

# 4 Foreign bribery offence

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This chapter analyses the provisions of Croatia's Criminal Act to determine whether all the elements of the offence of bribery of foreign public officials as defined in the OECD Anti-Bribery Convention are adequately covered in Croatia's legislation.

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The offence of foreign bribery is the first Convention accession criterion on the legal and enforcement framework to fight foreign bribery. Under the accession methodology, the OECD Working Group on Bribery assesses an accession candidate's foreign bribery offence against Convention Art. 1 and the 2009 Recommendation Annex I.

## 4.1. OECD standards on the foreign bribery offence

Art. 1(1) of the Convention sets out the requirements of a foreign bribery offence:

*Article 1:*

*The Offence of Bribery of Foreign Public Officials:*

*Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.*

Additional guidance on the foreign bribery offence is found in Commentaries 3-19 of the Convention, and Annex I.A of the 2009 Anti-Bribery Recommendation.

## 4.2. Croatia's foreign bribery offence

Croatia's foreign bribery offence is in Art. 294 of the Criminal Act (CA).<sup>1</sup> Art. 294(1) deals with bribery in order that an official do or omit to do something that he/she should not. This is known as bribery *in breach of one's duties* in some countries. Art. 294(2) covers bribery *to perform* one's duties, i.e. to induce an official to do or omit to do something that he/she should. Art. 294(3) releases the briber from punishment under certain circumstances:

*Article 294*

*Giving bribes*

*(1) Whoever offers, gives or promises a bribe intended to that or another person to an official or responsible person to perform within or outside the limits of his authority an official or other action which he should not perform or not to perform an official or other action which he should perform, or whoever mediates in such bribery of an official or responsible person shall be punished by imprisonment for a term between one and eight years.*

*(2) Whoever offers, gives or promises a bribe intended to that or another person to an official or responsible person to perform an official or other action that he should perform, or not to perform an official or other action that he should not perform, within or outside the limits of his authority, or whoever mediates in such bribery of an official or responsible person shall be punished by imprisonment for a term between six months and five years.*

*(3) The perpetrator of the criminal offence referred to in paragraphs 1 and 2 of this Article who gave a bribe at the request of an official or responsible person and reported the offence before its discovery or before learning that the offence was discovered, may be released from punishment.*

### 4.3. Elements of the foreign bribery offence

Under the accession methodology, the assessment of an accession candidate's foreign bribery offence is comparable to a Working Group Phase 1 evaluation of Parties to the Convention (OECD, n.d.<sup>[1]</sup>). Each discrete element of the candidate's foreign bribery offence is measured against the Convention and 2009 Recommendation. These elements are analysed below.

#### 4.3.1. Any person

Convention Art. 1(1) requires a foreign bribery offence to apply to “any person”. The offence in CA Art. 294 applies to “whoever” commits bribery. Croatian authorities state that the offence applies to “anyone” (*delicta communia*).

#### 4.3.2. Intentionally

Convention Art. 1(1) covers foreign bribery committed “intentionally”.

CA Art. 28 provides that crimes, including the foreign bribery offence in CA Art. 294, may be committed with direct or indirect intent. An individual has direct intent when he/she is aware of the material elements of the criminal offence, and wants or is sure of the elements' realisation. Indirect intent exists when an individual is aware that he/she is capable of realising the material elements of the offence, and accedes to their realisation.

A common issue is whether the intent requirement of a foreign bribery offence is sufficiently broad to cover a typical foreign bribery transaction. Such a transaction could involve an entrepreneur who pays a consultant a large sum of money. The consultant is asked to “do whatever it takes” to win a public procurement contract for the individual in a foreign country with widespread corruption. The consultant does not provide any other tangible work product or services in return. The entrepreneur also does not question how the consultant would spend the large sum of money that he/she receives. The entrepreneur is therefore wilfully blind to whether the consultant would use the money to bribe an official in the foreign country in order to win the contract.

