the offence may be the consequence of either a decision made deliberately by the legal person or of the negligence from its part, negligence which may consist of a faulty organization, insufficient safety measures of unreasonable budgetary restrictions that provided the circumstances for the perpetration of the offence. In respect of the offences perpetrated by an agent (e.g. directors or officers) or by an attorney in fact, it is required that the

[20] Florin Streteanu, Radu Chiriţă, *Răspunderea penală a persoanei juridice ,* 2007, Editura C.H. Beck, page 230;

company had been aware of his/her intention to perpetrate such offences or had encouraged such actions.[21]

It must also be stated that, according to the Criminal Code, the criminal liability of the legal person does not exonerate the criminal liability of the natural person (e.g. directors or officers) who contributed, in any manner, to the perpetration of the same offence.

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

Romanian legislation provides both procedural and substantial requirements regarding extradition. There are three main legal means that serve to protect the rights of the individual at whom the procedure is aimed.

Firstly, Romania has enacted legislation that serves as lex specialis, aiming at encompassing all important regulations regarding criminal matters in criminal matters. Both public prosecutors and judges have the legal obligation of ensuring that all extradition procedures meet minimum human rights exigencies, and Law no. 302/2004 is the fundamental instrument that they will use, being the most elaborate.

Secondly, all extradition procedures must comply with the minimum standards imposed by all international treaties that Romanian has adhered to, according to Article 11 of the Constitution. Particular attention is given to the Universal Declaration of Human Rights and all other international Conventions on Human Rights. Thus, the European Convention on Human Rights and the European Court on Human Rights Case Law are mandatory to all public institutions

[21] Lex Mundi, *Business Crimes and Compliance Criminal Liability of Companies Survey (2008)*, pages 276-288, www.lexmundi.com, [Accessed on 10th March 2017]

involved in the extradition proceedings. Many limitations to extradition rise from the Courts' elaborate doctrine of nonrefoulement.

Lastly, Article 19 of the Romanian Constitution should be seen as essential as far as extradition is concerned, stating that (i) a person that has Romanian citizenship can only be extradited in consideration of an international convention Romanian has signed; (ii) such a procedure must be provided by law; (iii) any individual that doesn't have Romanian citizenship can be extradited only based on an international act Romania has adhered to or if there is some form reciprocal reliance; (iv) all extradition procedures must have a judicial nature.

There are six insurmountable substantive bars to extradition that Romanian legislation enforces. Firstly, if the requesting state has not respected all conditions imposed by Article 6 of the European Convention on Human Rights during the trial of the requested person, the request must be denied. Furthermore, the same solution must be adopted in cases where there are objective factual circumstances to determine that a violation might be possible, as the of Articles 3 or 4 of the Convention. Secondly, the request cannot be granted in cases where there is a strong suspicion that the individual might be tried or sanctioned based on his race, religion, gender, nationality, language, political or ideological opinion or association with a certain social group. Furthermore, the request must also be denied in cases where the individual's situation may be aggravated in consideration of any of the aforementioned personal characteristics. Moreover, Romanian authorities must refuse to accept extradition if the person whose extradition is requested has been sentenced or would be liable to be tried or sentenced in the requesting State by an extraordinary or ad hoc court or tribunal, other than those recognised under international law.

Likewise, extradition must be barred when it has been requested regarding political crimes or a similar offence. Article 21 of Law no. 302/2004 excludes (i) attempt against the life of heads of state, or against that of any member of their families; (ii) crimes against humanity, as mentioned in the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations General Assembly on December 9 1948 as General Assembly Resolution 260; (iii) the crimes enshrined in article 147 of the 1949 Geneva Convention on the Protection of Civilian Persons in Time of War, article 50 of the Geneva Convention for the Amelioration of the

Condition of the Wounded and Sick in Armed Forces in the Field, article 51 of the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea and article 129 of The Geneva Convention relative to the Treatment of Prisoners of War.

Articles 19 and 20 impose several substantive personal bars to extradition. First of all, Romanian citizens can only be extradited if (i) they live in the requesting state or (ii) they have dual- citizenship in the requesting state or (iii) the (alleged) crime was committed in an EU State or against an EU citizen, if the requesting state is a member of the EU. In the first and last case, extradition is under the condition that the requesting state gives assurances that the eventual criminal conviction will be enforced in Romania. Moreover, refugees and asylum seekers cannot be extradited to their origin states, if they are at the risk of being subjected to treatment contrary to Art. 3 of the European Convention on Human Rights. Similar bars are imposed as far as beneficiaries of international law protection, both individuals, and legal persons.

The final bar enforced by Romanian legislation concerns military crimes or similar offences that do not a have a corespondent in civil legislation. This situation primarily refers to special legislation regarding the military. Article 22 refers to two other limits to extradition; however, the judicial authorities have full power to determine whether, in concreto, the request will be granted. Firstly, the extradition procedures may be halted if the requested person is being tried or may be tried in Romania for the same act. Secondly, the national judiciary may refuse extradition in cases where transferring the individual to the requesting state may prove to be dangerous to him/ her, especially due to age or state of health.

There are several additional bars to extradition, the most important being the necessity of double incrimination. The rule, codified in article 24 of Law no. 302/2004, states that extradition may only be granted when the offence that it relies upon is incriminated both in Romanian legislation and in that of the requesting state. The rule aims at offering stronger protection to the individual, by ensuring that he can only be held accountable for offences that are grave enough to be prohibited under Romanian legislation. However, there is no need for the offence to have exactly the same sanctioning regimen or name, as it is sufficient for the offences to be substantially the

same, in order to ensure the continuation of the extradition procedure. Exceptionally, as far as tax fraud and adjacent fiscal criminal activities are concerned, considering the variety of fiscal systems worldwide, the only condition that has to be respected is that the offence must be similar, at least in nature, to an offence that is punished under Romanian law.

Furthermore, extradition can only be granted when the offence is sanctioned, in both the soliciting states' legal system and under Romanian law with at least one year of imprisonment or a similar sanction. In cases where the request has been made regarding the execution of a decision, the minimal sanction must be of at least four months of deprivation of liberty.

Taking into consideration The European Court of Human Rights' case law concerning Article 3 and article 22 of The Romanian Constitution, article 27 of Law no.302/2004 states that extradition can only be granted when there are enough diplomatic assurances that capital punishment will not be applied to the extradited individual. This aims at protecting the person from inhuman treatment, as the death penalty has been abolished in all states that have co-signed the 13th Protocol of the European Convention on Human Rights.

Another requirement refers to offences that can only be criminally prosecuted after a criminal complaint was lodged against the perpetrator by the victim. In cases where under both Romanian and the requesting states' legislation such a complaint is necessary, the extradition cannot be granted if the aggrieved party opposes it.

Article 31 states that the request cannot be granted if the person would be tried by a Court that does not meet minimal procedural standards, or if the sentencing on which the request is based has been pronounced by such a court. In part, this provision only reiterates the content of Article 21.

Where the criminal prosecution or punishment of the requested person is statute-barred by the time the extradition procedures are still undergoing, under either the requesting states' or Romania's legislation, extradition must be barred.

Finally, the extradition procedures must be stopped if Romania grants amnesty for the offence that is under trial in the requesting state or the requesting state pardons the perpetrator.

The non bis in idem principle has a particular application as far as extradition is concerned. Firstly, if the individual has been acquitted or the trial has ended without sentencing, in any state, in a case regarding the same offence, the extradition must be refused. Likewise, if a sentence concerning the same criminal act for which the request is made has been executed or is considered to have been served either in Romania or in another state, the extradition cannot be granted. A similar solution must be adopted if under Romanian law a national court has decided that the offence will only be sanctioned with a waiver or an adjournment, and the probation term has expired, according to articles 82 and 84 of the Romanian Criminal Code.

5. Please state and explain any:

5.1 Internal reporting processes (i.e. whistleblowing);

The Romanian Legal Framework for internal and external reporting is defined by the Trading Companies Law no. 31/1990, the Anti-Money Laundering Law no. 656/2002 and by the Bucharest Stock Exchange Code in relation with the Capital Markets Law no. 297/2004.

The director(s) of a company[22] will notify the executive council of all the wrongdoings detected in fulfilling their duties. Moreover, the same article stipulates that the administrators are jointly accountable with their predecessors if, having knowledge of the latters' wrongdoings, do not notify the censors and, or, by case, their internal auditors and the financial auditor.

Furthermore, at least once in 3 months, the board of directors presents the supervisory council with a written report regarding the governance of the company, its activity and possible evolution[23].

[22] Art. 144-2, para 3 - Trading Companies Law no. 31/1990
[23] Art. 153-4, para 1 Trading Companies Law no. 31/1990

Moreover, the board of directors is required to provide in due time any information regarding events that might have a significant influence on the development of the company. In addition to this, the supervisory council may request any information they require for the exercise of their control responsibilities and for conducting the required investigations.

However, the Law does not explicitly state the obligation of the competent bodies to notify the criminal investigations bodies when a criminal offence is suspected.

5.2 External reporting requirements (i.e. to markets and regulators), that may arise on the discovery of a possible offence.

5.2.1 Reporting offences related to financial instruments

The Bucharest Stock Exchange (BVB) code stipulates that the issuers are required to provide the BVB with any information they consider adequate in order to protect the investors and ensure the orderly functioning of the market, in accordance with the procedures and deadlines set out by the BVB.[24] Additionally, the issuer is required to notify by report the BVB and National Commission on Securities (CVNM) any acts or deeds that might affect the price of financial instruments and/or investment decisions.[25] Moreover, the issuer is required to submit periodic rapports to the BVB.[26]

Based on these information, BVB may notify the judicial authorities regarding any suspicion of offences. Additionally, the BVB may be notified regarding any suspicion of wrongdoings and criminal offences by the Council of the Stock Exchange, the CVNM, any Participant, financial services agents, stock exchange agents, as well as by any natural or moral person that proves an interest. After the notification, the Bucharest Stock Exchange will issue an investigation through the competent departments on the respective issue. After the investigation is complete, the department(s) will issue a notice to the Bucharest Stock Exchange detailing its recommendations. If the specialized department considers that the act or deed is an offence as defined by the Capital

[24] Art. 73, Book I, Title II Bucharest Stock Exchange Code
[25] Art. 76, Book I, Title II Bucharest Stock Exchange Code
[26] Art. 80, Book I, Title II Bucharest Stock Exchange Code

Markets (Law no. 297/2004), it is required to notify the criminal investigation body, as well as notify the CVNM[27]. When the criminal investigation body is notified, the investigation by the BVB will be automatically suspended, excepting the situation when the competent bodies or the CVNM expressly request the continuation of the investigation.

5.2.2 Reporting money laundering and financing of terrorism offences

The Anti-Money Laundering Act (Law no. 656/2002)[28] – stipulates the procedure of notifying the competent criminal investigation body. Any natural person working for a moral person as defined in art. 10 informs the responsible person delegated by the moral person of any suspicions regarding acts or deeds concluded or performed with the purport of money laundering or financing terrorism.[29]

The above-mentioned person will, afterwards, inform the National Office of Prevention and Fighting Money Laundering (the Office). If necessary, the Office suspends the operation for 48 working hours, with the possibility to extend the suspension for an additional period of 72 working hours. The authorized persons, as listed in article 10, have the possibility of performing the suspicious operation without notifying the Office if the transaction has to be performed immediately or if by not performing it the prosecution would be foiled. The Office must be notified at the latest 24 hours after the transaction.[30] Furthermore, the persons listed by article 10 must notify the Office if an operation made in the account of a client presents signs of abnormality that rise the suspicion of being performed with the intent of money laundering of financing terrorist acts.

Aditionally, the Office may request the persons aforementioned to provide any information related to the fulfillment of its duties, which are processed under conditions of confidentiality.

[27] Art. 63, Title I, Bucharest Stock Exchange Code
[28] Art. 5 Law no. 656/2002
[29] Art. 10 Law no. 656/2002 – for the purpose of this publication, only the content referring to moral persons has been rendered, as natural persons do not fall under the scope of the reglementation.
[30] Art. 6 Law no. 656/2002

Professional and banking secrets are not opposable to the Office.[31] The initiative of notifying the criminal investigation bodies belongs to the Office.[32]

Article 25 stipulates the obligation of confidentiality of the personnel of the Office regarding the received and processed data regarding money laundering and counter-terrorism. The obligation lasts until 5 years after the leaving the Office.

Even though Romania was one of the first countries in the continental legislative system to have a comprehensive whistleblower protection act[33], the law only applies to the personnel within public authorities, public institutions or public companies.[34]

It is to be noted that there is no specific regulation aimed at protecting employees in cases of denunciation, which will, therefore, fall under the scope of the general regulation – the Witness Protection Act (Law no. 682/2002). Under its provisions, a person providing information that may determine the discovery of the truth regarding serious offences or whom contributes to the prevention or recovery of serious damages that may be caused by committing such offences, as well as their family members and close acquaintances[35], may be included in the Witness Protection Programme if their life, physical integrity or freedom is under threat as a result of the information and data provided or that they have agreed to provide to the judicial bodies or as a result of their declarations.[36] However, these persons may be included in the programme only if there is a motivated proposal emanating from the competent bodies.[37] The only such competent bodies are the prosecution bodies and the prosecutor.[38] Hence, the protection of whistleblowers is left at the appreciation of the prosecution bodies.

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[31] Art. 7 Law no. 656/2002
[32] Art. 8 Law no. 656/2002
[33] Law 571/2004
[34] http://www.transparency.org/files/content/corruptionqas/Whistleblowing_regulations_in_Romania_and_Hungary_2015.pdf, accesed at January 17 2017
[35] Art. 2 Law no. 682/2002
[36] Art. 2 and art. 4 Law no. 682/2002
[37] Art. 4 Law no. 682/2002
[38] Art. 5 Law no. 682/2002

6. Who are the enforcement authorities for these offences?

There are both administrative and criminal sanctions in the Romanian legal system. Likewise, there are both administrative and criminal authorities that have competence in prosecuting, investigating and enforcing sanctions. However, all criminal sanctions, *per se*, have to be the result of a fair trial and are pronounced by the judiciary.

In cases where there are no special authorities that have the legal competence of investigating such offences, the competent Prosecutor's Offices will have a general competence of investigating the offences, according to Article 55 of Criminal Procedure Code.

In several cases, the Prosecutor is not directly involved in some procedural acts, as they may be conducted by the Judiciary Police Force, under a Prosecutor's supervision. This is a specialised structure within the Ministry of Interior. However, all decisions concerning the investigation, such as indicating the offender are taken by the Prosecutor. At the same time, he may personally intervene at any point in the investigation that he supervises.

The Ministry Public is a public institution, that comprises all prosecutors and Public Prosecutor's Offices.

The manner in which the *ratione legis, ratione materiae* and *ratione loci* competence is determined is enshrined by the Criminal Procedure Code. However, considering the gravity of the offences (corruption, fraud and money laundering), they will only be judged by higher national courts and prosecuted by the Public Prosecutor's Offices attached to them.

In the Romanian legal system, as far as anti-corruption is concerned, a significant segment of prosecuting such offences is under the control of the National Direction of Anticorruption (commonly abbreviated as DNA). The DNA is a structure within the Ministry Public, which is specialised in investigating corruption-related crimes. In the past few years, the DNA has been strongly praised by media for the manner in which it operates. In this sense, it has been regarded

as one of the most trustworthy entities in Romania, ranking second in polls, being surpassed only by the Military[39].

The DNA was founded in 2002, under the name of The National Anticorruption Prosecutor's Office. However, after several legislative reforms, the current form the structure operates in took shape after the enactment of Law no. 54/2006. The DNA operates attached to the Higher Court of Cassation, the highest court in the Romanian legal system. Thus, the prosecutors working within benefit from all procedural benefits that come with this status, such as a special *ratione personae* jurisdiction in cases concerning them.

The DNA has extensive competence in investigating all corruption-related crime, as incriminated by Law no. 78/2000, if the alleged prejudice of the crime is of over 200.000 euros or the object or sum that constitutes was given to the agent has a value of over 10.000 euro. Article 13 of Law no. 78/2000 also states that it has competence in investigating any criminal activity of any leader of a party, trade union or lucrative legal person or NGO, conducted with the aim of obtaining money for himself or others.

Another important legal entity responsible for tracking, investigating and prosecuting offences as those in question is the Direction for Investigation of Terrorism and Organised Crime (commonly abbreviated and referred to as DIICOT). Similarly to DNA, the DIICOT is a specialised structure within the Ministry Public, that has extensive competence in investigating organised crime and terrorism related activity. Likewise, it is attached to the Higher Court of Cassation.

The DIICOT was founded based on Law. no 508/2004. Its activity is now governed by the Government Emergency Ordinance no. 78/2016, after a significant legal reform.

[39] http://www.ziare.com/stiri/justitie/increderea-romanilor-in-justitie-a-scazut-cu-13-la-suta-eurobarometru-1432991, accesed at March 10 2017

DIICOT has an extensive jurisdiction, relevant to the offences in question. In this sense, first of all, it has exclusive competence in investigating all organised crime. Furthermore, it has exclusive jurisdiction in investigating all money laundering activities.

In conclusion, as far as investigating the offences in question the Ministry Public has a general competence in investigating the offences addressed by the present study, whether through the ordinary Prosecutor's Offices or through the two specialised structures. In the vast majority of cases, as it has been shown, DNA and DIICOT will be competent to prosecute anyone accused of such offences.

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

The Criminal Procedure Code defines these in article 97 as 'any factual element serving to the ascertaining of the existence or non-existence of an offence, to the identification of a person who committed such offence and to the knowledge of the circumstances necessary to a just settlement of a case, and which contribute to the finding of the truth in criminal proceedings'[40]. The article continues in stating how one may obtain such evidence, and that can be through statements from suspects or defendants, victims, civil parties or of parties with civil liability or witnesses; documents, expert reports or fact finding reports or any other methods that are not prohibited by law. Article 100 states that, during a criminal investigation, the investigating bodies gather and produce evidence both in favour and against a suspect or defendant, *ex officio* or upon request. The importance of such a legal text comes from the fact that, in order to act, legal empowerment must exist.

These methods of production may take place during trial, upon request by the prosecutors or the parts, as well as *ex officio*. Moreover, the applications regarding the production of evidence that are

[40] Law n. 135 (Criminal Procedure Code) 2010 [Cod procedură penală]

filed during the criminal investigation can be sustained or denied by the judicial bodies, on a justified basis. Grounds for denying an application regarding the production of evidence can consist of the fact that a piece of evidence is not relevant for a number of logical reasons. It is clear that such an application cannot be filed by a person who has no such right and that the production of evidence must not be contrary to the law.

It must be noted that regarding the treated subject, article 97, entitled 'Evidence and Methods of Proof', comes as a possibility for all the parts that are involved in accessing the necessary information, as it refers to documents and expert reports, as well as fact-finding reports. Regarding corporate crime, the means that are most relevant are documents, data and bank accounts turnovers. 'Evidentiary processes' are the legal methods for obtaining evidence, according to the Criminal Procedure Code. By art. 172 of the Criminal Procedure Code, prosecutors may ask for the assistance of experts from specific areas of knowledge, meaning that these experts can produce important information that could be important evidence in a case – therefore, the same may be applied for corporate crime.

One of the ways by which the authorities can produce the information they need, by means of coercion upon a person, are regarding the duties of the witnesses. Art. 114 par. 2 of the Criminal Procedure Code states that 'any person having knowledge of facts or factual information representing evidence in a criminal case may be heard as a witness, and that his obligations are to come to court whenever he is summoned, to take an oath or a solemn statement before the court and to tell the truth' – the capacity as witnesses prevails on the capacity as expert or counsel, mediator or representative of either party or as the main subject in respect of facts and factual circumstances known to a person before they acquired this capacity.

The judicial bodies, according to art. 120 of the Criminal Procedure Code, must communicate to witnesses their rights and obligations, such as:

- the right to protection and to the reimbursement of expenses,
- the obligation to come to court, by drawing their attention that failure to comply with such obligation may lead to the issue of *a bench warrant* against them,

- the obligation to communicate in writing, within 5 days, any change of address, with the risk of penalties if they fail to do such, and,
- once they are in court, the obligation to tell the truth, not before drawing their attention that perjury is a punishable offence (possibly the most important aspect)

If the witnesses fail to comply with the obligations presented above, and the information is proved to be important, through art. 265 and art. 283, the prosecutors may act in the interest of the investigation. The first refers to the bench warrant, and it says that any person can be brought before a criminal investigation body if they have already been summoned and have failed to comply, and it also applies to suspects or defendants. It is important to note here that, during the investigation, such warrant is issued by the criminal investigation body, while during the trial it is issued by the Court itself. If the enforcement of the bench warrant requires entering a domicile or place of business, without having had the time to secure previous consent, the bench warrant can be issued during the criminal investigation, and based on affidavit by the prosecutor, by the Judge for Rights and Liberties of the court that has jurisdiction to try the case in first instance or of the court of the same rank in whose jurisdiction the head office of that prosecutor's office is located.

According to art. 171, if the person or witness that has objects or documents of interest, which they refuse to present voluntarily, 'criminal investigation bodies shall, through a prosecutorial order or a court resolution, order their forced seizure'

Experts are also assistants for the prosecution in penal cases. Article 175 of the above mentioned Code has the rights and obligations of experts, such as the right to refuse to perform the examination for the same reasons for which witnesses may refuse to testify, the right to learn of the materials in the case file necessary for the conducting of an expert examination, clarifications about specific facts of the case, clarifications, a fee for their work and protection measures. Once one accepted, an expert is under obligation to come before criminal investigation bodies or the court whenever they are called and to prepare their expert report by observing the deadline set in the order of the criminal investigation bodies or in the court resolution. Delays or unjustified refusal to conduct an expert examination will entail the enforcement of judicial fines and other sanctions. The fines are found in art. 283, par. (4) letters (b) and (c). Judicial fines may be applied

for failure by the legal representative of a legal entity, where an expert examination is to take place, to assure of the necessary steps to enable performance of said examination or to allow its performance in a timely manner, as well as any person's preventing the performance of the expert examination as required by law.

Obstructions in the face of justice's ways of acquiring and producing information in a legal and loyal way, for a criminal investigation, has compelled the lawmaker to create sanctions. These are regulated in the Penal Code[41]. Aiding and abetting a perpetrator (regulated by art. 269) is a punishable offence, either through a fine or a prison sentence. Article 271 par. (1), obstruction of justice - the individual who unlawfully prevents criminal prosecution or the individual who refuses to provide the criminal prosecution body, the court or the bankruptcy judge, any data, information, documents or assets they hold and which have been explicitly requested, in order to settle a case is also a punishable offence. False testimony, in art. 273, as well as stealing or destroying evidence or documents, in art. 275, and the undermining of justice in art. 277 prove to be efficient means to compel the production and protection of information.

8. In what circumstances may be withheld from enforcement authorities (e.g. legal privilege, privilege against discrimination)?

As a general rule, the authorities have the right to compel the production of evidence and information from the persons or entities that hold a certain connection with the situation at hand. Like it was said before, it must be noted that the production of information is, in reality, the taking of evidence. If the rights of the authorities for such instances are diverse and complex, not the same can be said about the legal privileges or information that may be withheld. The explanation resides in the fact that justice must not be obstructed, as it is the main construction basis for a civilized society. Continuing the analysis of the topic, these range from those concerning the witnesses, persons that can refuse to take the witness stand, information that can be disclosed only with the agreement of the person to which it refers (such as patients), to confidentiality agreements.

[41] Law n. 286 (Criminal Code) 2009 [Cod penal]

The Romanian Code of Penal Procedure states at art. 114 par. (1) that any person having knowledge of facts or factual circumstances representing evidence in a criminal case may be heard as a witness. Regarding their obligations, par. (3) says that the capacity as witnesses prevails on the capacity as expert or counsel, mediator or representative of either party or as the main subject in respect of facts and factual circumstances known to a person before they acquired this capacity.

However, during the investigation process and throughout the trial, certain persons are exempt from the obligation to fulfill the witness role. Therefore, are entitled to refuse to testify, according to art. 117 par. (1) letters a); b) the following: a suspect's or defendant's spouse, ancestors and descendants in direct line, as well as their siblings; persons who were a suspect's or defendant's spouse. They may decide to act in the opposite way, but are under no such obligation. Furthermore, a person having one of the capacities listed under par. (1) in relation to one of the suspects or defendants shall be also exempted from the obligation to testify against the other suspects or defendants, in case their statement cannot be limited only to the latter.

Witnesses do not have the right to remain silent. The obligations of witnesses are to tell the truth and to cooperate, and, as seen, the authorities have the means to ensure that. However, also important is their right to avoid self-incrimination. Art. 118 of the Code of Penal Procedure explains that a witness statement given by a person who had the capacity as suspect or defendant before such testimony or subsequently acquired the capacity of suspect or defendant in the same case, may not be used against them. At the moment when they record the statement, judicial bodies are under an obligation to mention their previous capacity.

The limits of witness statements at par. (3) of art. 116 states that facts or circumstances of which the lawful secrecy or confidentiality can be raised before judicial bodies cannot be the subject matter of a witness statement, respectively used against them.[42] Art. 306 par. (6) disallows certain

[42] As an example, the confidentiality of the relationship between the doctor and his patient makes the case of this article. The practical importance can apply in the present analysis as well - the patient presents personal information to his doctor, therefore, according to the rights of the patient (46/2003) all information on the cause of the patient's condition, investigation results, diagnosis, prognosis, treatment and personal data are confidential even after his death. As an exception, art. 22 of 46/2003 gives the possibility of disclosure only with the permission of the patient. In a

professional aspects to make the case for an exception. Therefore, banking and professional secrecy, except for the defense counsel's professional secrecy, cannot serve as a basis to deny a prosecutor's requests once the criminal investigation has started.

Electronic surveillance, according to art. 139 Code of Penal Procedure, is not generally permitted to intervene in matters that regard the relationship between a counsel and a person assisted or represented by them may be subject to electronic surveillance only when there is information that the counsel perpetrates or prepares the commission of any of the offences listed under par. (2): in case of offences against national security stipulated by the Criminal Code and by special laws, as well as in case of drug trafficking, weapons trafficking, trafficking in human beings, acts of terrorism, money laundering, counterfeiting of currency or securities, counterfeiting electronic payment instruments, offences against property, blackmail, rape, deprivation of freedom, tax evasion, corruption offences and offences assimilated to corruption, offences against the European Union's financial interests, offences committed by means of computer systems or electronic communication devices, or in case of other offences in respect of which the law sets forth a penalty of no less than 5 years of imprisonment. If during or after the performance of such measure it results that the activities of electronic surveillance also targeted the relations between the counsel and the suspect or defendant defended by the former, the evidence obtained this way may not be used in a criminal proceeding, and shall be destroyed forthwith by the prosecutor. The judge having ordered such measure shall is informed forthwith by the prosecutor. When deemed necessary, the judge will order that the counsel be informed. Generally, confidentiality agreements are protected by law. Only in special circumstances, which will be decided in concreto, may the judge ask for information that makes the case of such an agreement.

Generally, information of public interest of the case file shall be communicated according to the requirements provided by law. Disclosure of classified information, although of public interest,

similar manner, the lawyer, in the law which regulates their profession (51/1995), have clearly stated, at art. 11, that he is bound by professional secrecy concerning any aspect of the case which he has been entrusted with. However, the Code of Penal Procedure allows for facts or circumstances that are specified by par. (3) to be the subject matter of a witness statement when the relevant authority or the entitled person expresses their consent for this purpose or when there is another legal reason for removing the obligation to keep secrecy or confidentiality.

can represent possible dangers concerning national security. However, if theclassified information is essential to settle the case, the court shall request, as a matter of emergency, as the case may be, the total declassification, the partial declassification or the change of the classified level or that the defendant's counsel has access to that classified information. If the issuing authority does not allow the defendant's counsel's access to the classified information, it cannot form the basis for a ruling to convict, to waive penalty enforcement or postponed enforcement of the respective penalty.

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

9.1 Introduction

The protection of personal data is a real problem in today's society, taking into consideration the multitude of media (especially electronic) available. Personal data is provided when purchasing online, subscribing to a newsletter, creating an account on social networking sites or when applying for jobs on specialized websites.

The confidentiality of personal information is not a very common aspect anymore. At least not concerning the job sites, given that since the creation of the Curriculum Vitae is required information such as name, date of birth, phone number, address. Moreover, before the decisive interview of hiring, many employers form a file (even fictional) containing private information about a potential employee (information about religious affiliation, sexual orientation, personal activities). All these breaches of legal (and perhaps sometimes moral) limits are nothing but a violation of legal rights, including the right to privacy of an individual. This right is one of the fundamental rights contained in Article 26, of the Constitution of Romania together with the right to privacy. Moreover, sometimes to defeat the legislative framework means to violate the rules of labour law on non-discrimination in labour relations.

9.2 Legal Framework

In Romania, the protection of personal data is primarily governed by Law n. 677 of 21 November 2001 on the processing of personal data and the free movement of such data. This normative act

implements into national legislation the EU Data Protection Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data[43]. The decisions of the National Authority for the Surveillance of Personal Data Processing (in Romanian 'Autoritatea Nationala de Supraveghere a Prelucrarii Datelor cu Caracter Personal' or 'ANSPDCP') are also relevant in establishing a legal framework conducive to the protection of personal data. Unfortunately, neither at the European nor at the national level, there are not sufficient specific provisions regarding the protection of personal data in the recruitment procedure, proper employment and human resource management. However, various recommendations and/or opinions regarding the protection of personal data in the hiring process have been developed over time, an extremely important role in this regard was taken by Recommendation Rec (89) 2/1989 of the Council of Europe on the protection of personal data used for employment purposes[44].

9.3 The Concept Of 'Personal Data'

Both at the European and national level, 'personal data' is defined as information relating to an identified or identifiable natural person[45], namely information about a person whose identity is either obviously clear or which may be, at least, established by obtaining additional information.

Thus, in the process of recruiting, hiring and/or human resources management, the scope of personal data may include the following information: personal data allowing the candidate/ employee to be identified: name, gender, date of birth; information provided by the candidate that allow to conduct specific initial tests: address, telephone, fax, e-mail; information enabling verification of eligibility and selection conditions related to the recruitment process: nationality,

[43] Directive 95/46/EC (General Data Protection Regulation) has been repealed by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data;
[44] The Council of Europe, Committee of Ministers, Recommendation Rec (89) 2 to member states on the protection of personal data used for employment purposes, January 18, 1989;
[45] Under European law and Law no. 677/2001, an identifiable person is one who can be identified, directly or indirectly, in particular by reference to the personal data or the person who, though unidentified, is described in this information in a manner that makes the identification of the person targeted by conducting further research (on his physical, physiological, mental, economic, cultural or social identity);

language, education, professional experience; where appropriate, results of specific initial tests and of other related tests[46].

All these references outline a person's identity and can be usually found in the Curriculum Vitae, even since that person starts an application for a job on specialized websites.

9.4 'Sensitive Personal Data' Under The Data Protection Law

The following categories of data are deemed as **sensitive personal data** (data presenting special risks): **data regarding** racial or ethnical origins, political, religious, philosophical or other similar beliefs, affiliation to certain unions, physical or mental health conditions, sexual life and **criminal or administrative offences**. Moreover, according to the template notification form issued by the National Supervisory Authority for Personal Data Processing, genetic, biometric data, national identification number, series and number of identification documents are also categorised as sensitive personal data.

9.5 Collection And Processing Of 'Personal Data'

Data controllers may collect and process personal data provided that the data subject has expressly and unequivocally consented thereto. **The data subject's consent is not required under the following circumstances**: the processing is necessary for the performance of a contractual or pre-contractual arrangement where the data subject is a party, where the data controller needs to protect the life, physical integrity or health of the data subject or another person, **the data controller must comply with a legal obligation**, the **processing is necessary for the performance of public interest measures**, **the data controller has a legitimate reason for processing**, provided that fundamental civil liberties of data subjects are not breached and processing is performed exclusively for statistical, historical or scientific research purposes.

[46] Data protection. Compilation of Council of Europe texts, Directorate General of Human Rights and Legal Affairs Strasbourg, November 2010, 7;

On the other hand, the processing of personal data means any operation or set of operations which is conducted on personal data through automated or manual means, namely: collection, recording, organization, storage, adaptation or alteration, retrieval, consultation , use, disclosure to third parties by transmission, dissemination or otherwise making available the alignment or combination, blocking, erasure or destruction. Regarding the processing of personal data of candidates during the recruitment process and/or of the employees, it was emphasised at European level that the regulations can be applied both to automated processing of personal data realised by employers and where employers organise manual databases containing personal information of employees[47].

During the hiring process, the processing of personal data can be processed only by people occupying a position in a Human Resources department (they are the only employees who have specific responsibilities of recruitment, hiring itself and/or human resource management). After the recruitment process, employers can keep personal data of candidates only after they have obtained their prior consent and only if the storage of data is performed for the specific purposes of recruitment and hiring process itself[48]. Therefore, personal data cannot be stored by employers for a period longer than that justified by the purpose for which these data were collected. In this respect, for example, personal information collected from candidacy for a job should be deleted as soon as the employer's decision concerning the candidate is clearly negative. A relevant exception to the rule is when the employer request the direct and express consent of the candidate for retention of personal information within specific subsequent recruitment, in which case data can be retained for a reasonable period expressly mentioned (usually a year).

In order to ensure the respect of the employees' rights, it is necessary to balance the freedoms, rights and interests of each 'player' in the labour market. Thus, employees, as long as part of an organization, are obliged to accept some interference of the employer in their privacy and they also must share with the employer certain personal information[49]. In this regard, the employer, in

[47] Recommendation Rec (89) 2/1989, p. 2 pt. 1.1;
[48] Guide of European data protection legislation, the Agency for Fundamental Rights of the European Union, Council of Europe, 2014, p. 180;
[49] Charrier J.L. Code de la Convention européenne des droits de l'homme. Paris: Litec, 2005, p. 141 -166;

turn, has a legitimate interest to process personal data of its employees for lawful and legitimate in order to develop normally the labour relations and the business itself[50].

9.6 The Specific Obligations Of The Employer 'As A Data Controller'

Personal data can be processed by any person or entity, private or public, which alone or jointly with others determines the purposes and means of processing personal data ('controller/operator') or by a person appointed by an operator. The employer is the entity that processes personal data both in the recruitment procedure (including the case of competitions for a position) and the employment procedure itself and/or human resource management (conclusion, execution and termination of the individual employment contract). For example, employers collect and process information about their employees' salaries. Both internally and externally, processing of data on employees' salaries by employers is based on a legal basis, either the individual employment contract or a specific legislation (e.g. the Tax Law)[51]. In general, so that the processing of personal data arrives to carry out a legal framework, Law no. 677/2001 has implemented a number of obligations on controllers of personal data and on the people authorised by controllers as follows: to notify the Authority the quality of being an 'operator of personal data'; to obtain the express and unambiguous consent of the person who is subject of the processing data, if the information is not volunteered by the employee or by the person involved in the recruitment process; to collect and process personal data accurate and timely, adequate, relevant and not excessive in relation to the purpose they are collected and processed in good faith and in accordance with the legal provisions in this regard, with a specific purpose, explicit and legitimate; to store personal data in a way which permits to identify the data subjects for the duration strictly necessary to achieve the purposes for which the data are collected and processed; where appropriate, to declare or authorise the transfer of personal data; to destroy or turn personal data into anonymous data for statistical purposes, research, scientific or historical, when processing has stopped.

[50] Opinion n. 8/2001 concerning the processing of personal data in the employment context, Article 29 Working Group, Brussels, September 13, 2001, p. 19;
[51] Guide of European data protection legislation, the Agency for Fundamental Rights of the European Union, Council of Europe, 2014, p. 49;

Despite the general obligations stipulated by the relevant legislation in this area, in theory, **employers who collect and process personal data are not required to notify the Authority in the following situations**: the processing of personal data relating to individuals entered in competitions or examinations is conducted to fill vacancies[52]; the processing of personal data contained in the form Curriculum Vitae sent voluntarily by individuals is carried out by public and private entities, as potential employers[53]; **the processing of personal data relating to its own employees and external collaborators is carried out by entities of public and private law in order to fulfil legal obligations**[54].

9.7 Particular Considerations Regarding ANSPDCP

The National Authority for the Surveillance of Personal Data Processing ('ANSPDCP') operates the national registry of data controllers which can be accessed online free of charge. Public and private entities processing certain types of personal data must notify ANSPDCP in respect of their personal data processing and obtain a data controller number. The **processing of the following types of personal data requires prior notification to ANSPDCP**[55] , unless the processing is provided for by the law: personal data related to racial or ethnic origin, political, religious, philosophical beliefs or beliefs of a similar nature, trade union membership as well as data regarding the health condition and sexual life; genetic and biometrical data; geo-location data collected through electronic communication means; **personal data related to offences, criminal convictions, safety criminal measures or administrative sanctions applied to the data subject, when the processing is performed by private entities**; personal data processed by electronic means, having as purpose the monitoring/evaluation of certain personality traits, such as professional competence, credibility, behaviour or other related traits; **personal data**

[52] Decision n. 100 of 23 November 2007 establishing the situations in which it is not necessary to notify the processing of personal data to the National Authority for the Surveillance of Personal Data Processing, published in The Official Gazette of Romania, Part I, n. 823 dated 3 December 2007;
[53] *Idem;*
[54] Decision n. 90 dated 18 July 2006 on cases where no notification is required concerning the processing of personal data, National Authority for the Surveillance of Personal Data Processing , published in The Official Gazette of Romania, Part I, n. 654 dated 28 July 2006;
[55] On 28 December 2015, Romanian Data Protection Authority (RDPA) decision No. 200/2015 on the processing of individuals' personal data without prior RDPA notification (the "Decision"), came into effect repealing the above mentioned decisions from 2007;

processed by electronic means within record systems having as purpose the adoption of automated individual decisions regarding the creditworthiness, the economical-financial condition, **deeds which trigger the disciplinary, administrative or criminal liability of natural persons, when the processing is performed by private entities**; personal data of minors, processed for direct marketing activities; personal data of minors processed through internet or electronic messaging.

9.8 Transfer Of The Personal Data To The Foreign Authorities

Different rules shall have to be observed depending on the destination country of such personal data. Personal data transfers within the EU, the EEA (or to countries with an adequate level of protection) must only be notified to ANSPDCP, when the transfer involves the categories of personal data mentioned under the section above. In this case, if the personal data is transferred to another EU Member State or to the EEA, no other requirement must be met other than ticking the appropriate box in the online notification form. If the data is transferred to a country with an adequate level of data protection, such countries shall have to be explicitly listed in the online notification form. Personal data transfers to third party countries outside the EU, the EEA, as well as to countries considered as not offering an adequate level of protection require an authorization from ANSPDCP. In this case, the transfer is permitted provided that the controller has obtained the data subject's consent, or has concluded a data transfer agreement with the recipient of data located in the respective third country. This contract must be submitted to ANSPDCP for its review[56]. For the transfer of data to the United States, The Commission adopted on 12 July 2016 its decision on the EU-US Privacy Shield[57]. This new framework protects the fundamental rights of anyone in the EU whose personal data is transferred to the United States as well as bringing legal clarity for businesses relying on transatlantic data transfers. The new arrangement includes strong data protection obligations on companies receiving personal data from the EU; safeguards on US government access to data; effective protection and redress for individuals; annual joint review to monitor the implementation. The new arrangement lives up to the requirements of the

[56] http://www.dataprotection.ro/?page=Ghid_notificare_2016%20 (2016) accessed February 12, 2017;
[57] The decision on the EU-U.S. Privacy Shield adopted by the The Commission on 12 July 2016 enters into force upon notification to Member States (e.g. Romania);

European Court of Justice., taking into consideration that on 6 October 2015, the Court of Justice of the European Union had declared the Commission's 2000 Decision on EU-US Safe Harbour invalid[58].

10. If relevant, please set out information on the following:

10.1 Defences to the offences listed in question 2;

10.1.1 Justifying causes: state of necessity, order of the authority[59]

Acting in a **state of necessity** constitutes a defence if several conditions are observed.[60] The danger which threatens the life, bodily integrity, health or asset of their own or another's must be immediate, unavoidable (in the sense that the only way of escaping it is by committing that particular offence) and cannot have been caused intentionally by the person who claims to benefit from this justifying cause. The rescue action must take the form of a criminal offence (as described in an incriminating norm), be committed in order to eliminate the threat and its outcome must be proportional to that which would have been caused if the danger had not been precluded. A person (whether natural or artificial) acting in a state of necessity will not be subjected to any penal sanction or measure.[61]

An **order coming from an authority** (a natural or legal person who exercises state authority) will remove the illicit character of an act if it was given in the form requested by law and it is not visibly illegal.[62]

[58] ECHR decision of October 6, 2015 in case *Max Schrems v. Irish Data Protection Commissioner*, n. C362/14.
[59] Other justifying causes regulated by the Criminal code are: legitimate defense (art. 19), exercising a right or meeting an obligation (art. 21, which actually comprises the order of the authority) and consent of the victim (art. 22).
[60] Florin Streteanu, Daniel Niţu, Drept penal: partea generală (Volume 1, Universul Juridic 2014) 377-385 [Romanian].
[61] Ibid. 391.
[62] Ibid. 395-396.

10.1.2 Causes of non-imputability: physical and moral constraint, error[63]

Physical constraint exercised by a source generally exterior to the individual's body must be impossible for the perpetrator to withstand. On the other hand, **moral constraint** implies that an individual threatens another to harm him or another person (usually close to the one who suffers the threat directly) in a way that is serious, imminent, unavoidable and unjust. Under these circumstances, the only possible outcome is the commission of a crime. Therefore, the perpetrator will neither be held criminally liable, nor will he be subjected to any security measures (confiscation).[64] However, it has been noted that both physical and moral constraint are applicable only to natural persons; in the case of the latter form of constraint, an author emphasised that a threat to the existence of a company cannot be compared favourably to a menace to a person's life, therefore it is highly unlikely that a legal person may invoke successfully moral constraint as a defence.[65]

As far as giving a bribe is concerned, paragraph 2 of article 290 of the Criminal code establishes a special non-imputability cause, a form of constraint which can function for natural as well as legal persons, since the focus shifts in this case from a serious threat to the life/health of an individual to the interest of the bribe giver.[66] In this case, the mere fact that there was a form of either physical or moral constraint exercised on the bribe giver is sufficient. Therefore, paying a bribe may not be the only way to withstand or remove the threat.[67]

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[63] Other causes of non-imputability regulated by the Criminal code are: non-accountable excessiveness (art. 26), minority of the perpetrator (art. 27), mental incompetence (art. 28), intoxication (art. 29) and fortuitous case (art. 31). These causes have dissimilar significance and effects to those which fall under the category of justifying causes. Whereas the former concern the reproachableness of a certain conduct, the latter remove the illicit character of an action. Most notably, the effects of the justifying causes extend to all of the participants to an offence; this is not the case with the non-imputability causes, with the exception of fortuitous case.

[64] Florin Streteanu, Daniel Niţu, Drept penal: partea generală (Volume 1, Universul Juridic 2014) 445 [Romanian].

[65] Andra-Roxana Ilie, *Angajarea răspunderii penale a persoanei juridice* (C.H. Beck 2011) 167-168 [Romanian]

[66] Ibid. 169.

[67] Bogdan,Sergiu, *Drept penal. Partea specială* (3rd edition, Universul Juridic 2009) 337-338 [Romanian].

Article 30 of the Criminal Code regulates another relevant non-imputability cause, **error**. In the first paragraph, the legislator describes a concept known as ignorance of the facts.[68] This is not a genuine non-imputability cause, since its effects alter the subjective element of the offence.[69] A similar effect is ascribed to ignorance of a non-penal law as regards the same objective elements (article 30 para. 4). Ignorance of a criminal norm cannot constitute a defence under Romanian law.[70] An invincible error (whether it regards facts or non-penal norms) will remove the subjective element completely; if the error could have been avoided with due diligence, direct intention becomes negligence and the subject can be held criminally liable only if his conduct is incriminated as such.[71] Paragraph 5 of the same article covers error concerning the unlawful character of an action, which is a non-imputability cause. In this case, the wrongful actions of an individual will not be imputed to him/her if his/her erroneous evaluation of the facts or of the law (including penal provisions this time) could not have been avoided in any way.

10.1.3 Entrapment

This means of obtaining evidence in a criminal procedure is forbidden by article 101 paragraph 3 of the Criminal Procedure Code[72] (Law no. 135/2010, in force as of February 7, 2014).[73] Entrapment can be invoked before the end of the preliminary chamber procedure as a cause of relative nullity; subsequently, the evidence will be excluded from the file.[74]

When there is a reasonable suspicion related to the preparation or commission of, among others, money laundering, tax evasion and corruption offences, article 150 of the CPC stipulates that the prosecutor supervising or conducting the criminal investigation may authorise criminal investigation bodies, investigators or informants to perform specific activities for a limited period of time. These activities involve committing the *actus reus* element of a certain crime with the

[68] 'An act stipulated by criminal law does not constitute an offence when committed by a person who, at the time of commission of the act, was unaware of the existence of a state, situation or circumstance that determines the criminal nature of the act.'
[69] Streteanu, Niţu, *Drept penal: partea generală*. 430.
[70] Ibid. 432.
[71] Ibid. 434-435.
[72] Hereinafter the Romanian Criminal Procedural Code.
[73] English translation available at http://legislatie.just.ro.
[74] Udroiu, Mihail, *Procedură penală. Partea generală*, (3rd edition, C.H. Beck 2016) 261 [Romanian].

purpose of obtaining evidence. This method, if exercised in accordance with the conditions and limitations imposed by the prosecutor, does not constitute entrapment.[75] In order to prevent abuse on the part of the prosecution, the law limits the possibility to resort to this method of investigation to the instances where such measure is 'necessary and proportional to the restriction of fundamental rights and freedoms' and the evidence needed 'could not be obtained in other way or obtaining it would imply extreme difficulties that would harm the investigation, or there is a threat to the safety of persons or of high value goods'. Moreover, the person authorised to participate in the commission of a crime 'may be heard as witness in criminal proceedings, in compliance with the provisions on the hearing of threatened witnesses'.

10.1.4 Standard of proof

Another means of defending the position of the accused is by invoking the failure of the prosecution (who bears the *onus probandi* in the criminal limb of the trial) to gather sufficient proof for condemnation.

First of all, one of the guiding principles in the field of evidence is the freedom of proof.[76] Secondly, the court enjoys freedom in evaluating the evidence produced by the prosecution, since 'pieces of evidence do not have a value pre-established by law'.[77] Consequently, the court is able to weight the facts against each other both in terms of value and credibility.[78] Thirdly, the court must give its ruling 'based on the assessment of all pieces of evidence produced in a case'. In the end, the court will be able to convict the defendant if 'it feels that, beyond any reasonable doubt, the act exists, it is an offence and was committed by the defendant'.[79]When there is evidence both in favour and against the defendant, but his guilt cannot be established beyond reasonable doubt, *in dubio pro reo* applies and the accused will be acquitted.

[75] MihailUdroiu, *Procedură penală. Partea generală*, Editura C.H. Beck, 2013, 267.
[76] Article 97 paragraph 1 of the CPC.
[77] Article 103 paragraph 1 of the CPC.
[78] Ibid. 272.
[79] Article 396 paragraph 2 of the CPC.

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement);

10.2.1 Specific means of preventing prosecution

In case of both giving a bribe and buying influence, reporting the crime before the criminal investigators are otherwise notified constitutes a means for the perpetrator to obtain immunity from prosecution. In the case of giving a bribe, this is also a means for the legislator to prevent active bribery, since the person who considers taking a bribe may be deterred to do so knowing that they can be reported.[80] The same line of reasoning applies for buying influence and influence peddling, its corresponding offence.

10.2.2 General causes which remove criminal liability: absence or withdrawal of preliminary complaint, reconciliation

For certain offences designated by law, a perpetrator cannot be held criminally liable unless the victim files a **preliminary complaint**. This is more than a means of referral to the criminal investigation bodies, since it is a prerequisite for the exercise of the criminal action.[81]There are several offences targeted by this report which require filing a preliminary complaint: breach of a fiduciary by defrauding creditors, simple bankruptcy, bankruptcy fraud and fraudulent management.

As a general rule, the preliminary complaint can be filed only by the victim, either in person or by proxy, 'within 3 months of the day the victim learned of the commission of the offence'. However, the criminal lawsuit may be initiated ex officio in the case of legal entities when the offence was committed against the legal person by its representative.[82] If there are several victims of an offence, the prior complaint of one of them is sufficient to entail criminal liability. Furthermore, when there are several participants who concur in the performance of a criminal act, all of them can be held criminally liable even if the victim files a complaint only against one of them.

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[80] Gheorghe Biolan,'*Cauze de nepedepsire la infracţiunea de dare de mită şi la infracţiunile de corupţie prevăzute de Legea nr. 78/2000*' [2009] Dreptul 209 [Romanian]
[81]Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală* (Universul Juridic 2014) 406 [Romanian].
[82] Ibid. 408.

For various considerations, the victim may choose to withdraw his/her complaint and he/she is allowed to do so before the court gives a final ruling. Unlike the filing of the complaint, its withdrawal is effective only with respect to the person to whom it refers. If the criminal action was initiated ex officio, a withdrawal of the complaint can still be effective, but only if it is acknowledged by the prosecuting attorney. Withdrawal of the preliminary complaint cannot be revoked.[83]

For some of the offences for which the prosecuting bodies can start an investigation ex officio, the law provides that **reconciliation** between the victim and the perpetrator removes criminal liability. Insurance fraud and misrepresentation fall within this category.

Reconciliation removes criminal liability only for the defendants who agree to it, personally or by proxy. As a consequence, reconciliation between the victim and the perpetrator who is a legal person has no effect on the criminal liability of the natural persons involved. In order to produce effects, it must be brought to the attention of the court before the bill wherein the case was sent to trial is read. Moreover, reconciliation is definitive and unconditional. If the victim of the offence is the legal entity whose representative the perpetrator is, reconciliation is possible only if it is acknowledged by the prosecuting attorney.[84]

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

There is one general mitigating circumstance which is applicable to most of the offences targeted by this report, with the exception of money-laundering, corruption offences and fraud committed through computer systems and electronic means of payment. Letter d) of art. 75 para. 1, together with article 76 of the Criminal code stipulate that 'covering all the material damage caused by an offence, during criminal investigation or trial, until the first hearing, if the offender has not

[83] Ibid. 410-411.
[84] Ibid. 412-415.

benefited from this circumstance within 5 years prior to committing the crime' entitles the perpetrator to a penalty reduction of a third of the limits/interval prescribed by law.

In the case of **money-laundering**, article 30 of Law 656/2002 offers the perpetrator the possibility to obtain a reduction by half of the penalty prescribed by law if, in the course of the criminal investigations, he/she either refers the commission of the offence to the authorities or helps with the identifying and punishing of other participants.

As far as **tax evasion** is concerned, article 10 of Law 241/2005 stipulates that, if the defendant covers all the damages claims of the civil party by the first court hearing, he is punishable by half the penalty specified by law. This mitigating circumstance is limited, on the one hand, to the offences listed in articles 8 and 9 of the same Law, and, on the other hand, by the fact that it cannot be applied to the perpetrator who had committed another offence incriminated by the present Law in the course of 5 years before the current offence and had benefitted then from this penalty reduction.

Two general methods of obtaining penalty reductions are the guilty plea agreement and the guilty plea procedure.

A **guilty plea agreement** can be concluded only in writing, according to the procedure established in articles 478-488 of the CPC, in the course of the criminal investigation between the defendant and the case prosecutor. The benefits of this special procedure are twofold: the state saves time and human resources[85], whereas the defendant is granted a penalty reduction – imprisonment will be reduced by a third and fine – by a quarter, considering the limits provided by the law. In order for such an agreement be concluded, the defendant must admit to have committed the offence and accept the charges as established by the prosecutor. The negotiations are limited to the customisation of the penalty in terms of type, duration or amount and manner of execution. [86] The

[85] Ioana Călin, *'Acordul de recunoaştere a vinovăţiei'* [2015] Caiete de drept penal 110 [Romanian].
[86] Daliana Lupou, *'Acordul de recunoaştere a vinovăţiei'* [2016] Penalmente relevant 113 [Romanian].

initiative may belong to either the defendant or the case prosecutor, and either may refuse the proposal. Another requirement is that the penalty provided by law must be either a fine or no more than 15 years of imprisonment. Therefore, this procedure is applicable to all of the offences targeted by this report. Moreover, legal assistance is mandatory. That standard of proof that must be met is described by paragraph 2 of article 480 of the CPC: 'when the gathered evidence provides sufficient information that the offences for which charges have been filed exists, and that the defendant is the author of that offence.'

After its signing, the guilty plea agreement must be brought before a court. If all the aforementioned conditions are met, the court will sustain the guilty plea and order the solution to which the prosecutor and the defendant agreed. Otherwise, the guilty plea will be denied and the case – sent to the prosecutor to continue the investigation. Furthermore, the court will also deny the agreement if it finds that the solution is 'unjustifiably lenient in relation to the seriousness of the offence or the hazard posed by the offender'.

If such an agreement is not concluded in the course of the criminal investigation, after his case is brought to trial, the defendant may obtain the same penalty reduction following the **guilty plea procedure**[87], also known as the abridged procedure. Several conditions must be met: the criminal proceedings must not concern a crime punishable by life imprisonment, the court finds that the evidence produced in the course of the investigation is sufficient to determine the truth and the defendant makes a clear request to be tried according to this procedure, while fully admitting all the acts allegedly committed by him. Taking all these into consideration and after hearing the defendant and the arguments of the prosecutor and the parties, the court will rule on the admissibility of the defendant's request. Admission of the application will entail that the court establishes an adequate penalty somewhere between the reduced legal limits and give its ruling.

[87] Regulated by articles 349 para. 2; 374 para. 4; 375; 377; 396 para. 10 of the CPC.

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance)

Mitigation is an obligation and also a principle in the common law, but this concept **is not clearly defined in civil law**[88].

Mitigation Costs are reasonable and necessary payments to a potential claimant to reduce the ultimate civil legal liability of an Insured Person. In no event shall Mitigation Costs include: (a) liability which is not otherwise covered under this policy; (b) payments arising out of, based upon or attributable to an Insured Person Investigation or Pre-Claim Inquiry; or (c) payments to a potential claimant to reduce the ultimate civil legal liability of a Company whether incurred by the Company or by an Insured Person on behalf of the Company[89].

„There is no specific legal provision within Romanian law with respect to means of cost mitigation. Therefore, basic legal principles regarding liability are applicable. The starting point is the **fiduciary duty owed by directors** (based on a *commercial agreement*[90]) **and officers** (based on a *commercial or an employment agreement*[91], as the case may be) **to their company**, **whenever they are acting in their corporate capacity**. Consequently:

1. **When acting in their corporate capacity and intentionally harming their company (civil or criminal), directors and officers are thus breaching their fiduciary duty and become liable**[92] toward the Financial Institutions CorporateGuard 2013 SEC Directors and Officers Liability Insurance Policy Wording company. In such case, fundamental corporate law principles oppose any indemnification by the company for its directors and officers for defense costs, damages, judgments, and settlements.

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[88]Mustill M., "The New Lex Mercatoria: The First Twenty-Five Years" 4 Arb. Int'l (1988) 86 - 119, at 113.
[89]Financial Institutions CorporateGuard 2013 SEC. Directors and Officers Liability Insurance. Policy Wording https://www.aig.co.uk/content/dam/aig/emea/united-kingdom/documents/Financial-lines/Financial-Institutions/fi-do-policy-wording-sec.pdf [Accessed on March 20 2017].
[90]Such a commercial agreement is regulated by the provisions of the Company Law regarding the management of companies, the Romanian Civil Code and the provisions of the Statutes of the relevant company.
[91] Such a contract is required to comply with the procedures expressly provided by the Labor Code.
[92] Streteanu, Florin; Chiriţă, Radu, (2007). *Răspunderea penală a persoanei juridice juridice [Criminal liability of the legal entity]*, ediţia a 2-a, Editura C.H.Beck, Bucureşti.

2. **When directors and officers are acting in their corporate capacity and are breaching the law in matters such as, for example, company accountancy rules or environment protection**, this may lead to fines: a) imposed solely upon directors and officers, when the company is not necessarily harmed. b) imposed upon the company itself, thus harming the company. Such breaches of law indicate a mismanagement of the company and non-observance of fiduciary duties, as well as possible reputational risks for the company. However, in such circumstances, it is up to the shareholders to decide whether they indemnify directors and officers for defense costs, damages, judgments and settlements, in case such directors and officers challenge the fine before court.
3. **When acting in their corporate capacity and harming third parties (civil or criminal), directors and officers are acting on behalf of the company**. Thus, the company becomes liable towards harmed third parties. After indemnifying the third party, the company goes against the directors and officers who are in the end liable towards the company for the breach of law that has harmed third parties. In such case, no indemnification for directors and officers can be justified[93].
4. **When acting outside their corporate capacity and harming third parties, directors and officers are acting on their own behalf, not involving their company and related fiduciary duties, such as in private car accidents or conflicts with neighbours**. It is up to the shareholders to decide whether they indemnify directors and officers in such circumstances for defense costs, damages, judgments and settlements, taking into account all circumstances, including reputational risks for the company. In the particular case of joint-stock companies, directors and officers must have a professional insurance policy meant to cover their liability towards their company and third parties, when acting in their corporate capacity."[94]

[93]Streteanu, Florin; Niţu, Daniel, (2014), Drept penal. Partea generală. Vol. I [Criminal law. The general part], Editura Universul Juridic, Bucureşti.
[94] D&O Corporate Indemnification: A Reference Guide by Country, a research by Musat & Asociatii https://www.zurichcanada.com/_/media/dbe/canada/docs/english/management_liability/doreferenceguideeng.pdf [Accessed on February 25 2017].

Thereby, **a** *sui-generis* **epiphany of the concept of mitigation** related to the corporate criminal liability under Romanianlaw can be represented by a mechanism for corporate entities, more exactly for their directors and officers, such as to disclose violations in exchange for lesser penalties.

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

12.1 Legislation and penalties

The backbone of the fight against corruption for the next 3 years at least will be the National Anti-corruption Strategy 2016-2020. However, this instrument is rather declarative, lacking in concrete measures and justifications. For instance, amendments to both the Criminal code and the CPC are envisaged, yet it is difficult to understand why they are necessary, since no concrete critique to the current legislation is made. Even so, the NAS makes it clear that Romania intends to continue its efforts to become a full-fledged member of the OECD and its relevant working groups, in particular of the Anti-bribery Working Group. Moreover, it aims (vaguely) at greater transparency between the private and public sector and dissemination of anti-bribery policies.

For the foreseeable future, there are no legislative initiatives on the public agenda of the Parliament or of the Government regarding changes in the legislation concerning corruption, fraud, tax evasion or money-laundering. However, Romania should soon take steps towards amending its anti-money laundering legislation in order to comply with the EU Fourth Anti-Money Laundering Directive by June 26, 2017.

12.2 Enforcement

In order to understand the tendencies in prosecuting the offences targeted by this report, an overview of the recent activity of the main enforcement authorities may prove useful.

Firstly, since the establishment of the Cooperation and Verification Mechanism [95] by the Commission, the National Anti-corruption Directorate, a division of the Central Prosecutor's Office, has been a key factor in combating corruption at all levels and criminal enforcement has become increasingly strict in this area.

With most of its cases concerning corruption in the public sector, their complexity and the sheer number has been growing. Over 5000 new cases have been brought to the attention of the NAD in the past year.[96] Comparatively, there is a limited number of prosecutors working on them. On the other hand, in 2016 there has been an increase by 13% in the number of cases ending with either an indictment (the majority) or a guilty plea agreement, as compared to 2015. In general, most of the cases come to trial in one or two years from their initial referral to the NAD. There is indeed an appetite to prosecute the senior officers of companies. By comparison, the number of legal entities convicted is low.

Secondly, the Directorate for Investigating Organised Crime and Terrorism has its own struggles.[97] While money laundering cases have been on the increase, the number of solved cases was lower in 2016 than it was the previous year. Major impediments include: difficulty in producing evidence through evidentiary processes such as computer search and obtaining data regarding financial transactions, instrumenting money laundering and tax evasion cases in order to establish the prejudice to be recovered, a delay in procedures involving international judicial assistance and a deficit in judicial police officers.

Thirdly, as far as the activity of the ordinary Prosecutor's Offices throughout the country is concerned, misrepresentation cases constituted in 2015 15,1% of all cases regarding offences against property.[98] However, a major impediment in prosecuting these offenders is the possibility

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95 https://ec.europa.eu/info/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en accessed on March 3 2017
96 http://www.pna.ro/bilant_activitate.xhtml?id=38
97 http://www.diicot.ro/images/documents/rapoarte_activitate/raport.2016.pdf 20-21
98 http://www.mpublic.ro/sites/default/files/PDF/raport_activitate_2015_ro.pdf 27

of reconciliation between the victim and the defendant. Such choice in penal policy hinders severely the efforts of the Prosecutor's Offices to combat this type of crime.

On the whole, since criminal liability of the legal persons was first introduced in Romanian law, the prevailing tendency of these enforcement authorities has been to prosecute both the company and its representatives/administrators.[99] The Government's preoccupation with the necessity to have strong enforcement authorities is reflected in the increase in funding for this year: the budget of the Public Ministry (which encompasses all the above mentioned entities) has been supplemented by 18.5% as compared to 2016.[100]

A major drawback constantly brought to the attention of Romanian authorities by the CVM reports is the ineffectiveness of the anti-corruption prevention policies. It is hard to tell whether the NAS 2016-2020 will be more effective than the previous strategies in this respect, especially since it reiterates some of the measures from the NAS 2012-2015, which was not a success. However, the flagship institution remains the NAD, which is likely to enjoy a data analysis compartment for corruption offences, funding for new headquarters and an increase in the number of judicial police officers in the following years.

[99] Ilie, Roxana-Andrada, *Jurisprudenţă rezumată şi comentată*, Editura C.H. Beck, 2013
[100] http://www.agerpres.ro/economie/2017/01/23/ministerul-public-va-avea-in-2017-un-buget-mai-mare-cu-18-5--12-05-18 , accesed on February 2 2017

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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction.

Prior to the further analysis, it seems appropriate to mention that Russian legal interpretation is primarily based on statute interpretation made by law-appliers instead of the teachings of the most highly qualified publicists. Case law also plays a major role in understanding law. Concerning the topic of this research, Russian law does not provide for criminal liability of corporate entities - only individuals are subject to the criminal prosecution, whereas corporate entities may be held liable under the Administrative Offences Code of the Russian Federation [1] (Administrative Offences Code).

1.1 Anti-Bribery and Corruption Legislation

According to Article 15.4 of the Russian Constitution,[2] the universally recognized provisions of international law and international treaties ratified by the Russian Federation constitute a component part of its legal system. Thus, the relevant international documents regarding the issues of bribery and corruption include:

- UN Convention against Corruption 2003 ratified by Russia in 2006;
- Council of Europe Criminal Law Convention on Corruption 1999 ratified by Russia in 2006;
- OECD Convention on Combating Bribery of Foreign Public Officials 1997 ratified by Russia in 2012.

Russian domestic legislation is based on a broad understanding of corruption. It covers corruption both in public and private sectors.

[1] The Administrative Offences Code of the Russian Federation n. 195-FZ 2001 (as amended by Federal Law n. 393-FZ 2016)
[2] The Constitution of the Russian Federation, adopted on December 12, 1993

The Federal Law "On Combating Corruption"[3] (Anti-Corruption Law) in Article 1 defines corruption as 'abuse of official position, giving bribes, taking bribes, abuse of power, commercial bribery or other illegal use by individuals of his or her official capacity contrary to the legal interests of society and the state in order to obtain such benefits as money, valuables, property or other monetizable services, other property rights for himself or herself or for third parties or illegal provision of such benefits to the said individual by other individuals'.

