

OSCE



UNITED NATIONS
Office on Drugs and Crime



In Co-operation with the Agency on the Fight against Economic and Corruption Crime of Kazakhstan

Expert Seminar for Eastern Europe and Central Asia

26-28 March 2007, Almaty, Kazakhstan

CRIMINALISATION OF CORRUPTION:

Liability of Legal Persons for Corruption

Confiscation of the Tools and Proceeds of Corruption

Mutual Legal Assistance in Corruption-Related Cases

Proceedings of the Seminar

Table of Contents

Introduction	4
Expert Speakers at the Seminar	6
Chapter 1 Liability of Legal Persons for Corruption	7
Liability of Legal Persons for Corruption – A Swiss Perspective <i>Mark Livschitz, Baker & McKenzie, Zurich, Switzerland</i>	<i>7</i>
Liability of Legal Persons in Poland <i>Rafał Kierzyńska and Alicja Klameczyńska, Ministry of Justice, Poland.....</i>	<i>20</i>
Responsibility of Legal Persons for Corruption in Lithuania <i>Vytas Rimkus, Corruption Prevention Department, Special Investigation Service, Lithuania.....</i>	<i>32</i>
Responsibility of Legal Persons for Corruption <i>Boštjan Penko, Senior Prosecutor, Slovenia</i>	<i>37</i>
Chapter 2 Confiscating the Proceeds of Corruption.....	43
Switzerland’s Approach to Confiscation and Corruption-related Money Laundering <i>Mark Livschitz, Baker & McKenzie, Zurich, Switzerland</i>	<i>43</i>
The Extended Power of Confiscation of Crime-Related Proceeds <i>Rafał Kierzyńska, Ministry of Justice, Poland</i>	<i>62</i>
Confiscating the Proceeds of Corruption – A French Perspective <i>Eric Mangin, Investigating Judge, France</i>	<i>72</i>
Some Problems Related to Investigating and Prosecuting Corruption and to Forfeiture, Seizure and Confiscation of Proceeds of Corruption <i>Boštjan Penko, Senior Prosecutor, Slovenia</i>	<i>75</i>
Chapter 3 Mutual Legal Assistance in Corruption Cases	78
United Nations Instruments and Effective Casework Practice in Mutual Legal Assistance and Confiscation <i>Olga Zudova, Senior Legal Adviser, UNODC, Regional Office for Central Asia</i>	<i>78</i>
Mutual Legal Assistance and Confiscation in Corruption Cases in the United Kingdom and Offshore Regimes <i>David O’Mahony, Barrister, London and the Bailiwick of Jersey.....</i>	<i>82</i>
Mutual Legal Assistance through the Letters Rogatory Process <i>Eric Mangin, Investigating Judge, France</i>	<i>86</i>
Mutual Legal Assistance in Cases of Bribery of Foreign Public Officials <i>William Loo, Legal Analyst, OECD Anti-Corruption Division</i>	<i>88</i>

International Mutual Legal Assistance in the “Justice Tender Romania” Case
*Florin Ciobotaru, Police Liaison Officer, Prosecutor’s Office attached to the High Court of
Cassation and Justice National Anti-corruption Directorate.....* 94

Annex A - Agenda of the Seminar 97

Annex B – List of Participants..... 102

INTRODUCTION

The Anti-Corruption Network for Eastern Europe and Central Asia (ACN) is a regional anti-corruption programme which covers the countries of Eastern Europe and Central Asia. The ACN brings national governments from more than 20 countries in the region together with civil society, business representatives, and the governments of member countries of the Organisation for Economic Co-operation and Development (OECD). International organisations and international financial institutions also take an active part in ACN work, which include regular regional conferences; country reviews and monitoring; and thematic projects on selected priority issues.

Established in 1998, the main objective of the ACN is to support its participating countries in their fight against corruption by providing a regional forum for the promotion of anti-corruption activities, exchange of information, elaboration of best practices and donor coordination. At the 5th General meeting of the ACN, which took place in September 2003 in Istanbul, the Anti-Corruption Action Plan was endorsed by Armenia, Azerbaijan, Georgia, Kazakhstan, the Kyrgyz Republic, the Russian Federation, Tajikistan and Ukraine. The implementation of the Istanbul Action Plan includes:

- Review of legal and institutional framework for fighting corruption;
- Implementation of the recommendations endorsed during the reviews;
- Monitoring progress in implementing the recommendations.

The reviews are based on self-assessment reports prepared by the governments of the participating countries. These reports are examined by experts from ACN and OECD countries, who develop a draft of assessment and recommendations. The assessment and recommendations are then presented for the discussion and endorsement of the plenary meetings of the Istanbul Action Plan. The recommendations cover three broad areas: anti-corruption policies and institutions, criminalisation of corruption and preventive measures in civil service. The reviews are almost completed: recommendations for Armenia, Azerbaijan, Georgia, Kazakhstan, the Kyrgyz Republic, Tajikistan and Ukraine were endorsed in 2004-2005.

Following the reviews, the monitoring programme was launched in 2004. The monitoring comprises of self-reporting by governments and peer reviews. Self-reporting is organised regularly at every plenary meeting of the Istanbul Action Plan. The peer review takes place once for each country during 2006-2007. During the peer review, a group of experts from ACN and OECD countries and participating organisations visits each country and meets official representatives, civil society, and foreign missions. The team prepares a report, which rates progress for each recommendation as fully, largely, partially or not implemented. The report is presented for the endorsement of Istanbul Action Plan plenary meeting. Armenia, Azerbaijan, Georgia, Tajikistan and Ukraine were monitored in 2006; monitoring of Kazakhstan and the Kyrgyz Republic are scheduled for 2007.

Many of the countries reviewed in 2003-2005 received similar recommendations under the section on criminalisation of corruption. Namely, they were asked to bring their criminal law in line with international conventions on anti-corruption. The ongoing monitoring has revealed an important lack of progress in implementing this section of recommendations. To help countries to implement the recommendations, the ACN began a project on the criminalisation of corruption in 2005. This project included the development of a publication "Corruption: A Glossary of International Standards in Criminal Law" and several expert seminars. The first seminar on International Anti-Corruption Standards took place in Kiev, Ukraine in

February 2005. Its main aim was to raise awareness of the experts in the region about the international standards.

The idea of the second seminar was to focus at some of the most difficult issues, where many countries face particular difficulties, particularly in areas such as the liability of legal persons for corruption and confiscation. The OECD countries have also identified MLA among ACN members as problematic. The present seminar therefore aimed to deepen the understanding of legal experts and prosecutors in Eastern Europe and Central Asia in these areas. In particular, the seminar examined some of the international legal standards for the criminalisation of corruption established by the relevant OECD, Council of Europe and UN anti-corruption conventions. The seminar also examined how these requirements have been implemented by other countries, so as to offer valuable lessons for ACN countries.

The seminar was co-organised by the Organisation for Security and Co-operation in Europe (OSCE), the Organisation for Economic Co-operation and Development (OECD), the Council of Europe and the United Nations Office on Drugs and Crime (UNDOC). The Agency on the Fight against Economic and Corruption Crime of Kazakhstan provided additional support. We are also grateful for the participation of the expert speakers from member countries of the OECD and the European Union, including France, Lithuania, Poland, Romania, Slovenia, Switzerland, and the United Kingdom.

EXPERT SPEAKERS AT THE SEMINAR

Florin Ciobotaru: Mr. Ciobotaru is a liaison police officer with the General Prosecutor's Office, National Anti-corruption Directorate, Office for Mutual Legal Assistance in Corruption-Related Cases. Prior to this position, Mr. Ciobotaru served as a United Nations peacekeeper with the civilian police in Kosovo.

Rafal Kierzynka: Mr. Kierzynka is a judge in the Circuit Court of Gorzów, Poland, and has specialised in criminal law since 1992. Recently he has been working in the Legal Assistance and European Law Department of the Polish Ministry of Justice.

Mark Livschitz: Mr. Livschitz is an associate lawyer of the law firm Baker & McKenzie in Zurich, Switzerland, specialising in litigation, white collar crime and commercial law. He has published articles and given presentations on corruption-related issues, particularly on the liability of legal persons and their management, corruption-related money laundering and transnational bribery.

William Loo: Mr. Loo is a legal analyst in the Outreach Programme of the Anti-Corruption Division, Organisation for Economic Co-operation and Development (OECD). He has also been involved in the monitoring of the implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Prior to joining the OECD, Mr. Loo was a prosecutor with the Department of Justice Canada.

Eric Mangin: Mr. Mangin is a criminal investigating judge in Nîmes, France. He has been a magistrate since 1996 and the Vice President of the Nîmes court since 2006. He has lectured extensively in various universities in France.

David O'Mahony: Mr. O'Mahony is a practitioner based in London and the Bailiwick of Jersey. His practice strongly focuses on business crime, fraud, money laundering and related civil actions such as asset recovery. He has extensive experience in corruption cases involving offshore financial centres and mutual legal assistance, acting as advisor and counsel for several governments in corruption cases. He has also published and lectured on issues such as fraud, money laundering and the financing of terrorism.

Boštjan Penko: Mr. Penko is a Senior Prosecutor in Slovenia and a member of the Special Group of Prosecutors for Fighting Organized Crime, Serious Economic Crime and Money Laundering. From 2001 to 2004, he was the first Director of the Slovenian Anti-Corruption Agency. He has worked extensively with the OECD and the Council of Europe as an expert on anti-corruption matters, as well as representing Slovenia in the negotiations of the United Nations Convention against Corruption.

Vytas Rimkus: Mr. Rimkus is the Head of the Corruption Prevention Department, Special Investigation Service, Lithuania. Prior to this appointment, he headed the Personnel and Interior Investigations Division and later the Administration Department of the Special Investigation Service. Mr. Rimkus is also a lecturer with the Criminal Law Department of the Lithuanian Law Academy.

Olga Zudova: Ms. Zudova is a Senior Legal Adviser with the United Nations Office on Drugs and Crime (UNODC), Regional Office for Central Asia, Legal Assistance Programme for the CIS and East Asia. Her principal responsibilities include assisting Member States implement the three UN drug control conventions, the UN Convention against Transnational Organized Crime and the UN Convention against Corruption. Prior to joining the UNODC, Ms. Zudova practised law in Belarus and the United States.

CHAPTER 1 LIABILITY OF LEGAL PERSONS FOR CORRUPTION

Liability of Legal Persons for Corruption – A Swiss Perspective

Mark Livschitz
Baker & McKenzie, Zurich, Switzerland

I. Introduction

Switzerland introduced criminal liability of legal persons for active bribery in the public sector as of 1 October 2003. As of 1 July 2006, legal persons may be held criminally culpable also for active bribery in the private sector. The sanction is limited to a fine amounting to no more than CHF 5 million.¹ In case of a repeat offence, or if the legal person in question is concurrently culpable of other offences, the fine may be increased to a maximum of CHF 7.5 million.²

Whereas no case law exists yet on the criminal liability of legal persons for bribery, the introduction of relevant rules gave rise to a large number of unanswered questions and led to significant legal insecurity in particular for export-oriented industries. On the other hand, Swiss enterprises have started to implement measures in order to avoid relevant criminal exposure and seek legal advice in that regard. The criminal liability of legal persons for corruption is thus quite relevant in legal and business practice, and shall be explained by means of a sample case.

II. Sample Case

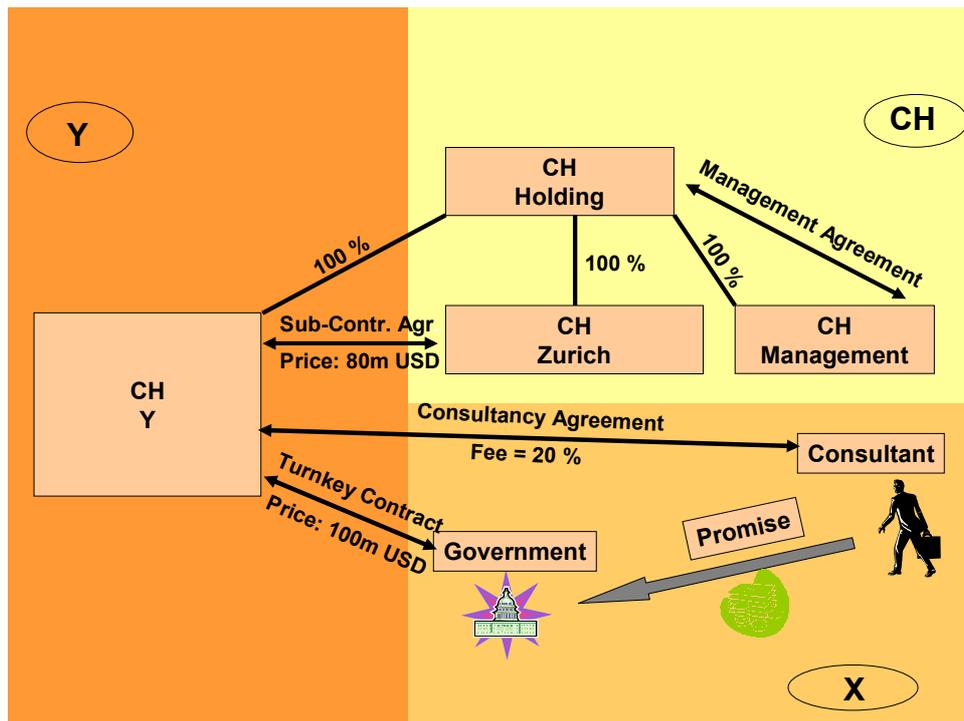
The CH Group is an enterprise in the business of construction. Its parent company is CH Holding, domiciled in Switzerland. CH Holding is a mere holding company which holds a controlling interest in a large number of operative subsidiaries throughout the globe. The group has a subsidiary in Switzerland named CH Zurich, fully operative in the construction business. The group is managed by CH Management in Switzerland under a management agreement between the latter and CH Holding. The management of the group is employed by CH Management and manages the group globally from within CH Management in Switzerland.

The executive board of CH Management instructs CH Y, a fully-owned subsidiary of CH Holding in jurisdiction Y, to retain consultant C in jurisdiction X. Consultant C enters into a consultancy agreement with CH Y, where consultant C commits to promote CH Y's construction business within jurisdiction X. CH Y commits to pay consultant C a fee amounting to 20% of the gross deal value of a turnkey contract to be concluded between CH Y and the government of X if the contract is entered into as a result of the introductory services of consultant C. Subsequently, consultant C promises a bribe to certain officials within the government of X. As a result, the government of X enters into a turnkey agreement with CH Y regarding the construction of a power plant against a consideration of USD 100 million. CH Y sub-contracts the construction work and related services fully to CH Zurich against a consideration of USD 80 million (because USD 20 million are payable to consultant C under the consultancy agreement).

The occurrences outlined above are visualized in the following diagram.

¹ The equivalent of approx. EUR 3 million; art. 102 of the Swiss Penal Code ("SPC").

² The equivalent of approx. EUR 4.5 million; art. 49 SPC.



The following analysis is based on a two-fold work hypothesis: first, the promising of a 20% consultancy fee to the consultant C and the subsequent passing-on of (at least a part of) such fee to foreign government officials represents indirect bribery of foreign officials by individuals within the CH Group according to Swiss penal law.³ Second, no organisational measures exist within CH Group in order to prevent such corrupt practices.

Which of the legal persons mentioned above can be held criminally culpable for bribing foreign officials, and what are the relevant requirements?

III. Overview of the Requirements for Culpability

The requirements for establishing criminal liability of legal persons for bribery pursuant to art. 102 para. 2 SPC are:

- a bribery must be committed by a natural person within the enterprise;
- the bribery must occur “within the scope of the enterprise while exercising a business activity”;
- an organisational flaw within the enterprise must have been conducive to the bribery;
- the case must fall under Swiss jurisdiction.

Looking at these requirements, it becomes clear that the criminal liability of legal persons for corruption is – in essence – not a proper criminal offence in itself, but rather a mere mechanism of attribution of an

³ Art. 322^{septies} SPC.

individual act of bribery to the enterprise.⁴ And indeed, the element of triggering of an individual bribery committed within an enterprise is quite crucial for the corresponding corporate culpability, as will be elaborated upon below.

IV. Individual Bribery within the Enterprise

This requirement appears straightforward at first glance, but in reality it proves to be rather complex in nature. Not only because it is two-fold (requiring the commission of bribery by an individual on the one hand and such commission “within the enterprise” on the other), but rather because each of these two sub-requirements poses difficult problems where many facets are open to debate.

A. Bribery by Natural Persons

Starting with the first sub-requirement of a bribery committed by an individual, one might ask at first glance where the complexity would be. The same only becomes apparent upon closer look.

1. The Perpetrator’s Position within the Enterprise

Firstly, the question arises regarding the position that the relevant individual must hold within the enterprise. Does it have to be a high-ranking officer of the company or can even acts of a low-ranking employee be attributed to the legal person in question? Looking for instance at the relevant situation under U.K. law, only acts committed by the so-called “directing mind”, *i.e.* a very high-ranking manager, can be attributed to the company in order to entail criminal liability of the same.⁵ Under French law, for instance, only acts of employees empowered to represent the company in business dealings can entail criminal liability of the legal person.⁶ Swiss law is not so picky in this regard. Even acts of low-ranking employees are attributable to the company in order to hold the same criminally liable.⁷

How about consultants, external legal counsel, people working for the company within the framework of outsourcing, etc.? If such persons are integrated into the organisation and hierarchy of the enterprise so intensely that their position is comparable to that of an employee, their acts might indeed be attributable to the company, too.⁸

Applying these principles to the case under scrutiny, one would firstly try to attribute the corrupt conduct of the consultant to the CH Group. Let us, however, assume that the consultant is neither integrated into the

⁴ Geiger (2006), *Organisationsmängel als Anknüpfungspunkt im Unternehmensstrafrecht*, Diss. Zurich, p. 21. On the other hand, the criminal culpability of legal persons also contains certain elements of a proper criminal offence given that the legal person is reproached for having failed to implement certain organizational measures, as will be shown below in more detail: *cf.* Jositsch (2004), *Das Schweizerische Korruptionsstrafrecht*, Zurich, p. 328.

⁵ Geiger (fn 4) p. 13.

⁶ Forster (2006), *Die strafrechtliche Verantwortlichkeit des Unternehmens nach Art. 102 StGB*, Diss. Bern, p. 43 *et seq.*

⁷ Forster (fn 6) p. 153.

⁸ Stratenwerth/Wohlens (2007), *Schweizerisches Strafgesetzbuch. Handkommentar*, Bern, art. 102 SPC N 4; Forster (fn 6) p. 156 *et seq.*; Macaluso (2004), *La responsabilité pénale de l’entreprise*, Zurich, N 729 *et seq.*; Pieth (2003), *Die strafrechtliche Verantwortung des Unternehmens*, in *ZStrR 2003*, p. 353 *et seq.*, p. 360; Schmid (2003), *Einige Aspekte der Strafbarkeit des Unternehmens nach dem neuen Allgemeinen Teil des schweizerischen Strafgesetzbuches*, in von der Crone et al. (ed.), *neuere Tendenzen im Gesellschaftsrecht*, Festschrift für Peter Forstmoser zum 60. Geburtstag, Zürich, p. 761 *et seq.*, p. 772.

organisation and hierarchy of CH Group, nor does he even work for CH Group on an exclusive basis; and by no means is he dependent on the same financially. In such situation his acts would certainly not be attributable to a CH Group entity.

Who else within CH Group might then be the individual briber whose acts shall be attributed to a group entity? Based on the above and give the pattern of facts outlined at the outset, one would simply look for those managers and possibly other employees within CH Management who liaised with the consultant. However, a tricky issue arises in that regard.

2. Perpetrator Fulfils Both *Actus Reus* and *Mens Rea*

The relevant individual perpetrator must fulfil both the *actus reus* and the *mens rea* of the bribery. Let us hypothetically assume that a singly guilty individual is hard to establish within CH Group. Two scenarios are conceivable in this regard.

a) *General Delinquency*

Firstly, it shall be assumed that, as a result of criminal investigations, a letter from the consultant addressed to the executive board within CH Management was discovered. The letter was not addressed to specific executive board members but rather to the executive board as a whole. In this letter, the consultant thanked the executive board for granting him a 20% commission on the gross deal value of the project with the government of X and promised to promote the interest of CH Group within jurisdiction X based on this to the best of his abilities. It remains unclear who exactly within the executive board received this letter or learned about its contents or negotiated the 20% consultancy fee arrangement with the consultant. The individual executive board members chose to remain silent in the investigation. The local manager within CH Y who was instructed by CH Management to sign the consultancy agreement providing for the 20% commission was unfortunately run over by a bus and is now in an indefinite coma; he cannot be interviewed by the prosecutor and thus cannot help solve the uncertainty as to who within CH Management knew about the corrupt arrangement through the consultant.

In such a situation there is a serious suspicion that at least one or maybe even more individuals within the executive board of CH Management must be the perpetrator(s), but it will never be known who exactly it was. In particular, it will not be known who within the executive board had what knowledge of which exact facts under scrutiny, although there is a serious suspicion that at least one member had comprehensive knowledge of all facts. This scenario is discussed under the theory of “general delinquency”.⁹ There is general delinquency when an offence was unequivocally committed within a specified, homogenous circle of potential perpetrators whereby all elements of the offence (including the *mens rea*) are strongly indicated by the circumstances.¹⁰ According to the prevailing Swiss doctrine, general delinquency is in principle sufficient in order to establish an individual predicate offence that triggers criminal liability of an enterprise.¹¹ However, one must be aware that the law clearly requires that such individual predicate offence be clearly proved in terms of both *actus reus* and *mens rea* and that the proof of *mens rea* without linking the same to a particular individual is in many cases hardly conceivable. *Mens rea* of bribery requires that the act be committed knowingly and wilfully, and in particular the wilfulness can in many cases not be proved beyond a reasonable doubt if no specific individual can be identified. Even in case of existing suggestive evidence strongly indicating wilfulness, doubts will remain

⁹ Macaluso (fn 8) p. 859 *et seq.*, Heine (2005), *Straftäter Unternehmen: das Spannungsfeld von StGB, Verwaltungsstrafrecht und Steuerstrafrecht*, recht 2005, p. 1 *et seq.*, p. 6.

¹⁰ Forster (fn 6) p. 166 *et seq.*

¹¹ Macaluso (fn 8) *ibid*, Heine (fn 9) *ibid*, in principle also Forster (fn 6) *ibid*.

so that under the principle of “*in dubio pro reo*”, at least the *mens rea* of the individual act in question must be denied.¹² The concept of general delinquency might work in very simple cases where only negligent conduct is required¹³ and maybe even in very simple cases of intentional conduct where a court cannot have any reasonable doubt as regards the *mens rea* as such, even in the absence of a concretely identified perpetrator. However, according to the position advocated here, the *mens rea* cannot be sufficiently established independently of specific individuals when wilfulness must be proved in complex setups like the sample case at hand. Ultimately, it is a question of assessment of the evidence by the court. But in view of the rather stringent standard usually applied by Swiss courts, the theory of general delinquency as presently discussed by Swiss scholars will hardly represent a viable solution from the practitioner’s perspective. The issue is still open to debate, as no pertinent published case law exists yet.

b) *Aggregate Fault*

Under an alternate scenario, one could imagine that the Chief Operations Officer (COO) for the particular region where jurisdiction X is located negotiated the arrangement with the consultant. He was of course well aware that the consultancy fee agreed upon was extraordinarily high but thought on the other hand – maybe out of naiveté – that this was a consideration for mere trading in influence. Trading in influence means that the consultant would not promise any favour to the government of X but would rather exercise his personal influence (be it due to personal friendship, moral authority or the like) to obtain the award of the turnkey project to CH Group. The COO thus had no idea of the consultant promising a monetary favour to government members of X. On the other hand, the CFO of the group also knew about the 20% project cost. However, he did not know any relevant details because, being snowed under with alternate tasks, he left the issue entirely to the COO whom he trusted implicitly. Had he, however, known about the involvement of the consultant, he would have rung all the alarm bells because he knew about the consultant’s dubious reputation and would have logically assumed that consultant would bribe the government of X as a matter of course. In such situation, neither of the two top managers involved, *i.e.* neither the COO nor the CFO, fulfilled the *mens rea* of bribing foreign officials individually. However, taken together - in other words, if their individual knowledge were melded - such collective knowledge would suffice in terms of *mens rea* of bribing foreign officials.

Swiss doctrine discusses whether such collective knowledge or aggregated fault suffices for the purposes of an individual predicate offence (in this case an individual bribery) attributable to an enterprise in order to constitute the criminal liability of the same.¹⁴ In case of criminal offences requiring wilfulness, it is, however, not enough to imagine a collective knowledge, but in addition one must be able to logically imagine a collective volition of separate individuals who do not act in concert at all. Such construction is rejected by the prevailing doctrine¹⁵ and also under the position advocated here. A collective will of persons acting clearly separately and not having the same perception of the situation at stake is not defensible under Swiss law, at least not for offences requiring wilfulness.

¹² As Forster (fn 6) admits in essence on p. 167 with references.

¹³ Stratenwerth (1992), *Strafrechtliche Unternehmenshaftung?*, in: Geppert/Bohnert/Rengier (ed.), Festschrift für Rudolf Schmitt zum 70. Geburtstag, Tübingen, p. 295 *et seq.*, p. 306.

¹⁴ Heine (fn 9) *ibid*; Pieth (2003), *Die strafrechtliche Verantwortung des Unternehmens*, in: ZStrR 2003, p. 353 *set seq.*, 361.; Forster (fn 6) p. 167 *et seq.*

¹⁵ Arzt (2004), Die kommende Strafbarkeit der Bank als juristischer Person – Sand im Getriebe der Geldwäschereibekämpfung, in: Wiegand (ed.), *Banken und Bankenrecht im Wandel*, Bern, p. 75 *et seq.*, p. 80; Schmid (fn 8) p. 772 *et seq.*; Stratenwerth (2004), *Zurechnungsprobleme im Unternehmensstrafrecht*, in: Graf/Medigovic (ed.), Festschrift für Manfred Burgstaller zum 65. Geburtstag, Vienna/Graz, p. 191 *et seq.*, p. 195 *et seq.*; Stratenwerth (2005), *Schweizerisches Strafrecht, Allgemeiner Teil I*, 3rd ed., Bern, § 13 N 185 at fn 247; Forster (fn 6) p. 182 *et seq.*; in part dissenting: Macaluso (fn 8) N 808.

3. Hardly Culpability of Enterprise without Singly Attributed Offence

Having said the above, it can be held that in the view advocated here, in the absence of unidentified individuals who are liable for the bribery committed, in most cases it will be impossible to hold the enterprise criminally liable for such bribery simply because the basis for such conviction would be a mere suspicion and not, as required by law, a proved individual underlying offence. This situation represents a serious lacuna in the law, because in many corporate structures work processes are complex, compartmentalised and involve large numbers of employees. Under Swiss law, it is prohibited to fill a lacuna of the law to the detriment of a defendant and thus this situation, which from the point of view of the legislator appears rather unsatisfactory, can only be resolved by introducing new provisions into the Swiss Penal Code that deal with the rather common situation of whether, in a corporate environment, even when a singly criminally liable individual cannot be identified, it would still appear fair to hold the enterprise criminally responsible for the corrupt practices indicated as such.

B. The Notion of “Enterprise”

1. The Problem

Let us continue the analysis based on an alternate work hypothesis, namely that the bribery of foreign officials described at the outset is attributable to an individual top manager within CH Management. In such case, the first sub-requirement of law *i.e.* a bribery committed by an individual, is of course fulfilled. What about the second sub-requirement of such bribery being committed “within the enterprise”? Which entity in the case at hand would be deemed “the enterprise”? Would that be CH Holding or would that rather be CH Holding including its Swiss subsidiaries CH Zurich and CH Management, or would the enterprise even include CH Holding along with its worldwide subsidiaries, *i.e.* in the present case including the foreign subsidiary CH Y? Or would one alternatively have to envisage CH Management as “the enterprise” because this is where, so to say, the operative music plays within the CH Group? In such case, would “the enterprise” be limited to just CH Management or would it consist of CH Management including the other subsidiaries of CH Holding, namely CH Zurich and possibly even the foreign subsidiary CH Y, simply because CH Management manages these subsidiaries at the highest level (gives relevant strategic instructions, issues global corporate guidelines and policies, etc.)?

2. The Statutory Definition of “Enterprise”

Looking at the wording of the Swiss Penal Code in such regard¹⁶ one finds the following definition for an “enterprise”:

- legal entities under private law;
- legal entities under public law (except territorial corporations);
- companies without legal personality;
- sole proprietorships.

This legal definition of an enterprise unfortunately does not answer the question above. This is because the Swiss Penal Code does not define the extent of an “enterprise” but rather only defines possible holders of an enterprise who eventually may be liable for the fine (capped at CHF 5 million) imposed.¹⁷ The extent of

¹⁶ Art. 102 para. 4 SPC.

¹⁷ In essence: Forster (fn 6) p. 100.

the “enterprise” and in particular the question whether one company can be attributed to another, and as a result both entities can form one single enterprise for the purposes of criminal liability of legal persons, is open to debate under Swiss law.