Croatian prosecutors at the fact-finding mission do not believe that the foreign bribery offence would readily cover this typical foreign bribery transaction. They state that bribery is usually committed with direct intent and rarely with indirect intent. In the hypothetical situation above, there must be evidence that the entrepreneur is aware that the consultant would unlawfully influence foreign public officials. One prosecutor states that the entrepreneur must know what happens to the money. Another prosecutor explains that a conviction would require the consultant to explain to the entrepreneur that there is a “high likelihood” that the consultant has to bribe an official. The entrepreneur must then agree to this course of action. This conversation must also be proven through direct evidence, for example via a wiretap or video recording.

Fact-finding mission participants from the judiciary, legal profession and academia express similar views. A judge considers that there must be direct proof of an agreement to bribe between the entrepreneur and the consultant. It is difficult to convict an individual who “does not want to speak about the bribe”. A professor states that the entrepreneur in the hypothetical above must know or accept that a bribe would be given. A defence lawyer adds that asking the consultant to “do whatever it takes” is ambiguous and not sufficient to establish indirect intent. A conversation – captured on wiretap – in which the entrepreneur and consultant state “we are ready to pay the bribe” would be necessary for a conviction.

Given these views, the intent requirement of Croatia's foreign bribery offence is likely too narrow. An entrepreneur must have a substantial level of knowledge of the bribery act before indirect intent is established. Moreover, direct rather than circumstantial evidence of knowledge is generally necessary to prove indirect and even direct intent. It would not be difficult for an individual to structure a foreign bribery

transaction to circumvent these requirements for intent. The OECD Working Group on Bribery has therefore made recommendations to countries where the intent requirement or evidentiary threshold of foreign bribery offences is too onerous.<sup>2</sup>

The Croatian Ministry of Justice and Public Administration disagrees with these views. It states that, in the hypothetical situation above, a response to the entrepreneur's request to "do whatever it takes" depends on the wider context. Nevertheless, if the entrepreneur "is aware of the *possibility* that the consultant would use given money to commit a criminal offence of foreign bribery and agrees with that possibility", then the entrepreneur acts with the indirect intent and would be liable. Furthermore, wiretap evidence of the bribery agreement is "ideal" – i.e. not strictly necessary – for a conviction. However, these positions of the Ministry contradict those expressed by the fact-finding mission participants.

#### **4.3.3. Offer, promise or give**

CA Art. 294 mirrors Convention Art. 1(1) by covering someone who "offers, promises or gives" a bribe. Croatian authorities state that an offer occurs when an individual indicates a readiness to provide a bribe. A promise results when an individual agrees with an official to provide a bribe. Giving is the transfer of a bribe. Croatian authorities add that the offence is complete when the perpetrator undertakes one of these actions. Proof that the foreign public official received the bribe or acted as a result of the bribe is not required. Supporting case law or jurisprudence is not provided, however.

#### **4.3.4. Any undue pecuniary or other advantage**

Convention Art. 1(1) requires a foreign bribery offence to cover the giving, offer or promise of "any undue pecuniary or other advantage" to a foreign public official.

CA Art. 87(24) defines a bribe as "any undue reward, gift or other property or non-property benefit, regardless of value". Both pecuniary and non-pecuniary bribes are therefore covered. Croatian authorities add that the term "undue" refers to "an official who receives something that he/she should not", or a thing that "does not belong to the official".

#### **4.3.5. Whether directly or through intermediaries**

Convention Art. 1(1) requires a foreign bribery offence to cover the giving, offer or promise of a bribe to a foreign public official, "whether directly or through intermediaries". The OECD has noted that using intermediaries is one of the most common *modus operandi* of the crime of foreign bribery (OECD, 2020<sup>[2]</sup>; 2009<sup>[3]</sup>).