The Anti-Corruption Law generally focuses on combating corruption in public sector, defining the obligations of officials and civil servants:

1. to abstain from having an account with a foreign bank located outside of Russia;
2. to disclose information about income and expenses, property and other property rights;
3. to inform employer, public prosecutor office and other relevant governmental bodies if somebody tries to impel that person into a corruption crime;
4. to reveal any potential conflict of interest (procedure of resolution of conflict of interests in public sector is defined in Article 19 of the Federal Law "On the State Civil Service"[4])

As for private sector, conflict of interest rules are applicable as well, providing that in case, when personal interests of a person affect or may affect proper and objective performance of his or her professional duties, such person should reveal the abovementioned interests and then employer should take measures to resolve the conflict. Moreover, the Anti-Corruption Law provides for a general obligation of organizations to develop and take measures for preventing corruption[5]. In particular, such measures may include:

1. definition of a department and an officer in charge of preventing corruption;
2. cooperation with law-enforcement authorities;

[3] Federal Law n. 273-FZ (On Combating Corruption) 2008 (as amended by Federal Law n. 236-FZ 2016) [О противодействии коррупции]
[4] Federal Law n. 79-FZ (On the State Civil Service in the Russian Federation) 2004 (as amended by Federal Law n. 276-FZ 2016) [О государственной гражданской службе Российской Федерации]
[5] Article 13.3, Federal Law n. 273-FZ (On Combating Corruption) 2008 (as amended by Federal Law n. 236-FZ 2016) [О противодействии коррупции]

3. development of codes and regulations aimed to maintain good company's practice;
4. implementation of a code of ethics and professional conduct of employees;
5. prevention and resolution of conflict of interests;
6. prevention of non-formal financial records and fake document usage.

Nevertheless, the requirements and scope of this measure are vaguely defined and judicial practice on the matter is rather slender. Furthermore, Russian legislation does not provide for any legal consequences for a separate violation of this obligation.

General corruption offence for corporate entities is set forth in Article 19.28 "Unlawful remuneration on behalf of a legal entity" of the Administrative Offences Code. It stipulates administrative violation - unlawful disposal, offer or promise (on behalf of or in the interest of legal entity) of monies, securities, monetizable services or other property rights to a government official, an executive employee or a foreign official for an action or omission connected with professional duties of that person to be performed in favor of the abovementioned entity. In other words, if somebody bribes an official or an executive employee on behalf of or in interest of a corporate entity, this entity is liable for the violation.

The definition of a government official and an executive employee is given in the appendixes to Articles 285 and 201 of the Criminal Code of the Russian Federation (Russian Criminal Code) respectively. The term *government official* includes persons in a position of authority and other employees of state or municipal bodies and organizations, who are entitled to dispose entity's assets or who have functions in human resources sphere. The term *executive employee* includes CEOs, members of a management board and again other employees, who are entitled to dispose company's assets or who have functions in human resources sphere.

Russia declares extraterritorial jurisdiction with regard to corruption offence for corporate entities. As such, it is subject to legal prosecution even if it was committed outside of the Russian Federation provided that it has detrimental impact on Russian Federation's interests.

Sanctions for abovementioned offence include confiscation of the bribe subject and fine, which differs depending on the amount of the bribe according to the table below:

Bribe amount	**Punishment**
Less than 1,000,000 RUB	Up to triple amount of the bribe, but not less than 1,000,000 RUB
More than 1,000,000 RUB but less than 20,000,000 RUB	Up to thirty times the amount of the bribe, but not less than 20,000,000 RUB
More than 20,000,000 RUB	Up to one hundred times of the amount of the bribe, but not less than 100,000,000 RUB

In determination of the fine's final amount, the judge takes into consideration the nature of the offence, financial position of the offender, mitigating and aggravating circumstances.

Criminal liability of individuals involved in bribery is set forth in the Russian Criminal Code. As such, Article 204 of the Russian Criminal Code criminalizes commercial bribery both for bribe-giver and bribe-taker, Article 204.1 – intermediation in commercial bribery, Articles 290, 291 and 291.1 of the Russian Criminal Code – bribe giving, bribe taking and intermediation in bribery in public sector. It is important to note, that criminal proceedings against individuals do not correlate with administrative process against legal entities. Organization may be held liable without rendering judgement of conviction against actual bribe giver and the opposite is also true.

1.2 Anti-Money Laundering Legislation

Similar to the issues related to bribery and corruption, anti-money laundering ("**AML**") is also regulated both at the international and national levels. Russia has joined the following international treaties dealing with anti-money laundering:

- United Nations Convention against Transnational Organized Crime ratified by Russia in 2004;
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime ratified by Russia in 2001;

- CIS Treaty on Countering Legalisation (Laundering) of Proceeds of Crime and Terrorism Financing ratified by Russia in 2009.

Federal Law "On Countering the Legalisation (Laundering) of Criminally Obtained Incomes and Terrorism Financing"[6] (AML Law) is the main national law covering AML issues. It contains a comprehensive system of measures aimed at preventing anti-money laundering and financing of terrorism. It mainly applies to limited types or organizations, basically to those, which carry out transactions involving monetary funds or other assets. The exhaustive list includes:

1. credit institutions;
2. professional securities market operators[7];
3. insurance companies;
4. pawnbrokers;
5. companies engaged in purchasing and selling of precious metals, gems and jewellery;
6. bookmakers;
7. managing companies of investment funds;
8. real estate agents;
9. microfinancing companies;
10. non-governmental pension funds;
11. telecommunication operators.

These organizations are obliged to take several control measures while carrying out their activities. These measures include:

- identification of a client, its representative and a principal if exists, which includes examination of their details;

[6] Federal Law n. 115-FZ (On Countering the Legalisation (Laundering) of Criminally Obtained Incomes and Terrorism Financing) 2001 (as amended by Federal Law n. 374-FZ 2016) [О противодействии легализации (отмыванию) доходов, полученных преступным путем, и финансированию терроризма]
[7] Brokers, security dealers, security managers, depositories and register-keepers.

- identification of the nature of business relations with a client, nature of commercial activities of the client, its reputation and possible source of monies;
- seeking for information about beneficial owner of a client;
- development of internal compliance rules and appointment of authorized officers responsible for its implementation;
- provision of the collected information to the relevant state bodies by their request;
- freezing client's assets as soon as it declared a person involved in extremist activities or terrorism;
- systematic update of relevant information about clients and storage of it for five years after termination of relations with a client;
- control measures with regard to specific types of transactions, in particular recording of information and transferring it to the relevant state bodies within three days from the completion of the transaction.

Under Article 6 of the AML Law, these controlled transactions are:

- Transaction, under which the sum to be transferred is more or equal to 600 000 RUB, which is performed in cash if it is:
    - Crediting an account or withdrawal from an account of a legal entity
    - Purchase or sale of a foreign currency by an individual
    - Purchase of securities by an individual
    - Cashing a check drawn by non-resident by an individual
    - Converting banknotes
- Transactions, one of the parties to which has a place of residence in a state, which does not comply with the Financial Action Task Force ("**FATF**") recommendations or if that transaction involves an account in bank registered in such state, under which the sum to be transferred more or equals 600 000 RUB
- Following bank account operations under which the sum to be transferred is more or equal to 600 000 RUB:

  - Opening a bearer deposit
  - Opening a deposit in favor of third parties loaded in cash
  - Receipt or withdrawal of funds with involvement of a foreign bank account opened in the name of anonymous holder
  - Transactions involving a legal entity, which operates less than three month or has not conducted any transactions using this account from its opening

- Transactions with movable assets under which the sum to be transferred is more or equal to 600 000 RUB:
  - Pawn of precious metals, gems and jewelry
  - Insurance transactions connected with accumulative insurance and pension maintenance
  - Financial leasing transactions
  - Transactions operated by non-credit institution under the instruction from a client
  - Sale and purchase of precious metals, gems and jewelry
  - Operation involving gambling and lotteries¨
  - Interest-free loaning and receiving of such loan performed by legal entity
- Real estate transactions, under which the sum to be transferred is more or equal to 3 000 000 RUB
- Transaction involving collection of money by non-profit organization from foreign states, organizations, individuals, international organizations or apatride, under which the sum to be transferred is more or equal to 100 000 RUB
- Transaction involving spending of funds or other assets by non-profit organizations, under which the sum to be transferred is more or equal to 100 000 RUB
- Transaction, one of the party to which is a company, which has a strategic impact on military-industrial complex and security of the Russian Federation, under which the sum to be transferred is more or equal to 50 000 000 RUB
- Transaction involving State Defense Order, under which the sum to be transferred is more or equal to 600 000 RUB
- Transactions, one of the parties to which is listed as a person involved in extremist

activities or terrorism or being an affiliate of such person

Furthermore, the AML Law partly applies to attorneys, notaries and other persons conducting legal services. In particular, they are obliged to perform identification of their clients, develop internal compliance rules and appoint authorized officers responsible for its implementation, and store information for five years after termination of the relations with a client provided that these legal representatives and notaries are involved into:

1. operations with real estate;
2. management of client's assets;
3. management of client's accounts;
4. attraction of financial resources for organizations;
5. creation, maintenance and management of organizations;
6. sale or purchase of organizations.

In case these persons suspect that during their activities acts of money laundering take place, they should notify relevant governmental body.

In addition, after the amendments, which were enacted as of December 21, 2016, all legal entities must take necessary measures to obtain information about their beneficiary owners and store it for five years with the exception of state-run organizations and publicly traded companies.

In case of non-compliance with the AML Law, a company and its officials are to be held liable under Article 15.27 of the Administrative Offences Code. This Article provides for a sophisticated system of sanctions for particular violations taking into consideration consequences of such violation:

Violation	**Punishment**
General non-compliance, which has not caused non-provision of the relevant information to the state bodies	Officer – 10 000 – 30 000 RUB Company – 50 000 – 100 000 RUB

General non-compliance, which has caused non-provision of the relevant information to the state bodies	Officer – 30 000 – 50 000 RUB Company – 200 000 – 400 000 RUB or suspension of activities for 60 days
Failure to freeze assets according to the AML Law	Officer – 30 000 – 40 000 RUB Company – 300 000 – 500 000 RUB or suspension of activities for 60 days
Failure to provide information to the relevant state bodies about refusals to conclude agreements with persons according to the requirements of the AML Law	Officer – 30 000 – 40 000 RUB Company – 300 000 – 500 000 RUB or suspension of activities for 60 days
Failure to provide available information to the relevant state bodies upon their request	Officer – 30 000 – 50 000 RUB Company – 300 000 – 500 000 RUB
Impeding to the control activities of the relevant state bodies and failure to comply with their orders	Officer – 30 000 – 50 000 RUB or disqualification for the period from 1 to 2 years Company – 700 000 – 1 000 000 RUB or suspension of activities for 90 days
Failure to comply with the AML Law, which caused act of money laundering or financing of terrorism recognized by decision of a court	Officer – 30 000 – 50 000 RUB or disqualification for the period from 1 to 3 years Company – 700 000 – 1 000 000 RUB or suspension of activities for 90 days
Failure by a credit organization to develop internal compliance rules and appoint specific officers responsible for its implementation	Officer – 10 000 – 20 000 RUB Company – 100 000 – 200 000 RUB

Under the abovementioned article, both the company and its officers may be held liable for the same violation simultaneously.

1.3 Fraud Legislation

The term "fraud" is narrowly understood under the Russian domestic laws. This term can be found in several laws and but its usage is limited to a crime committed by individual. The Russian Criminal Code contains the most comprehensive coverage of fraud, defining its constituent elements and establishing liability for the fraudulent activities. Thus, Article 159 of the Russian Criminal Code defines fraud as 'stealing another person's property or acquisition of another person's right of property by false pretences or abuse of trust'.

Analyzing Russian legislation in the context of broad understanding of the term *fraud*, one may find vast of relevant legislation, specific parts of which apply to legal entities. It is near impossible to reflect all types of fraudulent conduct and relevant laws, therefore, only part of it will be described below taking into consideration the fact that large number of other fraudulent activities is also prohibited by the Russian law and legal entities would be liable for that.

First, Russian law bans market abuse. Federal Law "On Countering Illegal Usage of Insider Information and Market Abuse" dated July 27, 2010 (as amended July 3, 2016) defines market abuse in Article 5. It applies to on-exchange trading and covers any intentional speculative actions, which affect price, supply or demand on a financial instrument, foreign currency or a good, for instance distribution of false information.

Second, the abovementioned law bans unlawful usage of inside information on such markets. Article 15.30 of the Administrative Offences Code stipulates for a sanction for market abuse committed by legal entities, which is fine in the amount of unjust enrichment caused by abovementioned actions, but not less than 700 000 RUB. Sanctions for unlawful usage of inside information are stipulated in Article 15.21 and are the same as for market abuse.

Furthermore, false advertising is prohibited under Federal Law "On advertising" dated March 13, 2006 No. 38-FZ (as amended December 5, 2016). The Administrative Offences Code in Article 14.3 stipulates that violation of advertisement legislation leads to fine in the amount from 100 000 RUB to 500 000 RUB. Moreover, false advertising may constitute an act of unfair competition regulated by Federal Law No. 135-FZ "On the Protection of Competition" dated October 26, 2006, which would lead to the separate fine in the amount from 100 000 RUB to 500 000 RUB under Article 14.33 of the Administrative Offences Code.

Deception of consumers is regulated by Article 14.7 of the Administrative Offences Code. False measurement, cheating in accounts or other fraudulent behavior would lead to fine from 20 000 RUB to 50 000 RUB. Misrepresentation with regard to end-use of a product or its quality is punishable by fine from 100 000 RUB to 500 000 RUB.

As for criminal liability, the Russian Criminal Code specifies fraud in its narrow understanding and defines its special features in several articles:

Article	Description
Article 159.1	Fraud in the sphere of credit provision is defined as stealing monetary funds by the borrower by submitting deliberately misleading and (or) inaccurate information to the bank or to another creditor.
Article 159.2	Fraud while obtaining payments is defined as stealing monetary funds or other property while obtaining benefits, compensations, subsidies, and other welfare payments established by the relevant laws and regulations by submitting deliberately misleading and (or) inaccurate information as well as by concealing facts which lead to termination of such payments.
Article 159.3	Fraud while using payment cards is defined as stealing another person's property with the usage of a false credit, settlement or payment card or the card owned by another person by deceiving an authorized employee of a credit, trade or other organization.

Article 159.5	Fraud in the insurance sphere is defined as stealing another person's property by deception as regards occurrence of the insured event and as regards the amount of insurance indemnity due according to the law or to an insurance contract.
Article 159.6	Fraud in the sphere of computer information is defined as stealing another person's property or acquisition of the right to another person's by entering, deleting, blocking or modification of computer information or otherwise by interference with the functioning of facilities for storage, processing or transmitting computer information or of information and telecommunication networks.
Paragraphs 5-7 of Article 159	Fraud connected with deliberate failure to perform contractual obligations in commercial field if it caused harm in the sum of more than 10 000 RUB

The relevant sanctions are provided for in above mentioned articles of the Criminal Code.

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

There is corporate liability for offences described in Question 1 in the Russian Federation and it defines the obligations of corporate entities. Such obligations arise out of joining the UN Convention against Corruption, UN Convention against Transnational Organized Crime, etc.

There are two types of public liability in the Russian Federation: criminal and administrative. Administrative liability is provided for offences, which are less dangerous to the society. As stated above in paragraph 1.1, the Russian criminal legislation does not provide the liability of corporate entities. Therefore, a legal entity can be held liable under the administrative law. Article 2.10 of the Administrative Offences Code contains general provisions on the administrative liability of a legal entity.

If a legal entity is found guilty of a violation of the law it does not excuse company officials who authorized or carried out the illegal act. This rule is intended to ensure the principle of equity, which means that each person must be held liable for offence in according to his or her crime. Exemption from liability for criminal conduct of one person because of the prosecution of another person (including a legal entity) for this conduct is unenforceable.

As a general rule says that the basis for liability for committing an administrative offence is one's guilt in committing an unlawful act. Article 2.1 of the Code of Administrative Offences stipulates that:

'a legal person is guilty of an administrative offense if it is established that it was possible to comply with the rules and regulations, for the violation of which this Code or the laws of the Russian Federation provides for administrative liability, if the person did not take all the measures in his power in order to comply with them'.

Thus it can be concluded, that in order to be found guilty for a conduct, there should be, firstly, at least a possibility for compliance with the rules and, secondly, failure to take all necessary measures to comply with them. Under "rules" in this context should be understood all the regulations in regards of the committed offence. Although it must be noted, that since 2001, when the liability of legal entities for committing administrative offences was introduced to the Russian law, there is a theoretical uncertainty and inconsistency in the legal definition of a legal person's guilt. Also, currently there is no consensus on the question of when measures taken by the company could be seen as sufficient enough in order to escape the liability, even within an analysis of similar situations. Therefore today there are significant difficulties in charging as well as defending legal entities in such cases, which can be proved by the somewhat controversial practice in courts.

Nevertheless, according to courts practice, the state may start legal actions against a legal entity on the grounds of administrative offence, regardless of the guilt of its director or employee[8].

[8] Resolution of the Plenum of the Higher Arbitrazh Court of the Russian Federation n. 10 2006.

Moreover, corporations are responsible for criminal offenses committed by its directors and employees if such offences are connected with corporation's activities. For example, if a director or an employee commits a number of crimes (the list is enclosed in Article 104.1 of the Criminal Code) and, therefore gains some benefit in a form of financial gain, such as money, valuables, etc., the enforcement authorities are entitled to confiscate this benefit. In case when confiscation of some object is not possible, the court decides to confiscate a sum of money which is the equivalent to the value of this object. Though the Russian criminal legislation does not consider this measure as a measure of criminal liability but considers it as 'another measure adopted under the criminal law', in academic literature this measure is called 'quasi-liability of corporate entities.[9]

Furthermore, during criminal proceedings involving directors and employees, there is a risk of the seizure and restraint of the corporation's assets for a sufficient period of time. They might be as physical evidences in accordance with the procedure set out in the Code of Criminal Procedure of the Russian Federation (Criminal Procedure Code). This may lead to breach of obligations to counterparts of a corporation thereof. Article 56 of the Civil Code[10] stipulates that a legal entity is liable for performance of its obligations with all property owned by it.

Despite the fact that a legal entity cannot be the subject of a criminal offense, it can be a civil defendant in criminal proceedings if criminal offences are committed by its director or an employee. However it is possible only if a legal entity has civil liability for damage caused by criminal offence.

[9] Krylova N. E. Ugolovnaja otvetstvennost' juridicheskih lic (korporacij): sravnitel'no-pravovoj analiz Vzaimodejstvie mezhdunarodnogo i sravnitel'nogo ugolovnogo prava - [Criminal Liability of Legal Persons (Corporations): Comparative Analysis // Interaction of International and Comparative Criminal Law], Gorodets, Moscow 2009, page 89.

[10] Civil Code of the Russian Federation n. 51-FZ 1994 (as amended by Federal Law n. 236-FZ 2016) [Гражданский Кодекс Российской Федерации].

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

An institution of extradition is governed by material and procedural law.

According to Article 13 of the Russian Criminal Code who has committed crimes in foreign states will not be subject to extradition to these states. Foreign nationals and stateless persons who have committed offences outside the boundaries of the Russian Federation and who are to be found on the territory of the Russian Federation may be extradited to a foreign state for bringing to criminal liability or to serve their sentences in conformity with international agreements of the Russian Federation.

The procedure of extradition of a person for criminal prosecution or serving of a sentence is regulated by the provisions of the Criminal Procedure Code. The decision to extradite a person who is located on the territory of the Russian Federation and is requested to extradite, is taken by the General Prosecutor of the Russian Federation or by his Deputy. This decision may be appealed in court.

Article 462 of the Criminal Procedure Code describes the general conditions which make the extradition possible. These conditions include:

- the criminal law should envisage a punishment for the perpetration in the form of deprivation of freedom for a term of over one year, or a more severe punishment;
- the person who is the subject of the request for extradition should be sentenced to the deprivation of freedom for the term of not less than six months or to a more severe punishment;
- the foreign state, which has sent a request for extradition, should guarantee that the person concerned will be prosecuted only for the crime specified in the request, and that after completing the judicial proceedings and serving the sentence such person shall be able to leave the territory of the given state without hindrance, and shall not be exiled, handed over or extradited to a third state without the consent of the Russian Federation.

If any of the above conditions is not met, the extradition shall be refused.

Other grounds for refuse an extradition are governed by Article 464 of the Criminal Procedure Code. Article 464 divides these grounds into mandatory (pt 1 thereof) and optional ones (pt 2 thereof). These grounds are in compliance with the international treaties, in particular with the European Convention on Extradition 1957, which was ratified by Russia in 1999.

Thus, the following grounds for refusing extradition are mandatory:

- the person is the citizen of the Russian Federation;
- the person has been granted asylum in the Russian Federation due to the possibility of his or her persecution in the given state on account of race, religion, citizenship, nationality, affiliation with a certain social group, or of his political views;
- if the sentence for the same act is passed for the person, who has named in the request, in Russian Federation, and it has entered into legal force, or the proceedings on the same criminal case are terminated;
- the criminal case cannot be initiated or the sentence cannot be executed because of an expiration of the limitation period or on another legal ground. It should be checked whether the limitation period has expired both under the laws of the Russian Federation and under the laws of the state requesting the extradition which is a party to the European Convention on Extradition. The extradition is prohibited if the limitation period has been expired under either of the laws;[11]
- there is a final and binding judgment of the court of the Russian Federation on existence of obstacles to extradition of the given person according to the legislation and international treaties of the Russian Federation;
- the act which has become a ground for sending a request for the extradition is not considered a crime under the criminal law of the Russian Federation.

[11] Resolution of the Plenum of the Supreme Court of the Russian Federation dated June 14, 2012 No. 11

In addition to the above mentioned points Article 464.2 of the Criminal Procedure Code provides for the optional grounds for refusal of extradition. They include the following:

- the act in connection with which a request for extradition is sent is committed on the territory of the Russian Federation or against the interests of the Russian Federation outside its territory;
- the person who is the subject of the request for extradition is already being prosecuted in the Russian Federation for the same act;
- criminal prosecution against the person who is the subject of the request for extradition is initiated by way of a private charge (ie by a private person).

There are also additional grounds for refusing extradition which are not directly stipulated in the Criminal Procedure Code. However they are governed by the international treaties of the Russian Federation.

Thus, Article 11 of the European Convention on Extradition states that 'if the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out'.

Another example is the prohibition to extradite a person to a state where he or she might be subjected to torture or to cruel, inhuman or degrading treatment or punishment which arises out of Article 7 of the International Covenant on Civil and Political Rights 1966, Article 3 of the European Convention on Human Rights 1950, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

5. Please state and explain any:

5.1 Internal reporting processes

Russian legislation does not provide for any particular internal reporting procedures. However, in compliance with the Presidential Decree dated April 2, 2013 No. 309 "On measures to implement certain provisions of the Federal Law "On Combating Corruption", the Ministry of Labor and Social Protection of the Russian Federation has developed the Guidelines for organizations to elaborate and enforce methods to prevent and combat corruption.

Development and implementation of special anti-corruption procedures, such as reporting to the employer about the existing conflict of interest, protection of employees who have provided the relevant information, assessment of corruption risks etc., constitute a part of the Guidelines.

Some large Russian companies have already developed in-house policies and procedures for preventing corruption. They include codes of ethics, special telephone lines, establishment of special compliance departments, employees training.

Some specific entities should meet certain requirements in the enablement of compliance procedures. These are predominantly credit institutions and other financial market participants. They are regulated by the Central Bank of Russia.

1. Professional securities market participants. These specific entities conduct brokering, dealer, depositary and other activities in accordance with Article 2 of the "Securities Market Act". The order of the Federal Service for Financial Markets (FSFM) of Russia dated May 24, 2012 N 12-32 "Approval of the Regulations on the Internal Control of the Professional Securities Market Participants" set an obligation to establish the position of a «controller» to provide the internal control. His functions include immediate notification of the director about any alleged offences, consideration of reports about alleged offences or complaints against a director or employees etc.
2. Credit organizations. These entities conduct banking transactions in order to make a profit on the basis of a special permission given by the Central Bank of Russia. According to Provision "About the Organization of Internal Control in Credit Organizations and

Banking Groups"[12], credit organizations need to establish the internal controlling including compliance service and the officially designated representatives to eradicate money laundering and the financing of terrorism. They have to inform the executive body of the credit organization about the violations revealed.

5.2 External reporting requirements (i.e. to markets and regulators), that may arise on the discovery of a possible offence

In the Russian legislation external reporting requirements include mandatory audit. The Federal Law No. 307-FZ "On Auditing" in Article 5 establishes mandatory auditing for:

- Joint-stock companies;
- Corporations when their securities are admitted for trading;
- Credit organizations.

Corporations when their annual profit exceeds 400 million rubles or assets of balance sheet exceed 60 million rubles;

- Corporations that reveal annual accounts;
- Etc.

Information about the results of the mandatory audit should be entered in the Unified Federal Register of Information about Activity Facts of Legal Entities.

Russian law system contains a particularity in initiating of criminal proceedings concerning offences committed in corporations. According to Article 23 of the Criminal Procedure Code, if the offence has violated only the interests of this corporation (if it has not violated interests of other corporations or individuals, society or the State), the criminal proceedings can be initiated exclusively with the consent or at the will of the director of this corporation. Moreover, according

[12] By Central Bank of the Russian Federation dated December 16, 2003 N 242

to Article 20, if the director commits such offences as fraud, embezzlement or causes property damage in business, only the victim of such offences is empowered to start criminal proceedings. Law enforcement agencies are not entitled to invoke responsibility for these matters with the mere fact of breach of the law. These measures are intended to make business more independent.

Another applicable law to whistleblowers is the Federal Law No. 119-FZ "On government protection of victims, witnesses and other participants of judicial proceedings on criminal cases". To be the subject of government protection in the sense of this law, the whistleblower must go public and participate in a long and arduous trial. Corporate whistleblowers are barely protected under the law. It is supposed to offer government assistance in finding another job, but there are no efficient means of such assistance.

6. Who are the enforcement authorities for these offences?

In this question it is necessary to clarify two things:

1. The pre-trial stage is considered
2. As enforcement authorities it is named authorities conducting investigation.

	Offences	Enforcement authorities
1	Unlawful remuneration on behalf of a legal entity (Art. 19.28 of the Administrative Offences Code)	Prosecutor's Office
2	Unlawful engaging in labour activities or in performance of works and rendering services of a state or municipal civil servant or a former civil servant or municipal employee (Art. 19.29 of the Administrative Offences Code)	

3	Bribery (Art. 204, 204.1, 290-291.2 of the Russian Criminal Code)	The Investigative Committee of the Russian Federation
4	The laundering of money and other property (Art. 15.27 of the Administrative Offences Code, Art. 174, 174.1 of the Russian Criminal Code)	The Federal Service for Financial Monitoring; Internal Affairs authority of the Russian Federation; Prosecutor's Office
5 6	Fraud (Art. 159 – 159.6 of the Russian Criminal Code) Misappropriation or Embezzlement (Art. 160 of the Russian Criminal Code)	Internal Affairs Authority of the Russian Federation
7	Offences of participants of professional securities market or credit organizations	Authorities for offences 1-6 and also the Central Bank of the Russian Federation (as a regulator)

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

A prosecutor, while considering cases concerning administrative offences No. 1, 2, 4(see the Table in Question 6) and an officer of the Federal Service for Financial Monitoring for offences No. 3 can ask for the explanations the person who is on trial in connection with a case concerning an administrative offence, the victim and the witnesses.

An official investigating such case shall be entitled, in order to obtain relevant evidence, to make requests of information directed to appropriate territorial agencies or to order an official of an appropriate territorial agency to commit individual actions. An order or a request shall be subject

to execution within a five-day term as of the date of receipt of said order or request. He or she is also entitled to issue a ruling in order to demand and obtain information necessary for settling the case. Demanded information shall be directed within a three-day term as of the date of the ruling's receipt, and with regard to an administrative offence entailing administrative arrest or the administrative expulsion as penalty, it shall be done without delay.

Article 14 of the AML Law stipulates that the execution of the said Federal law is supervised by the General Prosecutor of the Russian Federation and his/her subordinate prosecutors. The powers of the prosecutor are listed in Article 22 of Federal Law No. 2202-1 dated January 17, 1992 "On the Public Prosecution Office of the Russian Federation" (as last amended in February 2015). In particular, according to Article 22(1), the prosecutor has the right to access the documents and materials of organizations, to request the submission of the necessary documents, materials, statistical and other information from directors and from other officials of the organization. The prosecutor is also entitled to request explanations from officials and citizens.

State authorities of Russia, state authorities of subject of the Russian Federation, local self-government authorities and organizations, which were established by Federal Law, shall supply the Federal Service for Financial Monitoring with information and documents necessary for performance of its functions (except information on citizens' private life) in accordance with the procedure established by the Government[13].

For offences № 3, 4, 5, 6 (see the Table in Question 6) the enforcement authorities conduct investigation actions such as: examination, inspection, investigative experiment, search, seizure, putting the postal and telegraph messages under arrest, monitoring and recording of discussions, interrogation, identification line-up, identification, verification of the evidence, carrying out a forensic examination. Generally, investigation actions are conducted only after formal institution of a criminal case. However, there are some of them, which can be conducted even before it:

[13] Article 9. Federal Law n. 115-FZ (On Countering the Legalization (Laundering) of Criminally Obtained Incomes and Terrorism Financing) 2001 (as amended by Federal Law n. 374-FZ 2016) [О противодействии, легализации (отмыванию) доходов, полученных преступным путем, и финансированию терроризма]

examination, inspection and carrying out a forensic examination. To conduct investigation actions which may interfere with the constitutional rights and freedoms of people the investigator has to get the permission by the judge.

The system of law enforcement authorities in Russia also includes the agencies which carry out operational investigative activity. It is a general notion, and the list of these agencies is rather big. In particular, they include internal affairs bodies, Federal Security Service and its departments, customs authorities, and some other agencies which are authorized to take special investigative measures. According to Article 6 of the Federal Law "On Operational Investigative Activity" No. 144-FZ dated August 12, 1995, there are the following operational-search activities:

1. Interrogation
2. Making inquiries
3. Collection of the samples for a comparative study
4. Test purchase
5. Examination of items and of documents
6. Observation of subjects
7. Identification of persons
8. Examination of the premises, the buildings, the structures and the sites, and of the transportation means
9. Exerting control over the mail and over the telegraph and the other kind of communications
10. Bugging of telephone conversations
11. Taking of the information off the technical communications channels
12. Operational implanting
13. Controlled supply
14. Operational experiments
15. Taking computer information.

To enable these agencies to perform their functions efficiently, the Federal Law "On Operational Investigative Activity" confers certain powers on these agencies connected with gathering

information. Thus, while taking special investigative measures, the said agencies are allowed to seize the necessary documents, materials, and communications, including electronic storage devices (part 1 of Article 15).

The operational-search activity is carried out for discovering, preventing, suppressing and revealing crimes; for discovering and identifying the persons, who are preparing and committing or who have perpetrated them; for conducting searches for persons who are hiding from the inquest, the investigation bodies or the court and who are avoiding the criminal punishment.

The results of the operational-search activity may be used to prove the criminal cases in conformity with the provisions of the criminal procedural legislation of the Russian Federation, regulating the collection, the checking up and the estimation of the proofs. To reach this aim they have to take the form of evidence in criminal proceedings.

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self-incrimination)?

According to Articles 47 and 173 of the Criminal Procedure Code the accused may refuse to supply evidence without any liability for this. At the beginning of the interrogation, the investigator shall find out whether the accused recognizes himself as being guilty, whether he wishes to give evidence on the merits of the charge brought against him and a repeated interrogation of the accused on the same charge, if he has refused to give evidence at the first interrogation, may be conducted *only at the request of the accused himself*.

The information can be provided to the enforcement authorities in the form of witness statements and in the form of documents. Thus, the first group of circumstances when the information may be withheld from enforcement authorities includes provisions relating to the witness protection.

The criminal procedure legislation of the Russian Federation, in particular Article 56 of the Criminal Procedure Code, confers the right not to give testimony (and thus not to provide any information to the enforcement authorities) on certain persons, thus granting them a privilege.

Firstly, any witness may refuse to give testimony. This right complies with the constitutional provision according to which no one shall be obliged to give self-incriminating evidence or to give testimony against his/her spouse and close relatives, as they are defined by the federal law (Article 51 of the Constitution of the Russian Federation). In this case, however, the witness may waive his/her right not to give testimony.

Depending on his/her status, the witness may have the duty of non-disclosure of certain information which he/she has received in connection with his/her professional activity. E.g., the following persons shall not be the subject for interrogating as a witness:

- a judge or a jury member – regarding the circumstances of a criminal case which have become known to them as a result of participation in the given criminal proceedings;
- a lawyer, defense attorney – regarding the circumstances which have become known to them in connection with the recourse to the legal assistance or with the provision of the legal assistance;
- a member of the clergy – regarding the circumstances which have become known to him/her from the confession;
- members of the Federation Council and of the State Duma, without their consent - regarding the circumstances which have become known to them in connection with the exercise of their authorities;
- an official of the tax authority – regarding the information which he/she has received from the data contained in the special declaration submitted by an individual according to the Federal Law "On the Voluntary Declaration by Natural Persons of Assets and Bank Accounts (Deposits)" and (or) from the supporting documents;
- an arbitrator – regarding the circumstances which have become known to him/her during the arbitration procedure.

The similar provisions are provided by the civil legislation of the Russian Federation (Article 69 of the Civil Procedure Code).

The second group of circumstances when the person may withhold information from the enforcement authorities includes the situations when the request for information to be provided in the form of documents is unlawful. The request is unlawful if it:

- requires to provide the information the provision of which is not directly stipulated by law;
- is issued by an unauthorized official;
- does not comply with the special procedure for receipt of certain data (ie banking information);
- is not substantiated;
- does not contain the mandatory particulars.

Moreover, in criminal proceedings some investigative actions can be conducted only with the permission of the judge[14]. In order to get the permission factual and legal basis should exist. The factual basis means the data that indicates the possibility of extraction of the required information from sources prescribed by law. Legal basis means the existence of legal rules in the Criminal Procedure Code that require or permit the enforcement authorities to conduct investigation actions in compliance with procedure and conditions of their execution.

Besides adjudication, there are some specific rules for requesting information in current activity of public authorities. Often these rules are determent by the nature of information. For instance, according to Article 6 of Federal Law No. 98-FZ "On Trade Secret" dated July 29, 2004 the holder of information which contains a trade secret on the justified request of a public authority, state agency, local self-government authorities provides them on a *pro bono* basis information constituting the trade secret. The justified request should be signed by an authority, indicate the objectives and legal basis requesting information containing a trade secret and period for supplying the information, unless otherwise is specified by Federal laws.

[14] Article 165 of the Criminal Procedure Code of the Russian Federation No. 174-FZ dated December 18, 2001

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

Since the employer is able to provide the enforcement authorities only with the employee data which is available for the employer himself/herself, it is crucial to observe legal requirements for employee data processing by the employer.

These requirements are set by the Labor Code of the Russian Federation (Chapter 14) and by Federal law No. 152-FZ ("On personal data") dated July 27, 2006. Thus, the employer may process only the employee data that is necessary for ensuring the observation of laws and other regulations, assisting employees in obtaining employment, training and promotion, ensuring employee personal security, control the quantity and quality of fulfilled work and ensuring the safety of property.

Furthermore, all employee personal data should be obtained from an employee himself. If employee personal data can be obtained only from a third party, an employee must be notified in advance and a written consent must be obtained from him. Also, an employer may not obtain and process special categories of employee personal data[15] (data concerning racial or ethnic origin, political opinions, religious or philosophical beliefs, health or sexual life[16]).

Article 7 of the Federal law No. 152-FZ ("On personal data") sets forth a general rule – personal data, which is defined as any data in direct or indirect relation to an individual including employee data, cannot be disclosed to third parties including domestic and foreign enforcement authorities without prior consent of a the subject of personal data unless otherwise is provided by law.

Each law and regulation, which set forth competence of a specific enforcement authority, provides for a right of enforcement officials to order legal entity to provide the necessary data needed to

[15] Article 86 of The Labor Code of the Russian Federation
[16] Article 10 of Federal law No. 152-FZ (On personal data) dated 27.07.2006 [О персональных данных]

perform their duties[17]. In the event of such order, employer should provide employee data regardless of consent of a personal data subject.

Federal Supervision Agency for Information Technologies and Communications issued non-binding recommendations[18], containing requirements for an order for provision of employee data. Such order should contain:

- the purpose of request;
- references to legal grounds of request, including references confirming power of enforcement authority;
- the list of the requested information.

The only one restriction provided by law relates to scope of information that can be requested and eventually produced – enforcement authorities can request only data that is necessary to perform their duties and vice versa – employer is obliged to produce only such data[19]. However, since competence of Russian enforcement authorities is defined rather broadly and they are not obliged to disclose the matters for which they are ordering production, in practice employer cannot object to the request.

Foreign enforcement authorities cannot obtain employee data by a direct request. However, they can rely on multilateral and bilateral International Treaties, which provide for mutual assistance in legal matters. As such, foreign enforcement authority may send a request for assistance to Ministry of Justice of the Russian Federation. If the request fulfills the requirements provided by a relevant

[17] Article 13 of Federal law No. 3-FZ (On Police) dated 07.02.2011 [О полиции]; Article 7 of Federal Law No. 403-FZ (On Investigation Committee) dated 28.12.2010 [О следственном комитете Российской Федерации]; Article 24 of The Tax Code of the Russian Federation; Article 22 of Federal Law No. 2201-1 (On Prosecution Service) dated 17.01.1992 [О прокуратуре Российской Федерации]; Article 13 of Federal Law No. 40-FZ (On Federal Security Service) dated 03.04.1995 [О Федеральной службе безопасности]; Paragraph 8 of Chapter II of the Executive Order of the President of the Russian Federation No. 1313 (On Competence of Ministry of Justice) dated 13.10.2004 etc.
[18] Clarifications by Federal Supervision Agency for Information Technologies and Communications: Issues related to processing of personal data of employees, job applicants, and members of candidate pool
[19] Article 88 of the Labour Code of the Russian Federation

treaty, Ministry of Justice within its jurisdiction makes an order for provision of documents from a relevant organization under the regime described above and then transfers it to foreign authority.

As for sanctions, Article 13.11 of the Russian Administrative Offence Code provides for general sanctions for violations of personal data regime, which apply for both unlawful non-disclosure of an employee data and unlawful disclosure of such data. Fine for legal entities amounts from 5000 RUB to 10000 RUB. Moreover, non-provision of employee data upon a request of specific Russian enforcement authorities may result in worse consequences. As such, failure to obey to a lawful order of Federal Security Service of Russia or Federal Protection Service of Russia leads to a fine from 10000 RUB to 15000 RUB.

10. If relevant, please set out information on the following:

10.1 Defenses to the offences listed in question 2;

As defenses for criminal and administrative offences actions in a state of **necessity** should be considered. The meaning of this defense is similar both to criminal[20] and administrative[21] law.

The harming of legally protected interests in a state of necessity, that is, for the purpose of removing a direct danger to a person or his rights, to the rights of other persons, or to the legally protected interests of the society or the state, shall not be deemed to be an offence. To be legal the harming of legally protected interests in a state of necessity should meet these conditions:

1. The existence of legally protected interest;
2. This danger could not be removed in other ways;
3. The harm caused to the said interests should be less than the harm averted.

[20] Article 39 of the Criminal Code of the Russian Federation No. 63-Fz dated June 13, 1996
[21] Article 2.7 of Code of Administrative Offences of the Russian Federation No. 195-Fz dated December 30, 2001

It should be mentioned that court practice[22] of using this type of defense to economic offences is rather rare.

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement);

This question should be considered in the context of two situations:

1. from the perspective of legal entity's administrative liability,
2. from the perspective of an officer's criminal liability.

10.2.1 A legal entity may be released from administrative liability in these cases:

- When an administrative offence is insignificant.

An insignificant administrative offence[23] is an act which includes elements of an administrative offence but does not constitute a fundamental breach to legal relationship taking into account the nature of an offence committed and the role of offender, amount of damage and gravity of consequences.

- The expiry of limitations for administrative liability.

Moreover an administrative fine can be substituted with warning.

Warning is set for the first-time committed administrative offences when the offence does not inflict harm or pose a threat of harm to life and health of people, animals and plants, the environment, cultural heritage (monuments of historical and cultural importance) of the peoples of the Russian Federation, state security, the threat of natural and man-made disasters, and when

[22] Cassation ruling of the St Petersburg City Court n. 22-1462/2012 dated March 13, 2012; Cassation ruling of the Sverdlovsk Regional court n. 22-5009/2013 dated April 30, 2013; Cassation ruling of the St Petersburg City Court n. 22-8033/2012 dated December 5, 2012 and others
[23] Article 2.9 of Code Of Administrative Offences of the Russian Federation No. 195-Fz dated December 30, 2001

the offence does not inflict damage to property. At the same time this norm does not apply to corruption offences[24].

10.2.2 Postcriminal officer's behavior may lead to exemption from criminal liability.

Exemption from criminal liability is a waiver by a State represented by competent authorities from further prosecution of a person found guilty of crime. Speaking about the topic of LRG there are such grounds for exemption from criminal liability as:

Payment of legal fines[25]

If an officer first-time commits any of the criminal offences, which is the subject of this research, he or she may be exempted from criminal liability by the court with the appointment of a legal fine. This is possible if this fine provides reparation caused by a crime. Legal fine is not a criminal sanction, it is another criminal measure.

Active repentance[26]

If an officer first-time commits criminal offenses of lesser or intermediate gravity he or she may be exempted from criminal liability when several conditions are met: an offender has voluntarily given guilty plea after the crime, contributed to investigation, provided reparation caused by the crime, and due to active repentance has ceased to be socially dangerous.

The expiry of limitations for criminal liability[27]

Limitations are calculated from the date of the commission of the crime.

[24] Part 2 of Article 4.1.1 of Administrative Offences Code of the Russian Federation No. 195-Fz dated December 30, 2001
[25] Article 76.2 of the Criminal Code of the Russian Federation No. 63-Fz dated June 13, 1996
[26] Article 75 of the Criminal Code of the Russian Federation No. 63-Fz dated June 13, 1996
[27] Article 78 of Criminal Code Of The Russian Federation No. 63-Fz dated June 13, 1996

Some objective reasons can also lead to exemption from criminal sanctions when their execution and serving is inappropriate to achieving the purposes of sanctions:

Change of situation[28]

Due to change of situation the crime has stopped being socially dangerous. It applies only to first-time committed crimes of lesser or intermediate gravity. Decriminalization is not a part of change of situation.

Illness of the accused[29]

A person with mental derangement within the time of crime commitment or after it shall be released from punishment if this derangement deprives him/her of the possibility of realizing the actual nature and social danger of his/her actions (inaction), or of controlling them; while a person who is serving punishment in such state shall be released from further serving his/her sentence.

A person who has, after the commission of a crime, fallen ill with another serious disease preventing the serving of the sentence, may be exempted by the court from serving the sentence.

The expiry of the limitation period of the court's sentence[30]

Limitations are calculated from the date of adjudication.

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

Alongside with paragraph (b), this paragraph should also be considered in the context of two situations:

1. from the perspective of legal entity's administrative liability,

[28] Article 80.1 of Criminal Code Of The Russian Federation No. 63-Fz dated June 13, 1996
[29] Article 81 of Criminal Code Of The Russian Federation No. 63-Fz dated June 13, 1996
[30] Article 83 of Criminal Code Of The Russian Federation No. 63-Fz dated June 13, 1996

2. from the perspective of an officer's criminal liability.

10.3.1 The Administrative Offences Code

The Administrative Offences Code establishes the list of circumstances mitigating administrative liability, which should be taking into account when imposing an administrative penalty on a legal entity[31]. Speaking about the topic of LRG the relevant circumstances are:

- the voluntary termination of wrongful behavior by the legal entity that has committed an administrative offence;
- the voluntary provision of information about an administrative offence by the legal entity that has committed the administrative offence to an enforcement authority;
- the assistance of the legal entity that has committed an administrative offence rendered to an enforcement authority to carry out proceedings in a case of the administrative offence in establishing the circumstances that are to be established in the case of the administrative offence;
- voluntary compensation by the legal entity that has committed an administrative offence for inflicted damage or voluntary elimination of inflicted harm;
- the voluntary performance by the person that has committed an administrative offence - before the issuance of a decision in a case of the administrative offence - of an order for elimination of committed offence issued by a body responsible for state or municipal control.

Moreover, the administrative fine for legal entity may be imposed in a smaller sum than the Administrative Offences Code establishes it[32]. There are necessary conditions for that:

a. *a minimum fine for offence is 100,000 rubles*;
b. *the exceptional circumstances* that are connected with nature of administrative offence and its effect, the property and financial status of the legal entity.

[31] Article 4.2 of the Administrative Offences Code of the Russian Federation No. 195-Fz dated December 30, 2001
[32] Article 4.1 of the Administrative Offences Code of the Russian Federation No. 195-Fz dated December 30, 2001

According to court practice, the exceptional circumstances are as follows: a risk of legal entity insolvency[33], taking measures for elimination of committed offence[34], social importance of legal entity's activity[35], committing offence due to a clerical error[36], etc.

10.3.2 Criminal Penalty

Criminal penalty should be reduced in cases established by the Russian Criminal Code.

Conclusion of pre-judicial cooperation arrangement

When a pre-judicial arrangement is concluded for cooperation if there exist mitigating circumstances envisaged by Article 61 (part 1(i)) of the Criminal Code (giving oneself up, rendering active assistance in the clearance and investigation of a crime, the exposure and criminal prosecution of other accomplices in the crime, the search for property received through crime) and there are no aggravating circumstances the term or scope of the penalty shall not exceed a half of the maximum term or scope of the strictest type of penalty envisaged by the relevant article of the Code. When a pre-judicial arrangement is concluded for cooperation if the relevant Article of the Special Part of the Criminal Code has a provision for life imprisonment or death penalty these types of sentence are not applicable. In this case the term or scope of the sentence shall not exceed two thirds of the maximum term or scope of the strictest type of sentence in the form of imprisonment envisaged by the relevant Article.

Special procedure for taking a court decision if the accused agrees with the charge brought against him

This procedure describes in the Chapter 40 of the Criminal Procedure Code. The defendant, in consultation with a lawyer, must accept the charges in writing, petition for conviction without trial, and waive the right to appeal based on the facts of the case. Both a prosecutor and the victim must

[33] Moscow Arbitrazh Court Award n. A40-105929/2015 dated August 3, 2015; Moscow Arbitrazh Court Award n. A40-38980/15 dated May 13, 2015 and others
[34] Moscow Arbitrazh Court Award n. A40-37511/2015 dated April 9, 2015; Moscow Arbitrazh Court Award n. A40-29482/15 dated March 25, 2015 and others
[35] Moscow Arbitrazh Court Award n. A40-105929/2015 dated August 3, 2015
[36] Moscow Arbitrazh Court Award n A40-110600/14-121-930 dated September 17, 2014

consent to the special procedure. Finally, the judge must review the motion, ensure that the defendant understands what he or she is doing and has acted voluntarily and verify that the charges are supported by the evidence in the file. If the judge agrees, there will be no trial on the evidence; instead, there will be a short hearing on sentence, with the exclusion of the upper third of the normal sentencing range.

The term and scope of penalty imposed upon the person whose criminal case has been tried in the procedure provided for by Chapter 40 of the Criminal Procedure Code may not exceed two thirds of the maximum term and extent of the most severe kind of punishment provided for making a crime.

11. If relevant, please set out information on means of cost mitigation (ie taxation, directors and officers insurance).

Only limited types of options are available to mitigate costs connected with investigation, prosecution initiated against the company for the relevant offences as well as for liability imposed.

First, company may consider insurance against relevant risks. Article 928 of the Russian Civil Code stipulates that only legitimate interests may be insured. Since administrative offence is considered to be an act or a failure to act violating the interests of the Russian Federation, administrative liability cannot be covered by insurance, therefore insurance contracts aimed to cover those risks are invalid. However, interpretation of the legal principle estoppel in Russian courts[37] in theory still makes possible to claim damages from the insurance company in such case, because once it expressed its intention to conclude insurance agreement to cover risks of administrative liability, it lost its rights to plead its invalidity. Therefore, theoretically such agreements may be enforced.

[37] Judgement of Commercial Chamber of the Russian Supreme Court dated July 10, 2015 on the case No. A21-10221/2013

On the other hand, a company may try to cover risks connected with state examinations, prosecution and investigations brought against it. Plain wording of the Russian Civil Code does not prohibit it; however, judicial practice on that matter has not been formed uniformly. In practice, companies are reluctant to conclude such agreements.

Second, it is possible to delegate functions connected to anti-money laundering legislation to an external organization, which would be obliged to conduct relevant verifications, examinations and control functions. In case of violation of anti-money laundering law, the main company would be an offender; however, it may claim damages from the outsourcing provider in the amount of fine as well as compensation of any other negative outcomes of the committed violation. Judicial practice on that exact matter does not exist, but in case of outsource of accounting functions, Russian courts confirmed that consequences of tax offence might be claimed as damages[38].

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

The tendency of the legislation to be frequently amended and repealed is typical for Russian legal environment. Furthermore, in general, the legislative process or policy making is not always transparent, consequently making it hard to predict changes. Noted, that a five year period under these circumstances is to be seen as quite a long time.

The concept of a phased liberalization of the legislation in the field of criminal justice (criminal, criminal-procedural and criminal-executive legislation) is currently being introduced as state policy. The main trends in this area are usually outlined in messages and orders of the President of the Russian Federation, afterward implemented in laws.

[38] Decision of the Moscow District Federal Commercial Court dated July 18, 2012 on the case No. A40-4373/2012

Therefore, there have been voluminous legislative innovations that are part of more ambitious, and cardinal, liberalization of criminal legislation. Especially in the sphere of economic crime, there have been seen a reform towards humanization of the criminal legislation.

There is a trend to establish means of piercing corporate veils. Introduction of new measures in the Russian Federation was expected as reflection of global trends on the disclosure of beneficial owners of companies and organizations. Since December 2016 almost all legal entities have a new obligation to know their final beneficiaries and, if necessary, to communicate information on them to the tax authorities and other government representatives. For violation of the requirement to disclose information about persons controlling companies face a fine of up to 500,000 rubles. The obligation was included to the AML Law. The current obligation is quite new, and yet there is no clearance in how to implement it in practice. It does not reveal, what should be done in situations in which there is such complex chain of ownership, that not even the company knows their true beneficiaries. What comes to compliance, nevertheless, at least come means to establish them should be taken. However, at present time, forms of accounting and tax reporting of legal entities do not contain specific details to reflect information about the beneficial owners. It is likely that there will be a tendency to establish a new arsenal of tricks or new amendments to the legislation in order to reach the intended purpose of the new regulation.

The discussion about introducing criminal liability for legal entities continues seems unlikely to happen in next few years, although it would require multiple, systematic changes to multiple acts, a core change of the theoretical understanding of criminal liability in Russia as well as careful consideration of the consequences of such radical change.

In conclusion, it can be argued that in practice the greatest change to the way in which compliance is addressed in Russia is not likely to be a result from internal law enforcement but instead from companies adopting their internal policies for risk-management while doing business in jurisdictions where anti-bribery and corruption enforcement is stricter.

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- Code of Criminal Procedure of the Russian Federation 2001 (ed.30/03/2016) N 174-FZ
- Labour Code of the Russian Federation 2001 (ed. 30.12.2015) N 197-FZ
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- Federal Law On Combating Corruption 2008 (as amended by Federal Law N 236-FZ 2016) N 273-FZ
- Federal Law On the State Civil Service in the Russian Federation 2004 (as amended by Federal Law N 276-FZ 2016) N 79-FZ
- Federal Law On Countering the Legalisation (Laundering) of Criminally Obtained Incomes and Terrorism Financing) 2001 (as amended by Federal Law N 374-FZ 2016) N 115-FZ
- Federal law On personal data 2006 N 152-FZ
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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction.

The **Constitution of the Republic of Slovenia** (hereinafter: the Constitution) lays down the fundamental rights required for the development of commerce and composition of the relevant legislation, such as the guarantee of **Free economic initiative** (Article 74). It also states that the conditions for establishing commercial organisations shall be established by law and that commercial activities may not be pursued in a manner contrary to the public interest. According to the Constitution, unfair competition practices and practices which restrict competition in a manner contrary to the law are prohibited.

The provisions and sanctions regarding anti-bribery and corruption, fraud and anti-money laundering are primarily included in the **Criminal Code** [Official Gazette of the RS No. 50/12, Kazenski zakonik (hereinafter: KZ-1)]. KZ-1 is the central and most general act in the field of criminal law which defines criminal offences and provides sanctions for them.

Criminal offences, criminal responsibility and sanctions are furthermore governed by the **Liability of Legal Persons for Criminal Offences Act** [Official Gazette of the RS No. 98/04, Zakon o odgovornosti pravnih oseb za kazniva dejanja (hereinafter: ZOPOKD)], which determines only legal persons' criminal responsibility for criminal offences.

Furthermore, there are several special laws (*leges speciales*) in Slovenia which determine themselves which violations in the fields of anti-bribery and corruption, fraud and anti-money laundering are offences and the associated penalties. The responsibility for those offences is governed by the **Minor Offences Act** [Official Gazette of the RS No. 29/11, Zakon o prekrških (hereinafter: ZP-1)] in conjunction with ZOPOKD.

In the field of anti-bribery and corruption the **Integrity and Prevention of Corruption Act** [Official Gazette of the RS No. 69/11, Zakon o integriteti in preprečevanju korupcije (hereinafter: ZIntPK)] was adopted on 5 June 2010. The ZIntPK resulted in the establishment of the current Commission for the Prevention of Corruption of the Republic of Slovenia (hereinafter: CPC),

which is an independent state body with a mandate in the field of preventing and investigating corruption, breaches of ethics and integrity of public office.

On 20 October 2016, the parliament of the Republic of Slovenia adopted the **Prevention of Money Laundering and Terrorist Financing Act** [Official Gazette of the RS No. 68/16, Zakon o preprečevanju pranja denarja in financiranju terorizma (hereinafter: ZPPDFT-1)]. It replaced the Prevention of Money Laundering and Terrorist Financing Act, which was adopted in 2001 and amended several times.

In the field of fraud, several special laws (leges speciales) should be taken into consideration, covering areas such as consumer protection, product safety, competition, securities market, insurance, banking etc. As mentioned above, these laws determine themselves which violations are considered as offences and lay down the associated penalties. The responsibility of legal persons for such offences falls within the scope of the Minor Offences Act in conjunction with ZOPOKD.

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

Article 25 of ZOPOKD sets out the criminal offences under KZ-1 for which a legal person can be liable, whereas Article 26 of ZOPOKD provides penalties for such offences.

In the case of criminal offences for which the prescribed penalty for perpetrators is up to three years of prison, a legal person can be punished with a fine of EUR 500,000 or up to a hundred times the amount of damage caused or the proceeds of crime. If conditions under Article 15 of ZOPOKD are met, a legal person may be sentenced to termination instead of a fine. For the offences for which the perpetrator can be punished with a prison sentence exceeding three years, a legal person can be punished with a minimum fine of EUR 50,000 or up to two hundred times the amount of damage caused or illegal proceeds obtained by crime. For the offences for which

the prescribed penalty for perpetrators is five years of imprisonment or more, a legal person is punishable with deprivation of property instead of a fine.

In the Slovenian legislation the distinction between bribery and corruption is not very clear. The Criminal Code does however differ between the corruptive practices in the public and/or in the private sector.

In fact, Chapter 24 of the Criminal Code incorporates criminal offences against the economy, such as the Unauthorised Acceptance of Gifts (Article 241 of KZ-1) and the Unauthorised Giving of Gifts (Article 242 of KZ-1). These criminal offences apply only to the private sector.

According to Article 25 of ZOPOKD, a legal person can be liable for Unauthorised Acceptance and Giving of Gifts. A legal person can be punished with a minimum fine of EUR 50,000 or up to two hundred times the amount of damage caused or illegal proceeds obtained by crime. Any accepted awards, gifts or other benefit are confiscated.

While KZ-1 does not contain the word "corruption", it lists six criminal offences in Chapter 26 (Criminal offences against official duties and public authorizations) that the legislator considers and defines as acts of corruption. These violations are:

- obstruction of freedom of choice (Article 151 of KZ-1);
- acceptance of bribe during an election or ballot (Article 157 of KZ-1);
- acceptance of bribes (Article 261 of KZ-1);
- giving bribes (Article 262 of KZ-1);
- accepting benefits for illegal intermediation (Article 263 of KZ-1) and
- giving of gifts for illegal intermediation (Article 264 of KZ-1)[1].

[1] Transparency International Slovenia, Korupcija, <http://www.transparency.si/korupcija1>, accessed 21 January 2017 [Slovenian].

These criminal offences are applicable only for officials or public officers.

Article 25 of ZOPOKD provides that a legal person can be liable for Giving Bribes as well as for Accepting and Giving Benefits for Illegal Intermediation. A legal person can be punished with a minimum fine of EUR 50,000 or up to two hundred times the amount of damage caused or illegal proceeds obtained by crime. Any accepted awards, gifts or other benefits are confiscated.

Corruption, which is regulated in ZIntPK and KZ-1 as stated above, can be described as any violation of due conduct by officials and responsible persons in the public or private sector, as well as the conduct of persons initiating such violations or of persons benefiting from them, for the purpose of undue benefit promised, offered or given directly or indirectly, or for the purpose of undue benefit demanded, accepted or expected for one's own advantage or to the advantage of any other person (Article 5 of ZIntPK).

According to Article 3 of ZIntPK, the Act applies to the public sector, unless issues governed by the Act are otherwise regulated by any other law. However, ZIntPK can also apply to the private sector if it so provides.

ZIntPK lays down measures and methods to strengthen integrity and transparency, prevent corruption as well as avoid and eliminate conflicts of interest (Article 1). Furthermore, the Act outlines actions to be carried out in order for the purpose of ZIntPK to be achieved (Article 2). ZIntPK defines CPC and elaborates on its composition, supervision of its work, selection procedure, appointments, operation, tasks and powers etc.

ZIntPK specifies and establishes the protection of whistleblowers, defining the manner of reporting unethical or illegal conduct and providing measures to protect the reporting person.

ZIntPK furthermore elaborates on conflicts of interest and supervision of the acceptance of gifts. The term "conflict of interest" is defined as circumstances in which the private interest of an official person influences or appears to influence the impartial and objective performance of his

public duties. The first subsection outlines the incompatibility of office and exceptions to, whereas the second one focuses on prohibition and restrictions with regard to the acceptance of gifts. This is followed by the declaration and supervision of assets of officials. ZIntPK also lists the persons who have an obligation to declare their assets. In addition, ZIntPK contains an integrity plan and a resolution on the prevention of corruption. Section 8 deals with lobbying, whereas use of information and record keeping are covered under Section 9.

Article 78 of ZIntPK, in conjunction with ZP-1 and ZOPOKD, determines the responsibility of legal persons in the private and public sectors (with the exception of the Republic of Slovenia and its municipalities) for certain offences under the Act. Penalties for legal persons range from EUR 400,00 to 100,000,00.

Pursuant to Article 211 of KZ-1, whoever, with the intention of acquiring unlawful property benefits for himself or a third person by false representation, or by the suppression of facts leads another person into error or keeps him in error, thereby inducing him to perform an act or to omit to perform an act to the detriment of his or another's property, is responsible for the criminal offence of Fraud.

Article 25 of ZOPOKD provides that a legal person can be liable for the offence of fraud. A legal person can be punished with a fine of EUR 500,000 or up to a hundred times the amount of damage caused or the proceeds of crime. If conditions from Article 15 of ZOPOKD are met (established with the sole purpose of conducting criminal offences), a legal person may be sentenced to termination of legal person instead of a fine.

Fraud is furthermore regulated within special laws (*leges speciales*) in the areas of consumer protection, product safety, competition, securities market, insurance, banking etc. Fraudulent practices, governed by these laws, are not considered as criminal and are therefore not incorporated into Criminal Code. These special laws (*leges speciales*) determine themselves which violations are considered as offences and set out the associated penalties. The responsibility for such offences is governed by the Minor Offences Act in conjunction with ZOPOKD.

Money laundering is regulated under KZ-1. According to Article 245 of KZ-1, whoever accepts, exchanges, stores, disposes, uses in an economic activity or in any other manner determined by the act governing the prevention of money laundering, conceals or attempts to conceal by laundering the origin of money or property that was, to his knowledge, acquired through the commission of a criminal offence, shall be responsible for the criminal offence of money laundering.

Article 25 of ZOPOKD provides that a legal person can be liable for the criminal offence of money laundering. A legal person can be punished with a minimum fine of EUR 50,000 or up to two hundred times the amount of damage caused or illegal proceeds obtained by crime. Any accepted awards, gifts or other benefits are confiscated.

Money laundering is also regulated under ZPPDFT-1, in conjunction with ZP-1 and ZOPOKD. The main purpose of ZPPDFT-1 is to determine measures, competent authorities and procedures for identifying and preventing money laundering and terrorist financing. In addition, this Act regulates inspection of the enforcement of the ZPPDFT-1´s provisions.

In the new ZPPDFT-1, adopted on October 20 2016, the Fourth Anti-Money Laundering Directive- Directive 2015/849/EU (May 20 2015) was incorporated into the legal system of the Republic of Slovenia.

In addition, the new ZPPDFT also aims at harmonising the Slovenian legal system with the generally accepted international legal standards in this field, especially with the new recommendations of the Financial Action Task Force (FATF) from 2012 that all countries must take into consideration when enforcing measures of detection and prevention of money-laundering, terrorism funding and weapons for mass destruction funding. FATF is an

intergovernmental organization whose purpose is to combat money laundering and terrorism financing.[2]

Article 25 of ZOPOKD provides that a legal person can be liable for the offence of money laundering. A legal person can be punished with a minimum fine of EUR 50,000 or up to two hundred times the amount of damage caused or illegal proceeds obtained by crime. If the money is of high value (ie exceeding EUR 50,000,00) or if the perpetrator acted as member of criminal organization, a legal person can be punished with deprivation of property instead of a fine. The money is confiscated.

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

According to Article 4 of the ZOPOKD, a legal person may be responsible for the criminal offence of the perpetrator committed in the name of, on behalf of or for the benefit of a legal person, under the following conditions:

- if the offence is an unlawful execution of the decision, order or endorsement of its management or supervisory bodies;
- if its managerial or supervisory bodies influenced the perpetrator or enabled him to have committed the offence;
- if it acquires unlawful proceeds of crime or objects resulting from crime;
- if its managerial or supervisory bodies abandoned their due diligence with regard to the supervision of the legality of the conduct of the subordinate workers.

[2]Anti-Money Laundering Forum: Financial Action Task Force (FATF) <https://www.anti-moneylaundering.org/FATF.aspx>, accessed 25 May 2017.

Slovenian Supreme Court judgements[3] follow the above described requirements for liability. For corporate liability one of the procedural and substantive requirements needs to apply in order for that legal person to be liable. However, it is not enough if the court just states which requirements apply, because it also has to specify the facts of the offence and the circumstances that give rise to liability of legal persons.[4] The legal persons who have established effective compliance programs will therefore be in a better position compared to legal persons who completely abandon their due diligence and perform poorly when it comes to managing risks of wrongdoing and/or other compliance risks.

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

Article 47 of the Slovenian Constitution states that no citizen of Slovenia may be extradited or surrendered unless such obligation to extradite or surrender arises from a treaty on the basis of which Slovenia transferred the exercise of a part of its sovereign rights to an international organization in accordance with the provisions of the first paragraph of Article 3.a.

The extradition of foreigners is governed by the Slovenian Criminal Procedure Act [Official Gazette of the RS, No. 32/12, Zakon o kazenskem postopku (hereinafter ZKP)] under Articles 521 to 537. It applies to all extraditions to foreign countries, except for cases otherwise defined under international treaties or other acts (eg the Extradition the Member States of the EU).

In 2004, upon joining the European Union, Slovenia adopted laws governing the cooperation in criminal matters with EU Member States, ie the Act on the European Arrest Warrant [Official Gazette of the RS, No. 37/04 in 102/07, Zakon o evropskem nalogu za prijetje in predajo (hereinafter ZENPP)] and the Act on Cooperation in Criminal matters with Member States of the

[3] VS2004218 [2008] Supreme Court of the Republic of Slovenia [Slovenian].
[4] VS2006197 [2012] Supreme Court of the Republic of Slovenia [Slovenian].

European Union [Official Gazette of the RS, No. 48/13 in 37/15, Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije (hereinafter ZSKZDČEU-1)]. Since then, the provisions of ZKP are only used for extraditions regarding countries that are not Member States of the European Union.