3. Economic Notion of Enterprise

Swiss legal doctrine in principle recognises corporate structures under private law and hence, the legal personality of each separate subsidiary of a corporate group. On the other hand, a strongly economic notion of the “enterprise” prevails.

a) *Under the Theory of Strong Economic Ties*

According to one part of the doctrine, an entity may be attributed to a controlling company if strong economic ties exist between the two entities.¹⁸ This may be the case if one entity holds a controlling interest in the other or exercises effective control by means of instructions, influencing decisions and the like. Under this theory, it is quite clear that CH Holding along with the totality of its subsidiaries, including the management company and all foreign subsidiaries, may be deemed a single enterprise for the purposes of Swiss criminal law. But also CH Management along with all CH Subsidiaries can be deemed one single enterprise under that theory, because CH Management exercises effective control over the remaining group subsidiaries; in other words a “cross-stream piercing of the corporate veil” shall be admitted.

b) *Under the Theory of Assumed Organisational Responsibility*

Under another, more recent, more differentiated and thus more convincing theory, a “piercing of the corporate veil” for the purposes of criminal responsibility and thus the attribution of one company to another is possible under two aggregated requirements: firstly, the entities in question must appear as an organisational unit; secondly, the controlling entity must have assumed organisational responsibility over the controlled companies.¹⁹ Organisational responsibility can be assumed either factually or contractually. The factual assumption of organisational responsibility is the more interesting possibility in practice. Relevant indications can be:²⁰

- personal integration, *i.e.*, if for instance members of the group’s top management are simultaneously members of the local management within the group’s subsidiaries;
- integrated organisational structures, *i.e.* if organisational charge is in essence replicated among the various group subsidiaries;
- unified organisational management, *i.e.* if the group management divides the globe into a number of regions (*e.g.* the Americas, EMEA, Central Asia, East Asia, etc.) and manages these regions centrally from within the corporate headquarters;
- centralised risk management systems and centralised safety concepts;

¹⁸ Roth (2002), *l’entreprise, nouvel acteur pénal*, in: Berthoud (ed.), *Droit pénal des affaires: la responsabilité pénale du fait d’autrui*, Lausanne, p. 77 *et seq.*, p. 87; Macaluso (fn 8) N 576; (from a comparative perspective) Rüttsch (1987), *Strafrechtlicher Durchgriff bei verbundenen Unternehmen?*, Köln, p. 137.

¹⁹ Forster (fn 6) p. 140 *et seq.*

²⁰ Forster (fn 6) p. 141.

- specific organisational and/or commercial instructions repeatedly given by the controlling entity, etc.

Looking at the possibility to assume organisational responsibility contractually, the most common arrangements will be intra-group service agreements (e.g. management agreements) and outsourcing agreements.

Applying the theory of assumed organisational responsibility as a means to form a single enterprise in the sense of Swiss criminal law to the facts pattern at hand, it is quite clear that CH Management has assumed organisational responsibility over the totality of the CH Group subsidiaries both factually and contractually (by means of the management agreement with the holding company). It is thus undisputed that under this theory, CH Management may be considered as a holder of one single enterprise extending to the totality of the group's subsidiaries, but certainly not to the holding company. Looking at the holding company, the question whether the same might be considered a holder of a global enterprise composed of the totality of the group subsidiaries throughout the world including the management company appears disputable at first glance: the holding company has delegated all organisational responsibility for the group to its management company and thus has not apparently assumed the same. On the other hand, whoever creates a risky situation is, under Swiss criminal law, responsible for supervising and controlling the same and to prevent the risk from being realised.²¹ Hence, one cannot simply evade responsibility by delegating. On the contrary, one remains bound to intervene when the delegated tasks are not performed correctly. As a consequence, the management agreement between the holding and the management companies not only imposes organisational responsibility on the management company but simultaneously leaves the supreme organisational responsibility to the holding company within the group. The holding company has thus assumed organisational responsibility contractually.

C. Concurrent Liability of Several Affiliates within Same Group?

The question remains whether under these circumstances both the management and the holding company can be criminally liable concurrently where the bribery occurred. According to Swiss legal doctrine, this may in principle be the case.²² However, one must take into account that regardless of whether the management or the holding company is deemed the enterprise holder (and thus liable for the corporate fine), the enterprise held remains in essence unchanged in the case at hand (namely in both cases the operative business of CH Group). A concurrent liability would thus result (in essence) in the same enterprise bearing a double criminal sanction for the same bribery. If, in addition in both cases, the organisational flaw conducive to the bribery is identical, such concurrent liability would be at least very close to a breach of the principle "*ne bis in idem*" (the prohibition to condemn the same legal subject twice for one and the same criminal offence). According to the opinion advocated here, a concurrent liability of both entities in question is thus only defensible if in each case a different organisational flaw was conducive to the bribery, because only in such instance are two distinct wrongs punished (as would in essence be required under "*ne bis in idem*").²³

²¹ Stratenwerth, *Schweizerisches Strafrecht* (fn 15), § 14 N 18.

²² Forster (fn 6) p. 144.

²³ According to Forster (fn 6) p. 144, concurrent liability appears to be possible also in case of identical organizational flaws, but requires that *all* culpable entities in question failed to intervene against such flaw. Forster's approach does not appear to solve the problem because any existing organizational flaw will necessarily be a consequence of someone's failure to remedy (*i.e.* intervene against) the same.

D. Summary

As an interim result, we can ascertain that the first requirement for the criminal liability of a legal person for bribery, namely a bribery committed within the enterprise, is fulfilled in the sample case under scrutiny, provided that an individual who fulfils both the *mens rea* and the *actus reus* of such bribery can be identified. The criminal culpability of the holding and/or management company for the bribery in question now only depends on the remaining requirements:

- the bribery must have been committed within the scope of the enterprise and while exercising a business activity;
- an organisational flaw within the enterprise must have been conducive to the bribery;
- the case must fall under Swiss jurisdiction.

V. **Bribery within the Scope of the Enterprise while Exercising a Business Activity**

Let us now take a closer look at the second requirement for the culpability of the legal persons in question for the bribery, namely the bribery occurring within the scope of the enterprise and while exercising a business activity. This requirement means that the bribery must realise a risk inherent to the typical business activity of the enterprise, in other words, that the bribery must have a functional connection with the enterprise's business activity.²⁴ What does this mean concretely?

It simply means that the individual bribery must represent a risk that the company must reasonably take into account within the framework of its usual, typical business.²⁵ For instance if, at a construction site, a worker carries stones on a scaffold, stumbles and drops the stones on the head of a colleague working on the ground below, resulting in very serious injuries to that colleague, then the company running the construction site must reasonably take into account such accident. The same will thus be deemed within a risk sphere that the construction company must reasonably anticipate, and where the company must be expected to implement organisational measures to prevent such a risk. If, however, the same worker for instance suddenly runs amok, kidnaps his colleagues and asks the government for an aircraft to Tripoli, then this would certainly be beyond any risk sphere that must be reasonably anticipated by the construction company. As regards bribery, the same is unanimously deemed within a risk sphere that must be reasonably anticipated by a company, in particular a company that is export-oriented, but also through companies with primarily domestic dealings.²⁶ Thus, the bribery in the sample case at the outset will be deemed "within the scope of the enterprise and while exercising a business activity". In other words, this requirement is designed in order to exempt private excess offences from the criminal liability of an enterprise. The bribery in question is surely not such a private excess offence.

VI. **Organisational Flaw Conducive to Bribery**

The third requirement for the culpability of the enterprise is the absence of necessary and reasonable organisational measures to prevent bribery, or in other words an organisational flaw conducive to the

²⁴ Pieth (fn 14) p. 362; Roth (2003), *Une responsabilité sans culpabilité?*, in: SemJud 2003, p. 187 *et seq.*, p. 191; Forster (fn 6) p. 191; Heine (2003), *Das kommende Unternehmensstrafrecht* (Art. 100^{quater} f.), in: ZStrR 2003, p. 24 *et seq.*, p. 35.

²⁵ Similar: Forster (fn 6) p. 196.

²⁶ Jositsch (fn 4) p. 328 *et seq.*

bribery. It was mentioned at the outset that, in our sample pattern of facts, no organisational measures to prevent corrupt practices have been implemented within CH Group. Hence, in the case at hand, the third and in principle the main requirement for the criminal culpability of the enterprise for bribery would also be fulfilled.

But what organisational measures should have been put in place within CH Group in order to prevent bribery and thus in order to comply with the law?

No relevant organisational standard is defined in the Swiss Penal Code, and no relevant case law exists yet. According to unanimous legal doctrine, the courts would have to rely on a number of non-binding codes of conduct published by various organisations which fight against bribery.²⁷ In particular, the codes of conduct in order to counter bribery by the International Chamber of Commerce,²⁸ by Transparency International/Social Accountability International²⁹, as well as by the Swiss State Secretariat for Economy³⁰ must be mentioned, but also – as a complementary standard – the OECD Guidelines for Multinational Enterprises.³¹ Also, a number of codes of conduct for specific industries exist, and as of 2008 possibly also the standard ISO 26000 shall be taken into account. All these codes of conduct point in the same direction and contain in essence very similar guidelines. They are generic in nature and must in any event be customised for the particular enterprise. The main content of these codes can be summarised as follows:

- The management of the enterprise issues a written code of conduct to counter bribery accompanied by a mission statement. According to such a mission statement, all corrupt practices as described in the code of conduct are absolutely banned; employees who do not comply can be terminated for cause.
- All marketing-oriented agreements (agency agreements, brokerage agreements, consultancy agreements, distribution and resale agreements, etc.) must contain integrity clauses prohibiting corrupt practices and providing for the possibility of the company to terminate the contract for cause without notice, to report the conduct to the prosecution authorities and to claim damages and penalties.
- Consultants, brokers, agents and all other sales and marketing-oriented appointees of the company must be selected according to a due diligence process where it is ensured that only persons with sufficient integrity and solid reputation in the market and the relevant industry are selected. The personnel of the enterprise must be given clear guidelines in order to enable them to assess whether a fee solicited by an agent, consultant or the like represents compensation at fair market value for a real service rendered.
- All sales and marketing-related appointees and the payments made to them must be accurately recorded in a separate documentation/database which must be made available at all times for internal and external audits.

²⁷ Geiger (fn 4) p. 35; Jositsch (fn 4) p. 329 at fn 1481; Forster (fn 6) p. 236 *et seq.* with reference.

²⁸ www.iccwbo.org.

²⁹ www.transparency.ch.

³⁰ www.seco.ch.

³¹ www.oecd.org/dataoecd/56/36/1922428.pdf.

- The enterprise's personnel must be trained internally on an ongoing basis in order to be able to cope with corruption-related challenges, to identify transaction risks and to apply the proper remedies.
- No off-the-books payments must be tolerated. All financial transactions must be accurately recorded in line with the company's accounting policy.
- All exposed transactions must be subject to the four-eye principle, involving co-signatories from different business divisions if possible and where appropriate. The four-eye principle will work even better if at least one of the co-signatories is not remunerated in function of their enterprise's turnover.
- The enterprise should maintain a whistleblowing facility (for instance a confidential telephone line where employees can report suspicious occurrences to an external lawyer without fear of harassment from within the company and without disclosing their identity to the company).
- If the enterprise is large enough it should maintain an anti-corruption officer. Otherwise the company's legal department should fulfil such task, or at least the company should have an external anti-corruption expert at the company's disposal on an ongoing basis in order to resolve corruption-related issues.
- Contributions to political parties and the like must be strictly in line with the relevant laws and regulations.
- Such code of conduct must be applied effectively and group-wide.

If the company adheres to these principles it will always be in a position to draw a clear defence line where it can claim that the corrupt practices which occurred are private issues of the individuals involved because the company did everything in its power to prevent corrupt practices. In such case the company will not be exposed to criminal sanction, and the prosecution will focus on the individuals.

VII. Swiss Jurisdiction

In corruption cases, Swiss jurisdiction will be determined primarily on the principles of territoriality or active personality. The principle of active personality entails Swiss jurisdiction over a case when a Swiss national returns to Switzerland after committing a criminal offence abroad that is eligible for extradition and does not consent to his/her extradition and thus cannot be extradited under Swiss rules. In such a case, Switzerland does not wish to be a safe haven for suspect Swiss nationals but will rather prosecute such national itself.³² The principle of active personality is not relevant for the criminal culpability of legal persons simply because a legal person does not travel abroad where it commits a crime and thereafter returns to Switzerland. This analysis focuses on the principle of territoriality according to which all and any conduct occurring on Swiss soil shall be subject to Swiss criminal jurisdiction.³³

According to a part of the doctrine, under the principle of territoriality, an enterprise can only fall under Swiss jurisdiction if the individual predicate offence, in our case the individual bribery, has been

³² Art. 7 para. 1 and 2 SPC; See *inter alia* Eicker (2006), *das Schweizerische Internationale Strafrecht vor und nach der Revision des Allgemeinen Teils des Strafgesetzbuches*, in: Schweizerische Zeitschrift für Strafrecht 3/2006, p. 295 *et seq.*

³³ Art. 3 SPC.

committed within Switzerland.³⁴ This theory does not appear to be convincing because the criminal liability of legal persons is not a sanction for the underlying individual criminal conduct but rather for organisational flaws within the enterprise. Hence, another theory advocated by some prominent scholars appears more convincing:³⁵ the case will fall under Swiss jurisdiction if the organisational flaws in question, in this case the misorganisation conducive to the bribery, can be localised within Switzerland. An organisational flaw can be localised within Switzerland if the enterprise's management would have had the duty to intervene in or from Switzerland in order to remedy the flaw. This is the case if a company is effectively managed from Switzerland, if, in other words, the operative headquarters are situated on Swiss soil.³⁶ In the sample facts pattern under scrutiny, this is indeed the case because CH Group is globally managed from Switzerland by CH Management. Thus, the case at hand would fall under Swiss jurisdiction even if the individual bribery occurred outside Switzerland without any participation of a Swiss person, for instance, if only a local manager within CH Y would have retained the corrupt consultant within jurisdiction X without the knowledge of the group management in Switzerland, provided that within CH Group no appropriate and necessary organisational measures had been enforced in order to prevent corrupt practices.³⁷

Finally, according to a part of the doctrine, even a foreign enterprise might fall under Swiss jurisdiction if acting on Swiss soil through its officers or employees.³⁸ According to the opinion advocated here, this theory is not entirely convincing again because criminal liability of a legal person does not sanction the underlying individual conduct but rather the organisational flaw. However, the scholars advocating a possible jurisdiction of Swiss courts over foreign enterprises acting within Switzerland must be taken seriously because, *inter alia*, the question has not yet been decided by the courts and is still open to debate.

VII. Conclusion

The overview of the criminal liability of legal persons for corrupt practices under Swiss law presented above allows both for hints to lawmakers interested to introduce or amend relevant penal culpability in their own legal systems and for legal counsel advising non-Swiss persons or entities.

³⁴ Bernasconi/Rossini Scornaienghi (2000), *Nuove norme anticorruzione in Svizzera*, in: *Rivista trimestrale di diritto penale dell'economia* 13/2000, p. 529 *et seq.*, 544; Donatsch, in: Donatsch/Flachsmann/Hug/Weder (2006), *StGB. Kommentar*, Zurich, p. 190.

³⁵ Jositsch (fn 4) p. 451 with references; as a result also Schmid, *Strafbarkeit des Unternehmens: die prozessuale Seite*, in: *recht* 2003, p. 201 *et seq.*, p. 210 *et seq.*

³⁶ In art. 34 para. 2 of the draft bill of the Swiss Federal Government for a new Swiss Federal Act on Penal Procedure, a forum at the domicile of the enterprise has been suggested for criminal proceedings against an enterprise, regardless whether or not the investigation is also directed against an individual perpetrator acting within the enterprise. This concept reflects the theory advocated here of Swiss jurisdiction over the enterprise being independent of the jurisdiction over the underlying individual offence.

³⁷ In practice, however, corrupt conduct within corporate groups will often occur with the knowledge (or blind willfulness) of the group's management so that the same would often be co-culpable (for not intervening against the bribery) on an individual level under the theory of the principal's culpability (*cf. inter alia* Wiprächtiger (2002), *Strafbarkeit des Unternehmens*, in *AJP/PJA* 7/2002, p. 754 ff.; Swiss Federal Supreme Court, in: BGE/ATF 96 (1970) IV 155, 105 (1979) IV 172, 113 (1987) IV 68, 118 (1992) IV 244, 120 (1994) IV 300, 121 (1995) IV 10, 122 (1996) IV 103, 125 (1999) IV 9). In such instance there would thus also be Swiss jurisdiction over the relevant group managers for bribery committed individually (through non-intervention) provided the operative headquarters are on Swiss soil.

³⁸ Bertossa (2003), *Unternehmensstrafrecht – Strafprozess und Sanktionen*, Bern, p. 212.

A. From a Lawmaker's Perspective

As regards hints to lawmakers, the typical problematic issues of corporate criminal culpability should be identified and explicitly addressed in the law:

- The typical difficulty of proving the individual underlying offence in corporate setups in view of the complexity and compartmentalisation of workflows in enterprises. Theories dealing with these issues such as general delinquency and aggregate fault might be explicitly adopted in the law.
- As regards groups of companies, in particular groups acting trans-nationally, both the extension of the relevant enterprise where criminal conduct can trigger corporate culpability in a particular jurisdiction, as well as the jurisdiction of the courts over trans-national occurrences within a globally-acting group of companies, should be explicitly addressed in the law in order to avoid obfuscation and superfluous debates.
- The law should allow a sufficient transition period for the industry of the country to become duly organised and compliant in all respects. It must be noted that introducing and effectively enforcing such compliance already takes significant time within a particular enterprise but can be even more time-consuming and pose manifold problems communication-wise when it comes to educating the enterprises' clients and business partners on new compliance procedures and the like. Such sufficient transition period is adequate to protect a country's industry from potential hardship caused by an immediate situation where enterprises suddenly have to decide whether to completely give up certain business dealings (for instance in areas with endemic corruption) in order to comply with criminal law, or alternatively to face significant legal risk in order to protect the company's shortened midterm cash-flow, since a sufficient transition period allows the company to redesign its corporate strategy in case certain clients cannot be properly educated.
- Finally, a wise legislator will create sufficient incentives for enterprises to disclose corrupt practices voluntarily to the prosecution authorities. Such incentives consist of significant credits or even leniency upon disclosure, possibly in combination with confidential proceedings upon voluntary disclosure because detrimental publicity is one of the industry's greatest fears when it comes to dealing with criminal offences in general and with corrupt practices in particular.

B. From Legal Counsel's Perspective

The following two aspects should be taken into account by legal counsel with respect to the above analysis:

- As regards counselling strategies for foreign individuals and entities having business contacts with Switzerland, one must be aware that Swiss anti-bribery rules most probably have a global reach insofar as Swiss parent companies are likely to be held criminally liable for corrupt practices of their foreign subsidiaries. A foreign subsidiary should therefore be aware in its local and regional dealings that certain practices which might be acceptable under their local laws might entail serious problems for their Swiss parent.
- It cannot be excluded that foreign companies acting in Switzerland could fall under Swiss jurisdiction, too. Thus, a foreign company should beware if, for instance, it should decide to create slush funds in Swiss bank accounts or the like. This might entail detrimental legal consequences in Switzerland which might well be enforced in the respective entity's country of domicile if possible under the relevant mutual legal assistance rules.

Liability of Legal Persons in Poland

Rafał Kierzyńska and Alicja Klamczyńska
Ministry of Justice, Poland

1. The Law

Poland has established the liability of legal persons through the Act of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under Penalty (Journal of Laws of 27th November 2002, No.197/1661) (hereinafter the ACLE).

2. Legal Entities

Legal persons can be classified according to:

- a. Their relation with authorities (state-owned legal persons: *the State Treasury, state-owned enterprises*; self-governing legal persons: *municipality, district and voivodeship self-government*);
- b. Their goals and functions (legal persons of a commercial nature: *commercial companies, state-owned enterprises*; and of a non-commercial nature: *associations, political parties, trade unions, higher education institutions, ecclesiastical legal persons*);
- c. The fact that a group of people share the same interests (corporations: *associations, companies, co-operatives, professional organisations*; establishments: *state-owned enterprises, higher education institutions, research institutes, foundations*).

In general, the most important types of legal persons are:

- Commercial companies: mainly capital companies (limited liability companies, joint stock companies) and partnerships (limited joint-stock partnership, registered partnership, professional partnership, limited partnership);
- Co-operatives (voluntary associations of an unlimited number of persons which pursue a common business);
- State-owned enterprises (self-reliant, autonomous and self-financing entrepreneurs having the status of a legal person);
- Research and development agencies, associations, foundations;
- Health care institutions; and
- Trade unions, political parties and banks.

Polish law provides a broad definition of legal entities that can be liable for acts prohibited under penalty. The ACLE applies not only to legal persons as they are, but also to other collective bodies. Article 2 of the ACLE defines its subjective scope. According to that article, a collective entity denotes a legal person and/or an organisational entity without personality at law, except for the State Treasury, local government agencies and their associations, or state and local government bodies.

A collective entity should also be understood as a commercial company with equity participation of the State Treasury, a local government agency or an association thereof, a company in organisation, an entity in liquidation, and an entrepreneur other than a natural person, as well as a foreign organisational entity.

The liability of collective entities could be defined as criminal in nature, but there are some peculiarities that make the liability distinct from strict criminal liability to which natural persons can be subjected.

3. The Offences

Under the ACLE, all legal persons that have committed offences in the territory of the Republic of Poland are subject to quasi-criminal liability. Article 16 of the ACLE lists all of the offences for which the legal person could be found liable. These include offences:

- 1) against economic relations;
- 2) against money and securities trading;
- 3) of bribery and paid patronage, as provided for in: Arts. 228 (passive bribery), 229 (active bribery), 230 (passive trade in influence), 230a (active trade in influence), 250a (corruption in elections), 296a (corruption in private sector), 296b (corruption in sport) of the Penal Code;
- 4) against data protection;
- 5) against reliability of documents;
- 6) against property;
- 7) against sexual freedom and good morals;
- 8) against the environment;
- 9) against public law and order;
- 10) consisting in an act of unfair competition;
- 11) against intellectual property;
- 12) against terrorists acts; and
- 13) of drugs trafficking.

A legal entity may also be held liable for fiscal offences against:

- 1) tax duties and the obligation to account for grants or subsidies(...),
- 2) customs duties and the principles of foreign trade in goods and services(...).

4. General Rules of Liability of Legal Persons

In Poland, the liability of a collective entity is strictly connected with the liability of a natural person who has a particular relation with that entity. Bringing the collective entity before justice is possible under

certain conditions concerning the commission of the particular offence by the natural person defined in the ACLE, and after that person has been convicted and the judgement has become final and binding. Article 3 of the ACLE describes the natural person whose activities lead to the liability of the collective entity:

Article 3

The collective entity shall be liable for a prohibited act consisting in the conduct of any natural person who:

- 1) acts in the name or on behalf of the collective entity under the authority or duty to represent it, make decisions in its name, or exercise internal control, or whenever such person abuses the authority or neglects the duty,
- 2) is allowed to act as a result of an abuse of the authority or neglect of the duty by the person referred to in point 1 above,
- 3) acts in the name or on behalf of the collective entity with the consent or knowledge of the person referred to in point 1,

if such conduct did or could have given the collective entity an advantage, even of non-financial nature.

Moreover, according to Article 5 of the ACLE, the collective entity shall be held liable if it has failed to exercise due diligence in selecting the natural person referred to in Article 3.2 or 3.3. The collective entity may also be liable if the organ or the representative of the collective entity failed to exercise due supervision over the person.

Article 4 of the ACLE states and determines the types of judgments that could be passed against the natural person in order to found liability against the collective entity.

Article 4

The collective entity shall be held liable if perpetration of an offence or fiscal offence by the person referred to in Art. 3 is ascertained in a valid convicting judgement, a decision to conditionally discontinue the proceedings, a decision to leave voluntary submission to liability, or a decision to discontinue the proceedings for circumstances excluding prosecution of the perpetrator.

The proceedings for bringing the collective entity to justice is based on the provisions of the Code of Criminal Procedure, with some exceptions, *e.g.* provisions on preliminary proceedings, a victim's right to act as a private prosecutor or civil plaintiff in the proceedings before the court. These exceptions relate, *inter alia*, to the institution of the proceedings, formal requirements of the motion to institute the proceedings, competence of the court, representation, and appointment of defence lawyers. These issues are regulated directly in the ACLE in different way than in the Penal Code.

Proceedings against a collective entity are separate from those against the natural person and can be instituted only after the judgement mentioned in Article 4 of the ACLE has become final and binding. However, the collective entity can participate in the criminal proceedings against the natural person and its representative can testify as a witness. The court is the competent body to conduct proceedings against the collective entity. The ACLE provides for a list of quasi-criminal sanctions that can be applied against the collective entity.

Strictly speaking, the liability of collective entities cannot be considered “criminal” despite the similar features. The principle is that only a natural person can be held criminally liable. This stems from both the Constitution as well as other laws, *e.g.* the Penal Code, whose general provisions are applicable to other specific laws that regulate criminal liability, and the Fiscal Penal Code). The principle closely relates to a prerequisite of criminal liability, namely, that fault can only be attributed to a natural person. This principle does not, however, constitute an obstacle for holding collective entities liable for offences committed by certain natural persons in the form that was presented, *i.e.*, as the consequence the natural person’s liability.

It should be said that the Polish system of liability of legal persons was the subject of some critical comments by the European Commission. The remarks concerned the connection between the liability of the natural and the legal person.

The OECD has also analysed this requirement. In the January 2007 report on Poland’s implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the OECD Working Group on Bribery recommended that Poland, with respect to the investigation and prosecution of foreign bribery and related offences, “amend the Law on Liability of Collective Entities to eliminate the requirement that a natural person be finally and validly convicted as a prerequisite to proceeding against a collective entity.” The implementation of this recommendation will commence soon.

A collective entity may also be held liable for non-intentional offences where the offences can be committed in that manner. The legal provisions *expressis verbis* state which offences can be committed non-intentionally, *e.g.* Article 296 (breach of trust in business relations) and Article 181 (offence against environment) of the Penal Code.

Similarly, the collective entity can be held liable for offences committed by omission only when the offence can be committed in that fashion, *e.g.* Article 296 (breach of trust in business relations), Article 296a (corruption in private sector), Article 186 (against environment) of the Penal Code, Article 586 of the Code of Commercial Companies, and Article 229 of the Act on Insurance Activities.

5. Sanctions

The ACLE provides for the following sanctions:

- Fine from PLN 1 000 to 20 million (approximately: EUR 250 to 5 million, USD 330 to 6.6 million), but not more than 10% of the revenue generated in the tax year in which the offence was committed;
- Mandatory forfeiture of:
 - a) The objects coming, even indirectly, from the prohibited act, and objects used or designated for use as the tools to perpetrate the prohibited act;
 - b) The financial gains originating, even indirectly, from the prohibited act;
 - c) The amount equivalent to the objects or financial benefit coming, even indirectly, from the prohibited act, unless such amounts are owed to another entitled entity for restitution;
- Ban on promoting or advertising the business activities it conducts, the products it manufactures or sells, the services it renders, or the benefits it grants;

- Ban on using grants, subsidies, or other forms of financial support originating from public funds;
- Ban on using aid provided by international organisations to which Republic of Poland is a member;
- Ban on applying for public procurement contracts;
- Ban on pursuing indicated prime or incidental business activities; and
- Public pronouncement of the ruling.

Bans shall be imposed for 1 to 5 years. A ban on pursuing business activities shall not be imposed if it could lead to bankruptcy or liquidation of the collective entity, or to a large number of layoffs.

In the aforementioned OECD report, Poland was asked to “consider whether the cap on fines for legal persons under the ACLE (*i.e.*, 10% of the “revenue” generated in the tax year in which the offence was committed) is an obstacle to imposing effective, proportionate and dissuasive sanctions, and if so, amend the Law accordingly”.

Annex

J.L.02.197.1661

ACT
Of 28th October 2002
On Liability of Collective Entities for Acts Prohibited under Penalty
(Journal of Laws of 27th November 2002)

(excerpt)

Art. 1. The Act sets forth the principles defining the liability of collective entities for acts prohibited under penalty, *i.e.* offences or fiscal offences, and the principles to govern the procedure to be followed in matters of such liability.

Art. 2. 1. A collective entity, as understood in the Act, denotes a legal person and/or organisational entity without personality at law, except for the State Treasury, local government agencies and their associations.

2. A collective entity, as understood in the Act, also denotes a commercial company with equity participation of the State Treasury, a local government agency or an association thereof, a company in organisation, an entity in liquidation, and an entrepreneur other than a natural person, as well as a foreign organisational entity.

Art. 3. The collective entity shall be liable for a prohibited act consisting in conduct of any natural person who:

- 1) acts in the name or on behalf of the collective entity under the authority or duty to represent it, make decisions in its name, or exercise internal control, or whenever such person abuses the authority or neglects the duty,
- 2) is allowed to act as a result of an abuse of the authority or neglect of the duty by the person referred to in point 1 above,

- 3) acts in the name or on behalf of the collective entity with the consent or knowledge of the person referred to in point 1,
- 4) (cancelled)

- if such conduct did or could have given the collective entity an advantage, even of non-financial nature.

Art. 4. The collective entity shall be held liable, if perpetration of an offence or fiscal offence by the person referred to in Art. 3 is ascertained in a valid convicting judgement, a decision to conditionally discontinue the proceedings, a decision to leave voluntary submission to liability, or a decision to discontinue the proceedings for circumstances excluding prosecution of the perpetrator.