CA Art. 294 does not explicitly cover bribery through an intermediary. However, CA Art. 36 provides that a person who commits an offence "through another person" shall be liable as a principal. Furthermore, liability as co-perpetrators arises if several persons commit an offence based on a joint decision, and each participates or significantly contributes to the commission of the offence. The offence in CA Art. 294 also expressly provides for liability of the intermediary. Case law or jurisprudence on bribery through intermediaries is not provided, however. As discussed in Section 4.3.2, the intent requirement of Croatia's foreign bribery offence may limit the liability of bribery through intermediaries.

#### **4.3.6. A foreign public official**

##### *Definitions in the Anti-Bribery Convention and Croatian law*

Art. 1(4)(a) of the Convention defines a "foreign public official":

*Article 1(4) For the purpose of this Convention:*

*(a) “foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation.*

Croatia’s CA Art. 294 prohibits the bribery of an “official”, a term that is defined in CA Art. 87(3). In sum, the provision defines an “official” to include certain Croatian officials. It then extends this definition to persons who perform the same functions in foreign states, international organisations etc.:

*Article 87(3) An official is a state official or civil servant, an official or clerk in a unit of local and regional self-government, a holder of judicial office, a lay judge, a member of the State Judicial Council or the State Attorney’s Council, an arbitrator, a notary public and a professional worker performing tasks of social work, education and training activities. An official is also a person who in the European Union, a foreign state, an international organisation of which the Republic of Croatia is a member, an international court or arbitration tribunal whose jurisdiction the Republic of Croatia accepts, performs duties entrusted to persons referred to in the previous sentence.*

CA Art. 294 also prohibits the bribery of a “responsible person”, which is defined in CA Art. 87(6). Of note, this latter provision does not explicitly extend the definition of a “responsible person” to individuals with equivalent functions in a foreign state or international organisation:

*Article 87(6) A responsible person is a natural person who manages the affairs of a legal person or is explicitly or actually entrusted with the performance of activities in the field of activity of a legal person or state bodies or bodies of a local and regional self-government unit.*

Croatia’s Ministry of Justice and Public Administration contends that a “responsible person” can be a foreign public official but this is unlikely. It states that a “responsible person” can be a *Croatian citizen or resident* by reason of CA Art. 14(1), which provides for jurisdiction over Croatian nationals for extraterritorial crimes. However, a Croatian national or resident is unlikely to be the foreign public official receiving a bribe in a foreign bribery case. Croatia also states that a “responsible person” can be a foreign citizen if a crime is committed on Croatian territory due to CA Art. 10. This is doubtful, since the provision deals with territorial jurisdiction of the Criminal Act and not the substantive definition of a “responsible person”. But even if Croatia’s position is correct, the provision would not apply to the vast majority of foreign bribery cases since the crime is often committed outside the briber’s country.

### *Types of foreign public officials covered*

Overall, there is some question over whether Croatia’s definition fully covers all persons holding an administrative office of a foreign country. The definition of an “official” in CA Art. 87(3) explicitly covers “a holder of judicial office” and “a lay judge” in a foreign state. But there is no mention of holders of “administrative office”. Such persons *in Croatia* may be covered as “responsible persons” under CA Art. 87(6). But as mentioned above, it is debatable whether “responsible persons” include officials of *foreign countries*.

The term “official” in Art. 87(3) also does not appear to cover holders of “legislative office”, whether in Croatia, another country or an international organisation. Bribery of legislators is addressed in a separate offence in CA Art. 339. But this offence applies only to members of the Croatian Parliament, European Parliament, and councillors in the representative bodies of (Croatian) local and regional governments. Legislators in foreign countries and other international organisations are not included. However, Croatian authorities say that the definition of “official” in Art. 87(3) should be interpreted in light of the Act on Obligations and Rights of State Officials.<sup>3</sup> Under Art. 1 of the Act, “Officials within the meaning of the Act are [...] Members of the Croatian Parliament”. This interpretation is debatable, as it would mean that two different offences (CA Arts. 294 and 339) with different ranges of possible penalties apply to the bribery of a Croatian Parliamentarian. Croatian authorities explain that this is because the offence in CA Art. 339

“covers actions which cannot be subsumed under [Arts. 293-294] due to the fact that voting of a representative cannot be understood as an official act. In this manner the Croatian legislator has fulfilled the aforesaid legal gap.” But this implies that the “legal gap” remains for foreign legislative officials, since CA Art 339 does not apply to non-Croatian officials.