With regard to mutual legal assistance, Slovenia therefore has a double regulation with one part pertaining to the EU Member States and the other to all the other countries.[5]

Article 522 of ZKP outlines the following conditions for extradition:

- that the person whose extradition is requested is not a citizen of the Republic of Slovenia;
- that the offence for which extradition is requested was not committed in the territory of the Republic of Slovenia, against the Republic or its citizen;
- that the offence for which extradition is sought is a criminal offence both under the domestic law as well as under the law of the country where it was committed;
- that in the event that extradition is requested for prosecution for an offence, the latter is punishable in both countries with one or more years in prison or a detention order for a period of more than one year;
- that in the event that extradition is requested for the execution of legally imposed sentences or detention, the sentence or detention or their residue which is to be enforced is at least 4 months;
- that under the domestic law the prosecution or the execution of the sentence is not barred before the person has been detained or questioned as a defendant;
- that the person whose extradition is requested has not been previously acquitted or convicted for the same act in the Republic of Slovenia or a foreign country, provided that in the case where a penalty was imposed the sentence has been served or is being served or the penalty can no longer be enforced under the law of the country which imposed the

[5] Janez Žirovnik, 'Prijetje in predaja oseb v okviru medsebojnega sodelovanja držav članic Evropske Unije in sodelovanja držav članic Evropske Unije z ostalimi državami v okviru sodelovanja na kazenskem področju (Pogled preiskovalnega sodnika) [2013] (Zbornik 14. Slovenski dnevi varstvoslovja, Fakulteta za varnostne vede) [Slovenian].

penalty or the criminal procedure against the person was discontinued or the charge against them was finally rejected; or that there is no criminal procedure initiated against a foreigner for the same act committed against the Republic of Slovenia, or that, if a procedure has been initiated for an offence committed against a citizen of the Republic of Slovenia, the collateral to enforce the pecuniary claim of the injured party was given;

- that there is no pending procedure before an extraordinary court of the requesting country against the person whose extradition is requested in the case of a request for extradition for carrying out the procedure, and that no such court has ruled a sentence in case of a request for extradition for enforcement purposes;
- that the requesting country gives adequate assurances that the death penalty will not be imposed or carried out if the extradition is requested for an offence for which the requesting country prescribes the death penalty;
- that in the case when it comes to enforcement of the sentence that has been imposed by a final judgement in a trial in absentia of the person whose extradition is requested, the requesting country provides adequate evidence that the person was summoned personally or was informed of the time and place of the proceedings via a representative authorised in accordance with the law of the country which issued the judgment, because of which the judgment was rendered in absentia, or that the person has stated to the competent authority, that they do not contest the decision; or ensures that the criminal procedure will be carried out again in the presence of the extradited person after the extradition;
- that the request for extradition is not made for an offence which the requested person committed while under 14 years of age;
- that the identity of the person whose extradition is requested is established;
- that there is sufficient evidence to justify reasonable suspicion that the foreigner whose extradition is requested committed a certain crime or that a final judgment about this exists.

According to the third paragraph of Article 530 of ZKP, the Minister of Justice does not permit the extradition of a foreigner if the latter enjoys the right to asylum, if they have committed a political or military offence or if there is a likelihood that the person whose extradition is requested

would be subject to torture or inhumane or degrading treatment or such punishment in the requesting state.

With regard to the Member States of the European Union, Article 10 of ZSKZDČEU-1 states that the extradition of the requested person is refused in the following cases:

- if the warrant is issued for an offence which would in Slovenia be covered by amnesty if the authorities of the Republic of Slovenia had the jurisdiction for the prosecution and trial of the perpetrator of the offence;
- if the warrant is issued for an offence for which the requested person has already been finally acquitted or convicted in the Republic of Slovenia or another Member State or a third country, provided that in the case where a penalty was imposed the sentence has been served or is being served or that under the law of the country in which the penalty was imposed the penalty can no longer be enforced;
- if the warrant is issued for an offence for which the criminal procedure against the requested person was finally discontinued in the Republic of Slovenia or the charge was finally rejected, or if the competent state prosecutor dismissed the criminal complaint because the suspect has fulfilled the agreement in the mediation procedure or because the suspect fulfilled the tasks under the instructions of the public prosecutor in order to reduce or eliminate the harmful consequences of the offence in accordance with the provisions of the law governing criminal procedure;
- if the warrant is issued for an offence committed by the requested person when they were under 14 years of age;
- if the warrant is issued for an offence for which the criminal procedure or execution of the sentence would be statute-barred in the Republic of Slovenia if the court of the Republic of Slovenia had the jurisdiction for the prosecution or for the execution of the sentence;
- if the warrant is issued for an offence which is not punishable under domestic criminal law and it is not possible to use the exception in the second paragraph of the preceding article. If the arrest warrant is for crimes related to taxes and duties, customs and foreign exchange, the transfer may not be refused on the ground that domestic legislation does not impose the same taxes, duties and customs and exchange regulations as the law of the ordering country;

- if there is a criminal procedure pending against the requested person in the Republic of Slovenia for the same offence for which the arrest warrant was issued in the case of an offence committed against the Republic of Slovenia, in the case of an offence committed against a citizen of the Republic of Slovenia if there is no collateral for the enforcement of the pecuniary claim of the injured party;
- if there are reasonable grounds to conclude that the warrant has been ordered for the purpose of prosecution and punishment of the requested persons because of their gender, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or their position could be significantly worse because of these reasons;
- if the issuing judicial authority has not issued guarantees laid down in Article 14 of this Act;
- if the warrant is issued for executing a custodial sentence or other measure of the Criminal Court, which is exercised by deprivation of liberty and the requested person did not personally appear at the trial on the basis of which the decision was issued, unless the conditions for the execution of the warrant issued on the basis of a trial in absentia are fulfilled.

The following Article 11 of ZSKZDČEU-1 states the optional grounds for refusal to surrender a requested person:

- if there is a criminal procedure pending against the requested person in the Republic of Slovenia for the same offence for which the warrant was issued, if it is clearly easier to conduct the criminal procedure in the Republic of Slovenia;
- if the request for an investigation was rejected with a final decision in the Republic of Slovenia because there was reasonable suspicion to believe that the person sought committed the offence for which the warrant was issued and the public prosecutor states the intention to file another motion to initiate the criminal procedure;
- if the warrant is issued for the execution of a custodial sentence and the person sought is a citizen of the Republic of Slovenia or a Member State who resides in the territory of the Republic of Slovenia, if the requested person declares that he wants to serve their sentence in the Republic of Slovenia and if the domestic court binds to execute a court judgment of

the ordering state in accordance with domestic law, provided that there are sufficient circumstances for the execution of the sentence in the Republic of Slovenia under this Act;

- if the warrant is issued for criminal offences deemed under domestic criminal law as if they were wholly or partly committed on the territory of the Republic of Slovenia and the public prosecutor declares the intention to file a motion for initiation of the criminal procedure;
- if the warrant is issued for criminal offences that have been committed outside the territory of the ordering country and the domestic criminal law does not allow prosecution for the same offences when committed outside the Republic of Slovenia.

Article 12 of ZSKZDČEU-1 mentions the limitation of surrendering a person with the principle of speciality. It states that the requested person who is extradited to another Member State can be prosecuted, a sentence may be executed against them or they may be surrendered to another Member State only for the offence committed prior to the extradition and for which they were extradited, unless the law states otherwise.

5. Please state and explain any:

5.1 Internal reporting processes (i.e. whistleblowing);

The 2013 research carried out by Transparency International, the global civil society organisation leading the fight against corruption, which represents an overall assessment of adequacy of whistleblower protection laws of 27 Member States of the European Union as well as other mechanisms that may affect whistleblowing, includes Slovenia among the four countries with advanced legal frameworks for whistleblower protection (along with Luxemburg, Romania and the UK).

'Of the other 23 EU countries, 16 have partial legal protections for employees who come forward to report wrongdoing. The remaining seven countries have either very limited or no legal frameworks. Moreover, many whistleblower provisions that are currently in place contain

loopholes and exceptions. The result is that employees who believe they are protected from retaliation could discover, after they blow the whistle, that they actually have no legal recourse.'[6]

In order to improve the protection of whistleblowers in the European Union, the Council of Europe has developed a legal instrument on protecting whistleblowers. The Committee of Ministers adopted the Recommendation CM/Rec (2014)7 on the protection of whistleblowers drafted by the European Committee on Legal Co-operating of the Council of Europe and also took note of its Explanatory Memorandum. This legal instrument should guide member States to make the necessary changes to improve their legislation regarding whistleblowers.[7]

Slovenia has no specific legislation for the protection of whistleblowers, however ZIntPK does offer legal protection for government and company employees. Article 23 (reporting corruption and the protection of the applicant) grants everyone the right to inform the commission for the prevention of corruption or another competent authority about a wrongdoing that indicates corruption and to be informed, if they so wish, of the actions or courses of actions taken by the informed authority. The identity of the person reporting must be kept secret if they wish to stay anonymous. Reporting is punishable as an offence only if the reporter acted with bad intentions.

The above-mentioned ZIntPK also stipulates the process of internal reporting. Article 24 (reporting of an unethical or illegal conduct) states that an official person who has reasonable grounds to believe that he or she is required to commit an illegal or unethical act or is under this requirement the victim of psychological or physical violence, can report this act to a supervisor or a person authorised by the supervisor. If there is no authorised person to report to or if there is an authorised person but they do not give a written response in five working days or if the only authorised person is the person who requested that the official person commit an unlawful or

[6] Transparency International, WHISTLEBLOWING IN EUROPE LEGAL PROTECTIONS FOR WHISTLEBLOWERS IN THE EU, 2013, <http://www.transparency.si/images/publikacije/Whistleblowing_in_Europe.pdf>, accessed 31 January 2017.
[7] Council of Europe, PROTECTING WHISTLEBLOWERS, <http://www.coe.int/t/dghl/standardsetting/cdcj/whistleblowers/protecting_whistleblowers_en.asp>, accessed 31 January 2017.

unethical act, the responsibility for the reporting and process falls onto the commission. An authorised person or the commission evaluates the facts based on the report. If necessary, they may issue appropriate instructions for the handling and take the measures necessary to avoid illegal or unethical demands and the emergence of adverse consequences. The person reporting an illegal act is protected under Article 25 of ZIntPK. An employee may also seek reparative damages if he or she has been exposed to retributive acts, whereby he or she is granted assistance by the commission. The commission may order the employer to cease any retributive actions against the employee. If such actions do not stop, the employee may request to be transferred and notifies this to the commission, but only in the case of employment in the public sector.

LP,The employer must follow the employee's wish in 90 days and also inform the commission about it. If the employee states facts showing the existence of retributive actions against him or her, the burden of proof is on the employer. The person responsible for the offence can be punished with a fee under Article 77 of ZIntPK.

An employee is generally protected against discrimination and mobbing under Articles 6, 7, 47 of the Employment Relationship Act [Official Gazette of the RS, No. 21/13, Zakon o delovnih razmerjih (hereinafter ZDR-1)], Article 8 of which allows them to seek damages for the harm caused by the acts of discrimination or mobbing. The ZDR-1 allows persons to seek damages for the suffered mental pain. ZDR-1 also gives protection from the termination of an employment contract based on unfounded reasons mentioned in Article 90.

Article 140 of the Banking Act [Official Gazette of the RS, No. 25/15, Zakon o bančnistvu (hereinafter ZBan] obliges banks to establish a system enabling employees to report violations in the bank as well as violations of legal acts and internal acts of the bank. The system must be clear, simple and approachable. I would like to stress the importance of this requirement being clearly demanded by the law, because the way a system gives opportunity, chance and support to the people it is aimed at is what in the end makes a difference between a well-established and functioning mechanism that serves the purpose it was designed for on the one hand and a system that only carries a well-sounding name on the other.

5.2 External reporting requirements (i.e. to markets and regulators), that may arise on the discovery of a possible offence.

Generally, whenever the aforementioned supervisory bodies have a reasonable suspicion that a criminal offence took place they need to inform the Public Prosecutor or the Police, as per article 145 of ZKP which states, that all state bodies and organizations with public authorization shall be obliged to report criminal offences for which a perpetrator is prosecuted ex officio if they are informed or otherwise become aware of them. Paragraph 5 of Article 12 of the Code of Conduct for Civil Servants n. 8/01 [Kodeks ravnanja javnih uslužbencev], imposes a special duty to all the public servants who are employed in these bodies to report and transmit to the relevant authorities any evidence, allegation or suspicion of an unlawful action or criminal offence, which is in any way connected with the performance of their public duties.

With regard to bribery and corruption, ZIntPK offers special legal protection for public and private employees, since Article 23 (reporting corruption and the protection of the applicant) grants everyone the right to inform the Commission for the prevention of corruption or another competent authority about a wrongdoing that indicates corruption and to be informed, if they so wish, about the actions or courses of actions taken by the informed authority. The identity of the person reporting must be kept secret if he or she wishes to stay anonymous.

In the area of anti-money laundering, Article 68 of ZPPDFT-1 prescribes measures for the reporting of suspicious transactions. Organizations such as banks, payment institutions, mail providers of money transfer services, stockbroking companies, investment funds and other entities listed under the first paragraph of Article 4 of ZPPDFT-1 are required to provide the Office for Money Laundering Prevention information on all cash transactions exceeding EUR 15,000 (excluding audit companies, independent auditors and legal and natural persons providing accountancy services or tax advisory services) for which there are reasons to believe that money laundering or the financing of terrorism is taking place (lawyers, law firms and notaries also bear the duty to provide this information). This information must be sent via protected electronic means so that the Office for Money Laundering Prevention can display this information on its webpage. A similar requirement is stated in Article 69, where suspicious transactions are described as any planned or executed transactions in relation to which the person knows or has reason to

suspect that funds or assets are derived from criminal acts which could constitute an offence preceding to money laundering or are that they are related to terrorist financing or that they display the characteristics which correspond the indicators used to identify suspicious transactions referred to under Article 85 of ZPPDFT–1, outlining the reasons for suspicion of money laundering or terrorist financing. Such transactions must also be communicated to the Office for Money Laundering Prevention along with all documents that are in connection with the transaction by the aforementioned institutions. Article 12 of ZPPDFT-1 also requires the aforementioned institutions to provide risk assessments of money laundering and terrorist financing, establish internal policies, rules and procedures to effectively mitigate and manage the risks of money laundering and terrorist financing, implement "know your customer" measures in the manner of and under the conditions laid down in ZPPDFT–1 appoint agents and deputy commissioners, as well as perform other tasks and obligations under the provisions of ZPPDFT-1 and other adopted regulations.

6. Who are the enforcement authorities for these offences?

Pursuant to Article 20 of ZKP, whenever a reasonable suspicion that a criminal offence for which the perpetrator is prosecuted ex officio exists, **the Office of the State Prosecutor** is bound to institute criminal prosecution to the extent provided by law.

ZP-1 prescribes the general conditions for the prescription of offences and penalties for misdemeanours, while the various administrative powers, required for the successful investigation and enforcement of the said misdemeanours are regulated in the Inspection Act [Official Gazette of the RS, No. 43/07 in 40/14, Zakon o inšpekcijskem nadzoru (hereinafter ZIN)]. The role of these bodies is to act as an additional supervisor and to gather information and impose fines. They also have a duty to inform the Office of the State Prosecutor and the Police about discovering a criminal offence.

According to the ZPPDFT-1 **the Office for Money Laundering Prevention**, a special body of the Ministry of Finance, serves as an enforcement authority for the prevention of money laundering, in addition to the Public Prosecutor and the Police.

As stated in Article 3, Item 46, and Article 139 of ZPPDFT-1, many different bodies and entities serve as supervising authorities and bear the responsibility of supervising the implementation and compliance with the rules, set forth by the aforementioned Act in their own representative fields. These bodies include: the Securities Market Agency, the Insurance Supervision Agency, the Financial Administration of the Republic of Slovenia, the Market Inspectorate of the Republic of Slovenia, the Agency for Public Oversight of Auditing and Slovenian Institute of Auditors, the Bar Association of Slovenia and the Chamber of Notaries of Slovenia. While the listed bodies have the power to enact their own misdemeanour and disciplinary procedures, they have no other powers with regard to enforcing criminal offences.

Pursuant to Article 80 of ZIntPK **the Commission for the Prevention of Corruption** is responsible for the implementation and supervision of the rules set forth by the aforementioned Act. The Commission for the Prevention of Corruption is defined under Article 5 of ZIntPK as an independent state authority which aims to enhance the effectiveness of the Rule of Law, and prevent the threat of corruption within the legal framework. It independently exercises its powers and performs duties as assigned to it by ZIntPK and other laws. It has the capacity to receive anonymous corruption reports from individuals and can examine them on its own accord. It does not have the power to investigate cases like the Police or the Public Prosecutor and it also has no power to use covert investigative measures. Its main role is to uncover corruption and transmit its findings to the Police and the Public Prosecutor.

By the enactment of ZIntPK, the Commission for the Prevention of Corruption also became a minor offence authority. The Commission may, for a variety of offences listed under Chapter X of the aforementioned Act, such as bribery, abusing public power and unlawful lobbying, fine individuals, public servants and various legal entities in the public or private sector. The fines range from EUR 2,000 to 4,000 for individuals and up to EUR 100,000 for legal entities and special interest organizations.

In the area of fraud there are different enforcement agencies established, supervising different narrower areas of the subject matter.

With regard to the financial industry, Article 380 of ZBan, the main enforcement authority which decides on the offence committed under ZBan and imposes its fines in accordance with the Minor Offences Act is **the Bank of Slovenia**. Banks which state false data or otherwise use deceptive practices or provide incomplete or inaccurate information or do not report financial information or commit other misdemeanours as prescribed under Article 373 of ZBan can be punished with a fine ranging from EUR 25,000 to 250,000.

The Slovenian securities market is regulated by **the Securities Market Agency** which supervises and implements the rules of the Financial Instruments Market Act [Zakon o trgu finančnih instrumentov (ZTFI)], the Investment Funds and Management Companies Act [Zakon o investicijskih skladih in družbah za upravljanje (ZISDU – 3)], the Alternative Investment Fund Managers Act [Zakon o upravljavcih alternativnih investicijskih skladov (ZUAIS)], the Takeovers Act n. 75/15 [Zakon o prevzemih (ZPre – 1)], the Pension and Disability Insurance Act n. 102/15 [Zakon o pokojninskem in invalidskem zavarovanju (ZPIZ – 2)], the Book Entry Securities Act n. 74/16 [Zakon o nematerializiranih vrednostnih papirjih (ZNPV)]. As well as keeping an extensive list of registers, the Securities Market Agency also issues fines from the aforementioned acts in compliance with the Minor Offences Act.

The insurance market is regulated and supervised by **the Insurance Supervision Agency**, which was established under the Insurance Act [Official Gazette of the RS, No. 93/15, Zakon o zavarovalništvu (ZZavar-1)]. As a supervisory institution, its main goal is reducing and eliminating irregularities in insurance policies in order to protect the interests of policyholders and facilitate the functioning of the insurance business and its positive influence on the overall economy. Chapter 18 ZZavar gives the Insurance Supervision Agency the power to issue fines ranging from EUR 25,000 to 250,000 for small and from EUR 80,000 to 370,000 for medium sized insurance agencies, who perform various actions that do not comply with the rules set forth in the aforementioned Act.

Consumer protection and product safety issues are enforced by **the Market Inspectorate**, as stated in Article 1 of the Market Inspection Act [Official Gazette of the RS, No. 20/97, Zakon o tržni inšpekciji (hereinafter ZTI)], which gives the inspectorate the power to supervise the implementation of laws and regulations in the areas of trade, crafts, services, pricing, criteria, quality of goods and consumer protection. Enforcement powers are further established under Article 11 of ZTI, which binds every legal entity, individual entrepreneur or other natural person to withdraw from all acts that could impede the undergoing inspection. During an inspection, an inspector has the right to examine the goods, business books, business or production premises, facilities and equipment where the activity is performed, contracts, deeds and other documents, take samples and carry out investigations and any other actions that are needed to determine the material truth in matters of inspection, interrogate responsible persons and witnesses as well as review documents to determine the identity of persons.

The protection of competition on the market is supervised by **the Public Agency of the Republic of Slovenia for the Protection of Competition** which had been foreseen under Article 5 of the Prevention of Restriction of Competition Act [Official Gazette of the RS, No. 76/15, Zakon o preprečevanju omejevanja konkurence (hereinafter ZPOmK)]. The main responsibilities of the Agency are listed under article 12 of ZPOmK and mostly consist of supervising the implementation of ZPOmK and Articles 101 and 102 of the Treaty on the Functioning of the European Union [Pogodba o delovanju Evropske Unije (hereinafter PDEU)] as well as monitoring and analysing the situations on the market that are important for the development of effective competition. It also conducts procedures and issues decisions in accordance with the law and gives recommendations to the National Assembly and the Government on general issues within its competence. The Agency also acts as a misdemeanour authority for breach of the provisions of the aforementioned Act and provisions 101 and 102 of PDEU in accordance with the law governing misdemeanours.

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

In the precriminal stage of a criminal case, the first paragraph of Article 148 of ZKP sets out the activities of the Police in connection with the detection of criminal offences. The Public Prosecutor and the Police can thus use a number of overt and even covert investigative measures, whenever a certain degree of probability is met and the Investigating Judge deems them necessary. At this stage, the Police can collect data and information that would provide sufficient grounds for criminal indictment.

The Enforcement authorities listed under 1.2 Enforcement authorities for misdemeanors, generally have administrative powers, gained from ZP - 1, ZIN, and the State Administration Act [Official Gazette of the RS, No. 113/05, Zakon o državni upravi (hereinafter ZDU -1)].

As a general rule, every time the enforcement agencies impose penalties for misdemeanors, they are bound by ZIN and in some cases, where investigative measures are allowed. In such situations inspectors have various rights, prescribed by Article 19 of ZIN in addition to the specific rights, mentioned in the specific acts, governing the agencies and their work.

During their inspections some of these rights grant them the power to inspect the premises, facilities, installations and structures, working tools, installations, objects, goods, materials, books, contracts, deeds and other documents and business documentation, as well as inspect state bodies, corporations, institutions, other organisations and communities, and private individuals. They can also inspect business books, contracts, deeds and other documents and business documentation and, when such documents are managed and stored in an electronic format, they can request the production of such documents in written form. They can also seize items, documents and samples in the name of evidence preservation. Documents can be siezed during the inspection for a maximum of 15 days, if this is necessary in order to investigate the facts of the present case, and if there are reasonable grounds to suspect violations of laws or regulations, and if this does not impede the activities of a natural or legal person. The seizure of documents issued by the inspector

must be followed by the production of a certificate of seizure. State agency documents, which are classified as confidential, may not be withdrawn.

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self-incrimination)?

The privilege against self-incrimination is a fundamental right guaranteed by the Constitution of Republic Slovenia in Chapter II, Article 29 (legal guarantees in criminal procedure), point 4: »Anyone, who is accused of committing a criminal offence, must in complete equality be ensured (also) the following rights: …that he is not obliged to speak against him or herself or his or her close ones, nor to confess guilt«. This is a procedural privilege which does not exclude the existence of an offence or liability for it or a serious form of conduct, even if the wrongful act was committed to cover up another wrongful act. The privilege against self-incrimination does not in itself guarantee a fair trial, where the accused would not be exposed to pressure or other methods and means for obtaining useful information that could potentially harm the person.[8]

The Constitution gives everyone accused of having committed a crime the right to silence (under Article 19, Paragraph 3, protection of personal freedom). It states that any arrested person must be informed of the reasons for their arrest. This must be done right away and in the person's mother tongue or in a language he or she understands. The person must also be give a written note regarding their arrest. This must be done as fast as possible. The person also needs to be informed right away that they are under no obligation to make any statements, that they have the right to immediate legal help from an attorney, whom they can choose freely. The person must also be informed about the competent authority's legal obligation to notify, at his or her request, those close to the person of their arrest.

[8] VS2004218 [2008] Supreme Court of the Republic of Slovenia [Slovenian].

The privilege against self-incrimination is further guaranteed under Article 148, Paragraph 4 of ZKP. ZKP states that if, while collecting information, the police finds sufficient reasons to suspect a person has committed or has taken part in committing a criminal act, it has the obligation to explain to the person, before it begins obtaining information from them, what is the act they are accused of and what are the grounds for suspicion. They must inform the person that they are not obliged to state anything or answer any questions. If they choose to defend themselves, they do not need to make a statement against themselves or the ones close to them. Nor are they obliged to confess guilt. They must also be informed of their right to an attorney, whom they can choose freely and who can be present at their hearing, and that everything they say will be used against them. The suspect also needs to be informed by the police, that they have the right to use their language.

The privilege against self-incrimination is given only to natural persons in accordance with, as explained in the case VS2006890, Article 29 of the Constitution which clearly limits this institute to natural persons. In her article mag. Jasmina Potrč comments the judicial decision, explaining that Article 148 Paragraph 4 of ZKP refers only of natural persons and that the linguistics are clear when the discussed Paragraph speaks of a person committing a wrongful act, because a legal person cannot be the doer or participant in an act, although it can be held responsible following ZOPOKD.

As a party to the European Convention on Human Rights, the Republic of Slovenia is also bound by Article 6 of the Convention. Article 6 ensures the right to a fair trial and although it covers the basic principles of a fair trial, it lacks an explicit statement providing the privilege against self-incrimination. In his work "Self-Incrimination and the European Court of Human Rights: Procedural Issues in the Enforcement of the Right to Silence" Mark Berger comments: "Why the framers of the Convention did not include specific language creating a right to silence… is not clear. Nevertheless, the absence…has not deterred the European Court of Human Rights from

concluding that the Convention provides equivalent protection."[9] He underlines these words by saying that the right to silence was later explicitly incorporated into the International Covenant on Civil and Political Rights.

A legal person is not entitled to the same level of information protection, there are special rules for the protection of a business secret.

The term business secret is defined in Article 39 of the Companies Act [Official Gazette of the RS, No. 65/09, Zakon o gospodarskih družbah (hereinafter ZGD-1)] as any data, for which the company decides so with a written statement. The shareholders, employees, members of company bodies and other persons who have professional secrecy must be familiar with this statement. In addition to this, a business secret also means data whose revelation to an unauthorised person would clearly have harmful effects. Partners, employees, members of the company bodies and other persons are responsible for the issuance of business secrets if they knew or should have known the data was of such nature. In accordance with Article 40 of the ZGD-1, a company determines the manner of professional secrecy and accountability of persons who have professional secrecy of the written statement mentioned afore. Information which constitutes a business secret of a company must also be protected by persons outside the company, if they knew or should know the data was a business secret. Article 38, Paragraph 2, of the ZDR-1, states: "A worker is responsible for violations, if they knew or should have known about certain data being of this nature." An employee is prohibited to share data with a third party or use it to their own benefit. Any act with which persons outside the company would try to obtain data constituting a business secret in conflict with the law is prohibited. The data defined under law as public or the information on violation of the law or good business practices are excluded from this ban and must be reported to the competent authority.

[9] Mark Berger, Self-Incrimination and the European Court of Human Rights: Procedural Issues in the Inforcemenot of the Right to Silence, 2007, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1480161>, accsesed 27 December 2016.

The protection of business secrets will be clarified by analysing the Classified Information Act [Official Gazette of the RS, No. 50/06, Zakon o tajnih podatkih (hereinafter ZTP)]. According to In article 1, the ZTP defines the common grounds for a unified system of decision making regarding, protection of and access to classified information from the labour area of state authorities of the Republic of Slovenia, which are of relevance to public safety, protection, external affairs or intelligence or safety activities of the country, and the end of secrecy od such data. It is binding for anyone who has access to data defined as secret by the ZTP.

Article 2 of the ZTP defines classified information as a fact or means from the labour area of an authority, which has relevance to public safety, protection, external affairs or intelligence or safety activities of the country, that needs to be, due to reasons defined in this Act, protected by unauthorised persons, and is in accordance with the ZTP declared as secret. Article 5 of the ZTP further states that information can only be declared as secret if it is necessary to do so for reasons of safety and if the disclosure of such information could cause harm to the safety of the country or its political or economic benefit, and refers to public safety, protection, external affairs, intelligence or safety activities of the Republic of Slovenia; systems, equipment, project plans relevant to public safety, defence, foreign affairs and intelligence in security activities of state bodies of the Republic of Slovenia; scientific, research, technological, economic and financial matters relevant to public safety, defence, foreign affairs and intelligence and security activities of state bodies of the Republic of Slovenia. A business secret is therefore an act that is defined as such by the standards defined in this act, meaning information in which a company invested its own work or money and is by it given an advantage in comparison to its competition.

The ZTP defines different levels of classified information, which determine the procedure of the safety check needed to gain access to it. Article 22.a mentions three categories: private, secret and confidential. Following article 22.f, the procedure of safety check starts on the basis of a written suggestion made by the representative of the authority mentioned under Article 2 of the ZTP.

Among those who may suggest a safety check for the authorization are the head of the body referred to in Paragraph 1 of the ZTP for persons who need the authorization for the tasks at their workplace in this body, as well as persons employed in organizations referred to in Paragraph 1 of

the ZTP; the minister responsible for the economy, for persons employed in organizations that will be granted access to classified information in order to implement public and other contracts under which they will need access to classified information of a foreign country or international organization; the National Security Authority in cases not covered in the preceding paragraphs of this article.

It is however necessary to keep in mind that Article 4 of the ZTP clearly states that the Commission of the parliament of the Republic of Slovenia for the control of the work of security and intelligence services is granted access without authorisation.

In conclusion, the privilege against self-incrimination is first and foremost a privilege of natural persons. Companies may declare some of their information as a business secret in a written statement and enjoy legal protection of secrecy of this information. However, a business secret does not stand above the duty to report crimes, which can be explained by the argument of greater good. The protection of business secrets is meant to prevent companies from experiencing the harm caused by sharing such specific information with unauthorised persons and not to create a legal loophole for hiding a crime under the blanket of a business secret. Information may therefore be withheld from enforcement authorities whenever sharing such information would lead to self-incrimination (privilege against self-incrimination) in the case of natural persons. A legal person may indeed withhold information from enforcement authorities with the aim of protecting a business secret but not if this would mean covering up an illegal act. With regard to business secrets mentioned during a court hearing, Article 294 of the Code of civil procedure [Official Gazette of the RS, No. 73/07, Zakon o pravdnem postopku (hereinafter ZPP)] allows the senate to exclude the public from the hearing or a part of the hearing for the protection of a business secret.

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

The Constitution of the Republic of Slovenia states in Article 2 that the Republic of Slovenia is a legal and social state. As a social state, Slovenia provides a system of social security, for which

employers collect certain data from employees and transfer them to designated institutions that are a part of the public sector.

Employers may gather certain personal data of employees, provided there is a legal ground allowing this. The personal data protection act demands legal grounds for any kind of collecting or usage of personal data of employees. The employer-employee relationship is one of a very uneven power distribution, which is why the laws on protection of employee data are intentionally designed to be very strict in order to prevent abuse and protect the weaker party.

A company as a legal person cannot enjoy the rights belonging to a natural person, which means that company facilities are not included in the prohibition of entering one's apartment, guaranteed in Article 36 of the Constitution of the Republic of Slovenia. Any documents found in a company office is understood as business documents by the government. An individual does however have the right and duty to be present during the investigation and highlight the border between business documents and his privacy.

The interpretation of Article 37 of the Constitution, the protection of the confidentiality of correspondence, can also not be extended to legal persons, yet the fine line between personal and business correspondence needs to remain unbreachable. We must keep in mind that business correspondence may contain elements of personal data, personal communication and data recognized as a business secret. If documents found in a company office contain any personal correspondence, the part containing the personal correspondence must be eliminated from the collected documents, as well as any personal data from employees. The handling of documents containing a business secret is explained in the government's statement the Decision[10] in which, according to the government, the communication of a business nature can be a business secret, but this cannot include the personal data of employees that they would have reason to hide.

[10] Glasilo Uradni list RS, 1519. Odločba o ugotovitvi protiustavnosti prvega stavka prvega odstavka 28. člena Zakona o preprečevanju omejevanja konkurence. Odločba o ugotovitvi, da členi 54, 56, 57, 59 in 61 Zakona o preprečevanju omejevanja konkurence niso v neskladju z Ustavo, 2013, <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/113132>, accessed 27 January 2017, [Slovenian].

The government also stresses that the authorisations of the office are determined in the way that they enable a fast enforcement of Articles 101 and 102 of the Treaty. "For the decision of the Constitutional court in this case it should not matter whether the evidence from the administrative proceedings could also be used in other proceedings…this is a matter to be decided upon by the competent courts."[11]

Article 48 of the ZDR-1 states that the personal data of employees may be collected, used and communicated to third parties if so provided under the ZDR-1 or other laws in order to exercise the rights and obligations arising from the employment relationship, bust must however be immediately erased once the legal basis for their use is no longer present. The Personal Data Protection Act [Official Gazette of the RS, No. 94/07, Zakon o varstvu osebnih podatkov (hereinafter ZVOP-1)], Article 47 (cooperating with foreign authorities), states that the national supervisory authority, within its work, cooperates with state authorities, competent authorities of the European Union for the protection of individuals during the processing of personal data, international organisations, foreign supervision authorities for protection of personal data, institutes, associations, nongovernmental organizations from the field of protection of personal data or privacy and other organisations and authorities concerning all questions relevant to the protection of personal data. According to Article 51 (extent of inspection), Paragraph 4, the inspection authority "supervises execution regulations on exporting personal data to a third country and on their transfer to foreign users of personal data". According to Paragraph 1 of Article 53 (supervisor's authority), while exercising an inspection, the supervisor is entitled to look through the documentation regarding the handling of personal data, regardless of their confidentiality or secrecy, and the exportation of personal data into a third country and transmission to foreign users of personal data. According to Article 54, Paragraph 4, the supervisor may order a ban on exporting personal data into a third country or their transmission to foreign users of personal data, if they are being exported and transmitted in violation of the law or binding international contracts.

[11] Glasilo Uradni list RS, 1519. Odločba o ugotovitvi protiustavnosti prvega stavka prvega odstavka 28. člena Zakona o preprečevanju omejevanja konkurence. Odločba o ugotovitvi, da členi 54, 56, 57, 59 in 61 Zakona o preprečevanju omejevanja konkurence niso v neskladju z Ustavo, 2013, <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/113132>, accessed 27 January 2017, [Slovenian].

10. If relevant, please set out information on the following:

10.1 Defences to the offences listed in question 2;

Being accused of committing an offence such as the ones mentioned above damages one's reputation and credibility on the market (legal person) as well as destroys their image. People are therefore inclined to defend themselves. The defence usually claims lack of evidence under the **ZKP.**

Another line of defence is rejecting the (already proved) guilt under the KZ-1.

At the very extreme end, some defence claims resort to suggesting there are no elements of an offence in one´s conduct.

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement);

There is no relevant methods of obtaining immunity from or prevention of prosecution.

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

Penalty reductions are included in Article 11 of the ZOPOKD, which states that in case where management or supervisory body after conducting the offense, for which the liability for the legal person under paragraph 4 of Article 4 of the ZOPOKD is given, voluntarily announces the offender before the offense has been detected, and immediately orders the return of unlawfully obtained pecuniary advantage or eliminates the caused damage or transmit data on fundamental responsibilities for other legal persons, then they may be exempt from punishment.

There is another option for the offender. According to Article 450 of the ZKP, defense counsel and the public prosecutor may in criminal proceedings suggest the opposite party to reach an agreement on admission of guilt of the accused. Attorney General can offer such agreement even before the court proceedings start, if there is a reasonable suspicion that the suspect has committed

a criminal offense, which will be subject to the procedure. The suspect needs to be informed about the agreement in writing with the description of the offense and the legal classification of the offense, and if he has not yet been heard, he must also be educated about his right from the fourth paragraph of Article 148 of the Criminal Procedure Act.

With the agreement, by which the accused pleads guilty for all or some of the offenses that are subject of the charge, the defendant and the public prosecutor may agree on:

- the sanction or warning, and the method of execution of the sentence;
- the resignation of Attorney General from prosecution for crimes of the accused, not covered by the recognition;
- the costs of the criminal proceedings;
- the fulfilment of any other functions.

However, the legal definition of the crime or precautions, when they are mandatory, or deprivation of assets gained through illegal activities, except for the way of the deprivation, are not subject of the agreement. However, the agreement should include the type and amount or duration of the penalty to be imposed on the defendant for the offense. In some cases, when statutory conditions apply, defendant can face only a warning sanction instead of penalties. If so, it must include all the conditions that are required under the provisions of criminal law for such sanctions. Another part of the agreement can be on costs of criminal proceedings, which can determine that the defendant is exempt from reimbursement of all or part of the costs of the criminal proceedings, which means that costs are charged into the State's budget.

The fate of the agreement on the admission of guilt falls under the court that has jurisdiction for the criminal procedure, as it will decide on it in pre-trial hearing. However, in case the agreement has been concluded at a later stage, the court will take decision at the trial. When the court is deciding on the concluded agreement according to the Article 459. č, they will mainly assess, whether the agreement is in accordance with the provision in Articles 450, 450. b and 450. c of the ZKP, and whether the admission of guilt regarding the conditions referred to in paragraph 285. c of the ZKP are met.

In case the court finds that some of the conditions from paragraph 2 of the Article 450. č is not given, or that the defendant has not fulfilled their obligations under the fifth paragraph of Article 450. c, the court will reject the agreement and continue with the procedure in the same way, as if the defendant did not plead guilty. There is no appeal on such decision.

When the court imposed a punishment, it can also mitigate it. The court can decide to levy punishment below to that prescribed by law, or even to use a milder type of punishment, when the law stipulates that the perpetrator can be punished less severely or particular attenuating circumstances apply, which justify the imposition of a reduced sentence. In case where conditions for reduction of sentence according to Article 50 are met, the court can levy punishment within these limits:

- for the offense where prescribed sentence is fifteen years in prison, it may be lowered to ten years in prison;
- for the offense where the prescribed sentence is minimum three or more years of imprisonment, it may be mitigated to imprisonment of one year;
- for the offense where prescribed sentence is minimum one year in prison, it may be mitigated up to one month in prison;
- for the offense where prescribed sentence is imprisonment, but it does not specify its minimum, the court can instead impose a fine.

According to the second paragraph of Article 51 of the KZ-1, the perpetrator, who, according to the law, which regulates criminal procedure, confesses his or her guilt, when the first statement on the indictment act, in which for such case the reduction of sentence is proposed, or they confess their guilt in an agreement with prosecutors, the court can levy punishment within these limits:

- if the lowest punishment prescribed for the offence is ten or more years of imprisonment, it may be lowered up to three years in prison;
- if the minimum penalty prescribed for the offense is three to ten years in prison, it may be lowered up to three months in prison;
- if the minimum penalty prescribed for the offense is less than three years in prison, it may be mitigated up to one month in prison;

- if the minimum penalty prescribed for the offense is less than one year in prison, the court may impose a fine instead.

In some cases the court can even remission of sentence. According to Article 52, the court can do so, where the law specifically states so. Where the court has the right to forgive the sentence, it can also mitigate it without limitations prescribed for reduction of sentence.

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance)

In Slovenia also exists means of costs mitigation but not with a view to reduce crime and there are also no relevant studies which would suggest a direct effect of tax incentives to reduce economic crime.

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

[In the field of economic criminal law, in Slovenia we can constantly see improvements in suppression of criminal law. Firstly, National Assembly adapted in October 2012 the resolution on the national program of prevention and suppression of crime for the period 2012-2016.[12] Fundamental objective of the resolution is to ensure the safety of people and to achieve social welfare. Resolution refers to the 13 areas of crime prevention, and among them there is also the prevention of economic crime. The result of a resolution based on the report on the

[12] Glasilo Uradni list RS, 3293. Resolucija o nacionalnem programu preprečevanja in zatiranja kriminalitete za obdobje 2012–2016 (ReNPPZK12-16), 2012, <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/110390>, accessed 8 February 2017, [Slovenian].

implementation of resolution 2014 is positive so far. Resolution contains 37 strategies and programs of which most of them were already realized, as shown in the annual report of.[13]

Secondly, this year Slovenia enforced the legal basis for the establishment of specialized courts for the prosecution of banking crime. Ministry of Justice has already begun preparations. The legal basis will be ready by the first half of 2018. Creation of a specialized court is one of the key measures that would publicly demonstrated a common desire to reduce banking crime. Slovenia's proposal for the establishment of specialized courts for the prosecution of banking crime set clear guidelines and goals for the future.[14]

Thirdly and fourthly, similar activities for the prosecution of economic crime in the past have already taken place in the field of police and prosecutor. National Bureau of Investigation was established in Slovenia in 2010. The starting point in designing the concept of National Bureau of Investigation was when we noticed that in the field of detection and prosecution of economic crime we were not effective enough. It is an authority for the fight against economic crime, thus its detection.[15] In November 2011, in Slovenia began to operate Specialized Prosecutor's Office - the enforcement of the State Prosecutor Act [Official Gazette of the RS, No. 58/11, Zakon o državnem tožilstvu (ZDT-1)]. Specialized Prosecutor's Office of the Republic of Slovenia has jurisdiction to prosecute offenders in an organized classical and economic crime, terrorism, corruption offenses and other crimes whose detection and prosecution require special organization and competence of the entire national territory.[16] Due to the good results of the National Bureau of Investigation and the Specialized Prosecutor General's Office, they will continue to pursue its

[13] Vlada Republike Slovenije, Poročilo o izvajanju Resolucije o nacionalnem programu preprečevanja in zatiranja kriminalitete za leto 2014, 2015, <http://imss.dz-rs.si/imis/78453411ed6b3d519e95.pdf>, accessed 8 February 2017, [Slovenian].
[14] Katja Svenšek, Dnevnik, Dobili bomo tudi specializirano sodišče za gospodarsko-bančni kriminal, 2016, <https://dnevnik.si/1042754042/slovenija/dobili-bomo-tudi-specializirano-sodisce-za-gospodarskobancni-kriminal>, accessed 9 February 2017, [Slovenian].
[15] Patricija Bukovinski, Katrin Podgorski, Varen Svet, Nacionalni preiskovalni urad (NPU), 2015, <http://www.varensvet.si/nacionalni-preiskovalni-urad-npu/>, accessed 8 February 2017, [Slovenian].
[16] Vrhovno državno tožilstvo Republike Slovenije, SPECIALIZIRANO DRŽAVNO TOŽILSTVO REPUBLIKE SLOVENIJE, <http://www.dt-rs.si/specializirano-drzavno-tozilstvo-republike-slovenije>, accessed 9 February 2017, [Slovenian].

work investigating and prosecuting economic crime. The above data clearly indicates guidelines for the prosecution of economic crime in Slovenia.

With the establishment of specialized courts, prosecutor offices and similar groups, Slovenia is on a good track to reduce economic crime in the near future.

It is also necessary to point out that banks, insurance companies and SDH (Slovenian Sovereign Holding) are even committed by law to establish corporate compliance function, which is also aimed to reduce the risk of misconduct.

The arrangement of current legislation is therefore satisfying and is not expected to be changed in the next 5 years.

Furthermore, there are strong initiatives and lively activities within the non-governmental sector taking place in Slovenia. Different associations are helping develop best practices and recommendations in the field of anti-corruption and bribery (Transparency International Slovenia, United Nations Global Compact Slovenia etc.) and also in the field of general corporate compliance and business ethics, among which are The Managers' Association of Slovenia, Slovenian Director's Association and European Institute of Compliance and Ethics (EICE). These organizations aim to build an effective corporate governance by adopting different guidelines and recommendations (i.e. Slovenian Guidelines on Corporate Integrity [17], Slovenian Corporate Governance Code for Listed Companies[18] etc.), by educating and contributing to the development of good practices. EICE, which is an association of compliance professionals, goes even further in its mission to develop corporate compliance function and compliance profession according to the best international standards and practices. EICE has therefore ensured official Slovenian

[17] Slovenska korporativna integriteta, SLOVENSKE SMERNICE KORPORATIVNE INTEGRITETE, <http://www.korporativna-integriteta.si/Smernice/Smernice(SSKI).aspx>, accessed 9 February 2017, [Slovenian].
[18] Slovenian Directors' Association, SLOVENIAN CORPORATE GOVERNANCE CODE FOR LISTED COMPANIES, <http://www.zdruzenje-ns.si/uploads/bookstore/dokumenti/Slovenian_CG_Code_for_listed_companies_2016.pdf >, accessed 9 February 2017, [Slovenian].

translation of the ISO 19600:2014 Compliance management systems – Guidelines, has given many legislative iniciatives and will continue to endeavor to integrate compliance function in systemic laws such as Companies Act [Official Gazette of the RS, No. 65/09, Zakon o gospodarskih družbah (hereinafter ZGD-1)]).

These activities have immense preventative value, since they are helping and will help reduce the risk of violations such as corruption, bribery, fraud and money laundering through time and in the future. On the other hand, even if these situations will still occur, compliance function within organizations and educated professional community should help regulators, law enforcement and judicial authorities understand, what are the standards of conduct, what are the compliance risks, how organizations implement required supervision, do they have effective compliance programs in place etc., in order to more effectively establish whether there was a misconduct and what sanctions are appropriate.

Table of National Legislation

- Constitution of the Republic of Slovenia (Official Gazette of the RS, No. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121,140,143, 47/13 – UZ148, 47/13 – UZ90,97,99 and 75/16 – UZ70a) [Ustava Republike Slovenije].
- Criminal Code (Official Gazette of the RS, No. 50/12 - official consolidated text, 6/16 - corr., 54/15 and 38/16) [Kazenski zakonik (KZ–1)].
- Liability of Legal Persons for Criminal Offences Act (Official Gazette of the RS, No. 98/04 - official consolidated text, 65/08 and 57/12) [Zakon o odgovornosti pravnih oseb za kazniva dejanja (ZOPOKD)].
- Minor Offences Act (Official Gazette of the RS, No. 29/11 – official consolidated text, 21/13, 111/13, 74/14 – decision of the Constitutional Court, 92/14 – decision of the Constitutional Court and 32/16) [Zakon o prekrških (ZP–1)].
- Integrity and Prevention of Corruption Act (Official Gazette of the RS, No. 69/11 – official consolidated text) [Zakon o integriteti in preprečevanju korupcije (ZIntPK)].
- Prevention of Money Laundering and Terrorist Financing Act (Official Gazette of the RS, No. 68/16) [Zakon o preprečevanju pranja denarja in financiranja terorizma (ZPPDFT–1)].
- Criminal Procedure Act (Official Gazette of the RS, No. 32/12 – official consolidated text, 47/13, 87/14, 8/16 – decision of the Constitutional Court, 64/16 – decision of the Constitutional Court and 65/16 – decision of the Constitutional Court) [Zakon o kazenskem postopku (ZKP)].
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- Cooperation in Criminal Matters with the Member States of the European Union Act (Official Gazette of the RS, No. 48/13 and 37/15) [Zakon o sodelovanju v kazenskih zadevah z državami članicami Evropske unije (ZSKZDČEU-1)].
- Employment Relationship Act (Official Gazette of the RS, No. 21/13, 78/13 – corrected, 47/15 – ZZSDT, 33/16 – PZ-F and 52/16) [Zakon o delovnih razmerjih (ZDR – 1)].

- Banking Act (Official Gazette of the RS, No. 25/15, 44/16 – ZRPPB and 77/16 – ZCKR) [Zakon o bančništvu (ZBan–2)].
- Code of Conduct for Civil Servants (Official Gazette of the RS, No. 8/01) [Kodes ravnanja javnih uslužbencev].
- Insurance Act (Official Gazette of the RS, No. 93/15) [Zakon o zavarovalništvu (ZZavar-1)].
- Market Inspection Act (Official Gazette of the RS, No. 20/97) [Zakon o tržni inšpekciji (ZTI)].
- Prevention of Restriction of Competition Act (Official Gazette of the RS, No. 36/08, 40/09, 26/11, 87/11, 57/12, 39/13 – decision of the Constitutional Court, 63/13 – ZS-K, 33/14 and 76/15) [Zakon o preprečevanju omejevanja konkurence (ZPOmK-1)].
- Treaty of the Functioning of the European Union (version, UL C 326, 26 October 2012) [Pogodba o delovanju Evropske Unije (PDEU)].
- State Administration Act (Official Gazette of the RS, No. 113/05 – official consolidated text, 89/07 – decision of the Constitutional Court, 126/07 – ZUP-E, 48/09, 8/10 – ZUP-G, 8/12 – ZVRS-F, 21/12, 47/13, 12/14, 90/14 and 51/16). [Zakon o državni upravi (ZDU-1)]
- The Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette of the RS (June 13 1994) MP, No.7-41/1994 (RS 33/1994)) [Evropska konvencija o varstvu človekovih pravic in temeljnih svoboščin].
- Companies Act (Official Gazette of the RS, No. 65/09 – official consolidated text, 33/11, 91/11, 32/12, 57/12, 44/13 – decision of the Constitutional Court, 82/13 and 55/15) [Zakon o gospodarskih družbah (ZGD-1)].
- Classified Information Act (Official Gazette of the RS, No. 50/06 – official consolidated text, 9/10 and 60/11) [Zakon o tajnih podatkih (ZTP)].
- Civil Procedure Act (Official Gazette of the RS, No. 73/07 – official consolidated text, 45/08 – ZArbit, 45/08, 111/08 – decision of the Constitutional Court, 57/09 – decision of the Constitutional Court, 12/10 – decision of the Constitutional Court, 50/10 – decision of the Constitutional Court, 107/10 – decision of the Constitutional Court, 75/12 – decision

of the Constitutional Court, 40/13 – decision of the Constitutional Court, 92/13 – decision of the Constitutional Court, 10/14 – decision of the Constitutional Court, 48/15 – decision of the Constitutional Court and 6/17 – decision of the Constitutional Court) [Zakon o pravdnem postopku (ZPP)].

- Slovenian Sovereign Holding Act (Official Gazette of the RS, No. 25/14) [Zakon o Slovenskem državnem holding (ZSDH-1)].
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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction.

When talking about anti-bribery, corruption, fraud or anti-money laundering, it should be pointed out that in Spain there is no a specific text body or law exclusively focused on bribery and corruption. Conversely, the regulation of these issues can be found in different articles of several laws, although the main text body is the Spanish Criminal Code (SCC).

Moreover, it also should be noted that Spain was one of the latest countries in the recognition, incorporation and regulation of anti-bribery measures. It was in 2010 when our SCC was amended in order to introduce the new provisions on public and private corruption, the bribery of foreign public officials and, for the first time, it was recognised the responsibility of the legal entities. However, the OECD's 2013 report called for a quickly reform since almost 13 years after[1] the entry into force of the Convention on Combating Bribery of Foreign Public Officials, no individual or company had been prosecuted or convicted.[2] Therefore, the CC was not in line with the Convention and the Criminal Code had to be revised again in 2015.[3]

As noted above, the main text body that regulates theses issues is our Criminal Code. In any case, it should be pointed out that there is not a corruption crime *per s*e regulated in our legislation. Instead, the SCC regulates different conducts encompassed within "corruption". Those can be divided into two separate categories, distinguishing between the private and the public sector.

On the public sector, it can be pointed out the follow offences, referred to government contracting fraud:

i. influence peddling (arts. 428 to 429 SCC);
ii. misappropriation of public funds (Articles 432 to 433);

[1] Commission, 'EU Anti-Corruption Report' COM (2014) 38 final, Annex 9.
[2] Indeed, their responsability was reconignsed by the CC but the way in which legal entities should respond was not clear at all; further; therefore, their responsability was more theorical than practical.
[3] It was modified by means of Organic Law n. 1 (amending the Organic Law 10/1995, of 23 November, of the Criminal Code) 2015 [por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal].

iii. fraud and illegal levies (Articles 436 to 438);

iv. negotiations and activities forbidden to public officials and breaches of trust in the performance of their duties (Articles 349 to 442); and

v. bribery of government officials (Articles 419 to 422).

On the private sector (Art. 286 bis), the offences related to corruption were introduced for first time by the Organic Law n.5 of 22 June 2010,[4] which added the Article 286 bis –and which was subsequently modified by the Organic Law n.1 of 30 March 2015. This provision distinguishes between the active and passive corruption and it also foresees these offences in sports. Moreover, the SCC contains a Section on "corruption between private parties", which punishes these conducts when they occur in the private sphere. In this sense, Article 286 bis punishes those who directly or indirectly promise, offer or provide to manager, directors, employers or collaborators of a legal entity a non-justified benefited or advantage that favours themselves or a third party.

Notwithstanding, there are other regulations on corporate entities and governance that are interesting for the purpose of the present Report. Those are:

i. Royal Decree n. 24 (on the securities market) 2015;[5]

ii. Law n.22 (on audit accounts) 2015;[6]

iii. Circular n.1 issued by the Spanish Securities and Exchange Commission (Spanish acronym «CNMV»)[7] (on the annual corporate governance report to be issued by listed companies) 2004;

iv. Order EHA/3050/2004 of 15 September on related-party transactions;

[4] Organic Law n. 5 (on the Criminal Code) 2010 [del Código Penal]. In force since 24 December 2010
[5] Royal Decree n. 4 (approving the Revised Text of the Law on the securities market) 2015 [por el que se aprueba el texto refundido de la Ley del Mercado de Valores].
[6] Law n. 5 (on audit accounts) 2015 [de auditoría de cuentas].
[7] The *Comisión Nacional del Mercado de Valores* ("CNMV") is the agency in charge of the supervion and inspection of the Spanish Stock Markets and the activities of all the participants in those markets. 'The purpose of the CNMV is to ensure the transparency of the Spanish market and the correct formation of prices in them, and to protect investors. The CNMV promotes the disclosure of any information required to achieve these ends, by any means at its disposal; for this purpose, it uses the latest in computer equipment and constantly monitors the improvements provided by technological progress'.

v. Circular n. 4 issued by the CNMV (to modify the form of annual corporate governance reports) 2007;

vi. Royal Decree n. 362 (on transparency requirements in relation to information regarding issuers which securities are listed in an official secondary market) 2007;[8]

vii. Law n.3 (on the structural modification of companies) 2009;[9]

viii. Royal Decree-Law n. 2 (on sustainable economy) 2012.[10]

Apart from that, it is also interesting for the purposes of the present Report, the Law 10/2010 on Anti-Money Laundering and Counter-terrorist Financing ("AML & CTF"). This Law has been developed by Royal Decree n.304.[11] Furthermore, since 2013, a wide range of anti-corruption measures was adopted by our Parliament. It includes measures to improve the supervision of party funding through the strengthening of internal and external controls and rules on the obligations attached to exercising public office and the corresponding sanctions for breaches found. Basically, AML & CTF forces the obligated subjects to create and apply written policies and procedures regarding due diligence, information, document conservation, internal controls and evaluation and risk management procedures required to fulfil the regulation, which prevents and avoid the aforementioned conducts.[12]

[8] Royal Decree n. 362 (amending the Regulation approving the development of the Law n.35/2003, of 4 November, of collective investment institutions, approved by the Royal Decree 1307/2005, of 4 November) 2007 [por el que se modifica el Reglamento por el que se desarrolla la Ley 35/2003, de 4 de noviembre, de instituciones de inversión colectiva, aprobado por Real Decreto 1309/2005, de 4 de noviembre].
[9] Law n.3 (on the structural modification of companies) 2009 [sobre modificaciones estructurales de las sociedades mercantiles].
[10] Royal Decree n. 2 (on sustainable economy) 2012 [de saneamieno del sector financiero].
[11] Royal Decree n. 304 (approving the Regulation on the Law 10/2010, of 28 April, of the prevention of money laundering and terrorist financing) 2014 [por el que se aprueba el Reglamento de la Ley 10/2010, de 28 de abril, de prevención de blanqueo de capitales y de la financiación del terrorismo].
[12] José Luis Martín, Anti-bribery & corruption: the fight goes global. Commercial Fraud Commission (AIJA Annual Congress London, 1 to 5 September 2015) <http://london.aija.org/wp-content/uploads/2015/07/National-Report-Spain-41272167-Legal.pdf>.

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

On 30 March 2015, the Spanish Parliament passed the **Organic Law 1/2015 (in force since 1 July),** which amended the Spanish Criminal Code. This Law made several changes in the regulation of the compliance and the restrict number of crimes, capable of generating the criminal liability of corporations.[13] The Italian Decree Legislative n.231 enables us to observe this approach regarding the criminal liability of legal entities.[14]

The rules regarding offences and crimes somehow take into consideration the different areas of activity that a company may operate in and the risks that can be originated. For example, a nuclear facility has areas of risk that a financial institution might not. Under the new code, it is necessary to look beyond bribery to a whole list of crimes of different nature.[15] The list of offences are not limited to areas of corporate nature such as fraud, corruption, money laundering, punishable insolvency, intellectual property or information technology damages.[16] In fact, the list of such offences also includes crimes concerning organization of the territory and town planning, trafficking of human beings,[17] crimes against the workers, prostitution or the sale of human organs.[18]

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[13] Miquel Fortuny, 'Responsabilidad penal de las personas jurídicas: atenuantes actuales y eximentes futuras', 1 February 2015, <http://www.complia.es/blog/responsabilidad-penal-de-personas-juridicas-atenuantes-actuale.html> accessed 14 February 2017 [Spanish].

[14] María Hernández, 'Spain Compliance Programs at the light of the 2015 Criminal Code Reform, 21 March 2016)<http://www.corporatecompliance.org/Portals/1/PDF/Resources/past_handouts/EuroCEI/2016/302_2.pdf> accessed 14 February 2017.

[15] Stephanie Gallagher, 'Compliance Programs at the Light of the 2015 Criminal Code Reform – Live from the 2016 ECEI', *The Compliance & Ethics Blog*, (21 March 2016) <http://complianceandethics.org/compliance-programs-at-the-light-of-the-2015-criminal-code-reform/> accessed 14 February 2017.

[16] María Hernández, 'Spanish Criminal Code Reform 2015: Corporate compliance programs', November 2015) <http://www.eversheds-sutherland.com/documents/services/global-compliance-crisis-management/Compliance__ethics_professional_Nov_15.pdf> accessed 14 February 2017.

[17] María Hernández, 'Spain Compliance Programs at the light of the 2015 Criminal Code Reform, 21 March 2016)<http://www.corporatecompliance.org/Portals/1/PDF/Resources/past_handouts/EuroCEI/2016/302_2.pdf> accessed 14 February 2017; Rafael Carrau Criado, Compliance para PYMES (1st edn, Tirant lo blanch, 2016) 104 [Spanish]; María Hernández, 'Spanish Criminal Code Reform 2015: Corporate compliance programs', 3 November 2015) <http://www.lexology.com/library/detail.aspx?g=e3dabe6e-ebc5-486b-94d3-283b3baf73c5> accessed 14 February 2017.

[18] Stephanie Gallagher, 'Compliance Programs at the Light of the 2015 Criminal Code Reform – Live from the 2016 ECEI', *The Compliance & Ethics Blog*, (21 March 2016) <http://complianceandethics.org/compliance-programs-at-the-light-of-the-2015-criminal-code-reform/> accessed 14 February 2017.

It remains unclear as to why some acts are included as offences while others are not. In fact, many experts find it surprising that criminal liability can be attributed to the legal person for cases that are unlikely to occur in a company such as those related to child pornography.[19]

Complementary to this offences of the Spanish Criminal Code it is also relevant the Organic Law n. 12 (on the repression of smuggling) 1995,[20] exactly **Paragraph 7 of Article 2** which establishes that a legal person can be responsible for this actions.[21]

Subchapter I Chapter I Title III Book I of the Spanish Criminal Code: '*On punishments and their types*', regard potential penalties. Specifically, **Paragraph 7 of Article 33** specifies all serious crimes that can be committed by legal person are deemed serious. This article contains seven different penalties:[22]

a. Fine by quotas or proportional.
b. Dissolution of the legal person. The dissolution shall cause definitive loss of its legal personality, as well as of its capacity to act in any way in legal transactions, or to carry out any kind of activity, even if lawful.
c. Suspension of its activities for a term that may exceed five years.
d. Closure of its premises and establishments for a term that may not exceed five years.
e. Prohibition to carry out the activities through which it has committed, favoured, or concealed the felony in the future. Such prohibition may be temporary or definitive. If temporary, the term may not exceed fifteen years.

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[19] Almudena Vigil, 'Los 20 delitos por los que puede ser condenada una empresa', 31 October 2014, <http://www.expansion.com/accesible/2014/10/31/juridico/1414769670.html> accessed 14 February 2017 [Spanish]; Redaction team of Noticias Jurídicas, 'Los 20 delitos por los que puede ser condenada una empresa (versión ampliada)', 1 November 2014, <http://noticias.juridicas.com/actualidad/noticias/4170-los-20-delitos-por-los-que-puede-ser-condenada-una-empresa/> accessed 14 February 2017 [Spanish].
[20] Law n. 12 (on the repression of smuggling) 1995 [de represión del contrabando].
[21] Rafael Carrau Criado, Compliance para PYMES (1st edn, Tirant lo blanch, 2016) 104 [Spanish].
[22] Carna AR, 'The Criminal Liability of Companies, An International Comparison: The Case of USA, UK, Spain and Italy', *J Civil Legal Sci Volume 4 Issue 2*, May 2015 <https://www.omicsgroup.org/journals/the-criminal-liability-of-companies-an-international-comparison-thecase-of-usa-uk-spain-and-italy-2169-0170-1000144.pdf> accessed 14 February 2017.

f. Barring from obtaining public subsidies and aid, to enter into contracts with the public sector and to enjoy tax or Social Security benefits and incentives, for a term that may not exceed fifteen years.

g. Judicial intervention to safeguard the rights of the workers or creditors for the time deemed necessary, which may not exceed five years. The intervention may affect the whole of the organization or be limited to some of its premises, sections or business units.

   The judge or Court of Law shall determine exactly the content of the intervention, and shall determine who shall take charge of the intervention, and within which regularity monitoring reports must be submitted to the judicial body in the sentence, or subsequently by ruling. The intervention may be amended or suspended at any times, following a report by the receiver and the Public Prosecutor.

   The receiver shall be entitled to access all the installations and premises of the company or legal person and to receive as much information as he may deem necessary to exercise his duties. The implementing regulations shall determine the aspects related to the exercise of the duties of the receiver, as well as his remuneration or necessary qualifications. Temporary closure of premises or establishments, suspension of corporate activities, and judicial intervention may also be agreed by the Investigating Judge as a precautionary measure during investigation of the case.

We must also mention Organic Law n. 12 (on the repression of smuggling) 1995 because **Paragraph 1 of Article 3** establishes fines proportional to the value of the goods.

In addition to all of these penalties that can be applied to the company, it is also possible to make administrators personally liable.[23]

[23] 'Compliance penal' (2016) <https://i16abogados.com/compliance/> accessed 14 February 2017.

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

First of all, it should be said that there is any specific rule in our Spanish Criminal Code that establishes who should be considered liable within a company. While the liability for the infringements committed against the Spanish Capital Companies Law and related legislation revolves mainly around the figure of the "administrator", in Criminal Law, the responsible may be any individual who can actually make decisions on behalf of the company and who participated in the irregular action through the legal person; ie. what the law requires for being criminal responsible is a *de facto* authority of the individual to take and control decisions and not a *de iure* position in the company.[24] In any case, for the purposes of the present Report, those persons are going to be considered all as "directors".

Returning to the issue at hand, as mentioned above, corporate liability was introduced very recently in Spain. Until the date, there have so far been no significant prosecutions against the companies, but, conversely, complaints against individuals of the corporate entities have become more frequent. The Article 31(1) of our Criminal Code regulates the responsibility of directors for their criminal offences. According to such provision, directors may be personally liable if their companies meet the conditions, qualities or relations required to be an active subject of the crime. In those cases, they will be responsible even if they, as individuals, do not meet the requirements mentioned. In any case, this is not an automatic liability of these individuals; their responsibility must be proved. Indeed, in accordance with the so-called *culpability principle*, objective liability is forbidden in our legal system and that is why the proof of the criminal intent is always required.[25] In fact, to be considered as a responsible of the corporate liability, under Spanish law, most crimes or infringement require the existence of consent or wilful misconduct. Notwithstanding, for some conducts, such as money laundering, negligence is enough.[26]

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[24] Francisco Muñoz Conde, *Derecho Penal. Parte Especial* (20th edn, Tirant lo Blanc 2015) [Spanish].
[25] Esteban Astarloa, 'Criminal Liability of Companies' *Lex Mundi Ltd.* (2008)
[26] Clifford Chance, 'Corporate Liability In Europe' (Clifford Chance LLP 2012) <https://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf> accessed 24 January 2017.

Furthermore, Article 31 bis, on the responsibility of the legal entities or companies and, therefore, Article 31(1) too, establishes that criminal offenses arise from a lack of "*due control*" of the company over its employees; ie the company is responsible for the actions or the omissions committed by its employees in the cases in which the society did not avoid its commitment. Thus, as stated before, criminal liability of directors only arises in those cases in which the conduct is linked to a crime for which the company may be responsible.