Art. 5. The collective entity shall be held liable even if found to have failed to exercise due diligence in electing the natural person referred to in Art. 3.2 or 3.3, or to have had no due supervision over the person, held by the body or representative of collective entity.

Art. 6. Neither the existence nor non-existence of liability of the collective entity under the principles set forth in this Act shall exclude civil liability for the inflicted damage, administrative liability, or personal legal responsibility of the perpetrator of the prohibited act.

Art. 7. 1. For the act specified herein, the collective entity shall be punished with fine from 1 000 up to 20 000 000 PLN, not higher however than 10% of the revenue, borne in the year when the prohibited act was committed.

2. (...)

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

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

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

Art. 9. 1. The collective entity can be penalised with:

- 1) the ban on promoting or advertising the business activities it conducts, the products it manufactures or sells, the services it renders, or the benefits it grants;
- 2) the ban on using grants, subsidies, or other forms of financial support originating from public funds;
- 3) the ban on using the aid provided by the international organisations the Republic of Poland holds membership in;
- 4) the ban on applying for public procurement contracts;

- 5) the ban on pursuing the indicated prime or incidental business activities;
- 6) public pronouncement of the ruling.

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

3. The ban referred to in paragraph 1.5 shall not be imposed, if the ruling could lead to bankruptcy or liquidation of the collective entity, or layoffs discussed in Art. 1 of the Act of 28th December 1989 on special principles of terminating employment for reasons relating to the employer (Journal of Laws from 2002 No. 112, it. 980, and No. 135, it. 1146).

Art. 10. When decreeing the fine, imposing the bans or pronouncing the ruling in public the court shall consider in particular significance of the failure of exercising due diligence in electing or supervision, as referred to in Art. 5, the size of the gains obtained or been to be obtained by the collective entity, its material conditions, and the social consequences of the penalty and affecting further existence of the entity with the penalty.

Art. 11. 1. When adjudicating the fine or forfeiture the court shall recognise any valid judgement pronouncing the collective entity secondarily liable to bear the fine or forfeiture of amount equivalent to the object ruled against the natural person referred to in Art. 3 for the fiscal offence.

2. When ruling the forfeiture of the financial gains or an equivalent thereof the court shall recognise any valid judgement issued on the basis of Art. 52 of the Penal Code or Art. 24 § 5 of the Fiscal Penal Code that obliges the collective entity to refund the financial gains obtained through the offence of the natural person referred to in Art. 3.

Art. 12. In particularly justified cases, when the prohibited act that made the collective entity liable has not brought any benefit to the entity, the court may waive a fine and limit itself to ruling the forfeiture, ban, or public pronouncement of the judgement, though subject to the regulations of Art. 8.2 and Art. 11.

Art. 13. If prior to the expiration of a 5-year period following the adjudication of the fine the prohibited act that gave rise to the liability of the collective entity reoccurs, the entity may be fined in any amount up to the upper law-defined penalty limit increased by half; the regulation of Art. 9.3 shall not apply.

Art. 14. No fine, forfeiture, ban, or public pronouncement of the ruling shall be adjudicated against the collective entity 10 years after the issuance of the decision referred to in Art. 4.

Art. 15. No fine, forfeiture, ban, or public pronouncement of the ruling shall be carried out 10 years after the judgement pronouncing the collective entity liable for the prohibited act threatened with penalty became final.

Art. 16. 1. The collective entity shall be held liable under this Act, if the person referred to in Art. 3 committed an offence:

1) Against economic relations:

- a) Arts. 296 (breach of trust in business relations), 297 (credit and subsidy fraud), 298 (insurance fraud), 299 (money laundering), 300 (fraudulent action of the debtor against his creditor), 301 (intentional bankruptcy or conversion of a business entity with the aim of avoiding due payment to the creditor), 302 (acting to the detriment of the debtors by satisfying claims of only some of them), 303 (undue bookkeeping causing material damage

- to the business entity), 304 (forceful contract with the business entity under constraint), 305 (preventing or obstructing public tenders), 306 (falsifying identification marks and expiry dates of products) and Art. 308 (liability of representatives of business entities) of the Penal Code,
- b) Art. 224-232 of the Act of 22nd May 2003 on insurance activities,
 - c) Arts. 38-43a of the Act of 29th June 1995 on bonds,
 - d) Art. 171 of the Act of 29th August 1997 - the Banking Law,
 - e) Arts. 303-305 of the Act of 30th June 2000 - the Industrial Property Law,
 - f) Arts. 585-592 of the Act of 15th September 2000 - the Code of Commercial Companies,
 - g) Art. 33 of the Act of 29th November 2000 on foreign trade in goods, technologies, and services of strategic significance for the security of the state and for keeping international peace and security, and on amendments to selected laws,
 - h) Arts. 36 and 37 of the Act of 22nd June 2001 on pursuing business activities in the area of manufacturing and trading in explosives, arms, ammunition, and products and technologies designated for military or police purposes;
 - i) Art. 18a of the Act of 20th July 2001 on consumers' loan.
- 2) Against money and securities trading:
- a) Arts. 310 (falsification of the money and securities, putting them into circulation), 311 (disseminating false information in the documentation relating to trade in securities), 312 (putting into circulation counterfeit or altered money), 313 (counterfeiting of the official marks of value and putting such a sign into circulation), 314 (counterfeiting or altering an official mark designed to certify an authorisation, payments of fiscal charges) of the Penal Code,
 - b) Arts. 178-180 of the Act of 29th July 2005 - the Law of Public Trading in Securities,
 - c) Art. 37 of the Act of 29th August 1997 on mortgage bonds and mortgage banks,
 - d) Art. 99-101 of the Act 29th July 2005 on public offer and conditions of introducing securities into the organised trading system and on public companies;
- 3) Arts. 228 (passive bribery), 229 (active bribery), 230 (passive trade in influence), 230a (active trade in influence), 250a (corruption in elections), 296a (corruption in private sector), 296b (corruption in sport) of the Penal Code;
- 4) Art. 267-269 (offences against data protection) of the Penal Code;
- 5) Art. 270 (falsification of the document), 271 (certifying untruth in public documents), 272 (procuring an attestation by a deceit misleading of a public official), 273 (using of falsified documents) of the Penal Code;

- 6) Art. 286 (fraud), 287 (computer fraud), and in Arts. 291-293 (handling of stolen property or computer programme) of the Penal Code;
- 7) Against sexual freedom and good morals, as specified in Art. 199 – 200, Art. 203-204 of the Penal Code;
- 8) Against the environment, as specified in:
 - a) Arts. 181-184 and Arts. 186-188 of the Penal Code,
 - b) Art. 34 of the Act of 11th January 2001 on chemical substances and preparations
 - c) Art. 19 of the Act of 30 July 2004 on international trade in waste
 - d) Arts. 58-64 of the Act of 22nd June 2001 on genetically modified organisms;
- 9) Against public law and order, as specified in Arts. 252 (taking a hostage) and 253 (trade in human being), Arts. 256 (propagating of fascist or totalitarian system), Art. 257 (public insulting a person or group of persons because of their national, ethnic, race or religious affiliation and other reasons), Art. 258 (participating in an organised group or association having for its purpose the commission of offences), Art. 263 (illegal manufacturing or trading in firearms or ammunition) and Art. 264 (illegal crossing the border) of the Penal Code;
- 10) Consisting in an act of unfair competition, as defined in Arts. 23 and 24b of the Act of 16th April 1993 on combating unfair competition;
- 11) Against intellectual property, as specified in Arts. 115-118¹ of the Act of 4th February 1994 on copyright and related titles;
- 12) Against terrorists acts;
- 13) Drugs trafficking.

2. The collective entity shall also be held liable under this Act if the person referred to in Art. 3 committed a fiscal offence:

- 1) against tax duties and the obligation to account for grants or subsidies, as defined in Arts. 54 § 1 and 2, Art. 55 § 1 and 2, Art. 56 § 1 and 2, Art. 58 § 2 and 3, Art. 59 § 1-3, Art. 60 § 1-3, Art. 61 § 1, Art. 62 § 1 – 4, Art. 63 § 1-4, Art. 64 § 1, Art. 65 § 1-3, Art. 66 § 1, Art. 67 § 1 and 2, Art. 68 § 1, Art. 69 § 1 – 3, Art. 70 § 1-4, Art. 71-72, Art. 73 § 1, Art. 73a § 1 and 2, Art. 74 § 1 – 3, Art. 75 § 1 and 2, Art. 76 § 1 and 2, Art. 77 § 1 and 2, Art. 78 § 1 and 2, Art. 80 § 1-3, Art. 80a § 1, Art. 82 § 1 and Art. 83 § 1 of the Fiscal Penal Code;
- 2) against customs duties and the principles of foreign trade in goods and services, as provided for in Art. 85 § 1 and 2, Art. 86 § 1 – 3, Art. 87 § 1 – 3, Art. 88 § 1 and 2, Art. 89 § 1 and 2, Art. 90 § 1 and 2, Art. 91 § 1-3, Art. 92 § 1 and 2, Art. 93, Art. 94 § 1 and 2, And Art. 95 § 1 of the Fiscal Penal Code;
- 3) against foreign exchange dealings, as specified in Art. 97 § 1-3, Art. 98 § 1, Art. 99 § 1 and 2, Art. 101 § 1, Art. 102 § 1 Art. 103 § 1, Art. 104 § 1, Art. 105 § 1, Art. 106 § 1, Art. 106a § 1, Art. 106b § 1, Art. 106c § 1, Art. 106d § 1, Art. 106i § 1 and Art. 106j § 1 of the Fiscal Penal Code;

- 4) against organizing game of chance, slot machines games, mutual pools, as provided for in Art. 107 § 1 -3, Art. 107a § 1, Art. 108, Art. 109 and Art. 110 of the Fiscal Penal Code.

Art. 17-20. (cancelled)

Art. 21.-21a (...)

Art. 22. The proceedings concerning the liability of collective entities for the acts prohibited under penalty shall be governed as appropriate by the regulations of the Code of Penal Procedure, unless otherwise provided herein. The regulations of the Code of Penal Procedure on the private prosecutor, claimant in criminal proceedings, social representative, preparatory procedure, special proceedings, and on criminal procedure shall not apply to matters falling within the jurisdiction of the military court.

Art. 23. The burden of proof rests with the party that files the evidence.

Art. 24. 1. The matters of liability of collective entities for acts prohibited under penalty shall, in the first instance, fall under the jurisdiction of the local court in whose territory the prohibited act was committed, and if such act was perpetrated in the territories falling under the jurisdiction of several courts, or on board of a Polish vessel or air-craft, or abroad, the matter shall be tried by the local court competent for the registered address of the collective entity and in the case of a foreign organisational entity for the registered address of its agency in the Republic of Poland.

2. Appeals from rulings and judgments, and from orders that prevent the issuance of the ruling shall be tried by the competent district court under the regulations of the Code of Penal Procedure; appeals from other decisions, orders or acts shall be considered by the local court of a different though equivalent composition.

Art. 25. The court of appeal, on request of the local court, may refer any matter to be tried by the district court in the first instance in recognition of its particular gravity or complexity. The provision of Art. 24.2 shall apply to the court of appeal or district court, respectively.

Art. 26. In order to safeguard the proper course of the proceedings even before they are initiated, a motion can be filed with the competent court requesting the decision to secure the potential penalty or forfeiture on the assets of the collective entity.

Art. 27. 1. The proceedings are instituted on the motion of the prosecutor or petition of the injured party, though subject to the provisions of paragraph 2 below.

2. In cases where the cause of the liability of the collective entity is a prohibited act the law considers an act of unfair competition, the proceedings can also be initiated on the motion from the President of the Competition and Consumer Protection Office.

Art. 28. The motion filed by the injured party shall be produced and signed by the person qualified to advocate the cause under the regulations on the Bar system or the person qualified to render legal assistance under the regulations on legal advisors.

Art. 29. The motion shall state:

- 1) the identity of the mover, and its address for service of process;
- 2) the identity of the collective entity and its address for the service of process;

- 3) the precise definition of the prohibited act that gives rise to the liability of the collective entity including the circumstances provided for in Arts. 3 and 5;
- 4) the indication of the valid ruling or another decision referred to in Art. 4, with the identity of the court or body that issued the ruling or decision;
- 5) the indication of the court competent to try the case;
- 6) the grounds;
- 7) the list of evidence the mover requests to be heard at the main trial.

Art. 30. The motion shall be appended with the decision referred to in Art. 4 together with the grounds thereof, if given in writing.

Art. 31. The motion is subject to preliminary verification by the court; the regulations of the Code of Penal Procedure on preliminary verification of the accusation apply as appropriate, except for the fact that the parties' participation in the session is not mandatory.

Art. 32. If the prosecutor and injured party file their motions in one and the same matter, the court shall try the motion from the public prosecution; the court shall decide on admitting the injured party to join the proceedings alongside the prosecution, provided however, the interest of the administration of justice does not prevent it; Art. 53 of the Code of Penal Procedure shall apply as appropriate.

Art. 33. 1. The collective entity is represented in the proceedings by a member of its body authorised to represent it.

2. The collective entity may appoint its legal defence from among the persons eligible under the regulations on the Bar system or persons authorised to render legal assistance under the regulations on legal advisors.

(...)

Art. 34. 1. Participation in the proceedings is open to: the mover, the injured party admitted to join in the proceedings alongside the prosecutor, the representative of the collective entity, and its defence counsel.

2. No inexcused failure to appear by any party shall defer the trial.

Art. 35. Evidence is admitted on request from the parties, and *ex officio*, though in justified cases; no evidence obviously aiming at extending the proceedings shall be admissible.

Art. 36. 1. The court determines the facts and legal issues lying within the scope of the motion independently and on the sole discretion basis; the judgments referred to in Art. 4, though, are binding.

2. The judgement possessing validity in law or the pending case are determined on the exclusive basis of the prohibited act the collective entity has been or is to be held liable for.

Art. 37.-38 (...)

Art. 39. Both the mover and the collective entity enjoy the right to appeal from the judgement given by the court of the first instance.

Art. 40. The last resort appeal can be filed only by the Attorney General or Commissioner for Civil Rights Protection.

Art. 41. 1. In matters concerning the liability of collective entities for acts prohibited under penalty the court and prosecution render legal assistance on request from the relevant agency of the foreign country.

2. In cases where the prohibited action is an action classified by the law as an act of unfair competition, assistance is also rendered by the President of the Competition and Consumer Protection Office.

Art. 42. The execution of the adjudicated fine, forfeiture, bans, and/or public pronouncement of the ruling shall be governed by the relevant regulations of the Penal Code relating to the carrying out of fines, forfeitures, bans, and public ruling pronouncements, provided that the fine shall be paid out of the proceeds of the collective entity.

Art. 43. The judgement establishing the liability of the collective entity for an act prohibited under penalty is cancelled under the operation of the law 10 years after the execution, or remittance, or limitation of the fine, forfeiture, bans, and public pronouncement of the ruling.

Art. 44.-46 (...)

Art. 47. Until implementation regulations are issued based on the authority amended herein, the heretofore regulations shall remain in force, provided however, they are not in contradiction with this Act.

Art. 48. This Act shall come into effect 12 months following its publication date.

Responsibility of Legal Persons for Corruption in Lithuania

Vytas Rimkus

Corruption Prevention Department, Special Investigation Service, Lithuania

Introduction

It is common knowledge that criminology and legal systems in the former Soviet republics are influenced by the classical school of criminal law. The approach of the classical school to the liability of legal persons is articulated by N.S. Tagantsev: “All kinds of legal entities exist only as a fruit of the judicial myth. If one legitimises the legal entity’s criminal liability, such legalisation would distort the fundamentals of criminal law. That is why criminal liability of legal entities might be possible in theory, but it is unlikely to become practical.”¹

The opponents of criminal liability of legal persons in Lithuania once would have adhered to this stance. However, life goes on and everything changes, including us and our legal environment. After the restoration of Lithuania’s independence, the country reformed its legal system. In developing a new Criminal Code, Lithuanian experts studied other nations’ experiences and international documents. They also engaged in heated debates, particularly on the liability of legal entities for committing crimes. Common sense and a shrewd understanding of the reality became ultimate victors in the debate.

Few people doubt that legal entities can cause great damage to society. Crimes are committed on behalf of legal entities, and such crimes are aimed at maximising the entities’ profits. The shareholder(s) owns the legal entity and is separated from the legal entity itself. The owner often does not participate in corporate management. In effect, in not punishing the corporate entity for a given crime, the state leaves unpunished the shareholders on whose “behalf” the crime was committed. As G.T. Nielsen correctly put it, “The society as a whole and its individual members have long accepted the concept of legal entities’ criminal liability, and it is only lawyers that have problems with acknowledging the concept”.²

Lithuanian criminal justice representatives have acknowledged that a legal entity (corporation) is an independent participant in legal, social and economic relations both in civil and criminal law. Having recognised the legal entity as a subject of crime, the Lithuanian legislature thus legitimised its criminal liability as an independent kind of responsibility. It should be noted, however, that compared to the Slovenian, Danish or Dutch criminal codes, our law contains no direct reference to the legal entity as a subject of crime.

The criminal liability of a legal entity in Lithuania has been in effect since January 2002. The practice is just emerging, but researchers have already begun examining the issue. The following is a highlight of the conditions for imposing liability.

Which Legal Persons Can Be Liable?

Article 20 of the Lithuanian Criminal Code, which regulates the conditions of the legal entities’ liability, reads: “The legal entity is held responsible in criminal acts, for which corporate criminal liability is

¹ Tagantsev, N.S. (2001), *Russkoye ugolovnoye pravo. Chast obschaya* Vol. 1. Tula: Avtograph., p. 310.

² Unofficial translation from Nielsen, G.T. (1999), “Criminal Liability of Legal and Collective Entities – the Danish Model”, *Criminal Responsibility of Legal and Collective Entities*, eds. A. Eser, G. Heine, B. Huber, Freiburg im Breisgau, H. 189.

provided for” (Art. 20(1)). However, not all legal entities are held responsible. Art. 20(5) reads: “In compliance with the present Code, one may not bring to criminal account the government, local self-governance, public and local self-governance institutions, or an international public entity”.

The Doctrine of the Legal Entity’s Direct Liability

Art. 20(2) reads:

The legal entity is held responsible in criminal acts committed by a private individual only in the event that the criminal acted on behalf of the legal entity and the act has been committed by a private individual that acted individually or on the legal entity’s behalf, provided that, while holding an executive position, he/she had the right to:

1. Represent the legal entity, or
2. Make decisions on the legal entity’s behalf, or
3. Control the legal entity’s operations.

The provision establishes direct liability of the legal entity. The criminal act is committed by private individuals who are members in the legal entity’s specific management body (in the event it is a collegial body), or by the body itself (if it consists of a single person), *e.g.* an enterprise director, *i.e.* a private individual who holds an executive position. Thus, the model of direct liability centres on a person who holds an executive position, and a crime committed by a corporate executive is attributed to the legal entity.

Proponents of this theory deem the corporation as a real participant in legal relations and tend to personify the corporation. This stance can be illustrated by a quotation from a British case:

A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such.³

Returning to Art. 20(2), the legal entity can be brought to account under this provision if:

1. The private individual has committed a criminal act;
2. He/she holds a relevant executive position and has the right to represent the legal entity, or make decision on its behalf, or he/she has the right to exercise control over its operations;
3. The criminal act is committed in behalf of the legal entity.

To prove the first condition, one has to establish that a given specific person has committed a specific crime that gives rise to the legal entity’s criminal liability.

³ *H.L. Bolton (Engineering) Co. v. T.J. Graham and Sons Ltd.*, [1957] 1 Q.B. 159 at 172 (C.A.).

The second condition requires that the individual in question was holding the status of a head of administration (director, president etc.), chairman of the board, chairman of the supervisory council, or any other executive position, which, according to the corporation's constitutional documents, implies the right to act on the company's behalf, to represent it, or be its legal representative.

To prove the third condition, one must establish that, while committing the crime, the individual who held an executive position acted for the legal entity's benefit or on its behalf. The legislature has identified two indicators of this condition, namely, benefit and interest. While benefit is understood to cover material benefits, interest can be interpreted to include non-material benefits acquired by the legal entity.

These provisions have been applied in practice. For example, the 3rd Municipal District Court of Vilnius convicted JSC "S.K." of a crime under Art. 192(2) of the Criminal Code and Art. 15(2) of the Copyright Law for using unlicensed software on the company's computers. The court established that the company was represented by Director AC who held an executive position and had the right to represent the legal entity. AC made decisions on the entity's behalf, controlled the decisions' execution, and acted on the legal entity's behalf and for its benefit. The court imposed a LTL 3 000 penalty.⁴

Liability for the Acts of an Employee or Authorised Person

A second head of liability is found in Art. 20(3) of the Code:

The legal entity can be brought to criminal account for criminal acts in the event an employee or authorised person committed such acts on the legal entity's behalf because of inadequate supervision or control exercised by the person referred to in Article 20(2).

Art. 20(3) therefore maintains the theory of indirect responsibility of the legal entity (*respondeat superior*). In a nutshell, the act and fault of the private individual who acts on behalf of the legal entity is transformed and applied to the legal entity on behalf of which the individual has acted. In practice, the application of the provision is a two-stage process. First, one qualifies the act of the individual and establishes whether or not there are signs of a concrete *corpus delicti*. At the next stage, all the necessary signs of the *corpus delicti*, including the private individual's *mens rea*, are cast upon the legal entity.

In addition to these two procedural stages, one must also establish the other elements in the provision, namely:

1. The criminal act was committed by the legal person's representative;
2. The said representative acted within his/her competence and fulfilled his/her labour function or assignment;
3. While committing the crime, he/she was authorised to act on behalf of the legal entity;
4. The representative did act on behalf or for the benefit of the legal entity; and
5. The legal entity has not undertaken any measures to prevent possible criminal acts.

If a given private individual is a representative of the legal entity but committed the crime "at his own discretion" - thus clearly exceeding the scope of his/her authority - then the legal person is not liable. In

⁴ Soloveičikas D. (2006), *Juridinių asmenų baudžiamoji atsakomybė (lyginamieji aspektai): monografija*, Vilnius Justicija

other words, if an employee committed a crime pursuant to his/her own interests or those of third parties, then the legal entity should not be held responsible. This follows from the fourth condition, that is, while committing the crime, the private individual should have intended to act on behalf or for the benefit of the legal entity. Benefit includes greater corporate revenues, property, cash or acquisition of property rights.

Another condition is that the legal entity's executive bodies described in Art. 20(2) have exercised insufficient control. The legislator has decided that the legal entity should be liable only when the crime resulted from the entity's inadequate supervision or control. This condition enables corporations to build an efficient shield against what they believe to be ungrounded accusations. The concept of insufficient control is understood as "ethical" and legal operational measures that fall short of standards of good corporate governance. Companies that follow concepts of good corporate governance exercise prevention and control over criminal acts by adopting special programmes whose objective is to ensure a careful regulation of their employees' operations. As well, the legal entity establishes aspirational ethical values (entrepreneurial ethics) which it strongly advocates. It is assumed that legal entities that develop and implement these standards are "loyal" to the state and hence there are no grounds to initiate criminal proceedings against them.

Presently, there are no cases dealing with the interpretation of Art. 20(3) (while committing the crime, the individual was authorised to act on behalf of the legal entity.)

Legal Effects for the Legal Entity that Has Committed a Criminal Act

The penalties that can be imposed on a legal entity are:

1. A fine;
2. Restrictions on its operations; and/or
3. Liquidation of the legal entity.

The maximum fines for a legal person and a private individual are 10 000 conditional units (LTL 1 250 000) and 300 conditional units (LTL 37 500) respectively.

In imposing a restriction on a legal entity's operations, the court can prohibit the entity from conducting certain operations or order it to shut down a particular division. The duration of the restrictions can be between one to five years.

Liquidation of the legal entity is the severest penalty. In imposing this penalty, the court obliges the legal entity to terminate all its economic, commercial, financial and/or professional operations, and to shut down all of its divisions. The liquidation must take place within a specified period of time. Liquidation has serious consequences not only for the entity's owner, but also for other private individuals and legal entities such as employees, creditors, debtors, and partners. Hence, the court should deem liquidation as an extraordinary penalty and impose it only when a legal entity systematically commits crimes or serves as a smokescreen for anti-social acts.

In addition to these penalties, the legal entity can face other unfavourable consequences. Pursuant to Art. 11 of the Act on Preventing Corruption, a legal person's conviction for corruption crimes are submitted to the company register. The same applies when a legal entity's employee or authorised representative is convicted for engaging in corruption while acting in favour or on behalf of the legal entity.

The information that is submitted to the register is fundamental to characterising the legal entity's reliability and has legal consequences. For example, the Law on Public Procurement requires an institutional buyer to appraise the vendor's reliability, and a record of conviction poses a serious obstacle to a vendor's prospects of obtaining the contract (Art. 28 and 32). The Cabinet Resolution that regulates the privatisation of public assets also states that a legal entity is deemed unreliable if it or its employee(s) who acted on its behalf has been convicted of a crime against the civil service (*e.g.* bribery, abuse of official position, fraud etc.).

Responsibility of Legal Persons for Corruption

Boštjan Penko
Senior Prosecutor, Slovenia

Historical Evolution of the Institute of (Criminal) Responsibility of Legal Persons for Criminal Offences

Traditionally, the doctrine of *societas delinquere non potest* restricted the imposition of liability for criminal acts to natural persons. Common law countries reversed this trend much earlier than continental civil law systems or mixed systems. England and the United States began doing so in 1842 and 1909 respectively, while Canada and Australia followed in the second half of the 20th century. The first civil law country to do so was France in 1992, followed by Denmark, Netherlands, Finland, Norway, Sweden, Belgium, Switzerland, Slovenia (in 1999), and many others.

Main Approaches towards the Concept of (Criminal) Liability of Legal Persons

The concept of liability of legal persons is generally founded on the following bases:

- **Master-servant responsibility** (*respondeat superior*) – A legal person is liable for the acts of its employees, regardless of the participation, acquiescence, knowledge or authorisation by higher level employees or officers, unless an employee's acts are completely outside his or her assigned duties or are contrary to the corporation's interests.
- **Identification theory** – The acts and states of mind of certain corporate organs or officers when acting in the company's interests are the embodiment of the company (*i.e.* the "directing mind"). A legal person is liable for the criminal acts of a person with such a directing mind.
- Responsibility is imposed against legal persons for crimes stemming from (non-) establishment of a **corporate culture** within a legal person. In essence, the legal person is held responsible for its organisational shortcomings.
- Modern approach – different combinations of the above.

Several international documents expressly deal with liability of legal persons:

- 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which includes the monitoring of the implementation of the Convention by the OECD Working Group on Bribery;
- 1997 Second Council Protocol of 19 June 1997 to the Convention on the Protection of the European Communities' Financial Interests;
- 1998 Council of Europe Convention on the Protection of the Environment through Criminal Law;
- 1999 Council of Europe Criminal Law Convention on Corruption, which includes the monitoring of the implementation of the Convention by GRECO;
- 2001 Council of Europe Convention on Cybercrime;

- 2001 UN Convention against Transnational Organized Crime;
- 2003 UN Convention against Corruption.

These international instruments share several common requirements:

- Liability arises not for all offences but only for those covered by the particular instrument.
- Criminal liability of a legal person is not stipulated as the only option or the exclusive approach. Hence, civil and administrative liability are also available. A country's national legal tradition and fundamental principles should always (and fully legitimately) play a decisive role in determining the type of liability.
- The definition of a legal person is not included in any of the international documents but is left to be prescribed by national laws (if at all).
- Grounds for imposing liability against a legal person are based on two fundamental, complementary conditions:
 1. The offence is committed for the benefit of a legal person, and
 2. A person (or an organ, a body) with a leading position within a legal person is involved in the commission of the offence (but is not necessarily the perpetrator).

Definition of a Leading Person

A person with a leading position can be any person (acting either individually or as a member of a collective body) who has the power and authorization to:

- Represent the legal person;
- Take decisions on behalf of the legal person; or
- Exercise control within the legal person.

The leading person may be involved in the commission of the offence in two ways:

- The leading person is the actual perpetrator who commits the criminal offence by himself/herself; or
- Another natural person commits the offence in an environment of a lack of control/supervision by a leading person.

It is important that both situations are adequately criminalised in national legislation.

The Relationship between the Responsibility of a Legal Person and the Responsibility of the Natural Person Offender

It is important that liability against a legal person should not exclude, preclude or substitute criminal proceedings against a natural person who has actually committed the criminal offence in question.

Sanctions against Legal Persons

In principle, all international instruments require states to provide effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions. The introduction and the application of parallel, complementary (administrative, civil) sanctions have to be taken into consideration as well. These may include measures such as the exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities, placing under judicial supervision, and a judicial winding-up order.

Main Characteristics of the Slovenian Law on Responsibility of Legal Persons

The Slovenian framework for imposing liability against legal persons is found in the Law on Responsibility of Legal Persons for Criminal Offences (Official Gazette of the Republic of Slovenia nb. 59/99 from 23.7.1999). The Law is *sui generis* but it is also a complementary law since it comprises relevant provisions from substantive and procedural penal legislation. In this sense, the law supplements and complements the Criminal Code and Criminal Procedure Code. Unless a provision in the Law provides otherwise, the Criminal Code and the Criminal Procedure Code apply by analogy as subsidiary legislation and *legis generalis*. The Law is considered a part of Slovenian criminal legislation in a narrow sense (*i.e.*, it is a criminal law), a characterisation that has important consequences for investigations and mutual legal assistance. The Law does not replace or substitute the earlier system of administrative offences of legal persons.