Similar questions arise about the coverage of “any person exercising a public function for a foreign country”. Convention Commentary 12 explains that a “‘public function’ includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.” One purpose of this provision is therefore to cover states that contract out certain public functions to private sector providers. However, the definition of an “official” in CA Art. 87(3) does not cover public functions generically. Instead, it describes specific types of functions or professions. The definition of a “responsible person” in CA Art. 87(6) is broader. The concept encompasses persons “entrusted with the performance of activities in the field of activity of a legal person or state bodies or bodies of a local and regional self-government unit”. But as mentioned above, it is not clear that the provision applies to individuals in foreign states.

### *Employees of foreign state-owned or state-controlled enterprises*

Convention Art. 1(4)(a) states that a “foreign public official” should include “any person exercising a public function for a foreign country, including for a public agency or public enterprise”. A “public enterprise” is essentially a foreign state-owned or controlled enterprise (SOE), according to Commentary 14:

*Commentary 14. A “public enterprise” is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, inter alia, when the government or governments hold the majority of the enterprise’s subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise’s administrative or managerial body or supervisory board.*

Commentary 15 adds that an SOE in a privileged market position is deemed to be performing a public function:

*Commentary 15. An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.*

Examples of such enterprises may therefore include a majority state-owned aircraft manufacturer that receives public subsidies, or government-run liquor store monopolies found in many countries. Employees of these companies are foreign public officials under the Convention, even if building airplanes or selling alcohol may not be typical “public functions” in some countries.

Croatia’s definition of a foreign public official is narrower than the Convention in this respect. The definition of an “official” in CA Art. 87(3) covers “typical” public functions such as those of state officials, civil servants, and judges. SOE employees are clearly omitted. The definition of a “responsible person” in CA Art. 87(6) covers SOE employees, since it includes “a natural person who manages the affairs of a legal person or is explicitly or actually entrusted with the performance of activities in the field of activity of a legal person”. But as mentioned earlier, the definition of a “responsible person” may apply only to individuals in Croatia, not foreign countries. Some Croatian prosecutors and judges state that bribery of foreign SOEs is covered by the commercial bribery offence (CA Art. 253). But this offence raises additional problems, such as lower sanctions and proof of additional elements (such as damage). Coverage of foreign SOE employees has been the subject of recommendations by the OECD Working Group on Bribery.<sup>4</sup>

### *Officials and agents of a “public international organisation”*

Convention Art. 1(4)(a) states that a “foreign public official” includes “any official or agent of a public international organisation”. Commentary 17 elaborates that a “public international organisation” includes “any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of competence, including, for example, a regional economic integration organisation such as the European Communities.”

Croatia only meets this requirement partially. The definition of an “official” in CA Art. 87(3) refers to the European Union and an international organisation “of which the Republic of Croatia is a member”. Similarly, the definition covers an international court or arbitration tribunal “whose jurisdiction the Republic of Croatia accepts”. The Convention is not so limited, as the OECD Working Group on Bribery has observed.<sup>5</sup> Extending Croatia’s definition is important since there are many international organisations of which it is not a member, e.g. regional multilateral development banks outside Europe. Otherwise, a Croatian individual could commit bribery on behalf of a company from a country that is a member of such an international organisation, for example.

### *Meaning of a “foreign country”*

Convention Art. 1(1) prohibits the bribery of officials of “a foreign country”. This term is very broadly interpreted. Art. 1(4)(b) stipulates that the term “foreign country” includes “all levels and subdivisions of government, from national to local”. Commentary 18 adds that the concept “is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.”