Nevertheless, our legislation does not attribute liability to the companies for all the conducts considered as crimes, but companies can be found guilty only for the offences in which the Criminal Code establishes specifically their possible liability. Those are the following ones: (i) fraud (Article 251 bis); (ii) bribery and corruption (Article 427 bis); (iii) money laundering [Article 302(2)]; (iv) falsification of financial information [Articles 399 bis and]; (v) punishable insolvencies (Articles 258 ter and 261 bis); (vi) the discovery and disclosure of secrets (Article 197 quinquies); (vii) offenses against environmental resources [Articles 319(4) and 328], ; and (viii) workplace mobbing (Article 318). For instance, the Spanish Criminal Code punishes those directors who incur in criminal liability for crimes arising out of their duties (e.g. for include the falsification of company information, the adoption of harmful or abusive agreements or fraudulent management).

Moreover, as a general rule, directors are jointly and severally liable to the company, the companies and third parties for any damages caused by breaches of the law, the internal regulations or their duties.[27] Eventually, directors can be responsible before the company, shareholders and third parties. But this is not a criminal liability, but a civil responsibility. Under the Spanish Capital Companies' Law directors of a company are obliged to fulfil their office, diligently and heedfully, and be properly informed about the company's ordinary business; in other words, the duty of diligent management. The company, their shareholders and creditors may eventually request for directors liability whenever they consider that directors did not act on a diligent manner.[28]

[27] Wilma Rix and Lucy Fergusson, 'A Cross-Border Guide For Group Company Directors' *Linklaters* (2014).
[28] Miguel Angel Rodríguez-Sahagún and Ricardo Noreña, 'New Spanish Criminal Liability Of Companies' (2017) <http://www.doingbusinessinspain.org/archivos/dbs_2011/ernst-young-abogados.pdf> accessed 11 February 2017.

With regard to the sanctions for this offences, the SCC regulates the liability of legal entities in its Article 31 bis, according to which, they may be held to be criminally liable both objectively (section 1) and on the grounds of fault in the supervision of its employees or negligence (section 2: "*culpa in vigilando*") and must ensure that they have suitable corporate compliance programmes. Indeed, a corporation may be exempted from criminal liability if it has a corporate compliance programme for the prevention of crime. The legal framework of the exemptions is laid down in Article 31 bis 2 SCC, which requires the following conditions:

1. The Board of Directors, prior to the perpetration of the crime, should adopted and implemented an internal model suitable to prevent the offences committed;
2. The supervision of the function of the model should be entrusted to a supervisory body with independent powers of initiative and control;
3. The individual authors of the crime have fraudulently eluded the organisation and prevention model;
4. The supervision body has not omitted or neglected its monitoring, supervision and control duties.

The requirements that the compliance programme should meet are found in Art. 31 bis 5.

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

The Spanish Supreme Court[29] defines extradition as a mechanism by which one State requires another to surrender a person (the "**extraditee**") who may have committed a criminal offense. A state can request an extradition to either prosecute the extraditee or to fulfil a court order issued against the extraditee by the courts of the requesting State. The process may follow rules agreed in advance between the two states (the "**requesting state**" and the "**requested state**"), which can

[29] *851/2012* [October 24, 2012] Supreme Court of Spain. La Ley 162472/2012 [Spanish].

be found either in treaties or in national legislation. Thus, the extradition mechanism becomes an essential tool in ensuring the effectiveness of international cooperation in criminal matters.

Regarding the violation of compliance rules as a basis for extradition, the United Nations Convention Against Corruption (hereinafter referred to as **the UNCAC**), which is a landmark international anti-corruption treaty adopted by the UN General Assembly in October 2003, contains articles relating to the international cooperation and, specially, to the extradition. The UNCAC is unique because of its worldwide coverage and the extent of its provisions. It provides both mandatory rules and recommendations that serve as framework standards that will be adopted by state parties' (countries that have ratified the Convention) respective national legislations. Article 44 of the UNCAC, setting the extradition regulation that shall apply to offences established in accordance with this Convention, may apply to criminal offences such as bribery of national or foreign public officials, embezzlement, misappropriation or other diversion of property by a public official, trading in influence, abuse of functions, and illicit enrichment among others.

Article 44 states that each state party shall adopt such legislative and other measures necessary to establish the extradition regime. Therefore, the potential bars to extradition of an individual will depend on the rules provided by the domestic law of the requested state and also by any treaty containing extradition provisions between the two States involved.[30] Each state party can exercise a little discretion in applying the conditions regarding the minimum penalty requirement for extradition. Furthermore, requested state party has limited grounds upon which they may refuse extradition.

Under the Spanish legal system, there are two types of regulatory sources that contain the requirements and limitations of the extradition of an individual. On the one hand, those restrictions are contained in treaties ratified by Spain and, therefore, are agreed among two or more States. [31] On the other hand, in the absence of an existing treaty between the requesting and the

[30] Article 44.8 of the UNCAC.
[31] In the event that the requesting State is a Member State of the European Union, it is applicable the Council Framework Decision 2002/584/JHA of 13 June 2002, on the European arrest warrant and the surrender

requested States, the **Passive Extradition Law, n. 4/1985, enacted on 21st March 1985**[32] (hereinafter referred to as PEL) will be applied.

The potential bars to extradition of an individual adopted by the Law are the following:

- Principle of mutual recognition or double criminality. This means that there will be an action defined as a crime in both the requesting and the requested state statutes when the petition for extradition is sustained.
- Principle of specialty.[33] The extradition granted has its own scope, which is limited to the prosecution of the offence that is the object of the extradition. Except in the event where the State that acceded to the extradition consents to an extension of the effects to other offences, the extradition request cannot be extended in scope to include other offences that are not the object of the extradition.
- Principle of exclusion of political and military offences.[34] Acts of terrorism, crimes against humanity provided for by the Convention on the Prevention and Punishment of the Crime of Genocide and the attempt against the life of a Head of State or his family are offences excluded from extradition procedure's scope.
- Principle of exclusion of people with the Spanish nationality.[35] Spain does not allow the extradition of nationals or foreigners for crimes that fall under the jurisdiction of the Spanish Courts, according to national legislation.
- Principle of legality. The extradition request shall be based on an explicit regulation or, at minimum, its justification shall be clearly indicated in the treaties or legislations.
- Principle of "*non bis in idem*".[36] If the requested person has already been tried or is being tried in Spain for the same findings and offences, it is forbidden to accept the extradition because it would entail an infringement of the "*non bis in idem*" rule.

procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision. In Spain the content of such European Decision is legally adopted by art. 34 ff. of the Mutual Recognition of Judgments on Criminal Matters within the European Union Law, n. 23 2014.

[32] Law n. 4 (on Passive Extradition) 1985, [de extradición pasiva].

[33] Article 21 of PEL.

[34] Article 4 of PEL.

[35] Article 3 of PEL.

[36] Article 4 of PEL.

In the event of a court decision accepting the passive extradition, the government of Spain is not bound by the content of the court decision[37]. On the basis of the foregoing, the government has the prerogative to decide whether to hand over the alleged offender to the requesting state or to deny the request[38]. The reasons for the extradition denial shall be the reciprocity between both states involved, security reasons, public order or other Spain essential interests. In addition, whether or not a government rejects or accepts an extradition request is a political decision excluded from judicial review. As a result of this fact, the material content of the decision cannot be appealed[39].

5. Please state and explain any:

5.1 Internal Reporting Processes

5.1.1 Introduction

The implementation of internal channels is a very new practice in Spain, since it is a country that lacks a real Compliance tradition. In fact, there is no legal provision that foresees, as a mandatory obligation, the employment of such means as a mandatory obligation. After the new amendment of the Spanish Criminal Code that established criminal liability for legal persons, the adoption of a reporting channel is a mechanism for companies to result exempted from such liability in case of infringement of the law. For this reason, the internal reporting processes are designed by the companies on a voluntary case by case basis and, in general, we can say that the treatment of the complaints is most of the times rather opaque.[40]

According to a study conducted in Spain in 2014,[41] the means of detection made available to employees, suppliers, and third parties are one of the most effective methods of discovering

[37] To read about the competence of the Government in the decision of passive extradition and its relation with the Courts of Justice; *Appeal n. 123/2004* [September 20, 2005] Supreme Court of Spain, La Ley 1904/2005 [Spanish], and *Appeal n. 107/2005* [November 07, 2006] Supreme Court of Spain, La Ley 135396/2006 [Spanish].
[38] Article 6 of LEP.
[39] *Appeal n. 142/2010* [May 13th, 2011] Supreme Court of Spain, RJ\2011\4346 [Spanish].
[40] José Luis Goñi Sein, *Systems of internal reporting of irregularities («Whistleblowing»), Business ethics and codes of conduct* (1st edn, La Ley 2011).
[41] Survey on fraud and economic crime 2014 Results in Spain, available at https://www.pwc.es/es/publicaciones/gestion-empresarial/assets/encuesta-fraude-economico-2014.pdf, accessed 5 February 2017

crimes. The survey revealed that both the internal and external reporting means were the most efficient at detecting economic offences, with a percentage of 22,6% of the total accomplishment (ie success rate), comparing to a 21,2% European rate and a 23,3% global rate. For this reason, the internal channels are one of the most suitable tools implemented in the companies for the detection and prevention of frauds.

5.1.2 Mandatory Reporting

Although the Spanish legislation foresees the general legal obligation of any person to report criminal acts, there is no provision obligating workers to inform their superiors when they witness criminal offences in a company.[42] This duty will depend, therefore, on the content of each Compliance programme and the consequences will be those provided therein (*i.e.* by the Compliance programme), but they will be mostly limited to the labour relations. However, the case law has restrained its possible effects to persons directly related to functions of responsibility in the field of compliance.[43]

On the other side, there is no direct legal protection for workers who decide to release information which could trigger an internal investigation.[44] The labour legislation only grants certain express prerogatives to the legal representatives of workers,[45] such as the right of not being discriminated against in their economic or professional promotion, precisely because of the performance of their representation, which could serve as a cover to provide protection in cases of complaints of

[42]Beatriz García Moreno and Axel-Dirk Blumenberg, *Responsability of Companies and Compliance. Prevention, detection and penal reaction programmes.* (1st edn, 2014).
[43] In Judgment of the Superior Court of Justice of Catalonia of 15 February 2010, the Court considered as fair the dismissal of a person in charge of the observance of compliance with the rules and who did not inform the Management Board about representation expenses incurred by the Director-General, which were exorbitant and unfounded. Or Judgment of the Superior Court of Justice of Zaragoza, 6 March de 2013 about the fair dismissal of the Chief Financial Officer for not informing the Compliance Officer immediately about offences against corruption and use of privileged information.
[44] Even less conceivable is the existence of an economic reward, as it happens in countries such as the United States, where the whistle-blower receives a percentage of the fine imposed to the company.
[45] 'The labour legislation only grants certain express prerogatives regarding worker's rights, such as the right of freedom from discrimination in their economic or professional promotion, precisely because their performance could influence levels of protection in cases of irregularities.' From a legal point of view, in Spain, the legal representatives of workers are not workers. Conversely, they are workers chosen by their colleagues to represent them before the Board. Eg: from 100 workers, 2 of them are appointed to be the legal representatives of the other 98.

irregularities. Nonetheless, the right of workers not to suffer retaliation has been established by the Courts who considered improper dismissals on the basis of a report of irregularities in their place of work.[46]

5.1.3 Investigations

A routine inspection of the company, an inspection carried out by the administrative authorities or even the initiation of a judicial proceeding in which there is evidence of a possible irregularity, may lead to internal investigations. In Spain, this is due to an economization of the criminal process, where the private enforcement is essential for detecting potential irregularities. The advantages are the reduction of costs for the judicial authority and lower penalties for the legal person. However, some disadvantages related to the protection of the rights of the employees or to the basic guarantees of criminal investigations required by the Constitution may arise, which can be not taken into consideration by the company when investigating its own problem (there is a conflict of interest) when the investigator is the company and not the judicial authority, considering the lack of regulation in this field.[47]

Taking account of the legal deficiency in this matter, and in response to a written request, the Spanish Data Protection Agency issued in 2007 a Legal Report in which analyses the requirements a compliance internal reporting process needs to meet in order to be able to display all its effects or results. We can summarize them as it follows:

- It is necessary that all the employees had been informed about the existence of the reporting channels, its functioning, and the guarantee of confidential data regarding the reporting person. Furthermore, the Data Protection Agency recalls the fact that, according to the Law on Data Protection, the information must be channelled through the corresponding labour contracts under data protection laws. As some critics have indicated, this means that an

[46] Judgments of the Constitutional Court, like 198/2001, 5/2003, 55/2004, 87/2004 have recognized the right of protection of employees, as a corollary of the right of indemnity, foreseen by the article 24.1 of the Spanish Constitution.
[47] Albert Estrada i Cuadras, Mariona Llobet Anglí, *Rights of the workers and duties of the entrepreneur: conflict in the internal business research*, available at http://www.umayor.cl/revista-perspectiva-penal-actual/derechos-de-los-trabajadores-y-deberes-del-empresario-conflicto-en-las-investigaciones-empresariales-internas/, accessed 9 February 2017.

internal channel acquires legitimacy through the corresponding labour contracts. As some critics have indicated, this means that an internal channel acquires legitimacy through the incorporation into the contract of the main characteristics of the reporting process, with exclusion of other means, such as unilateral actions or collective bargaining.

- Every employee can be the reporting or the reported person, and the internal procedure will take place by phone or in person.
- As a general principle, can only have access to the data the Compliance Counter and the persons necessary for the investigation of the reported facts.
- The whistleblowers must identify themselves, although their personal data will be duly respected, which implies that it will be kept confidential at all stages of the process and that, in particular, will not be disclosed to third parties, to the reported person or to the hierarchical superior of the employee. Once the complainant is identified, disciplinary measures may be taken in cases of false or malicious complaints.
- The complainant shall be informed by the person in charge of the file, within a period of 3 months counted from the time of registration of the complaint in an express, precise and unequivocal manner of the treatment of the complainant's data as well as its rights and obligations under Article 5.1. of the Organic Law on Data Protection.[48]
- The data will be cancelled within a maximum period of 2 months after the end of the investigations if the facts had not been proven. In the event of criminal actions, the data will be kept as long as it is necessary for the company to exercise its rights in court.

5.1.4 Sanctions

The Directive Board, having broad autonomy over the matter, establishes fines and disciplinary sanctions for non-compliance with the internal rules of the company. However, the regulatory principles of the administrative and labour process require that the catalogue of sanctions must be established according to the responsibilities that are assumed in order to comply with the risk

[48] The article refers to the rights of persons required to provide personal information. Among the rights listed, it is worth highlighting the right to be informed about the mandatory or optional obligation of answering the questions posed to them, and the consequences of refusing to contribute to the investigation.

prevention measures. There must be, in this sense, a clear correlation between the obligations and standards of conduct required and the corresponding actions or behaviours constituting a sanction. There is no possibility open for a generic sanction system. In the Spanish legal framework, the collective agreement is the ordinary source of regulation of the sanctioning system.

5.2 External Reporting Requirements

The agency in charge of supervising and inspecting the Spanish Stock Markets issued in 2008 a document requiring listed companies to inform the regulator about any suspicious economic operations related to abuse of the market, privileged information and market manipulation. Furthermore, the Spanish Unified Code of Good Governance of Listed Companies establishes the obligation for this type of company to issue an annual corporate governance report.[49]

6. Who are the enforcement authorities for these offences?

6.1 Structure of the Supervisory Body

The existence of a person in charge of ensuring Compliance with the legal norms within a company is foreseen by Article 31bis SCC, which establishes as a requirement for the liability exemption to be applied that the Compliance Programme must be managed by a bound person:

"[…] the supervision of the operation and compliance with the prevention model implemented had been entrusted to a body of the legal person with autonomous powers of initiative and control, or to a body who has been legally entrusted with the function of supervising the effectiveness of the internal controls of the legal person".

From the *chapeau* of the article we can point out two means of control. The first one refers to persons who hold important powers, such as executives who can act with some independence vis-

[49] Notice of the Spanish Supervisor of the Stock Markets (CNMV) 6/2009, of 9 December, on internal control of the management companies of collective investment institutions and investment companies and Notice 1/2014, of 26 February, on the requirements of internal organization and Control functions of entities providing investment services.

à-vis the Board and the company as a whole. The second one refers to certain sectors where the legislation has been more expressive and directly established the body in charge of the supervision. This is the case, for example, of the Recommendation 42 of the Code of Good Governance of Listed Companies issued by the CNMV in 2015.[50] It requires the audit commission "to establish and supervise a mechanism that allows employees to communicate, on a confidential basis and, if it is possible and considered appropriate, anonymous, irregularities of potential importance, especially financial and accounting, that they notice within the company". This way, a more transparent and effective mechanism can be implemented, by avoiding conflicts of interests and ensuring that the supervision is warranted not by managing directors, who, actually can pass on legal responsibility to the company for acts done by themselves, but by specialists.[51]

In the case of small companies, such as those who were able to present abbreviated profit and loss accounts in cases provided by the legislation, the supervisory tasks can be undertaken by the administrative body. Nevertheless, in circumstances not foreshadowed by legislation,[52] it is for each company to decide what internal structure the supervision mechanism requires according to its needs and characteristics.

On the other hand, it is possible the outsourcing of such supervision tasks,[53] but that will not mean the transfer of the liability of the Directors and Managers to the new supervisory body. Furthermore, it must be borne in mind that the proper design and the correct functioning of the programme will still correspond to the managing body of the company.

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[50] Code of Good Governance of Listed Companies issued by the CNMV on 24 February 2015.
[51] The members of the audit commission must be non-executive directors appointed by the Board, two of whom shall be independent- can act independently of the managing body and shareholders-, and one of them shall be appointed taking into account their knowledge and experience in accounting, auditing or both. For more information, see art 529 quaterdecies of the Spanish Code Regulating Capital Companies.
[52] In January 2017, has been approved the Spanish Standard Project nr. 19601 on Criminal Compliance Management Systems, in conformity with the international standardization process ISO 19600 on Compliance Management Systems and ISO 37001 on Anti-Bribery Management Systems, which will provide homogeneity between management systems for Compliance programmes. The final version is expected to be published in March.
[53] However, some scholars insist in recalling the fact that the legislator, although not expressly forbidding outsourcing, it does refer to "a body of the legal person". An example of a company that combines both internal and outsourcing means is KPMG Spain, who provides a Spanish phone number for complaints but also a hotline whistle-blowing application managed by the Canadian Company Clearview Strategic Partner. See https://home.kpmg.com/es/es/home/about/linea-etica.html, accessed 9 February 2017.

6.2 Functions

The tasks conferred to the Compliance Officer concern the programme administration, which consists of the supervision of the programme and the staff bound to it, the provision of all the necessary information, and the training of the Executive Heads and employees of the company about the existence, content and revisions of the programmes implemented. Besides the supervisory function, they can also be entrusted to detect offences once they have compromising information, as a result of other data or business policy decisions. Furthermore, the Prosecution Office expressed in a in a non-binding Notice issued in 2016[54] the opinion that 'the Compliance body must participate in the elaboration of risk management and management models and ensure their proper functioning by establishing appropriate systems of auditing, monitoring and control'.

6.3 The Secretary of the Board of Directors

An additional supervisory figure is the Secretary of the Board of Directors, to whom the article 529 *octies* of the Law regulating capital companies grants the task of ensuring that the actions of the Board of Directors observe the applicable legislation and are in compliance with the Articles of Association and other internal regulations.

This provision necessarily took into account that, unlike other legal frameworks such as the German one that has a two-tier board of directors[55], the Spanish framework is based upon a horizontal relation of the *Consejeros* of a company. Therefore, it was necessary to entrust someone close to the Board with supervisory tasks that could provide a critical assessment before, during, and after its performance.[56]

[54] Notice 1/2016 on the criminal liability of legal persons in accordance with the reform of the Criminal Code, in compliance with Organic Law n. 1 on the Criminal Code 2015, cited before.
[55] The management board called *Vorstand* and the supervisory board called *Aufsichtsrat.*
[56] José Salvador Esteban Rivero, *The secretary of the board of directors and the compliance officer: Filias and phobias in the normative compliance,* available at http://www.elderecho.com/tribuna/mercantil/secretario-administracion-compliance-officer_11_949180002.html, accessed 9 February 2017

6.4 Criminal liability of the Compliance Officer

Paragraph (c) of the already mentioned Article 31 bis foresees the possibility of the Compliance Officer transferring legal liability to the company. [57] The circumstance under which this responsibility can be triggered will certainly be shaped by the Courts who, given the recent implementation of the mechanisms of Compliance, have not yet had the chance to rule on this matter. In any case, it is important to bear in mind that, according to the Spanish legal framework, differences between wilful and negligence must be made. While a deviation from the external and internal rules committed wilfully will always produce full responsibility, a different approach must be made towards negligent acts and omissions. In this case, it is necessary that the legislation directly require this modality of conduct, which implies a diminishment of the *accordion*, since most of the list of offences that could lead to their responsibility are crimes in which only their intentional modality is foreseen.[58]

6.5 External Enforcement Authorities

Once alleged economic offences within a company have been released, corresponds to the Unit of Internal Affairs of the Police and to the Judicial Commission of the competent Court (*Juzgado de Instrucción*) to further continue the investigations and report them to the Public Prosecutor (*Ministerio Fiscal*). The latter has the legal power to decide whether a criminal action or complaint should be brought before the Court for its prosecution.

In particular, and as a result of the transposition of European directives in the field of prevention of money laundering, the Spanish legislation has established other actors bound to promote compliance with the law. Indeed, AML & CTF has implemented SEPBLAC, the Financial Intelligence Unit and Supervisory Authority who reports possible offences to the Commission of Money Laundering and Monetary Infractions, chaired by the Secretary of State for the Economy. This organism will act once compromising information has been revealed by subjects bound by

[57] The article states: "In the cases provided for in this Code, legal persons shall be criminally responsible [..] for acts carried out by persons who have powers of organization and control within the company."
[58] Elena Gutiérrez Perez, *The figure of the compliance officer. Some notes about her criminal responsibility* , La Ley Nr. 8653, Sección Tribuna, 25 November 2015, Ref. D-443, Editorial Wolters Kluwer.

the law to report reasonable criminal evidence of which are aware while exercising their functions. These professionals are listed in Article 2 of the Law, and includes Financial agencies, agencies involved in granting loans or credits, real estate developers, auditors, accountants and tax consultants, notaries and property registrars, as well as attorneys -although these ones with certain limitations. Their legal obligations are further explained in its Regulation, which refers to measures of diligence and of internal control. The first ones relate to the general identification of the actual holder, this is, the person on whose behalf the economic operation is intended, and to the person who ultimately own or control, directly or indirectly, a percentage greater than 25% of the capital or voting rights of a legal person. The second ones relate to internal obligation, such as the creation of a body responsible for the implementation of the policies and procedures required by the law, the approval of an appropriate manual of prevention on the subject, and the training of employees.

Lastly, it is noteworthy to mention that the law prohibits such persons from disclosing to the client or third parties the transmission of information to the Commission's Executive Service. On the other hand, article 31 quarter of the Criminal Code provides a partial exemption of the criminal liability of the legal person when the violation has been revealed to the authorities before knowing that a proceeding was conducted against the company.

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

The enforcement agencies explained before have several powers to compel the production of information, according to the law. Among others we can find the inquiries and the taking of evidence through preliminary requests. At this point, the Court may request any kind of information to the company, be it documents, answers to the questions made by the judge (testimonial) or any other kind of potential evidence. The representative designated by the company is responsible for providing the Court with the information requested and he or she is allowed to do this accompanied by the company's lawyer. If the representative does not appear in the Court hearing, the company's lawyer will be responsible for providing the information requested instead.

The Court obtains crucial information from the statements made by the company. However, these statements must be made in certain conditions. For example, the only person who may provide the Court with the information requested is the designated representative, who will testify assisted by the lawyer of the company. We will further study this issue in the next point.

Moreover, the Court may take protective measures against the company, in order to make sure that no harm will be made to any of the parties in the process of obtaining information. The protective measures taken may be those set out in the article 33.7 of the Criminal Code, such as the suspension of its activity, the temporary closure of its premises, or the judicial intervention in order to protect the rights of the workers and creditors. The protective measures cannot be taken ex officio by the Court, but upon request from the party. All the parties affected by the protective measures will have to appear in the hearing.

The judge may also request searches in the company's premises. In accordance with the CPC Act, the searches may only take place in the physical space in which the company's activity is carried out, or in any other places in which documents and other potential evidence are kept.

Finally, there are several legal guarantees that may be carried out in order to ensure the appearance of the legal person in the Court hearing, and the obtaining of information.[59] In case the company has an unknown head office, the judge may perform a call by requisition, obliging it to appear in Court in the new term given. If the legal person does not appear within the term, it will be considered to be "rebel", allowing the judge to issue an arrest warrant against the company.

[59] Article 839 bis of the Royal Decree of 14 september 1882 approving the Criminal Procedure Code. This article was modified in order to transpose the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. The Update of the Law introduced the right to "remain silent" and the right to not make any statement that the person do not wish do.

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self-incrimination)?

After the recent incorporation of these kind of offences in our legal system, over the course of these years, one question regarding these issues have been raised. That is that, at least for the moment, the Compliance officers are not bounded by professional secrecy; so, therefore, they are obligated to speak the truth.[60] Nevertheless, as we shall see in the following pages, from the moment that a person is accused, the Spanish legal system protects him or herself against the self-incrimination through several mechanisms deriving directly from the Constitutional text.

On the one hand, in the trial, the legal person is represented by a person specially designated by itself, who will sit on the place reserved for the defendant. This person is able to speak in the name of the company that he or she is representing, without prejudice of the privilege against self-incrimination and the right to not declare itself guilty of the charges against it, to remain silent, and to have the final say in trial.

Moreover, those who have been requested as witnesses will not be able to be designated as representatives of the company. If the representative does not appear in trial, the hearing will take place in the presence of the lawyer or procurator of the company. These we can call "objective conditions" for withholding information.

On the other hand, there are also "subjective conditions" for withholding information: the questions made to the representative of the legal person and his or her statement must be in regard to the facts and the participation in them of the investigated company or any of its physical members. If it is not the case, the information obtained from those questions or statements may not be accepted by the Court.[61]

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[60] Carlos Berbell, 'La regulación del cumplimiento normativo tiene agujeros negros' *Confilegal* (12 February 2017)
[61] Noticias Jurídicas, 'La Responsabilidad Penal De Las Personas Jurídicas: Societas Delinquere Et Puniri Potest · Noticias Jurídicas' (*Noticias Jurídicas*, 2017) <http://noticias.juridicas.com/conocimiento/articulos-doctrinales/4746-la-responsabilidad-penal-de-las-personas-juridicas:-societas-delinquere-et-puniri-potest/> accessed 11 March 2017.

In any case, in Spain and specifically regarding criminal proceedings, people have the following rights of defence:

i. the right to not make any statement that the person do not wish to;
ii. the right to not make any statement against him or herself;
iii. the right to not plead guilty;
iv. the right not to answer questions; and
v. the right to declare that the person will only testify before the judge. In principle, the silent of the person cannot affect him or her; *i.e.* this decision cannot suppose a negative consequence to him or her.[62]

As mentioned before, this right of non self-incrimination –and, actually, the total of the rights of defence– is also covered by our Constitution, which guarantees the right to plead not guilty and to not self-incriminate oneself by making statements that could lead to this incrimination. The pure silence of the accused couldn't be enough to convict someone [Article 24(2) of the Spanish Constitution].

Moreover, our legal system hinges on the presumption of innocence, which is a fundamental right applicable in all legal fields where a sanction can be imposed and, as a consequence, it includes the criminal process too. The presumption of innocence must be respected in the wording of statutes and in its construction, but this right concerns mainly criminal process in which it is considered, at the same time, a rule that must be applicable to the treatment of the defendant. The right to the presumption of innocence belongs to the defendant in any case, no matter the nature or the seriousness of the crime.

[62] Articles 118 *et seq* of the Royal Decree of 14 September 1882 approving the Criminal Procedure Code.

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

Employers have the obligation to protect personal data stored in its files. That personal data includes '*any information concerning identified or identifiable natural persons*'.[63] Given the definition above and the scope of application set out in Article 2 of the **Spanish Personal Data Protection Organic Law n. 15/1999, dated on December 13th** (hereinafter "PDPOL"), the protection conferred by this law is solely granted to natural persons. Legal entities neither enjoy the highest guarantees provided in the PDPOL nor the regulations implementing the law.[64] However, courts may deal with liability claims if the use of information relating to the companies causes them any damage.[65]

An employer's data files might contain all the data obtained from their clients, suppliers, employees and third parties.

Under the PDPOL, the level of protection regarding the data collected shall differ considering the sensibility of the data concerned. The employer must take strong precautions when collecting sensitive data as defined in Article 7 of the above act (ideology, religion, health status, sexual orientation, among other personal data). In these cases, under the Spanish law, it is forbidden to create files that have the exclusive purpose of storing personal data related to any racial or ethnic origin, sexual orientation, political opinions, religious or philosophical. However, it is possible to gather such data in files that do not have this exclusive purpose –e.g. *data files of employees*.

The legal regime applicable to transferred sensitive data requires the express and written consent of the person whose data will be transferred. This consent shall be given case by case. Nevertheless,

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[63] Article 3 of the Organic Law n. 15 (on Personal Data Protection) 1999 [de Protección de Datos de Carácter Personal].
[64] Royal Decree n. 1720 (approving the Development Regulation of the Organic Law 15/1999, of 13 December, on Personal Data Protection) 2007 [por el que se aprueba el Reglamento de desarrollo de la Ley Orgánica 15/1999, de 13 de diciembre, de protección de datos de carácter personal].
[65] María José Vañó Vañó, "El acceso por los terceros a datos de carácter personal titularidad de las sociedades mercantiles" in *Tecnologías de la Información y de la Comunicación en la gestión y organización societaria*. (Universidad de Valencia, 2008).

communicating sensitive personal data to third parties is allowed if it is based on a legal obligation[66]. Accordingly, the employer shall transfer employee data to national authorities such as a police force, public prosecution service, or court of justice because of employer's legal obligation to collaborate with them[67]. Unless a special law limits it requiring a court order, the police force can access for the sole purpose of investigating criminal offences to personal (sensitive or simple) data. The Electronic and Network Communications Act[68] and the Autonomy of Patients and Rights and Obligations about Clinical Information and Documentation Law[69] contain an article that requires this judicial authorization to access to the data. There is no proscriptive authorization in case of prosecution of fraud and the obtaining of grants or subsidies illegally from public funds, even if they are at charge of EU funds.

The protection over the personal data is established in Article 6 of PDPOL. Under this article, unless otherwise provided by law, the simple consent of the person involved is required to transfer the data[70]. Such consent is not required when:

i. the data is collected by public authorities for the exercise of their functions;
ii. the data is referred to the parties of a commercial, labour or administrative contract or pre-contract relationship and is necessary for its maintenance or fulfilment;
iii. when the treatment of the data is intended to protect a vital interest of the interested party;
iv. when the data appears in sources accessible to the public;[71] and
v. when the transfer of personal data related to health is necessary to solve an emergency or to carry out epidemiological studies.[72]

[66] *55/2006* [June 7, 2006] National High Court. AS\2006\2223 [Spanish].
[67] Cfr. Article 11.2 (d) PDPOL.
[68] Law n. 25 (on the retention of data regarding telephone and Internet communications), 2007 [de conservación de datos relativos a las comunicaciones electrónicas y a las redes públicas de comunicaciones].
[69] Law n. 42 (basic regulation on the Autonomy of Patients and Rights and Obligations about Clinical Information and Documentation) 2002 [básica reguladora d ela autonomía del paciente y derechos y obligaciones en material de información y cocumentación clínica].
[70] Cfr. Article 11.2 (a) and Article 6.2 of PDPOL.
[71] Cfr. Article 11.2 (b) and Article 6.2 of PDPOL.
[72] Cfr. Article 11.2 (f) of PDPOL.

Therefore, when the petitioner is the Spanish Tax Authority or the Spanish Public Social Security Body, the employer shall transfer only the data related to the exercise of the functions and the competence of the authorities mentioned. Otherwise, any communication of personal data for commercial and marketing purposes should be clearly ruled out unless it is obtained under the explicit and documented consent of the employee.

Article 33 of PDPOL, on the **transfer of data to foreign enforcement authorities** forbids the transfer of temporary or definitive data to states that do not provide a comparable level of protection to the one given in Spain, unless the director of the Spanish Data Protection Agency previously authorises it often in return for adequate guarantees of protection. To ensure that an adequate level of protection is achieved, authorities consider numerous factors such as: the nature of the data, the purpose of collecting the data, the length of the processing, the original state and the final state, the laws and regulations in force in the third state concerned and the professional and safety measures in those states. Therefore, the process of transferring employees' data to foreign authorities may vary depending on the country where the authorities reside. Spanish legislation, since it enacted a Ministerial Order for purposes of international data transfer[73] in 1995, considers the possibility to transfer data to public authorities or private entities in other countries in which the protection of said data is not comparable to the one given in Spain.

Nowadays, Spain, as a member of European Union, can transfer data to other Member States because, in the EU, data protection rules have been harmonised. Furthermore, there is a European institution called "*European Data Protection Supervisor*"[74] that controls the EU administrations' processing of personal data so as to ensure compliance with privacy rules. It concurrently works with the national authorities of EU countries in order to achieve consistency in data protection.

Data is transferred to foreign enforcement authorities residing beyond European Union borders, e.g. to the U.S. or China. As a general rule, the transfer will be forbidden unless that the recipient

[73] Ministerial Order of February 2, 1995 approving the first list of countries with data protection of natural persons comparable to the Spanish one, for purposes of international data transfer. [*nowadays repealed*]
[74] European Data Protection Supervisor website: *https://secure.edps.europa.eu/EDPSWEB/edps/EDPS?lang=en*

State grants an adequate level of protection. In the case of E.U. and U.S., there is an agreement called "*privacy shield*" whereby the U.S. agrees to protect data transferred by European Union Member States with the same measures and obligations established for the EU countries.

Moreover, Article 34 of the PDPOL allows for different scenarios where the transfer of data to international authorities. Besides the exceptions above mentioned, the scenarios related to providing employees' data to enforcement authorities are the following:

i. when the international transfer of personal data results from the application of treaties or agreement to which Spain is a party;
ii. when the transfer is done to provide or request international judicial assistance;
iii. when the transfer is necessary for the prevention or medical diagnosis or the provision of medical care;
iv. when it refers to monetary transfers according to its specific legislation;
v. when the person concerned has given his or her consent to the proposed transfer;
vi. when the transfer is necessary or legally required for the safeguarding of a public interest. The foregoing is applicable in case of requesting information by tax or custom authorities, and
vii. when the transfer is necessary for the recognition, exercise or defence of a right in a judicial process.

In the latter cases, apart from the requirement by special laws of judicial authorisation previously explained, there are additional restrictions applicable such as: necessity, proportionality of data required by the authority compared to the result sought, and not overextend what the law requires.

10. If relevant, please set out information on the following:

10.1 Defences to the offences listed in question 2;

The reform through Organic Law 1/2015 provides companies with an exemption from criminal liability if they have effectively implemented a **compliance program** that meets the requirements

of the new Code.[75] The reform establishes the elements that the compliance program should incorporate to serve as means of corporate defence from certain crimes.[76] The applicable legislation establishes that legal entities may be exempted from criminal liability if it has a corporate compliance program for the prevention of crime. This statement ended the discussion on the matter and for the first time establishes the requirements that must be met by what the law terms an organization and management model for the prevention of crime.

In particular, the **paragraph 1 of article 31 bis** of Criminal Code differentiates between:[77]

1. Crimes committed in the benefit of the company by its legal representatives or by those with authorized decision-making authority (typically the senior management). According to the **paragraph 2 of article 31 bis** in order to be possible the exemption it is required:
    - The board of directors has, prior to the perpetration of the crime, adopted or implemented an organization, management and control model suitable to prevent offences.
    - The supervision of the model is entrusted to a supervisory body with independent powers of initiative and control, but in small and medium enterprises might be the board according **paragraph 3 of article 31 bis of our Criminal Code.**
    - The authors of the crime committed if fraudulently eluding the model.
    - The supervisory board has not neglected its duties of supervision and control.
2. Crimes committed in the benefit of the company by individuals under the management of others ("subordinated individuals") possible if the commission of the offence was possible

[75] María Hernández, 'Spanish Criminal Code Reform 2015: Corporate compliance programs', November 2015) <http://www.eversheds-sutherland.com/documents/services/global-compliance-crisis-management/Compliance__ethics_professional_Nov_15.pdf> accessed 14 February 2017.
[76] Raúl Rojas Rosco. 'Los sistemas disciplinarios en los compliance programs y su relevancia en la exención penal de la empresa', 12 January 2017<http://www.elderecho.com/tribuna/laboral/Sistemas-disciplinarios-compliance-programs-exencion-penal-empresa_11_1043305001.html> accessed 14 February 2017 [Spanish].
[77] Stephanie Gallagher, 'Compliance Programs at the Light of the 2015 Criminal Code Reform – Live from the 2016 ECEI', *The Compliance & Ethics Blog*, (21 March 2016) <http://complianceandethics.org/compliance-programs-at-the-light-of-the-2015-criminal-code-reform/> accessed 14 February 2017; 'New Penal Code Amendment'<http://depedraza.com/wp-content/uploads/2015/04/Criminal-Code-2015-amendment.pdf/> accessed 14 February 2017; María Hernández, 'Spanish Criminal Code Reform 2015: Corporate compliance programs', 3 November 2015) <http://www.lexology.com/library/detail.aspx?g=e3dabe6e-ebc5-486b-94d3-283b3baf73c5> accessed 14 February 2017.

due to a lack of surveillance and control by the decision-making authority. The **paragraph 4 of article 31 bis** of our Criminal Code establishes that the legal entity is exempted of liability if, prior the crime was committed, it did in fact adopted and effectively executed an organization and management model adequate to prevent crimes of the sort committed or to reduce significantly the risk of the commission of such crimes. [78]

But what are the specific elements of a compliance program under the new regulation? The model must incorporate the following elements according to **paragraph 5 of Article 31 bis** of our Criminal Code:[79]

- Risk assessment to identify the activities within the company that may represent a risk.
- Policies, procedures, and controls to prevent, mitigate, and/or sanction any criminal risks detected.
- Financial management system to prevent the commission of the crimes identified.
- Obligation to report any potential risks or non- compliant activities to the compliance officer/committee (for example need to implement whistleblowing channels).
- Disciplinary system to sanction any violation of the management model.
- Periodic verification and changes to the model if significant violations are discovered, or if there are significant changes in the organization, control structure, or activities of the corporation.

[78] María Hernández, 'Spanish Criminal Code Reform 2015: Corporate compliance programs' *Compliance & Ethics Professional, November 2015*, <https://www.eversheds.com/documents/global/spain/scce-cep-2015-11-Hernandez.pdf> accessed 14 February 2017.
[79] María Hernández, 'Spain Compliance Programs at the light of the 2015 Criminal Code Reform, 21 March 2016)<http://www.corporatecompliance.org/Portals/1/PDF/Resources/past_handouts/EuroCEI/2016/302_2.pdf> accessed 14 February 2017.

This article, albeit not entirely exhaustive, indicates the minimum requirements that the compliance models must possess.[80] It should be noted that Public Prosecutor's Office Circular 1/2015 of 19 June 2015 indicates that compliance programs *per se* are not a 100% guarantee.[81]

As in comparative law effective compliance programs acquires full force and importance.[82] The requirements that the above models of organization and management will have to ensure are the same as provided by Italian law (in fact, paragraph 5 of Article 31 bis of the Spanish Criminal Code provides the same requirements outlined in paragraph 2 of Article 6 of the Italian Legislative Decree 231/2001).[83] In addition, we can see in this elements the influence of the United Kingdom Bribery Law of 2010 and the United States Sentencing Guidelines of 2013.[84] However, María Hernández, head of Compliance department at Eversheds Nicea Spain, pointed several missing elements such as the due diligence of third parties (regulated in the Bribery Act) or no requirement for periodic communication (mentioned in the sentencing guidelines).[85]

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement);

As a general rule this is still **not** possible in Spain deferred prosecution agreement. However, our criminal procedure laws are being substantially amended in order to provide for a similar concept called the "principle of discretionary prosecution".

[80] 'Corporate Criminal Compliance in Spain: The reform of the Spanish Penal Code (in force since 1st of July 2015)', <http://www.escura.com/archivos/pdf/Corporate-Compliance-in-Spain-ing.pdf> accessed 14 February 2017.
[81] María Hernández, 'Spain Compliance Programs at the light of the 2015 Criminal Code Reform, 21 March 2016)<http://www.corporatecompliance.org/Portals/1/PDF/Resources/past_handouts/EuroCEI/2016/302_2.pdf> accessed 14 February 2017.
[82] 'Compliance penal' <http://www.dpglegal.es/es/criminal-compliance> accessed 14 February 2017.
[83] 'Criminal liability of legal persons'<http://www.escura.com/blog-escura/criminal-liability-of-legal-persons/> accessed 14 February 2017.
[84] María Hernández, 'Spain Compliance Programs at the light of the 2015 Criminal Code Reform, 21 March 2016)<http://www.corporatecompliance.org/Portals/1/PDF/Resources/past_handouts/EuroCEI/2016/302_2.pdf> accessed 14 February 2017.
[85] Stephanie Gallagher, 'Compliance Programs at the Light of the 2015 Criminal Code Reform – Live from the 2016 ECEI', *The Compliance & Ethics Blog*, (21 March 2016) <http://complianceandethics.org/compliance-programs-at-the-light-of-the-2015-criminal-code-reform/> accessed 14 February 2017.

In fact, one of the main modifications introduced by Organic Law 1/2015 was to suppress the misdemeanours historically regulated in Book III of the Criminal Code, although some of them are incorporated into Book II of the Code, regulated as minor offences. The reduction in the number of misdemeanours – minor offences in the newly-introduced regulations – is oriented by the principle of minimal intervention and is designed to facilitate a relevant reduction of the number of minor matters most of which may be handled through the administrative and civil penalties system.

This reform – that has been discussed in depth in the Public Prosecutor's Office Circular 1/2015 of 19 June 2015 – is completed with a revision of the regulation of criminal procedure rules to try misdemeanours provided in the Criminal Procedure Act, which continues to apply to minor offences.

The main innovation in this matter is the introduction of an opportunity criterion that allows judges, at the request of the Public Prosecutor's Office, to agree to the dismissal to apply the minimal intervention principle under Criminal Law and to relieve the administration of justice from the bureaucratic load involved until now in the treatment and judging of misdemeanours.[86]

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

The criminal liability of legal persons can be reduced in the followings circumstances set out in **article 31 *quater*** of the Spanish Criminal Code:[87]

- disclosure of the offence to the authorities prior to knowing that criminal proceedings have been brought against them.

[86] 'Spain Business Crime 2017', 14 October 2016, <http://www.iclg.co.uk/practice-areas/business-crime/business-crime-2017/spain> accessed 14 February 2017.
[87] 'Spain Bribery & Corruption 2017, 4th Edition' <https://www.globallegalinsights.com/practice-areas/bribery-and-corruption/global-legal-insights---bribery-and-corruption/spain> accessed 14 February 2017; 'Criminal corporate compliance: derecho penal preventivo', 9 December 2015, <https://www.sfabogados.com/derecho-penal/criminal-corporate-compliance-derecho-penal-preventivo> accessed 14 February 2017 [Spanish].

- cooperation by providing evidence to the investigation that is new and decisive for shedding light on the criminal liability.
- reparation or mitigation of any damage caused by the offence prior to the criminal trial.
- prior to trial, taking effective measures to prevent and detect any possible offences that could be committed in the future using the resources of the legal entity.

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance).

N/A*

(*) In this regard, perhaps, the most interesting measure that a company can adopt is a Compliance Programme, since the SCC provides companies with an exemption from criminal liability whether they have implemented a compliance program that meets the requirements of this legal text body. But these programmes cannot be seen as an "insurance",[88] as it has been pointed out by the Public Prosecutor General's Office (*Fiscalía General del Estado*).[89]

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

As mentioned above, the implementation of compliance provisions in the Spanish legislation is late, or at least in comparison with the countries around us. Despite this, Spain is experiencing a fast development in the corporate ethics and compliance landscape and in the next years the country should continue with the implementation and consolidation of the new legislation.

[88] Almudena Vigil, 'Los programas de compliance no deben percibirse como un seguro para las empresas' (2016) *Expansion*.
[89] Circular 1 (on the responsbility of the legal persons according to the reform of the Criminal Code introduced by the Organic Law 1/2015) 2016 [sobre la responsabilidad penal de las personas jurídicas conforme a la reforma del Código Penal efectuada por Ley Orgánica 1/2015].

Although the responsibility of legal entities was recognised in 2010 for the first time, it was not until the last year 2016 when the Spanish Supreme Court ruled on the first event of corporate criminal liability.[90] In this case, the corporation was found an instrument to commit a crime of public order offence and the Supreme Court confirmed its conviction (a fine of 776 million euros). Moreover, because the crime was committed before the 2015 Update of the SCC, the reduction or exception of the criminal liability for having a compliance program was not possible.

In any case, the compliance framework is under development in Spain. There is a significant amount of uncertainty and some companies have adopted a "viewer" or "spectator" approach during the last two years, to see how these issues will be developed. Nevertheless, since the mentioned reform of our Criminal Code, the companies are changing and most of them are adapting themselves to the new legislation and incorporating in their structures and organisation, both the compliance programs and officers. At the same time, the market is looking for guidance on international best practices to mitigate the uncertainty.

[90] Judgment of the Spanish Supreme Court nº 154/2016, of 26 February 2016.

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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction.

1.1 National anti-money-laundering legislation

The definition of money laundering has been debated by the Swedish legislators in the preparatory work for the legislation. Money laundering is defined as the various ways in which illegal transactions can be hidden with regards to the profits of the crimes which these transactions have originated from. A common way to hide the illegally obtained monetary means is through legal consumption as well as investments.[1]

The Swedish legislation regarding money laundering is divided into two fields of legislation The criminal legislation is as of the reform in 2014[2], in the Swedish Penal Code (1962:700) [Brottsbalken]. The reform was mainly made to ensure compliance with the EU legislation, harmonization and more effective sanctioning of the crime.[3] The term for the crime has also been reformed from the designation of *receiving (fencing) stolen money*, to the new term of money laundering in the 2014 legislation.[4] The initial paragraph[5] states the criminal aspects of the law. The second part of the paragraph refers to the Act on Measures Against Money Laundering and Financing of Terrorism (2009:62) [lag om åtgärder mot penningtvätt och finansiering av terrorism] with a broader definition of who can be held accountable for the crimes.[6] The civil law and administrative part of the anti-money laundering legislation is directed towards financial institutions as well as other business operations and their responsibilities for the elimination of money laundering within their field.[7] The legislation is focused on measures to prevent the use of money-laundering in general as well as focusing on financing of terrorism which is closely related to money laundering.[8]

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[1] Prop. 2008/09:70 s. 46.
[2] Prop. 2013/14:121 s 60.
[3] ibid, p. 60-62.
[4] Jareborg Nils, Friberg Sandra, Asp Petter, Ulväng Magnus, *Brotten mot Allmänheten och Staten*, 2nd. Ed. Iustus, 2015, p. 75.
[5] Swedish Money Laundering Penalties Act (2014:307) [Lag (2014:307) om straff för penningtvättsbrott.]
[6] Swedish Money Laundering Penalties Act (2014:307), Ch 1, art 1.
[7] Swedish Money Laundering Penalties Act (2014:307), Ch 1 art 1, Money Laundering and Terrorist Financing Prevention Act (Lag (2009:62) om åtgärder mot penningtvätt och finansiering av terrorism), Ch 1 art 1.
[8] Money Laundering and Terrorist Financing Prevention Act, Ch 1 art 1.

There are three prerequisites of which a person must fulfil to be sanctioned and punished for the crime money laundering. The first prerequisite is if the action they took was made with the intention to launder money. The second prerequisite is that the intention has to be connected to a specific measure with property or goods. The third prerequisite is that the specific measure in prerequisite two must regard property or goods which origin from a crime or criminal business.[9]

There is a special kind of money-laundering legislation which is entitled *näringspenningtvätt (*business money laundering*),* business money laundering. Elaboration regarding this degree of money laundering as well as sanctions is found under section 2 and 3.

The main criteria for this legislation to be applicable and criminal charges may only be enforced if the property or goods used in prerequisite two are obstructed to restore. The deed must have been done within the chain of business or the exertion of thereof in a larger proportion.[10]

1.1.1 Sanctions of Anti-money-laundering legislation

If a person is convicted of money laundering of the regular degree, they may be sentenced to imprisonment for a maximum of two years.[11] If the crime, on the other hand, is considered as gross according to the same legislation article 5, the penalty varies from six months to six years.[12]

There are three types of *näringspenningtvätt (*Business money laundering*)* in the Swedish Penal code. The regular degree, for which the penalty is imprisonment for a maximum of two years. The gross degree for which the penalty is a minimum of six months up to a maximum of six years of imprisonment. As well as, the minor degree of the crime, for which the penalty is a fine or prison for a maximum of six months.[13]

[9] Jareborg Nils, Friberg Sandra, Asp Petter, Ulväng Magnus, *Brotten mot Allmänheten och Staten*, 2nd. Ed. Iustus, 2015, p. 75-76.
[10] SOU (2012:12), penningtvätt, - kriminalisering, förverkande och dispositionsförbud, s 71.
[11] Swedish Money Laundering Penalties Act (2014:307), art 3.
[12] Swedish Money Laundering Penalties Act (2014:307), art 5.
[13] Swedish Money Laundering Penalties Act (2014:307), art 5.

1.2 Compliance with EU legislation and international standards[14] Wien, EU, etc.

1.2.1 Anti-bribery and corruption legislation

The anti-bribery legislation in the Swedish penal system is composed of passive corruption, active corruption,[15] indirect corruption and direct corruption. Direct corruption is sanctioned as given to the receiver directly, while indirect corruption may be given to a third party who is to influence the first receiver.[16]

The Swedish Penal Code does not differentiate between the criminal acts of corruption and bribery[17], as it is considered one and the same offense in Swedish legislation after the reformation of the legislation made in 2012.[18] As of 2012, the Swedish legislation was reformed to conform with the international standards of anti-bribery and corruption legislation and treaties, from thereon out the legislation on anti-bribery and corruption can be found in chapter 10 of the Penal Code which includes bribery and corruption.[19] The legislation of the Swedish Penal Code differentiates between three types of bribery offences.

The prerequisites for someone to be able to be charged and convicted for corruption under the Swedish Penal Code are some offering or receiving a tortious advantage. With offering the bribe the tortious advantage would have been given, promised or offered, the receiving party would have to accept, comply or request the tortious advantage.[20] The tortious advantage has to be given or received to someone whom is an employee or is contracted out for a particular mission or is an employee or a participant in a competition which has a connection to gambling arranged for the public.[21]

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[14] Prop 2013/14:121, under section 4.4.3 Council of Europé.
[15] Jareborg Nils, Friberg Sandra, Asp Petter, Ulväng Magnus, *Brotten mot Person och Förmögenhetsbrotten*, 2nd. Ed. Iustus, 2015, p. 349.
[16] ibid., p. 362.
[17] ibid., p. 348.
[18] ibid., p. 349.
[19] ibid., p. 349, BrB, Ch 10, art 5 a, section 1.
[20] Jareborg Nils, Friberg Sandra, Asp Petter, Ulväng Magnus, *Brotten mot Person och Förmögenhetsbrotten*, 2nd. Ed. Iustus, 2015, p. 349.
[21] Ibid. P. 349.

1.2.2 Sanctions of Anti-bribery and corruption legislation

If a person is convicted of the crime offering a bribe of the regular degree, the penalty according to the Swedish penal code is a fine or imprisonment for a maximum of two years.[22] The penalty for receiving a bribe is a fine or imprisonment for a maximum of two years. [23] If the crime, either offering or receiving a bribe is of the gross degree the penalty is imprisonment for a minimum of six months and a maximum of six years.[24] As mentioned previously there is also a special case of bribery, trade with the influence which is pointed towards government institutions. If someone is convicted with the trade of influence the penalty is a fine or imprisonment of maximum years.[25] The final type of sanctions is pointed towards business owners. If someone carelessly finances bribery or is found to be trading with influencing, the penalty is a fine or imprisonment for a maximum of years. [26]

1.2.3 Compliance with EU legislation and international standards

The Eutopean Economc and Social Committee, EESC, on a comprehensive EU policy against corruption has defined the terminology for corruption indecisive.[27] In the policy, the definition is unanimous and more traditional with the Organisation Transparency International which states that corruption is 'the use of one's public position for illegitimate private gains', whereas the broader definition of the United Nations states that corruption is 'the abuse of power for private gains'.[28] According to the 12 Article of The Council of Europe's Criminal Law Convention all member states are to prohibit trading with influence.[29] The Swedish regulations comply with the regulation according to the national anti-bribery and corruption legislation mentioned above.

[22] BrB, Ch 10, art 5 a, section 1.
[23] BrB, Ch 10, art 5 b, section 1.
[24] BrB, Ch 10, art 5 c, section 1.
[25] BrB, Ch 10, art 5 d, section 1.
[26] BrB, Ch 10, art 5 e, section 1.
[27] Communication from the european commision to the council, the european parliment and the european economic and social committee – on a compprehensive eu policy against curruption /* com/2002/0317 final */, section intorduction, subsection 2. Terminology paragraph 1, act (16) - (17). (UN Convention against corruption), SOU 2010:38, p. 28-29.
[28] Ibid, act (16) - (17).
[29] 12 Article of The Council of Europe's Criminal Law Convention, SOU 2010:38, p. 28-29.

1.3 Fraud legislation

The anti-fraud legislation is found in chapter 9 of the Swedish Penal Code. The crime has three degrees of intensity, the first one being classified as the regular degree of fraud. The second degree is a milder version of the normal degree. This is referred to as fraudulent behavior. The difference between fraud and fraudulent behavior is the degree to which the court can sanction the offender as well as the degree of unlawful behavior the offender has committed.[30] The gross fraud clause has the longest imprisonment sentence of the three fraud variations mentioned.

The first prerequisite to charge someone with the regular degree of fraud is that someone needs to be misled or led into a false faith regarding something. The act of misleading can be done through action or omission, the results of set action or omission have to result in an advantage or profit for the culprit. The action has to lead to loss or damages for the person who have been misled, or someone who has been put in their place.[31] The second prerequisite is that someone has to have been induced to a predisposition. For this prerequisite to be valid the person who is being misled must have believed been aware of the predisposition. This could have been done through an active gesture, action or a passive gesture which would have caused the person to believe the terms of which the predisposition stated to begin with.[32] The third prerequisite which needs to be fulfilled in order for this offense to be penalized is that the one who is committing the fraud needs to gain something of monetary value and the victim of the fraud needs to loose the equal amount the offender gains. The loss can also happen to someone who is in the place of the victim, instead of the victim itself.[33]

1.3.1 Sanctions of Fraud legislation

If a person is convicted of the regular degree of fraud under the Swedish Penal Code the penalty is prison and the maximum prison sentence is two years.[34] If a person is convicted of the gross

[30] BrB, Ch 9, art 2, section 1, ch 9 art 3, section 1.
[31] Jareborg Nils, Friberg Sandra, Asp Petter, Ulväng Magnus, *Brotten mot Person och Förmögenhetsbrotten*, 2nd. Ed. Iustus, 2015, s. 219-220, BrB, ch 9, art 1, section 1.
[32] ibid., p.233-234.
[33] ibid., p.233-234.
[34] BrB, Ch 9, art 1, section 1.

degree of fraud the penalty is imprisonment, which can result in a penalty of six months up to six years.[35] The minor degree of fraud is entitled fraudulent behaviour with a penalty alternating from a fine to a prison sentence of maximum six months. [36]

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

2.1 Legal principles in criminal liability

According to Swedish legal principles only natural persons can be criminally for a crime. Liability or criminal charges may therefore not be imposed on companies as an entity or lead to the corporate being liable.[37] However, corporate liability may be imposed as a special means in the form of forfeit, company fines and other special legal effects in connection with corporate liability according to the Swedish Penal Code.[38] It is important to clarify is that when the nature of the offenses for companies are stated below, the charge and penalization of the illegal actions is permanently fixed to an individual responsible in the name of or for the company. This may be, e.g. a director of the board who has taken on the state of the legal entity.[39]

2.2 Separate Legal effect for crimes

As said by the preparatory work for the legislation of the Swedish Penal Code,[40] aside from mentioned previously, there is no possibility of charging a company for their crimes according to Swedish criminal law. Due to the fundamental legal principles, read contrariwise, which states that only psychical people can be charged and convicted for a criminal offense based on national legislation. However, there are separate legal effects for crimes committed by legal entities which are enforced when a corporation is alleged to or has committed an illegitimate violation. The

[35] BrB, Ch 9, art 2, section 1.
[36] BrB, Ch 9, art 3, section 1.
[37] Jareborg Nils, Asp Petter, Ulväng Magnus, *Kriminalrättens Grunder*, 2nd. Ed. Iustus, 2013, p. 189.
[38] ibid p. 189, e.g. BrB, Ch 36.
[39] Jareborg Nils, Asp Petter, Ulväng Magnus, *Kriminalrättens Grunder*, 2nd. Ed. Iustus, 2013, p. 198.
[40] Sou 2010:38, p. 86-88.

regulations of these violations are found in The Swedish Penal Code or other legislation. These penalties are applicable because there is no other regulation which can handle these exact offenses when dealing with companies, specifically when there is no individual to charge with the offense but an entire legal entity. [41]

2.2.1 Forfeiture

Forfeiture is a sanction for corporate entities which is applicable to the offenses of bribery and corruption[42]. In some cases it might also be applicable to fraud, depending on the circumstances. This sanction can be applicable when there is no natural person to responsible for the offense and other legislation cannot be exhausted. Chapter 36 in the Penal Code consists of regulations regarding forfeiture as well as a corporate fines. The Act on the Procedure in Some Cases of Forfeiture etc. (1986:1009) [lagen om förfarandet i vissa fall vid förverkande m.m.] regulates confiscation of property or monetary means for the public or as a special cause of criminal activitiesif someone has not been accused of the crime.[43]

Forfeiture may become the penalty for a company which has been a part of criminal activities if the crime committed have a minimum of two years imprisonment in the sentencing. Chapter 36 in the Penal Code refers to value compensation and item confiscation. Both types of confiscation is aimed towards monetary values.[44] In the criminal legislation, there are three clauses of interest for legal entities. The first act of chapter 36 in the Penal Code states that forfeiture may be possible as an exchange for crime or costs thereof if there is a crime committed which is included in the Penal Code. The second paragraph of chapter 36 of the Penal Code deals with forfeiture with resources in crime, as in the possible aid which had been used while committing the crime. The paragraph includes both items, the product of a crime or illegal goods, even items which were meant to be used in a crime but never got used for their intended purpose may be forfeited. [45] The

[41] Jareborg Nils, Zila Josef, *Straffrättens Påföljslära*, 4th ed., Norstedts Juridik, 2014, p. 54-55.
[42] ibid., p. 86-88., Jareborg Nils, Zila Josef, *Straffrättens Påföljslära*, 4th ed., Norstedts Juridik, 2014, p. 54-55.
[43] The Act on the Procedure in Some Cases of Forfeiture etc. (1986:1009) [lagen om förfarandet i vissa fall vid förverkande m.m.], act 1.
[44] Jareborg Nils, Zila Josef, *Straffrättens Påföljslära*, 4th ed., Norstedts Juridik, 2014, p. 55-58.
[45] Jareborg Nils, Zila Josef, *Straffrättens Påföljslära*, 4th ed., Norstedts Juridik, 2014, p. 58.

fourth paragraph of chapter 36 of the Penal Code is the one which may be most applicable in relation to fraud and money-laundering legislation, due to the fact that it [46]concerns the forfeiture of the economical benefits which have arisen for a business owner because of a crime. The criteria this act puts up is that the crime must have been a part of the business exertion. The business this paragraph focuses on is primarily physical or legal entities which conduct economical business.

2.2.2 Corporate Fine

The main corporate fine legislation is found in the Penal Code, chapter 36 act 7 pt. 1, p.1 and p. 2. A corporate fine can only be placed upon a company if they have not lived up to their responsibility to prohibit the criminal act, according to chapter 36 act 7 pt. 1, p. 1. Also chapter 36 art 7 pt. 1, p. 2, states that the company can be held liable if there is a person in which their position is as such that they have the power to represent the company or make decision as in the name of the company, or if the person if question have or has had a certain position that required them to have oversight or control over the company.[47] However, there are certain criteria the company needs to fulfil before they are to be sanctioned under this legislation. One of the criteria is that the business needs to have a certain amount of sustainability. According to doctrine a sustainable business can also be on a smaller scale aside form the main business operations.[48] For the company to be charged with a corporate fine the penalty for the offense the entity has committed must be greater than a fine. Furthermore, the offense must have been committed during the execration of business. Also, the corporate fine cannot be placed on a company if the offense is directed at them, because the company itself is the victim of the crime and that same company is charged with the penalty of the offense.[49]

There is an exception to the rule in the regulations about corporate fine in ch 36 art 7 pt. 1, p. 1[50]. It states that the company can be charged with the fine despite being the object of the crime itself.

[46] ibid., p. 58-59.
[47] Jareborg Nils, Zila Josef, *Straffrättens Påföljslära*, 4th ed., Norstedts Juridik, 2014, p. 59-61.
[48] ibid., p. 60.
[49] SOU 2010:38, p. 87-88.
[50] The Act on the Procedure in Some Cases of Forfeiture etc. (1986:1009) [lagen om förfarandet i vissa fall vid förverkande m.m.]