The Law consists of the following main Parts:

- Basic Provisions: This Part deals with issues such as the validity of the law and statutory changes in the legal person.
- General Part: This Part covers issues that cannot be dealt with through the direct application of the Criminal and Criminal Procedure Codes, *e.g.* complicity, necessity, attempt, *de minimis* offences, statutes of limitation, sentence;
- Special Part: This Part includes a catalogue of criminal offences for which legal persons may be held responsible; and
- Procedural Provisions: Similar to the General Part, this deals with procedural issues that cannot be dealt with through the direct application of the Criminal Procedure Code.

The grounds for imposing liability are found in Article 4. A legal person shall be liable for a criminal offence committed by the perpetrator in the name of, on behalf of, or in favour of the legal person if:

1. The committed criminal offence involves carrying out an illegal resolution, order or endorsement of its management or supervisory bodies;
2. Its management or supervisory bodies influenced the perpetrator or enabled him or her to commit the criminal offence;
3. The legal person has illegally-obtained property gains at its disposal or uses objects gained through a criminal offence; or
4. The legal person's management or supervisory bodies have omitted mandatory supervision of the legality of the actions of employees who are subordinate to them.

Article 5 concerns the relationship between the liabilities of the legal and natural persons, and liability based on negligence:

1. Under the conditions from the preceding article, a legal person shall also be liable for a criminal offence if the perpetrator is not criminally liable for the committed criminal offence. In other words, the perpetrator must be identified but need not be convicted.
2. The liability of a legal person does not preclude the criminal liability of natural persons or responsible persons for the committed criminal offence.
3. A legal person may be liable for criminal offences committed out of negligence only under the conditions from point 4 of Article 4 of this Act. In this case the legal person may be given a reduced sentence.
4. If a legal person has no other body besides the perpetrator who could lead or supervise the perpetrator, the legal person shall be liable for the committed criminal offence within the limits of the perpetrator's criminal liability.

The Law provides for a range of sanctions and measures against legal persons, including:

- Fine
- Expropriation of property
- Winding-up of the legal person
- Suspended sentence
- Publication of a judgment
- Prohibition of a specific commercial activity
- Prohibition of further operations on the basis of licences, authorisations and concessions granted by a public authority
- Prohibition of the acquisition of licences, authorisations and concessions granted by public authority
- All other measures available in the Criminal Code, *e.g.* confiscation

The Act also includes some specific procedural rules for prosecuting legal persons. Proceedings against the natural and legal persons concerned should be unified (Article 27). A different rule on prosecutorial discretion, namely the opportunity principle, applies to proceedings against legal persons (Article 28). Other provisions deal with the representative of a legal person, the defence counsel, and the indictment. The Criminal Procedure Code applies to other procedural matters that are not expressly dealt with by the Law.

Specific Issues Concerning Prosecution of Legal Persons in Slovenia

Identification of the Perpetrator

The subjective/objective conception of a criminal offence (*mens rea / actus reus* in common law) means that, to constitute a criminal offence of bribery, there must be proof of both an act and a mental element. In the case of bribery, the subjective element is the intent to bribe (*dolus coloratus*).

Applied to prosecutions of legal persons, this concept requires the prosecutor to prove that a natural person has committed the criminal offence (though a conviction is not necessary). The “act” of a legal person, such as transferring money to the account of a public official who makes decisions concerning the legal person, may be perceived as bribery. However, this act alone cannot trigger the responsibility of a legal person for a criminal offence of bribery if the subjective elements of this particular crime have not been established. Instead, the prosecutor must identify an actual perpetrator and prove the perpetrator’s direct intent to bribe a public official.

Whether Actual Perpetrators Are Leading Persons or Employees

As noted earlier, Article 4 identifies four bases for imposing liability against a legal person. To establish liability against a legal person, the actual perpetrator does not have to be a leading person or employee of the legal person. However, in practice, the actual perpetrator in most cases is a director, manager or member of the leading person.

Identification of a Leading Person

The management and supervisory bodies of a legal person are usually prescribed and defined in the law, regulation or internal act of a legal person. However, a leading person for the purposes of imposing liability against a legal person need not be a body that is formally defined in the law, regulation or internal act of the legal person. In other words, a leading person may be someone who holds a *de facto* leading position.

What Are Major Problems with Respect to Drafting New Legislation in the Region?

Slovenia’s experience illustrates some potential issues when drafting legislation for imposing criminal liability against legal persons:

- Resistance because of the legal tradition against imposing (criminal) liability of a legal person: This could be addressed through careful drafting.
- Establishing a proper distinction between liability (guilt) of a natural person and a legal person: Liability against natural persons is based on moral culpability for the crime, while liability against legal persons is based on something less, such as the lack of supervision.
- Introduction of new offences instead of attaching a new type of liability to existing offences;
- Confusion and overlapping of administrative and criminal offences;
- Weakening the principle “*lex certa*” by applying provisions from the Criminal and Criminal Procedural Codes: This is the result of extensive application of both Codes to liability of legal

persons. This concern could be alleviated by providing for specific provisions in the law on liability of legal persons, rather than referentially incorporating the Codes.

- Responsibility for offences that are not committed by a leading person;
- It is preferable that liability may be imposed against legal persons for all crimes, rather than only for offences in a list or catalogue.
- Inconsistent and misleading use of terminology.

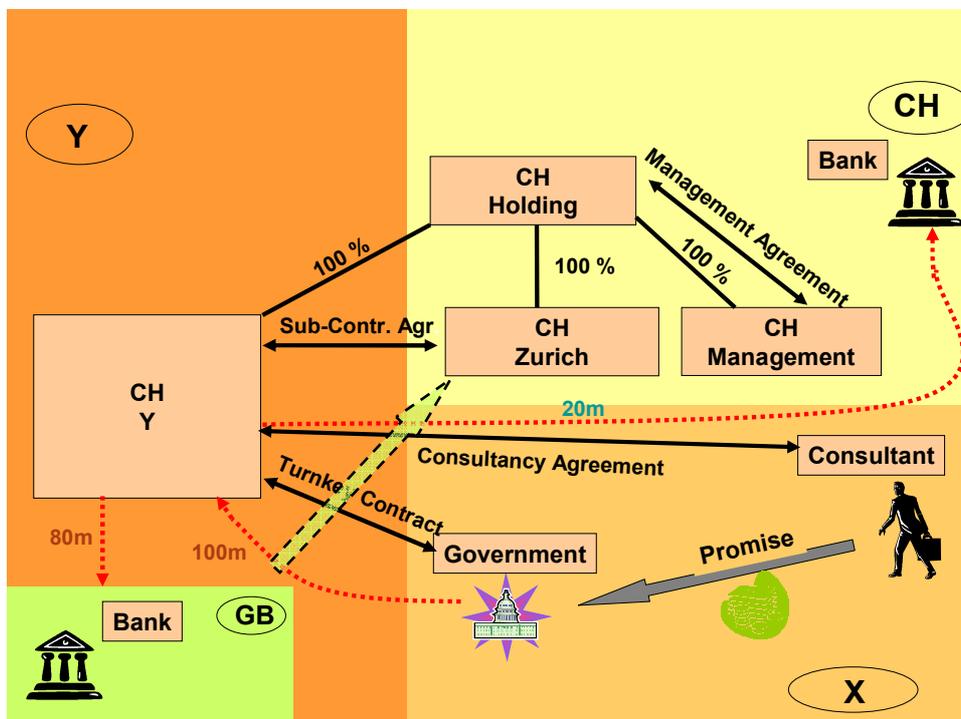
CHAPTER 2 CONFISCATING THE PROCEEDS OF CORRUPTION

Switzerland's Approach to Confiscation and Corruption-related Money Laundering

Mark Livschitz
Baker & McKenzie, Zurich, Switzerland

I. Introduction

Switzerland's approach to confiscation and corruption-related money laundering is best explained by means of the following sample case.



The CH Group is an enterprise in the business of constructions. Its parent company is CH Holding, domiciled in Switzerland. CH Holding is a mere holding company which holds a controlling interest in a large number of operative subsidiaries throughout the globe. The group has a subsidiary in Switzerland named CH Zurich, fully operative in the constructions business. The group is managed by CH Management in Switzerland under a management agreement between the latter and CH Holding. The management of the group is employed by CH Management and manages the group globally from within CH Management in Switzerland.

The executive board of CH Management instructs CH Y, a fully-owned subsidiary of CH Holding in jurisdiction Y, to retain a “consultant” in jurisdiction X. The consultant enters into a consultancy agreement with CH Y, where the consultant commits to promote CH Y’s construction business within jurisdiction X. CH Y commits to pay consultant a fee amounting to 20% of the gross deal value of a turnkey contract to be concluded between CH Y and the government of X if the contract is entered into as a result of the introductory services of the consultant. Subsequently, the consultant promises a bribe to certain officials within the government of X. As a result, the government of X enters into a turnkey

agreement with CH Y regarding the construction of a power plant against a consideration of USD 100 million. CH Y sub-contracts the construction work and related services fully to CH Zurich.

The government of X pays CH Y the consideration agreed; upon receipt of the same CH Y pays the consultant the consultancy fee due under the consultancy agreement amounting to USD 20 million. As per the consultant's instructions, the consultancy fee is transferred to a bank account within bank B in Geneva, Switzerland. The remaining contract price of USD 80 million is payable to CH Zurich under the sub-contractor's agreement, but CH Zurich does not require the funds immediately. The CFO of CH Group thus decides to transfer the USD 80 million to its bank in London, England, where a lucrative term deposit deal is available for as long as CH Zurich does not require the funds. From there, the funds will eventually be passed on to CH Zurich.

Suddenly, the Board of Directors of CH Holding learns about these occurrences. The consultancy agreement providing for a 20% consultancy fee raises a serious suspicion of bribery of foreign officials within the Board of Directors. The Board thus decides to stop the provision of services and works under the respective agreements and freezes the funds in the London term deposit. It seeks answers to the following questions: is the USD 80 million in the London term deposit subject to a confiscation claim of the Swiss judiciary? Will the use of these funds to pay for works provided under the respective agreements be considered money laundering? Can the payment of the consultancy fee of USD 20 million to the consultant's Geneva bank account raise money laundering issues?

In the following, we shall firstly analyze the issue of possible confiscation (below II) and thereafter look at potential money laundering issues (below III).

II. Confiscation of Proceeds and Tools of Bribery

A. Overview

Let us start with a generic overview of the requirements for confiscation of proceeds and tools of criminal offences under Swiss law:¹

- First, a predicate offence is required. The predicate offence does not need to be qualified, *i.e.* it does not need to be, for instance, a serious crime.
- Second, the predicate offence must fall under Swiss jurisdiction.² Switzerland would certainly claim jurisdiction if at least a part of the predicate offence has been committed on Swiss soil. But Swiss jurisdiction is also possible in certain instances where an offence is committed abroad, for instance, if a Swiss national travels abroad, commits an offence there and returns to Switzerland from where he cannot be extradited because the Swiss national refuses to consent thereto.³ In cases where the predicate offence is perpetrated abroad, dual criminality is required for Swiss jurisdiction. Dual criminality means

¹ As set forth in art. 70 of the Swiss Penal Code ("SPC") effective as of 1 January 2007, equaling in essence art. 59 of the former General Part of the SPC in force until 31 December 2006 ("Old SPC").

² Swiss Federal Supreme Court in: BGE/ATF 115 (1989) Ib 543.

³ Art. 7 para.1 and 2 SPC; See *inter alia* Eicker (2006), *das Schweizerische Internationale Strafrecht vor und nach der Revision des Allgemeinen Teils des Strafgesetzbuches*, in: *Schweizerische Zeitschrift für Strafrecht* 3/2006, p. 295 *et seq.*

that the conduct not only represents a criminal offence under Swiss law, but also under the law in the jurisdiction where the act occurred.⁴

- Third, we of course require assets that are to be confiscated and a nexus between these assets and the predicate offence. Such nexus means that the assets are either proceeds of the predicate offence or tools used to perpetrate the same.⁵

Upon fulfilment of these requirements, there is a confiscation claim of the Swiss judiciary, unless the following two exceptions apply: (i) the victim of the predicate offence has a restitution claim against the perpetrator or an abettor under private law, or (ii) the assets have been passed on to a third party who is protected in its good faith.⁶

These requirements respectively exceptions shall be analyzed in more detail simply by applying them to the case at hand.

B. Confiscating the Fee of the Consultant

1. Predicate Offence under Swiss Jurisdiction: General Delinquency Unlikely to Suffice

Let us assume that, under the pattern of facts presented at the outset, the enterprise “CH” or, as the case may be, its parent company CH Holding (or, as the case may be, the management company CH Management) is culpable for bribing a foreign official indirectly through the consultant as intermediary.⁷ Let us further assume that there would be Swiss jurisdiction over the enterprise “CH” and its bribing a foreign official, because the CH group is effectively managed from within Switzerland.⁸ In such a case the requirement of a predicate offence falling under Swiss jurisdiction would be unequivocally met.

However, criminal culpability of CH Holding and/or CH Management for the bribery at hand requires, among other things, that an *individual* within CH Group has accomplished both the *actus reus* and the *mens rea* of such bribery; in other words, criminal culpability of CH Holding and/or CH Management for the bribery would *inter alia* be the result of attributing to CH Holding and/or CH Management a bribery committed *individually*.⁹ What if no individual who is singly criminally liable for bribing foreign officials can be identified within CH Group, but instead it can *e.g.* only be established that someone from within the executive board of CH Management must have bribed, without having certainty who exactly it was? Such scenarios where an individual offence cannot be *clearly* attributed to a singly liable individual are quite common in corporate patterns of facts and are discussed by Swiss scholars under the term “general delinquency”; in cases of general delinquency the criminal liability of legal persons is controversial¹⁰ and

⁴ Stratenwerth (2005), *Schweizerisches Strafrecht, Allgemeiner Teil I*, Bern, § 5 N 21; Popp, *Grundzüge der internationalen Rechtshilfe in Strafsachen*, Basel/Geneva/Munich 2001, p. 134 *et seq.*

⁵ Stratenwerth/Wohlens (2007), *Handkommentar zum schweizerischen Strafgesetzbuch*, Bern, art. 70 SPC N 2 *et seq.*

⁶ Art. 70 para.1 and 2 SPC.

⁷ Art. 102 para.2 in connection with art. 322^{septies} para.1 SPC.

⁸ *Cf.* Jositsch (2004), *Das schweizerische Korruptionsstrafrecht*, Zurich, p. 451 with reference; as a result also: Schmid, *Strafbarkeit des Unternehmens: die prozessuale Seite*, in: recht 21/2003, p. 201 *et seq.*, 210.

⁹ Stratenwerth/Wohlens, *op. cit.* (fn 5), art. 102 SPC N 4.

¹⁰ Forster (2006), *Die strafrechtliche Verantwortlichkeit des Unternehmens nach Art. 102 StGB*, Bern, p. 160 *et seq.* with further references. According to the opinion advocated here, the theory of “general delinquency” is in many instances unlikely to stand before the principle of “*in dubio pro reo*”.

criminal culpability of an individual is clearly excluded. Would a predicate offence perpetrated only in the sense of general delinquency (and hence possibly the absence of criminal liability of both legal and natural persons) suffice in order to have the relevant proceeds and/or tools confiscated?

The controversy regarding general delinquency continues among scholars when it comes to confiscating assets or proceeds of crimes and proving to such end the existence of a predicate offence.¹¹ On the one hand, in case of a confiscation no sanction is directed against a person; rather, the confiscation is a criminal sanction *in rem*.¹² This stands in favour of admitting general delinquency when it comes to proving a predicate offence for a confiscation. There is also no defensible interest in abandoning the confiscation of assets that have a nexus with the predicate offence once the same is established *as such*, but can simply not be attributed to a singly identifiable individual. On the other hand, the proof of the predicate offence *as such* is hard to imagine without having regard to a specific perpetrator: a criminal offence is only proved “as such” if not only the *actus reus* but also the *mens rea* can be established,¹³ and establishing the *mens rea* without scrutinising a specific individual is in many cases unlikely to meet the standard of proof “beyond reasonable doubt” required by law. According to the opinion advocated here, it will as a rule not suffice to establish just general delinquency in order to prove an individual predicate offence as such, simply in view of the standard of proof required in criminal proceedings. Thus, in the author’s view, general delinquency will as a rule not only be insufficient in order to hold CH Holding and/or CH Management culpable for the bribery outlined in the sample case above, but equally in order to confiscate the relevant proceeds and/or tools because in essence it would result in basing a criminal sanction (although “just” *in rem*) on mere suspicion rather than on conclusive evidence. The issue is however open to debate, and should the Swiss courts ever hold that general delinquency with regard to the predicate offence would suffice in order to hold a legal person culpable for the same, the debate would in part become moot: then at least a predicate offence committed by a legal person could be established despite the absence of a conclusively identified physical perpetrator.

The confiscation of crime proceeds and/or tools does not, however, require that the perpetrator of the predicate offence be *sentenced*.¹⁴ It is possible that the predicate offence is proved as such (both in terms of *actus reus* and *mens rea* as well as in terms of absence of any legally recognised justification) and yet no criminal sanction can be imposed, *e.g.* because the perpetrator is insane, deceased or has escaped and, in case of a corporate perpetrator, a requirement other than the existence of an individual offence within the enterprise is not met (for instance if no organisational flaw within the enterprise was conducive to the bribery, *cf.* art. 102 para. 2 SPC). In such case the relevant proceeds and/or tools can be confiscated despite the absence of a criminal sanction against a natural or legal person, provided the remaining (affirmative and negative) requirements are met. These will be elaborated upon in the following.

2. Nexus of Assets with Predicate Offence

Let us assume that a predicate offence, namely the bribery outlined at the outset, could be proved at least “as such”. In such case the only remaining affirmative requirement for confiscation is a sufficient nexus

¹¹ Schmid, Kommentar Einziehung (1998), *Organisiertes Verbrechen, Geldwäscherei*, Vol. I, Zurich, art. 59 Old SPC N 25 footnote 122 with further references; Baumann, Deliktisches Vermögen, Diss. Zurich 1997, p. 15 with references; Arzt, Einziehung und guter Glaube, in: Schmid/Killias (eds.) (1996), *Le droit pénal et ses liens avec les autres branches du droit*, in *Mélanges Jean Gauthier*, Bern, p. 96 *et seq.*

¹² Unless, of course, a compensatory claim is enforced in lieu of confiscation: Stratenwerth/Wohlens, *op. cit.* (fn 5), art. 70 SPC N 4 with further references.

¹³ Ruling of the Swiss Federal Supreme Court in: BGE/ATF 129 (2003) IV 305 *et seq.*, 310 regarding art. 59 Old SPC.

¹⁴ Ruling of the Swiss Federal Supreme Court in: BGE/ATF 129 (2003) IV 305 *et seq.*; see also art. 69 SPC.

between the consultant's bank assets and the bribery of foreign officials. These bank assets are in part tools of the bribery (namely to the extent they are intended to be passed on to the foreign officials to whom bribes were promised), and are in part the price for the bribery paid by the enterprise "CH" respectively by the relevant individual(s) within "CH" to the consultant. The price for bribery is a sub-class of "proceeds of bribery" (namely from the consultant's perspective) and thus likewise regarded as sufficiently connected with the bribery respectively as subject to possible confiscation.

However, the consultancy fee paid into the consultant's Geneva bank account is not connected to the bribery and thus not subject to confiscation to the extent it represents a consideration at fair market value for real services provided, *i.e.* insofar as (i) the consultant provided real introductory services and (ii) the fee corresponds to a reasonable consideration for such services in view of the consultant's efforts and the deal value under free and fair market conditions (in markets without endemic corruption). In the case at hand, only a very small part of the fee would represent a fee of the consultant at arm's length (and not a bribe or a remuneration of the consultant for bribing), and thus only a small part of the fee would be *a priori* exempt from confiscation.

It remains to be verified whether the two exceptions to confiscation apply: restitution claim of victims of the predicate offence or good faith protection of third parties.¹⁵

3. Restitution Claims of Victims?

Let us first look at possible restitution claims of victims of the bribery.

a) *Restitution Claim of the Government of X*

Would *e.g.* the government of X have a restitution claim? Whereas in Swiss domestic corruption cases the state is never admitted as a victim (because the state receives the crime proceeds/tools anyway when they are confiscated), it makes sense to consider the victim's status of foreign jurisdiction X. In case of confiscation, X would not automatically receive the corresponding assets, not even within the framework of mutual legal assistance. In such a case, a Swiss confiscation claim in principle prevails over a foreign jurisdiction's request for repatriation of the funds,¹⁶ unless a sharing arrangement between Switzerland and the foreign country is negotiated.¹⁷

Indeed, foreign jurisdiction X is damaged as a result of the bribery, because the same resulted in an inflated consideration under the turnkey agreement with CH Y. Also, foreign country X does not appear to have acted *iure imperii* (*i.e.* within the framework of a relationship under public law) when negotiating and concluding the turnkey agreement: the turnkey agreement is a commercial contract, and also country X's liaising with the consultant must be regarded (from a Swiss perspective) as a relationship falling under private law. It is thus defensible to consider a possible restitution claim under private law of country X¹⁸ as a victim with regard to the consultant's Geneva bank assets.

¹⁵ Schmid, *op. cit.* (fn 11), art. 59 Old SPC N 66, 77.

¹⁶ Art. 74a para. 4 subpara. d. of the Swiss Federal Act on International Mutual Legal Assistance in Criminal Matters ("IMLA").

¹⁷ Schmid, *op. cit.* (fn 11), art. 59 Old SPC N 236 with further reference. Sure enough the foreign state requesting the sharing of the assets is to submit a final domestic court ruling ordering the confiscation of the assets frozen in Switzerland: art. 74a para.3 IMLA in connection with art. 33a of the Ordinance of the Swiss Federal Government on the IMLA.

¹⁸ If indeed existing under the legal provisions applicable to the case pursuant to the Swiss Federal Act on International Private Law.

However, in cases of bribery of foreign officials, the foreign states concerned do not, as a rule, put forth restitution claims under private law in their capacity as victims, so that in the sample case at hand, we can assume the hypothesis that country X will not file such claim.

b) *Restitution Claim of CH Holding or CH Y?*

How about CH Holding or CH Y? Would any of these companies be entitled to put forth a restitution claim as victims under private law? These companies could at first sight be victims of the scheme because they had to pay exorbitant consultancy fees. Both, or as the case may be, only either of the companies could be victims to the extent they effectively paid the consultancy fees.

It must be emphasised that these companies can only be considered victims if they were compliant with the organisational requirements¹⁹ in place, in order to prevent bribery under the Swiss rules on criminal liability of legal persons for corruption (art. 102 para. 2 SPC), *i.e.* if in these companies a relevant code of conduct existed and was effectively enforced so that the bribery committed appears to be a private offence of a savage individual who broke ranks, and not the result of an unlawful organisation within the enterprise. Only in such a case can the respective company be considered a victim and not a corporate perpetrator of the bribery.

The improper payment made (indirectly, through the consultant) to the foreign officials shall always be considered a damage to the compliant company even if, from a strictly economic perspective, the improper payment resulted in the awarding of a lucrative contract to the enterprise (and thus, without the improper payment the company would have had less income than as a consequence of the same).²⁰

- Firstly, that is because under Swiss criminal law, a damage is computed by comparing income/assets with and without the presumably damaging event, but income or assets that are not recognised by the legal system are not accounted for in such computation.²¹ Without accounting for the illegal profit made due to the bribery, the company's assets will of course be decreased as a consequence of the payment in question, and thus the company will be damaged.
- Secondly, the income (or at least net profit) generated as a result of the bribery is likely to be written off because in principle it is subject to confiscation (as will be elaborated upon below). Hence, also from a strictly economic perspective, CH Y or, as the case may be, CH Holding appears to be damaged as a result of the consultant's conduct.

In brief, if the CH Group were compliant with the relevant organisational requirements of Swiss criminal law and thus is not considered a corporate perpetrator of the bribery, the payment of the consultancy fees to the consultant would in principle be regarded as a damage of CH Group and/or CH Y and might give the relevant entity(s) of CH Group a basis to request restitution of the confiscated consultancy fee under the applicable private law provided that a cause of action exists under the same.

Let us assume hypothetically that none of the CH entities could put forth a restitution claim against the consultant under private law (because they must be considered corporate perpetrators of the bribery). In such case, most of the consultancy fee paid to the consultant is in principle subject to confiscation unless the fee was passed on to third parties in the meantime, who are protected in their good faith.

¹⁹ Geiger, *Organisationsmängel als Anknüpfungspunkt im Unternehmensstrafrecht*, Diss. Zürich 2006, p. 35 *et seq.*

²⁰ Forster, *op. cit.* (fn 10), p. 199 with references.

²¹ Stratenwerth/Wohlers, *op. cit.* (fn 5), art. 146 SPC N 12.

4. Good Faith Protection of Third Parties?

a) *Establishing the Paper Trail: Tainting Theories*

Let us assume for the sake of discussion that out of the USD 20 million received by the consultant, he makes the following two payments: first, he pays his ex-wife USD 5 million under a divorce settlement; second, the consultant buys a villa on the banks of Lake Geneva for USD 10 million. Can the USD 5 million paid to the consultant's ex-wife and the USD 10 million paid to the house vendor be seized and confiscated from the ex-wife and the vendor respectively?

To such end, it must first be ascertained whether the payments to the ex-wife and the house vendor are still considered to be connected to the predicate offence (the bribery). Let us look at the relevant bank transactions.

Assume that the consultant's Geneva bank account already had USD 30 million prior to receiving the USD 20 million consultancy fee. Upon receipt of that fee, the same was blended with the USD 30 million already in the account. Let us further assume that the USD 30 million already in the account were untainted funds. The interim result is an amalgamation of criminal and non-criminal assets in the same bank account, and the question is the extent to which the USD 20 million connected to a bribery taint the USD 30 million already in the account. Only to the extent that the payments to the ex-wife and the house vendor are paid from tainted assets and a paper trail from the predicate offence to the accounts of the ex-wife and the house vendor can be established, and only to such extent are the assets in principle subject to confiscation (unless the third party protection rule applies). As regards the degree of tainting of clean assets by assets deriving from criminal conduct, various theories exist in Swiss legal doctrine, and no case law has thus far established which theory prevails. Let us examine whether we can establish a paper trail to the bank accounts of the ex-wife respectively the house vendor under the most significant theories:²²

- Under the first theory ("last in first out"), one has to imagine the "dirty" USD 20 million floating on the surface of the bank account. Upon receipt of the USD 20 million, the subsequent payments are made out of this floating mass, so that the first payments in the aggregate amount of USD 20 million subsequent to the receipt of the consultancy fee should be considered as deriving from the consultancy fee or, in other words, fully tainted. Provided the USD 5 million paid to the ex-wife and the USD 10 million paid to the house vendor are transferred immediately after the receipt of the consultancy fee, these payments will be fully tainted and the paper trail leading to the bank accounts of the house vendor and the ex wife will be established. The house vendor and the ex-wife will be deemed to have received assets that are *in principle* subject to confiscation.
- Under the second theory ("last in last out"), one has to imagine the consultancy fee sinking to the bottom of the bank account. All payments made from the account subsequent to the receipt of the consultancy fee would thus be deemed as made from clean assets so long as they can be taken from the USD 30 million which were in the account already. In other words, as long as sufficient alternate assets are available in the account which enable payments without touching the USD 20 million received as a result of the bribery, payments made from the account will not represent transfers of tainted funds, and under the "last in last out" theory, no paper trail to the bank accounts of the ex-wife and the house vendor would be established provided that the relevant payments are made immediately upon receipt of the consultancy fee.

²² For an overview of the pertinent theories cf.: Giannini, *Anwaltliche Tätigkeit und Geldwäscherei*, Zurich 2005, 69 *et seq.*

- Under the prevailing tainting theory, the consultancy fee of USD 20 million would in any event taint the pre-existing USD 30 million in the account. Each payment made from the account after receipt of the consultancy fee would be proportionally tainted in the ratio corresponding to the assets deriving from the predicate offence and the pre-existing assets, or, in the case at hand, in the ratio of 40% to 60%. Under this theory, the payments to the house vendor and the ex-wife would be tainted in the amount of 40%, and to that extent, a paper trail to the bank account of these third parties would be established.²³

In brief, unless the “last in last out” theory was to apply, tainted assets would be transferred to the bank accounts of the house vendor and the ex-wife in the case under scrutiny and would thus in principle be subject to confiscation unless the ex-wife and the house vendor would be protected in their good faith, as will be elaborated upon below.

b) *Overview of the Requirements of Good Faith Protection*

A third party (*i.e.* a person who is neither a main perpetrator of nor a participant in the predicate offence as an abettor or instigator) is entitled to oppose the confiscation of the tools and/or proceeds of the predicate offence under the following conditions:²⁴

- The third party has acquired ownership (or quasi-ownership) of the funds under private law. The notion of quasi-ownership refers to the ownership of electronic funds in bank accounts because from a Swiss law perspective, ownership is limited to physical assets but assets booked electronically in bank accounts are treated in analogy to physical assets by case law and doctrine.
- In addition, the third party neither knows nor takes into account that the funds derive from a criminal offence.
- In addition, the third party has either given a return service (of economic value, *i.e.* not for instance, political protection or the like) at fair market value, or the confiscation would represent a disproportional hardship for the third party concerned.