Croatia’s definition of a foreign country includes at least some of the entities contemplated by the Convention. Read as a whole, CA Art. 87(3) defines an “official” to include public officials and civil servants of a “foreign state”. It also covers “an official or clerk in a unit of local and regional self-government” in a foreign state. Croatian authorities at the fact-finding mission state that there is no requirement that Croatia officially recognises the foreign state in question. As mentioned many times above, the definition of a “responsible person” in CA Art. 87(6) does not refer to a “foreign state”. Neither provision explicitly mentions further subdivisions, such as an organised foreign area or entity, autonomous territory or a separate customs territory. The OECD Working Group on Bribery has recommended that countries clarify the coverage of these sub-state entities.<sup>6</sup>

### *Autonomous definition of a foreign public official*

Commentary 3 of the Convention states that the definition of a “foreign public official” must be “autonomous”. Proof of the law of the country of the foreign public official should not be a strict necessity. The test is instead functional. In other words, a person is a foreign public official if he/she performs one of the functions described in Convention Art. 1(4)(a). The individual’s status under the foreign country’s law is not determinative. The OECD Working Group on Bribery has recommended on many occasions that countries adopt an autonomous definition of a “foreign public official”.<sup>7</sup>

The Ministry of Justice and Public Administration asserts that Croatia’s definition of a “foreign public official” is autonomous. It states that this is clear from the wording of CA Art. 87(3) which defines a public official using a “functional approach”. A person is a foreign public official if he/she “performs duties corresponding to the duties of the persons who have status of official in the Republic of Croatia.” It is “irrelevant whether a person has a status of an official under the law of foreign country or international organisation.”

Practitioners at the fact-finding mission are less sure. Prosecutors state that they would seek evidence of a foreign public official’s status under foreign law. Absent such proof, they are not sure that they could secure a conviction for foreign bribery. Judges state that, in a domestic bribery case, they would ask for documentary proof of the official’s status. Transplanting the reasoning to a foreign bribery case, they expect

that similar evidence would be obtained through mutual legal assistance. A defence lawyer at the fact-finding mission is more conclusive, stating that proof of the foreign public official's legal capacity is certainly required.

#### ***4.3.7. For that official or for a third party***

Convention Art. 1(1) requires the coverage of bribes paid to an official “or for a third party”. Croatia's CA Art. 294 covers such third-party beneficiaries by referring to bribes intended for an official “or another person”.

#### ***4.3.8. In order that the official act or refrain from acting in relation to the performance of official duties***

Convention Art. 1(1) covers bribery “in order that the official act or refrain from acting in relation to the performance of official duties”. Croatia's foreign bribery offence clearly applies to such cases. CA Art. 294(1) covers bribery in order that an official act or omit to act when he/she should not. Art. 294(2) covers bribery to induce an official to act or omit to act when he/she should. In either case, it is an offence regardless of whether the official's act or omissions are “within or outside the limits of his/her authority”.

However, the Convention goes further and requires coverage of bribery in exchange for an act beyond an official's competence. Art. 1(1) prohibits bribery “in order that an official act or refrain from acting “in relation to the performance of official duties”. This phrase includes “any use of the public official's position, whether or not within the official's authorised competence”, according to Art. 1(4)(c). Commentary 19 adds that this would cover a case where an executive of a company gives a bribe to a senior official of a government. The official then uses his/her office – though acting outside his/her competence – to make another official award a contract to the company.

Croatia prohibits such cases of bribery to act outside official competence. CA Art. 294 applies to an official's acts or omissions whether “within or outside the limits of his/her authority”. However, the offence concerns acts and omissions that an official should or should not do. It does not deal with situations when there is no explicit requirement for an official to act or a prohibition from acting. The Ministry of Justice and Public Administration states that such a case is instead covered by the trading in influence offence in CA Art. 296. This provision prohibits the giving of a bribe to someone to use his/her “official or social position or influence to mediate” the act or omission of an official. The offence is subject to the same range of sanctions as active foreign bribery.