The regulation targets and sanctions the company for omitting to prevent the crime despite it being targeted towards the same company it originated from. The crime committed towards the company is not penalized itself, which is important to point out as it would collide with the main clause.[51]

Furthermore, the clause in chapter 36 art 7 pt. 1, p. 2[52], adapts an inexplicable concept in Swedish criminal legislation, namely the *principle of substitute liability* which is also found in part 3.3 below. This clause substitutes the responsibility for set action which initiated the offense to occur on an individual whom at the time was responsible for the company or had the responsibility of control in the given area of expertise of the company.[53] It is possible to combine the sanctions of fortitude and corporate fine. The possible penalties for an offense falling under the corporate fine jurisdiction is from 5000 SEK to 2 million SEK, depending on the severity of the offense, the damage made and how large the damage was in comparison to the business operation as a whole. Although this practice seems to be receive, statistically it is not used frequently as this penalty has only been reported by the government to have been used 113 times during 2009.[54]

2.2.3 Ban on Business Operations

The Ban on Business Activity Act (2014:836) [lagen om näringsförbud] and the Act on Prohibition on Judicial and Economical Support in Some Cases (1985:354 [lagen om förbud mot juridiskt eller ekonomiskt biträde i vissa fall], are two legislations which have limited how companies can conduct business. An example given in the doctrine is if a company has received a permit for a certain activity, such as selling alcohol and breaches this permit by selling illegally imported alcohol or banned alcohol, may get this permit revoked together with the rights it previously enforced.[55] The ban is most commonly placed upon a company anywhere between three to ten years. During this time the company is not allowed to operate. It is important to note is that this ban is partly

[51] Jareborg Nils, Zila Josef, *Straffrättens Påföljslära*, 4th ed., Norstedts Juridik, 2014, p. 59-61.
[52] The Act on the Procedure in Some Cases of Forfeiture etc. (1986:1009) [lagen om förfarandet i vissa fall vid förverkande m.m.]
[53] ibid., p. 61.
[54] SOU 2010:38, p. 87-88, Jareborg Nils, Zila Josef, *Straffrättens Påföljslära*, 4th ed., Norstedts Juridik, 2014, p. 60-61.
[55] Jareborg Nils, Zila Josef, *Straffrättens Påföljslära*, 4th ed., Norstedts Juridik, 2014, p. 54-55.

executing the substitute principle, mentioned above which states that an individual responsible for the control or whom has a certain position of power may become responsible for the company. During the ban the person in question is not permitted to sign for the company or act in place of the company, a person is not allowed to be employed or for the company. This ban is needed because of public interest. [56]

2.2.4 Penalty

There are two main purposes for the sanctions, firstly to easier deal with trivial illegal actions and secondly to make sure legal entities will feel the economical consequences of the sanction. The sanction in question is always monetary and as mentioned previously is usually incorporated in other penalties, such as the corporate fine or ban on business operations legislation.[57] Sweden has in many instances gotten critique for ruling against the European Union Convention on Human Rights, which Sweden incorporated and ratified in 1995 and prohibits double penalties[58], when it comes to the charges of monetary penalties as well as the *ne bis in idem principle*. The critique Sweden has received is primarily due to ruling both the monetary penalty as well as extra taxation in two different cases against the same person. This is according to the European union convention article 4, TP 7 and article 50 of the EU Charter of Rights [59]

2.2.5 General Contractual principles

General principles regarding contractual basis and the invalidity of the contract if offenses such as fraud are committed, are regulated under the rules of the Contracts Act (1915:218) [Avtalslagen] contractual legislation (1915:218).[60]

There are, however, general principles and legislation which can be directed straight towards companies under the legislation mentioned above, these are entitled criminal sanctions in contrast

[56] SOU 2010:38, 89.
[57] Jareborg Nils, Zila Josef, *Straffrättens Påföljslära*, 4th ed., Norstedts Juridik, 2014, p. 60-61.
[58] ibid, p. 62.
[59] NJA 2013 s. 502.
[60] ibid, p. 54-55.

to penalties. According to the fundamental principles of criminal legislation in Sweden, as mentioned previously, legal entities are not able to be held accountable, penalized or charged from a criminal law perspective.[61] A special legal effect in Swedish legislation is that legal entities can be held accountable for criminal activities is a corporate fine, which is applicable under certain circumstances.[62]

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

3.1 Anti-bribery and corruption

There is a special case of anti-money laundering legislation which sanctions *näringspenningtvätt (*business money laundering*),* approximately translating into *business money laundering.*[63] The aim of the legislation is to sanction the risk factors which can lead to a transaction that can be taken as a legislative presumption in the means of money-laundering. The sanctions of this degree of money-laundering have been clarified in *section 1.1.1.*

The *business money laundering* paragraph in the anti-bribery legislation focusing on careless finance of bribery, the Penal Code chapter 10 act 5 e. It may be applicable in this section as well as section 3.0. The reasoning behind this is the definition of the term business owner, which has been defined as the one who conducts a business, with focus on an actual individual[64], but also in the preparatory work to the legislation as 'is a part of the *formal defined execution management at a legal entity or through delegation*. In practice, this would be the person who in power of delegation and decision-making'[65]

[61] SOU 2010:38, p. 87.
[62] ibid, p. 87., BrB, Ch 36, art 7, section 1-2.
[63] Law (2014: 307) on penalties for money laundering [Lag (2014:307) om straff för penningtvättsbrott.]Lag (2014:307) om straff för penningtvättsbrott, ch 1, art 7.
[64] Jareborg Nils, Friberg Sandra, Asp Petter, Ulväng Magnus, *Brotten mot Person och Förmögenhetsbrotten*, 2nd. Ed. Iustus, 2015, p. 364.
[65] Prop. 2011/12:79 s. 49.

According to the principles of company liability[66]. There is a potential responsibility clause for the person who is a business owner or someone who is in a chain of formally divided execution management to a legal entity or corporate body or through delegation has the right of determination in such entity.[67]

The prerequisites for the offense which must be fulfilled in order for someone to be held liable for the crime are the following. Initially, a business person or entrepreneur has to provide or supply for someone who is representing the business person or entrepreneur in question in a certain matter, and therefore liable by gross carelessness foster offering a bribe, gross offering of a bribe or trade of influence according to para 5 d. The penalty, if the person is convicted, is a fine or imprisonment on a maximum penalty of two years.[68] The criminal liability can also be enforced on the receiver of the bribe, whom is either a physical person or a legal entity and is located outside of Swedish jurisdiction, but has a connection to the company they are representing. This representation may be on a contractual basis or through a position.[69] A common example of such a position is an employee or a daughter company which is located in another country.[70]

3.2 Special subject principle

As mentioned before, according to Swedish legal principles only natural persons can be criminally liable for a crime or criminal activity.[71] However, corporate liability may be imposed as a special means in the form of forfeit, company fines and other special legal effects in connection with the corporate liability according to the Swedish Penal Code.[72] However, in Swedish criminal law, there is a principle special subject[73] where substitute liability in certain cases may arise. The subject is working as a substitute for the corporate entity which cannot be found liable for the illegal acts. A common replacement for the company is whoever can sign for the company or be legal responsible

[66] Refer to 2.1 anti-bribery, under section company responsibility.
[67] Prop. 2011/12:79 s. 49.
[68] BrB, Ch 10, art 5e, section 1.
[69] Prop. 2011/12:79 s. 49-50.
[70] ibid s. 49-50.
[71] Jareborg Nils, Asp Petter, Ulväng Magnus, *Kriminalrättens Grunder*, 2nd. Ed. Iustus, 2013, p. 189.
[72] Jareborg Nils, Asp Petter, Ulväng Magnus, *Kriminalrättens Grunder*, 2nd. Ed. Iustus, 2013, p. 189, tex. BrB Ch 36.
[73] ibid p. 190.

for their business, this usually is a vice president or someone in the members board of the organisation.[74]

3.3 Accessible Company Liability Principle

The principle of *accessible company liability*[75] may be particularly applicable in the case of anti-money laundering as the criminal act of which this principle covers consists of the entrepreneur or business person by his or her actions that have to be driven by personal culpa, omit to prevent that the business they are running or board member of, is not operated legally.[76] When speaking about the principle of *accessible company liability,* it is important to state that the actual position of power is of primary value. For instance, someone responsible for the accounting may be less liable than the members of the board. The final stage of the principle of accessible company liability is that there always needs to be one or more people responsible for the misconducts. It is not uncommon that the employer is liable for their employees' misconducts. This type of responsibility not only corresponds to the principle but also to general legitimacy perspective.[77]

As mentioned, the main principle in Swedish criminal legislation regarding corporate liability as such is that the entity cannot be held liable based on criminal charges. However, according to case law, the person who may be held accountable and be responsible in the company's place, have a relevant circle of directors, vice directors that are responsible for the continuous administration of the company.[78] The Supreme Court held the directors of the board as well as board members accountable in NJA 1946 s. 265 and NJA 1979 s. 657 together with corporate law legislation.[79]

[74] ibid p. 191.
[75] ibid p. 191.
[76] ibid p. 194.
[77] ibid p. 194-200.
[78] ibid p. 194.
[79] Swedish Companies Act (2005:551), Ch 8: regarding the division of responsibility in corporate law.

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

4.1 Bar of extradition of an individual

According to the Law on Extradition for Crime (1957:668) [lag om utlämning för brott][80], a person who is not a Swedish citizen may be extradited, if someone is a suspect, convicted or charged for a crime within Swedish jurisdiction. The law is not applicable if there is also a European arrest charge on the individual.[81] However, there are limitations to whom may be extradited to their country of residence from Sweden, if they meet the criteria in act 1.

Paragraph 6 of the act states that an individual may not be extradited if their crime is of a political nature. If the political crime is extended to another crime, the person may only be extradited if the criminal misconduct is more severe in comparison to the political crime.[82] According to act 6, clause 3, the even if partly political extradition may not be executed if the extradition order collides with an international convention that Sweden has ratified and sanctioned, the convention has to be valid between the state who requests the extradition and Sweden.

Paragraph 7 states that an individual may not be extradited for a crime they committed within the Swedish boarders if they risk prosecution due to their religious, political or social status which may endanger they lives or freedom or where the state the individual will be extradited to, will not feel safety where they risk the above mentioned prosecutions.[83]

Act 8 states that the individual may not be extradited if due to the youth of the person, their health, or other personal matters, with the perspective of the crime they have committed and the foreign states interests, it would be obviously inconsistent with humanity demands.[84]

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[80] Law on Extradition for Crime (1957:668) [lag om utlämning för brott]
[81] Law on Extradition for Crime (1957:668) [lag om utlämning för brott], art 1, section 1-2.
[82] Law on Extradition for Crime (1957:668) [lag om utlämning för brott], art 6.
[83] Law on Extradition for Crime (1957:668) [lag om utlämning för brott], art 7.
[84] Law on Extradition for Crime (1957:668) [lag om utlämning för brott], art 8.

According to act 11 of the legislation a person may not be extradited to their country of residence from Sweden if the obstacle remains. [85]

Any breaches of the national legislation is also a breach of the European Convention on Human Rights which Sweden has ratified.

4.2 The Supreme court verdicts

Consistent with recent case law, the Islamic Republic of Iran requested that Sweden would extradite an individual who has been accused of a number of criminal charges, including suspicions of fraud in the year of 2013.[86] The Swedish supreme court denied the extradition of the set individual to the Islamic republic pf Iran based on the European convention on Human Rights. The court stated, apart from the lack of sufficient documentation for detention according to Swedish law, that the extradition would be inconsistent with the European convention on Human Rights article 3 and 6, according to what is known about the Islamic republic of Iran.[87] Article 3 of the European convention on Human Rights states the prohibition of torture, inhumane or degrading treatment or punishment.[88] Article 6 of the convention states the rights to a fair trail, which in act 1 section 1 states that everyone is entitled to a fair public hearing, with reasonable time in front of an impartial and independent tribunal established by law.[89]

5. Please state and explain any:

5.1 Internal reporting processes (i.e. whistleblowing);

Internal reporting processes are not regulated by the Swedish legislator. Instead, there are laws that require certain companies to establish their own compliance routines. The Swedish Money Laundering and Terrorist Financing Prevention Act 2009:62 [lag om åtgärder mot penningtvätt

[85] Law on Extradition for Crime (1957:668) [lag om utlämning för brott], art 11.
[86] HD beslut, Mål nr. Ö 2803-16, s. 3.
[87] ibid, p. 3.
[88] Convention of the Protection of Human Rights and Fundamental Freedoms article 3
[89] Convention of the Protection of Human Rights and Fundamental Freedoms, article 6

och finansiering av terrorism] is the most explicit legislation in this field and will be the focus here. There are no regulations governing the compliance mechanisms and the internal reporting processes for the offences bribery/corruption or fraud.

The purpose of the Money Laundering and Terrorist Financing Prevention Act is to prevent financial activity and other commercial activity from being used for money laundering or financing of terrorism. Chapter 5, art 1 of the Act requires that there are internal routines for risk management regarding money laundering and financing of terrorism in companies where the risk of such a conduct is high. This system mirrors the risk-based approach that is advocated for by the Financial Action Task Force (FATF), of which Sweden is a member.[90] The risk-based approach was implemented by the third EU anti money laundering directive[91] and means that the focus is placed on the existing vulnerabilities and threats.

General international and national risk analyses set the ground for concrete strategies on how to meet the threats and risks connected to money laundering and the financing of terrorism. The risk assessments on the individual branch level, together with the national and international risk analyses are used to form the internal procedures for how different customers and transactions of the companies operating in the 'risk zone' should be handled.[92] The Money Laundering and Terrorist Financing Prevention Act requires these companies to make the mentioned risk analyses, document them and introduce individual compliance routines, see ch 5, art 1 of the Act.[93]

[90] Public Investigation SOU 2016:8, Additional measures against money laundering and terrorist financing, 65 [Ytterligare åtgärder mot penningtvätt och finansiering av terrorism].
[91] See Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, Recital 5. The revised FATF Recommendations are included in the fourth anti-money laundering directive, see 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, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, Recital 4.
[92] Public Investigation SOU 2016:8, Additional measures against money laundering and terrorist financing, 66 [Ytterligare åtgärder mot penningtvätt och finansiering av terrorism].
[93] Similar rules can be found in ch 6 of the Swedish Banking and Financing Business Act 2004:297 [lag om bank- och finansieringsrörelse].

5.1.1 Finansinspektionen's General Guidelines for Compliance in Financial Companies

Finansinspektionen (the Swedish Financial Supervisory Authority, *FI*) [94] has issued General Guidelines for Compliance in Financial Companies 2005:1 (FFFS) [Finansinspektionens allmänna råd om styrning och kontroll av finansiella företag] as a further clarification on the compliance function. Chapter 3, art 2 of the Guidelines suggest that the companies operating in the above mentioned risk zone should have an internal system for reporting deviations from the goals of the firm. The Guidelines do not speak about the details of how such compliance mechanisms should be set up and what the internal report system should look like. On the contrary – it is stated that different companies may have different internal compliance systems and that there may even exist several different compliance bodies within one company, all depending on the nature and the needs of the company.[95] The Guidelines set out several examples of what can be done to obtain a proper compliance in a financial company, including continuous monitoring, internal rules, timely audits, etc.[96]

The Guidelines also recommend that the companies assign the responsibility for corporate compliance to a person or a body within the company. It is suggested that such bodies regularly monitor and inform the board of directors about the compliance risks and that there are routines for internal information in cases of incompliance.[97] To guarantee full compliance, the body for compliance should be monitored by an independent internal auditor.[98]

The Guidelines are not of a hard law nature, but they have a fairly strong authoritative power due to FI's regulative power. Companies that do not operate in conformity with FI's Guidelines may face a difficult situation when trying to prove their innocence in an administrative or a criminal procedure.

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[94] *Finansinspektionen* is further described below, under question 6.
[95] See FI's General Guidelines for Compliance in Financial Companies, ch 5, art 6.
[96] ibid, ch 3, art 4.
[97] ibid, ch 5, arts 2 and 4.
[98] ibid, ch 6.

The companies that are currently affected by this regulation are the ones operating in the banking or financing sector, life insurance business, the securities market, companies issuing electronic funds, real estate agents, casinos and other gambling businesses, registered accountants and auditors, tax advisors, lawyers and associates and businesses including the trade in goods when the operations relate to sales on a cash basis amounting to not less than EUR 15.000.[99] The list is likely to keep expanding in the future – the most recent addition to the list, that came into force on the 1st of January 2017, is companies providing consumer mortgage loans pursuant to the Swedish Mortgage Loans Business Act 2016:1024 [Lag om verksamhet med bostadskrediter].[100]

5.1.2 The analogy principle

The Swedish legislation sets the actual law and its preparatory works (mainly proposals including extensive motivation to the proposed legislation and the public investigations) as the two legal sources having the highest authority. When a specific topic is not regulated, and neither the court precedents nor the European or the international law give any clear answers, analogical interpretation is often applied in Swedish law to keep the law and its application coherent.[101] No analogies can be made in the field of criminal law due to the nulla poena sine lege principle.[102] However, when it comes to civil law and routines for reporting, a compliance routine found in one area will almost certainly have an influence on routines and interpretation of such routines in other unregulated situations.[103] Therefore, FI's Guidance on Compliance can in fact have a significant importance in the area of compliance in Sweden in general, as it is likely that any other compliance systems would be compared to the Guidelines if any application questions arise.

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[99] Money Laundering and Terrorist Financing Prevention Act 2009:62, ch1, art 2.
[100] Other relevant documents issued by the FI are FI's Security Market Regulation FFFS 2007:16 [Finansinspektionens föreskrifter om värdepappersrörelse], its regulations and general guidelines on Governance, Risk Management and the Control of Credit Institutions FFFS 2014:1 [Finansinspektionens föreskrifter och allmänna råd om styrning, riskhantering och kontroll i kreditinstitut], on the Management of Operational Risks FFFS 2014:4 [Finansinspektionens föreskrifter och allmänna råd om hantering av operativa risker] and on Information Security, IT Operations and Deposit Systems FFFS 2014:5 [Finansinspektionens föreskrifter och allmänna råd om informationssäkerhet, it-verksamhet och insättningssystem]. Naturally, these are all related to financial companies.
[101] Aleksander Peczenik, *Juridikens allmänna läror* (SvJT 2005), 249 [Swedish].
[102] See also Art 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. For a Swedish approach on the principle, see Public Investigation SOU 1988:7, Freedom from Responsibility - The Principle of Legality and the General Grounds for Discharge, 46 [Frihet från ansvar - Om legalitetsprincipen och om allmänna grunder för ansvarsfrihet: slutbetänkande].
[103] The word *unregulated* is used broadly in this context and does not only refer to the purely legislative acts.

5.2 External reporting requirements (i.e. to markets and regulators), that may arise on the discovery of a possible offence.

5.2.1 Money laundering and terrorist financing

Pursuant to chapter 3 of the above mentioned Money Laundering and Terrorist Financing Prevention Act, all the companies operating in the risk zone must review the profiles of the customers as well as their transactions if such transactions can be reasonably suspected to constitute an element of money laundering or terrorist financing. If the suspicion remains following a closer analysis, information regarding *any and all* circumstances which *may* indicate money laundering or terrorist financing needs to be provided to the Swedish Police Authority without delay. Information about the transaction and the recipient should be provided as well.

Once this is made, all other companies operating in the risk zone must submit all information requested by the Police Authority for the investigation of money laundering or terrorist financing offences if the Police make such a request.[104] The Police Authority can store this information for a period of five years.[105] Similarly, the majority of the companies operating in the risk zone[106] are by law required to maintain a system for promptly and comprehensively providing information about whether or not they have had a business relationship with a specific person as well as the nature of the relationship for the last five years.[107]

These provisions do not cancel the data protection legislation, however, it is not allowed to inform the suspect about the above mentioned provision of information to the Police.[108] Moreover, the disclosure of sensitive classified information by the company operating in the risk zone, which is normally criminalized, is exempted from criminalization in such cases.[109]

[104] Swedish Money Laundering and Terrorist Financing Prevention Act, ch 3, art 1.
[105] ibid, ch 3, art 1b.
[106] The ones listed in the Swedish Money Laundering and Terrorist Financing Prevention Act ch 1, art 2, pts 1–7 and 17–21.
[107] ibid, ch 3, art 7.
[108] ibid, ch 4, art 3.
[109] ibid, ch 4, art 6.

Finally, FI is the supervision authority for money laundering and financing of terrorism pursuant to Instruction for the Financial Supervisory Authority 2009:93 [förordning med instruktion för Finansinspektionen] art 1, pt 2. If it finds information about any possible connections to money laundering or financing of terrorism during its regular control of financial companies, it is required to provide such information to the Police as well.[110]

5.2.2 Relevant whistle-blower protection

Such information can also be provided to the Police by any natural or legal person inside or outside of the company – without the risk of being prosecuted for disclosure of classified information. The requirement is that the person had a reason to believe that the information should be provided.[111] The liability for providing information to the Police in these cases is limited also by the Swedish Companies Act 2005:551 [aktiebolagslag]. For example, a statutory auditor can only be liable for damage resulting from incorrect information, which he had reasonable cause to believe, was incorrect.[112]

The banking sector is the most regulated area in this regard. Pursuant to the Swedish Banking and Financing Business Act, banks are by law required to not only have compliance routines, but also to have internal reporting systems. Whistle-blowers in the banking sector are protected by ch 6, articles 2a and 2b of the Banking and Financing Business Act. These provisions safeguard the internal whistle-blowers and employees that notify FI about their employer's lack of compliance with the banking legislation where the employee had a reason to believe that a violation had occurred. Thus, since it is by law required for banks to have compliance routines, there is legal ground for the employees in a bank to safely notify FI about the lack of compliance routines in their bank. The utter responsibility to ensure that compliance rules and internal reporting systems exist in a bank lies with the board of directors.

[110] ibid, ch 3, art 6.
[111] ibid, ch 3, art 5.
[112] Swedish Companies Act, ch 29, art 2. Similar provisions are included in the Swedish Associations Act 1987:667 [lag om ekonomiska föreningar], Swedish Foundations Act 1994:1220 [stiftelselag] and the Swedish Audit Act 1999:1079 [revisionslag].

5.2.3 Corruption, bribery and fraud

As described above, the offences corruption, bribery and fraud are considered as regular criminal offences, meaning that information is gathered by the Swedish Police Authority once an investigation about any of these offences has been initiated. The Swedish Penal Code does not include any specific regulations for reporting when there is a suspicion that such offences have been committed. Instead, the regular investigation procedure pursuant to chapter 23 of the Swedish Procedural Act 1942:740 [rättegångsbalk] is applied. The rules relating to the criminal investigation are examined under section 7.1 below.

6. Who are the enforcement authorities for these offences?

6.1 Introduction

It has already been established that there is no single act in the Swedish legislation which deals with compliance as e.g. the US Sarbanes-Oxley Act.[113] In addition, the term *compliance* does not have one concrete definition.[114] As mentioned above, the Swedish compliance rules are spread out throughout a number of different acts and the actual rules depend on the relevant legal area and also the type of market in which the companies operate. Thus, there is no single authority responsible for the enforcement of the offences described above.

6.2 Swedish Police Authority and Security Service

The main offences considered within the framework of compliance and discussed above are criminal offences. As the Swedish Police Authority is responsible for the law enforcement in Sweden, it also has the responsibility for the enforcement of anti-bribery, corruption, fraud and anti-money laundering legislation. Both the Swedish Prosecution Authority and the Swedish Police Authority have special national units specializing in corruption and related offences – the Police's National Corruption Group and the Prosecution Authority's National Unit for Corruption, which

[113] US Sarbanes–Oxley Act 2002, Pub.L. 107–204, 116 Stat. 745.
[114] Gareth Adams, *What is compliance?*, 1994, Journal of Financial Regulation and Compliance, Vol. 2, Iss 4, 278.

were both established to strengthen the law enforcement relating to these offences as a part of Sweden's own compliance to the international compliance framework.[115]

The Police Authority is responsible for the investigations and once reasonable suspicion is established, the prosecutor takes over the case.[116] In cases relating to money laundering and financing of terrorism pursuant to the Money Laundering and Terrorist Financing Prevention Act, the Security Service may take over or take part in the investigation as well.[117] No special courts exist for the compliance offences money laundering, bribery/corruption or fraud though. These cases are dealt with by the regular district courts.

6.3 Financial Supervisory Authority

As mentioned above, rules governing financial companies are the ones that include the most explicit writings on compliance in Sweden. In the area of money laundering and other offences of financial character, the Swedish Financial Supervisory Authority plays an important role. It is a government central administrative authority with the main task to ensure that the financial systems in the country are well functioning and stable and that there is a high level of consumer protection. FI thus supervises the regulatory process related to financial markets and issues permits for the financial companies.[118] It has a certain legislative mandate of its own. The regulation it creates is gathered in the Regulations from FI (*Finansinspektionens författningssamling)* and can be found on their website.*[119]* Therefore, FI has a clear influence on the Swedish compliance regulation in the financial sector. The term *compliance* is defined by FI in ch 5, art 1 of its General Guidelines for Compliance in Financial Companies. The definition is broad – all types of compliance with laws, regulations and internal rules as well as good practices and norms for the financial companies are included in the term.

[115] Commission Report on Measures Against Corruption in Sweden, Annex 27, 3.2.2014, COM(2014) 38 final, 3.
[116] Swedish Procedural Act 1942:740 ch 23, art 3.
[117] Swedish Police Act 1984:387 [Polislagen], art 3, pt 1.
[118] Instruction for the Financial Supervisory Authority 2009:93, art 1.
[119] www.fi.se.

The mandate of FI may overlap with the Swedish Economic Crime Authority (*Ekobrottsmyndigheten*) or the Swedish Tax Athority (*Skatteverket*) when it comes to crimes of economic nature. However, these authorities' predominant focus is tax-related crimes.

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

7.1 Criminal investigations

There is a set of powers that the Police Authority can undertake in its investigatory work. However, the powers described below almost always require that an investigation is initiated. Normally, it is also required that a prior decision by a court or a prosecutor is made.

7.1.1 Interrogation

Once an investigation has been initiated, the Police can hold interrogations with anyone who may have relevant information for the investigation.[120] Penalty payments can be applied to those who are required to take part in an interrogation if it is reasonable with regards to the circumstances of the case, but this is applied restrictively.[121] A person who has been called for an interrogation and does not appear can also be brought to the questioning by the Police.[122]

The maximum time period under which a person is obliged to stay for the interrogation is twelve hours, but normally the person does not need to stay for longer than six hours.[123] The interrogator may also temporarily confiscate all electronic communication devices from the person who is about to be interrogated.[124] If a person refuses to provide information during an interrogation, he may be required to testify in front of the court later.[125]

[120] Swedish Prodecural Act, ch 23, art 6.
[121] Government Bill prop. 2001/02:147, Faster Prosecution, 27 [Snabbare lagföring].
[122] Swedish Prodecural Act, ch 23, art 7.
[123] Swedish Prodecural Act, art 9.
[124] This can be done even before an investigation is initiated.
[125] Swedish Prodecural Act, ch 23, art 13.

It should be noted that the person who is being questioned cannot be prohibited to eat or sleep. Neither is it legal to, in order to obtain a confession or a statement from the interrogated person, deliberately use false statements, promises, threats, coercion, fatigue or other improper actions.[126]

7.1.2 Detention and arrest

A person that is suspected for a crime on a probable cause can be arrested by a decision of a court in several cases – if the prescribed prison term is one or more years; if the person refuses to identify himself or if it can be supposed that the information is false; or if the person does not have a domicile in the country and there is a risk that he escapes prosecution if he leaves the country. Normally a decision by the prosecutor is required to detain the person until the court decision is made, but in urgent cases the initial detention may be possible without any prior decision as well.[127] Pursuant to the Procedural Act chapter 24, art 8, an interrogation must follow as soon as possible after this type of detention to determine whether the detention shall remain.

7.1.3 Other types of restrictions and investigative powers pursuant to the Procedural Act

The court or the prosecutor may decide to put a travel ban on a suspect, or to oblige him to notify the Police Authority from a specified place under specified times as an alternative to arrest. These options are used when there is a risk that the suspect will escape prosecution, but when there is a lack of need to arrest him. This is described in chapter 25 of the Procedural Act. Furthermore, the suspect may also face sequestration of property if it is reasonable to believe that he will dispose property and will therefore not be able to pay fines, damages, etc. as a consequence of a crime.[128]

Lawful interception can also be used, but only in special cases. When it comes to the compliance-related offences described in this report, lawful interception can be used if, given the circumstances in a specific case, it can be supposed that the final penalty that the suspect would be charged with

[126] ibid, art 12.
[127] ibid, ch 24, arts 1-7.
[128] See chapter 26 of the Swedish Procedural Act.

would exceed two years of imprisonment.[129] This means that it could only be used in cases that may result in gross bribery, gross fraud or gross money laundering.[130]

Finally, search and seizure as well as external and internal body searches can be used during investigations. These types of powers do not necessarily require the same level of severeness as lawful interception, but they are nevertheless considered to be harsh forms of violation of the personal integrity and are therefore used restrictively. The main prerequisite for these powers to be used is that imprisonment is a possible penalty for the investigated offence. They are further described in chapter 28 of the Procedural Act.

7.1.4 Seizure of money in money laundering prevention

In addition to the above mentioned rules there is a lex specialis in the area of money laundering prevention. Art 12 of the Swedish Money Laundering Penalties Act[131] states that seizure of money, securities or similar documents can be made when it is reasonable that the money or the documents come from or are related to criminal activity. There are no special prerequisites for such measure, apart from that the decision regarding money seizure may only be made if the reasons for the measure outweigh the interference caused to the suspect.

7.2 FI's powers

FI is the supervision authority pursuant to the Money Laundering and Terrorist Financing Prevention Act. It's chapter 6, art 4, para. 3 states that FI shall prohibit certain types of companies in the risk zone[132] from operating if they are lacking a permit. When FI deems it necessary, it may undertake investigations in the companies which it is supervising. In addition, FI may demand that

[129] Swedish Procedural Act, ch 27, art 18.
[130] Lawfull interception is also regulated in the Swedish Act on measures to prevent certain particularly serious offenses 2007:979 [lag om åtgärder för att förhindra vissa särskilt allvarliga brott] and Swedish Act concerning the collection of data on electronic communication in the law enforcement intelligence 2012:278 [lag om inhämtning av uppgifter om elektronisk kommunikation i de brottsbekämpande myndigheternas underrättelseverksamhet].
[131] Swedish Money Laundering Penalties Act 2014:307 [lag om straff för penningtvättsbrott].
[132] They are listed in ch 1, art 2, pts 11, 12 and 14–16 and include, inter alia, accountants, auditors and lawyers that are not working in registered accounting, audit or law firms, tax advisors and people working with professional trade in goods to the extent the operations relate to sales on a cash basis amounting to at least EUR 15,000.

these companies provide information and grant FI access to documents that are needed for such a supervision. The powers of FI described here may be combined with monetary penalty. Companies that do not comply with these rules risk being prohibited from further operations.[133] Such decisions by the FI may not be appealed.

The strongest power of FI is however related to banks and financing institutions. The Swedish Banking and Financing Business Act requires FI to intervene when a credit institution has violated its obligations pursuant to the laws governing the bank's operations, the articles of association, other by-laws or regulations and even the bank's internal instructions if they are based on regulations governing the bank.[134] FI can revoke permits, issue warnings, fines and other orders requiring the bank to e.g. limit or reduce the risks of its operations. This means that FI can issue orders requiring banks to create a compliance system, since the law requires banks to have such systems. In certain circumstances, FI can also intervene against a person who is a member of a credit institution's board of directors, who is its managing director or who is a replacement for any such person.[135]

The fine for banks issued by the FI may not be set at less than SEK 5,000 and cannot exceed 10 % of the bank's turnover during the immediately preceding financial year; alternatively two times the profit which the institution realised as a result of the regulatory infringement; or two times the costs which the institution avoided as a result of the regulatory infringement.[136] The fine for natural persons cannot exceed an amount equivalent to 5 million EUR; two times the profit which the natural person realised as a result of the infringement; or two times the costs which the natural person avoided as a result of the regulatory infringement.[137] Such decisions can however be appealed to the Swedish Administrative Court.[138]

[133] Money Laundering and Terrorist Financing Prevention Act, ch 6, arts 7 and 9.
[134] Banking and Financing Business Act, ch 15.
[135] Swedish Banking and Financing Business Act, ch 15, art 1a.
[136] ibid, ch 15, art 8.
[137] ibid, ch 15, art 8a.
[138] ibid, ch 17. art 1.

One of the most recent decisions by FI in this regard was the decision to issue fines against two Swedish banks because of their lack of routines for money laundering prevention. One of the banks was fined with 35 million SEK (around 3 million EUR) and the other with 50 million SEK (approx. 4,5 million EUR). Had the procedure started after 2014, the fines would have been even higher, as the grounds for their calculation changed to 10 % of the turnover during the immediately preceding financial year in august 2014.[139]

Generally, FI needs to choose what power to use carefully,[140] but this does not undermine the fact that banks risk particularly large sums of money for not complying with the regulations that govern their operations. The lack of clarity regarding the compliance rules has not been unnoticed in Sweden, but no legislation processes are currently taking place.[141]

Lastly, it should be mentioned that FI holds similar powers pursuant to the Swedish Special Supervision of Credit Institutions and Securities Companies Act 2014:968 [lag om särskild tillsyn över kreditinstitut och värdepappersbolag] and the Act Concerning Capital Buffers 2014:966 [lag om kapitalbuffertar].

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self-incrimination)?

8.1 Swedish Procedural Act

The right to remain silent or the legal privilege against self incrimination[142] is regulated in the Procedural Act. It's ch 36, art 1 stipulates that only those who are not parties in a dispute or suspects in a criminal case can be heard as witnesses. Witnesses have a legal obligation to leave

[139] FI Decision *Nordea Bank AB* of 19 May 2015, Nr 13-1784. See also Daniel Kederstedt, *'FI:"Nordea har släppt igenom vad som helst"'* (Svenska Dagbladet, May 19 2015) <https://www.svd.se/fi-nordea-har-slappt-igenom-vad-som-helst>, accessed on March 4 2017 [Swedish].
[140] Swedish Banking and Financing Business Act, ch 15, art 1b states that the choice depends on the nature of the infringement, its gravity and duration, its tangible and potential effects on the financial system, the losses that have arisen and the degrees of responsibility.
[141] See Anne Marie Pålsson, *Finansinspektionens ingripanden 2004–2014* (SvJT 2015) 496. See also Christina Strandman Ullrich, *Compliance – Roll, organisation, ansvar, uppgifter* (Jure Förlag, Stockholm, 2011) [Swedish].
[142] Peter H. Collin, *Dictionary of Law*, (4rd edition, Bloomsbury Publishing, 2005).

their testimonies in front of the court, but this does not apply to the parties or suspects. Moreover, this right is extended to the family members of the parties or the suspects.[143] A person which is leaving a testimony can also refuse to disclose information about his family's or his own criminal activities.[144]

The other group of people that are not obliged to testify are doctors, lawyers, psychologists and similar professions. This is applicable for classified information that they have obtained in their profession. However, even this information can be included in the testimony if the person whom the classified information relates to has given his consent, or the obligation to disclose such information is prescribed in law.[145] For the same reasons, the general rule is that no documents that are related to information which can be excluded from the testimonies can be seized during the investigation, pursuant to the Procedural Act, ch 27, art 2. Examples of exemptions from this are situations when the investigation concerns serious crimes such as espionage, terrorist crimes, etc.

The Money Laundering and Terrorist Financing Prevention Act also stipulates that the members of the Swedish Bar Association, associates at law firms, other independent legal professionals, approved and authorised public accountants as well as tax advisors are not required to provide information concerning that with which they have been entrusted when defending or representing a client in a legal proceeding. This includes advice in order to initiate or avoid legal proceedings and applies regardless of whether they have received the information before, during or after such a proceeding. The same applies when they have received the information in connection with assessing the client's legal situation. However, the refusal to provide information according to the Money Laundering and Terrorist Financing Prevention Act only regards situations where information has to be provided to the Police Authority pursuant to the ch 3, art 1 described above.[146]

[143] Procedural Act, ch 36, art 3.
[144] Procedural Act, ch 36, art 6.
[145] A detailed list of all the professions is included in the Procedural Act, ch 36, art 5.
[146] Money Laundering and Terrorist Financing Prevention Act, ch 3, arts 2-3.

8.2 European Convention on Human Rights

The privilege against self-incrimination is prescribed in art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Even though the article does not state it specifically, the right to remain silent in order not to incriminate oneself is considered as an integral part of art 6.[147] This has been established by several judgments of the European Court of Human Rights.[148] Art 52.3 of the EU Charter of Fundamental Rights of the European Union states that in so far as the EU Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the said Convention. Therefore, arts 47 and 48 of the EU Charter ought to mirror art 6 of the Convention. Both the EU Charter and the Convention are fully applicable in Sweden, thus, the privilege against self-incrimination is strongly guarded by the European law as well.

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

In this chapter, the contents of constitutional laws is explained with focus on how these laws affect possibilities to provide employee data to domestic and foreign enforcement authorities. Constitutional laws give protection against intrusion on personal integrity and make some restrictions on providing employee data to enforcement authorities. Exceptions to constitutional laws can only done by law.[149] After constitutional laws in this chapter contents of those laws which make exceptions to constitutional laws is explained. These laws regulate use of personal data in different situations.

[147] Council of Europe's Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (criminal limb), 2014, para 119.
[148] Case 374/87 *Orkem* (1989) ECR 3283; case 27/88 *Solvay & Cie v Commission* (1989) ECR 3355; *Engel and others v Netherlands* (1976) 1 EHRR 647; *Funke v France* (1993) 16 EHRR 297; *Saunders v UnitedKingdom* (1997) 23 EHRR 313.
[149] RF Ch 2 Sec 20.

9.1 Constitutional laws

(The Instrument of Government) [Kungörelse om beslutad ny regeringsform] (1974:152) (RF) states a fundamental rule that power of public authority shall be exercised with respect for the freedom of the individual.[150] Public authority shall also protect the right to private life and family life.[151] According to RF Ch 2 Sec 6 Pt 2 everyone is protected against significant intrusion on personal integrity from public authority if intrusion is done without agreement and involves surveillance or surveying the personal relationships of the individual. This includes most of the enforcement authorities which have a task to fight crime. Exceptions to these rules can be done only by law. Furthermore, the requirements in RF Ch 2 must be fulfilled.[152]

Article 8 The Charter of Fundamental Rights of the European Union regulates protection of personal data. According to this article everyone has the right to protection of personal data about his/her. Personal data shall be handled lawfully for a determined purpose and based on the agreement of the particular person or on the basis of some other legitimate or legal ground. Everyone has the right to access information which is collected about themselves and get wrong information corrected. Exceptions can be done by law or if it is necessary and proportional in achieving a purpose which is accepted in a democratic society. An acceptable purpose for exception is e.g. preventing crime.[153]

9.2 The Personal Data Act 1998:204 (PUL)

(The Personal Data Act) [Personuppgiftslag] 1998:204 (PUL) regulates how personal data can be used and how much personal data a data controller can give to enforcement authorities. This includes both domestic and foreign enforcement authorities. Personal data is defined in PUL Sec 3 and this kind of data is considered to be all information which can be related to physical person directly or indirectly. From PUL Sec 2 can be read that PUL should only be applied if there is no special legislation because all special rules are superior to PUL.

[150] RF Ch 1 Sec 2 Pt 1.
[151] RF Ch 1 Sec 2 Pt 4.
[152] Dir. 2016:21.
[153] ibid.

According to PUL Sec 10 handling of personal data is allowed if the registered person agrees or if it is necessary a) to fulfil contract with the registered person, b) for a data controller in order to complete legal obligation c) for protection of vital interest of the registered person d) for completing assignment of general interest or e) for exercise of authority. A more general rule is PUL Sec 10 Pt 2 f) which gives data controller or third party right to get personal data if their interest is more important than registered persons right for integrity. In addition, there are other points allowing handling of personal data but these points do not have direct relation for enforcement authorities.

Handling of personal data which exposes race, ethnicity, political opinions, religion, philosophical conviction, health, sexual orientation or belonging to labour union is usually not allowed according to PUL Sec 13. This kind of data is considered sensitive personal data. Exceptions to this rule are PUL Sec 14-19 and (Personal Data Ordinance) [Personuppgiftsförordning] (1998:1191) (PUF) Sec 8. PUF Sec 8 allows enforcement authorities to use sensitive personal data in text if the data has been received for a case or it is necessary for handling the case. A situation when handover of sensitive personal data is allowed is when the registered person agrees to it. Handover is also allowed if it is necessary a) for a data controller to do in order to complete requirements of labour law b) in order to protect vital interest of either the registered person or someone else and the registered person cannot leave his/her approval or c) in order to determine, claim or defend a legal demand. According to PUL Sec 16 Pt 2 can a) only be applied if labour law requires that a data controller hands over data or if the registered person approves of handover. There are also exceptions for non-profit organisations, for health care and for research purposes.[154] The Government of Sweden can also declare other exceptions if it is needed for important general interest.[155]

The main rule according to PUL Sec 21 is that only enforcement authorities have permission to handle criminal records. Exceptions are allowed for research purposes. The Government of Sweden may also declare other exceptions but this opportunity should be used restrictively.

[154] PUL Sec 17, 18, 19.
[155] PUL Sec 20.

9.2.1 Transferring personal data to foreign enforcement authorities

According to PUL Sec 33, transferring data to a country which does to have an adequate level of security for handling personal data is not allowed. This rule applies to EU-countries as well as other countries. Adequacy of security level should be determined by taking all conditions which have connection to data transfer into account. What should especially be taken into consideration is for what purpose the requesting country wants to use the personal data, what kind of personal data is transferred, how long the personal data will be stored in the requesting country and what rules the requesting country has about handling personal data.

PUL Sec 34 is an exception to the main rule in PUL Sec 33. It is allowed to transfer personal data to countries outside of the EU if the registered person agrees to that or if data transfer is necessary for a) fulfilling a contract between the registered person and data controller or to complete a task that the registered person has asked data controller to do when contract was made b) a contract which benefits the registered person and is between data controller and a third party c) determining, claiming or defending a legal demand or d) protection of vital interest of the registered person. Transferring data is also allowed to countries which have joined European Convention of the European Parliament and of the Council on the adequate protection of personal data.[156]

PUL Sec 35 is another exception to the rule in PUL Sec 33 and it allows the Government of Sweden to decide about transferring personal data to other countries in EU. It is also possible for the Government of Sweden to decide to transfer personal data to countries outside of the EU but these countries have to sign an agreement to guarantee that they have an adequate level of security for handling of transferred personal data. This is required to guarantee the protection of the registered persons' data.

[156] PUL Sec 34.

9.3 Police Data Protection Act (2010:361) (PDL)

(Police Data Protection Act) [Polisdatalag] 2010:361 (PDL) regulates handling of personal data in fighting crime and protecting people's integrity.[157] According PDL Ch 2 Sec 1 its rules are superior to rules of PUL because PDL is a special law while PUL is a general law (lex specialis). In PDL Ch 2 Sec 2 is listed which PUL rules should be applied beside PDL. Handling of personal data is allowed when it is needed to reduce, prevent or notice criminal activities. It is also allowed when it is needed to investigate or counter crimes or to complete requirements of international agreements.[158] In addition, it is allowed to handle personal data according to PDL Ch 2 Sec 8 if it is necessary for:

1. National Intelligence Service, The Swedish Economic Crime Authority, Public Prosecutor's office, Swedish Customs and Excise, The Coast Guard or Swedish tax agency on fighting crime;
2. foreign enforcement authorities or international organizations to fight crime;
3. assisting work for police;
4. other work police has liability to do if there is especial reasons to handover personal data;
5. preventing crime and keeping safety at prisons;
6. verifying fingerprints at Swedish Migration Board; or
7. work of authorities.

According to PDL Ch 2 Sec 8 Pt 2 personal data can be handed over to the Government of Sweden or others if it is required according to any other law or regulation. The Government of Sweden can regulate that personal data about people who are wanted for crime or are being removed from the country can be used to give information to enforcement authorities. In some cases, personal data can be handed over to someone else than in PDL Ch 2 Sec 8 Pt 1-3 if the purpose for that is the same as the purpose which the personal data was collected for. Handling of personal data is allowed if it is needed for making data entry. It is also allowed when data has

[157] PDL Ch 1 Sec 1.
[158] PDL Ch 2 Sec 7.

been given for a police authority or The Swedish Economic Crime Authority in report, application or the same kind of document and this data is necessary for handling of cases.[159]

In most cases, handling of personal data is not allowed if it only contains sensitive personal data. If there is another reason to collect data and sensitive personal data is only part of it, handling of data may be permitted if it is absolutely necessary for processing of personal data. This kind of personal data can be handled even in case it is regulated in PDL Ch 2 Sec 9. Personal data describing the appearance of a person should be formulated objectively and human dignity shall be respected. According to PDL Ch 2 Sec 11 only those who need personal data for completing their work should have access to personal data and only to such data which is relevant for completing their work. Personal data should not be stored for a longer time than needed for some purpose regulated in law.[160]

If it is in Swedish interest, personal data can be handed over to Interpol, Europol or police authority in a country which is connected to Interpol if data is needed for the authority to fight crime.[161]

Collected personal data is not allowed to be kept for a longer time than needed for achieving the purpose of the regulation. In PDL Ch 2 Sec 12 Pt 1-8 there is more specific time for keeping the data in various situations according special laws. [162] If collected personal data is not used it should be destroyed one year after the case for which the data was collected has been closed. According to PDL Ch 2 Sec 13 Pt 2 this does not apply for personal data which is collected for the purpose of investigating or preventing crime.

National Intelligence Service, The Swedish Economic Crime Authority, Public Prosecutor's office, Swedish Customs and Excise, The Coast Guard or Swedish tax agency on fighting crime have the

[159] PDL Ch 2 Sec 9.
[160] PDL Ch 2 Sec 12.
[161] PDL Ch 2 Sec 15.
[162] PDL Ch 2 Sec 12.

right to handle personal data even if it is confidential according to (the Secrecy Act) [Offentlighets- och sekretesslag] 2009:400 (OSL) Ch 21 Sec 3 Pt 1 or OSL Ch 35 Sec 1 when data is needed for fighting crime. This does not allow them to get personal data which is defined in PDL Ch 4. This includes the DNA register, the fingerprint register, the description register and the money laundering register.[163] PDL Ch 2 Sec 17 is the first exception to rule in PDL Ch 2 Sec 16 and allows named enforcement authorities to get DNA profiles if these are needed in fighting crime. PDL Ch 2 Sec 18 is the second exception to the rule in PDL Ch 2 Sec 16 and allows named enforcement authorities to get data from the fingerprint register and the description register if data is needed for fighting crime. Besides, the Swedish Migration Board has the right to get the same data if it is needed for controlling fingerprints they have taken. The Government of Sweden can allow handing over data in other cases than those named in PDL Ch 2 Sec 14-18.[164]

It is not allowed to handover personal data in electronic form other than singular personal data.[165] Allowing direct access is not permitted unless not regulated in PDL or if The Government of Sweden makes an exception for it. There are also some other regulations about direct access in PDL Ch 3 Sec 8, Ch 4 Sec 10, Ch 4 Sec 17.

9.4 Secrecy Act (2009:400) (OSL)

OSL can be applied when an employer is a public authority. OSL also regulates how public authorities are allowed to use personal data. Most of the rules of this law regulates when personal data can be handed over from one public authority to another.

9.5 Law on gathering of data relating to electronic communications as part of intelligence gathering by law enforcement authorities (2012:278) (LIU)

Police authority, National Intelligence Service and Swedish Customs and Excise have according (Law on gathering of data relating to electronic communications as part of intelligence gathering

[163] PDL Ch 2 Sec 16.
[164] PDL Ch 2 Sec 19.
[165] PDL Ch 2 Sec 20.

by law enforcement authorities) [Lag om inhämtning av uppgifter om elektronisk kommunikation i de brottsbekämpande myndigheternas underrättelseverksamhet] 2012:278 (LIU) Sec 1 the right to secretly get information about 1) messages which have transferred inside of electronic communication network to or from a mobile number or other address 2) which electronic communication device have been in a particular geographical area or 3) in which geographical area an electronic device is or has been. This information can be obtained from the subject which is a service provider for an electronic communication network or for an electronic communication service. This is according LIU Sec 2 allowed when personal data is obtained 1) for action of particular significance to prevent, counteract or notice criminal activity which involves crime that leads to penalty which has a minimum sentence of two years and 2) purpose of action outweighs intrusion or hurt which action causes to the person action is taken against or to someone else who has opposite interest. Data may also be handed over in some other cases according to LIU Sec 3. This includes crimes like espionage, sabotage, terrorism and some other serious crimes. In the decision it should be stated against which criminal activity the action is taken, for which time the decision should last and which mobile number, other address or geographical area the decision is related to. Time shall not be decided to any longer than necessary and permission cannot be granted more than one month before action will be taken. If the purpose of the permission is no longer actual, decision shall be annulled immediately.[166]

10. If relevant, please set out information on the following:

10.1 Defences to the offences listed in question 2;

Defences to the offences are found in (The Swedish Penal Code) [Brottsbalken] (1962:700) BrB Ch 24. Only applicable to these offences are BrB Ch 24 Sec 8 and BrB Ch 24 Sec 9. According to Ch 24 Sec 8 criminal charges can be dropped if a criminal act is committed by following an order from a superior. Which type of criminal act and other circumstances are at hand should be taken into account when the decision is being made. According to BrB Ch 24 Sec 9 can mistake of law lead to that criminal act does not cause criminal liability if a mistake of law has been caused by

[166] LUI Sec 5.

incorrect announcement of criminal law or if the criminal act for some other reason was obviously excusable.

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement);

There are no equivalents to deferred prosecution agreements in Swedish law. There has been proposals to create a system for plea agreements but it was not implemented to Swedish law.[167]

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

Penalty can be reduced according to BrB Ch 29 Sec 3. Only BrB Ch 29 Sec 3 5) can be applied to these criminal charges. BrB Ch 24 is explained in Sec 10a. When the penalty is decided, it should be taken into account:

1. if the defendant has suffered severe bodily injury
2. if the penalty or penal value of the crime, because of defendants' high age or poor health, would be unreasonably hard
3. if long time has elapsed from committing a crime in relation to the type of crime
4. if the defendant has tried to prevent, correct or limit the damages of the crime
5. if the defendant has voluntarily turned herself/himself in or has given information which has particular significance for crime investigation
6. if the defendant suffers harm because of he/she is being deported from the country
7. if the defendant suffers harm because he/she will or probably will be dismissed or laid off from employment because of the crime or suffers from other difficulty or special inconvenience in exercising his/her profession
8. if penalty would be disproportionately hard considering other legal sanctions following the crime or

[167] Prop. 2014/15:37.

9. if some other circumstance calls for lower penalties than what the penal value of the crime suggests.

If any of these circumstances occur, the court may mitigate lower penalty than the penal value of the crime suggests. The court can decide not to sentence any penalty if it would be obviously unreasonable considering circumstances in BrB Ch 29 Sec 5.[168] If a person who is under 21 years old commits a crime, the penalty may be mitigated according to BrB Ch 29 Sec 7.

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance)

11.1 Possibilities for tax reductions

Income taxes are regulated in the (Income Tax Act) [Inkomstskattelag] (1999:1229) (IL). The Swedish income tax system is divided in three categories by forms of income. These forms are capital income, corporate income and labour income. The main rule for tax deduction in corporate income is that expenditures for earning and maintaining incomes can be deducted. Interest expenditures and capital losses can be deducted in all cases. Exceptions for the right to make deductions are in IL Ch 9 which states which expenditures cannot be used for deductions. Fines and other penalties cannot be used for tax deductions according to IL Ch 9 Sec 9. IL Ch 9 Sec 9 is the general rule and it does not specify which penalties are included to prohibition. Some examples were given in a legislative proposal.[169] Besides, according to IL Ch 9 Sec 10, bribes and other inappropriate remunerations cannot be used for tax deductions.

11.2 Insurances for cost mitigation

Directors' and officers' insurances usually have a clause which excludes coverage for criminal acts. Because of this, the insured does not get insurance compensation for damage caused by a crime that the insured has committed.

[168] BrB Ch 29 Sec 6.
[169] Prop. 1999/2000:2 part 2, p. 110 ff.

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

In this chapter, the content of the new EU data protection rules is discussed as well as how these rules are likely going to affect Swedish legislation in the future. Thereafter, the protection of whistleblowers under the current legislation and which changes are likely to happen in the future is discussed briefly. Stronger whistleblower protection rules are reflected in relation to need of better protection of trade secrets. Lastly, there is an explanation of how Swedish law is going to be adjusted in order to be more effective against money laundering.

12.1 Reform of EU data protection rules

As preliminary rulings of the EC Court of Justice C-203/15 and C-698/15 showed, Swedish law needs to be adjusted to EU law. Therefore, a new government inquiry has been started February 17 2017. The EC Court of Justice stated that legislature exceeded its competency because 2006/24/EG[170] is against the principle of proportionality in the Charter of Fundamental Rights of the European Union articles 7, 8, 11 and 52. That is why 2006/24/EG was declared to be invalid. This caused 2002/58/EG article 15.1 to become applicable. 2006/24/EG, which is now invalid, was especially implemented to the (Electronic Communications Act) [Lagen om elektronisk kommunikation] 2003:389 (LEK).[171]

An investigator has the task to research which changes are needed in order to make Swedish law proportional and balanced in terms of protection of privacy and use of personal data for fighting, investigating and preventing crime. The investigator has to make sure that procedural rights and mechanisms are protected when secret means of coercion are used. These are for example secret telephone bugging and secret telephone surveillance. These methods can be used only in cases of particularly serious crimes or in case crime threatens society. Even after preliminary rulings there should be a possibility for making compulsive rules that require data controllers to store personal

[170] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.
[171] Prop. 2010/11:46, bet. 2011/12: JuU28.

data on electronic communication.[172] However, it must be investigated how extensively this possibility can be used.

12.1.1 Storing personal data

Access to personal data for other domestic enforcement authorities becomes more limited and access is only available if personal data is about a person who is suspected to plan, commit or to have committed a serious crime or is somehow involved with such a crime. Another situation when personal data can be handed over to domestic enforcement authorities is when information is needed for national security, national defence or for public security which is threatened by terrorism. In this case even personal data about other people than the suspect can be handed over to domestic enforcement authority. Before handing over personal data ex-ante control should be done by court or by an independent authority. The person whose personal data is being handed over should be informed if informing him/her does not risk to cause harm to the investigation.[173] The data controller must make sure that personal data is stored in such a way that requirements of adequate level of security is fulfilled. the EC Court of Justice has stated that national legislation must order that storing must be kept inside the EU and personal data must be destroyed after the storage period has elapsed.

12.1.2 Goals of the government inquiry about storing personal data

One goal of the government inquiry is to clarify how serious crime must be to give domestic enforcement authorities right to access to personal data. The second goal is to investigate how requirements of notification to the person whose data is being handled should be applied. There is also the question if information which is included in professional secrecy should be protected by a special form of legal protection. The main objectives are to find in which parts Swedish legislation does not fulfil requirements of EU law after preliminary rulings of the EC Court of

[172] Dir. 2017:16.
[173] ibid.

Justice and to investigate alternatives for fulfilling EU law requirements. Advantages and disadvantages of alternatives should be clarified too.[174]

The government inquiry should analyse if Swedish legislation fulfils EU law requirements of an adequate level of security. If the current legislation is found not to fulfil the requirements of EU law, ways to fulfil the required level must be investigated.

12.1.3 Related issues

It should be investigated if current legislation is in line with RF and the Charter of Fundamental Rights of the European Union and suggest modifications if legislation does not fulfil requirements of those laws. It should also be clarified how all modifications of this inquiry is going to affect possibilities to prevent, notice and investigate crimes.

12.1.4 What happens next?

The result of the inquiry is expected to be completed by August 16 2018. The part of the inquiry which is done because of preliminary rulings of EC Court of Justice should be completed by October 9 2017.[175]

12.2 Whistleblowing

New regulations about whistleblowing can be found in the (Act on Special Protection Against Victimisation of Workers Who Are Sounding the Alarm About Serious Wrongdoings) [Lag om särskilt skydd mot repressalier för arbetstagare som slår larm om allvarliga missförhållanden] 2016:749 (LAA). Its purpose was to give employees better opportunities to give information about illegal or unethical activities. At the preparation stage the law was supposed to include confidentiality to the identity of whistleblowers on public services. Confidentiality for the identity of whistleblowers was partially supposed to be protected even on private services. It was even

[174] ibid, p.8 f.
[175] Dir. 2017:16.

thought that the law would require employers to create policies to ease whistleblowing. Lastly it was proposed that damages would be paid by an employee who gets targeted by retaliatory measures from employees' side. Only the last mentioned of these propositions was taken into the new regulations. There has been debates about efficiency of a law like this. On the one hand it does not give comprehensive protection to whistleblower because there are still risks for employees to act as whistleblowers. On the other hand, it is difficult to find balance between protecting trade secrets and creating an effective system for protection of whistleblowers.

12.2.1 Stronger protection for whistleblowers

Whistleblowers have an important role in society and employees have a special opportunity to suspect and notice if there is something wrong the actions of an organisation. There is also a common interest that such abuse gets noticed and remediated. Noticing abuse increases effectivity in using resources and public funds. Other benefits are fair competition between companies by preventing use of unfair practices. Especially for public enforcement authorities it is important to have trust from the public and this can be achieved by increasing transparency.[176]

An argument against a stronger protection of the identity of whistleblowers is that employees already get enough protection from (the Employment Protection Act) [Lagen om anställningsskydd] (1982:80) (LAS) which gives employees right to compensation for damages if his/her employment gets terminated without objective grounds. However, protection is weaker compared to other measures the employer can take, e.g. relocation or defaulted increase of salary.[177] The protection in these cases is weaker but there is still some protection available.[178]

In the public sector there is stronger protection for whistleblowing employees which relates to freedom of speech. (The Freedom of the Press Act) [Tryckfrihetsförordning] (1949:105) (TF) and (Fundamental Law on Freedom of Expression) [Yttrandefrihetsgrundlag] (1991:1469) (YGL) are constitutional laws and give protection if information is given to media. Even if TF or YGL cannot

[176] Prop 2015/16:128, p. 10 f.
[177] ibid, p. 11.
[178] AD 1978 nr 89.

be applied, an employee has protection given by (The Instrument of Government) [Kungörelse om beslutad ny regeringsform] (1974:152) (RF).[179] Before LAA employees in the public sector could not get damages if there was no violation of European Convention on Human Rights.

12.2.2 Protection of whistleblowers' identity

Everyone in Sweden has the right to freedom of speech and it is protected in constitutional laws such as RF, TF and YGL. Public authorities are not allowed to investigate who has given information about abuse to be published. Journalists and press have the right to protect their sources.

Employees in the private sector have less protection. This gets a bigger effect since some publicly financed businesses are left for private actors to operate. Although this does not apply to companies if a municipality or county council has legal determinative influence over them.[180] Before LAA there was no informant protection for whistleblowers in the private sector. Besides, an employer has the right to limit employees' possibilities to speak to media through an agreement. It is even possible for private employers to investigate who the whistleblower is.

There is currently a government inquiry on which type of publicly funded actors should give strong informant protection for whistleblowers considering constitutional laws.[181]

12.3 Need of protection of trade secrets

There is a government inquiry about how protection of trade secrets should be formed. What will be investigated is how criminal liability should be formed when an employee uses or exposes trade secrets which she/he has got access through their job assignments. Balance needs to be found between protection of trade secrets, freedom of speech and protection of whistleblowers. At the moment the (Act on the Protection of Trade Secrets) [Lagen om skydd för företagshemligheter]

[179] Prop. 2015/16:128, p. 12.
[180] OSL Ch 13 Sec 2.
[181] Prop. 2015/16:128, p. 13.

(1990:409) only provides protection against unauthorized attacks. According to the law it is not an unauthorized attack if someone gets, uses or exposes trade secrets to public authority or publishes trade secrets if there is reasonable doubt that the employee has committed a crime for which jail is the penalty. In some cases, freedom of speech overweighs protection of trade secrets. Unauthorized attacks can cause obligation to pay damages. Criminal liability is possible only if trade secrets are obtained without permission or if someone gets access to trade secrets without permission. If an employee has access to trade secrets because of their tasks they cannot be convicted of company espionage.[182] The main objective of the government inquiry is to make sure that Sweden can implement Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.[183] It can be expected that possibilities for criminal liabilities is going to be increased even to cases where an employee has got access to trade secrets because of their job assignments if appropriate balance between protection of trade secrets and freedom of speech is found. Constitutional laws are not going to be modified. The government inquiry should be completed by May 19 2017.[184]

12.4 Anti-money laundering

There is a government inquiry about how money laundering can be prevented more effectively. Final report of inquiry came to the conclusion that this goal can be achieved by implementing the fourth anti-money laundering directive to Swedish law and implementing what is needed in order to fulfil recommendations of the Financial Action Task Force (FATF). Furthermore, Swedish law shall be adjusted to the revised regulations about the information that should accompany money transfers. Another goal of the inquiry is to revise the current anti-money laundering law and carry out the necessary restructuring.[185]

[182] Ericsson-case (Svea hovrätt, 20 October 2003 Case nr B 5221-03).
[183] Dir. 2016:38.
[184] Dir. 2016:38.
[185] SOU 2016:8 p. 25 ff.

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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanction legislation in your jurisdiction.

For many countries including Turkey; due to significant effect of globalization, corruption has become a worldwide problem that is required to be solved in the international dimension. Nowadays governments' struggle for corruption is not effective by its own and it has been supported by global or/and regional civil society organizations. The struggle for anti-corruption has a particular importance for Turkey in the achievement of its goal of becoming a European Union member, since anticorruption is expected to feature prominently in Turkey's talks on European Union accession.[1]

As a result of this international cooperation; the contracting states are obliged to comply with their respective domestic laws and to make these territorial arrangements for all these contracts. Many new regulations in Turkey's legislation have also been codified in line with the principles of international agreements and have been made more appropriate for the day.

In the process of membership to the European Union, Turkish legislative amendments were made between the dates 6.2.2002 and 14.7.2004, which consisted of 8 packages, consisting mainly of Turkish Penal Code and Criminal Procedure Law, in compliance with the European Union, and bribery, corruption, fraud, anti-money laundering and many provisions in the nature of combat have been added, either directly or indirectly.

Two examples of the innovative amendments made in Turkish Legislation are the" Law on amendment of some laws in order to prevent bribery of foreign public officials in international commercial transactions' 'and' n. 5918 Law on amendment of Turkish Penal Code and other codes'.

[1] Güneş Okuyucu Ergun, '*Anti-Corruption Legislation in Turkish Law*', German Law Journal, Vol. 8 N. 9 [2007] https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b8697520c6474278b43265/1454926197866/GLJ_Vol_08_No_09_Okuyucu-Ergun.pdf accessed 27 January 2017

According to the law numbered 5918, corruption functions both individually and through organized crime organizations and involves a wide variety of crimes. The law also includes various legal considerations directly or indirectly related to each other, such as corruption of property value arising from the crime, bribery, corruption in the private and public sectors, and liability of legal persons. In this context, it is observed that the European Union (EU) overlaps with the obligations to be fulfilled in the full membership negotiations and international institutions such as the Council of Europe (EC) and the Organization for Economic Co-operation and Development (OECD).

For this reason, in the scope of our obligations arising from international treaties that Turkey is a state party of, significant changes have been made in particular regarding the bribery of foreign public officials, the laundering of crime incidents and the responsibility of legal persons and in which case sanctions will be enforced in the Criminal Law.

The main legislation regulating the acts of corruption is the Turkish Criminal Code No. 5237, effectuated on June 1, 2005, that prohibits bribery, malversation, malfeasance, embezzlement and other forms of corruption such as negligence of supervisory duty, unauthorised disclosure of office secrets, fraudulent schemes to obtain illegal benefits, etc. [2]

Primarily, Turkey defined the offense of bribery of foreign public officials as a crime in 2000 by ratifying the Convention on the Prevention of Bribery of Foreign Public Officials in the OECD International Business Transactions.[3] In 2003, the Law on the Amendment of Certain Laws in order to Prevent the Bribery of Foreign Public Officials in the International Commercial Transactions entered into force in 2005, as well as the new Turkish Criminal Code. Featuring this element which was not previously criminalized was taken into domestic law in the scope of EU compatibility.

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[2]Gürkaynak, G. Kama, O, Anti Corruption in Turkey, Anti-Corruption Regulation 2016, Getting the Deal Through [2016], http://www.elig.com/docs/b821a-mi-3.6-ac-turkey.pdf accessed 27 January 2017,188.

[3] Dilaver Nisancı, *'Yolsuzluk ve Yolsuzluğu Önlenmesine İlişkin Olarak OECD Rüşvetle Mücadele Sözleşmesi'* (Corruption and Relating to the Prevention of Corruption OECD Anti-Bribery Conventions Audit Process) TBB [2014] http://tbbdergisi.barobirlik.org.tr/m2014-114-1417 accessed 27 January 2017

The crime of bribery has been expanded and reorganized in July 2012 with the law numbered 6352. The definition of this crime was organized in article 252 (Turkish Criminal Code) and in subsequent articles, and a detailed regulation was made for the crime of bribery of foreign public officials with the 9th section of the article.

In accordance with paragraph 9 of the Article's provisions:

a. to public officials elected or appointed in a foreign state,
b. judges who serve in international or transnational courts or in foreign government courts, jury members or other officials,
c. To members of the international or supranational parliament,
d. persons who are engaged in a public activity for a foreign country, including public institutions or public enterprises,
e. Citizens or foreign referees appointed in the framework of the arbitration procedure referred for the purpose of resolving a legal dispute,
f. to the officials or representatives of international or international organizations established on the basis of an international agreement, for the purpose of obtaining or retaining a job or an unfair advantage in the performance of or in connection with the performance of the mission, or in the case of international commercial transactions; by way of direct or intermediary, interest offer, offer or promise, or demand or acceptance by them. " In the form of a criminal offense and bribery of foreign public officials described the details and undertaken.

In addition, when the 8th paragraph of the same article is assessed, it is deduced that the listed persons will be punished as public officials, since they will have the facilities of taking bribes together while not adressed as public officials, so that a limited number of individuals may be punished in a situation in which they benefit from bribery.

The person acts in the interest of a public official or another person directly or through intermediaries commits a crime of bribery gets sentenced to four years to twelve years in prison for the incumbent government official and bribe-giver. Appropriate measures against legal entities

benefiting from bribery and subject to attenuating and aggravating circumstances are set forth in the Criminal Code. Also, pursuant to the 7th paragraph of the aforementioned article, the length of potential imprisonment can be increased by one-third to one-half if the individual who receives a bribe or offers bribe or agrees to provides judicial duty, or is an arbitrator, expert witness, a notary public, or a sworn financial consultant.

Turkish legislation also regulates the crime of money laundering as an another special aspect of corruption. The threshold of predicate offences is six months of imprisonment. According to article 282 of the Criminal Code, laundering of proceeds of a crime occurs when a person:

1. takes out of the country funds obtained due to a crime that fulfils the abovementioned threshold;
2. subjects the funds to certain transactions to create the impression that they have been obtained legitimately
3. subjects the funds to transactions to conceal their illegitimate source.