Let us apply these requirements to both the house vendor and the ex-wife.

c) *Good Faith Protection of the House Vendor*

The house vendor has acquired ownership of the funds under scrutiny through blending, *i.e.* an amalgamation of the funds received with the existing funds in his account. The acquisition of ownership through blending of existing money with money received is a concept under Swiss customary law that is applied to both physical and (by analogy) electronic money. By the way, the consultant had already acquired ownership in the assets at stake through blending.

Let us furthermore assume that the seller of the house acted *bona fide*, *i.e.* had no knowledge and did not even take into account that the sale price he received for the villa derived from a criminal offence. Also, let us assume that the sale price agreed represented a consideration for the villa at arm’s length. Under these requirements, the seller of the villa would be protected in his good faith and the purchase price received in his bank account would not be subject to confiscation. However, the villa purchased by the consultant could still be confiscated by the Swiss judiciary because the same represents a so-called “proper substitute”

²³ Schmid, *op. cit.* (fn 11), art. 59 Old SPC N 64.

²⁴ Schmid, *op. cit.* (fn 11), art. 59 Old SPC N 81 *et seq.*

for the assets originally deriving from the criminal offence.²⁵ This proper substitute shall remain subject to confiscation so long as it is legally or beneficially owned by the perpetrator of the predicate offence (in the present case the consultant).²⁶

d) *Good Faith Protection of Ex-Wife Is Debatable*

Also, the ex-wife has acquired ownership in the USD 5 million transferred to her by means of blending, as the consultant had done previously and as the house vendor did. Let us furthermore assume that the ex-wife was in good faith when receiving the money as regards the nexus thereof with a criminal offence, *i.e.* she did not know or take into account that the funds derived from bribery. The problem that remains to be solved is that the ex-wife did not perform any return service (and hence no return service at arm's length) which would be a requirement for good faith protection against confiscation.

According to a part of the doctrine²⁷ the absence of a return service at arm's length does not prevent good faith protection of the recipients of assets connected to a predicate offence if these assets were transferred to the recipients on the grounds of a legal duty. In the case under scrutiny, the USD 5 million paid to the consultant's ex-wife would be the result of a divorce settlement and hence a legal duty of the consultant would be the reason for the payment. Under the theory mentioned, the ex-wife would be protected against confiscation if she received the money without knowing or taking into account the fact that it derive from a criminal offence.

According to another part of the doctrine, the mere fulfilment of a legal duty would not be sufficient to protect a recipient in good faith of criminally tainted assets.²⁸ In the absence of a return service by the recipient at fair market value, the only possibility to protect the recipient in his/her good faith would be a disproportionate hardship in case of confiscation. When duties under family law are fulfilled, such as the payment of alimonies, in theory, the confiscation of corresponding assets can indeed represent a disproportionate hardship for the recipient, in particular if recipient needs these assets in order to subsist. However, in the case under scrutiny it cannot be reasonably presumed that the consultant's ex-wife requires the full USD 5 million in order to ensure her subsistence, so that the funds in question would most probably to a very large extent not fall under the hardship exception.

The latter theory insisting on a return service at arm's length by the recipient of criminally tainted assets in order to protect him/her from confiscation appears to be more convincing than the opinion according to which the fulfilment of a legal duty would suffice for such protection. The confiscation regime aims at realising the principle according to which crime must not pay on the one hand and to implement a fair balance of the interests concerned on the other. Against this background, one fails to see why the consultant, who damaged both the government of X by artificially inflating the price of the turnkey contract and the shareholders of CH Holding (provided that CH Group was compliant with Swiss criminal law), by conspiring with its management in making an improper payment and by entailing the confiscation

²⁵ As opposed to substitutes *not* in the proper sense: physical money, checks, bank account balances and the like, *i.e.* instruments designed for payment transactions and easy circulation.

²⁶ Vest, *Anwendungsprobleme im Bereich der Geldwäscherei*, SJZ 2004, p. 53 *et seq.*, p. 54, as opposed to "substitutes not in the proper sense", which are in principle subject to confiscation regardless of their being legally or beneficially owned by the perpetrator provided the paper trail leading to the crime tools and/or proceeds can be established: Cassani, *Commentaire du droit pénal suisse*, Bern 1996, art. 305^{bis} SPC N 23; Stratenwerth/Wohlens, *op. cit.* (fn 5), art. 70 SPC N 5.

²⁷ Schmid *op. cit.* (fn 11), art. 59 Old SPC N 89.

²⁸ Greiner/Akiol, *Grenzen der Vermögenseinziehung bei Dritten* (Art. 59 Ziff. 1 Abs. 2 StGB), AJP 2005, p. 1348.

of the profit earned from the turnkey deal by CH group (as will be shown below) should fulfil his marital obligations from funds which he stole from his victims. Also, it is hard to appreciate why the consultant's ex-wife should profit from such funds even if the victims do not claim restitution thereof and even though the ex-wife acts *bona fide* if she has not performed any return service at fair market value. In such a case, the most equitable results seems to be the confiscation of the assets in question unless the result would be deemed a disproportionate hardship. It is only fair to confine the consultant to fulfilling his legal obligations from alternate, non-criminally tainted assets. Otherwise the crime would have paid off for the consultant.

To the extent the ex-wife would be protected against confiscation (because the court would either deem the case to be a disproportionate hardship²⁹ or if the court applies the first good faith protection theory mentioned above) the Swiss judiciary would have a compensatory claim against the consultant for the corresponding amount unless such compensatory claim would likely be unenforceable (because the consultant lacks sufficient assets) or if its enforcement would hinder the reintegration of the consultant.³⁰

5. Excursus: Confiscation of Consultancy Fee Prior to Its Payment?

Let us take the issue of confiscating the consultant's fee one step further by making the following hypothesis: let us assume that the consultancy fee has not yet been paid by CH Y, but the consultancy agreement providing for the 20% fee has already been concluded and the consultant has already promised the bribes to his contact persons within the government of X. Can the consultancy fee be confiscated within CH Y prior to its payment to the consultant?

Under Swiss law, the offence of bribing foreign officials can be completed at a very early stage, namely as soon as such bribe has been promised. As of that very moment, the assets intended to fulfil such promise and to remunerate the corrupt consultant for his service (in the case at hand, the USD 20 million payable to the consultant) have a nexus to the bribery (as partly tools, partly a price for the bribery). At this point in time, the USD 20 million becomes subject to confiscation under the requirements outlined earlier.

It is disputed among scholars whether the amount corresponding to the bribery must already be separated from the remaining assets of the (direct or indirect) briber (in our case, CH Y)³¹ or whether confiscation is also possible failing such separation.³² The question has not yet been decided by the courts, but one fails to see why a separation is necessary: as has been explained earlier bribes may be confiscated if they are blended with "clean" assets once the bribes are paid; there is no identifiable reason why the same bribes should be treated differently before payment, provided that the offence of bribery is accomplished (as a result of the bribes being promised).

As a result, let us keep in mind that, upon promising the bribe, the corresponding amount is in principle subject to confiscation within the bank account(s) of CH Y in the case at hand. According to the opinion defended here, this applies regardless of a separation of the intended bribe (*e.g.* by creating a slush fund or the like).

²⁹ Greiner/Akiol, *op. cit.* (fn 28), p. 1346.

³⁰ Art. 71 SPC.

³¹ Jositsch, *Das Schweizerische Korruptionsstrafrecht*, Zürich 2004, p. 424.

³² Pieth, *Korruptionsgeldwäsche*, in: Ackermann/Donatsch/Rehberg (ed.), *Wirtschaft und Strafrecht*, Festschrift für Niklaus Schmid, Zurich 2001, p. 452.

C. Confiscating the Bribery Proceeds from CH Group

1. Theory of Direct Nexus?

Let us now look at the price paid by the government of X under the turnkey agreement. In principle, these funds are subject to a Swiss confiscation claim because they derive from a predicate offence under Swiss jurisdiction (as has been explained earlier) and represent proceeds of that predicate offence. However, according to a part of the doctrine, proceeds of crime may only be confiscated if they are in a very direct nexus to the predicate offence.³³ A direct nexus between the predicate offence and its proceeds can for instance be established in case of a theft: the assets stolen are simultaneously the very object of the illegal conduct as well as its proceeds. In the case of bribery, the briber first bribes the official, the latter decides to award an agreement, the agreement is then executed by both parties, the contractor delivers legitimate work under the agreement, and only in consideration thereof does he receive the presumed proceeds of crime. Under the theory of direct nexus, such proceeds of bribery would not be sufficiently directly connected to the predicate offence and are hence in principle not subject to confiscation.³⁴

The theory of direct nexus is not convincing for two reasons: first, it would result in privileging crimes with a simple structure (such as theft) that have a very direct nexus between the *actus reus* and the proceeds on the one hand over more complex crimes such as bribery on the other. Such a privilege would be hard to appreciate because the proceeds of more complex crimes do not become more legitimate simply because they are harder to connect with the predicate offence. Second, Switzerland must in principle confiscate proceeds of bribery according to art. 3 para. 3 of the OECD convention on combating bribery of foreign officials in international business transactions. And it is clear that such proceeds are by no means limited to the actual bribe but include the profits earned as a result of the corrupt conduct of the bribed officials.³⁵

As an interim result, the price paid by the government of X under the turnkey agreement is in principle subject to a Swiss confiscation claim. However, given that this price was first received in an account within jurisdiction Y and thereby blended with non-tainted assets in the same account and only thereafter transferred to the London term deposit account of CH Y, let us examine whether we can establish a paper trail from the original consideration paid under the turnkey contract and the funds currently in the London term deposit account.

2. Establishing the Paper Trail

Let us assume that, just prior to receipt of the turnkey contract price of USD 100 million, CH Y had a balance of USD 40 million of “clean assets” in its account in jurisdiction Y. Immediately after receipt, CH Y paid the USD 20 million consultancy fee to the consultant and transferred the remaining USD 80 million to its London term deposit account.

A paper trail to the assets in the London term deposit account can be established despite the amalgamation of clean and tainted assets in the account within jurisdiction Y. Under the “last in first out” theory, the full USD 80 million sent to London would be tainted because the first USD 100 million leaving the account in jurisdiction Y after the receipt of the tainted USD 100 million from the government of X is considered tainted. Under the reverse “last in last out” theory, three quarters of the USD 80 million sent to London would be tainted because only the first USD 40 million leaving the account (namely the USD 20 million

³³ Schmid *op. cit.* (fn 11), art. 58 Old SPC N 23 and 26.

³⁴ Schmid, *op. cit.* (fn 11), art. 59 Old SPC N 36.

³⁵ Pieth, *op. cit.* (fn 32), p. 444.

paid to the consultant and the first USD 20 million out of the USD 80 million paid to the London account) would be deemed as deriving from the USD 40 million pre-existing balance of “clean funds” so that USD 60 million would be regarded as deriving from the bribery. Finally, under the theory of proportional tainting, the USD 80 million sent to London would be tainted to the extent of roughly 70%. Consequently, under any of the three tainting theories discussed, at least a significant part of the funds in the London term deposit account would be deemed proceeds of the bribery because the relevant paper trail could be established. Depending on which theory would be sustained by the court, the full USD 80 million or a part thereof would be confiscated.

3. Extraterritorial Confiscation

In the case under scrutiny, it would not be a problem for the Swiss judiciary to confiscate the funds within the UK. First, Switzerland has jurisdiction over the confiscation of the UK assets because the predicate offence falls under Swiss jurisdiction. Second, both the UK and Switzerland are signatory states to the Convention no. 141 of the Council of Europe on Money Laundering, Tracing, Seizure and Confiscation of Crime Proceeds dated November 8, 1990 (“the Convention”). Under art. 13 para.1 of the Convention, the UK would grant Switzerland mutual legal assistance as a matter of course: the UK court would either simply enforce the Swiss confiscation ruling (art. 13(1)(a) of the Convention) or would instead issue its own domestic confiscation judgment as a result of the Swiss MLA request (art. 13(1)(b) of the Convention). The UK Court would be bound by the facts ascertained in the Swiss confiscation ruling in either case.³⁶

4. Causal Nexus between Proceeds and Bribery Required

However, another argument might confine the confiscation of the London term deposit account.

According to unanimous doctrine,³⁷ no confiscation of the proceeds earned under the turnkey contract is possible if such a contract would have been awarded without the bribe. For instance, if the bribery resulted in a simple increase of the contract price but did not influence the decision to award the turnkey contract to CH Group, only the part of the contract price corresponding to the increase would be subject to confiscation. The full consideration could be confiscated only if the bribe engendered the decision to award the contract as such. The burden of proof as to the effect of the bribery (*i.e.* whether the same engendered the award of the deal as such or an increase of the price) lies with the prosecutor. On the one hand, the prosecutor might want to claim that the bribery in itself suggests an assumption of the bribe having had an effect on the official’s decision to award the deal. Also, the notion of bribery under Swiss law requires a *quid pro quo* between the undue favour promised or granted on the one hand and a discretionary or unlawful official conduct on the other. On the other hand, even if the court upholds such an assumption, the defendant may challenge the same by a simple positive balance of probability that, for instance, the deal would have been awarded anyway: *e.g.* by stating credibly that in a particular sector the capacities are extremely well-booked so that their particular customer would not have found a viable alternate contractor in due course, or because in the particular case the competitive offers were less beneficial to that client, or because the contractor in question is presently the only one in the market who is in a position to render the services contracted, or that in a complex transaction the bribery entailed only the awarding of a part of the contract whereas other parts of the transaction are unrelated to the granting of undue favours, etc.

³⁶ Cassani, *Combattre le crime en confiscant les profits: nouvelles perspectives d’une justice transnationale*, in: *Wirtschaftskriminalität/Criminalité économique*, Chur/Zurich 1999, p. 257 *et seq.*, p. 273 with reference.

³⁷ Pieth, *op. cit.* (fn 32), p. 449; Jositsch, *op. cit.* (fn 31), p. 425 *et seq.*

According to a minority opinion,³⁸ profits gained as a result of a discretionary decision of a public official could always be earned legally and are thus never subject to confiscation. This theory is not convincing for two reasons: First, proceeds of bribery in international business transactions are indeed quite often the result of discretionary decisions of officials, namely decisions to award a deal to the briber or to the entity represented by the same. Most corrupt proceeds would then *a priori* be exempt from confiscation, which would hardly be in line with article 3 para. 3 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Second, one fails to understand from a practical point of view why a discretionary decision might *always* have been obtained without the bribe.

5. Net Principle vs. Gross Principle

Let us assume in the case at hand that the prosecutor could prove that the turnkey agreement would not have been awarded to the CH Group without the bribe. The court would then have to decide whether it should confiscate the crime proceeds under the “net principle” or instead under the “gross principle”: Under the net principle, CH Y could deduct its expenses incurred in connection with the contract awarded. The Swiss judiciary would only confiscate the net profit. Under the gross principle, no deductions from the crime proceeds are allowed, and the gross crime proceeds are confiscated. The Swiss Federal Supreme Court has a general tendency to lean towards the gross principle,³⁹ but would in theory allow the net principle where the proceeds in question are not illegal as such (as would for instance be the case with the profits from drug sales or a fraud or with stolen money), but only the particular circumstances of the case make the proceeds illegal. In case of proceeds earned under a corrupt agreement, the proceeds as such are not illegal because there is nothing illicit in delivering work under a turnkey agreement against a consideration. This consideration is only illegal because it is the result of a bribery, *i.e.* only in view of the particular circumstances under scrutiny. This is why in cases of bribery the Swiss legal doctrine unanimously advocates confiscation according to the net principle only, *i.e.* allows deduction of the expenses incurred by the contractor for instance for sub-contractors, suppliers, etc. (but of course not of the bribe itself).⁴⁰ Confiscation of proceeds from a corrupt deal according to the net principle only is furthermore in line with case law of the Swiss Federal Supreme Court, according to which a contract awarded as a result of bribery is in principle fully valid provided Swiss contract law applies. The contract is only subject to cancellation by the entity in whose name it was awarded if the entity so decides based on material error or wilful deception.⁴¹ However, if the awarding entity opts for maintaining the contract in force, the briber and the enterprise to which the contract was awarded is fully bound to perform under the agreement. It would be totally inconsistent to maintain legal validity of the contract on the one hand and refuse to recognise the legality of related cost of performance on the other by confiscating the assets necessary to pay for the performance. This is another reason why also according to the opinion advocated here, only net principle confiscation is defensible as regards the proceeds earned under corrupt agreements.

One must keep in mind that confiscation under either the net or gross principle is in theory an extreme position. The court always has a margin of discretion to confiscate any amount between these two caps so that the legal reason for the confiscation regime - that crime should not pay - is best realised.⁴² The criteria for further use of such discretion will be, *inter alia*, whether the tools or price for the bribery have already been confiscated from the particular defendant (or a corresponding compensatory claim shall be enforced)

³⁸ Jositsch *op. cit.* (fn 31), p. 425.

³⁹ See *inter alia* Swiss Federal Supreme Court in: BGE/ATF 123 IV 73 *et seq.*

⁴⁰ Jositsch *op. cit.* (fn 31), p. 427; Pieth, *op. cit.* (fn 32), 449.

⁴¹ Swiss Federal Supreme Court in: 4C.352/2002 as well as BGE/ATF 119 (1993) II 380; art. 24 respectively 28 of the Swiss Code of Obligations.

⁴² Schmid *op. cit.* (fn 11), art. 59 Old SPC N 56.

and/or whether the confiscation might entail financial hardship for the perpetrator and the particular enterprise (which, according to the opinion defended here, is an obstacle to confiscation because the same must not hinder the re-integration of the person concerned).⁴³ Such margin of discretion allows the court to best customise its ruling in order to meet the relevant criteria of the law (crime should not pay, no disproportionate hardship, allow re-integration of the person concerned) on the one hand; on the other hand, it renders impossible to determine in advance the exact amount subject to confiscation. The defendant concerned will thus never know to what extent he/she moves assets subject to confiscation as long as the court has not decided on the same. This problem, the moving of assets subject to confiscation, brings us to the next topic, namely money laundering.

III. Money Laundering

A. Overview of Requirements

Under Swiss law, money laundering⁴⁴ is in essence any act that is adequate to thwart the confiscation of assets that derive from a so-called “serious crime”. In more detail, the requirements for money laundering are:⁴⁵

- A predicate offence that is characterised a serious crime under Swiss law. A serious crime is one where the sanction consists of a jail term in excess of three years.⁴⁶
- If the predicate offence has been committed abroad, double criminality of the conduct (both under Swiss law as well as the jurisdiction where the predicate offence was committed) is required. The characterization of the predicate offence as a serious crime is required under Swiss law only.
- A disposal of assets deriving from such a predicate offence.
- These assets are either tools or proceeds of the predicate offence as has been explained in more detail in the section on confiscation above.
- The disposal over these assets must be adequate to thwart their confiscation. It must be noted that under Swiss law, the perpetrator of the predicate offence can be his/her own money launderer⁴⁷ so that we shall not only be looking at disposals by third persons, but also (and in particular) at disposals by the perpetrator(s) of the predicate offence.
- In terms of *mens rea*, at least indirect intent is required. Indirect intent is when the perpetrator takes the result of his/her act into account.
- The act of money laundering must fall under Swiss jurisdiction.

⁴³ Art. 70 para.2 respectively art. 71 para.2 SPC.

⁴⁴ Art. 305^{bis} SPC.

⁴⁵ Stratenwerth/Wohlens, *op. cit.* (fn 5), art. 305^{bis} SPC N 1 *set seq.*; Cassani, *Commentaire (op. cit. at fn 26)*, art. 305^{bis} SPC N 6 *et seq.*; Giannini, *op. cit.* (fn 22), p. 57 *et seq.*

⁴⁶ Art. 10 para.2 SPC.

⁴⁷ Swiss Federal Supreme Court in: BGE/ATF 120 (1994) IV 323 *et seq.*

In the following we shall examine whether according to this checklist, acts of money laundering have been committed with regard to the consultancy fee (below at B) as well as with regard to the proceeds earned under the turnkey contract (below at C).

B. Money Laundering of Consultancy Fee

1. Bank Transfer into Switzerland Might Represent Money Laundering

The consultancy fee of the consultant derives from a predicate offence committed in Switzerland which is characterised as a crime in the sense of art. 10 para. 2 SPC (jail term in excess of 3 years, see art. 322^{septies} SPC), as already results from the analysis in relation to the confiscation of the fee made earlier. It has also been explained that the consultancy fee represents assets deriving from a crime prior to its payment to the consultant as soon as the bribe has been promised because at that stage bribery is already accomplished. Against this background, paying the consultancy fee represents a disposal of assets subject to confiscation, and from a money laundering point of view, the question is whether such disposal is adequate to thwart the confiscation. In the affirmative, the *actus reus* of the Swiss money laundering provision is accomplished, given that not only third parties, but also the perpetrators and abettors of the predicate offence are possible money launderers.⁴⁸

Disposals adequate to thwart the confiscation are typically interruptions of the paper trail by means of cash withdrawals, bank transfers to foreign accounts (because enforcing confiscation claims abroad is relatively burdensome even if a relevant MLA treaty is in place), a transfer of the assets to a fiduciary (where the beneficial ownership is concealed and hence the tracing of the assets is hindered), and in some instances, even bank transfers from foreign jurisdictions into Switzerland: the Swiss money laundering provision protects foreign confiscation claims against hampering too where Switzerland would grant MLA⁴⁹ so that a transfer of assets from foreign banks into Swiss bank accounts is critical under Swiss law when the jurisdiction of origin has a confiscation claim. Certainly, most well-known practices of professional money launderers will fall under the notion of “disposal adequate to thwart confiscation”, such as “smurfing”, change or run-through transactions etc., but these practices will not be elaborated upon in the present context.

In the case at hand, the fee was transferred from the bank account of CH Y to the Swiss bank account of the consultant. Under the hypothesis that the government of Y has a confiscation claim with respect to the consultancy fee under scrutiny (already before the same is paid), its transfer to Switzerland would indeed be adequate to hamper such confiscation claim because obviously for the government of Y, it is more burdensome to have the funds seized and confiscated (and thereafter repatriated) as a result of their transfer to Geneva, than in case they remained within jurisdiction Y. Not so, if jurisdiction Y would not have a confiscation claim with regard to the consultancy fee: in such case the receipt of foreign assets in a Swiss bank account would by no means hamper a Swiss confiscation claim in respect thereof, and typically the mere receipt of assets in a bank account does not accomplish the *actus reus* of money laundering under Swiss law in the absence of any additional acts of concealment (such as the transfer to a fiduciary or a shell company without disclosing to the bank the real beneficial ownership).

⁴⁸ The prevailing legal doctrine criticises the case law of the Swiss Federal Supreme Court (in particular BGE/ATF 120 (1994) IV 323 *et seq.*) according to which (i) the perpetrator of the predicate offence can be his/her own money launderer and (ii) in theory money laundering can be committed with regard to the bribe prior to or at the time of the payment of the same: Jositsch *op. cit.* (fn 31), p. 430 *et seq.*; Pieth, *op. cit.* (fn 32), 451 *et seq.* The Swiss Federal Supreme Court maintains its case law despite such criticism.

⁴⁹ Swiss Federal Supreme Court in: BGE/ATF 126 (2000) IV 263.

How about hampering of confiscation claims of the government of X? Provided such confiscation claims exist, the consultancy fee was never on the soil of jurisdiction X. It was abroad – within jurisdiction Y – when the bribe was promised, and was likewise abroad – in Switzerland – when the assets intended to finance the bribe and to pay consultation for his “services” were received in the Geneva bank account. One fails to appreciate why from the point of view of the government of country X the mere bank transfer of tainted assets from one foreign country to another would – in the absence of specific acts designed to conceal these assets (such as the creation slush funds and the like) – be adequate to thwart their confiscation. For the sake of clarity it must be pointed out that the above discussion does not depend on whether the relevant foreign jurisdictions indeed put forth a confiscation claim; the question is whether in theory they have one, because the *actus reus* of money laundering does not require an *imminent* thwarting of confiscation under Swiss law, but rather a *potential* thwarting thereof suffices.

As an interim result, it can be established that a transfer of the consultancy fee by CH Y to the consultant’s Geneva bank account might accomplish the *actus reus* of money laundering under Swiss law, depending on whether the foreign jurisdictions involved have (in theory) confiscation claims with respect to that fee. Provided that the *mens rea* can be established with the persons involved in the transfer within CH Y, the offence of money laundering would be completed simultaneously with the payment of the consultancy fee (which in reality mostly consists of funds intended to be used for bribing and of the consultant’s remuneration for bribing). This is a logical consequence of the theory advocated by the Swiss Federal Supreme Court according to which the perpetrator of the predicate offence can be his own money launderer.⁵⁰

2. Swiss Jurisdiction

It remains to assess whether the Swiss judiciary would have jurisdiction over such money laundering case. As opposed to confiscation, Swiss jurisdiction over the predicate offence would not suffice here; Switzerland would have to claim jurisdiction over the actual *actus reus* of money laundering. Unless a Swiss national is involved in any foreign act and, after having committed the act abroad, returns to Switzerland (or unless a Swiss national can be deemed a victim of the money laundering), Swiss jurisdiction would depend on committing the *actus reus* on Swiss soil.⁵¹

In the sample case at hand, the individuals involved were not acting on Swiss soil, but rather abroad (at least under the hypothesis that the *actus reus* of money laundering would consist of a mere bank transfer from a foreign account into Switzerland, thereby hampering a foreign confiscation claim, without additional acts of concealment within Switzerland). In particular, art. 8 SPC, according to which an act is deemed committed both where the conduct actually occurs and where its result is materialised, does not change this assessment in the case of money laundering given that the offence of money laundering does not produce a result separate from the actual act.⁵² However, according to a part of the doctrine (and some case law), even in the absence of a separate result in Switzerland, it would suffice for Swiss jurisdiction that the effect of potentially hampering a confiscation claim would be manifested in Switzerland. Hence it would suffice for Swiss jurisdiction that a Swiss bank account is involved in the money laundering scheme (even as a mere recipient of a bank transfer or even as a transit account).⁵³ According to the opinion

⁵⁰ See above at footnote 48.

⁵¹ Art. 3 SPC, art. 7 para.1 and 2 SPC.

⁵² Ackermann (1998), *Kommentar Einziehung, Organisiertes Verbrechen, Geldwäscherei*, Vol. I, Zurich, art. 305^{bis} SPC N 246.

⁵³ Cassani, *op. cit.* (fn 36), p. 264 *et seq.* with reference to a non-published ruling of the Swiss Federal Supreme Court dated September 29, 1997 in the matter of Cuperstein and Feuer vs. the Attorney General of the Canton of Geneva.

defended here, this interpretation is extremely broad and lacks a sufficiently specific legal basis as would be required under the principle of legality (“*nulla poena sine lege* – no sanction without legal basis”). In the absence of specific acts designed to conceal assets or thwart their confiscation taking place on Swiss soil, Switzerland would not have jurisdiction over that money laundering case,⁵⁴ but would only be limited to providing MLA by, for instance, seizing the relevant bank accounts and repatriating the assets concerned if a foreign jurisdiction so requests.⁵⁵

C. Money Laundering of Turnkey Proceeds

Finally, let us look at the proceeds from the turnkey contract frozen in CH Y’s London term deposit. The “80 Million Dollar Question” for CH Group is obviously: Can they transfer the funds to Switzerland in order to pay for CH Zurich’s work in connection with the turnkey agreement with the government of X? Assuming this agreement is governed by Swiss law, it is fully enforceable unless the government of X challenges the same because of material error or deception.⁵⁶ And assuming the government of X does not challenge the agreement but instead insists on the work agreed, the possibility to use the USD 80m at stake might be critical for the financial standing of CH Group.

We remember that at least a part of the USD 80 million is subject to a Swiss confiscation claim.⁵⁷ Their transfer to Switzerland would not yet potentially hamper such confiscation claim and would thus not represent an act of money laundering. However the subsequent use of the funds in order to pay suppliers, sub-contractors of CH Zurich and the like would certainly be adequate to frustrate such confiscation claim: all these recipients of payments would as a rule (i) render a return service at arm’s length and (ii) neither know nor should have known of the dubious origin of the funds. In view of the good faith protection rules outlined earlier,⁵⁸ the funds could no longer be confiscated once received by those suppliers, sub-contractors and the like. Thus the use of the proceeds from the turnkey agreement in order to pay for the services due under the same would in principle represent an act of money laundering *to the extent the funds are subject to confiscation*. The question is now: to what extent are the funds subject to confiscation and can CH Group dispose of the remaining part of the assets without committing money laundering?

⁵⁴ In essence likewise: Ackermann, *op. cit.* (fn 52), art. 305bis SPC N 495. However, the mere use of Swiss bank accounts to transfer bribes would suffice to constitute Swiss jurisdiction over the corresponding *bribery case*: Jositsch *op. cit.* (fn 31) p. 450 with further reference. This difference between money laundering and bribery is on the one hand due to the different structure of these offences (the receipt of the bribe in a bank account is part of the corrupt conduct, as opposed to money laundering where the mere receipt of money is in itself not yet an act of money laundering); on the other hand, art. 4 no. 1 of the OECD Convention imposes a broad interpretation of the principle of territoriality when it comes to ruling over bribery cases: Jositsch, *op. cit.* (fn 31), p. 179 with references.

⁵⁵ Art. 74a para.3 IMLA / art. 33 a of the Ordinance of the Swiss Federal Government on the IMLA as well as under the relevant international treaties: *cf. inter alia*: Forster, *Internationale Rechtshilfe bei Geldwäschereiverdacht*, ZStrR 2006, p. 274 *et seq.* Often such MLA requests are triggered by information submitted to the relevant foreign jurisdiction by a Swiss prosecution authority *sua sponte* pursuant to art. 67a IMLA. Under this provision however, a Swiss authority may only remit information previously introduced in its own Swiss domestic proceedings (and thus in cases where Switzerland has domestic jurisdiction) spontaneously to foreign states: Popp, *op. cit.* (fn 4), p. 356.

⁵⁶ Swiss Federal Supreme Court in: 4C.352/2002 as well as BGE/ATF 119 (1993) II 380; art. 24 respectively 28 of the Swiss Code of Obligations.

⁵⁷ For purposes of keeping the discussion simple we shall not deal with any possible confiscation claims of the UK.

⁵⁸ *Supra* II.B.4.

As explained above, the determination of the part of the funds that is subject to confiscation will depend on (i) which tainting theory applies⁵⁹ and (ii) whether the funds will be confiscated under the net or the gross principle.⁶⁰ The answers to both questions are uncertain: the debate on tainting theories has not been resolved by the courts yet, and although scholars unanimously advocate confiscation under the net principle in bribery cases, the courts always have a margin of discretion to assess any amount to be confiscated anywhere between the gross and net proceeds in order to best address the specific circumstances of the case.⁶¹ In view of these uncertainties, the disposal of any part of the assets at hand might *potentially* thwart their confiscation, which is however enough to accomplish the *actus reus* of money laundering. Also, according to a precedent by the appellate court of the canton of Basel-Landschaft, the disposal of any part of the assets would be characterised as money laundering regardless of whether the net or gross principle applies to their confiscation.⁶²

Sure enough, this situation is awkward: on the one hand, the legal system obliges the CH Group to perform under the turnkey agreement because it considers the same in principle enforceable. On the other hand, the law prohibits CH Group from using the consideration received under the same agreement to pay for the performance thereunder. Rather, the legal system must recognise the lawfulness of these payments made in order to discharge legally binding duties clearly connected with the funds in question. Under the opinion advocated here, the use of proceeds from an agreement won through bribery in order to pay suppliers and sub-contractors within the framework of the performance thereunder never represents money laundering; only the use of the remaining proceeds, the actual net profit, might accomplish that offence provided all relevant requirements are met. However, the issue remains open to debate.

IV. Conclusion

Any legal system dealing with the confiscation and laundering of criminal assets should strive for a reasonable degree of certainty when it comes to defining the *corpus delicti*, *i.e.* the funds subject to confiscation and money laundering. This definition depends (i) on clear rules on the tainting of assets and (ii) on a foreseeable calculation of the amount subject to confiscation (gross or net principle, exemption of payments made to fulfil enforceable obligations within the framework of the corrupt deal, etc.). Also, confiscation of criminal funds (and thus also their laundering) should be strictly limited to the extent necessary in order to achieve the legal purpose of confiscation: crime should not pay. For such purpose, it will as a rule be unnecessary to confiscate more than just net profits made from unlawful transactions, unless a proper criminal organisation is concerned. In the absence of such clear rules and limitations (and as a result of too much discretion accorded to the courts in that regard), the legal regime regarding confiscation and money laundering will not only represent an unreasonable burden for the economy. Also, the prosecution authorities will in many cases refrain from moving for the confiscation of criminal assets in court simply because the identification and/or computation of these assets is unreasonably complex (and as a result the courts will in many cases not have any opportunity to fix the flaws mentioned above). Sadly enough, the latter is the case in Switzerland.⁶³

A legislator who would like to avoid such a situation should explicitly address the typical issues related to confiscation and money laundering: to opt for one tainting theory, to define exactly what deductions (if

⁵⁹ *Supra* II.C.2.

⁶⁰ *Supra* II.C.5.

⁶¹ *Supra, ibid.*

⁶² Ruling dated June 29, 1993, in: SJZ 1994, p. 331 *et seq.* In support of the result (although not of the rationale): Ackermann, *op. cit.* (fn 52) N 230.

⁶³ Jositsch, *op. cit.* (fn 31), p. 426 with references (in footnote 2031).

any) can be made when it comes to confiscating criminal assets, and to find appropriate solutions to the question of enforcing corrupt agreements and (in case such agreements are enforceable) to the use of the considerations paid in order to ensure the performance under the agreements. Any relevant (and in theory overdue) initiative of the Swiss legislator would be more than welcome.

The Extended Power of Confiscation of Crime-Related Proceeds

Rafał Kierzyńska
Ministry of Justice, Poland

1. Outline of the Problem

The main purpose of many criminal offences is a material gain. The desire of material benefit makes offenders commit different types of the illegal actions: crimes, misdemeanours, petty offences and so on. However, the gain is not only the result of the illegal deed. Especially regarding organised crime, the illegal gain is also the material basis for developing further criminal activity, committing additional crimes and launching new attacks against the public.

Thus, the gain from the crime has dual meaning: it is the aim and purpose of the perpetrator as well as the factor creating further opportunity for other criminal actions.

For this reason, the idea of confiscation of crime-related proceeds also has multiple rationales. The first aim is to punish. Confiscation of proceeds of crime serves perfectly a dissuasive function. However, the second aim of confiscation – prevention - is not of a lesser significance. The forfeiture of criminal benefits, especially if it concerns organised crime groups, effectively decreases the perpetrator's ability to organise and execute new actions against the public.

Last but not least, the confiscation of crime-related proceeds can be, and often is, a source of the state's revenues. In some European countries, e.g. Italy, confiscated property is used to create a special solidarity fund for victims of crime, who may apply for lump sum compensation for damage caused by the offender.

Hence, effective forfeiture of proceeds of crime is a very important and significant measure for counteracting criminal activity. This is well-known among judges, police officers, and public servants, but also criminals.

In some sense, a democratic state is in a "weaker" position than the criminals whom it fights. A democratic state must observe the rule of law while criminals do not respect any law. The state must act according to appropriate legal procedures, while those who attack it know no procedural limits and pursue only the purpose of their criminal activity. Therefore, judges, the police and the public service must constantly look for new, effective measures to counteract crime and steadily improve existing ones.

One of the biggest obstacles to effective confiscation is proof of the connection between the crime and the gain. Courts all over the world have found it difficult to prove that the offender's property is the result of his or her criminal activity. The rule "*nulla poena sine crime*" ("no punishment without crime") has been known and applied for more than 2 000 years. No judge or magistrate can or want to question it. However, since the traditional understanding of confiscation is focused on its function as a penalty, *nulla poena sine crime* is understood to mean: "No confiscation shall be imposed unless it is doubtlessly proven that the property of the offender is the proceeds of this crime for which he or she has been judged and sentenced".

The second basic rule of criminal proceedings that is of interest is the onus of proof. Throughout criminal proceedings, the onus is on the public authorities: on the court and the prosecutor to act; on the prosecutor to gather and submit the evidence; and on the court to prove the guilt of the offender. The accused need not undertake any activity during the trial. He or she is neither obliged to play any active role within the litigation nor to submit any evidence. This fundamental right of the accused must be respected by all democratic legal regimes. Again, the traditional interpretation of the rule on the onus of proof is very

broad. Thus, the rule concerns not only the question of guilt, but all of the factors constituting the final judgement, including confiscation.

These rules are of absolutely fundamental significance in criminal proceedings. Furthermore, when the question of guilt is concerned, these rules must not allow for any exceptions.

However, as aforementioned, confiscation is not only a penalty. Its meaning and role is much broader. Moreover, like any other penal measure, confiscation may be imposed only after a court has delivered a guilty verdict. Because of this, the understanding and scope of these two rules have recently changed for the purpose of forfeiture.

This is the reason. In my professional experience as a judge, proving guilt is not necessarily the most difficult part of the trial. Very often the evidence is clear, the witnesses are convincing and the documents are reliable. Thus, sometimes it is quite easy to prove that the offender has committed the crime of which he or she has been accused.

Much more difficult questions are: What was the total gain of this crime? What were the benefits from the criminal activity? Was the property of the sentenced person purchased with proceeds of crime? What exact part of the property came from the crime for which the accused has been convicted?

Sometimes the court can answer these questions based on the evidence submitted in the trial. The solution then is simple. A crime has been committed. Accordingly, there must be a penalty and confiscation of the fruits of the crime. The problem occurs when there is no clear connection between the crime and the perpetrator's property.

Very often, the public authorities suspect or even know that the offender obtained his or her property from the crime-related sources. Very often, he or she has been sentenced for the crimes, but there is no means of proving that the property comes only from these crimes.

Consider the following example: the court is trying a person accused of operating an extortion racket. The value of racket is \$100 000. His property – money, house, cars, jewellery and paintings – is valued at \$1 000 000. He does not work and has no legal income from other sources. He is also the well-known boss of the local mafia.

What can the court do if the racketeering is proven and the accused is sentenced? According to the traditional model of forfeiture, the court can confiscate only \$100 000, as this was the value of the proceeds of the crime for which the perpetrator has been convicted. The rest of the assets remain with the offender and may be used as the financial basis for further criminal activity.

What then are the obstacles to an effective confiscation law? Both were aforementioned: the traditional, broad interpretation of the basic rules of “no punishment without crime” and the onus of proof.

It must be underlined that the re-definition of these rules does not concern the question of guilt. It is doubtless that both the rules must be strictly applied on the question of guilt. However, for the purpose of confiscation, some changes are required and appreciated.

2. The United Nations Conventions Against Corruption and Transnational Organized Crime

A signal of a change in the approach to the problem is found in the United Nation Convention Against Transnational Organized Crime signed on 15 December 2000 in – symptomatically – Palermo, Sicily, the heart of Italian Mafia. The key provision is Article 12, particularly paragraph 7.

Article 12

Confiscation and Seizure

1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;

(b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.

...

7. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.

The Convention thus reverses the usual onus of proof by requiring that an offender demonstrate the lawful origin of property liable to confiscation. An identical provision can be found in Article 31(7) of the more recent United Nations Convention against Corruption signed on 29 September 2003. These two UN Conventions are not the only ones that deal with the diversion of the burden of proof, but they are probably the most important ones relating to this issue.

3. European Union Law

The recent Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property deal fully with the traditional rules of “no punishment without crime” and onus of proof:

Article 2

Confiscation

1. Each Member State shall take the necessary measures to enable it to confiscate, either wholly or in part, instrumentalities and proceeds from criminal offences punishable by deprivation of liberty for more than one year, or property the value of which corresponds to such proceeds.

...

Article 3

Extended Powers of Confiscation

1. Each Member State shall as a minimum adopt the necessary measures to enable it, under the circumstances referred to in paragraph 2, to confiscate, either wholly or in part, property belonging to a person convicted of an offence

(a) committed within the framework of a criminal organisation as defined in Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, when the offence is covered by [various Council Framework Decisions on counterfeiting, money laundering, proceeds of crime, trafficking in human beings, sexual exploitation of children and child pornography, and drug trafficking],

(b) which is covered by the Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism,

provided that the offence according to the Framework Decisions referred to above

— regarding offences other than money laundering are punishable with criminal penalties of a maximum of at least between 5 and 10 years of imprisonment,

— regarding money laundering, are punishable with criminal penalties of a maximum of at least 4 years of imprisonment,

and the offence is of such a nature that it can generate financial gain.

2. Each Member State shall take the necessary measures to enable confiscation under this Article at least:

(a) where a national court based on specific facts is fully convinced that the property in question has been derived from criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively,

(b) where a national court based on specific facts is fully convinced that the property in question has been derived from similar criminal activities of the convicted person during a period prior to conviction for the offence referred to in paragraph 1 which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively,

(c) where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court based on specific facts is fully convinced that the property in question has been derived from the criminal activity of that convicted person.

3. Each Member State may also consider adopting the necessary measures to enable it to confiscate, in accordance with the conditions set out in paragraphs 1 and 2, either wholly or in part, property acquired by the closest relations of the person concerned and property transferred to a legal person in respect of which the person concerned - acting either alone or in conjunction with his closest relations - has a controlling influence. The same shall apply if the person concerned receives a significant part of the legal person's income.

4. Member States may use procedures other than criminal procedures to deprive the perpetrator of the property in question.

4. Examples of the Implementation of the EU Law

The following are some regulations on forfeiture found in continental European law. This discussion does not concern the United Kingdom or Ireland, although both countries have their own regulations (the Irish “Proceeds of Crime Act” from 1996, and the British Act of the same name from 2002).

4.1. Finland

The Finland’s Penal Code largely repeats the Council Framework Decision:

Chapter 10 - Forfeiture (875/2001)

Section 3 - *Extended forfeiture of the proceeds of crime* (875/2001)

(1) A full or partial forfeiture of property to the State may be ordered

(1) on a person who is found guilty of an offence which carries a possible penalty of imprisonment for at least four years, a punishable attempt of such an offence, or an offence referred to in chapter 32, sections 1 or 6, chapter 46, section 4, chapter 50, sections 1 or 4, of this Code, or in section 82 of the Alcohol Act (459/1968), and

(2) on a participant in an offence referred to in paragraph (1) above and on a person on whose behalf or to whose advantage the said offence has been committed,

provided that the nature of the offence is such that it may result in considerable financial proceeds and that there is reason to believe that the property is fully or partially derived from criminal activity that is not to be considered insignificant. (61/2003)

4.2. Lithuania

The relevant provisions of Lithuania’s Penal Code allows for the forfeiture of the property of a convicted person. However, the law is silent on shifting the onus of proof:

Article 72 – Confiscation of Property

2. Confiscation of property is applicable only in respect of property used as an instrument or a means to commit the crime or which is acquired as the result of a criminal act. The court must order compulsory confiscation of:

1) money or other property that has material value, which was delivered to the defendant or his accomplice for the purpose of commission of a criminal offence;

2) money or other property that has material value, which was used in committing a criminal offence;

3) money or other property that has material value, which was acquired through a criminal offence.

4.3. Hungary

Hungary's Penal Code provides for forfeiture of assets obtained by a person while he/she was involved in a criminal organisation. Furthermore, all assets acquired by the person during his/her period of involvement are presumed to be subject to forfeiture, although this presumption may be rebutted:

Section 77/B

(1) Forfeiture of assets shall be provided for

- a) assets originating from a criminal offence obtained by the perpetrator either in the course of or in relation to his criminal act,
- b) assets obtained by the perpetrator while he/she was involved in a criminal organisation,
- c) assets, which replaced assets originating from a criminal offence, being obtained in the course of or in relation to the perpetration of a criminal act,
- d) assets, which were made available or were intended to provide the conditions required, or designed to facilitate the perpetration of a criminal act,
- e) any property embodying the subject of financial gain.

...

(4) Unless proven otherwise, in the case of paragraph (1), point (b), all assets obtained while being involved in a criminal organization shall be regarded as assets subject to forfeiture.

(5) No forfeiture shall be ordered with respect to assets that

...

- c) in case of paragraph (1), point (b), if the lawful origin of the assets is proven.

4.4. Poland

Poland's Penal Code reverses the onus of proof by presuming that property received by the perpetrator during and after the commission of an offence is subject to forfeiture:

Article 45

§ 2 In the case of sentencing for the offence from which the perpetrator received, even indirectly, any benefit of considerable value, the property that the perpetrator received or took possession of or to which the perpetrator received any legal title during or after the commission of the offence, even before any final judgement, is deemed to be the benefit derived from the offence unless the perpetrator or any other interested person proves otherwise.

4.5. Portugal

The relevant legislation in Portugal is Law No. 5/2002 of 11 January to Establish Measures for Combating Organised Crime and Economic and Financial Crime. The Law contains a presumption of property subject to forfeiture, but the scope of the provision is relatively limited since it applies only to a list of offences:

Article 1 - Scope of application

1. This law establishes a special regime for the collection of evidence, breach of professional secrecy and confiscation of assets to the State in relation to the following offences:

- a) Narcotics trafficking, pursuant to articles 21 to 23 and 28 of Decree-Law No. 15/93, of 22 January;
- b) Terrorism and terrorist organisation;
- c) Arms trafficking;
- d) Passive corruption and embezzlement;
- e) Money laundering;
- f) Criminal gang;
- g) Smuggling;
- h) Trafficking and change of identification elements in robbed vehicles;
- i) Incitement to prostitution and incitement to prostitution and trafficking in minors;
- j) Counterfeiting currency and securities equivalent to currency.

...

Article 7 - Assets confiscation

1. In case of conviction for an offence referred to in article 1, and for the purpose of assets confiscation to the State, it is considered as benefit from a criminal activity the difference between the value of the defendant's actual property and one that is consistent with his lawful income.

An interesting feature in the Portuguese law requires the prosecutor to set out the amount to be confiscated in the indictment. This allows the accused to be informed precisely of the case that he/she has to meet:

Article 8 - Procedure for assets confiscation

1. At the moment of the indictment, the Public Prosecutor shall settle the amount to be confiscated to the State.

2. If the settlement is not possible at the moment of the indictment, it may take place until the 30th day prior to the date of the first discussion and trial audience, and it shall be included in the proceedings themselves.

3. Once settled, the amount may be changed within the time period provided for in the preceding paragraph, if it proves to be inaccurate later on.

4. Once the settlement is received by the court, or the respective amendment, it shall immediately be reported to the defendant and to his defender.

5. The Judgments of the European Court of Human Rights

In at least three cases, the European Court of Human Rights has considered legislation presumptions similar to those described above.

5.1. Philips vs. UK (Case 41087/98, 12.12.2001)

In this case, the Court considered the presumption of property subject to forfeiture in the British Anti-Drug Trafficking Act of 1994:

In determining whether and to what extent the defendant has benefited from drug trafficking, section 4(2) and (3) of the 1994 Act require the court to assume that any property appearing to have been held by the defendant at any time since his conviction or during the period of six years before the date on which the criminal proceedings were commenced was received as a payment or reward in connection with drug trafficking, and that any expenditure incurred by him during the same period was paid for out of the proceeds of drug trafficking. This statutory assumption may be set aside by the defendant in relation to any particular property or expenditure if it is shown to be incorrect or if there would be a serious risk of injustice if it were applied (section 4(4)). The required standard of proof applicable throughout the 1994 Act is that applied in civil proceedings, namely on the balance of probabilities (section 2(8)).

The Court held that the presumption does not violate the right to a fair trial under Article 6 §1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court underlined that:

40. The Court considers that, in addition to being specifically mentioned in Article 6 § 2, a person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her forms part of the general notion of a fair hearing under Article 6 § 1. This right is not, however, absolute, since presumptions of fact or of law operate in every criminal-law system and are not prohibited in principle by the Convention, as long as States remain within certain limits, taking into account the importance of what is at stake and maintaining the rights of the defense.

...

43. [T]he assessment was carried out by a court with a judicial procedure including a public hearing, advance disclosure of the prosecution case and the opportunity for the applicant to adduce documentary and oral evidence. The court was empowered to make a confiscation order of a smaller amount if satisfied, on the balance of probabilities, that only a lesser sum could be realised. The principal safeguard, however, was that the assumption made by the 1994 Act could have been rebutted if the applicant had shown, again on the balance of probabilities, that he had acquired the property other than through drug trafficking. ... Furthermore, the judge had a discretion not to apply the assumption if he considered that applying it would give rise to a serious risk of injustice.

The Court also held that the presumption does not violate the right to protection of property that is provided for in Article 1 of the First Protocol to the Convention.

52. As to the aim pursued by the confiscation order procedure, as the Court observed in *Welch*, these powers were conferred on the courts as a weapon in the fight against the scourge of drug trafficking. Thus, the making of a confiscation order operates in the way of a deterrent to those considering engaging in drug trafficking, and also to deprive a person of profits received from drug trafficking and to remove the value of the proceeds from possible future use in the drugs trade.

5.2. Welch vs. UK (Case 17440/90, 09.02.1995)

The Court had considered the same Act in the earlier case of *Welsh*. The Court noted that confiscation must not be carried out in administrative proceedings. At the same time, the Court underlined that:

36. ... This conclusion does not call into question in any respect the powers of confiscation conferred on the courts as a weapon in the fight against the scourge of drug trafficking.

5.3. Raimondo vs. Italy (Case 12954/87, 22.02.1994)

In *Raimondo*, the Court considered Italian Law no. 646 of 1982, which states that:

[T]he District Court may issue a reasoned decision, even of its own motion, ordering the seizure of property at the direct or indirect disposal of the person against whom the proceedings have been instituted, when there is sufficient circumstantial evidence, such as a considerable discrepancy between his lifestyle and his apparent or declared income, to show that the property concerned forms the proceeds from unlawful activities or their reinvestment.

Together with the implementation of the preventive measure the District Court shall order the confiscation of any of the goods seized in respect of which it has not been shown that they were lawfully acquired. Where the inquiries are complex, this measure may also be taken at a later date, but not more than one year after the date of the seizure.

The District Court shall revoke the seizure order when the application for preventive measures is dismissed or when it has been shown that the property in question was lawfully acquired.

The Court held that the Italian law does not violate the right to protection of property provided for in Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms:

In addition, the applicant did not contend that on 13 May 1985 it was unreasonable for the District Court to hold that there was sufficient circumstantial evidence to show that the possessions seized represented the proceeds from unlawful activities or their reinvestment. What he complained about is, rather, that such a drastic measure was taken at this stage of the proceedings. However, seizure under section 2 of the 1965 Act is clearly a provisional measure intended to ensure that property which appears to be the fruit of unlawful activities carried out to the detriment of the community can subsequently be confiscated if necessary. The measure as such was therefore justified by the general interest and, in view of the extremely dangerous economic power of an "organization" like the Mafia, it cannot be said that taking it at this stage of the proceedings was disproportionate to the aim pursued.

Conclusion

The recent legislative provisions that create presumptions of property subject to seizure are important advancements in European law. These provisions represent a broader interpretation of the rules of “No punishment without law” and the onus of proof on the state and should thus be applied with care. Nevertheless, these are positive developments because they are practical and powerful weapons, particularly against criminal organisations.

Confiscating the Proceeds of Corruption – A French Perspective

Eric Mangin
Investigating Judge, France

Seizure of Objects, Including Proceeds of Crime

Under French law, seizure consists of placing objects and documents that could serve as evidence under court supervision. The Code of Criminal Procedure (CCP) authorises the seizure of instruments that have been used in or are intended for the commission of the offence, objects that are evidence of the offence and objects that appear to be the proceeds (Article 54 CCP).

Any moveable or immovable objects may be seized, irrespective of their location or the person holding them, including legal persons. One exception is correspondence between a lawyer and the person under investigation if it has not been demonstrated that the lawyer is a party to the offence.

Instruments and proceeds of corruption may be seized during on-the-spot police investigations (Article 54 and 56 CPP), preliminary inquiries (Article 76 CPP) or judicial investigations (Article 97 CPP). Seizures may be delegated to police officers by national or international warrant issued by an investigating judge (Article 81 and 151ff CPP). Objects seized must be listed and placed under seal as proof of origin and to ensure that they are not tampered with (Article 56, 76, 97.2 CPP). The only exceptions are bank and post office accounts, which are simply blocked. The judicial authorities may also require persons under investigation to provide a surety (Articles 138 paragraphs 11 and 15 CPP).

The French financial intelligence unit (TRACFIN) may also order the administrative blocking of suspicious banking transactions for up to 12 hours. This deadline can be extended with the approval of the president of the Paris Regional Court (Article L 562-5 of the Monetary and Financial Code – MFC).

There is no special body for managing seized assets. Moveable assets are stored in court registries while fixed property is overseen by court-appointed guardians or receivers. If the seizure concerns money, bullion, bills of exchange or securities that do not have to be maintained in their original state for evidentiary purposes or to protect the rights of the parties, an investigating judge may authorise the court registrar to deposit them in the Bank for Official Deposits (*Caisse des Dépôts et Consignations*) or the Bank of France. For example, I had a case in which an investigating judge from Luxembourg required me to seize money that came from a theft in Luxembourg. The money had to be deposited first in the Bank for Official Deposits before it was sent back to Luxembourg.

Financial investigations are systematically launched in all corruption inquiries to identify bank accounts and other securities through which dubious funds may have been channelled, together with their origins, holders and beneficiaries. Banking secrecy and business confidentiality are not grounds for opposing such judicial action. To facilitate these investigations, an automated file of all open bank accounts in France (FICOBA) has been established (Article 1649A ff of the Monetary and Financial Code). It is also possible to use the Simplification of Tax Procedures (SPI) 4 File to process national information on all individuals and legal persons covered by any tax, duty or contribution within the jurisdiction of the directorate general of taxes.

Confiscation

Confiscation is an additional optional penalty which may become mandatory. It may be ordered in the absence of a conviction if the objects are dangerous or harmful (Articles 131-10 and 131-21 of the

Criminal Code). There are specific, additional penalties for each offence, including all offences relating to corruption and trading in influence. These penalties may be in addition to or replace main sentences or fines and imprisonment, and may apply to legal persons. They must be expressly ordered by the trial court, but they do not require a specific application by the prosecution. Unless an alternative provision is made, such as destruction or award to a third party, confiscated items become state property.

Confiscation may also be ordered pursuant to an administrative procedure. For example, the Customs Code authorises the seizure and confiscation of the proceeds of corruption when these are not properly declared at the frontier.

Instrumentalities and proceeds of offences, as well as objects connected with offences, may be confiscated. For certain offences, including crimes against humanity, drug trafficking, money laundering, trafficking in human beings and procuring, the Criminal Code authorises the general confiscation of the property of the offender, whether a private individual or legal person, whatever its nature, movable or immovable. Under Article 131-21.4, when a confiscated item has not been seized or cannot be produced, property of an equivalent value will be confiscated. The amount is decided by the trial court, often after seeking expert advice. Civil imprisonment may be used to recover the sum representing the value of the confiscated item.

It is possible to seize assets held by a third party who is acting with criminal intent, has already been prosecuted or convicted, or is unable to establish legal ownership of or title to the property (Article 131-21).

Regarding the apportionment of the burden of proof, courts have the power to deduce the fraudulent nature of assets from the manner in which they were acquired.

Money Laundering

The offence of money laundering (Articles 324-1 and 324-2 of the Criminal Code) applies to all serious and lesser indictable offences (*crimes* and *délits*) in French law, including the offences of corruption and trading in influence, even if committed abroad. The offence includes self-laundering. Article 222-38 of the Criminal Code makes money laundering related to drug trafficking a separate offence.

Other anti-laundering provisions include, firstly, the offence of customs laundering (Article 415 of the Customs Code). In addition, individuals are required to declare transfers abroad of securities and money to the value of EUR 7 600 or more. The offence of non-justification of income linked to trafficking in drugs and human beings, criminal association, extortion of funds and terrorism allows for the apprehension of persons who, though not participating directly in the criminal activity, benefit from the proceeds generated by criminals with whom they are in contact. Finally, the system for declaring suspicions assists the detection of transactions linked to laundering.

I have dealt with a case in which a French man travelled from Holland to Spain. He was arrested on the motorway near Nîmes, a place well-known for trafficking cannabis and cocaine. Police dogs stopped right in front of the car door. Policemen found a hiding place in the door with no drugs but with EUR 100 000. I asked this person how he obtained this money, and he answered that he had sold a lot of cars in Holland but was unable to provide supporting evidence. I asked a scientific laboratory to look for drugs in the hiding place. Unfortunately for the prosecution, they found no traces of drugs. This led the lawyer of the accused to ask me for the return of the seized money. We had insufficient evidence to charge the accused with drug trafficking, but this large amount of money hidden and discovered by drug sniffing dogs led us to think that this money probably came from drug trafficking. Therefore, it was not right to return the money to the accused. We eventually found the solution in Articles 464 and 465 of the Customs Code,

which require individuals to declare transfers abroad of securities and money in the amount of EUR 7 600 and above. Based on this provision, the money found in the hiding place was confiscated accordingly.

Some Problems Related to Investigating and Prosecuting Corruption and to Forfeiture, Seizure and Confiscation of Proceeds of Corruption

Boštjan Penko
Senior Prosecutor, Slovenia

Challenges to the Investigation and Prosecution of Corruption

The challenges to effective investigation and prosecution of corruption fall into three general categories. The challenge could be *legislative*, such as inadequate investigative means or complex and excessively complicated procedures. This is the most relied-upon explanation of obstacles; in reality, it is probably the cause in less than 5% of cases. Challenges could be *institutional*, such as when the judiciary is not sufficiently independent, or when law enforcement agencies have conflicting competencies, are understaffed and do not have the technical skills to deal with complex corruption cases. Finally, the challenge could also be *practical* in nature.

Some of these challenges can lead to problems in identifying or recognising a particular event, situation, misdeed, or a violation of a law or a regulation, as a criminal offence. It is therefore absolutely necessary to have specialists deal with cases of serious economic crime and corruption. Such specialists should be involved from the beginning of the case when the substantive information or allegation is first made. Therefore, before even beginning to prove the case, it is crucial to whom the case is reported. In some instances, it is also important that an event is “translated” into a language understandable to a criminal lawyer.