If those who are not complicit in the perpetration of this crime buy, accept, possess or use the asset which constitutes the subject of this crime will also be punished by imprisonment from two to five years.

As an another type of corruption offences, fraud is defined as the fraudulent behaviour that one deceives another in order to benefit himself/herself or someone else by the Turkish Criminal Code, Article 157. The act of fraud can be sanctioned up to five years of imprisonment or 5,000 days of judicial moneary fine.Qualified fraud is sanctioned with (article 158, Criminal Code) two to seven years of imprisonment and up to 5,000 days of judicial monetary fine. The judge determines the rate of the fine depending on the individual's economic and other personal status.

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

Nowadays, corruption is no longer just a public sector issue but also a private sector issue. With globalization and liberalization, regardless of business volume, companies in every measure face different corruption risks. Since Turkey's has an integrated and growing economy, we have a number European Union instruments are implemented and linked to specific sanctions in Turkish law. In the Turkish legislation, deterrent arrangements against corporations and those who have a role in the company within the scope of fight against corruption are mentioned in the new TCC (Turkish Criminal Code) and Capital Markets Law.

Corporate governance principles in the prevention of corruption are listed as; transparency, justice, liability and accountability in the company management. These principles have been adopted by the Commercial Code in Turkish legislation.[4] Corporate governance principles constitute the first step in advocating anti-corruption for companies. It is commonly believed that if reliance on stakeholders' acts that are responsible and in good faith can be provided, the integrity in management will increase and a trial of corruption will be inspected in more rigorous way.

According to UNAC stablishments, its legislation as a type of offense in that it does not comply with the obligations imposed on the promotion of on-site accounting and auditing standards, the development of good governance principles, and the recognition and prevention of corruption activities.

To comply with the obligations of the Council of Europe Corruption Criminal Code in relation to the relevant regulations and the improvement of the accounting and auditing standards in the UNAC, the development of good governance principles and the recognition and prevention of corruption activities has been regulated and settled as a main offence under the Turkish Penal Code.

[4] Özlem Zıngıl, '*An overview of the legal arrangements for fighting transparency and corruption'* retrieved from International Transparency Association

Nevertheless, it should be emphasized that instead of the context of having internal controls to help identify and prevent corruption activities as outlined in UNAC, the legislation in Turkey is framed by institutional governance principles an and is supported by sanctions in the appropriate juridical and criminal jurisdictions.

These regulations on the prevention of corruption are spreading to a wide range from the obligation to report on the company's true financial position to the evasion of law for acquiring the company's own shares. Besides that, in order to increase the accountability of the company, new regulations related to internal and external denial have been adopted in financial reporting, and additional responsibilities have been introduced to company management boards. Example of these regulations amended in Turkish Commercial Code and Capital Markets Law such as Merchant's obligation of keeping corporate books, presenting financial tables and reports, appointing an independent auditor and necessity of joint-stock companies set up and maintain a company website can be given to point out the principle of corporate governance in Turkish legislation.

Additionally, many acts of corruption of shareholders, board members and auditors are turned into a criminal offense and are subject to criminal penalties and foreseen forcible or imprisonment penalties which has been outlined beloved in detail.

The prosecution of corporate or business fraud and money laundering, however, ultimately rests with the public prosecutors. When it comes to corporate liabilities with the main offences in Turkish legislation explained in the previous question, the general principle under Turkish criminal law is that penal sanctions cannot be imposed on legal entities.[5] Also in the Turkish Constitution Article 38, it is stipulated that '*Criminal responsibility shall be personal.*' However, these regulations does not mean only natural persons shall be criminal offenders. Legal persons can also be involved

[5] Gönenç Gürkaynak & Ç. Olgu Kama, '*The International Comparative Legal Guide to: Business Crime 2017'*, http://iclg.com/practice-areas/business-crime/business-crime-2017/turkey accessed 24 January 2017, 248.

in criminal offences as offenders. However legal persons only can be subject to security measures due to their lack of criminal capacity.

In criminal perspective, has been regulated in Turkish Penal Code stipulates that there are security measures will be enacted on the legal persons who are provided with corruptions like unjustified benefits for their own benefit by the abuse of trust and crime of bribery.[6] Moreover, the Criminal Code provides that sanctions for these offences as follows:

According to related code, if a bribe creates an unlawful benefit to a legal entity, security measures may be imposed on the relevant entity, it will cause of:

- invalidation of the licence granted by a public authority,
- seizure of the goods which are used in the commitment of, or the result of, a crime by the representatives of a legal entity or
- seizure of pecuniary benefits arising from or provided for the committing of a crime. (elit)

Furthermore, in accordance with 43/A in cases that the body or the representative of legal entity or, not being any of them, a person who undertakes a task within the scope of the that legal entity's activity commits the following crimes of:

- Turkish Criminal Code No.5237,
  - Fraud which is defined in Article 157 and 158
  - To rig a big which is defined in Article 235
  - To rig a performance which is defined in Article 236
  - Bribery which is defined in Article 252
- To launder the value of assets arising from the crime which is defined in Article 282
- Embezzlement which is defined in Article 160 of Banking Law No.5411
- Smuggling which is defined in Fighting Against Smuggling Law No.5607

[6] Özlem Zıngıl, '*An overview of the legal arrangements for fighting transparency and corruption'* retrieved from International Transparency Association

- The crime which is defined in Annex 5 of Oil Market Law No.5015
- Financing terror which is defined in Article 8 of the Prevention of Terrorism Law No.3713

In favor of legal entity, an administrative fine of ten thousand Turkish Liras to two million Turkish Liras can be imposed on the legal entity.

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

In the Turkish jurisdiction criminal responsibility is personal and stipulated under the Turkish Criminal Code, Article 20:

Individuality of Criminal Responsibility

ARTICLE 20

1. Criminal responsibility arises from a private wrong. No one can be kept responsible from another person's act.
2. No punitive sanctions may be imposed for the legal entities. However, the sanctions in the form of security precautions stipulated in the law for the offenses are reserved.[7]

According to Turkish Criminal Code Article 20, no one shall be held responsible from the acts of another party. Furthermore, in the second paragraph of the same article, it has been stated that legal entities cannot be subject to punitive sanctions. However, security precautions are reserved.

Under Turkish law, a company cannot be subjected to criminal court proceedings as an individual would be subjected since it is a legal entity. It should also be noted that it has been provided under the TCC that the legal entities may only be sentenced to security measures. Due to the fact that

[7]<http://www.wipo.int/edocs/lexdocs/laws/en/tr/tr171en.pdf> accessed 15 January 2017.

companies cannot be prosecuted or sued, it has been provided by Article 249 of the Turkish Code of Criminal Procedure numbered 5271.

Representation of a legal entity

ARTICLE 249

a. At the investigation and prosecution for crimes committed within the activities of a legal entity, the organ or the representative of the legal entity shall have the capacity of the party who is in conjunction with the intervening party or the defence party and shall be permitted to take the stand in the main hearing.
b. In such cases, the organ or the representative of the legal entity shall utilize the rights furnished to the intervening party or to the accused by this Code.
c. In cases where the accused has capacity of the organ or the representative of the legal entity at the same time, the provisions of subparagraph one shall not be applicable.

This article indicates that companies cannot be prosecuted. Nonetheless, there are exceptions which are stated in different codes. For instance, the violations listed in Turkish Commercial Code provide responsibility for legal entities. Consequently, in these exceptions legal entities can also be subjected to punitive sanctions. The reason behind this derogation is that in commercial law, legal entities are able to take a merchant title and therefore punitive sanctions that are applicable to merchants are implicitly applicable to merchant legal entities.

Some of these exceptions for the crimes of legal entities regulated on Article 562 of the New Turkish Commercial Code No. 6102 has been amended as follows:

a. Those who fail to fulfil the liabilities defined in the second and third sub-clauses of the first paragraph of Article 64 of this Code,
b. Those who fail to submit copies of documents in line with the second paragraph of Article 64 of this Code,
c. Those who fail to obtain necessary approvals in line with the third paragraph of Article 64 of this Code,

d. Those who fail to carry out bookkeeping activities in line with Article 65 of this Code,
e. Those who take inventory in contradiction with the procedure defined in Article 66,
f. Those who fail to submit documents in line with Article 86 of this Code, shall be subject to an administrative fine of 4,000 TL.
g. Those who act in contradiction with Article 88 shall be subject to an administrative fine of 4,000 TL.
h. Those who act in contradiction with the first and fourth paragraphs of Article 199 shall be subject to a judicial fine which may not be less than 200 days.
i. Those who do not hand in or hand in incompletely the books, records and documents which are kept or held according to the provisions of this Code and the related information to the auditors authorised in line with the first paragraph of Article 210 regardless of whether such documents and information belong to the real or legal person subject to auditing; or
j. Those who prevent such auditors from performing their job shall be subject to a judicial fine which may not be less than 300 days.

a. Founders who make declarations contrary to Article 349 of this Law
b. Creditors who give debt to shareholders in contradiction with Article 358 of this Law,
c. Those who violate the provisions in the first or second sentences of the second paragraph of Article 395 of this Law, shall be subject to a judicial fine which may not be less than 300 days.

1. If commercial books do not exist or contain any entries or which are kept in contradiction to this Law, those in charge shall be subject to a judicial fine which may not be less than 300 days.
2. Those who act in violation of Article 527 shall be punished according to Article 239 of the Turkish Criminal Code.
3. Those who issue fake copies of the documents stated in Article 549 and those who intentionally include misstatements in commercial books shall be punished with imprisonment from one to three years.

4. Those who act in violation of Article 550 shall be punished with a judicial fine or imprisonment from three months to two years.
5. Those who act in contradiction with Article 551 shall be subject to a judicial fine which shall not be less than 90 days.
6. Those who act in violation of Article 552 shall be punished with imprisonment from six months to two years.
7. Responsible members and managers who fail to open a website as stipulated in Article 1524 shall be subject to a judicial fine between 100 to 300 days. Those who fail to duly post the content required by the same Article on their website shall be subject to a judicial fine up to 100 days.
8. If there is no contrary decision, administrative fines within the scope of this Law shall be applied by the top civil administrator in the region.
9. If one of the offences defined in this Law is repeated prior to the sentence of the administrative fine, the relevant real or legal person shall be subject to a double administrative fine. However, the amount of the administrative fine to apply in case of making a profit or causing a loss through the offence, may not be less than three times as much as the amount of such profit or loss.[8]

The main difficulty with the common law offence arises from the identification principle. This means that a company can only be convicted of manslaughter if a person, who can be identified as the directing mind of the company, is individually guilty of the gross negligence which resulted in the death in question. A directing mind is an individual in the company who is sufficiently senior to be "identified as the embodiment of the company itself.[9]

In UK's common law, companies are legal persons; accordingly they can also be held liable for their acts if there is a crime. In this situation, there is a different application from Turkish Law in terms of corporate liability. As it is stated above, in Turkish Criminal Code, legal persons cannot

[8]Ibid.
[9] Ibid.

be a subject to crimes. Identification principle determines the extent of exceptions in UK Law, but in Turkish Law exceptions are codified.[10]

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

According to Article 18 of Turkish Criminal Code, the extradition of an individual is possible; meaning that a foreigner accused or convicted of a crime committed in a country may be returned to his country upon demand for prosecution or execution of the punishment. However, in Turkish Criminal Code it has also been stated that there are bars to extradition as in the UK.

The first limitation to extradition is the instance that the act is not subject to an offense according to the domestic law. Therefore the authorities do not have the obligation to return the individual who is being accused or convicted of a crime committed in another country, if that particular act is not constituted as a crime in Turkish laws.

Secondly, if the act does not carry the nature of a political or military offense, the demand for extradition is rejected.

If the so called offense is committed against a Turkish citizen or the Turkish State, or a legal entity incorporated according to Turkish laws, the demand for extradition is rejected. Consequently, in these cases, the accused or convicted individual will be prosecuted or the punishment will be executed in Turkey instead of returning the individuals to his country.

The demand for extradition is rejected, if the so called offense is within the competence of Turkish courts. The jurisdiction will be exercised in Turkish courts.

[10] Ibid.

If the action is subject to statute of limitation, the demand for extradition will be rejected, since in this case, the individual that committed the offense cannot be up for trial. The procedure is the same, if the offense is subject to amnesty.

Excluding the provisions seeking participation in the International Criminal Court, a citizen may not be returned to a foreign country due to the committed offense.

The demand for extradition is rejected if there is deep concern or uncertainty about the future of a person after being extradited, whether he will be subject to prosecution or punishment due to racial, religious preference, or nationality, or membership to a social or political group, or to a cruel treatment or torture. In these cases, the authorities may choose to not return the individual since he might face.

5. Please state and explain any:

5.1 Internal reporting processes (i.e. whistle blowing) and;

Whistle blowing has been observed as an action against the interests of the organisation. Whistle-blower, is a word that is used to indicate a person who is an employee or has been an employee of an organization who reports wrongdoings within that organization from an individual who is an outsider or has never been employed in that organization.[11] The definition of "whistle blowing" in the decision of the International Labour Organization (ILO) which is also ratified by Turkey 4 January 1995 is: *The reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers.*[12] Since there is no specific whistle-blower legislation yet exists in Turkey, the OECD recently criticised Turkey's lack of specific whistle-blower legislation. However, legal entities have the right to adopt internal regulations to determine their whistle blowing policy. General foundations of Turkish law provide counselling when setting the restrictions of both

[11]Near and Miceli, 1985; and Rocha and Kliener, 2005). Near Janet P and Miceli Marcia P , *Organizational Dissidence: The Case of Whistle blowing*, Journal of Business Ethics, Vol. 4, No. 1, [1985] 1-16.
[12]1. ILO Thesaurus 2005, INFORM Bureau of Library and Information Services, International Labour Organization, <http://www.ilo.org/public/libdoc/ILO-Thesaurus/english/tr2695.htm> accessed 18 January 2017

internal and external confession. The nature of information plays a crucial role while determining the loyalty of employee. Due to the fact that all the employees have a duty to be loyal to their employers, the fundamentals of uprightness and good faith should not be violated. Otherwise, employees who violate the rules and the principle of loyalty will not be secured by law and this would constitute valid grounds for the employer to terminate the employment. (Turkish Law of Obligations n. 27836, Art. 396)

Failure of public officer in notification of an offense is regulated under the Turkish Labour Law

ARTICLE 278

1. Any public officer who neglects or delays in notification of an offense to the authorized bodies being aware of commission of an offense which requires investigation or prosecution, is punished with imprisonment from six months to two years.
2. In case of commission of this offense by an officer undertaking duty in a judicial department, the punishment to be imposed according to the subsection above increases by one half.

Therefore, according to Turkish Law, an officer must notify the offense in the firm; but, if there is not an offence that is commissioned then he must be respectful towards his firm's confidentiality. Without a certain offence, it is going to be whistle blowing.

5.2 External reporting requirements (i.e. to markets and regulators), that may arise on the discovery of a possible offence.

According to Turkish Criminal Code, all people who are aware of the criminal offences which are in progress or have been completed, must report these offences to the Public Prosecutor's Office. (Article 158, Code of Criminal Procedures). According to Article 278; Turkish Criminal Code, if one does not report an offence; the punishment by imprisonment may be up to one year.

Turkish Criminal Code, Article 278 encompasses all criminal offences; although there is no article that discusses offences taking place in enterprises. Article 278 does not spesifically regulate liability for the people failing to report a corruption offence.

However, the expression of an individual employed by an entity that acknowledges that a criminal offence has been committed or commissioned (including members of the board of directors, managers, and all other employees with such knowledge) must report corruption or face criminal liability under the Turkish Criminal Code for failure to report.

6. Who are the enforcement authorities for these offences?

Enforcement authorities for these offences under the Turkish jurisdiction are listed below;

Prime Ministry Inspection Board: The main institution in Turkey in the fight against corruption at central government level is the Prime Ministry Inspection Board[13]. The Board of Inspectors has the authority to inspect and audit public institutions and other public bodies in cases of corruption. In addition to the inspection power,the Board also received a secretariat duty in 2009 to manage the implementation of the Strategy Plan for the Improvement of Transparency in Turkey and the Effective Management in the Public Administration[14].Inspection boards assist the administration in identifying corruption and enforcing sanctions, rather than preventing corruption.

State Supervisory Board: The aim of the State Supervisory Board is in accordance with Article 108 of the Constitution; '*To ensure that the lawfulness of the order is carried out in a regular and efficient manner*'[15]. At the request of the President, all kinds of investigations, researches and inspections are carried out in all public institutions and organizations and in all kinds of institutions and organizations participated by more than half of the capital, professional institutions which are public institutions, professional workers and employers. The functioning of the State Supervisory Board with its duties and authority, the term of office of its members and other personal affairs are regulated by law.

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[13] TESEV *Corruption and Combat with Corruption Turkey Evaluation Report.* (Yolsuzluk ve Yolsuzlukla Mücadele Türkiye Değerlendirme Raporu) Retrieved from TESEV: <http://tesev.org.tr/tr/yayin/yolsuzluk-ve-yolsuzlukla-mucadele-turkiye-degerlendirme-raporu> 33.

[14] ibid 33.

[15] Tarhan, B. TEPAV *The Legislation of Anti-Corruption and International Legal Acquis (*Yolsuzlukla Mücadele Mevzuatı ve Uluslararası Müktesebat) retrieved from TEPAV[2015]: <http://www.tepav.org.tr/upload/files/1425475143-3.Yolsuzlukla_Mucadele_Mevzuati_ve_Uluslararasi_Muktesebat.pdf> 41.

6.1 Independent Top/Upper Boards

The collective nature of these institutions fulfil both regulatory and supervisory functions in areas such as capital markets, money market, and audiovisual communication, which are also referred to as sensitive sectors of public life. It would be adequate to state that independent administrative authorities are fighting corruption by taking into consideration conjunctural sensitivities of the purposes of establishment; considering the fact that, in addition to the functions mentioned in the legal grounds of our country, the most obvious areas of activity are corruption.

6.2 The Ombudsman Institution (Ombudsman)

This institution is appointed by the parliament or legislator, responsible for the appointed body; but acting independently; is a private office or task that has the authority to conduct investigations on its own, propose corrective action for the complaint, and prepare reports by accepting the applications of complainants from various actions and transactions of public institutions, employees and their accountants. Due to its transparency and good governance contributions, the Ombudsman institution is also recognized as an important means of combating corruption.

6.3 Financial Crimes Investigation Board (MASAK)

MASAK is a Financial Intelligence Unit (FIU) (Financial Intelligence Units FIU), which were established in order to detect money laundering prevention activities and suspicious transaction notices all over the world in terms of its foundation philosophy, structure and activities which has expanded over time to prevent terrorism financing. MASAK is the designated FIU in Turkey. It is envisaged that countries should establish a financial intelligence unit on the recommendation of the Financial Action Task Force (FATF) 26, which is also a member of our country and operates in the prevention of money laundering. In accordance with the recommendation, countries should establish a central financial intelligence unit that receives, analyzes and distributes suspicious transaction notices and other information on potential money laundering and terrorism financing. The financial intelligence unit must be provided with timely, direct or indirect access to financial, administrative and executive information necessary to adequately and effectively perform its functions, including the analysis of suspicious transaction notifications.

6.4 Ethics Board of Public Officers

In Turkey, with the Law no. 5176, the "Ethics Committee of Public Servants" affiliated to the Prime Prime Ministry was established. The purpose of the Council was expressed as follows: "To determine and implement ethical codes of conduct such as transparency, impartiality, honesty, accountability, and public interest that public officials must observe."[16]

6.5 Information Evaluation Board

One of the key conditions for providing transparency and transparency in governance is the removal of barriers to the right to access to information. In our country, the Law on the Acquisition of Information No. 4982, which sets forth the principles and procedures regarding the use of this right, to make decisions on the use of the right to information and to examine decisions made on the basis of the reasons prescribed in the prescribed law on the objections to be made concerning the application for information; Information Evaluation Board was established.

6.6 Non-governmental Organizations Directly Fighting Against Corruption in Turkey

The contributions of civil society organizations for the solution of social problems cannot be denied. As corruption is also a social problem, NGOs play an important role in creating clean society and transparent public administration.

6.6.1 Society for Transparency Movement (TSHD)[17]

The Society for Social Transparency Movement was founded in 1996. The association is the Turkish representative of Transparency International. The association is a non-governmental organization established to tackle with the issue of corruption on a scientific platform. The purpose of the formation in the direction of regulation is the aspiration of a transparent society. To this

[16] TESEV *Corruption and Combat with Corruption Turkey Evaluation Report.* (Yolsuzluk ve Yolsuzlukla Mücadele Türkiye Değerlendirme Raporu) Retrieved from TESEV[2015]: <http://tesev.org.tr/tr/yayin/yolsuzluk-ve-yolsuzlukla-mucadele-turkiye-degerlendirme-raporu> 56.

[17] Burcu Gediz Oral , '*Yolsuzlukla Mücadele ve Türkiye'de Yolsuzlukla Mücadelenin Kurumsal Yapısı'* (Combat with Corruption and the Institutional Structure of Anti-Corruption in Turkey) MU İktisadi ve İdari Bilimler Dergisi, [2015] http://dergipark.gov.tr/muiibd/issue/492/4401 accessed 28 January 2017, Turkish, 21.

end, it is primarily aimed to prevent the abuse of all kinds of public power (central and local) for personal interests, to ensure that political, social and economic events are monitored and assessed at all times by citizens, and that all corruption is eliminated. The Association takes into account the corruption incidents in Turkey and the World in the direction of its aims, participates the studies in this area and creates social awareness regarding the issue.

6.6.2 Association for the Protection of Citizens' Tax (VAVEK)[18]

Established in 1997, VAVEK has a variety of objectives such as the reduction of tax losses and fugitives, questioning whether public expenditures are made in place and transparent, realization of transparency and gaining social support for anti-corruption. For this purpose, the association prepares various reports and shares it's publications with the public opinion.

6.6.3 Turkish Economic and Social Studies Foundation (TESEV)[19]

TESEV is a non-governmental organization that aims to provide solutions to the problems of society. Since corruption is one of the most important problems of the society, the main mission of TESEV is to attain a clean society. Among TESEV's priority targets takes place transparency and contribution to the realization of openness in Turkey.

6.7 Other Non-Governmental Organizations

In the fight against corruption, NGOs are directly involved in the fight against corruption and transparency. Some other non-governmental organizations that also include the topic of corruption in their social work:

6.7.1 Association of State Auditors (DENETDE)[20]

DENETDE is an association formed by the duties of the duties and it contributes to the fight against corruption by working on supervision and transparency.

[18] ibid 21.
[19] ibid 21.
[20] ibid 22.

6.7.2 Turkish Ethical Values Center (TEDMER)[21]

TEDMER is the association that the executives integrate by establishing themselves with the problems of the business world. Bribery and irregularities are indirectly linked to corruption due to the problems of the business world.

6.7.3 Turkish Industrialists' and Businessmen's Association (TÜSİAD)[22]

6.7.4 White Point Foundation[23]

The White Point Foundation is involved in social studies and is involved in corruption, a problem that is closely related to society.

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

Public prosecutors have the powers below to compel the production of information:

- The power to conduct all types of searches, either directly or through police enforcement working under the public prosecutor *ex officio*, or upon being informed of a crime.
- The power to request any kind of information from all public officials in order to determine the facts of a case and in order to conduct adjudication.
- The power to issue orders to judicial police enforcement officials in writing and, in cases of emergency, verbally, to obtain the requested information. These public enforcement officials are obliged to provide the necessary information and documents post-haste.

[21] ibid 22.
[22] ibid 23.
[23] ibid 23

- The power to gather information regarding civil registries and criminal records, summoning and interrogating the relevant parties.[24]

To be more precise, the offences of corporate fraud, corruption and money laundering should be examined further.

7.1 Money Laundering

According to Article 19 of the Anti Money Laundering Law, The Presidency of the Financial Crimes Investigation Board (MASAK) have certain powers to investigate and gather information regarding the act of money laundering. These powers are explained as follows:

- To collect data, to receive suspicious transaction reports, and to analyse and evaluate them as part of the prevention of laundering the proceeds of crime and terrorist financing.
- To request such documents for examination from law enforcement and other relevant bodies as may be needed during the evaluation of suspected money laundering activities.
- To convey files to the Chief Public Prosecutor's Office for the necessary legal actions under the Criminal Procedure Law if, at the conclusion of the examination, there are serious findings that a money laundering offence has been committed.
- To convey the cases to the competent Public Prosecutor's Offices in cases where serious suspicion exists that a money laundering or terrorist financing offence has been committed.

7.2 Fraud

As it is stated in Article 157 of the Turkish Criminal Code, fraud occurs when a person deceives another person through fraud or secures benefit both for himself and others by causing injury to the victim. According to Article 158 of the same code, where fraud is committed during the

[24] Gürkaynak, G., & Kama, Ç. O. *The International Comparative Legal Guide to: Business Crime 2017*. Global Legal Group.[2016] <http://www.elig.com/docs/489ae-bc17-chapter-29turkey.pdf> accessed 29 January 2017

commercial operations of merchants, company managers or other persons acting on behalf of the company, it is considered to be a "qualified fraud" and subject to even stricter penalties.

The regulator's powers of investigation, enforcement, prosecution in cases of corporate fraud are operation of actions they consider necessary, as it is stated in the Turkish Criminal Procedural Law No. 5271, they can conduct searches. It should be noted that a search order from a judge is needed for workplaces, houses, other closed areas.

According to Article 160 of The Turkish Criminal Procedure Code, in order to investigate the factual truth and to secure a fair trial, the public prosecutor is obliged, through the judicial security forces, who are under his command, to collect and secure evidence in favor and in disfavor of the suspect, and to protect the rights of the suspect.

The public prosecutor may conduct any kind of exploration either directly or through the judicial security forces under his command; in order to achieve the outcomes mentioned in Article 160, he may demand all kinds of information from all public servants.

Other public employees are also obliged to supply the information and documents that are needed during a pending investigation to the requiring public prosecutor without any delay.

Public prosecutors have the power to issue interim injunctions such as freezing orders, confidentiality and disclosure orders, orders for stay of execution, and so on during the investigation. If the public prosecutor determines that the gathered evidence constitues a sufficient doubt that a crime has been committed, the prosecution phase will be conducted under the supervision of the relevant judge.[25]

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[25] BIBLIOGRAPHY \l 1055 Gürkaynak, G., & Kama, Ç. O. *The International Comparative Legal Guide to: Business Crime 2017*. Global Legal Group.[2016] <http://www.elig.com/docs/489ae-bc17-chapter-29turkey.pdf> accessed 29 January 2017

7.3 Bribery and Corruption

The Turkish Criminal Code is applied when there is a case of corruption. Other than that, Turkish Criminal Procedure Code is also applied to acts of corruption and bribery. The powers of investigation, enforcement and prosecution are the same as for fraud.

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self incrimination)

Despite the fact that the public prosecutors can issue interim injunctions such as freezing orders, confidentiality and disclosure orders, orders for stay of execution, etc., a court order is mandatory to search a lawyer's office or house under the supervision of a public prosecutor and as well someone from the relevant bar association for representation. Additionally, there are certain circumstances in which information may be withheld from enforcement authorities.

When it comes to witness testimonies, the Turkish Criminal Procedure Code regulates the instances that refraining from giving testimony is allowed.

According to the Article 45 of the Turkish Criminal Procedure Code, the following persons may use the privilege to not testify as a witness:

a. The fiancée of the suspect or the accused,
b. The husband or wife of the suspect or the accused, even if the link of marriage is non-existant at that time,
c. Persons related to the suspect or the accused in the assending or dissending direct line, either by blood relationship or affinity relationship,

d. Persons lineally related to the accused within three degrees, or persons collaterally related to the accused within two degrees,
e. Persons having a relation to the accused by virtue of adoption.

The individuals who have the right to refrain from giving testimony shall be given notice of their privilege before being called upon to testify. These individuals may also assert their privilege at any point of the testimony during the hearing.

Refraining from testimony is also possible because of professional privilege and privilege caused by permanent occupation.

According to Article 46 of Turkish Criminal Procedure Code (CPC), the persons who have the right of refraining from taking the witness-stand because of their professions or their permanent occupations, as well as the subject matter and the conditions of refraining are listed as:

a. The lawyers or their apprentices or assistants about the information they have learned in their professional capacity or during their judicial duty. According to the general principles applicable to attorney-client privilege, a material is deemed to be privileged if it has been prepared by an independent attorney (i.e. without an employment relationship with her/his client) and to the extent that it aims at the client's right of defence.[26]

   An employer has the obligation to keep the information regarding the employee confidential if the employee has a rightful interest in its confidentiality. The employer uses the information given by the employee, lawfully and in good faith.

   However, in 2016, Turkish Constitutional Court stated that an employer can view and supervise its employees' corporate email accounts, even though these so called accounts may include personal information about the employee. However, this monitoring act must be in accordance with the purpose of monitoring. Therefore this competence of monitoring the

[26] Gürkaynak, G., & Kama, Ç. O. *The International Comparative Legal Guide to: Business Crime 2017*. Global Legal Group.[2016] <http://www.elig.com/docs/489ae-bc17-chapter-29turkey.pdf> accessed 23 January 2017

information cannot be interpreted as limitless. It is regulated within boundaries and if it exceeds these boundaries, the act would be considered intrusive.

b. Medical doctors, dentists, pharmacist, hebammas and their assistants, as well as other members of the medical profession, about their patients' information and that of the relatives of the patients that they acquired in their capacity as a professional,

c. Certified public accountants and notary publics in respect to information of their clients that they acquired in their capacity as a professional. On the other hand, those persons shall not refrain from taking the witness-stand if the related person gives his consent.

Refraining from testimony against himself/herself, or against relatives has been regulated in the Article 48 of CPC. A witness has the privilege of refraining from testimony on questions that would incriminate him (self-incrimination) or individuals listed in Article 45, paragraph one. His right of refraining from answering questions shall be declared to the witness before any testimony is given.

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

Personal data is a source of information that is directly linked to individuals and has also been defined in the European Convention on Human Rights (ECHR) as an information that refers to an "identified or identifiable natural person" the latter being "one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity."[27] On this stage the ratification of the OECD Privacy Guideliness helps maintain the protection of personal data privacy.[28] Grounds of data protection have developed with the cooperation of the Council of Europe and OECD.

[27]Council Directive (EC) 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995]
[28]*Report on the Cross-Border Enforcement of Privacy Laws* [2006] Retrieved from Organization for Economic Co-Operation and Development (OECD): http://www.oecd.org/sti/ieconomy/37558845.pdf accessed 3 February 2017

Under Turkish Law, there are rules and restrictions on providing employee data to domestic or foreign enforcement authorities especially in the Code of Obligations (Law no. 6098 of January 11 2011), Labour Law (Law no. 4857 of May 22 2003), Data Protection Law (Law no. 6698 of April 7 2016) and Law on the Right to Access Information (Law no. 4982 of October 9 2003).

The obligations on data protection of employers have defined that *'Article 419 of the Turkish Code of Obligations sets out that employers are prohibited from using the personal data of their employees unless this is necessary for the execution of the employment agreement.'*[29]

The employees' data protection rights are clarified under Article 75 of the Turkish Labour Code as well. In Article 75 it is stated that,

'The employer shall arrange a personal file for each employee working in his establishment. In addition to the information about the employee's identity, the employer is obliged to keep all the documents and records which he has to arrange in accordance with this Act and other legislation and to disclose them to authorised persons and authorities when requested.The employer is under the obligation to use the information he has obtained about the employee in congruence with the principles of honesty and law and not to disclose the information for which the employee has a justifiable interest in keeping it as a secret.'[30]

Therefore, employers ought to apply and use their employees' personal data respectfully and with the limitations of rule of honesty and other applicable laws.

Although it has been in the stage of preparation for a significant amount of time, the Data Protection Law has recently established in Turkey. The objective was to establish compliance with the EU data protection legislation with the new statute. Similarly, Data Protection Law is quite

[29] Üçer, K. Ergin, B. *Employment and Employee Benefits in Turkey: Overview,* 1 November 2015 http://uk.practicallaw.com/8-383-1562?sd=plc# accessed 3 February 2017
[30] http://turkishlaborlaw.com/turkish-labor-law-no-4857/19-4857-labor-law-english-by-article accessed 3 February 2017

comparable to the Data Protection Directive, along with some differences.[31] Article 8, 9 and 11 provides information about the transfer of personal data, transfer of data abroad and on the rights of the data subject.

Turkish Law on the Right to Access Information has applicability for the public enforcement authorities that direct to uphold the proper access to information of a natural or legal person. Article 21 sets out that;

"With the provision where the consent of the concerned individual has been received, the information and documents that will unjustly interfere with the health records, private and family life, honour and dignity, and the economical and professional interests of an individual, are out of the scope of the right to information. Due to public interest considerations, personal information or documents may be disclosed by the institutions on the condition that concerned individual is notified of the disclosure at least 7 days in advance and his/her written consent is obtained."

Public interest and individuals' written consent play a significant role on disclosing their personal data and information. There are some exemptions that the Data Protection Law will not be applied if:

Data is processed by a natural person in the course of purely personal or household activity.Data is processed for official statistical purposes or, provided that they are anonymised, for research, planning and statistical purposes.Data is processed for artistic, literary, historic or scientific purposes or within the scope of freedom of expression provided that such processing does not infringe the privacy and personal rights, national defence and security, public security and order, and economic security or constitutes a crime.Data is processed for criminal investigations, prosecutions and cases by judicial bodies and execution offices. [32]

If non-compliance with data protection provisions arises, some inherent penalties such as Article 17 of the Data Protection Law sets out a relevant issue with Criminal Code for the crimes engaging data protection. Article 18 imposes administrative fines between TRY5.000 to TRY1 million for

[31] Council Directive (EC) 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995]
[32] Toksoy, F. Balki, B. Yıldız, S. *Data Protection in Turkey: Overview* ,1 September 2016 <http://uk.practicallaw.com/7-520-1896> accessed 30 January 2017

infringements of the Data Protection Law. In conclusion, the transfer of data to a foreign country is possible only if the destination country provides sufficient protection.

10. If relevant, please set out information on the following:

10.1 Defences to the offences listed in question 2;

The Turkish Criminal Code Article 30 which stipulates 'error', a state of non-liability, can function as a defence mechanism for financial crimes:

Error :

1. A person executing an act without knowing factual means of offense defined in the law is not considered to have acted intentionally. The state of negligent responsibility is reserved due to such mistake.
2. A person who is mistaken about the factual qualifications of an offense which require heavier or less punishment may take advantage of this mistake.
3. A person who inevitably makes mistake about existence of conditions eliminating or diminishing criminal responsibility may take advantage of this mistake.[33]
    i. Any person who makes an inevitable mistake about whether his act was unjust or not shall not be subject to penalty.[34]

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement); and

'Article 253 of the Criminal Procedure Law provides a "pre-trial diversion" in the form of an "agreement" between the suspect and the aggrieved person or the real person who has been damaged as a result of the respective act[35].

[33] http://www.wipo.int/edocs/lexdocs/laws/en/tr/tr171en.pdf accessed 30 January 2017
[34] http://www.legislationline.org/documents/section/criminal-codes/country/50 accessed 30 January 2017
[35] Gürkaynak, G., & Kama, Ç. O. *The International Comparative Legal Guide to: Business Crime 2017*. Global Legal Group.[2016] <http://www.elig.com/docs/489ae-bc17-chapter-29turkey.pdf> accessed 23 January 2017, 8.

Article 253 can only be applicable in cases of certain crimes as set out in Article 253[36]. This includes the crime of disclosure of documents or information with the qualification of commercial, banking or customer secrets[37].

At the end of the process, the negotiator prepares a report and submits this report to the public prosecutor[38]. If an agreement is reached between the parties, a detailed explanation as to how an agreement was reached is written out in the report, which must also include the parties' signatures[39]. If, at the end of the agreement, the suspect fulfils his obligation, then the public prosecutor decides not to prosecute[40]. If the fulfilment of such an obligation is promised to be made at a later date, or is divided into instalments, or is to be made for a continuous period of time, then the filing of a public lawsuit will be postponed[41]. If, after such a postponement, the relevant obligations as per the agreement reached are not fulfilled, then the public lawsuit will be filed[42].'

Non-prosecution agreements or deferred prosecution agreements are not available in Turkey.

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

Article 4 of the Criminal Code provides that "not knowing the criminal law is not an excuse" ("ignoratia juris non excusat")[43]. The exception to this rule is the existence of a "legal mistake", which is stipulated under Article 30(4) of the Criminal Code, and which provides that an individual who has inescapably erred in the fact that the act which he committed has caused injustice shall not be punished.

"Legal mistake" relinquishes an individual from being at fault. In other words, even if the act may have been intentionally committed, because the act itself is "faulty", the individual having committed that act will not be punished.

The Turkish adjudication system does not recognise any plea bargaining mechanism.

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[36] ibid.
[37] ibid.
[38] ibid.
[39] ibid.
[40] ibid.
[41] ibid.
[42] ibid.
[43] ibid.

Article 254 of the Criminal Code provides "effective regret" :

1. (Amended: 2/7 / 2012-6352 / 88 md.) If a person who receives a bribe is entitled to submit the bribe matter to the authorities competent to investigate it before the situation has been learned by the authorities, he shall not be punished for the bribe. If the public official who agrees to take a bribe informs the competent authorities before the situation has been learned by the official authorities, he shall not be punished for the offense.
2. (Amended: 2/7 / 2012-6352 / 88 art.) If a person who bribes or agrees with the public official in this matter informs the authorities in his / her case before he / she has been informed by the official authorities, he shall not be punished for bribery.
3. (Amended: 2/7 / 2012-6352 / Article 88) If other persons participating in the crime of bribery inform the competent authorities of the situation before they are learned by the official authorities, they shall not be punished for this crime.
4. (Supplement: 26/6/2009 - 5918/4 md.) The provisions of this article shall not apply to persons who bribe foreign public officials.

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance).

Not relevant

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

Corruption is a notion that is frequently considered as a deterioration that solely exists within the public sector in the eyes of the society. However private establishments aiming to seek financial profit also play a significant part in the commission of corruption and other financial crimes in the

course of their relations with the public institutions as well as their internal affairs.[44] Corruption in the private sector constitutes a handicap before entrepreneurship and it weakens free market economy.[45] Therefore the existence of effective control mechanisms that function on private establishments providing transparency is crucial to maintain a stabilized and credible market economy.

Turkey struggles to perform effective prevention on corruption due to its cultural formation although the legal framework is adequate to tackle with the issue and harmonised with a number of international and anti-corruption instruments.[46] Accordingly, Turkey is widely criticised because of its weak enforcement policies.[47] Meanwhile there are still remaining deficiencies in the legislation that will be expressed below.

The evaluation of the International Transparency Association on Turkish Private Sector demonstrates that a significant number of BİST-100 companies do not share sufficient information with the public opinion regarding their anti-corruption policies, and their reporting process is not entirely transparent. The Association also noted that only 9 companies out of 100 declared a separate anti-corruption programme. The general assessment on the transparency of anti-corruption policies demonstrated that BİST-100 companies scored a point of %28, while the approximate score of the same research was %70.[48]

The tenth and current development plan of the government for 2014-2018 puts emphasis on the growth and consolidation of financial markets and the maintenance of economical discipline and

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[44] Özarslan, E. Zıngıl, Ö. Dönmez, E. *The Guide to Combat Corruption in the Private Sector*. [2016] Retrieved from International Association of Transparency: <http://www.seffaflik.org/ozel-sektorde-yolsuzlukla-mucadele-rehberi/> accessed 25 January 2017, 5.
[45] ibid 5.
[46] Gönenç Gürkaynak, Olgu Kama, 'Market Intelligence: Will Increased International Cooperation Stem Corruption? (Turkey)' (2016) LBB <http://www.elig.com/docs/b821a-mi-3.6-ac-turkey.pdf>69.
[47] Anti-Corruption Resource Centre. *U4 Expert Answer: Overview of Corruption and Anti-Corruption in Turkey* Retrieved from Anti-Corruption Resource Center: <http://www.u4.no/publications/overview-of-corruption-and-anti-corruption-in-turkey/> 2.
[48] Özarslan, E. Zıngıl, Ö. Dönmez, E. (2016) *The Guide to Combat Corruption in the Private Sector*. Retrieved from International Association of Transparency: <http://www.seffaflik.org/ozel-sektorde-yolsuzlukla-mucadele-rehberi/> .8.

stability.[49] The requirement of the development of new financial instruments and the increase of product variety is also pointed out, within the context of growth of financial markets, requiring higher standards of supervision to achieve a more transparent functioning. As the number of publicly traded companies in Istanbul increased to 406 at the end of 2012 (from 329 at the end of 2009), absolute diligence on auditing became crucial.[50]

In the development plan it is also indicated that the objective of entering the European Union as a Member State is still carried on.[51] This objective leads to another objective; that is the implementation of European Union instruments that Turkey has not implemented to its national law, as specified in the 2016-2019 National Action Plan on Membership to EU and the 2016/10 Prime Ministry Action Plan on the Increase on Transparency and the Consolidation of Anti-Corruption Policies.[52]

The expected changes on the legislation, enforcement and penalties will be explained below through these action plans and through regulations of international legal co-operation bodies that are not mentioned in these programmes.

12.1 The 2016/10 Prime Ministry Action Plan

The 2016/10 Prime Ministry Action Plan follows the lead of the 2010-2014 Strategy of Improvement of Transparency and the Consolidation of Anti-Corruption Policies. [53] The action plan foresees stricter corruption rules for public officials and provides swifter ways leading to prosecution.[54] It consists of precautions aimed at prevention, precautions aimed at enforcement

[49] 10th Strategy of Development of the Ministry of Development, 2013, 19, [Onuncu Kalkınma Planı (2014-2018)]
[50] ibid 22
[51] ibid 22
[52] Circular n. 2016/10 of the Prime Ministry (Approving the Strategy of Improvement of Transparency and the Consolidation of Anti-Corruption Policies) 2016, [Saydamlığın Artırılması ve Yolsuzlukla Mücadele Eylem Planı]; National Strategy of Membership to European Union of the European Union Ministry, 2015-2019, 28, [Avrupa Birliği'ne Katılım için Ulusal Eylem Planı].
[53] Circular n. 2016/10 of the Prime Ministry (Approving the Strategy of Improvement of Transparency and the Consolidation of Anti-Corruption Policies) 2016, [Saydamlığın Artırılması ve Yolsuzlukla Mücadele Eylem Planı]
[54] Gönenç Gürkaynak, Olgu Kama, 'Market Intelligence: Will Increased International Cooperation Stem Corruption (Turkey)' (2016) LBB <http://www.elig.com/docs/b821a-mi-3.6-ac-turkey.pdf>68.

and precautions aimed at raising social awareness. The strategies of reform relevant to the subject are listed below;

12.1.1 Preventive Precautions

- The consolidation of the capacity of supervision institutions and the commission of effective cooperation between these institutions in order to establish areas prone to corruption. This objective is to be achieved through amendments to the legislation.
- The revision of the code 3628 of Declaration of Wealth, Fight Against Corruption and Bribery.
- The improvement of transparency in private sector establishments and the prevention of corruption; therefore to increase accountability in the private sector.

12.1.2 Precautions of Enforcement Actions:

The protection of 'whistleblowers'

With this section of the action plan; it is intended to protect individuals who report corruption to officials within the private sector. It is stated that this protection will be provided through the amendment of legislation.[55]

Pursuant to the Global Integrity Report 2010 (Turkey), private sector whistle-blowers are frequently punished for disclosing information through official or unofficial means. The consequences of whistle blowing include the loss of job, being assigned to a less distinguished positions or simply harassment; namely mobbing.[56] This evaluation can be interpreted to make a deduction that the Turkish Code of Labour may be the body of legislation to be amended.

[55] Circular n. 2016/10 of the Prime Ministry (Approving the Strategy of Improvement of Transparency and the Consolidation of Anti-Corruption Policies) 2016, [Saydamlığın Artırılması ve Yolsuzlukla Mücadele Eylem Planı]. 2

[56] Global Integrity (2010) Global Integrity Report, Retrieved from: <https://www.globalintegrity.org/research/reports/global-integrity-report/global-integrity-report-2010/gir-scorecard-2010-turkey/>

Whistle blowing is defined as *"an act of a man or a woman who believing the public interest overrides the interest of the organisation he serves, and publicly blows the whistle if the organisation is involved in corrupt, illegal, fraudulent or harmful activity"*.[57] The act includes reporting the issue to executives at the work environment as well as public institutions and even the media in some instances. [58]

If the information that is reported is accurate and linked to a genuine interest of the public this act constitutes an exception to the ban of disclosing information under the rule of confidentiality that derives from the employment contract.[59] Pursuant to the ILO Convention of Termination of the Contract, article 47, reporting or filing a complaint about the employer on the basis of an unlawful act does not constitute a valid reason to end the relation of employment.

The Directive 2016/943 of the European Parliament and of the Council on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) Against Their Unlawful Acquisition, Use and Disclosure; also stipulates the protection of whistle-blowers; prescribing that "*the protection of trade secrets should not extend to cases which disclosure of a trade secret serves the public interest, in so far as directly relevant misconduct, wrongdoing or illegal activity is revealed*."

Another EU instrument that safeguards whistle blowing is the Regulation No 596/2014 on Market Abuse and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. The Regulation indicates that whistle blowing has a crucial role on the detection of market abuse and therefore adequate arrangements tackling with retaliation or the lack of incentives should be provided to enable whistle-blowers to alert competent authorities.

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[57] Paul Latimer, 'Whistle blowing in the Financial Services Sector' U. Tas. L. Rev. [2002] 3.
[58] Ufuk Aydın, 'The Whistle blowing of the Employee in terms of Employment law ' (2002-2003) The Journal of Social Sciences <http://w2.anadolu.edu.tr/arastirma/hakemli_dergiler/sosyal_bilimler/pdf/2002-2/sos_bil.4.pdf>81.
[59] ibid 86.

Considering Turkey's objective to be a member state of the EU, the implementation of the specified regulations to the Turkish Code of Capital Markets which stipulates insider dealing and market manipulation is a high possibility.[60]

12.2 The National European Union Membership Strategy (2016-2019)

The Minister of European Union and the Chief Negotiant, Ambassador Volkan Bozkır shared the National Strategy with the public opinion on February 26, 2016.[61]

The Action Plan for 2016-2019 encompasses the steps that the government will take with regards to harmonization of legislation as well as institutional and administrative precautions.[62]

The plan consists of sections of subjects, including the amendments and changes will be made for each subject matter. To shed light to the possible amendments on legislation, and changes on execution, the relevant sections of the Action Plan regarding anti-money laundering activities, and transparency of the Capital Markets will be assessed.

12.2.1 The Section of Free Movement of Capitals

In this section the requirement of amending the Turkish Money Laundering Legislation in accordance with the new Financial Action Task Force Recommendations that are revised in 2012 is included. With the amendments it is aimed to achieve effective combat with money laundering and the financing of terrorism.[63]

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[60] Turkish Code of Capital Markets 2012 [Sermaye Piyasası Kanunu] Art. 106-107.
[61] *'AB Bakanı Volkan Bozkır AB'ye Katılım İçin Ulusal Eylem Planı'nı Açıkladı'* The Minister of EU, Volkan Bozkır has announced the National Action Plan for the EU Membership Strategy <http://www.abhaber.com/ab-bakani-ve-basmuzakereci-buyukelci-volkan-bozkir-abye-katilim-icin-ulusal-eylem-planini-acikladi/> accessed at 27 January 2017, Turkish.
[62] ibid.
[63] National Strategy of Membership to European Union of the European Union Ministry, (2015-2019) 28, [Avrupa Birliği'ne Katılım için Ulusal Eylem Planı].

In October 21 2016 a circular of the Prime Ministry that introduces a programme of efficient application of the Recommendations was published on the Official Gazette.[64] The circular notes that the IV. FATF Mutual Evaluation of Turkey will start on 2018, and the report of Mutual Evaluation (Turkey) will be negotiated on the 2019 FATF General Assembly. Therefore the assessment of the compliance of the national legislation and the amendment of the legislation in accordance with FATF recommendations is seen explicitly necessary. Also the National Risk Evaluations that the FATF Recommendations requires the states to perform should be executed by MASAK (The Ministry of Finances, Financial Crimes Investigation Board). Thus a National Risk Evaluation Project and a Project Action Plan will be prepared.[65]

The Financial Action Task Force is an international standard setting body, which coordinates worldwide combat against money laundering and sets international standards regarding the issue.[66]

The FATF Recommendations foresee measures that countries should take in order to combat money laundering and the financing of terrorism. The essential measures that the FATF recommendations set out are;*'enhancing the transparency and availability of beneficial ownership information of legal persons and arrangements; and facilitate international cooperation.'*[67]

States are recommended to designate an authority or a mechanism to coordinate an assessment of risks and apply a risk based approach (RBA) to prevent or mitigate money laundering.[68] They are also asked to obligate financial institutions and the non-financial businesses specified in the recommendations to an assessment of risks and mitigation of their money laundering risks.[69]

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[64] Circular n. 2016/22 of the Prime Ministry (Financial Action Task Force Fourth Evaluation Round Preparations and National Risk Assessment), 2016.
[65] Ibid.
[66] Turner, N. *'The Financial Action Task Force: International Regulatory Convergence Through Soft Law'* 59 N.Y.L. SCH. L. REV. 547 [2014-2015] 557.
[67] FATF (2012), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, updated October 2016, FATF, Paris, France <http://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf> 7. accessed 10 February 2017
[68] ibid.
[69] ibid.

The Financial Action Task Force Plenary subjected Turkey to a follow-up reporting process due to its lack of compliance to the Recommendations that is identified in the 2007 evaluation report.[70] However in 2014, the FATF Plenary reviewed the progress report by Turkey and concluded that the measures taken were sufficient to address the deficiencies of compliance. Therefore it has been decided that Turkey would no longer be subject to the monitoring process of FATF.[71] It has been concluded in the 15th follow up report that Turkey adequately amended the money laundering offence in its Criminal Code by lowering the threshold for predicate offences and including elements required by the relevant UN convention, adopted regulations and amendments allowing stricter customer due diligence, beneficial ownership, risk and simplified/enhanced due diligence.[72]

Therefore it is safe to state that the essential rules prescribed in the recommendations are mainly implemented to;

- Turkish Regulation on the Precautions on the Prevention of Money Laundering and the Financing of Terrorism,
- Turkish Regulation on Programme of Compliance with Obligations of Anti-money laundering and Countering the Financing of Terrorism

However some deficiencies still remain in the legislation when compared to the Revised Recommendations that may be amended in the course of the Action Plan of The Prime Ministry.

The 10th of the revised recommendations sets forth the principle of Customer Due Diligence (CDD) and record keeping.[73] Customer due diligence is a precaution that financial institutions are required to take on certain conditions before initiating financial relations. This assessment is performed mainly to discover the risks of money laundering and terrorist financing that the

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[70] Retrieved from Financial Action Task Force official website:< http://www.fatf-gafi.org/documents/news/fur-turkey-2014.html> Accessed 12 February 2017

[71] Retrieved from Financial Action Task Force official website :<http://www.fatf-gafi.org/publications/fatfgeneral/documents/plenary-outcomes-october-2014.html#turkeyexit> Accessed 12 February 2017

[72] <http://www.fatf-gafi.org/documents/news/fur-turkey-2014.html> Accessed 12 February 2017

[73] FATF (2012), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, updated October 2016, FATF, Paris, France <http://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf> 7. accessed 10 February 2017

customer exposes the financial institution to.[74] The recommendation suggests that financial institutions should be required to apply CDD when establishing business relations, carrying out occasional transactions and in other conditions. This recommendation is implemented to the Turkish Regulation on the Precautions on the Prevention of Money Laundering and the Financing of Terrorism (RoM) and the Code on the Prevention of Money Laundering except for one subsection of the recommendation:[75]

'(d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds."[76]

The Turkish Regulation on the Precautions on the Prevention of Money Laundering and the Financing of Terrorism (RoM) and the Code of Prevention of Money Laundering requires measures of customer due diligence only primarily to the transaction/business relation and not through the course of the relationship. Therefore the implementation of this subsection to the legislation is expected.

The 12th Recommendation stipulates additional risk assessments such as establishing the source of the customers' wealth and obtaining senior management approval for establishing the relation to normal CDD measures when the customer is a politically exposed person.[77] Financial instruments are required to take reasonable measures to determine whether a customer is a politically exposed person or not. Not any part of this recommendation takes place in the relevant Turkish legislation. Thus, the implementation of this recommendation to the aforementioned legal instruments in the next couple of years is a high possibility.

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[74] *What is Customer Due Dilligence (CDD)?*. Retrieved from International Compliance Association <https://www.int-comp.org/careers/a-career-in-aml/what-is-cdd/> accessed 27 January 2016.
[75] Turkish Regulation on the Precautions on the Prevention of Money Laundering and the Financing of Terrorism, 2007 [Suç Gelirlerinin Aklanması ve Terörün Finansmanının Önlenmesine Dair Tedbirler Hakkında Yönetmelik] Art. 5 – Art. 17 p. 2-5.
[76] FATF (2012), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, updated October 2016, FATF, Paris, France <http://www.fatfgafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf> accessed 10 February 2017, Rec. 10, 7.
[77] İbid. Rec. 12

The 15th Recommendation prescribes the duty of care to be shown and the precautions that should be taken against the use of new technologies. Although a similar provision is prescribed in the 20th article of RoM, it does not include some aspects of Recommendation 15. The recommendation suggests that financial institutions should assess the risks before the launch of new products, business practices or the use of new or developing technologies and take appropriate measures to manage and mitigate those risks. This suggestion should be implemented to the aforementioned Regulation. The 16th of the Recommendations regulates the wire transfers foreseeing that financial institutions should include the information of the originator and the beneficiary and ensure that the information remains within the wire message throughout the payment chain. Art. 24 of RoM stipulates similar conditions except keeping track of the beneficiary's details and the obligation of monitoring wire transfers for the purpose of detecting those which lack required originator and/or beneficiary information, and take appropriate measures.

The 17th Recommendation designates reliance on third parties. Pursuant to the article countries are allowed to permit financial institutions to rely on third parties when certain conditions are met. This article is also implemented to the Turkish Regulation with the exception of subsections c and d. In subsection c, it is prescribed that the financial institution should satisfy itself that the third party is regulated, supervised or monitored and has measures in accordance with the Recommendations 10 and 11, in order to rely on the third party. Subsection d prescribes that financial instruments should be obliged to also take into account the risk based on the country that the 3rd party is from. These conditions should be implemented to Article 21 of RoM.

The 22th of the FATF Recommendations sets out the instances when customer due diligence and record keeping requirements apply to non-financial businesses and professions. The 4th Article of RoM lists the institutions that are obligated to follow the anti-money laundering precautions. However this list does not include some of the non-financial institutions that are stipulated in the 22th Recommendation such as real estate agents '*when they are involved in transactions for their client concerning the buying and selling of real estate.'* Lawyers are obligated to perform risk assessments only in purchasing of immovable property and companies, the establishment, management and transfer

of charitable foundations and associations. On the other hand the 22th recommendation additionally includes the activities of management of bank, savings and securities accounts of the client to be subjected to CDD and financial record keeping. In conclusion an amendment providing additions to the listed obligators in Article 4 of the Turkish Regulation is a possibility.

The Turkish Regulation also does not include casinos as one of the obligators to follow risk prevention and mitigation requirements while they are subjected to CDD and financial record keeping requirements according to the 22th Recommendation. The sole reason for that is providing facilities and premises for gambling is a criminal offence under the Turkish Criminal Code, Article 228.

12.2.2 The Section on Corporate Law

This part of the EU strategy plan includes parts from the unrevised 2015-2019 Action Plan; therefore the amendments and implementations that are objected are already fulfilled in the first period of 2015.

However the general guidelines indicated in this section before specifying the objectives for amendments refers to on-going projects foreseeing to achieve adequate enforcement pursuant to the guidelines.

One of the guidelines is consolidating the administrative capacity to enforce the EU legislation accurately.[78] The European Union Compliance Project on Consolidating the Capacity of the Capital Markets Board is a Project that is conducted in accordance with this guideline.[79]

The European Commission approved project consists of two strategies; "Training in the Area of Accounting and Auditing" and "The Improvement of the Administrative Capacity of Capital

[78] National Strategy of Membership to European Union of the European Union Ministry, 2015-2019, 28, [Avrupa Birliği'ne Katılım için Ulusal Eylem Planı] 37.
[79] <http://www.spk.gov.tr/indexpage.aspx?pageid=770&submenuheader=4> Retrieved from Board of Capital Markets, accessed at 25 January 2017, Turkish.

Markets Board."[80] The first strategy projects the establishment of the top priority areas to be taken into account in the training programmes, and a short term instructive programme that consists of the experts of Capital Markets Board being given seminars and working visits regarding the relevant legislation of the European Union.[81] The second strategy; "The Improvement of the Administrative Capacity of Capital Markets Board", projects the comparison of the EU legislation to national legislation and the preparation of drafts of legislation aimed at compliance when it is seen necessary. This strategy also includes trainings in financial services.[82]

Another guideline that is instructed to be followed in the national strategy on EU regarding corporate law is the European Bank for Reconstruction and Development (EBRD) supported Project on the Enforcement of the Corporate Governance Principles. The Project that has been commenced with EBRD is aimed at broadening the area that the principles are enforced and also improving the reporting process. It is aimed to enforce the publicly traded companies in Istanbul to follow the regulations that are stipulated with regards to corporate governance. The supervision of this practice is being performed by the Board of Capital Markets. The project contains the preparation of application guidelines, booklets and templates that will deem the process of compliance clearer for companies. Furthermore in respect to the enforcement of compulsory rules, trainings will be conducted regarding matters that the publicly traded companies establish that are problematic.[83]

12.3 Possible Amendments of Legislation and Reforms of Execution Regarding the Offence of Bribery

12.3.1 The Evaluation Report Of The Group Of States Against Corruption (GRECO)

The Group of States against Corruption (GRECO) is the monitoring mechanism of compliance with the legal instruments that the Council of Europe developed regarding the criminalisation of

[80] ibid.
[81] ibid.
[82] ibid.
[83] <http://www.spk.gov.tr/duyurugoster.aspx?aid=20160106&subid=0&ct=f> Retrieved from Board of Capital Markets, accessed at 28 January 2017, Turkish.

corruption in the public and private sectors, liability and compensation for damage caused by corruption, conduct of public officials and the financing of political parties.[84]

In the Interim Compliance Report, adopted by GRECO at its 66th Plenary Meeting on 12 December 2014, it is concluded that Turkey had only implemented two of the thirteen recommendations. Seven recommendations were partly implemented and four recommendations were not implemented at all. Therefore it has been requested from the Head of Delegation of Turkey to provide a new report on the measures taken to implement the pending recommendations.[85]

The Second Interim Compliance Report on Turkey of the Third Evaluation Round that is published on March 21 2016, contains recommendations suggesting amendments in the Turkish Penal Code (TPP); provisions of the bribery offence.[86]

In the report it is recalled that provisions on private sector bribery has been implemented pursuant to the recommendations which proposed the implementation of Articles 7 and 8 of the Criminal Law Convention on Corruption. However it is also concluded that only a limited number of entities with public participation or acting in the public interest were included in the 8th paragraph of Art.252 of the Turkish Penal Code.[87] Therefore it is a possibility that this paragraph may be amended with the addition of other entities that does not act in the public interest but private financial interests.

[84] <http://www.coe.int/en/web/greco/about-greco/priority-for-the-coe> accessed at 25 January 2017.
[85] GRECO, Third Evaluation Round, Second Interim Compliance Report On Turkey, (Adopted by GRECO at its 70th Plenary Meeting (Strasbourg, 30 November - 4 December 2015) 2. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c9d29 > accessed 25 January 2017.
[86] ibid 3.
[87] ibid 3.

Another recommendation regarding bribery is the revising of the rule of exemption from punishment and also the restitution of bribe giver that is designated in Art.254, Turkish Penal Code.

In the Second Compliance Report it is concluded that provisions on effective regret had been amended; abolishing the restitution of the bribe to the bribe giver.[88] An issue regarding effective regret was concerning the exact phase that the defence of effective regret could be invoked. GRECO recommended the abolishment of invoking the defence in situations where the public authorities already came to knowledge of official authorities.[89] Turkey implemented the recommendation by modifying the phrase 'before the investigation begins' to 'before the offence comes to the knowledge of the authorities.[90] However GRECO notes that there haven't been any changes made to the *'automatic – and mandatorily total – nature'* of effective regret; as it is prescribed in the Art.254 of the TPP.[91] Based on the assessment of GRECO, the amendment of the Turkish Penal Code through a reform of the nature of the defence of effective regret prescribed in Art. 254, is quite possible.

12.3.2 Phase Three Report On Implementing the Organization For Economic Cooperation and Development (OECD) Anti-Bribery Convention In Turkey

The Anti-Bribery OECD Convention is considered as the primary legal framework regulating international co-operation on anti-bribery enforcement.[92] The Convention successfully had influence in terms of harmonizing legislation among member states, prohibiting the bribery of

[88] ibid 3
[89] ibid 3
[90] Ufuk Ünlü, 'Bribery Within The Scope of the Last Amendment' [2012]. TBB <http://tbbdergisi.barobirlik.org.tr/m2012-102-1222> accessed 29January 2017, 37.
[91] GRECO, Third Evaluation Round, Second Interim Compliance Report On Turkey, Adopted by GRECO at its 70th Plenary Meeting (Strasbourg, 30 November - 4 December 2015) 2. <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c9d29> 3.
[92] Elizabeth K. Spahn. Multijurisdictional Anti-Bribery Enforcement [2012] Virginia Journal of International Law Vol. 53:1,8.

foreign officials.[93] Therefore the OECD Working Group started to concentrate on enforcement measures and the cooperation on enforcement between member states.[94]

The Convention essentially requires the contracting states to issue legislation criminalizing active bribery for a foreign public official in international business transactions[95] as well as requiring the states to define liability of legal persons in conformity with the State's legal principles.[96] In terms of enforcement measures the states are obliged to keep track of accounting activities in order to prevent off-the-book records and similar practices.[97] Another very important aspect of the Convention is that it encourages member states to mutual legal assistance[98].

The Phase Three Report on Turkey that is adopted on October 17 2014 by the OECD Working Group on Bribery, contains recommendations on Turkey's implementation of the OECD Convention on Combating Bribery and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.[99]

The Report declares considerations on insufficient imposal of corporate liability, criticizing the effectiveness of penalties and the enforcement mechanisms.[100] It is also declared by legal practitioners working in the affiliated area that the overflowing issue regarding compliance in Turkey is the lack of enforcement of corporate liability despite the domestic laws' allowance.[101] In the OECD Report it is indicated that the practice of the new foreign bribery offence has been limited to a single prosecution process and six investigations that did not result in prosecution.[102]

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[93] Ibid 1.
[94] Ibid.
[95] India Carr, Opi Outwaite. The OECD Anti-Bribery Convention In Ten Years [2008] MJIEL Vol. 5 Issue 1, 7; The OECD Anti-Bribery Convention (adopted 28 July 1951, entered into force 15 February 1999) art. 1.
[96] ibid; The OECD Anti-Bribery Convention (adopted 28 July 1951, entered into force 15 February 1999) art. 2.
[97] ibid; The OECD Anti-Bribery Convention (adopted 28 July 1951, entered into force 15 February 1999) art 8.
[98] ibid; The OECD Anti-Bribery Convention (adopted 28 July 1951, entered into force 15 February 1999) art 9.
[99] OECD Working Group: Phase 3 Report On Implementing The OECD Anti-Bribery Convention In Turkey, October 2014, 1.
[100] Filiz Toprak Esin, Ezgi Eren, *'Corporate Liability: Applicable Criminal Penalties' (ILO – White Collar Crime,* 13.02.2017) <http://gun.av.tr/tr/corporate-liability-applicable-criminal-penalties/> accessed 28 February 2017.
[101] ibid.
[102] OECD Working Group: Phase 3 Report On Implementing The OECD Anti-Bribery Convention In Turkey, October 2014, 60.