Another significant challenge to prosecuting corruption cases is the availability of admissible evidence. It should never be forgotten that only legally-obtained evidence may be used before a court (the exclusionary rule). Furthermore, most corruption offences are consensual by definition and are motivated by mutual interest. As a result, law enforcement bodies have serious difficulties in collecting reliable evidence. Confessions and testimonies are rare. Due to a lack of supporting evidence, it is often difficult to obtain a judicial order allowing the use of special investigative means and methods. The active participation of an undercover agent in a simulated active or passive bribery transaction (controlled delivery) could amount to entrapment and acquittal of the individual.

Proving these crimes requires systematically and gradually combining different investigative means, methods and procedural institutes, including:

- Classical/traditional methods of gathering information and obtaining evidence;
- Highly intrusive measures such as telephone tapping, electronic surveillance, etc.;
- Use of undercover agents and “agents provocateur” to simulate the giving or accepting of a bribe;
- Special procedures to promote and encourage denunciation; and
- Granting anonymity to witnesses.

It is also important to note that financial investigation is an integral part of investigating corruption. Criminal organisations are most sensitive and vulnerable in the segment of benefits obtained by a criminal offence. At a certain point, these financial gains must enter a legalisation process (*i.e.* be used for some legal purposes). This entry point is where financial investigations become particularly relevant.

Financial investigations raise some important issues. For example, which body has competence over financial investigation within specific criminal proceedings? In other words, who is the *dominus litis* of this procedure? As well, what is the scope and purpose of a financial investigation, *i.e.* what do we want to prove? An investigator must keep in mind the two purposes of the investigation, namely, to identify, trace, seize and confiscate the proceeds of crime, and to simultaneously prove the predicate offence. Finally, how should we deal with legally-obtained property?

Establishing proper relations among different bodies may help to resolve some of these issues. It is important to strike a balance between the conduct of financial investigations and the conduct of criminal investigations for criminal offences. Investigators must possess a combination of skills that cover fundamental knowledge of police operative criminology practices as well as knowledge of commercial, financial, economic activities. Specialisation of prosecutors is necessary in order to properly supervise and direct the financial aspects of an investigation. The assistance and guidance of an autonomous expert enable the prosecutor to substantively direct and supervise an investigation.

Forfeiture, Seizure and Confiscation of Proceeds of Crime

Forfeiture, seizure and confiscation of proceeds of crime are essential parts of every criminal procedure against corruption and a result of a financial investigation. A very important instrument in this area is the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. The Convention contains provisions on not only money laundering but also – of equal importance – on search, seizure and confiscation of the proceeds of crime. In this respect, the most important articles of the Convention include:

Article 2 – Confiscation measures

1. Each Party shall adopt such legislative and other measures as may be necessary to enable it to **confiscate** instrumentalities and proceeds or property the value of which **corresponds** to such proceeds.

Article 3 – Investigative and provisional measures

Each Party shall adopt such legislative and other measures as may be necessary to enable it to **identify and trace** property which is liable to confiscation pursuant to Article 2, paragraph 1, and to **prevent** any dealing in, transfer or disposal of such property.

Article 11 – Obligation to take provisional measures

1. At the request of another Party which has instituted criminal proceedings or proceedings for the purpose of confiscation, a Party shall **take the necessary provisional measures**, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request.

The obligations for the parties to the Convention are obvious. Not only do parties have to be able to execute MLA requests for seizure, forfeiture and confiscation, but they must also be able to:

- Demonstrate that crime does not pay (to the offender and in general);
- Compensate harm and damages;

- Prevent the use of these benefits for facilitating the commission of future crimes;
- Prevent investments in legal business/money laundering; and
- Justify criminal proceedings economically.

The responsibility of legal persons for offences is of special importance in the area of economic crime and corruption. From the very beginning of an investigation or prosecution, it is necessary to take into account and check whether there are grounds for holding legal persons liable for criminal offences. Procedures against legal persons should be conducted simultaneously, *i.e.* concurrently with the obtaining of evidence and establishing the guilt of physical persons. In terms of sanctions, forfeiture and confiscation of benefits from legal persons is more likely to be successful than from natural persons.

CHAPTER 3 MUTUAL LEGAL ASSISTANCE IN CORRUPTION CASES

United Nations Instruments and Effective Casework Practice in Mutual Legal Assistance and Confiscation

Olga Zudova
Senior Legal Adviser, UNODC, Regional Office for Central Asia

This presentation will focus on two necessary ingredients for success in international co-operation in mutual legal assistance (MLA) and confiscation: effective legal frameworks through the implementation of United Nations conventions, and sound casework practice within such frameworks.

Implementation of UN Conventions in Mutual Legal Assistance in National Legislation

A number of UN conventions deal with MLA, including:

- Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988);
- Conventions against terrorism, including the Convention for the Suppression of the Financing of Terrorism (1999) and the Convention for the Suppression of Acts of Nuclear Terrorism (2005);
- Convention against Transnational Organized Crime (2000) and the associated protocols on migrant smuggling, human trafficking and firearms; and
- Convention against Corruption (2003) (UNCAC).

Most of these Conventions contain the following general provisions:

- “The Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings” (UNCAC Article 46(1)). To implement this provision, it is recommended that countries render MLA in the absence of bilateral agreements with (or even without) an assurance of reciprocity by the requesting state.
- All requests shall be executed to the extent not contrary to the domestic law of the requested Party (UNCAC Article 46(17)). This provision should be contrasted with other instruments which require the execution of a request in strict compliance with the domestic law.
- Provisions to minimise the grounds for refusing to execute MLA requests:
 - Simplify or eliminate the dual criminality requirement (UNCAC Articles 43(2) and 46(9)(c));
 - Prohibition on refusing MLA on grounds of bank secrecy or a fiscal offence (UNCAC Article 46(8) and 46(22)); and
 - Restricting the political offence exclusion to the essential minimum (UNCAC Article 44(4) for extradition).

- MLA requests may be made orally, but shall be confirmed in writing forthwith (UNCAC Article 44(14)).
- States Parties may, without prior request, transmit information relating to criminal matters (UNCAC Articles 46(4) and 56).
- States Parties may enable the presence of foreign law enforcement and/or judicial officers during the execution of a request, and use modern technology to ensure greater effectiveness, *e.g.* permit a hearing to take place by video conference (UNCAC Article 46(18)).
- States should reduce or eliminate authentication and certification requirements for documents as recommended by the UNODC Informal Expert Working Group on Effective Extradition Casework Practice.

In addition, Article 52 of the UNCAC deals specifically with international co-operation on confiscation and requires a State Party to:

- Notify financial institutions within its jurisdiction, at the request of another State Party, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny (paragraph (2)(b));
- Share financial information on appropriate public officials with the competent authorities in other States Parties (paragraph (5));
- Require appropriate public officials having an interest in, or signature or other authority over a financial account in a foreign country, to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts. Such measures shall also provide for appropriate sanctions for non-compliance (paragraph (6)).

Article 53 of the UNCAC provides for the direct recovery of property. States Parties are required to:

- Permit other states to initiate civil action in its courts to establish title to or ownership of property (paragraph (a));
- Permit its courts to order those who have committed corruption-related offences to pay compensation or damages to another State Party that has been harmed by such offences (paragraph (b));
- Permit its courts, when having to decide on confiscation, to recognise another State Party's claim as a legitimate owner of property (paragraph (c)).

In addition to the general MLA provisions, Articles 54 and 55 of the UNCAC provides additional measures in relation to confiscation:

- When a State Party receives a confiscation request from another State Party, it must directly enforce the foreign confiscation order, or obtain and enforce a domestic order of confiscation (Article 55(1)).
- Upon a request by another State Party, a requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime of crime (Article 55(2)).

In essence, States Parties should make the same powers available for foreign requests as for domestic confiscation.

A significant feature of the UNCAC is in Article 57, which deals with the return of assets. In the case of embezzlement of public funds, a requested State Party shall return the confiscated property to the requesting State Party. In the case of proceeds of other offence covered by the Convention, the requested State Party shall return the confiscated property to the requesting State Party when the latter reasonably establishes its prior ownership of the confiscated property or when the requested State Party recognises damage to the requesting State Party as a basis for returning the confiscated property. In all other cases, the requested State Party shall give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.

Effective Casework Practice in MLA

To ensure MLA is effective, it is helpful to bear in mind the following practice points:

- Use the MLA key only when “the door is locked”. In other words, seek alternatives when possible.
- Give confiscation priority in concurrent jurisdiction casework.
- Make greater use of requests to offshore jurisdictions. Money laundering typologies indicate that shell companies and trusts in such jurisdictions are often used in corruption crimes. Fictitious contracts on consulting services, loans and credits are also used frequently.
- When drafting an MLA request, note the following:
 - Request evidence or materials that are gathered in compliance with the procedural requirements in your jurisdiction, so as to enable their subsequent admissibility in your courts. A requested state should also provide evidence or materials that are admissible in the courts of the requesting state.
 - Explain the connection between the requested assistance and the outcome of your investigation.
 - Avoid using terminology that is too specific to your country and perhaps unknown to the requested country, *e.g.* “affidavit”, or “opening a file or initiation of a criminal case” (возбуждение уголовного дела).
 - Be concrete when requesting banking information, *e.g.* if possible, specify the account number, the period for which records are sought, etc.
 - Explain the reasons for the urgency of your request when urgency is paramount.
 - Indicate the need for confidentiality.
- Consult your own and the foreign central authority, your government’s staff located abroad and the foreign government’s staff located in your country, as well as representatives of international organisations, such as the European Judicial Network and Евроюст. Maintain consultations during all stages of the request.

- Refer to guidelines and manuals of the requested states, *e.g.* “Mutual Legal Assistance Guidelines: Obtaining Assistance in the UK and Overseas”, issued by the Home Office of the United Kingdom in December 2004.¹
- Send a draft request to the requested state for feedback.
- As a requested state, always consult the requesting state before refusing a request since it may be possible to overcome the problem, such as by modifying the request or postponing its execution. If the problems cannot be overcome, then a requested state should give clear reasons for why the request has been refused.

The following tools are available on the UNODC Web site (www.unodc.org) to assist practitioners:

- Model laws and treaties (including a model agreement on sharing of confiscated proceeds of crime or property);
- A directory of Central Authorities under the 1988 Drug Convention
- Recommendations of Expert Working Groups
- Current and pending initiatives:
 - MLA request drafting software
 - Caseflow management software
 - Extradition request drafting software

¹ police.homeoffice.gov.uk/operational-policing/mutual-legal-assistance/

Mutual Legal Assistance and Confiscation in Corruption Cases in the United Kingdom and Offshore Regimes

David O'Mahony
Barrister, London and the Bailiwick of Jersey

Introduction

Globalisation and advancements in technology have allowed financial transactions to be conducted internationally with ease. Criminals involved in corruption increasingly take advantage of this phenomenon by transferring the instrumentalities and proceeds of their crimes abroad, particularly to offshore financial centres.

Offshore financial centres are generally found on small islands in three regions of the world: the Caribbean, the Channel Islands (*e.g.* the Bailiwicks of Jersey and Guernsey), and in the South Pacific. Many of these centres have common law systems with laws and principles on corruption and MLA that are similar to those in the United Kingdom. Unlike the U.K., however, these islands are very small and are thus able to survive with relatively low tax regimes. Their low tax rates, remote locations and traditionally strong bank secrecy laws have made offshore centres attractive to wealthy people who want to avoid tax as well as criminals.

Laws on Corruption in the United Kingdom and Offshore Centres

Misconduct in a public office is the traditional common law corruption offence in the U.K. and most offshore financial centres. The offence has four elements:

- (1) A public officer acting as such;
- (2) Wilfully neglects to perform his/her duty and/or wilfully misconducts him/herself;
- (3) To such a degree as to amount to an abuse of the public's trust in the office holder; and
- (4) Without reasonable excuse or justification.¹

This common law offence was extended to private corruption in the U.K. through Section 1 of the Prevention of Corruption Act 1906:

(1) If any agent corruptly accepts or obtains, or agrees to accept or attempt to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or for forbearing to do, or for having after the passing of this Act done or forborn to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

if any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward ...; or

¹ *Attorney General's Reference (No.3 of 2003)*, [2005] Q.B. 73 at 91G.

if any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and to which to his knowledge is intended to mislead the principal:

he shall be guilty of a misdemeanour...

Because of various international instruments, the U.K. has extended the corruption offence to bribery of foreign public officials and companies. Section 108 of the Anti-Terrorism, Crime and Security Act 2001 reads:

(1) For the purposes of any common law offence of bribery it is immaterial if the functions of the person who receives or is offered a reward have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom.

(2) In section 1 of the Prevention of Corruption Act 1906 (c. 34) (corrupt transactions with agents) insert this subsection after subsection (3) -

“(4) For the purpose of this Act it is immaterial if:

(a) The principal’s affairs or business have no connection with the United Kingdom and are conducted in a country or territory outside the United Kingdom;

(b) The agents functions have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom.”

Section 109 of the Anti-Terrorism, Crime and Security Act 2001 further extended the concept of corruption to U.K. nationals and companies operating anywhere in the world:

(1) This section applies if-

(a) a national of the United Kingdom or a body incorporated under the law of any part of the United Kingdom does anything in a country or territory outside the United Kingdom, and

(b) the act would, if done in the United Kingdom, constitute a corruption offence (as defined below).

(2) In such a case-

(a) the act constitutes the offence concerned, and

(b) proceedings for the offence may be taken in the United Kingdom.

In accordance with their international obligations, offshore jurisdictions are gradually introducing laws on private corruption, overseas corruption and corruption by their nationals. Jersey and Guernsey have adopted all of the elements described above.² For example, Jersey recently prosecuted a case in which the accused agreed to sell vehicles to the government of an African country. At the request of the country’s president, the accused inflated the purchase price on the sales invoice. The accused then received the

² See the Corruption (Jersey) Law 2006 and the Prevention of Corruption (Bailiwick of Guernsey) Law 2003.

purchase funds in his bank account in Jersey and transferred the portion representing the inflated price to a Swiss bank account. The accused was eventually arrested in the U.K. and prosecuted by Jersey for money laundering.

Mutual Legal Assistance to Obtain Evidence

Mutual legal assistance (MLA) to obtain evidence is the easiest form of MLA to obtain. All offshore jurisdictions have legislation allowing this to be done. These jurisdictions will arrange for evidence to be collected and can apply for search warrants at the request of a foreign jurisdiction. Production orders for banking information are also available. The U.K. can also issue customer information orders and account monitoring orders at the request of a foreign state that is a “participating country”. The request for MLA must come from a prosecuting authority or from the courts.

A request for evidence must contain the following elements:

- A full description of the facts of the offence;
- The authority by which the request is made;
- The reasons for believing that relevant evidence is in the requested state (no fishing expeditions are allowed);
- How the evidence sought will assist the investigation; and
- The laws under which any investigation/prosecution is being carried out.

The request should be in the native language of the requesting state and translated into the language of the receiving state (usually English in the case of offshore islands).

MLA to Freeze Assets

The regimes for freezing assets pursuant to a foreign request are very similar in the offshore islands and the U.K.³ The legislation in the U.K. is broader than other jurisdictions (*e.g.* Switzerland) since not only proceeds of crime but a criminal’s assets may also be seized.

A foreign confiscation order can be enforced if the order relates to property obtained as a result of or in connection with a relevant offence. An order can also be enforced for the value of such property. In addition, a domestic (*i.e.* U.K.) order can be made at the request of a foreign government in relation to property specified in the request, property held by the defendant, or property held by a person to whom the defendant has directly or indirectly made a gift that is caught by the legislation.

Applications will be acted upon only if they are made by countries which are set out in the lists attached to the relevant U.K. or offshore legislation. The list includes the United States, the Russian Federation, Ukraine, and countries in the European Union, but otherwise the list is quite short. However, Jersey has been quick to add countries to the list when it receives a request from an unlisted country.

³ See the Criminal Justice Act 1988 (Designated Countries and Territories) Order 1991 (UK) and the Proceeds of Crime (Designated Countries and Territories) (Jersey) Regulations 1999. However, there is a proposal for a new regime in the U.K.

Dual criminality is a precondition to the freezing of assets. In other words, there must be proof that the conduct underlying the request is an offence in the requesting and requested states. Corruption offences would fall within the legislation in the United Kingdom and in the offshore islands. Some technical issues may also arise, such as state immunity or act of state non-justiciability.

Other requirements for freezing assets include:

- Proceedings have been or are to be instituted against the defendant; and
- There are reasonable grounds for thinking that a confiscation order will be made in those proceedings. However, any freezing order that is granted can be discharged if proceedings are not instituted within such time as the court considers reasonable.

Confiscated assets go to the treasury of the requested state by law. Nevertheless, an agreement to share the assets could be negotiated between the requesting and requested states at the political level.

MLA has been used in a number of corruption cases to great effect. In a recent example, the United States received an incoming MLA request indicating that a corrupt Eastern European official had transferred the proceeds of his crime between two non-U.S. bank accounts. Since the transfer was in U.S. dollars, the transaction was settled through banks that were located in the U.S., which gave the U.S. jurisdiction to prosecute the official for money laundering.

An expensive but effective alternative to freezing assets is to commence civil proceedings. The U.K. has very sophisticated international commercial courts which have held that a contract involving a corrupt payment may be set aside. Furthermore, if the contract is not set aside, the courts will assume that the contract price has been inflated by the amount of the corrupt payment. Another advantage to freezing assets through civil proceedings is the lower standard of proof (balance of probabilities).

Extradition

Extradition is a complicated area of law which is also in a state of flux. The old U.K. treaty-based system is still in force in many, if not most, offshore jurisdictions. However, England and Wales have adopted a new regime, namely the European arrest warrant, which is a simple backing of warrants system. This system has begun to spread and has been copied in Jersey.

The types of issues which could arise in extradition include:

- Dual criminality
- Specialty
- Political motivation
- Racial motivation
- Human rights
- Death penalty

Mutual Legal Assistance through the Letters Rogatory Process

Eric Mangin
Investigating Judge, France

The Letters Rogatory Process

A letter rogatory is a request from a judge in one country to a judge in another in which the former asks the latter to use the requested state's judicial power to assist the requesting judge. While this process was developed to enable judges to aid other judges, a judge in the requesting state may issue letters rogatory on behalf of the police or prosecutors in that country. Virtually every country either has legislation for the execution of letters rogatory, or permits its judges to execute them as a matter of comity.

Once a judge in the requesting state signs a letter rogatory, the letter is transmitted via diplomatic channels, a process that can take many weeks or months. Upon arrival, it is first reviewed by the ministry of foreign affairs of the requested state. This can add a degree of uncertainty to the process because the diplomatic corps is generally considered free to refuse to act on a letter rogatory if they feel that the assistance sought is inconsistent with the requested state's public policy.

If the ministry of foreign affairs accepts the request, it is usually forwarded to the ministry of justice in the requested state, which typically transmits the request to a judge for execution. The judge generally is under no obligation to execute the request. If he or she does execute the request, it will be done in strict compliance with the law of the requested state.

Difficulties Posed by the Law of the Requested State

The need to comply with the law of the requested state can add another level of uncertainty to the process. The law of the requested state may be very different from that of the requesting state on matters such as the authentication of evidence, the manner in which evidence is taken or preserved, and the privileges that witnesses may invoke. In some instances, the law of the requested state may contain restrictions on cooperation that seriously impede efforts to execute the request. For example, some countries refuse to execute letters rogatory issued before formal criminal charges are filed in the requesting state. This is a serious limitation, since sometimes the requesting state needs the evidence sought to determine whether charges should be filed. Another example is that the bank secrecy laws in some countries do not permit bank records to be obtained via letters rogatory. After the request has finally been executed (or execution has been denied), the results are usually sent back to the requesting judge via diplomatic channels.

Too often, however, the letters rogatory process is not very successful, and a prosecutor or police officer who generates a letter rogatory may wait many frustrating months or years, only to find that the requested evidence is not produced. We also have many cases in which the evidence sought by letters rogatory was supplied long after the trial for which it was requested had been completed.

To address these problems, the European Union has created a judicial network which allows letters rogatory to be transmitted directly between judges in member countries, thereby expediting the execution of letters rogatory between nations covered by this network. It is a very efficient way to manage the letters rogatory process while taking into account differences in cultures and traditions.

Difficulties Due to Differences in Legal Traditions and Systems

Another problem is that the letters rogatory process itself has limitations that seriously curtail its effectiveness for non-European states. Historically, letters rogatory were developed in certain civil law countries in Europe in which an investigating magistrate oversees the criminal investigation and assembles the evidence against the suspect prior to trial. It makes sense for the investigating magistrate in one such country to help the investigating magistrate of a neighbouring country, and to expect such help in return. In many non-European countries, however, judges ordinarily do not participate directly in the criminal investigation. Rather, it is the responsibility of the police to solve the crime, and it is the duty of the prosecutor to present the incriminating evidence at trial. In countries that follow this legal tradition, the judge is supposed to be a strictly impartial referee at trial and not an active participant in the criminal investigation. For such countries, letters rogatory never work very well as a tool for gathering evidence. The prosecutors and police who need evidence from abroad can generate a letter rogatory only by enlisting the help of a judge, who must pretend to be the requesting authority.

In my view, we must be very careful with this kind of request because we generally do not know sufficiently well the culture and the legal system of the requesting country. For instance, I had a case in which a Spanish judge requested us to inform a Spanish person living in France that he had to go to Spain for a criminal trial. The Spanish judge did not tell us whether this man had been informed of the accusations against him. It was not possible for me to know whether I was only a messenger or whether he wanted me to notify the man of the charges against him. I chose the second option which I considered to offer better protection to the rights of the accused.

I had another case in which a person was arrested near Nîmes with a large quantity of cannabis. The court immediately sentenced him to jail for four years. Eight months later a prosecutor in Milan requested us to interview this person because he appeared to have been involved in a major drug trafficking organisation. Unfortunately, since the person had already been convicted, he could only be interviewed as a witness.

Conclusion

The letters rogatory process is perhaps the oldest form of mutual legal assistance. It remains a vital source of international co-operation among many countries in the world today. Unfortunately, the process is not always as successful as it should be due to bureaucratic delays and differences in legal systems. Changes to the letters rogatory procedure, at least within the European Union, have greatly enhanced the process. Nevertheless, practitioners must be mindful of the remaining pitfalls and obstacles if they hope to use letters rogatory with success.

Mutual Legal Assistance in Cases of Bribery of Foreign Public Officials

William Loo
Legal Analyst, OECD Anti-Corruption Division

The bribery of foreign public officials in international business transactions is generally considered to be a widespread phenomenon. For this reason, the 30 member countries of the OECD and 7 non-member countries have adopted the OECD Convention against Bribery of Foreign Public Officials in International Business Transactions. In doing so, these 37 countries have undertaken to criminalise and prosecute transnational bribery of this nature. A similar requirement can be found in other international anti-corruption instruments, such as the United Nations Convention against Corruption (UNCAC)¹ and the Council of Europe Criminal Law Convention on Corruption.² As more countries implement the standards embodied in these international instruments, the number of investigations and prosecutions for transnational bribery is likely to grow.

The increase in transnational bribery cases should in turn result in more mutual legal assistance (MLA) requests to gather evidence abroad. Evidence in transnational bribery cases will often be found in more than one jurisdiction because of the international nature of the crime. It is therefore worthwhile to examine particular issues that could arise in MLA requests arising from transnational bribery investigations. Furthermore, these issues are relevant even for countries that have not criminalised transnational bribery since they may receive an MLA request from a country that is prosecuting such a crime.

Dual Criminality

Dual criminality is the requirement that the conduct underlying an MLA request must constitute a criminal offence under the law of the requested state, if the conduct had occurred there. Dual criminality is not a mandatory requirement for MLA in all instances. Many MLA legislation and treaties consider it a discretionary requirement only, while others require dual criminality only for certain types of assistance. There are even instances in which dual criminality is not required at all.

When it is required, countries generally apply a conduct-based definition of dual criminality. In other words, the question is whether the conduct underlying the MLA request is criminal in requesting and requested states. The question is not whether the conduct is punishable by the same offence in the two states, or whether the offences in the two states have the same elements.³

Dual Criminality and Bribery of Foreign Public Officials

A potential issue could arise when MLA is sought from a jurisdiction that has not created an offence of foreign bribery. Most countries around the world have outlawed the bribery of its own public officials a criminal offence. However, many have yet to do the same for the bribery of officials of other countries. Can these countries provide MLA in a transnational bribery case if dual criminality is required?

The key to overcoming this issue is the conduct-based definition of dual criminality. As noted earlier, the test is whether the conduct underlying the request constitutes an offence – not the same offence - in the

¹ Article 16, UNCAC.

² Article 5, Council of Europe Criminal Law Convention on Corruption.

³ See also Article 43(2), UNCAC.

requested state. The conduct of the offender could well amount to offences other than the bribery of a foreign public official, thus satisfying the dual criminality requirement.

Example 1

A briber from Country X bribes a public official of Country Y. Country X prosecutes the offender for bribery of a foreign public official and seeks MLA from Country Y. Country Y has not criminalised bribery of foreign public officials. Nonetheless, there is arguably dual criminality. From Country Y's perspective, the conduct underlying the request is bribery of its own official (*i.e.* domestic, not foreign bribery), which is presumably a crime in Country Y.

Thus, a requested state should try to “fit” the conduct underlying an MLA request into any criminal offence under its laws, not necessarily bribery of foreign public officials. When looking for an alternate offence that would catch the conduct, it may be helpful to look at the corruption-related offences listed in Articles 15-24 of the UNCAC.

Another possible solution is to consider whether dual criminality exists based on additional conduct in the case, and not just the conduct that constitutes the elements of the offence.

Example 2

A manager of a company in Country X transfers company funds into a secret bank account that is used as a “slush fund” for bribes. The manager later bribes an official of Country Y with money from the slush fund. Country X prosecutes the manager for bribery of a foreign public official and seeks MLA from Country Z (a third country). Country Z has not criminalised bribery of foreign public officials. Nonetheless, there is arguably dual criminality since the conduct of the manager may amount to other offences under the law of Country Z, such as false accounting, breach of trust, theft, embezzlement or money laundering.

This example demonstrates that requesting states should consider describing all of the facts and conduct in the case when drafting an MLA request. Facts that are not directly relevant to the elements of the offence could ultimately help the requested state to find an offence under its law to satisfy dual criminality.

Dual Criminality and Liability of Legal Persons

International anti-corruption instruments generally require countries to impose effective, proportionate and dissuasive sanctions against legal persons for corruption.⁴ However, these instruments do not mandate criminal sanctions. Countries may impose civil and administrative penalties, so long as the sanctions are effective, proportionate and dissuasive. Hence, for example, Italy imposes administrative liability against legal persons for corruption, since its constitution only allows criminal responsibility to be attributed to natural persons. For practical reasons, Germany has likewise decided to impose only civil and administrative liability against legal persons for corruption.⁵

Issues could arise when MLA is sought in a case in which a legal person is the target of a corruption investigation. If the requested state has not established criminal liability of legal persons for corruption, then the conduct underlying the request is arguably not a crime in the requested state. Accordingly, there is no dual criminality. As well, if the requesting state has commenced civil or administrative (not criminal)

⁴ See Articles 2 and 3(2), OECD Convention; Article 26, UNCAC; and Articles 18 and 19(2), Council of Europe Criminal Law Convention on Corruption.

⁵ OECD (2006), Midterm Study of Phase 2 Reports, paragraphs 116-117.

proceedings against a legal person, then legislation and treaties on MLA in criminal matters arguably do not apply.

In addressing these concerns, it is important to note that the proceedings against a legal person may be civil or administrative in nature only in a technical sense. The cause of the proceedings (*i.e.* corruption) is a criminal offence. In many jurisdictions, the proceedings against legal persons are brought by a prosecutor on behalf of the state, as in criminal cases. The procedural rules and the requesting state's investigative powers may be akin or identical to those in a criminal investigation. The legal person may be tried in the criminal courts, often simultaneously with a natural person who perpetrated the crime. It is therefore reasonable to consider the case to be a criminal matter for the purposes of rendering MLA. Such a flexible approach is also more consistent with international MLA instruments, which generally require parties to afford one another the widest measure of MLA in investigations, prosecutions and judicial proceedings.⁶

In any event, some international instruments now expressly address this situation. Article 46(2) of the UNCAC reads:

Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.

Another solution is to rely on conduct that was committed by a natural person in the case.

Example 3

A manager of a company in Country X bribes a public official to win a contract for the company. Country X prosecutes the company for bribery and seeks MLA from Country Y. Country Y does not impose liability of legal persons for bribery. Nonetheless, there is dual criminality since the conduct of the manager constitutes an offence under the law of Country Y, namely bribery.

Waiver of Dual Criminality

When confronted with obstacles related to dual criminality, practitioners could consider asking the requested state to waive the requirement. As noted at the outset, dual criminality is only a discretionary requirement for MLA in many jurisdictions. Some countries may insist on dual criminality only for more intrusive measures, such as search and seizure.

The UNCAC has codified some of these principles. The Convention encourages its States Parties to “adopt measures as may be necessary to enable it to provide a wider scope of assistance pursuant to [the Convention] in the absence of dual criminality.” For MLA requests made under the UNCAC, States Parties may waive the requirement of dual criminality, and are obliged to do so for MLA requests for non-coercive actions.⁷

⁶ See Article 46(1), UNCAC; Articles 25(1) and 26(1), Council of Europe Criminal Law Convention on Corruption; Article 1, European Convention on Mutual Assistance in Criminal Matters; and Article 8, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime. Most bilateral MLA treaties contain similar language. See also Article 9(1) of the OECD Convention.