Accordingly the Working Group presents recommendations entailing training for law enforcement mechanisms, increased engagement with relevant public agencies and improved reporting mechanisms such as whistleblower protections.[103]

With regards to penalties, the working group recommends an establishment of detailed statistics on sanctions imposed on foreign bribery cases.[104] The stipulation of effective, proportionate and dissuasive penalties on legal persons that are spesific for foreign bribery and the implementation of sanctions of imprisonment for natural persons are also proposed.[105]

Another issue is regarding the link between the criminal liability of a legal person and a natural person. The wording of the Article 43/a of the Turkish Code of Misdemeanors which prescribes penalties on legal persons, creates the false impression that it requires the conviction of a natural person affiliated to the legal person as a prerequisite to the enforcement of a penalty on the legal person. According to the report, this interpretation is confirmed by the juridical authorities.[106] Therefore the working group recommends Turkey to clarify in its legislation that the conviction of a natural person is not a preliminary condition to the sanctioning of a legal person. Subsequently the importance of training the law enforcement authorities on corporate liability provisions in foreign bribery cases is emphasized.[107] In terms of investigation, prosecution and effective prevention of foreign bribery, the Working Group proposes a rather educational reform as it recommends Turkey ensure that the Public Prosecutor Offices and the police have access to sufficient resources and expertise to detect foreign bribery.[108] It is also recommended to raise awareness in MASAK and in reporting entities, in order to make it clear that foreign bribery is a predicate offence to money laundering.[109] On the other hand the co-operation between law-enforcement authorities and reporting-auditing entities and MASAK is proposed as a solution.

[103] ibid.
[104] ibid 61.
[105] ibid.
[106] ibid 19.
[107] ibid 61.
[108] ibid 62.
[109] ibid.

Lastly, as identified in the FATF Recommendations, the Working Group recommends the encompassment of Politically Exposed Persons' in the anti-money laundering legislation.[110]

The Working Group also recommends Turkey to train auditors and accounting professionals on foreign bribery, by making sure that foreign bribery is perceived as a category of fraud.[111] Turkey is also recommended to ensure that the reporting auditing standards set by Article 8(1) of the Convention is applicable to legal and natural persons, so that both can be held liable for;

"the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery."[112]

According to the assessment of the implementation of Phase 2 Recommendations, it is seen that Turkey fully implemented all of them, except for one partial implementation.[113] Therefore the implementation of the aforementioned recommendations to Turkish legislation and enforcement practice is an expected possibility.

[110] ibid.
[111] ibid 63.
[112] ibid; The OECD Anti-Bribery Convention (adopted 28 July 1951, entered into force 15 February 1999) Art 8.
[113] ibid 66, 67.

Table of Provisions

- Constitution of the Turkish Republic, Article 108
- Turkish Criminal Code Article 20
- Turkish Code on Criminal Procedure Article 249
- Turkish Commercial Code Article 562
- Turkish Criminal Code Article 18
- Turkish Criminal Code Article 158
- Turkish Criminal Code Article 278
- Turkish Criminal Procedure Code Article 160
- Turkish Criminal Procedure Code Article 45
- Turkish Criminal Procedure Code Article 46
- Turkish Code of Obligations, Article 419
- Labor Code Article 75
- The Code of Protection of Personal Data, Article 17
- The Code of Protection of Personal Data, Article 18
- Turkish Criminal Code Article 30
- Turkish Criminal Procedure Code Article 253
- Turkish Criminal Code Article 254
- Turkish Criminal Code Article 252
- Misdemeanours Law No: 5326, Article 43/A
- The Code of Capital Markets Article 106
- The Code of Capital Markets Article 107
- Turkish Criminal Code, Article 228
- Turkish Regulation on the Precautions on the Prevention of Money Laundering and the Financing of Terrorism, Article 4
- Turkish Regulation on the Precautions on the Prevention of Money Laundering and the Financing of Terrorism, Article 5

- Turkish Regulation on the Precautions on the Prevention of Money Laundering and the Financing of Terrorism, Article 20
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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering, and sanctions legislation within your jurisdiction.

Corruption has become almost the main cause of economic and political upheaval in modern Ukraine. Recently, the need to fight corruption in politics, business and everyday life (medicine, service sector, etc.) has become the most important.

Going back to the history of the compliance phenomenon, it should be noted that the term 'compliance' has emerged in its current sense in the business environment in the USA within the last 30-40 years and shall be interpreted as the system of internal regulations and measures implemented by commercial and non-commercial entities to ensure compliance with laws, as well as with specific industry standards, trade customs and regulations.

Currently, in international business relations, this term also consists of the system of control an entity uses to ensure that its directors, managers and other employees, as well as contractors and authorised representatives, adhere to all regulations applicable to the business, whether local or foreign.

In Ukraine this term has not been applied widely, as legislative and practical efforts are aimed primarily at counteracting corruption and eliminating the impact of conflicts of interest on business and government decisions. However, just as in many other aspects of the Ukrainian economy and business over the last quarter of a century, Ukrainian companies will inevitably follow the path chartered by multinational companies in the area of compliance and will adopt all the best practices that have been developed.

Walking business out of the shadow is only possible if the state fully contributes to this process by developing and implementing a number of legislative initiatives regulating the prevention of corruption.

Approximately five years ago, only few Ukrainian companies without foreign investments decided to establish a compliance system since there was no direct provision of law, which requires implementing compliance procedures at the company.

However, amending Ukrainian legislation (anti-corruption and data protection) and generally movement of our country towards European integration led to what is now the Ukrainian companies are increasingly focused on developing their own compliance policies and implementation of comprehensive compliance programs.

The topic of compliance in Ukraine still requires proper research, accurate state legislative contribution and, what is the most necessary, educational activity as for many nationals it is still a non-discovered topic.

Defining Ukrainian legislation regarding the area of the research, we remark that any sanctions of criminal nature are enshrined exceptionally in the Criminal Code of Ukraine. Nevertheless, for some subareas, as anti-bribery and corruption sphere, are provided specific laws, indicating the state policy of prevention the crimes, as well as, in some extent, specifying and interpreting the notions, used in the Criminal Code, and the peculiarities of particular components of crimes.

The most significant primary legislation, that regards fighting against anti-bribery and corruption area, consists of the following laws:

- The United Nations Convention against Corruption of October 31 2003/ratified on October 18 2006.
- Council of Europe Criminal Law Convention on Corruption of January 27 1999 No. ETS173.
- The Additional Protocol to the Criminal Law Convention on Corruption of May 15 2003 No. ETS 191 ratified on October 18 2006.
- Civil Law Convention on Corruption of November 4 1999 ratified on March 16 2005.
- Council of Europe / Committee of Ministers / Resolution (97) 24 On the Twenty Guiding Principles for the Fight Against Corruption of November 6 1997.

- The Criminal Code of Ukraine No. 2341-II of April 5 2001 (Art. 354, 364, 364-1, 368, 368, 369, etc.).
- Law No. 1700-VII (On Prevention of Corruption) 2014 [Про запобігання корупції].
- Law No. 772-VIII (On the National Agency of Ukraine for detection, investigation and management of assets derived from corruption and other crimes) 2015 [Про Національне агентство України з виявлення, розслідування і управління активами, отриманих в результаті корупції та інших злочинів].
- Law No. 1699-VII (On the Principles of State Anti-Corruption Policy in Ukraine (the Anti-Corruption Strategy) for 2014 – 2017) 2014 [Про основи державної політики по боротьбі з корупцією в Україні (стратегія по боротьбі з корупцією)].
- Law No. 1698-VII (On the National Anti-Corruption Bureau of Ukraine) 2014 [Про Національне антикорупційне бюро України].

The regulation of fraud crimes according to Ukrainian legislation isn't comprehensive enough, though the responsibility for fraud, enshrined in the Criminal Code of Ukraine, isn't limited by one offence and sanction, as the Code distinguishes several specific types of fraud. In spite of this, the sanctions that are relevant are indicated in the Art. 190 (Fraud) and 222 (Financial Fraud).

The national system of anti-money laundering is regulated in less specialised laws than the anti-corruption sphere, though, a high number of international acts, regarding money laundering, were ratified and consequently have legitimate power on the territory of Ukraine:

- United Nations Convention against Transnational Organised Crime of November 15 2000 ratified on February 4 2004.
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of November 8 1990 ratified on December 17 1997.
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of May 16 2005 ratified on November 17 2010.

- Directive 2005/60/EC of the European Parliament and of the Council of October 26 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing of October 26 2005 ratified on September 16 2009.
- Forty Recommendations of the Financial Action Task Force on Money Laundering of September 25 2003 ratified on September 25 2003.

The national laws, which lay in the core of anti-money laundering regulation system, are the following:

- Law No. 1702-VII (On prevention and counteraction to legalisation (laundering) of the proceeds from crime or terrorism financing, as well as financing proliferation of weapons of mass destruction) 2014 [Про запобігання та протидію легалізації (відмиванню) доходів, одержаних злочинним шляхом, або фінансуванню тероризму, а також поширення фінансування зброї масового знищення].
- Law No. 2121-III (On Banks and Banking Activity) 2000 (Chapter 11) [Про банки та банківську діяльність].
- Law No. 2664-III (On Financial Services and State Regulation of Financial Services Market) 2001 [Про фінансові послуги та державне регулювання ринків фінансових послуг].

Those laws are complemented by several legal acts of secondary legislation, like:

- Decree No. 1070/2011 of the President of Ukraine (On the National Commission for State Regulation of Financial Services Markets) 2011 [Про Національну комісію з державного регулювання ринків фінансових послуг].
- Order No. 1407-p of the Cabinet of Ministers of Ukraine (On approval of the Strategy of development of prevention and counteraction to legalisation (laundering) of proceeds from crime, terrorist financing and the financing of proliferation of weapons of mass destruction for the period till 2020) 2015 [Про затвердження Стратегії розвитку запобігання та протидії легалізації (відмиванню) доходів, одержаних злочинним шляхом, фінансуванню тероризму та фінансуванню розповсюдженню зброї масового знищення на період до 2020 року].

The sanctions for money laundering are enshrined in the Criminal Code of Ukraine, namely in the Articles 198, 209, 209-1, 368-2. The activities that result in criminal responsibility include also any intentional violation of Law n. 1702-VII (On prevention and counteraction to legalisation (laundering) of the proceeds from crime or terrorism financing, as well as financing proliferation of weapons of mass destruction) 2014 [Про запобігання та протидію легалізації (відмиванню) доходів, одержаних злочинним шляхом, або фінансуванню тероризму, а також поширення фінансування зброї масового знищення], mentioned above.

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

As it was already mentioned, Criminal Code of Ukraine is a Law that stipulates all the crimes and offence committing which a person may be recognised liable by a court ruling. Within Ukrainian jurisdiction, Chapter VII of the Criminal Code of Ukraine is dedicated to criminal offences in the sphere of economic activity that is directly relevant to the topic of the research. Economic activity is activity of economic entities in social production aimed at manufacturing and sale of goods, performing works or rendering services on commercial basis at certain price.[1]

An object of such crimes is system of public relations in the sphere of economic activity, aimed at the development of market economy. In other words, it is an established procedure for entrepreneurial and other economic activities of production, distribution, exchange and consumption of material goods and services. Freedom of such activities is guaranteed by legislation, including the rules of criminal law. For example, the object of violation of procedure of business operation and banking procedure[2] is public relations that establish the procedure of business operation and banking procedure. The participants of these relations are the state represented by the licenser and business entities. When committing some crimes that infringe public relations, which consist of economic activity, the damage is inflicted on both main and

[1] Law No. 436-IV (Economic Code of Ukraine) 2003 [Господарський кодекс України]. Art. 3 pt. 1
[2] Law No. 2341-III (Criminal Code of Ukraine) 2001 [Кримінальний кодекс України]. Art 202

subsidiary objects. For example, the object of such crime as the production or sale of substandard products is public relations aimed at the ensuring the right of consumers to safety of work and services and may additionally ne targeted on the life and health of the consumer.[3]

Some crimes that infringe on public relations in the sphere of economic activity can have such targets as:

- adulterated national and foreign currency and state securities, state lottery tickets (Art. 199);
- documents on the transfer of funds, payment cards and other means of access to bank accounts (Art. 200);
- goods (Art. 201);
- disks for laser reading systems, matrices, equipment and material for their production (Art. 2031);
- alcohol beverages, tobacco and other excise goods (Art.204);
- funds that are on foreign accounts of natural and legal persons (Art. 208);
- budget (Art. 210).

Majority of crimes in the area of economic activity are committed by action, eg manufacturing, storage, acquisition, transportation, transfer, import to Ukraine with intent to sell or sale of counterfeit money, government securities or state lottery tickets, smuggling, fictitious business, opposition to the legitimate economic activity, illegal opening or use of currency accounts outside Ukraine, etc.). Tax evasions, duties (mandatory payments) evasion, evasion of contributions to mandatory universal state pension insurance are characterized by inaction.

The subjective aspect of crimes committed in the field of economic activity is represented only in deliberate form of fault. Motive and purpose are the binding elements in certain crimes. Thus, the

[3] I. I. Mytrofanov, T.V. Haikova, *"General Characteristics and Types of Economic Crimes"* no 4-2009 *«Загальна характеристика та види злочинів у сфері господарської діяльності»* <http://www.kdu.edu.ua/statti/2009-4-2(57)/154.PDF> accessed 15 February [Ukrainian].

fictitious entrepreneurship is a criminal offense if the creation or acquisition of business (legal persons) was carried out in order to cover up illegal activities. Making bankrupt entails criminal liability pursuant to Art. 219 of the Criminal Code if it is committed with mercenary motives or other personal interest.

Art. 18 of the Criminal Code of Ukraine stipulates that the offender is a physically sane person who committed the offense at an age of criminal discretion. One of the main features of the criminal is his sanity. Sane is the person who during the commission of a crime could be aware of his actions (inaction) and manage them[4]. Some of the crimes under consideration can be committed only by a special subject directly indicated in the rule of criminal law (eg an officer of a legal person, institution and organization regardless of ownership or person who carries out economic activities without establishing legal entity (Art. 207), a person who is obliged to pay taxes, duties (mandatory payments) (Art. 212).

Depending on the object of a violation, the types of crimes committed in the sphere of economic activity may include:

- violations of procedure of circulation of money, securities and other documents (Art. 199, 200, 215, 223, 224);
- tax crimes (Art. 204, 212, 216);
- crimes against the system of budgetary control (Art. 210, 211);
- crimes against the system of currency regulation (Art. 207, 208); 5)
- crimes against the order of movement of goods across the customs border of Ukraine (Art. 201);
- violation of the procedure of entrepreneurial and other economic activities (Art. 202, 203, 2031, 205, 209, 2091, 213, 214);
- crimes against rights and interests of creditors (Art. 218-222);

[4] Law No. 2341-III (Criminal Code of Ukraine) 2001 [Кримінальний кодекс України], Art. 19 pt. 1

- crimes against fair competition (Art. 206, 228, 229, 231, 232);
- crimes against rights and legal interests of consumers (Art. 217,225-227);
- violation of the procedure of privatisation (Art. 233-235).[5]

Although the abovementioned classification is convenient, it is not comprehensive, as some crimes may infringe on a few objects, but are classified into only one of the groups. Thus, financial fraud is classified as a crime against rights and legitimate interests of creditors, although the illegal obtaining of tax benefits or an attempt to obtain as an element of the crime is an attack on the tax system. Illegal use of a trademark, which is regarded as a crime against fair competition, may also be considered as encroachment of the rights and legal interests of consumers.

Ukrainian legislation provides for criminal liability of legal persons. The main offences for companies are enlisted in the Criminal Code of Ukraine. Such offences may be committed by an officer of a legal person and are, namely:

- legalisation (laundering)of proceeds of crime (Art. 209);
- the use of proceeds of illicit trafficking of narcotic drugs, psychotropic substances and/or their analogues and precursors, toxic or potent substances or toxic/potent drugs (Art. 306);
- bribery of a private legal entity's official; bribery of a person who provides a public service (ie notary, auditor, evaluator etc.) (Pt. 1 and 2 of Art. 368-3, pt. 1, 2 of Art. 368-4);
- offering or giving unlawful advantage to public service officials; abuse of power (Art. 369, 369-2);
- act of terrorism and/or involvement in the commission of a terrorist act; public incitement to commit a terrorist act, the creation of a terrorist group or terrorist organisation, facilitation of an act of terrorism; financing of terrorism (Art. 258-258-5 of the Criminal Code).

[5] M. I. Melnyk, "Criminal Law of Ukraine. Special Part" (Yurydychna dumka 2004) «Кримінальне право України. Особлива частина : підручник» 156 [Ukrainian].

A special system of penalties for legal persons, which, in essence, are not criminal penalties, was established. The Criminal Code of Ukraine provides for fine, confiscation of property and liquidation as penalties for companies where liquidation and fine may be applied as main penalties, and confiscation of property being additional measure.[6] When the abovementioned measures are applied, a company also has to reimburse in full losses and damage inflicted and the amount of the undue advantage that was obtained or could be obtained by the entity.[7]

Another measure of criminal liability of legal persons is a special confiscation.

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK).

The Criminal Code of Ukraine defines the reasons for corporate liability in Ukraine that seem to be very close in meaning with the 'identification principle' in the UK. Among these reasons are the following:

- committing by its official on behalf and in interests of the company of any crime, established under Articles 209 (money laundering), 306 (use of provided form illegal drug trafficking, psychotropic substances, their prototypes and precursors, toxic substances, toxic pharmaceutical products), 368^3(1,2) (bribery), 368^4(1,2) (incitement of a public official), 369 (proposition, pledge or granting with improper advantage), 369^2 (influence abuse) of the Criminal Code of Ukraine;
- failure to execute obligations of its official regarding corruption prevention, which resulted in commitment of any crime, established under Articles 209 (money laundering), 306 (use of provided form illegal drug trafficking, psychotropic substances, their prototypes and precursors, toxic substances, toxic pharmaceutical products), 368^3(1,2) (bribery), 368^4(1,2)

[6] Law No. 2341-III (Criminal Code of Ukraine) 2001 [Кримінальний кодекс України], Art. 96-6
[7] idem

(incitement of a public official), 369 (proposition, pledge or granting with improper advantage), 369[2] (influence abuse) of the Criminal Code of Ukraine;

- committing by its official on behalf and in interests of the company of any crime, established under Articles 258-258[5] of the Criminal Code of Ukraine (crimes, related to commitment of acts of terrorism);
- committing by its official on behalf and in interests of the company of any crime, established under Articles 109, 110, 113, 146. 147, 159[1](2-4), 160, 260, 262, 436, 437, 438, 442, 444, 447 of the Criminal Code of Ukraine.

Pursuant to Criminal Code of Ukraine provisions, the statutes of limitations under which a company may be prosecuted are established.

If the company in the face of its official is recognised liable for committing a minor crime the statute of limitations if applicable within 3 years as of the day the crime was committed, 5 years – for crimes of average weight, 10 years – for grave crimes, 15 years – for extremely grave crime. Company may be recognised liable for such crimes and punished with either a fine, confiscation of property or liquidation.

4. What are the potential bars to extradition of an individual (i.e. in the UK you cannot extradite individuals where the request is politically motivated or would expose someone to human rights violations)?

The citizens of Ukraine cannot be extradited to another country for crimes, committed outside Ukraine. As to foreigners and stateless persons, who dwell in Ukraine, the Criminal Code of Ukraine states that it is possible to extradite them to another country for prosecution.

Issues of extradition are addressed in the Charter 44 of the Criminal Procedural Code of Ukraine as well as international agreements ratified by the Verkhovna Rada of Ukraine, such as the European Convention on Extradition and relevant treaties on mutual legal assistance on criminal matters. A request for extradition can be filed to a relevant Ukrainian authority, when one of the

crimes, for which the extradition of a person is requested, under Ukrainian legislation is punishable with imprisonment for no less than 1 year or a person has been sentenced to imprisonment and the unserved term is no less than 4 months.

Ukrainian legislation defines cases when extradition is not possible. Among them, if:

- a person, who a Ukrainian authority is requested to extradite, at the time of making a decision regarding extradition is a citizen of Ukraine;
- a punishment for a crime, for which a person should be extradited, is less than imprisonment;
- terms of criminal responsibility of a person or for enforcement of a court decision for the crime have passed;
- a competent foreign authority has not given additional materials or information, necessary for making a decision regarding the extradition, on request of a relevant Ukrainian authority;
- the extradition contradicts Ukrainian obligations under international treaties;
- there are other reasons the person cannot be extradited.

Besides, a person granted a refugee status, a person who requires additional protection, or granted temporary protection in Ukraine cannot be extradited to the country from which it sought refuge or a country, where there are risks for its health, life or freedom on the ground of race, religion, nationality, citizenship, membership in a particular social group or political opinion, otherwise defined in international treaties of Ukraine.

Moreover, Ukraine has ratified the European Convention on Extradition (1957), which provides for the extradition between Parties of persons wanted for criminal proceedings or for the carrying out of a sentence. The Convention does not apply to political or military offences. Thus, all reasons for refusal of extradition, contained in the Convention, are applied in Ukraine.

With regard to fiscal offences (taxes, duties, customs) extradition may only be granted if the Parties have decided so in respect of any such offence or category of offences. Extradition may also be refused if the person claimed risks the death penalty under the law of the requesting State.

Getting back to extradition in the meaning of compliance and corruption activities, the Criminal Law Convention on Corruption n. ETS 173 as of January 27 1999/ in force in Ukraine as of March 1 2010, should be taken into consideration.

Pursuant to para 4, 5 Art. 27 of the aforementioned Convention, extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds on which the requested Party may refuse extradition. If extradition for a criminal offence established in accordance with this Convention is refused solely on the basis of the nationality of the person sought, or because the requested Party deems that it has jurisdiction over the offence, the requested Party shall submit the case to its competent authorities for the purpose of prosecution unless otherwise agreed with the requesting Party, and shall report the final outcome to the requesting Party in due course.

This shall be interpreted that prior to conducting any procedures on extradition of the person suspected in corruptive actions the requesting Party shall cooperate with the requested Party (e.g. Ukraine), submit the case to its authorities and inform on the ongoing process.

5. Please state and explain any:

5.1 Internal reporting processes (i.e. whistleblowing);

5.2 External reporting requirements (i.e. to markets and regulators), that may arise on the discovery of a possible offence.

Reporting processes are a vital instrument for the proper functioning of compliance in the country. Efficient internal and external mechanisms of reporting create one of the most crucial sources of information for preventing and combating corruption and legislation breach in order to follow the best compliance practices. It is extremely important for transparent business environment to have internal reporting mechanisms, as well as legislative provisions on whistleblower protection, regular and external reporting mechanisms, system of guarantees and liability etc. The current legal regulation of reporting in compliance area is based on general and unsystematic provisions from

criminal procedure and informational legislation without subordinate detailed regulations on mechanisms of enforcement.

The provisions on internal and external reporting processes in Ukraine are prescribed both in national legal sources and ratified international treaties, which are the part of the legislation of Ukraine. Concerning the ratified international treaties, it is worth mentioning the provisions of Civil Law Convention on Corruption of the Council of Europe as of 2005 and Termination of Employment Convention of the International Labor Organization.

Ukraine has ratified the Civil Law Convention on Corruption of the Council of Europe in 2005, under the Article 9 of which there is an obligation to provide in internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report their suspicions in good faith to responsible persons or authorities.[8]

In 1994 Ukraine ratified the Termination of Employment Convention of the International Labor Organization, Article 5 (c) of which precludes termination of an employee on the grounds of an employee's filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities (as a necessary consequence of whistleblowing).[9]

Concerning the current legislation of Ukraine, which regulate general provisions of internal and external reporting processes, the following are worth mentioning – the Code of Laws on Labor of Ukraine, the Law No. 393/96-BP (On Petitions of Citizens) [Про звернення громадян], Law of Ukraine No. 1700-VII (On Prevention of Corruption) 2014 [Про запобігання корупції] and others.

[8] Civil Law Convention on Corruption ETS No.174 2003
[9] ILO Convention No. 158 (Termination of Employment Convention of the International Labor Organization) 1982

Article 9 of the Law of Ukraine "On Petitions of Citizens" No. 393/96-BP as of 2 October 1996 precludes retribution against citizens and their family members who submit complaints or criticize either any government or private institution or officials.[10]

The first legislative act, which for the first time introduced specific rules on protection of whistleblowers, was the Law of Ukraine "On the Principles of Prevention and Countering of Corruption" No. 3206-VI as of 7 April 2011 (not current now).[11] This Law expressly prohibited dismissal of, or any disciplinary sanctions or other negative employment consequences, against informants reporting corruption offenses of the superior or the employer. The whistleblower protection provisions of this Law were considerably expanded by the Law of Ukraine "On Amendment of Some Legislative Acts of Ukraine in Area of State Anticorruption Policy in Accordance with the Plan of the European Union on Liberalization of Visa Requirements for Ukraine" No.1261-VII as of 13 May 2014;[12] the amended Law obliged employers to establish channels for reporting corruption offenses (a telephone line, a website, email, etc.) and required introduction of the position of a compliance officer in state enterprises as well as in private companies seeking to participate in public procurement tenders and public joint stock companies. The amended Law expressly allowed anonymous reports and set out procedures for consideration of such reports (15 days, extendable to 30 days in special cases).[13]

The current Law of Ukraine "On Prevention of Corruption" No. 1700-VII as of 14 October 2014 (entered into force on 26 April 2015) generally incorporated the whistleblower protection provisions of the previous law and additionally reinforced the anonymity guarantee providing that the whistleblower's identity may be disclosed only upon his consent (unless otherwise provided by

[10] Law No. 393/96-BP (On Petitions of Citizens) 1996 [Про звернення громадян]
[11] Law No. 3206-VI (On the Principles of Prevention and Countering of Corruption) 2011 [Про засади запобігання та протидії корупції]
[12] Law No.1261-VII (On amendment of some legislative acts of Ukraine in area of state anticorruption policy in accordance with the Plan of the European Union on liberalization of visa requirements for Ukraine) 2014 [Про внесення змін до деяких законодавчих актів України у сфері державної антикорупційної політики у зв'язку з виконанням Плану дій щодо лібералізації Європейським Союзом візового режиму для України]
[13] Daniyil E. Fedorchuk, *Protection of Private Sector Whistleblowers in Ukraine*, (The Ukrainian Journal of Business Law, No. 12, 2) <http://www.integrites.com/en/publication/protection-of-private-sector-whistleblowers> accessed 11 February 2017

law). In particular, Article 53 of this Law prescribes that persons who assist in preventing and combating corruption, are under state protection. If there is any danger to life, home, health and property of persons, who assist in preventing and combating corruption, or their close persons in connection with performed notice on violation of this Law by law enforcement agencies, the legal, organizational, technical and others measures aimed at protection against illegal encroachments are to be applied, provided by the Law of Ukraine "On the safety of persons involved in criminal proceedings". A person or a member of his family cannot be dismissed or forced to dismissal, be the subject of disciplinary proceedings or subjected by the manager or employer to other negative measures (transfer, certification, change in working conditions, denial of appointment to the top job, wage cuts etc.) or the threat of such measures in connection with his/her report on violations of this Law by another person. However, these provisions are too general and cannot be implemented properly in practice, because there are no mechanisms of realization of these rights and guarantees.[14]

The Code of Laws on Labor of Ukraine in Article 235 was amended granting a whistleblower who was unlawfully dismissed the right to either claim reinstatement to the same position or to leave the employer upon being paid 6 months of salary as compensation (assumingly, without detriment to other payments he/she may be entitled to).[15]

According to the fact of the provisions on internal and external reporting procedures have declarative nature and cannot be properly implemented in practice, the draft Law of Ukraine "On Protection of Whistleblowers and Disclosures in the Public Interest" has been developed and being promoted by the Initiative 11, which is a coalition of civil society organizations for whistleblower protection in Ukraine. A group of NGOs and activists have formed a coalition to work for the passage of Ukraine's first whistleblower protection law. The groundbreaking campaign is a key piece of civil society efforts to fight corruption, strengthen democratic institutions and enhance citizen participation. Initiative 11 was launched by four Ukrainian organisations – the Ukrainian League of Lawyers for Combating Corruption, Media Law Institute,

[14] Law of Ukraine No. 1700-VII (On Prevention of Corruption) 2014 [Про запобігання корупції]
[15] Code of Laws on Labor of Ukraine 322-VIII 1971 [Кодекс законів про працю України]

CenterUA and the Anti-Corruption Action Center – and one international organization, Blueprint for Free Speech.[16]

The draft Law establishes: guarantees of whistleblower protection from unlawful dismissal, disciplinary proceedings, and other negative discriminatory measures; rights of whistleblower (privacy and anonymity in the disclosure of harm or danger to the public interest, in damages reparation; security issues; issues of information); the guarantees of transparency of information on cooperation with the whistleblower, observance and protection of their rights etc.[17]

The draft Law defines: channels (internal regular, external) and procedures for disclosure of information on harm or danger to the public interest, disclosures of information with limited access on harm or danger to the public interest; measures to protect whistleblowers; acts of reaction of Ombudsman on human rights violations of the law on protection of whistleblowers and disclosure of information on harm or danger to the public interest (prescription on renewal of rights of whistleblower or a member of his/her family, including reinstatement in work, the requirement to eliminate the corresponding violations) which are binding; funding mechanism for the protection of whistleblowers and control the spending of the funds. It is envisaged in draft law that if the disclosure of information on harm or danger to the public interest led to return of funds to State Budget of Ukraine, the whistleblower has a right to remuneration in the amount of 10 percent of returned funds.

Under the draft Law, there is an obligation that internal reporting channels for disclosures in the public interest must be established by: subjects of public authority; state, utility companies, their subsidiaries and establishments, other legal entities of public law, subjects of economic activity, in the share capital of which fifty or more per cent belong to the state or a local self-government; economic entities, which exercise delegated powers of subjects of public authority in compliance

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[16] Dmytro Foremnyi, *Will Whistleblowing Make Ukraine a Better Place for Doing Business?* (16 November 2016) <http://complianceperiscope.com/home/2016/11/16/whistleblowing-in-ukraine-to-be-or-not-to-be> accessed 10 February 2017 [English]

[17] Draft Law No. 4038a (On Protection of Whistleblowers and Disclosures in the Public Interest) 2016 [Про захист викривачів і розкриття інформації про шкоду або загрозу суспільним інтересам]

with the Law or contract also provide administrative, educational, social or other public services; economic entities that have a monopoly on the market, are empowered with special or exclusive rights, or are natural monopolies; banks, credit unions, leasing companies, trust companies, insurance companies, pension saving institutions, investment funds and companies and other legal entities, the only activity of which is provision of financial services, and in cases directly provided by the Law, – other services (operations) connected with provision of financial services; legal entities, where the average number of employees for the reporting (fiscal) year exceeds fifty persons, and the gross domestic product from the sale of goods (work, services) of which for the period exceeds seventy million UAH; legal entities that participate in public procurement procedures.

According to the Article 6 of the draft Law, regular reporting channels for disclosures in the public interest – are means of reporting wrongdoings that harm or threaten the public interest, which are disclosed by the whistleblower to the Ukrainian Parliament Commissioner for Human Rights or a government agency competent to examine and take decisions on matters of relevant disclosures. Regular reporting channels for disclosures in the public interest must be established by the Ukrainian Parliament Commissioner for Human Rights; the National Agency for Prevention of Corruption; public prosecution bodies; pre-trial investigation bodies; agencies authorized persons of which have the right to draw up protocols on administrative wrongdoings; agencies responsible for the oversight of compliance with relevant legislation; the High Council of Justice; The Higher Qualification Board of Judges, Qualification and Disciplinary Commission of Public Prosecutors; other agencies authorized to consider matters and take decisions on subjecting officials and employees to disciplinary action, whose jurisdiction covers the territory of at least one region, city or city district.

Under the provisions of draft Law, external reporting channels for disclosures in the public interest – are means of reporting wrongdoings that harm or threaten the public interest through natural persons or legal entities, including the media, public organizations, journalists, trade unions etc.

The draft Law has passed committees consideration of Verkhovna Rada of Ukraine. It was taken as a as a basis of Law in the first hearing under the No. 4038a and was returned for revision to subject of legislative initiative.

Concerning the external reporting requirements, there are no particular provisions of reporting on compliance with legislation by the company. There are general provisions on compulsory audit, within which the failure to follow the compliance practices becomes evident.

Concerning Limited Liability Company, the annual extenal audit is obligatory, when LLC is owned by foreign investor for USD 10of its share capital or more. However, in Ukrainian legislation there is no reqiurement to file such audit to any government authority.[18]

Concerning the Joint Stock Company, this type of company has more regulations by the legislation of Ukraine. For Public Joint Stock Company there are various requirements for publication of financial statements and annual external audit. However, there are no particular compliance obligations.[19]

6. Who are the enforcement authorities for these offences?

Nowadays, in Ukraine there are powerful supervisory authorities conducting anti-corruption policy, i.e. Anti-corruption Specialised Prosecutor's Office of Ukraine, the Ministry of the Internal Affairs, National Anti-corruption Bureau of Ukraine (NABU), the National Agency on Corruption Prevention (NACP), the special units on fighting corruption and organised crime of the Security Service of Ukraine. The Committee of the Supreme Council of Ukraine on Corruption Prevention and Counteraction Question is working on the Anti-corruption legislative initiative.

[18] Law No. 1576-XII (On Economic Entities) 1991 [Про господарські товариства]
[19] Law No. 514-VI (On Joint Stock Companies) 2008 [Про акціонерні товариства]

Anti-corruption Specialised Prosecutor's Office of Ukraine acts as a separate unit of the Prosecutor General's Office of Ukraine and performs additional functions on investigation crimes.

According to the Anti-corruption strategy of Ukraine, the Group of states against corruption (GRECO) and the European Union recommend our country to establish institution on fighting corruption. Such specialised institutions are NABU and NACP. NABU is a state law enforcement body which prevents, detects, stops, investigates and discloses corruption offences and crimes assigned to its jurisdiction, and also averts commission of the new ones.

Ukraine joined GRECO and ratified the Criminal Convention on Corruption Responsibility and Civil Convention on Fighting Corruption. That means that our Anti-corruption policy must comply with the common states action against corruption. The latter Convention determines the notion of bribery and describes the manifestation of the fact. But in our national Law «On Corruption Prevention» such term is not a subject of this Law. Instead, the illegal advantage notion is defined. In this position we have differences in definitions. The Convention gives an interpretetion wider than our legislator.

The special units on fighting corruption and organised crime of Security Service of Ukraine perform their activity according to the Law of Ukraine «On organisational legal foundation fighting organized criminality» and other normative acts. The rights of these units are stipulated in the Article 12 as the following:

- receive from bank, financial institutions, customers, enterprises all necessary information for investigation;
- receive the information from state bodies (such as database, the state register).

NACP is a central executive power body with specialised status providing formation and realisation of the state Anti-corruption policy. Differences between NABU and NACP are as follows: NABU investigates corruption crimes and prevents them, whereas NACP directs on analytical, control work of corruption offenses. On January 17 2017, the Memorandum on cooperation was approved between two specialised bodies, namely NABU and NACP. The essence

of Memorandum is to exchange the information between these bodies in order to secure better and efficient cooperation.[20]

The main powers of NACP are the following:

- control and audit authorities' declaration;
- perform state control on financing of political parties;
- lead up state register of authorities' declaration and register of persons committed corruption offenses.[21]

Key powers of NABU are the following:

- lead up the operational investigation measures, including conduction of tacit investigative actions:
- require necessary information from state bodies;
- compose the common investigation group with another competitive body.[22]

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

For the specialised body on fighting corruption it is necessary to interact with the other state bodies. Therefore, the informational exchange is a guarantee of Anti-corruption strategy maximum effect. The Law «On National Anti-corruption Bureau of Ukraine» (Article 17) determines following to receive information from another competitive bodies:

- send up the request and receive the data about property, revenue, costs, financial position and other information define by law from state and local competitive bodies. Include using automatic information and reference systems of state and local bodies;

[20] Memorandum on cooperation between NABU and NACP, (Official web-cite of NACP,17 january 2017) <https://nazk.gov.ua/news/memorandum-pro-spivpracyu-ta-obmin-informaciyeyu-z-nabu-shvaleno-v-nazk> [Ukrainian]
[21] Law No. 1700-VII (On corruption prevention) 2014 [Про запобігання корупції]
[22] Law No. 1698-VII (On National Anti-corruption Bureau of Ukraine) 2014 [Про Національне антикорупційне бюро України]

- inspect the limited access information; receive the necessary information from banks and other financial institution for investigation, that is the data about account, deposits, operations; receive the materials from the bodies of Prosecutor's Office and Ministry of Justice, which were got in international legal assistance process and related to corruption and financial criminal offenses;
- gets access to items and documents under the court ruling.

Though NABU has the wide powers, but it activity isn't effective. The register of corruption court cases informs about forty-three number proceedings of which eleven have sentenced. Other cases were delayed or have not been started. Those numbers demonstrate a little amount of investigated corruption cases and no interests in competitive authorities who must investigate corruption crimes.

The report of NACP by 2016 year states competitive activity lead the State Register of declaration and State single persons committed corruption offenses register. But report doesn't have information about checking the declarations, opening the investigation of corruption crimes and offenses. In addition, the plan of activity NACP contains intention to initiate new law drafts and change present legislation. The Plan of activity NACP on 2017 year is unpublished, though the approval decision is posted. Anti-corruption measures must be performed by the authorized subjects and economic activity subjects on their own. Establishing the Ukrainian Anti-corruption bodies don't resolve corruption and bribery problems but create additional outgoing from the budget. [23]

NABU as a specialised law enforcement body has the right to provide investigation action accordingly to its competence, meaning this body has the access to all documents which enterprise and institutions have. Here comes the question: "May all the information be removed and delivered to investigation body?" According to the Article 5 of the Law of Ukraine "On information" the authorities as a subject of information society, realising it's right on access to the information,

[23] «The report of NACP activity» (26 January 2017 year) ftp://91.142.175.4/nazk_files/zvity/NAPK_annual-report_2016.pdf [Ukrainian]

doesn't break economic rights of economic subject. Measures which NABU may apply at investigation corruption offenses are provided by Criminal Procedure Code of Ukraine and Administrative Offenses Code of Ukraine (such as arrest, confiscation, etc.).

Present Criminal Procedure Code determines the documents which the authority can't remove during operative measures. They are the correspondence or other forms of communication and their apps between client and his defender or another person who provides legal services. At the same time the legislator protects the subjects who are suspected at issues on slot of items and documents in such forms as inability access to banking secrecy, confidential information, correspondence, notary action, information given by the providers and operators. But in case of the subject deliver to the investigator judge the petition on access to the confidence information with motivated background which proves impossibility to obtain the information another way and the information in the subject's possession and this information is significant. Therefore, protection all confidential information will be impossible de-jure so the investigative judge has the right to adopt the decision on access to such documents even without the consent of the possessor of the information.

To sum up, all the anti-corruption bodies has the wide powers to investigate different private documents. But the amount of criminal proceedings on corruption crimes is low, highlighting the inefficiency of competent anti-corruption bodies and other additional bodies to fight corruption.

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self-incrimination)?

8.1 Domestic Law on Withholding Information from Enforcement Authorities

National legislation on circumstances under which information may be withheld is the following:

- Constitution of Ukraine
- Criminal Procedure Code of Ukraine
- Law of Ukraine n. 2657-XII "On information"

8.2 Privilege against Self Incrimination

Privilege against self-incrimination is one of the constitutional freedoms outlined in Article 63 of the Constitution of Ukraine. According to its provisions a person is not liable for refusal to testify or to explain anything about himself or herself, members of his or her family or close relatives in the extent determined by law.[24]

Article 18 Part 1 of the Criminal Procedure Code of Ukraine provides that nobody shall be compelled to admit their guilt of a criminal offence or to give explanations, testimonies, which may serve a ground for suspecting them or charging with a commission of a criminal offence.[25]

However, Article 18 Part 3 provides that a person has a right not to give testimony against his/her relative.

According to the Constitution of Ukraine the person is not liable for refusing to testify or to explain anything about himself/herself, his/her family members or close relatives as determined by law (Art. 63) each person, including witness during questioning of the inquiry or pre-trial investigation and persons who gives explanations in state bodies, must be provided with an opportunity to receive legal aid to defend him/her against a possible violation of the right not to give testimony or explanations about himself/herself, his/her family members or close relatives, which can be used in criminal proceedings to bring charges against these individuals.[26]

This freedom is one of the essential in criminal proceedings and covers a number of subjective rights, such as the right to remain silent (not say anything) as on allegations or prosecution and on any other issues such as grounds for suspicion, the right to refuse to answer questions.

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[24] Constitution of Ukraine, 1996 [Конституція України]. art 63
[25] Law No. 4651-VI (Criminal Procedure Code of Ukraine) 2012 [Кримінальний процесуальний кодекс України]. art 18 pt.1
[26] *Decision № 23-rp/2009 in the case upon the constitutional petition of citizen Holovan 'Ihor Volodymyrovych concerning official interpretation of provisions of Article 59 of the Constitution of Ukraine (Case on the right to legal assistance)* [2009] Constitutional Court of Ukraine Visnyk of the Constitutional Court of Ukraine Vol. 6 [2009] 32 [Ukrainian]

It should be noted that some of the categories of people cannot act as witnesses. However, some of the persons concerned may be released from the duty to keep professional secrets by the person who entrusted them such information and within the scope defined by such person. Such release shall be done in writing and signed by the person who entrusted such information. The following persons are:

- a defense counsel, a representative of a victim, civil plaintiff, civil defendant and legal person in whose respect proceedings are taken, a legal representative of a victim, civil plaintiff in criminal proceedings in regard of circumstances which they became aware of as a result of fulfilling their functions of representative or defense counsel;
- defense attorneys, about information which constitutes counsel's secret;
- notaries, about information which constitutes notarial secret;
- medical practitioners and other persons who in connection with the performance of professional or official duties became aware of disease, medical checkup, examination and results thereof, intimate and family sides of a person's life about information which constitutes doctor's secret;
- clergymen, about what a believer confessed to them.[27]

Journalists, professional judges, jurors, individuals who participated in concluding and fulfilling a conciliation agreement in criminal proceedings, persons to whom security measures have been applied, persons who are aware of bona fide information about individuals in respect of whom security measures have been applied cannot be interrogated as witnesses about confidential information that they became aware of as a result of their professional activities.

Information about the economic activity of a legal person may be deemed confidential. Under Article 21 of the Law of Ukraine "On information" confidential is information an access to which is restricted by a person or an entity. Article 21 Part 2 of the abovementioned Law provides that the confidential information may be disseminated upon the approval of a respective person, and

[27] Law No. 4651-VI (Criminal Procedure Code of Ukraine) 2012 [Кримінальний процесуальний кодекс України]. Art 5 pt. 2-3

in a manner prescribed by this person, and in other cases prescribed by law.[28] Pursuant to the Criminal Code of Ukraine, such information contains secret protected by law.

However, Article 29 of the Law "On Information" establishes that the confidential information may be disseminated in case of public necessity, i.e. it is a matter of public interest and the public's right to know this information overweight potential harm of its dissemination. According to the Law a matter of public interest is information that suggests there is a threat to national sovereignty and territorial integrity of Ukraine; ensures implementation of constitutional rights, freedoms and duties; suggests there is a possibility of violation of human rights, deception of the public, harmful environmental and other negative effects of activity (or inactivity) of natural and legal persons.[29]

Criminal Procedure Code of Ukraine provides that information containing secret protected by law may not be disclosed, unless investigating judge or court issue the ruling to grant provisional access to objects and documents containing secrets protected by law. Such ruling may be granted if a party to criminal proceedings proves:

- the fact that the objects or documents are or can be in possession of a physical or legal person;
- the fact that the objects or documents per se or in combination with other objects and documents of the criminal proceedings concerned, are significant for establishing important circumstances in the criminal proceedings;
- the possibility to use as evidence the information contained in such objects and documents;
- the impossibility by other means to prove the circumstances which are intended to be proved with the help of such objects and documents.[30]

[28] Law No. 2657-XII (On Information)1992 [Про Інформацію]. Art 21
[29] ibid, Art 29
[30] Law No. 4651-VI (Criminal Procedure Code of Ukraine) 2012 [Кримінальний процесуальний кодекс України]. Art 163

Article 1 of the Law of Ukraine "On personal data protection" prescribes that "personal data is data about an individual who is identified or can be specifically identified". According to the abovementioned law the processing of personal data on the racial or ethnic origin, political, religious or philosophical beliefs, membership in political parties and trade unions, criminal conviction, as well as data concerning health, sexual life, biometric or genetic data is forbidden.[31] However this prohibition does not apply to judgments of the courts, completion of investigation and counterintelligence activities, counterterrorism. In addition, personal data collected in the course of these activities shall be removed or destroyed in accordance with the legislation.[32]

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

The employee data is a very important issue during the internal and external compliance investigations in the company. The mentioned-above data may consist of sensitive personal information and it is extremely important to be acquainted with legal regulations in this area in order to omit breaches of right to respect for private life and family life, which is regarded as one of the most important human rights both under European Convention on Human Rights and under national legislation.

According to the fact that there is no specific legal regulation on employee data during compliance investigations, the issue of the restrictions on providing employee data to enforcement authorities can be regarded from two views – right to respect for private life and family life of employee and personal data of employee.

Under the Article 31 of the Constitution of Ukraine, everyone is guaranteed privacy of mail, telephone conversations, telegraph and other correspondence. Exceptions shall be established only by a court in cases envisaged by law, with the purpose of preventing crime or ascertaining the

[31] Law No. 2297-VI (On protection of personal data) 2010 [Про захист персональних даних]. Art 7
[32] idem, Art.15

truth in the course of the investigation of a criminal case, if it is not possible to obtain information by other means.

According to the Article 32 of the Constitution of Ukraine, the collection, storage, use and dissemination of confidential information about a person without his or her consent shall not be permitted, except in cases determined by law, and only in the interests of national security, economic welfare and human rights. Every citizen has the right to examine information about himself or herself, that is not a state secret or other secret protected by law, at the bodies of state power, bodies of local self-government, institutions and organizations. Everyone is guaranteed judicial protection of the right to refute incorrect information about himself or herself and members of his or her family, and of the right to demand that any type of information be expunged, and also the right to compensation for material and moral damages inflicted by the collection, storage, use and dissemination of such incorrect information.

The right to respect for private life and family life can be limited in the understanding of Article 31 of the Constitution of Ukraine during the criminal proceeding against person, in particular, during the open and covert investigative actions of state authorities. The procedure of performing such is strictly limited by the Criminal Procedural Code of Ukraine. Concerning the covert investigative actions, it is a kind of investigation action, information and methods on which cannot be disclosed, with exceptions provided in Code. Covert investigative actions are carried out in cases where information about a crime and the person who committed it, cannot be obtained otherwise. The permission for such actions is provided by an investigating judge in case. One of the covert investigative action, which limit the right to private life is the interference in private communication. It can be performed only in case of investigation of grave or especially grave crime. The interference in private communication means the access to the content of communication provided that communication participants have sufficient reason to believe that communication is private. Varieties interference in private communication are: audio and video surveillance of person; arrest, inspection and seizure of correspondence; interception of information from transport telecommunication networks; interception of information from electronic information systems.

There is criminal liability in Ukraine, prescribed in the Criminal Code of Ukraine for the violation of the secrecy of the correspondence, telephone conversations, telegraph and other correspondence transmitted through means of communications or computer, as well as the liability for the violation of privacy.[33]

Concerning the issue of personal data of employee, Article 11 of the Law of Ukraine "On information" stresses that the information about a natural person (personal data) is the data or collection of data about a natural person, who, according to which, is identified or can be specifically identified. The collection, storage, use and dissemination of confidential information about a person is not allowed without his or her consent, with the exceptions in cases determined by Law and in the interests of national security, economic prosperity and human rights. Confidential information about natural person includes information about his or her nationality, education, marital status, religious beliefs, health and address, date and place of birth.[34]

According to the Decision of the Constitutional Court of Ukraine on the official interpretation of Articles 3, 23, 31, 47, 48 of the Law of Ukraine "On Information" and Article 12 of the Law of Ukraine "On Prosecutor's Office" of 30 October 1997 No. 5-зп (case of K. H. Ustymenko No. 18/203-97), not only the collection, but also storage, use and dissemination of confidential information about a person are prohibited without their prior consent of person, except in cases specified by Law and only in the interests of national security, economic prosperity, human rights and freedoms.[35]

The Law of Ukraine "On Personal Data Protection" prescribes the procedure of processing of personal data by the holder of personal data (employer in accordance with labor relationships), cases, in which the subject of personal data must additionally give consent for the processing of his/her personal data and the obligation of holder to report about such cases to the Ombudsman

[33] Law No. 2341-III (Criminal Code of Ukraine) 2001 [Кримінальний кодекс України]
[34] Law No. 2657-XII (On information) 1992 [Про інформацію]
[35] *K. H. Ustymenko case No. 18/203-97 (On the official interpretation of Articles 3, 23, 31, 47, 48 of the Law of Ukraine "On Information" and Article 12 of the Law of Ukraine "On Prosecutor's Office" of 30 October 1997 No. 5-зп*)[1997] Constitutional Court of Ukraine http://zakon5.rada.gov.ua/laws/show/v005p710-97 [Ukrainian]

(for example, tracking location of the person during working hours) as well as international cooperation in the field of personal data.[36]

It should also be noted that under Article 17 of the Law of Ukraine "On Enforcement of Decisions and Application of Practice of the European Court of Human Rights", Ukrainian courts apply the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of ECHR as a source of law during the case consideration.[37]

Due to the dynamic interpretation of the Convention, the ECHR actively takes into account in its practice, in particular, technological progress of communication means and, except of paper correspondence, the right to privacy of correspondence also protects: telephone conversations, including information about them, such as: date of calls, duration and dialed numbers; messages received via pager; e-mails and information obtained from the analysis of individual Internet use; electronic data; packages and more.

It is also worth mentioning on the use of private and corporate communication means in working hours. This should be an issue under consideration in order to clarify the regulation of social relation, which have aroused in Barbulescu v. Romania judgement of ECHR (case, in particular, on allegation of employee on the interference of employer in private life of employee in accordance with the use of corporate communication means in private motives).[38] There is no specific regulation on this area, however, general provisions of the Code of Laws on Labor of Ukraine bring clarity on this issue.

According to Article 29 of the Code of Laws on Labor of Ukraine, while taking the employee to the start of the work duties it has to be informed (with a signing of appropriate document) about working conditions, including the possibility and procedure (if allowed) of usage of technical

[36] Law No. 2297-VI (On Personal Data Protection) 2010 [Про захист персональних даних]
[37] Law No. 3477-IV (On Enforcement of Decisions and Application of Practice of the European Court of Human Rights) 2006 [Про виконання рішень та застосування практики Європейського суду з прав людини]
[38] *Barbulescu v. Romania* [2016] European Court of Human Rights [French]

means in workplace for personal use ("inform with a signing of appropriate document about working conditions").

In the case where the employer decided to establish such a control in the period of current employment, the employee should be informed about such control, in accordance with Article 32 of the Code of Laws on Labor of Ukraine, no later than two months before the introduction of such a control and the possible supervision by the employer of the employee electronic correspondence, in particular, using the Internet, checking phone calls or shooting video etc. If the employee does not agree with such innovations of employer, the employment agreement with such an employee may be terminated due to the changes in essential working conditions.[39]

Concerning the international cooperation in the field of personal data, under the Article 29 of the Law of Ukraine "On Personal Data Protection", personal data can be transferred to foreign entities connected with personal data, as in the case of: providing by a subject of personal data of one-time consent to such a transfer; the need to conclude or perform the transaction between the holder of personal data and a third person-subject of personal data in favor of the subject of personal data; the need to protect the vital interests of personal data; he need to protect the public interest, establishment, performance and ensuring legal requirements; granting by the holder of personal data appropriate guarantees on non-interference in private and family life of the subject of personal data.[40]

[39] Law No. 322-VIII (Code of Laws on Labor of Ukraine) 1971 [Кодекс законів про працю України]
[40] Law No. 2297-VI ("On Personal Data Protection") 2010 [Про захист персональних даних]

10. If relevant, please set out information on the following:

10.1 Defences to the offences listed in question 2;

10.2 Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement);

10.3 Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas).

Ukrainian legislation does not contain mechanisms of obtaining immunity from or prevention of prosecution of corporate entities.[41] Criminal Procedure Code explicitly prohibits the conclusion of reconciliation or plea agreement with authorized representative of a legal entity in proceedings, which serve as a ground for proceedings against a legal entity.[42]

The only way to evade prosecution, which is equally applicable to any offence, is a limitation period. Under Article 96-5 of the Criminal Procedure Code, a legal entity is exempted from liability if from the moment its authorized representative committed an offence until the verdict of the court entered into force the period of 3-15 years, which depends on the severity of a crime, has passed.[43]

There are also ways to prevent prosecution relevant specifically to certain offences. In tax evasion cases, criminal proceedings against legal entity have to be terminated if tax compromise has been reached.[44] However, tax compromise applies only to relations that arose prior to 1st April 2014 concerning value added tax and corporate profit tax liabilities.[45] As regards the creation of a terrorist group or terrorist organization and financing of terrorism a person may be exempted

[41] Dmitriy Kamensky, 'Introducing Corporate Criminal Liability in Ukraine: Terra Incognita' (2016) 3 SUCLRP <https://ssrn.com/abstract=2738353> assessed 16 February 2016
[42] Law No. 4651-VI (Criminal Procedure Code of Ukraine) 2012 [Кримінальний процесуальний кодекс України], Art 469(3), 469(4)(2)
[43] Law No. 2341-III (Criminal Code of Ukraine) 2001 [Кримінальний кодекс України], Art 96-5(1)
[44] Law No. 4651-VI (Criminal Procedure Code of Ukraine) 2012 [Кримінальний процесуальний кодекс України], Art 284(2)(3)
[45] Law No.63-VIII (On Amendments to the Tax Code of Ukraine concerning the Features of Corrections to the Tax Liabilities of Corporate Income Tax and Value Added Tax in the Case of Application of the Tax Compromise)

from liability if it informed the appropriate law enforcement agency about terrorist activities and contributed to its termination or Investigation of a crime.[46]

There are no means to reduce a penalty, which can be employed during proceedings. However, when considering the severity of penalties to be applied the court takes into account, *inter alia*, measures taken by the entity to prevent an offence.[47] Apparently, in connection with corruption offences such measures may include an introduction of anti-corruption program and appointment of a person responsible for implementing it as provided for in Charter 10 of the Law "On Prevention of Corruption".[48]

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors and officers insurance)

Under Ukrainian legislation, taxable income may be reduced by certain types of expenditures and is determined according to national accounting standards. [49] Pursuant to these standards expenditures may include recognised fines,[50] fees for legal services and the costs of dispute settlement in courts.[51]

Additionally, the court may allow the legal entity, in the view of its financial position, to pay a fine by installments during the period of up to 3 years.[52]

[46] Law No. 2341-III (Criminal Code of Ukraine) 2001 [Кримінальний процесуальний кодекс України], Art 258-3(2), 258-5(4)
[47] Ibid, Art 96-10
[48] Law No. 1700-VII (On Prevention of Corruption) 2014, Art 61-64
[49] Law No. 2755-VI (Tax Code of Ukraine) 2010 [Податковий кодекс України], Art 134.1.1
[50] Order of the Ministry of Finance of Ukraine (Regulation (Standard) of Accounting 16 "Expenses") 1999, p 20
[51] Ibid, p 18
[52] Law No. 2341-III (Criminal Code of Ukraine) 2001, Art 96-7 (3)

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

While Ukraine is working towards the approximation of Ukrainian legislation to *"Acquis communautaire"* and the close international cooperation, in criminal compliance sphere most policy documents, approved by the state authorities of Ukraine, are adopted on implementation of international obligations under the EU Association Agreement.

In furtherance of this cooperation, the NBU Resolution No. 391 (On approval of comprehensive Program on Development of Financial Sector of Ukraine for 2020) 2015 [Про затвердження комплексної програми з розвитку фінансового сектора України на 2020 рік] was adopted, foreseeing several strategic aims in the researched area. Those are:

- strengthening the responsibility for fraud with the use of financial markets, including liability of beneficiaries and management of financial institutions whose actions led to the deterioration of the financial condition of these institutions, and curvature of financial information;
- completing the implementation of international standards on combating money laundering and financing of terrorism and proliferation of the Financial Action Task Force on Money Laundering (FATF);
- strengthening the cooperation between National Anticorruption Bureau, National Bank of Ukraine and the State Financial Monitoring Service of Ukraine;
- implementing "Forty Recommendations" and "Nine special recommendations on combating terrorist financing" of the Financial Action Task Force on Money Laundering (FATF).[53]

Development perspectives of Ukrainian legislation in the area of criminal compliance are often specified in separate strategic documents, like plans of Directives implementation, general strategic

[53] Resolution No. 391 of the National Bank of Ukraine "On approval of comprehensive Program on Development of Financial Sector of Ukraine for 2020" 2015 [Про затвердження комплексної програми з розвитку фінансового сектора України на 2020 рік]

plans, etc. For example, for the sphere of anti-money laundering were implanted with the order of the Cabinet of Ministers of Ukraine No. 1407-p.[54]

Furthermore, annual Action plan on prevention and counteraction to legalization (laundering) of proceeds from crime, terrorist financing and the financing of proliferation of weapons of mass destruction is one of legislative forces in the area of criminal compliance.[55]

According to those documents, the prospects of anti-money laundering development in Ukraine involve:

- participation in international events under the auspices of the Financial Action Task Force on Money Laundering (FATF), the EU, the Council of Europe, the Organization for Security and Cooperation in Europe (OSCE), the World Bank, the International Monetary Fund, the United Nations, the Egmont group, Eurasian group on combating money laundering or terrorism financing, law enforcement agencies and financial intelligence bodies of other countries;
- involvement of EU aids under the Comprehensive Institution Building of Twinning and TAIEX tools, and ensuring the cooperation in the framework of SIGMA program;
- implementation of international standards of the Financial Action Task Force on Money Laundering (FATF) (2016-2019);
- implementation of 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, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC;

[54] Order No. 1407-p of the Cabinet of Ministers of Ukraine "On approval of the Strategy of development of the system on prevention and counteraction to legalization (laundering) of proceeds from crime, terrorist financing and the financing of proliferation of weapons of mass destruction for the period until 2020" of December 30 2015
[55] Resolution No. 103 of the Cabinet of Ministers of Ukraine "On approval of the action plan for 2016 on prevention and counteraction to legalization (laundering) of proceeds from crime, terrorist financing and the financing of proliferation of weapons of mass destruction" of February 11 2016

- implementation of the provisions of Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006.

The strategy for development of anti-corruption legislation is provided by the Law of Ukraine "On principles of anti-corruption policy in Ukraine (Anti-corruption Strategy) for 2014-2017 years". According to this strategy, there are several more steps have to be done to implement the strategy:

- adopting the legislation to implement the recommendations of the Group of States against Corruption (GRECO);
- adopting the legislation, defining legal principles of lobbying:
    - creating legal barriers to corruption in the law-making sphere;
    - creating effective mechanisms for monitoring lobbying;
- enacting legal liability for participants of lobbying relationships and determining appropriate sanctions for illegal lobbying;
- implementing the conclusions of the European Commission "For Democracy through Law" (Venice Commission);
- create a single state register of legal persons involved in corruption, in order to enshrine impossibility of access of those legal persons to public resources like public procurement, tax exemptions, subsidies and subventions.[56]

They say there is always room for perfection and the issue of compliance programs and legislation development in Ukraine is far from being the exception. Legal ignorance, lack of both state and private sector involvement into decision-making process on the national level, misunderstanding of the ongoing reforms, protracted economic and political crisis hold the process of European integration back.

[56] Law No. 1699-VII (On principles of anti-corruption policy in Ukraine (Anti-corruption Strategy) for 2014-2017 years) 2014 [Про засади антикорупційної політики в Україні (Антикорупційна стратегія) на 2014-2017 роки]

Hopefully, the situation will change soon as compliance is becoming an effective tool for companies to prevent and avoid risks of legislation abuse in Ukraine. It can be noticed mostly at corporate documents of subsidiaries of major international corporations. Such companies typically implement and adhere to codes of business conduct, charters fair competition, and so on. While the vast majority of domestic small and medium business in general is not understanding the algorithm of implementation of compliance programs and its advantages.

As for now Ukraine remains to be the country that is in need of serious reforms. We, ELSA Ukraine, believe that no matter how much assistance we receive from foreign colleagues, we need to work on our unique compliance experience that will perfectly fit to Ukrainian realities. It is important not only to retake the best practices of the world but start changing our society's perception of the corruption phenomenon, how the corporate life should be performed and what the penalties shall be for breach of corporate documents and anticorruption laws.

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- Law No. 254к/96-ВР (Constitution of Ukraine), 1996 [Конституція України].
- Law No. 4651-VI (Criminal Procedure Code of Ukraine) 2012 [Кримінальний процесуальний кодекс України].
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- Law No. 2341-II (Criminal Code of Ukraine) 2001 [Кримінальний кодекс України].
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- Law No. 1699-VII (On the Principles of State Anti-Corruption Policy in Ukraine (the Anti-Corruption Strategy) for 2014 – 2017) 2014 [Про основи державної політики по боротьбі з корупцією в Україні (стратегія по боротьбі з корупцією) на 2014 - 2017 роки].
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- Law No. 436-IV (Economic Code of Ukraine) 2003 [Господарський кодекс України].

- Law No. 2341-III (Criminal Code of Ukraine) 2001 [Кримінальний кодекс України].
- Law No. 393/96-ВР (On Petitions of Citizens) 1996 [Про звернення громадян].
- Law No. 3206-VI (On the Principles of Prevention and Countering of Corruption) 2011 [Про засади запобігання та протидії корупції].
- Law No.1261-VII (On amendment of some legislative acts of Ukraine in area of state anticorruption policy in accordance with the Plan of the European Union on liberalization of visa requirements for Ukraine) 2014 [Про внесення змін до деяких законодавчих актів України у сфері державної антикорупційної політики у зв'язку з виконанням Плану дій щодо лібералізації Європейським Союзом візового режиму для України].
- Law No. 322-VIII (Code of Laws on Labor of Ukraine) 1971 [Кодекс законів про працю України].
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- Law No. 514-VI (On Joint Stock Companies) 2008 [Про акціонерні товариства].
- Law No. 3477-IV (On Enforcement of Decisions and Application of Practice of the European Court of Human Rights) 2006 [Про виконання рішень та застосування практики Європейського суду з прав людини].
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- Resolution No. 391 of the National Bank of Ukraine (On approval of comprehensive Program on Development of Financial Sector of Ukraine for 2020) 2015 [Про затвердження комплексної програми з розвитку фінансового сектора України на 2020 рік].
- Order No. 1407-p of the Cabinet of Ministers of Ukraine (On approval of the Strategy of development of the system on prevention and counteraction to legalization (laundering) of proceeds from crime, terrorist financing and the financing of proliferation of weapons of mass destruction for the period until 2020) 2015 [Про затвердження Стратегії розвитку системи з питань запобігання та протидії легалізації (відмиванню) доходів, одержаних злочинним шляхом, фінансуванню тероризму та фінансуванню розповсюдженню зброї масового знищення на період до 2020 року].
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1. Please identify the relevant anti-bribery and corruption, fraud, anti-money laundering and sanctions legislation within your jurisdiction.

The relevant legislation for anti-bribery and corruption, fraud, anti-money laundering and sanctions can be found in a few keys acts: the **Bribery Act 2010**, **Fraud Act 2006** and the **Proceeds of Crime Act 2002**. Additional requirements for anti-money laundering can be found in the **Money Laundering Regulations 2007**.

1.1 Anti-Bribery and Corruption

Section 1 of the **Bribery Act 2010** makes it an offence for a person "P" to offer, promise or give a financial advantage to another person in one of two cases:

> Case 1 applies where P intends to induce another to perform a function or task improperly or reward them for doing so.
>
> Case 2 applies where P knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a relevant function or activity.

'Improper performance' is defined in **Sections 3**, **4** and **5** of the **Bribery Act 2010**.

Section 6 serves as a standalone offence for bribery of a foreign public official. The offence is committed where a person offers, promises or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions. The person offering, promising or giving the advantage must also intend to obtain or retain business or an advantage in the conduct of business by doing so. However, the offence is not committed where the official is permitted or required by the applicable written law to be influenced by the advantage.

Section 7 covers the failure of a commercial organisation to prevent bribery. A commercial organisation will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation.

Additionally, under **Section 14**, offences under **Sections 1**, **2** and **3** by bodies corporate also renders the senior officer or person (as well as the body corporate or partnership) guilty of the offence.

1.2 Fraud

Fraud is covered in the **Fraud Act 2006**. **Section 1**, sets out three types of fraud: fraud by representation, fraud by failing to disclose information, and fraud by abuse of position.

Fraud by false representation (**Section 2**): When a person dishonestly makes a false representation with the intention to make a gain or cause loss.

Fraud by failing to disclose information (**Section 3**): When a person dishonestly fails to disclose information to another person which he is under a legal duty to disclose with the intention to make a gain or cause loss.

Fraud by abuse of position (**Section 4**): When a person occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person but dishonestly abuses that position with the intention of making a gain or cause loss.

1.3 Anti-money Laundering and Sanctions

There are two areas that the anti-money laundering regulations can be divided into; the substantive offences and, the administrative and regulatory requirements. The substantive offences are primarily located in **Part 7** of the **Proceeds of Crime Act 2002** and the administrative requirements are set out in the **Money Laundering Regulations 2007**; these regulations only apply to firms in the regulated sector.

Money laundering is defined as an act which constitutes an offence under the following sections or a conspiracy or attempt to commit such an offence. Money laundering includes counselling, aiding or abetting or procuring.

1.3.1 Substantive Offences

The principal money laundering offences are found in **Sections 327**, **328** and **329** of the **Proceeds of Crime Act 2002**.

Section 327: a person commits an offence if he conceals, disguises, converts, transfers criminal property or removes it from the jurisdiction.

Section 328: a person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.

Section 329: a person commits an offence if he acquires, uses or has possession of criminal property.

Sections 330 to **333** contain the offences for failure to disclose; in the regulated sector and otherwise and actively made disclosures which are 'likely to prejudice any investigation'.

1.3.2 Administrative and Regulatory Requirements

In addition to the Act, the Regulated Sector is subjected to administrative requirements set out in the **Money Laundering Regulations 2007**. The regulations are the United Kingdom's answer to the **Third Money Laundering Directive**.[1]

Every business covered by the regulations must be supervised by a supervisory authority. Either by supervisory bodies for example, the Law Society, or HM Revenue & Customs if the business falls under one of five business sectors; Money Service Businesses, High Value Dealers, Trust or Company Service Providers, Accountancy Service Providers, and Estate Agency Businesses, then it must be supervised by HM Revenue & Customs.

[1] Directive 2005/60/EC.

Essentially, the **2007 Regulations** require that firms in the regulated sector put in place certain preventative controls. These include:[2]

- Assessing the risk of your business being used by criminals to launder money;
- Checking the identity of your customers;
- Checking the identity of 'beneficial owners' of corporate bodies and partnerships;
- Monitoring your customers' business activities and reporting anything suspicious to the National Crime Agency (NCA). The reporting is done by a nominated officer or yourself if the business has no employees and must be done at the earliest possible opportunity;
- Making sure you have the necessary management control systems in place;
- Keeping all documents that relate to financial transactions, the identity of your customers, risk assessment and management procedures and processes;
- Making sure that your employees are aware of the regulations and have had the necessary training.

2. Please explain the nature of the main offences for companies under this legislation and any potential penalties.

Bribery, fraud, and money-laundering are all white collar crimes, traditionally those that are non-violent and committed in the processes of business transactions. An exact definition for white collar crime has been the topic of debate for the past century with numerous academics, since Edwin Sutherland coined the term in 1939.[3] The main debate focuses on whether it is a white collar crime because of the social status of the offender or because of the legal standing of the behaviour. The penalties for each of the three crimes are similar due to their comparable nature.

[2] HM Revenue and Customs, 'Money Laundering Regulations: introduction' (*GOV.UK*, 23 October 2014) < https://www.gov.uk/guidance/money-laundering-regulations-introduction> accessed 26 February 2017.
[3] Edwin Sutherland, 'White-Collar Criminality' [1940] 5 American Sociological Review 1.

2.1 Bribery

Offences can be committed by corporate bodies are covered in **Section 14** of the **Bribery Act 2010**. This section applies if an offence under **Section 1**, **2**, or **6** is committed by a body corporate or a Scottish partnership. If the offence is committed with the knowledge of a senior officer or a person purporting to act in such a capacity then the person is also guilty of the offence.

2.1.1 Penalties

The penalties can be found in **Section 11**. The CPS has summarised this.[4] The maximum penalty for offences under **Sections 1**, **7** and **9** is 12 months' imprisonment on summary conviction and 10 years' imprisonment on conviction on indictment. Section 10 of the Act increases the maximum penalty for offences contrary to **Section 458** of the **Companies Act 1985** to 10 years' imprisonment. The maximum penalty for an offence under **Sections 6** and **11** is 12 months' imprisonment on summary conviction and 5 years' imprisonment on conviction on indictment. Offences relating to commercial organisations carry an unlimited fine.

2.2 Fraud

Fraud committed by a corporate body can be found in **Section 12**:

12 Liability of company officers for offences by the company

1. Subsection (2) applies if an offence under this Act is committed by a body corporate.
2. If the offence is proved to have been committed with the consent or connivance of –
    a. a director, manager, secretary or other similar officer of the body corporate, or
    b. a person who was purporting to act in any such capacity, he (as well as the body corporate) is guilty of the offence and liable to be proceeded against and punished accordingly.
3. If the affairs of a body corporate are managed by its members, subsection (2) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

[4] Crown Prosecution Service, 'The Fraud Act 2006' (*CPS*) <http://www.cps.gov.uk/legal/d_to_g/fraud_act/#penalty> accessed 25 February 2017.

2.2.1 Penalties

Fraud offences carry a number of possible penalties depending on the type of fraud and severity of the situation:

- Fines
- Incarceration
- Restitution order
- Compensation order
- Deprivation order
- Disqualification from acting as a company director
- Financial reporting order
- Serious crime prevention order

2.3 Money Laundering

Penalties for money-laundering can be found in **Section 334**:

334 Penalties

1. A person guilty of an offence under section 327, 328 or 329 is liable –
    a. on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both, or;
    b. on conviction on indictment, to imprisonment for a term not exceeding 14 years or to a fine or to both.
2. A person guilty of an offence under section 330, 331, 332 or 333 is liable –
    a. on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both, or;
    b. on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine or to both.

3. Please explain whether, and in what circumstances, criminal conduct by directors and officers may lead to corporate liability (i.e. the identification principle in the UK)

3.1 Overview

In criminal law, corporate liability outlines the extent to which a corporation- as separate legal entity distinct from their owners, officers or employees - can be held criminally liable for the unlawful acts of the natural persons it employs. A well-established legal approach based on the application of relevant statutes, case-law, standing orders, guidance notes and common-law principles is adopted with regard to offences targeted at corporate entities, regulation of business activities and establishing corporate criminal liability in the UK. Consequently, corporate liability may or may not be attributed to a corporate depending on the construction of the offence and the avenues available to pursue in determining corporate criminal liability.

Two of the most important recent pieces of legislation which have targeted corporate entities with the aim of facilitating the establishment of corporate criminal liability and created specific corporate offences: the **Corporate Manslaughter and Corporate Homicide Act 2007** (introducing the 'corporate manslaughter' offence) and the Bribery Act 2010 (concerning the 'failure to prevent bribery' offence). In the absence of legislation which expressly creates criminal liability for companies i.e. for most other offences in the UK targeted at corporate entities, this inclusive of all to which deferred prosecution agreements (DPAs) would apply, the legal concepts of vicarious liability and non-vicarious liability are accepted as governing ones.

3.2 Establishing Corporate Liability

3.2.1 Common law rules

A corporate entity can incur criminal or quasi-criminal liability for the wrongdoings of their employees and agents in the circumstances of established vicarious liability or if the requirements for the "identification principle" method are satisfied.

3.2.1.1 Vicarious Liability

The principle of vicarious liability has been in use for more than two hundred years now. As per ***Mousell Bros Ltd v London and North Western Railway Co***[5] a corporate employer is vicariously liable for the acts of its employees and agents where a natural person would be similarly liable. When applied in the context of attributing corporate criminal liability, the principle of vicarious liability is most commonly found in quasi-regulatory areas of criminal law such as health and environmental law. Usually vicarious liability arises from offences of strict liability i.e. offences which do not require neither proof of *mens rea* (the mental element of criminal liability), nor anything further beyond the existence of the facts amounting to the contravention such as intention, recklessness, negligence, as to one or more elements of the *actus reus*. For instance, many statutory/regulatory offences impose liability upon employers (corporate and human) to ensure compliance with the relevant regulatory legislation and thus impose an absolute duty on the employer, even in the cases where the employer has not authorised or consented to the act.

When determining whether a company is vicariously liable or not, the terms of the statute creating the offence should be considered. It may require *mens rea*, yet vicarious liability will be imposed. Conversely, it may create strict liability without imposing vicarious liability.

3.2.1.2 Non-vicarious liability arising from the so-called "identification principle"

Since companies are legal persons, they may also be held criminally responsible for the offences requiring proof of *mens rea* by the application of the identification principle. The "identification principle" concept has developed over decades and determines if "the acts and state of mind" of those who represent the "directing mind and will" of the company will be imputed to the company.[6] Consequently, subject to some limited exceptions, a corporate entity may be convicted for the unlawful acts of the directors and managers who are representatives of the directing mind and will and who are also in control of what the company does. The case of ***Tesco Supermarkets***

[5] [1917] 2 KB 836.
[6] *Lennard's Carrying Co v Asiatic Petroleum* [1915] AC 705; *Bolton Engineering Co v Graham* [1957] 1 QB 159 (per Denning LJ).

Ltd v Nattrass[7] restricts the application of the principle to the 'board of directors, the managing director and perhaps other superior officers of the company who carry out functions of management and speak and act as the company'. Thus, criminal acts conducted by such officers will not only be offences for which they can be individually prosecuted, but also offences which can attribute corporate criminal liability to the company because of the individuals' status within the company. Further, as established in ***Moore v I. Bressler Ltd***[8]***:*** a company may be liable for the acts of its servants even though that act was done in the fraud of company itself.

Historically the "identification principle" has proven a hurdle which has sometimes prevented companies from being held liable for the acts of the individuals who work within them. As a result, the method indicated in ***Tesco***[9] has received criticism as one, which creates a principle which is inflexible and artificial. Even though the case is still considered current state of the law governing the cases related to corporate criminal offences requiring proof of the *mens rea* element, the Privy Council has attempted to adopt a less rigid application of the identification principle in the case of ***Meridian Global Funds Management Asia Ltd v Securities Commission***[10]. It was argued in the case that in order to ascertain whose act or knowledge or state of mind was intended to count as being that of the company, normal principles of interpretation should be applied to the statute which created the offence. However, more recent cases such as ***R v Regis Paper Co Ltd.***[11] have adopted and restated the stricter application of the identification principle established in the ***Tesco*** case.

There are certain types of offences for which corporate liability may be determined irrespective of the "identification principle", most notably by examining the construction of a particular statute as certain regulatory offences may necessitate a more prudent interpretation in addition to the primary rules of attribution. In the process of identification of the 'directing mind' of a company,

[7] [1972] AC 153
[8] [1994] AII ER 515
[9] *Tesco Supermarkets Ltd v Nattrass [1972] AC 153.*
[10] [1995] 2 AC 500
[11] [2012] 1 Cr. App.R. 14

the prosecution may need to consider the constitution of the company concerned and any reference in statutes to offences committed by company's employees/agents.[12]

3.3 Statutory Provisions

As a general rule, the attribution of corporate criminal liability offences is governed by common law rules, except in the cases where there is a statutory provision which has offences specifically directed at companies. For example, the **Corporate Manslaughter and Corporate Homicide Act 2007** establishes that a corporate is guilty of the offence of corporate manslaughter if the way in which its activities are manages or organised 'causes a person's death; and amounts to a gross breach of a relevant duty of care owed by the entity to the deceased'.[13] Similar is the jurisprudential effect of section 7 of the **Bribery Act 2010**[14] which has been developed for attributing to a 'relevant commercial organization' corporate criminal liability for a failure to prevent bribery if a person 'associated' with it bribes another person intending to obtain or retain business or an advantage for it. This can be established unless it can be proven that adequate procedures were in place to prevent such conduct.[15]

3.4 Conclusion

Some offences such as the one created by the Bribery Act 2010 were codified in statutes as a response to evidence that the common law rules on regulatory sanctions and economic crimes were not tackling well enough commercial bribery. Since its implementation this legislation has proved its utility as a successful enforcement tool. In recent times, however, there has been an increasing number of corporate wrongdoings particularly but not limited to the financial services. Some commentators have expressed firm belief that the common law "identification" doctrine is one of the challenges in bringing successful criminal corporate liability prosecutions because of the limited circumstances in which the identification principle can be satisfied. Consequently, the Government has expressed their concern on the matter and issued a 'call for evidence' with the

[12] ibid 7; R v British Steel plc [1995] 1 W.L.R. 1356 (for offences under the Health and Safety at Work etc Act 1974)
[13] The Corporate Manslaughter and Corporate Homicide Act 2007, s 1.
[14] The Bribery Act 2010.
[15] ibid 11, s 7(2).

aim of seeking proof 'on the extent to which the identification doctrine is deficient as a tool for effective enforcement of the criminal law against large modern companies'. Subject to the outcome of the first stage of this call for evidence, the Government may consult on the detail of a firm proposal for reform in its efforts to improve their response to corporate economic crime.[16]

4. What are the potential bars to the extradition of an individual?

4.1 Introduction

Extradition is the legal process set up when a person accused or convicted of a criminal offence is returned from one country to another in order to be tried there or to serve a term of imprisonment.[17] s it involves different countries, extradition is therefore a process depending on political and international factors. Extradition law takes the shape of the country's stance on the international stage, as they often take the form of agreements between countries. The Law Commission describes extradition as 'a form of international cooperation in criminal matters, based on comity (rather than any overarching obligation under international law), intended to promote justice.'[18] It is a complex politico-legal game played by governments, where maintaining a good diplomatic relationship is crucial, but each party also endeavours to enforce its notion of justice. In this respect, every request for the extradition of an individual is not granted by the British courts.

However, due to its membership of the European Union, the United Kingdom's extradition law has changed vis-à-vis the European Union. Judicial authorities of member states of the European Union can issue a European Arrest Warrant (EAW) if the person whose return is sought is accused of an offence defined in the article 2 of the Council Framework decision for it, and for which the maximum period of the penalty is at least one year in prison or is required to serve a term of four

[16] Ministry of Justice, *Corporate Liability for Economic Crime Call for Evidence* (January 2017).
[17] Committee on Extradition law, *Extradition: UK law and practice*, March 10 2015, HL, para 4.
[18] A Review of the United Kingdom's Extradition Arrangements ['the Baker Review'], 18 October 2011, p 20 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extraditionreview.pdf accessed March 5 2017.

months or more, requesting the United Kingdom authorities to apprehend and surrender an individual on their soil.[19] The countries capable of issuing an EAW are known as category one countries, and the rest is known as category two.

In both cases, if the individual is arrested, he will face an initial hearing, setting up a date a date for the extradition hearing, during which the court considers matters preventing his granting of the extradition, also known as bars to extradition.

4.2 The Law

The statute governing the general extradition rules for both categories is the Extradition Act 2003.

S11 lists the possible bars, as well as art3 and art4 of the Council Framework Decision for the EAW. The bars are further detailed in the following sections of the Act.

- Double jeopardy[20]: To define this principle, the Law Commission[21] borrowed the words of Black J, of the Supreme Court of the United States:

  > The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[22]

  Although double jeopardy has rarely caused any major discussion in the domain of extradition law, it has been successfully argued in the past in the UK.[23]

[19] European Commission, 'European Arrest Warrant', http://ec.europa.eu/justice/criminal/recognition-decision/european-arrest-warrant/index_en.htm accessed March 5 2017.
[20] Extradition Act 2003, s12 and Council Framework Decision of 13 June 2002, art 3(2).
[21] Law Commission, *Double Jeopardy* (Law Com No 156, 1999).
[22] *Green v US* 355 US 184, 2 L ed 2nd p 199 at p 201
[23] JFH Crime, 'Extradition success in double jeopardy case', <http://jfhcrime.co.uk/extradition-success-in-double-jeopardy-case/> accessed March 5 2017

- Extraneous conditions[24]. Courts must ensure that the extradition request (whether a category one or two) was not made in order to persecute the person on the basis of his race, gender, religion, sexual orientation, nationality or political opinions. This is an argument often used in court hearings, especially regarding countries that would be viewed as dictatorships, and countries having experienced war crimes.[25]
- Passage of time. Very rare argument that 'it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have committed the extradition offence'[26]. This happens in the case where so long has passed since the person was absent from his trial for a good reason and was tried *in absentia*.[27]
- Age[28]. Where the person is too young to be indicted of the alleged crime under UK law.
- Hostage-taking considerations[29], regarding the **Hostage Taking Act 1982**.
- Specialty[30]. This bar prevents courts from extraditing an individual when there is no extradition agreement between the UK and the extradition country. This doctrine has advanced to the point that it provides a protection, known as the 'specialty protection',[31] preventing the extradited person to be tried for any other offence than the one listed for the extradition request.
- Proportionality,[32] which is used by judges when faced by trivial cases in order not to create too many EAW cases, thus reducing the cost and the length of the process.
- Earlier extradition to the United Kingdom cases[33]. Incidentally, if multiple countries have jurisdiction over the case, the court has the power to refuse the extradition if the United Kingdom's jurisdiction is balanced in comparison, and if it is in the interest of justice to do so[34]. This is known as the forum bar.

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[24] Extradition Act 2003, s13
[25] *Republic of Serbia v Ejup Ganic*, [2010] EWHC 878 (Admin)
[26] Extradition Act 2003, s14
[27] *Chen v The Government of Romania,* [2006] EWHC 1752 (Admin)
[28] Extradition Act 2003, s15 and Council Framework Decision of 13 June 2002, art 3(3)
[29] Extradition Act 2003, s16
[30] ibid 29, s17
[31] Anti-social Behaviour, Crime and Policing Bill,
[32] European Commission, 'European Arrest Warrant', <http://ec.europa.eu/justice/criminal/recognition-decision/european-arrest-warrant/index_en.htm> accessed March 5 2017
[33] Extradition Act 2003, s18 and 19
[34] *Norris v Government of the United States (No. 2)* [2010] UKSC 9

- Abuse of process, which is a common law power[35] for courts to verify the fairness and the rightfulness of the indictment.
- Human rights compatibility[36]. The judge must judge this with regards to the Convention rights and the **Human Rights Act 1998**. This is the main area of argument and case law. The leading case is ***McKinnon v The United States of America and another***.[37] **Article 3** of the Convention is often discussed, especially with regards to physical and mental health.

4.3 Reviews and possible future

Extradition law bars have been subject to many reviews from the Law Commission. In October 2010, a panel chaired by Sir Scott Baker was missioned to review the state of extradition law in the United Kingdom.[38] Its introduction reads:

In the course of conducting our Review, it became apparent that some of the criticism directed at the **Extradition Act 2003** was based on a misunderstanding of how the 2003 Act operates in practice … we were struck by the fact that out of the hundreds of cases that are dealt with by the courts each year, only a handful is relied upon as support for the contention that the existing law is defective.[39]

The Review helped dispelling some doubts over extradition and the EAW, especially since it does not expressly need evidence to be complied with. However, the review has rightly pointed out that an EAW cannot be used for investigative purposes. [40] Furthermore, the review was decisive in implementing the proportionality bar.[41] There is also added value to the fact that there is no executive review of the decision for EAWs.[42] But the review did not approve of the introduction of the forum bar.

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[35] *R(Kashamu) v Governor of Brixton Prison (No 2)* (2002) QB 887 at 27–31
[36] Extradition Act 2003, s20
[37] [2008] UKHL 59
[38] The Baker Review
[39] The Baker Review, pp8-9
[40] Council Framework Decision of 13 June 2002, art1
[41] The Government Response to the Extradition: UK Law and Practice Report by the House of Lords Select Committee on Extradition Law, p2
[42] European Commission Memo/05/58

Added to the review, media criticism is also on the economic factor, since the UK has been found to pay twenty-seven million pounds for the cost of the EAW.[43] This economic argument has added value with the public discontentment due to overturned EAW decisions such as ***Andrew Symeou v Public Prosecutor's Office at the Court of Appeals, Patras, Greece***[44].

4.4 Conclusion

Extradition rules are a very intricate and discrete process, entangled with political considerations. Its many bars are evidence of concern for mistreatment and abuse of rights by other countries. Extradition has thus led to a lot of legal conundrums, and is often misconstrued by the public opinion. But, as the **2nd Report of Session 2014–15 'Extradition: UK law and Practice'** stated 'the fundamental purpose of extradition is to bring criminals to justice. The interests of the victims of crimes must therefore always be considered'.[45]

5. Please state and explain any:

a. internal reporting processes (i.e. whistleblowing) and;

b. external reporting requirements (i.e. to markets and regulators), that may arise on the discovery of a possible offence.

5.1 Description of the procedures

The UK internal and external reporting procedures are governed by the **Employment Rights Act 1996**, as amended by the **Public Interest Disclosure Act 1998** (PIDA) and by **Sections 17 to 20** of the **Enterprise and Regulatory Reform Act 2013** (ERRA). These legislations apply to the private and voluntary sectors as well as to public bodies, except the intelligence services and armed forces. They are also applicable to all categories of information, irrespective of whether it is confidential or not.

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[43] David Barrett, 'How Britain pays £27m a year to return EU's wheelbarrow thieves', *The Telegraph* (London, October 13 2012) <http://www.telegraph.co.uk/news/uknews/law-and-order/9606795/How-Britain-pays-27m-a-year-to-return-EUs-wheelbarrow-thieves.html> accessed 25th February 2017.
[44] (2009) EWHC 897 (Admin).
[45] Committee on Extradition law, *Extradition: UK law and practice*, March 10 2015, HL.

For the purpose of simplifying the UK reporting procedures as provided under the law, there are summarily three entities to which an employee may disclose an alleged or suspected wrongdoing at workplace. Internally, the employee shall make the intended disclosure to his/her employer.[46] Aside from that, he/she may also lodge a report with prescribed bodies or persons.[47] These are regulators such as the Financial Conduct Authority, the Health and Safety Executive or the Inland Revenue Commission. Finally, wider disclosures can also be made to any other parties such as the police, media, MPs, consumers and non-prescribed regulators.[48]

It is important to note that for a whistle-blower to be conferred protection under the law, the requirements that have to be satisfied under each procedure of reporting vary from each other especially in their level of strictness.

Quite simply, the two essential requirements under the internal reporting procedure are that the report must have been made in reasonable belief and in the public interests.[49] Meanwhile, disclosures to prescribed bodies or persons are protected only where the tests for internal disclosures have been met and, additionally, the whistle-blower also needs to reasonably believe that the information as well as his/her allegation is substantially true and is relevant to that regulator.[50]

As regards the third category of disclosure, a wider disclosure will qualify for protection if it satisfies all the aforementioned requirements and furthermore, falls within one of four broad circumstances[51] which are:

i. the whistle-blower reasonably believes in the possibility of victimisation if the matter is brought internally or with a prescribed regulator; or

[46] Employment Rights Act 1996, s 43C.
[47] Employment Rights Act 1996, s 43F.
[48] Employment Rights Act 1996, s 43G.
[49] Employment Rights Act 1996, s 43C as amended by s 18(1) of the ERRA 2013.
[50] Employment Rights Act 1996, s 43F.
[51] Employment Rights Act 1996, s 43G(2) and 43H, as amended by s 18(1) the ERRA 2013.

ii. there is no prescribed regulator and the whistle-blower reasonably believes in the likelihood of the evidence being concealed or destroyed; or

iii. the concern has already been raised with the employer or a prescribed regulator; or

iv. the concern is exceptionally serious in nature.

In determining the reasonableness of a wider disclosure, several other factors will also be taken into account such as the identity of the person to whom it is made, the seriousness of the concern, whether the risk or danger remains, and whether the disclosure breaches a duty of confidence which the employer owes a third party. Where the concern has been raised with the employer or a prescribed regulator, the reasonableness of their response will be considered too.

5.2 Evaluation

In order to evaluate the effectiveness of the UK reporting procedures, it is primarily crucial to identify the defining elements of a good regulatory framework in this area. It is submitted that an effective regulatory framework is one that sufficiently incentivizes disclosures of wrongdoing since the ultimate objective of the law in this area is to cultivate and encourage a culture of transparency at workplace. Sufficient incentives are provided where the law (i) ensures minimal barriers for an employee to make a protected disclosure, (ii) affords sufficient protection to whistle-blowers and finally (iii) brings clarity into the law on the scope of rights which whistle-blowers are entitled to. The strengths and weaknesses of the reporting procedures shall hence be evaluated in these respects.

The law that governs whistle-blowing in the United Kingdom has considerably reduced the barriers to disclosure through the passing of the ERRA. In particular, the 2013 legislation removed the requirement of good faith for a disclosure to qualify for protection. This, in effect, encourages transparency as it allows disclosures of wrongdoing regardless of motives.[52] At the same time, this

[52] Samantha Mangwana, 'Whistleblowers: Is a change in the law enough to protect them – and us?' (Independent, Wednesday 3 July 2013) <http://www.independent.co.uk/voices/comment/whistleblowers-is-a-change-in-the-law-enough-to-protect-them-and-us-8685210.html> accessed 5 March 2017.

also prevents an employer from challenging the protection conferred upon its employee under the pretext that the employee in question has acted in bad faith. This is of particular significance in the light of the rise in the number of cases where employers accused whistle-blowers of acting in 'bad faith' (in 2011, bad faith was raised in 11% of cases, an increase of 7% from cases in 2009-2010)'.[53]

The bad faith requirement also involves a threshold that is difficult to bet met. This is because a whistle-blower can still be considered to have acted in bad faith even though he reasonably believed that his/her claim is substantially true, if he/she happens to have other ulterior motives.[54] Comparatively, the new public interest test is deemed to be relatively more lenient and easier to satisfy. According to the case law[55], from which the meaning of test is derived, the public interest test may still be satisfied even in the event where the basis of the public interest claimed for is wrong or even where there is actually no public interest in the disclosure, provided that the whistle-blower reasonably believed otherwise.

Despite being rather effective in removing barriers to disclosures, the law is still lagging behind when it comes to the issue of whistle-blowers' protection. On the face of it, there has been an increase in protection as the **2013 legislation** extended employers' liability through providing that it may arise not only from reprisals carried out by the employers themselves but also from any forms of punitive treatment by co-worker as well (vicarious liability). This has been said to address the problem of harassment by co-workers which is the more common detriment suffered by whistle-blowers as compared to punishment by employers.

However, a deeper analysis would suggest that the scope of protection to whistle-blowers as conferred by the law remains largely limited. Primarily, it is a major weakness in the law that in the case of dismissal, the employer could only be challenged if it can be proven that disclosure of

[53] Whistleblowing: Beyond the Law, pages 13-14, http://www.pcaw.org.uk/files/PCAW_Review_beyondthelaw.pdf
[54] *Street v Derbyshire Unemployed Workers' Centre* [2004] EWCA Civ 964 at [56].
[55] *Chesterton Global Ltd (trading as Chestertons) and another v Nurmohamed* [2015] I.C.R. 920 at [34].

wrongdoing is the principal reason behind such action.[56] Not only that it is difficult to establish what constitutes a principle reason and what does not, but this has also placed a huge burden of proof on the part of the employee.

Furthermore, whistle-blowers are still capable of receiving punitive treatments outside their current workplace. For example, the law still does not prevent employers from "blacklisting" and refusing to hire those who are known within the industry to have made disclosures in previous jobs.[57] The anti-whistleblowing culture within the whole industry is therefore left unaddressed.

As regards the issue of legal certainty, the law in this area has indeed failed to provide for a sufficiently clear regulatory framework within which disclosures shall be dealt with. Arguably, the most significant factor that has contributed to the lack of clarity is the absence of a requirement for all employers to have their own whistleblowing policies.[58]

Since the law merely defines the general requirements which disclosures are subject to and the scope of protection which employees are entitled to, there are still numerous unaddressed questions as to the manner in which complaints should be handled and the kinds of remedial measures that employers are obliged to take. Furthermore, according to the UK government's guidelines on protected disclosures, not only that an employee does not have a say in how his/her concern is addressed, the employer is also under no obligation to inform him/her of the measures that they have or have not been taken.[59]

On the face of it, it has been argued that there is no overwhelming need for the law to require employers to introduce their own whistleblowing policies since the legislations in and of

[56] Public Interest Disclosure Act 1998, s 5.
[57] Kelly Bouloy, 'The Public Interest Disclosure Act 1998: Nothing more than a "Cardboard Shield"' 2012 MSLR <http://www.humanities.manchester.ac.uk/medialibrary/law/main_site/Research/Student_Law_Review1/MSLR_Vol1_1%28Bouloy%29.pdf> accessed 29th February 2017.
[58] ibid.
[59] The UK Government, 'Whistleblowing for Employees' (GOV.UK, 2 March 2017) <https://www.gov.uk/whistleblowing/what-is-a-whistleblower> accessed 5 March 2017.

themselves have already encouraged many employers to do so. This is said to be partly due to the employer's desire to fix problems before they become publicly reported. However, it is important to note that whilst many employers may have adopted their own whistleblowing policy since the 1998 legislation was passed, a survey done by Public Concern at Work showed that in 2010, only 38 percent of those surveyed worked for companies with whistleblowing policies in place, and only 23 percent knew that legal protection for whistle-blowers existed.[60]

The absence of any whistleblowing policy at workplace would cause employees to feel reluctant to report wrongdoings as they are not well-informed of the circumstances in which they can be conferred protection. Consequently, this hinders the development of the culture of transparency at workplace.

6. Who are the enforcement authorities for these offences?

Though several authorities are involved in these offences, we will see none of them covers all of the offences. This has much to do with the purpose of its operations, funding and several other factors.

6.1 Financial Conduct Authority

The Financial Conduct Authority (FCA) was established on 1 April 2013 when the Financial Services Act 2012 came into force. The Act modelled the regulatory framework in the UK for financial services, replacing the Financial Services Authority (FSA). The FCA is a part of this refined regulatory structure, operates independently of the UK government. Being responsible for a critical role in the integrity of the economy, it regulates financial firms providing services to consumers focusing on both retail and wholesale financial services providers.

[60] Public Concern at Work, 'Where's Whistleblowing Now? 10 Years of Legal Protection for Whistleblowers' (PCaW, March 2010) <http://www.pcaw.org.uk/content/4-law-policy/5-document-library/report-10-year-where-s-whistleblowing-now-10-year-review-of-pida.pdf> accessed 5th March 2017.

It performs its role with three (3) main objectives in mind:[61]

- Securing an adequate degree of protection for consumers
- Securing protection for UK's financial market and economy
- Promoting healthy and effective competition in the financial market

While the FCA promotes the above, it is only empowered to deal with fraudulent matters and anti-money laundering. Recently, the FCA posted that it fined Deutsche Bank AG (Deutsche Bank) £163,076,224 for failing to sustain the required and appropriate anti-money laundering frameworks during 2012 -2015 – the biggest penalty for such actions it has ever issued.[62]

Though the FCA does enforce anti-bribery, corruption or sanctions, due its duty to a prospering, and healthy market it nonetheless advises the providers periodically on the matters and what can be done for further improvement.

6.2 Financial Reporting Council

The Financial Reporting Council (FRC) is an independent regulator with responsibility of facilitating a high standard of corporate governance and reporting to stimulate healthy investments. It is partially funded by the UK government with its Board of Directors appointed by the Secretary of State for Business, Innovation and Skills. The FRC sets the standards for corporate reporting, as well as audit, accounting and actuarial practices, in addition to monitoring and enforcement. There are three (3) components to the functioning of this body:

- The Codes and Standards Committee, which advises on the codes, standards and policy;
- Executive Committee, which supports its daily operations;
- Conduct Committee, which advises on the stimulation of good corporate reporting, monitoring and disciplinary and investigatory functions.

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[61] Financial Conduct Authority, '*Enforcement*' (*FCA*, 31 January 2017) <www.fca.org.uk/about/enforcement> accessed 26 February 2017.
[62] Financial Conduct Authority, '*FCA Fines Deutsche Bank £163 million for Serious Anti-Money Laundering Controls Failings*' (*FCA*, 31 January 2017) < www.fca.org.uk/news/press-releases/fca-fines-deutsche-bank-163-million-anti-money-laundering-controls-failure> accessed 26 February 2017.

The FRC does not formally investigate or enforce measures specific to any of these offences, as they are the underlying principles of its codes and standards. These offences and particularly, sanctions tend to be highlighted when it is investigating accounting and actuary practices in public interest cases.[63] Generally, it does not penalize or sanction those who fail to comply but advises as such to the relevant authorities or bodies.

6.3 Serious Fraud Office

The Serious Fraud Office (SFO) was established in 1987 as an independent UK government department to investigate and prosecute serious or complex fraud, bribery and corruption. It is empowered the by the Criminal Justice Act 1987[64] and the Bribery Act 2010[65] thus with the aim of improving the UK's image as a secured place to conduct business. The SFO's daily activities involve an enormous amount of intelligence gathering (referred to as the pre-investigation stage) on possible criminal activities. This information is then analysed and assessed by their Intelligence Unit on the possibility/need to commence an investigation.

Once an investigation is launched, the SFO has a unique cooperation and coordination between investigators and lawyers from the start. They refer to this as a **Roskill model** and it is believed to be necessary to make sure the lines of investigations are the best ones to pursue for success in possible prosecution cases. If the SFO is convinced, charges would be brought at the end of an investigation or alternative, the SFO Director may consider a company/cooperation to negotiate for a Deferred Prosecution Agreement (this allow for the prosecution's case to be suspended for a period of time). In investigating and prosecuting cases, the SFO also aims to recover the proceeds of crime to prevent any unjust enrichment.[66]

Most recently, on 2nd February 2017, four individuals were found guilty for conspiracy to make

[63] Financial Reporting Council, '*Enforcement*' (*FRC*) < www.frc.org.uk/Our-Work/Enforcement/Enforcement.aspx> accessed 26 February 2017.
[64] Criminal Justice Act 1987.
[65] Bribery Act 2010.
[66] Serious Fraud Office, '*Stages of a Case*' (SFO) < www.sfo.gov.uk/about-us/#Stagesofacase > accessed 26 February 2017.

corrupt payments and conspiracy to commit fraud against Barclays Bank and KBC Lease (UK) Limited, In order to obtain approximately £160m. The SFOs successful prosecution lead to a sentence totalling 44 years.[67] The SFO works with several other law enforcement partners to tackle economic crimes in the UK. It also cooperates under Mutual Legal Assistance agreements, a formal request to provide help among different countries, to obtain evidence and conduct investigations and prosecutions.

6.4 The National Crime Agency

The National Crime Agency (NCA), established in October 2013 is a leading law enforcement and policing agency in the UK. It is a non-ministerial government department, replacing the Serious Organised Crime Agency. One of the NCA's focuses is economic/financial crime (particularly money laundering) of any type that may go across regional and intentional borders. It should be noted though it has full operational capacity in England and Wales, it has limited powers in Scotland.

The NCA pursues investigations of any financial crime by making full use of the powers of state to detect, investigate and disrupt criminality at the earliest stage and retrieve the assets. It has an International Corruption Unit, which investigates allegations of bribery and corruption committed by an individual or company that has any ties (either by being based or receiving aid) to the UK. Where it a criminal charge is not feasible, its Civil Recovery and Tax Department implements measures to recover the loss assets and also (occasionally) assume the powers of Her Majesty's Revenue ad Customs to impose/increase tax penalties. [68]

6.5 The Office of Financial Sanctions Implementation

The Office of Financial Sanctions Implementation (OFSI) was established in March 2015 as part of Her Majesty's Treasury Department. It enables financial sanctions to make its maximum impact

[67] Serious Fraud Office, 'Four Found Guilty in £160m Financing Fraud' (SFO, 7 February 2017) < www.sfo.gov.uk/2017/02/07/four-found-guilty-in-160m-financing-fraud> accessed 26 February 2017.
[68] National Crime Agency, 'Economic Crime' (NCA) <www.nationalcrimeagency.gov.uk/about-us/what-we-do/economic-crime > accessed 26 February 2017.

on UK's foreign policy and national security. The OFSI helps to ensure financial sanctions are properly understood, executed and enforced in the UK. Financial sanctions make take various forms and may adapt to suit the particular situation. They may include:[69]

- Target Asset Freezes – restricting access to funds and other financial resources
- Restrictions to financial markets and services – for example investment prohibitions, restricted access to capital markets
- Orders to cease all business (of a particular type)

6.6 City of London Police

The City of London Police (CoLP) is a national policing lead on financial/economic crimes in the UK. It works alongside Action Fraud and the National Fraud Intelligence Bureau.[70] Action Fraud is the national reporting centre for fraud crimes in the UK. The National Fraud Intelligence Bureau (NFIB) is responsible for the assessment of the fraud reports. These assessments are conducted with data from three mediums – reports made to Action Fraud, fraud data from the industry and public sector and intelligence sources nationally or internationally. Their advanced system is set up to identify trends and linkages in fraud offences. Where is it determined feasible, these assessments and reports are transferred to the necessary law enforcement agencies (mainly the CoLP) to commence investigations. When investigations are completed, the Crown Prosecution Service may bring charges against the individual or company. Occasionally, dependent on the nature of the suspected crime, the CoLP refers the matter to NCA due to their competencies.

[69] Office of Financial Sanctions Implementation, 'Financial Sanctions: Guidance' (OFSI, December 2016) < www.gov.uk/government/uploads/system/uploads/attachment_data/file/576291/OFSI_Financial_Sanctions_-_Guidance_-_December_2016.pdf> accessed 26 February 2017.
[70] City of London Police, 'Fraud Squads' (CoLP) <www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/Pages/default.aspx> accessed 26 February 2017.

7. What powers do those enforcement agencies have to compel the production of information (i.e. documents, answers to questions)?

Though involved in enforcing these offences, as we will see, there are varying degrees of power to compel information production. A core factor to this is the role of the agency itself and how it fits into the entire enforcement framework in the country.

7.1 Financial Conduct Authority

When the Financial Conduct Authority (FCA) is about to commence an investigation, it appoints investigators and sends a Notice of Appointment of Investigators to the individual/business. Information can be provided to the FCA voluntarily to assist investigations. However, the FCA has been granted investigatory powers, which extend over disciplinary, criminal and civil matters derived from the Financial Services and Market Act 2000[71] and the Consumer Rights Act 2015.[72] Within these frameworks lies the power to compel information production.

The FCA under **Section 165**[73] may require information and documents from individuals/firms to support both its enforcement responsibilities. **Section 166**[74] of the Act also grants the FCA the power to require a firm and certain other persons to submit a report by a 'skilled person'. Furthermore, **Sections 122A** and **122B**[75] grants the power to require information from a person/business, an issuer, and individual with managerial or associated responsibilities to assist the functions of the FCA under Market Abuse Regulations[76] and/or auction regulation. Other empower provisions include **Sections 97**, **122C**, **131E**, **131FA**, **167-169** and **284** of the Act.[77] It is important to note, all exercises of powers must comply with the **Human Rights Act 1998**.[78]

[71] Financial Services and Market Act 2000.
[72] Consumer Rights Act 2015.
[73] Financial Services and Market Act 2000, s 165.
[74] ibid, s 166.
[75] ibid, s 122A and 122B.
[76] Council Regulation (EC) 596/2014 of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L173/1.
[77] Financial Services and Market Act 2000, s 97, 122C, 131E, 131FA, 167-169 and 284.
[78] Human Rights Act 1998.

7.2 Financial Reporting Council

The Conduct Committee of the Financial Reporting Council has a core function to do corporate reporting review and so doing can mandate information. These powers are derived from the **Companies Act 2006**.[79] Directors of companies are required to report on their accounts and auditors' audit. These reports are to be prepared by the directors thus making them responsible for its accuracy. Further enquiries can be made into director's actions where reporting requirements were not adhered to strictly. Generally, requests/enquiries have been fulfilled voluntarily but in the event there is resistance, a court order may be applied for to compel the director.

7.3 Serious Fraud Office

The SFO receives information on suspected criminal activity voluntarily from several sources. The Intelligence Unit, a team of lawyers, analysts, investigators and other officers treat with this information. This unit also has 'forceful' powers under the **Criminal Justice Act 1987**[80] to gather further information where there's a deficit in the investigation.

Section 2 of the Act grants the powers to compel information provision to the director, by, which he/she can delegate accordingly. **Subsections 2** and **3**[81] require the person/business whose affair is being investigated to answer all necessary questions, explanations and furnish information relevant to the investigation in the specified time. In the event a request under this Act was no complied with, a warrant may be issued thus authorizing a constable to enter and search premises or take possession of the relevant documents (subsections 4-5).[82] Additional powers have been granted under **Section 2** to assist the SFO with varying circumstances that may arise in course of its investigations.

[79] Companies Act 2006.
[80] Criminal Justice Act 1987, s 2.
[81] ibid, ss 2(2) and 2(3).
[82] ibid, ss 2(4) and 2(5).

7.4 The National Crime Agency

Anti-money laundering laws can be found in several European Union legal frameworks, the **Proceeds of Crime Act 2002** (POCA)[83] and the **Terrorism Act 2000** (TACT).[84] The NCA derives its information gathering and reporting powers from this framework.[85]

In the **POCA 2002**, reporting obligations are placed on anyone/business for interacting with someone who commits a money laundering offence. Suspicious Activity Reports (SARs) are mandated from businesses in the regulated sector where there is reasonable grounds to know or suspect someone engaged in the offence.

The **Money Laundering Regulations** (MAR)[86] supplement the primary legislation. Together with the **POCA 2002**, a system of establishing a 'nominated officer' in business to which suspicions are reported was created.[87] It is offence under the Act to fail to report the relevant information to the nominated officer or the nominated officer to report the information. NCA also has the authority to have the information (being sought) to be protected so that it doesn't prejudice a current or future investigation (**Sections 33A-E** of the Act).

7.5 The Office of Financial Sanctions Implementation

Due to the nature of its role, the OFSI has not been given powers to compel information production. This power would fall outside the scope of its role, i.e. on enforcing sanctions.

7.6 City of London Police

The City of London Police (CoLP), besides its general policing powers and access to warrants also derives its powers from the **POCA 2002** like the National Crime Agency.[88] Compliance with the

[83] Proceeds of Crime Act 2002.
[84] Terrorism Act 2000.
[85] National Crime Agency, 'Legal Basis for Reporting SARs' (NCA) < www.nationalcrimeagency.gov.uk/about-us/what-we-do/economic-crime/ukfiu/legal-basis-for-reporting> accessed 26 February 2017.
[86] MAR (section 15).
[87] NCA (section 24).
[88] POCA 2002 (section 22).

information production requests here is not important to merely ensure market confidence, protection for consumers and enhancing the UK financial network, but for the subject of a police investigation. A finding of an obstruction has its own consequences as a result. The Money Laundering Investigations Unit of the CoLP uses the legislation to aid in its investigations and retrieving information. Further to this, the Financial Investigation Unit (FIU) is responsible for analysing the intelligence. These two units use the information production to identify the proceeds of crime and arrange for them to be returned to victims.

8. In what circumstances may information be withheld from enforcement authorities (e.g. legal privilege, privilege against self incrimination)?

"Enforcement authorities" broadly refers to legal authorities, such as legislative regulators and the judiciary, that have legal capacity to issue requests demanding information from natural and legal persons, in other words, individuals as well as private and public corporate bodies. As such, requests can also be made from both national and foreign authorities. Understandably, given the still-relevant 'Panama Paper' fiasco, companies – *and their clients* – are ever more cautious in regards to the distribution and privacy of their sensitive information. "Information" includes personal data, which may relate to company employees, clientele, and other company-connected individuals. Therefore, personal data encompasses information relating to identifiable natural persons.

Notably, there are diverse circumstances in which requests for personal information can be rejected. Following from this, the **Freedom of Information Act 2000** lists exemptions applicable to U.K. public authorities to otherwise refuse, confirm, or deny holding certain information.[89]

The national legislation covering the lawfulness of the processing of personal data by companies is inscribed within the **Data Protection Act 1998** ('DPA'). This statute sets forth criteria for which

[89] Freedom of Information Act 2000, ss 21-44.

data controllers must meet to legitimise the processing of said data. It must also be noted that the DPA implements the underlying objectives of the **European Data Protection Directive 95/46/EC**. Essentially, the DPA protects the rights, privacy and information of those individuals who have processed their data with the holder, the company. As such, the DPA ensures fair processing conditions by outlining eight principles that require the compliance of data controllers. [90] These principles emulate the underlying policy-objectives of the statute, and "made it reasonably simple to determine whether [a data controller] was meeting its obligations". [91] As such, the processing of personal data must: have a legitimate basis for doing so, done fairly and lawfully; that the purpose or purposes for which the personal data was obtained be specified; that the personal data collected is sufficient for the purposes of its collection; that the accuracy of the data kept is maintained; that the data is retained for no longer than necessary for the purposes of its collection; that the rights of data subjects is respected at all times; that appropriate security standards are put in place to protect personal data; and, that if data is to be sent to a country outside the EEA, that country must ensure an "adequate" protection of the data being transferred.[92] The DPA also holds statutory exemptions from compliance requests for data.[93]

Despite pressure to comply with requests for information there are circumstances in which fear of potential statutory breaches may incentivise companies to withhold information instead. As such, compliance with a request may causally subvert national or EU legislation. Breaches of data protection laws may have various consequences. For one, it may amount to a criminal offence if data stored is unlawfully used or distributed.[94] Interestingly, company officers may incur personal criminal liability if the misuse of personal data held by the company is committed with their consent or negligence. Breaches would also authorise data protection authorities, such as the Information Commissioner's Office,[95] to impose fines and sanctions upon the company, with

[90] Data Protection Act 1998, s 4(4).
[91] Alan Calder, 'A Brief History Of Data Protection', *EU GDPR A Pocket Guide* (IT Governance Publishing 2016), 15; See also Paul Ticher, 'The Data Protection Principles', *Data Protection vs. Freedom of Information* (IT Governance Publishing 2008), 35-42.
[92] Data Protection Act 1998, sch 1, pt 1, ss 1-8.
[93] ibid, s 27-39.
[94] Data Protection Act 1998, s 55.
[95] See (*Information Commissioner's Office*) <https://ico.org.uk/>.

monetary penalty fines[96] amounting up to £500,000 for serious data protection contraventions. The calculation of the penalty is contingent on an objective and voluntary evaluation[97] of a 'serious contravention' of the DPA, 'likely to cause damage (i.e. a financially quantifiable loss) or substantial distress' where, either the 'contravention was deliberate' or the data controller (i.e. the company or organisation) knew, or ought to have known, that there was a risk that the contravention would occur, and that such a contravention would be of a kind 'likely'[98] to cause substantial damage or substantial distress, but failed to take reasonable steps to prevent the contravention'. [99] Nevertheless, there is a plethora of additional considerations the Commissioner will take into account when making his or her assessment of the company or organisation.[100]

However, parties may be entitled to protection by legal privilege, which provides an entitlement to withhold evidence from the authorities aforementioned. There are manifold forms of privilege, including: (a) legal professional privilege, (b) joint privilege, (c) common interest privilege, and (d) privilege against self-incrimination.

Legal professional privilege[101] takes form in two manners. Firstly, it may exist as legal advice privilege, which envelopes the communications between lawyers and their clients in confidentiality. This is synonymous for "attorney-client" privilege. It may otherwise operate as litigation privilege, in which lawyer-client (and perhaps a third party) communications are held confidential but may be brought up for the purposes of litigation proceedings. Joint privilege, or "joint interest privilege", is privy to a company representative provided that that individual receiving legal advice from the company's lawyer is receiving such counsel as a factually individual client at the time, regardless if there was no express retainer detailing this relationship.[102] Common interest privilege

[96] Data Protection Act 1998, ss 55A-55E.
[97] ibid, s 41A.
[98] See *R (Lord) v Secretary of State for the Home Department* [2003] EWHC 2073, in which Munby J's definition of 'likely' has now been endorsed as to mean something more than a "real risk".
[99] Data Protection Act, s 55A.
[100] See Information Commissioner's Office, *Data Protection Act 1998: Information Commissioner's guidance about the issue of monetary penalties prepared and issued under section 55C (1) of the Data Protection Act 1998* (2015), 23-25.
[101] Freedom of Information Act, s 42; 'Legal professional privilege' (*Practical Law*) <http://uk.practicallaw.com/4-107-6756?q=&qp=&qo=&qe=> accessed 25th February 2017.
[102] *R (on the application of Ford) v Financial Services Authority (defendant) and Johnson and another (interested parties)* [2011] EWHC 2583 (Admin).

would allow the company or individual to share already privileged information with a third party, provided that that third party can assert a common interest, even where there is no joint privilege.[103] Finally, privilege against self-incrimination would exempt the company or individual from being forced to reveal information that may incriminate said person in any current or potential criminal proceedings in England and Wales. This privilege is attainable provided the risk of incrimination is "real" rather than remote.[104] Ultimately, regardless of what method the company or individual chooses to reject totally or partially the request for information, a written notice must be issued to the requestor.

9. What are the restrictions on providing employee data to domestic or foreign enforcement authorities?

Although domestic and foreign enforcement authorities share their respect for the eight core principles found in the **Data Protection Act 1998** ('DPA') in terms of restrictions on the transfer of information (such as employee data), foreign authorities face the additional obstacle of the 'Adequacy Test'.[105] As such, this test could give rise to potential conflicts of law.

Companies entertaining the provision of employee data have to navigate national restrictions,[106] overarching EU data protection and privacy laws,[107] and contractual duties of confidentiality protecting client-relationships. As such, an individual (or 'data subject') who suffers damage or personal distress may potentially have a right to seek financial compensation from the body that discloses their data without first seeking approval from the data subject. As such, restrictions on providing employee data apply dissimilarly to domestic and foreign enforcement authorities.

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[103] *Buttes Gas and Oil Co v Hammer (No.3)* [1981] QB 223 (CA) [1982] AC 888 [1981] 3 All ER 616. See also *Svenska Handelsbanken v Sun Alliance and London Insurance plc* [1995] 2 Lloyd's Rep 84, in which Rix J expanded common interest privilege as equally applicable in litigation and to situations concerns only legal advice in question.
[104] Civil Evidence Act 1968, s 14(1).
[105] Data Protection Act 1998, sch 1, pt 1, s 8.
[106] ibid.
[107] European Data Protection Directive 95/46/EC; Regulation (EC) 45/2001 of the European Parliament and of the Council of 18. December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data (2001) OJ L008/1; Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data 1985.

In regards to domestic enforcement authorities requesting data from companies within that very same jurisdiction, it will be manageable to disclose such data by complying with the national provisions put in place.[108] Given that the law or a residing public interest test may support domestic requests, data processing will generally be legitimate. Nevertheless, data subjects will still be guaranteed protection of their rights in the event of damage or personal distress. This is generally enforced given that the Human Rights Act 1998, which employs provisions from the **European Convention of Human Rights 1953** ('ECHR'), crystallises the citizen's right to privacy and family life.[109]

On the other hand, the provision of employee data to foreign enforcement authorities is a more challenging process. The DPA, by virtue of the EU directive's drop-down policies,[110] prohibits the provision of personal data to foreign bodies and authorities in countries outside the European Economic Area ('EEA'). However, this obstacle can be circumvented provided either the destination country ensures "adequate" data protection,[111] or whether certain pre-conditions are strictly met.

The destination country (therefore, the country in which the authority is requesting the data) must ensure an "adequate" level of data protection for data subjects. The degree of "adequacy" is one assessed by reference to European Commission ('EC') decisions.[112] An alternative assessment of "adequacy" can be attained in light of the following factors: the data's sensitivity; the underlying purpose of the transfer of and request for the data; the particular destination country; and, the security measures in place to support the maintenance of data.[113]

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[108] Data Protection Act 1998.
[109] Human Rights Act 1998, s 1; European Convention of Human Rights 1953, art. 8.
[110] European Data Protection Directive 95/46/EC.
[111] Data Protection Act 1998, sch 1, pt 1, s 8.
[112] European Data Protection Directive 95/46/EC, art 25(6). For EC decisions see 'Commission decisions on the adequacy of the protection of personal data in third countries' (*European Commission*) <http://ec.europa.eu/justice/data-protection/international-transfers/adequacy/index_en.htm>.
[113] 'Sending personal data outside the European Economic Area (Principle 8)' (*ICO.*)< https://ico.org.uk/for-organisations/guide-to-data-protection/principle-8-international/> accessed 25th March 2017.

If the destination country does not facilitate "adequate" data protection provisions, it will be advised to deter from advancing a self-assessed standard of "adequacy". The transfer may still succeed if certain pre-conditions are met. These include criteria such as whether consent from the data subject was obtained to authorise the transfer, or the transfer is fundamental for the outstanding performance of a contractual agreement with the partied data subject. This is a non-exhaustive list of possible scenarios. Data transfer restrictions are particularly relevant in the context within groups of companies, where employee data may be requested between sister subsidiaries and the parent corporation.

The existence of a group of companies, which operates within multiple jurisdictions, also highlights a concern in respect of conflicting laws. Expectedly, there may be cultural differences between jurisdictions regarding the treatment of data privacy and protection, and it is thus imperative that corporations, with their legal counsel, ought to consider what data jurisdictions seek to protect.[114] Though a voluntary system called the **Binding Corporate Rules** (BCRs)[115] operative within the EEA exists to transfer certain data within groups of companies, it is strenuous. As such, a recently renegotiated EU-U.S. "Umbrella Agreement"[116], thereafter reformulated into the EU-U.S. "Privacy Shield"[117] seeks to address this lack of international harmonisation, and encourages the cooperation between enforcement authorities between jurisdictions for the prevention, investigation, detection and prosecution of criminal offences in respect of data privacy breaches and misconduct. This development is one of many in an increasingly digitised world against the backdrop of post-Snowden[118] and various innovations pioneered by companies such as Google, which have sparked political debate on the extent as to which such factors have directly

[114] Tarifa B. Laddon, '*Navigating Between U.S. Discovery And European Data—Protection Laws*' (2012) 38 Litigation 2, 11.
[115] Rosemary Jay And Jenna Clarke, 'Transferring Data Overseas', *Data Protection Compliance in the UK* (IT Governance Publishing 2010), 38.
[116] See Commission, 'MEMO/16/4183: Questions and Answers on the EU-U.S. Data Protection "Umbrella Agreement"' (2016) <http://europa.eu/rapid/press-release_MEMO-16-4183_en.htm>. This agreement was otherwise coined "Safe Harbour", which covered U.S. companies that have adopted self-regulatory EU-equivalent standards of data protection.
[117] See Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (*notified under document C(2016) 4176*) [2016] OJ L207/1.
[118] David P. Fidler, 'Edward Snowden, Testimony to the European Parliament', *The Snowden Reader* (Indiana University Press 2015), 294-306.

or indirectly infringed on individuals' personal rights.[119] Member states and bodies have responded incoherently, with some wishing to withdraw their support for their reliance on the "Privacy Shield" scheme in data protection law, and issuing opinions for its review.

This opt-out determines the mode in which companies transfer data to the United States of America. Resultantly, the EC has sought to renegotiate terms in order to strengthen the agreement and thereby guarantee expanded data protection.[120] These movements have been accompanied by an additional proposed **EU General Data Protection Regulation** ('GDPR')[121] that aims to replace the data protection directive,[122] harmonise data protection laws and strengthen the rights of individuals. It will also address the issue of exporting personal data outside the EU, potentially prohibiting the sharing of personal data with foreign enforcement authorities without specific prior approval issued by a domestic data protection authority. As such, breaches would incur potential fines limited to a 5% maximum of company turnover.[123]

The regulation is set to take effect as of 25 May 2018, and given its nature as a regulation, it will not require qualifying national legislation, and will be directly applicable from the outset.

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[119] Tossapon Tassanakunlapan, 'From Snowden to Google: Has EU been ready to deal with internet spy?' in Luis Alfonso Guadarrama Rico (eds), *Controversial Matters on Media Ethics* (Dykinson, S.L. 2016), 127; Mira Burri and Rahel Schär, '*The Reform of the EU Data Protection Framework: Outlining Key Changes and Assessing Their Fitness for a Data-Driven Economy*' (2016) 6 Journal of Information Policy, 480-482.

[120] 'Data watchdog rejects EU-US Privacy Shield pact' (*BBC*, 30 May 2016) <http://www.bbc.co.uk/news/technology-36414264>; See also Opinion 01/2016 on the EU – U.S. Privacy Shield draft adequacy decision (2016) WP 238/1.

[121] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

[122] European Data Protection Directive 95/46/EC.

[123] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1, art. 83.

10. If relevant, please set out information on the following:

a. Defences to the offences listed in question 2;

10.1 Bribery

There is only one defence for bribery for organisations; implementation of 'Adequate Procedures'. These are based off six non-prescriptive principles:[124]

1. Proportionate procedures - A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces.
2. Top-level commitment - The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it.
3. Risk assessment - The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it.
4. Due diligence - The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.
5. Communication (including training) - The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.
6. Monitoring and review - The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

These provide an absolute defence and are looked at on a case-by-case basis.

[124] Ministry of Justice, 'Bribery Act 2010: Guidance to help commercial organisations prevent bribery' (*GOV.UK*, 11 February 2012) < https://www.gov.uk/guidance/money-laundering-regulations-introduction> accessed 19 February 2017.

10.2 Fraud

Except for the general defences to crime; duress, mistake, superior orders, etc., there are no defences to fraud if the offender has satisfied all the elements of the relevant fraudulent offence. The offence is one of strict liability and as such a court defence will rely on an absence of dishonesty.

10.3 Money-Laundering

There are two defences to the principal money laundering offences; (i) the consent defence and; (ii) the reasonable excuse defence.[125]

i. You make an authorised disclosure prior to the offence being committed and you gain the appropriate consent.
ii. You intended to make an authorised disclosure but had a reasonable excuse for not doing so.

An authorised disclosure is found **Section 328** of the **Proceeds of Crime Act 2002** (POCA) and authorises you to make a disclosure regarding suspicion of money laundering as a defence to the principal money laundering offences.

In relation to **Section 329 POCA**, you will also have a defence if you received adequate consideration for the criminal property.

[125] The Law Society, 'Anti-money Laundering (22 October 2013) <http://www.lawsociety.org.uk/support-services/advice/practice-notes/aml/> accessed 19 February 2017.

b. Any methods of obtaining immunity from or prevention of prosecution (i.e. deferred prosecution agreement);

Deferred prosecution agreement makes it possible for corporate offenders to be freed of their criminal liability but in exchange of their cooperation to assist the investigation, payment of fine, receive formation and even engage in rehabilitating the cooperation.[126]

1. Deferred prosecution can be obtained by an agreement with parties involved
2. Cooperating in investigations
3. Payment of fine
4. Participating in restoring the cooperation back to its former position.

c. Means and availability of and penalty reductions (i.e. co-operation, early guilty pleas.)

10.4 Reducing penalties

Since extradition have yes or no judgment, it is not strictly possible to have any possible mean of a reduced penalty. However, there is a possibility of avoiding punishments that are not approved by the United Kingdom. Indeed, non EAW extradition orders must be signed by the Home Secretary, who must also sign the arrest order. The case of ***Soering v United Kingdom***[127] is an important judgment of the European Court of Human Rights, as it established that capital punishment violated **Article 3** of the **European Convention of Human Rights**, which guarantees the right against inhuman treatment. It is thus impossible for the Home Secretary to sign an order of extradition for a capital punishment, giving a kind of penalty reduction to the extradited person.

[126] Benjamin Greenblum, 'What Happens to a Prosecution Deferred - Judicial Oversight of Corporate Deferred Prosecution Agreements' (2005) 105 Columbia Law Review 1863.
[127] 161 Eur. Ct. H.R. (ser. A) (1989).

11. If relevant, please set out information on means of cost mitigation (i.e. taxation, directors, and officers insurance)

11.1 Reducing the Cost of Directors and Officers Insurance

Directors have the option of insuring themselves against liabilities. This will not only make them less risk averse but will improve their performance.

The increases in both civil and criminal liabilities of which directors and corporate officers can be held have led to more focus on their insurance against such claims and litigation. [128]

To reduce the amount of finance that goes into directors and officer's insurance, companies can demand that the directors should be held liable for any breach of law except when done in good faith and out of ignorance.

The board should be regularly educated on what their duties and responsibilities are. This can involve regular training and conferences.

Companies should have a breakdown of director's responsibilities as set out by the law to make it easier for directors to understand what their responsibilities are.

Directors and Officers can be made, as part of their contract, to sign agreements that will make them personally liable should they be found to have acted in bad faith and with full knowledge of the wrongdoing.

The recruiters of directors must be aware of the concern to save cost on insuring directors. This will make them concentrate on the individual profile so as to select the right persons for the

[128] Sullivan Noel, 'The Demand for Directors' and Officers' Insurance by Large UK Companies' (2002) 20 European Management Journal 574.

positions.

11.2 Tax Mitigation

Every corporation's dream is to reduce the amount of tax they pay. Various factors are said to contribute to tax mitigation of a corporation. The underlying fact being that corporate governance as a lot to do with it.[129]

The corporate governance structure of any establishment will go a long way to contribute to its performance which is very much associated with tax reduction. It is also suggested that the more incentives directors receive, the more they will channel their efforts into managing the company's tax.[130] Directors need to be motivated to perform and one way of checking performance is a reduction in tax which ultimately means more profit.

Risk management can go a long way to help reduce the amount of tax corporations pay.[131] Getting the right people on board to manage the risks of an establishment can go a long way in reducing tax. Companies need to pay attention to the individuals that manage their risks and the kind of risks they get into.

Corporation can reduce the amount of tax they pay by the amount of charitable contributions they make.[132] Today what we find is that corporations involve in charities as a way to reduce their tax.

[129] Kristina Noga Minnick, Tracy, 'Do corporate governance characteristics influence tax management?' (2010) 16 Journal of Corporate Finance 703 ,706.
[130] ibid 129.
[131] Friese Arne Link Simon Mayer Stefan, *Taxation and Corporate Governance — The State of the Art* (Springer Berlin Heidelberg 2006), 420-421.
[132] Martin Feldstein, 'THE INCOME TAX AND CHARITABLE CONTRIBUTIONS: PART I-AGGREGATE AND DISTRIBUTIONAL EFFECTS' (1975) 28 National Tax Journal 81

12. Looking forwards, how do you think that the legislation, enforcement and penalties are likely to change over the next five years?

Much of the relevant legislation has gone through updates and additions in the past decade. The **Bribery Act 2010** and the **Fraud Act 2006** both consolidated and replaced previous legislation, simplifying and clarifying the law in the process. The **Bribery Act** represents the most radical revision to anti-corruption law in the UK in over one hundred years and arguably the toughest anti-bribery legislation in the world.[133] It is still a relatively new Act but uncertainty around the interpretation of certain terms may result in minor changes being made in the near future.

The legislation regarding money laundering has the highest potential to change. This is due to the recent decision to leave the European Union. The UK would no longer be forced to implement the **Third Money Laundering Directive**[134]. This could result in a repeal of the **Money Laundering Regulations 2007**. The Regulations may simply be replaced with a more relaxed set of guidelines to ensure UK businesses can compete with their International counterparts following Britain's exit.

This is a very uncertain area to make speculations. In light of the EU referendum in the UK in June 2016 and the decision of the UK Supreme Court in the Miller case,[135] we must consider what could occur if the UK leaves the EU or if it doesn't. Leaving the EU makes the future of financial regulation enforcement uncertain because the EU has contributed a significant body of law through Directives and Regulations. Arguably, there may not be any significant changes if there's an exit.[136] This is because the proposed exit plan indicates that on repealing the **European Communities Act**, all EU influenced legislation will remain a part of UK law. However, on the possibility that this isn't agreed to in Parliament, we can see a number of laws also being removed,

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[133] Gordon Belch, 'Analysis of the Efficacy of the Bribery Act 2010' (2014) < https://www.abdn.ac.uk/law/documents/An_Analysis_of_the_Efficacy_of_the_Bribery_Act_2010.pdf> accessed 4 March 2017.
[134] Directive 2005/60/EC.
[135] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
[136] Theresa May, 'Brexit Plan' (Lancaster House, 17 January 2017) <www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> accessed 26 February 2017.

including the **Money Laundering Regulations**.[137] A significant number of powers granted may be revoked thus weakening enforcement but for new legislation. Its noteworthy that regardless of the state of current laws, new laws would have to be enacted to strengthen enforcement in UK-EU activities.

Alternatively, if the UK does not leave the EU, enforcement would slowly increase. The fourth **Money Laundering Directive** is scheduled to enter force in June 2017.[138] This is only a step in the EU's strategy to combat financial crimes as technology improves.

[137] MAR (section 15).
[138] Council Regulation (EC) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC
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