⁷ Articles 46(9), UNCAC.

Denial of MLA Because of Multiple Proceedings

Many treaties and legislation on MLA require or permit the refusal of MLA when there are parallel legal proceedings in both the requesting and requested states. For example, the doctrine of double jeopardy (*ne bis in idem*) permits a requested state to deny MLA if the target of an investigation has been acquitted, convicted, punished or pardoned for the conduct underlying the request. Some treaties and legislation focus on whether there has been an acquittal, conviction etc. in the requesting state. Others inquire whether this has occurred in the requested state or a third state.

In addition, some treaties and legislation allow MLA to be refused if it would jeopardise an investigation or proceedings in the requested state. MLA may also be denied if the offence underlying the request took place wholly or partly in the requested state. These grounds for denial may be mandatory or discretionary, depending on the applicable treaty and legislation. Many arrangements allow the requested state to postpone the provision of MLA as an alternative to denying the request.⁸

These grounds of denial could arise in transnational bribery cases since these offences potentially give rise to proceedings or investigations in multiple jurisdictions. A country may prosecute an individual found in its territory for bribing an official of another country. Meanwhile, the country of the bribed official could also prosecute the same individual for bribery of its official. The result is concurrent proceedings against the briber in both states which may prevent or delay the provision of MLA. If the briber is tried and convicted/acquitted in one of the two states, the doctrine of double jeopardy could further impede assistance.

A more common scenario is when an individual is prosecuted in the country where he/she is located for bribing a foreign public official, while the bribed official is prosecuted by his/her government for accepting a bribe. The doctrine of double jeopardy likely will not prevent MLA in this case since the two proceedings involve different individuals and different offences. However, MLA could still be denied because of jeopardy to an ongoing proceeding or because the offence was committed wholly or partly in the requested state.

Consultation with Foreign States

Because of the prospect of multiple proceedings, it is imperative that prosecutors and investigators in a transnational bribery case consult their counterparts in foreign states. Contact should be established as early as possible and before an MLA request is sent. Discussions could help identify whether steps taken by one state (*e.g.* executing an MLA request) might jeopardise an ongoing investigation in another state. If such a concern exists, the parties could agree to postpone the execution of an MLA request or execute only a part of the request.

Another purpose of inter-state consultation is to avoid duplication. Consultations could allow the states involved to share the information already in their possession, to the extent allowed under their own laws. This could narrow down or even eliminate subsequent MLA requests. States could also avoid duplicate proceedings, which are particularly wasteful when the proceedings involve the same accused. In deciding which state to continue its proceedings, the parties could consider factors such as:

- Where was the impact of the offence felt or likely to have been felt,
- Which jurisdiction has the greater interest in prosecuting the offence,

⁸ For example, see Article 19, Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime.

- Which police force played the major role in the development of the case,
- Which jurisdiction has laid charges,
- Which jurisdiction has the most comprehensive case,
- Which jurisdiction is ready to proceed to trial,
- Where is the evidence located,
- Whether the evidence is mobile,
- The number of accused involved and whether they can be gathered together in one place for trial,
- In what jurisdiction were most of the acts in furtherance of the crime committed,
- The nationality and residence of the accused, and
- The severity of the sentence the accused is likely to receive in each jurisdiction.⁹

States may also consult with one another in order that an accused in one jurisdiction co-operates with the authorities in another jurisdiction. As noted earlier, the briber and the bribed foreign official in a transnational bribery case are often prosecuted in different jurisdictions. In some cases, the briber may be willing to admit his/her guilt and co-operate with the foreign authorities in the prosecution of the official. The briber could enter into a plea agreement to this effect. The proceedings against the briber may be held in abeyance until the briber co-operates in the foreign jurisdiction.

An example of such an arrangement is *The World Bank Case* in Sweden.¹⁰ The case involved two Swedish businessmen who bribed two World Bank officials in the United States. The U.S. authorities charged the two officials with accepting bribes. The officials eventually entered into a plea agreement with the U.S. authorities. Under the agreement, the officials pleaded guilty to the charges against them, the proceedings against the officials were adjourned, and the officials assisted the Swedish authorities in the prosecution of two bribers. After the officials had satisfactorily co-operated with the Swedish authorities and the bribers were convicted, the officials returned to the U.S. and were sentenced. By securing the officials' assistance through the plea agreement, Sweden was able to avoid delays and legal obstacles associated with the MLA process. Furthermore, the quality of the officials' co-operation may well have been better since the officials testified voluntarily while charges were still outstanding against them.

Communication with foreign authorities in a transnational bribery case can prove vital even when one is not seeking MLA. Corruption crimes are usually very difficult to detect because of their consensual nature. The authorities of the other jurisdictions that are involved in a case may well be unaware of the offence. Alerting these authorities of the crime may allow them to initiate an investigation and prosecution. The value of providing "spontaneous information" can be seen in the *Aulson & Sky* and *Seo* cases,¹¹ in which

⁹ These factors were suggested by the Supreme Court of Canada in an extradition case (*United States of America v. Cotroni*, [1989] 1 S.C.R. 1469), but they are equally applicable to the present context.

¹⁰ For a more detailed summary of the case, see OECD (2005), Sweden Phase 2 Report on the Application of the OECD Convention, OECD, Paris, Annex 3 (www.oecd.org).

¹¹ For a more detailed summary of the case, see OECD (2004), Korea Phase 2 Report on the Application of the OECD Convention, OECD, Paris, paragraphs 16-19 (www.oecd.org).

internal audits by U.S. authorities revealed that South Korean businessmen had bribed U.S. military officials. The U.S. provided this information to Korean officials spontaneously, which led to the prosecution and conviction of the businessmen in Korea for transnational bribery.

Article 46(4) of the UNCAC acknowledges the importance of providing spontaneous information:

Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

A similar provision can be found in Article 28 of the Council of Europe Criminal Law Convention on Corruption and Article 8 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime.

Conclusion

The number of MLA requests in transnational bribery cases will rise as investigations and prosecutions of this offence become more common. Because of the nature of this crime, MLA requests in these cases may raise some specific legal issues, such as dual criminality and concurrent proceedings in different jurisdictions. To ensure that these issues do not impede prosecution and MLA, practitioners need to apply legal rules and principles in a flexible manner so as to afford the widest measure of MLA to foreign states. Creativity will be helpful in finding solutions. Frequent communication and close co-operation among states – whether through executing MLA requests, informal consultations or providing information spontaneously – will greatly enhance the chances of success.

International Mutual Legal Assistance in the “Justice Tender Romania” Case

Florin Ciobotaru

Police Liaison Officer, Prosecutor’s Office attached to the High Court of Cassation and Justice
National Anti-corruption Directorate

The recent “Justice Tender Romania” case conducted by Romania’s National Anti-corruption Directorate demonstrates the usefulness and importance of mutual legal assistance in corruption cases.

Background of the Case

In 2001, the Ministry of Justice Romania held a public tender to purchase medical equipment worth approximately EUR 20 million for the hospitals of the National Administration of the Penitentiaries. The Romanian Government guaranteed a credit in the same amount. Dr. AB was a well-known heart surgeon and a senator at the time. He was appointed the president of the tender commission by the Minister of Justice, although he was not an employee of a hospital of the Ministry of Justice. Dr. AB chose six other doctors from different hospitals and set up a tender commission.

On 26 October 2001, the tenders were opened and the offers of several well-known companies were rejected without explanation. On 21 December 2001, contracts for different groups of medical equipment worth EUR 12 million were awarded to Company CC of Switzerland and Company BI of Austria. Smaller contracts were awarded to two other companies, Si and Med.

When the penitentiary hospitals received the medical equipment in 2002–2003, they found that much of the equipment was useless for various reasons, *e.g.* a lack of cases that required the equipment, a lack of specialised personnel to operate the equipment, the presence of old equipment which was cheaper to use. The National Administration of Penitentiaries determined that EUR 1.6 million worth of equipment was not used and EUR 2.94 million worth of equipment was used in only a few cases.

The companies whose tenders were rejected contested the legality of the public tender. Accordingly, the National Administration of the Penitentiaries informed the National Anti-corruption Directorate about the case.

Preliminary Investigation

A preliminary investigation conducted by the National Anti-Corruption Directorate established that the tenders of the other companies were technically comparable but the tender commission had chosen the most expensive equipment. The price difference of some of the other tenders was enormous (millions of euros) even though some of the equipment was identical in not only technical specifications but even in colour and manufacturer.

Among the documents of the tender were two “sponsoring contracts” between the Ministry of Justice and Company CC in Switzerland, and between the Ministry and Company BI in Austria. The contracts were for a donation for humanitarian reasons in the amount of 0.5% of the value of the sales contract. Both contracts were unsigned on behalf of the Ministry but signed by Mr. FB and Mr. MB, directors of Company CC, and Dr. SM, the director of Company BI.

The preliminary investigation also established that a CH, a Romanian company belonging to Mrs. CP, was authorized by Company CC as its representative in Romania for the tender. Furthermore, the members of

the tender commission stated that they signed the tender documentation but only Dr. AB knew everything and had decision-making power.

Criminal Investigation

At this stage, a criminal proceeding was lodged against Dr. AB and the six other members of the tender commission for the crime of “abuse of authority against public interests” with serious consequences. However, there was no evidence of bribery in Romania at that time.

Romania accordingly sought mutual legal assistance (MLA) from other countries in 2006. An MLA request was addressed to the Swiss Ministry of Justice to obtain statements from Mr. MB and Mr. FB, directors of Company CC, regarding the sponsoring contract. A similar request was addressed to the Austrian Ministry of Justice for a statement from Dr. SM, director of Company BI.

In April 2006, an investigating judge from the Prosecutor’s Office of the Canton of St. Gallen contacted the National Anti-corruption Directorate and requested direct contact according to the article 4 of the 2nd Protocol on Judicial Assistance in Criminal Matters. The judge also requested a meeting in Vienna, Austria with the Austrian authorities because there was evidence in St. Gallen concerning bribery of high officials of countries in Eastern Europe and the Middle East who have connections with Austria and Switzerland.

The trilateral meeting in Vienna on 11-12 May 2006 was attended by the Prosecutor’s Office and Police Department St. Gallen, Switzerland, the International Co-operation Unit of the Ministry of Justice and the Anti-corruption Unit of Ministry of Interior, Austria, and the Prosecutor’s Office attached to the High Court of Cassation and Justice, National Anti-corruption Directorate of Romania.

During this meeting, the Swiss authorities indicated that, until 1999, bribery of foreign officials was not punishable in Switzerland and such bribe payments were tax deductible. Bribery of foreign public officials then became an offence in 2000. The Prosecutor’s office in St. Gallen therefore checked with the fiscal authorities to see whether Company CC paid taxes.

The prosecutors in St. Gallen learned that the bookkeeping company KP had presented two letters to the fiscal authorities on behalf of Company CC in 2001 and 2002. Both letters tried to negotiate the taxes of Company CC for 2001 and 2002 (without knowing that bribery of foreign officials had become punishable). The letters described very clearly how Company CC bribed foreign officials in order to obtain the contracts in Romania and that the bribes could not be registered in the books of Company CC. The first letter mentioned that the person who was responsible for securing the contract was Dr. MM, a well-known doctor in Austria and an employee of Company MDI of Lichtenstein. Dr. MM had used his “relations” in Romania in order to obtain contracts in favour of Company CC. The prosecutors also learned that the contract with Romania was made with the support of the Romanian company CH which had identified the potential contracts. The detail payments to Dr. MM were attached to the letter and included payments for travel expenses and meetings with various people. The payments totalled over CHF 300 000.

As a result of the meeting in Vienna, investigators began to suspect that Dr. MM from Austria was the principal suspect in the bribery the foreign officials. Dr. MM was also suspected to be the owner of Company CC Holding in Switzerland, MDI Company, an off-shore company in Lichtenstein, and Company BI in Austria. Dr. MM apparently paid himself with funds from Company CC through the Company MDI of Lichtenstein. Significant amounts of money were also handed over to different Romanian officials as it resulted from a list added to the letters addressed to fiscal authorities in Switzerland.

The investigators decided to conduct searches for more evidence. In particular, the Romanian authorities would search the address and office of Dr. AB at the premises of the company CH and Mrs. CP. At the same time, the Austrian authorities would search the house of Dr. MM, the Swiss authorities would search the premises of Company CC, the houses of Mr. FB and Mr. MB, while the Lichtenstein authorities would search Company MDI.

The searches were conducted on 20 June 2006 and yielded significant evidence. In Romania, investigators seized all documents related to Company CC and Company BI from Company CH. From the office of Dr. AB, investigators seized a copy of the tender file. Thousands of documents were seized from Company CC in Switzerland. Many of the documents were relevant to the Romanian investigation, including details of payments for the completion of the project in Romania, commissions paid for the Ministry of Justice Tender, cash payments for the completion of the project IS Company II, and several invoices of Company ARN relating to the Tender Justice Romania 2002 project. Further inquiries with banks in Switzerland revealed that the bank account of the Company ARN from Tortola, British Virgin Islands, had been opened by Dr. AB from Romania. Further checks revealed that Dr. AB was the owner of the offshore company ARN from the British Virgin Islands. Nevertheless, Dr. AB claimed that he had never heard of Company ARN. Also seized were credit card receipts of Company CC which showed that Dr. MM spent significant amounts of money on restaurants and holidays. Dr. AB as well spent significant sums on holidays, jewellery, and fireworks. The authorities ultimately froze all accounts of Company ARN and Company CC.

Dr. AB's trial in Romania began on 22 March 2007. He faced charges of receiving bribes of approximately EUR 4.2 million and abuse of authority against public interests with serious consequences causing a damage of over EUR 9 million to the National Administration of Penitentiaries. All of Dr. AB's property was seized pending the court's final decision. Criminal proceedings against six other members of the tender commission were dropped because these individuals did not act with criminal intent. The proceedings against Mrs. CP were also terminated because she died of natural causes.

Conclusions

This case demonstrates the importance of international co-operation in corruption investigations. The Prosecutor's Office of the Canton of St. Gallen, Switzerland played an important role in revealing the most significant evidence in the case. The main difficulties were the differences in the legal systems and getting information from the banks from Switzerland. Fortunately, these difficulties were overcome, and the case would not have been a success without such efficient international co-operation.

ANNEX A - AGENDA OF THE SEMINAR

Monday 26 March 2007

9.30	Opening of the Seminar and Welcome Remarks <ul style="list-style-type: none">• Agency on the Fight against Economic and Corruption Crime, Kazakhstan• Ambassador Ivar Vikki, Head of the OSCE Centre in Almaty, Kazakhstan• Jean-Charles de Cordes, Project Manager, Council of Europe• William Loo, Legal Analyst, Anti-Corruption Division, OECD• Olga Zudova, Senior Legal Adviser, UNODC
9.50	Plenary Session 1: The Role of the OSCE in the International Fight against Corruption <p>Presenter: Mr. Kilian Strauss, OSCE</p> <p>This Session will provide a brief overview of the OSCE's involvement in the international fight against corruption, its activities and alliances with other international organisations and NGOs.</p>
10.00	Plenary Session 2: Liability of Legal Persons for Corruption - A Swiss Perspective <p>Presenter: Mr. Mark Livschitz</p> <p>This session will provide an overview of Switzerland's approach to imposing liability against legal persons for corruption. By looking at a sample case involving a multinational enterprise, the discussion will cover issues such as the requisite link between the legal person and the crime, the perpetrator's position within the legal person, the standard of liability and jurisdiction. The session will conclude by providing some advice to practitioners on how to advise clients, and to lawmakers on how to establish effective legislative frameworks for imposing liability against legal persons in corruption cases.</p>
11.00	<i>Coffee Break</i>
11.15	Plenary Session 3: Liability of Legal Persons from a Polish Perspective <p>Presenter: Mr. Rafał Kierzyńska</p> <p>This session will provide an overview of Polish legislation concerning the liability of legal persons and a presentation of some statistics of the law in practice.</p>
12.15	Plenary Session 4: Responsibility of Legal Persons for Corruption in Lithuania <p>Presenter: Mr. Vytas Rimkus</p> <p>This session will cover Lithuania's approach to imposing criminal responsibility of legal persons as well as other legal measures that can be applied to legal persons in corruption cases.</p>

13.00 *Lunch*

14.00 Plenary Session 5: Liability of Legal Persons: International Standards and Approaches to Legislative Drafting

Presenter: Mr. Boštjan Penko

This session will look at international standards on liability of legal persons in corruption cases and different approaches to meeting those standards. The discussion will also focus on examples found in countries in the region and will examine issues such as the “guilt” of a natural person versus the “criminal” liability of a legal person, grounds for imposing liability, identification of an actual offender etc. Slovenian legislation will be presented as well. The discussion will also cover the application of the general provisions of penal and criminal procedure codes.

15.00 Break-Out Session 1: Hypothetical Cases on Liability of Legal Persons for Corruption

Participants will be divided into two groups led by experts to analyse and discuss hypothetical case scenarios involving the issues and concepts that have been discussed in the plenary.

Group A: Mr. Mark Livschitz

Group B: Mr. Vytas Rimkus

16.15 Coffee Break

16.30 Plenary 6: Reporting Back to Plenary

Participants will reconvene to report on the discussions in the break-out sessions.

17.00 Closing of the Day

18.00 Reception at the Alatau Sanatorium

Tuesday 27 March 2007

9.30 Opening of the Day

9.45 Plenary Session 7: Switzerland’s Approach to Confiscation and Corruption-Related Money Laundering

Presenter: Mr. Mark Livschitz

This session will focus on Switzerland’s approach to confiscation and money laundering in corruption cases, covering issues such as the confiscation of the instrumentalities and the proceeds of bribery, confiscation prior to the completion of the bribery, and the connection between the property and the predicate offence. The discussion will conclude with advice and lessons for lawmakers and practitioners.

10.45 Coffee Break

11.00 Plenary Session 8: European Union Instruments Concerning Confiscation of Proceeds of Corruption

Presenter: Mr. Rafał Kierzyńska

The session will focus on EU instruments that apply to confiscation in corruption cases, the most important being the EU Council Framework Decision 2005/212/JHA of 24 February 2005 on the Confiscation of Crime-Related Proceeds, Instrumentalities and Property. The session will also look at how some EU Member States have implemented this decision.

12.00 Plenary Session 9: Confiscating the Proceeds of Corruption – A French Perspective

Presenter: Mr. Eric Mangin

This session will examine the system for confiscating proceeds of crime under French law and some practical issues that could arise.

13.00 Lunch

14.00 Plenary Session 10: Practical Issues in Confiscating Proceeds of Corruption

Presenter: Mr. Boštjan Penko

This session will cover practical issues related to the investigation and prosecution of corruption and the consequent confiscation of the proceeds of corruption. Mr. Penko will relate his personal experience in dealing with cases of this nature, with particular emphasis on provisional measures (freezing) of different kinds of proceeds, tracing of proceeds, financial investigations and confiscation from legal persons.

14.45 Plenary Session 11: UN Instruments for Confiscation, MLA and Repatriation of Proceeds of Corruption

Presenter: Ms. Olga Zudova

This session will provide an overview of UN legal instruments that deal with confiscation, mutual legal assistance and the repatriation of proceeds of corruption. Particular emphasis will be given to the relevant provisions of the UN Convention against Corruption.

15.15 Coffee Break

15.30 Plenary Session 12: Panel Discussion on Issues Related to the Confiscation of the Proceeds of Corruption

Panel: Messrs. Rafał Kierzyńska, Mark Livschitz, Eric Mangin, David O'Mahony, Boštjan Penko, Ms. Olga Zudova

A panel of experts on the confiscation of proceeds of corruption will convene to discuss and respond to questions and issues raised by the participants.

17.00 *Closing of the Day*

Wednesday 28 March 2007

9.00 *Opening of the Day*

9.10 **Plenary Session 13: Demonstration of the UNODC MLA Drafting Tool**

Presenter: Ms. Olga Zudova

Ms. Zudova will demonstrate a software tool for drafting MLA requests that has been developed by the UNODC.

9.30 **Plenary Session 14: United Kingdom and Offshore Regimes on Mutual Legal Assistance and Confiscation**

Presenter: Mr. David O'Mahony

This session will focus on the legislative regime in the United Kingdom and offshore financial centres regarding mutual legal assistance for evidence gathering and confiscation. By examining actual corruption cases, Mr. O'Mahony will illustrate some pertinent issues such as the application of dual criminality in practice.

10.45 *Coffee Break*

11.00 **Plenary Session 15: Mutual Legal Assistance through the Letters Rogatory Process**

Presenter: Mr. Eric Mangin

The session will deal with the French approach to MLA, notably the letters rogatory process. By looking at one or two cases involving different judicial systems, the session will examine the differences between the inquisition and accusation systems and their implications of the differences for MLA. The discussions will cover issues such as mutual incomprehension of the requesting and requested authorities resulting from misunderstandings over the functions of the criminal instruction judge, a body which does not exist in some legal systems. The session will conclude by considering the necessity of having sufficient knowledge of the foreign legal system and point of view in order to succeed in MLA.

12.00 **Plenary Session 16: Some Select Legal Issues in MLA in Corruption Cases**

Presenter: Mr. William Loo

This session will focus on some specific legal issues that may arise in MLA in corruption cases, including transnational bribery cases that fall under the OECD Convention against Bribery of Foreign Public Officials in International Business Transactions.

12.30 *Lunch*

13.30 International Mutual Legal Assistance in the Criminal Case “Justice Tender Romania”

Presenter: Florin Ciobotaru, Police Liaison Officer, Prosecutor’s Office attached to the High Court of Cassation and Justice, National Anti-corruption Directorate

The recent “Justice Tender Romania” case conducted by Romania’s National Anti-corruption Directorate demonstrates the usefulness and importance of mutual legal assistance in corruption cases.

14.00 Break-Out Session 2: Analysis of Hypothetical Case Studies on MLA in Corruption Cases

Participants will be divided into two groups led by experts to analyse and discuss hypothetical case scenarios involving the issues and concepts that have been discussed in the plenary.

Group A: Mr. David O’Mahony

Group B: Mr. Eric Mangin

15.00 Plenary 17: Reporting Back to Plenary

Participants will reconvene to report on the discussions in the break-out sessions.

15.30 Coffee Break

15.45 Plenary Session 18: Panel Discussion of Cases and National Legislation

Panel: Messrs. Rafał Kierzyńska, Mark Livschitz, Eric Mangin, David O’Mahony, Boštjan Penko, Vytas Rimkus

Each country delegation will present case studies of successful or failed corruption cases involving the main topics covered by the seminar. A panel of experts will discuss the issues raised in the case studies.

16.45 Closing of the Seminar

ANNEX B – LIST OF PARTICIPANTS

ARMENIA

1. Mr. Arthur Sargsyan Senior Specialist, Juridical Department, the Government Staff of the Republic Armenia
2. Mr. Mihran Minasyan Head of Anti-Corruption Department, General Prosecutor’s Office of Armenia
3. Mr. Murad Hovakimyan Chief Specialist for Expertise of Legal Acts, Ministry of Justice of Armenia

AZERBAIJAN

4. Mr. Ilgar Jafarov Chief of the Department, Office of the Prosecutor general of the Republic of Azerbaijan
5. Mr. Anar Tanriverdiyev Chief Advisor, Constitutional Court of the Republic Of Azerbaijan
6. Mr. Mehti Mehtiyev Expert, Ministry of National Security of the Republic of Azerbaijan

KAZAKHSTAN

7. Mr. Adilbay Marat Head of Administrative Department for the Committee on Legislation and Law-Judicial Reform, Majilis of the Parliament of Kazakhstan
8. Mr. Zhakupov Askar Deputy Head of Department on Legislation, Majilis of the Parliament of Kazakhstan
9. Mr. Sekishev Askar Judge, Supreme Court of the Republic of Kazakhstan
10. Ms. Kurmanbekova Sholpan Judge, Almaty State Court
11. Mr. Mirzamuratov Maratbek Senior Prosecutor of Department on the Rule of Law in the State Entities, General Prosecutor’s Office
12. Mr. Tapayev Samat Senior Prosecutor of Department for Oversight in Investigation Activities, General Prosecutor’s Office
13. Mr. Zhilikbayev Bolat Head of Department on Personal Security of the Almaty Division, Ministry of Internal Affairs of Kazakhstan
14. Mr. Kalabayev Zhomart Deputy Head of Personnel Department, Ministry of Justice of Kazakhstan
15. Mr. Bereketov Makhsat Head of Department of the Committee on Registration Services, Ministry of Justice of Kazakhstan
16. Mr. Seitkazinov Kairat Head of Department on Zonal Control of the Investigation Department, Agency RK on the Fight against Economic and Corruption Crime

- 17. Mr. Ibraimov Erzhan Head of Unit on imperative issues, Department on closing and prevention cases on Corruption, Agency RK on the Fight against Economic and Corruption Crime
- 18. Mr. Kabdyla Shyngyz Head of Unit on international relations, Department on Law and International Cooperation, Agency RK on the Fight against Economic and Corruption Crime
- 19. Mr. Sergey Zlotnikov Head of Transparency Kazakhstan
- 20. Ms. Zhemis Turmagambetova Executive Director, Fund “Charter for Human Rights”

KYRGYZSTAN

- 21. Mr. Dyushenbek Zilaliev Department of Defense and Security, Administration of President of Kyrgyzstan
- 22. Mr. Timur Imankulov Officer of the Criminal Investigation Department, Ministry of Internal Affairs of Kyrgyzstan
- 23. Mr. Farhad Kubatbekov Head, Development and Coordination Anti-Corruption Policy, National Agency of the Kyrgyz Republic on Corruption Prevention
- 24. Mr. Ruslan Imanbekov Normative-Legal Analysis Unit, National Agency of the Kyrgyz Republic on Corruption Prevention
- 25. Mr. Aziz Ibraev Defense and Security Affairs, Administration of the President of KR

MOLDOVA

- 26. Ms. Lidia Lozovanu Head of Directorate for Approving Normative Acts, General Department of Legislation, Ministry of Justice of Moldova
- 27. Mr. Vsevolod Ivanov Chief of investigation Unit, General Prosecutor’s Office of Moldova
- 28. Mr. Tatiana Boestean Officer within the General Criminal Prosecution Division, Centre for Combating Economic Crimes and Corruption, Moldova

RUSSIAN FEDERATION

- 29. Ms. Tatiana Dukasheva Expert, Department of International Law and Cooperation, Russian Federation
- 30. Mr. Aslan Usufov Senior Prosecutor, General Prosecutor’s Office, Russian Federation
- 31. Mr. Valentin Golovan Expert, Department of Constitution and Law Safety, Russian Federation

UKRAINE

32. Mr. Volodymyr Lyska Senior Specialist of the Department of Law for Justice, Law Enforcement Activities and the Fight against Criminality, Ministry of Justice of Ukraine
33. Ms. Eleonora Khachatryan Assistant – Consultant of the People’s Deputy of Ukraine, Committee on the Fight against Organized Crime and Corruption, Parliament of Ukraine
34. Ms. Anastasiya Kalina Assistant – Consultant of the People’s Deputy of Ukraine, Committee on the Fight against Organized Crime and Corruption, Parliament of Ukraine

UZBEKISTAN

35. Mr. Shukhrat Khusenov Deputy Head of Department
36. Mr. Ravshan Umarov Ministry of Justice

INTERNATIONAL ORGANIZATIONS

INTERNATIONAL EXPERTS

37. Mr. William Loo Anti-Corruption Division, Organisation for Economic Co-operation and Development (OECD)
38. Mr. Eric Mangin Criminal Investigative Judge, Ministry of Justice, France
39. Mr. Boštjan Penko Senior Prosecutor, Supreme Prosecutor’s Service, Slovenia
40. Mr. Florin Ciobotaru Police Officer, International Co-operation Unit, Office for Mutual Legal Assistance in Corruption-Related Cases, Prosecutor’s Office, Romania
41. Mr. Mark Livschitz Senior Associate, Baker and McKenzie Zurich, Switzerland
42. Mr. David O’Mahony Lawyer, Bakerplatt English and Jersey lawyers, London, United Kingdom
43. Mr. Rafał Kierzyńka Legal Assistance and European Law Department, Ministry of Justice, Poland
44. Mr. Jean-Charles de Cordes Administrator, Department of Crime Problems, Council of Europe
45. Ms. Olga Zudova Senior Legal Adviser, United Nations Office on Drugs and Crime, Regional Office for Central Asia
46. Mr. Vytas Rimkus Head of the Corruption Prevention Department, Special Investigation Service, Lithuania

OSCE

47. Mr. Ivar Vikki Ambassador, Head of OSCE Center in Almaty

48. Mr. Kilian Strauss Senior Programme Officer, Office of the OSCE Coordinator for the Economic and Environmental Activities, OSCE Secretariat, Vienna
49. Ms. Léa Bure Economic Environmental Officer, OSCE Centre in Almaty
50. Ms. Madina Ibrasheva National Programme Coordinator, OSCE Centre in Almaty
51. Mr. Kuban Ashyrkulov Senior Programme Assistant, OSCE Centre in Bishkek
52. Mr. Zarina Ligay Assistant to Economic and Environment Officer, OSCE Centre in Almaty