#### ***4.3.9. In order to obtain or retain business or other improper advantage in the conduct of international business***

Croatia's foreign bribery offence in CA Art. 294 is not restricted to bribery in a business context. Convention Art. 1(1) prohibits the bribery of a foreign public official “to obtain or retain business or other improper advantage in the conduct of international business”. CA Art. 294 does not have a similar limitation. In this respect, the offence is broader than Convention Art. 1(1).

Croatian authorities state that CA Art. 294 meets two further requirements of the Convention. It is an offence under the provision whether or not the briber is the best qualified bidder for a contract or can otherwise be awarded the business (Commentary 4). It is also an offence if the briber obtains something to which he/she is not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements (Commentary 5). Supporting case law or jurisprudence is not provided, however. The application of these requirements to legal persons is considered in Section 5.5.



## 4.4. Complicity to commit foreign bribery

Convention Art. 1(2) states that “each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence.” Commentary 11 clarifies that these offences “are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party’s legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.”

Croatia addresses complicity in the general part of the Criminal Act. As mentioned in Section 4.3.5, CA Art. 36 provides that a person who commits an offence “through another person” is liable as a principal. Liability as co-perpetrators arises if several persons commit an offence based on a joint decision, and each participates or significantly contributes to the commission of the offence. The Ministry of Justice and Public Administration states that this provision also covers authorisation to commit an offence. In addition, under CA Art. 37(1) a person who intentionally incites another to commit an offence is punishable as if he/she had committed it. A person who intentionally assists another to commit an offence is liable under CA Art. 38, but may be punished “more leniently” than the perpetrator.

## 4.5. Attempt and conspiracy to commit foreign bribery

Convention Art. 1(2) states that “attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official.”

In Croatia, the crime of attempt applies equally to foreign and domestic bribery. Under CA Art. 34, a person is guilty of attempt if he/she intends to commit an offence, and undertakes an action that “spatially and temporally immediately precedes” the commission of the offence. A person who attempts an offence may be punished “less severely” than a perpetrator who carries out the act. The provision applies only when explicitly prescribed by law or when the offence that is attempted is punishable by imprisonment of at least five years. Attempt therefore applies to foreign (and domestic) bribery to breach duties, which is punishable by one to eight years’ imprisonment (CA Art. 294(1)). Attempt also applies to foreign (and domestic) bribery to perform duties, since the maximum penalty for the offence is five years’ imprisonment (CA Art. 294(2)).

Conspiracy to commit foreign bribery also applies to the same extent as domestic bribery. Under CA Art. 327, it is a crime to agree with someone to commit an offence that is punishable by imprisonment of more than three years. The active foreign and domestic bribery offences qualify for this provision. A conspiracy is punishable by imprisonment of up to three years.

## 4.6. Defences to foreign bribery

### 4.6.1. Defence of small facilitation payments

The Convention does not require Parties to criminalise small facilitation payments. Commentary 9 defines such payments as those “made to induce public officials to perform their functions, such as issuing licenses or permits”. These payments are not considered as made “to obtain or retain business or other improper advantage”. They are therefore not prohibited by the Convention. However, in view of the corrosive effect of this phenomenon, the 2009 Anti-Bribery Recommendation VI asks countries to periodically review their policies and approach on small facilitation payments, to combat the phenomenon, and encourage companies to prohibit or discourage the use of small facilitation payments in their internal controls, ethics and compliance programmes.

Croatian authorities state that their foreign bribery offence prohibits “small facilitation payments”. CA Art. 87(24) defines a bribe as any undue reward, gift or benefit “regardless of value”. This overrides a defence of an “insignificant crime” in CA Art. 33. This latter provision states that there is no criminal offence if “the degree of guilt of the perpetrator is low, the offence had no consequences or the consequences are insignificant, and there is no need to punish the perpetrator.” The Ministry of Justice and Public Administration states that CA Art. 33 is not applied in practice in corruption cases. Data on the provision’s application are not available.

#### **4.6.2. Effective regret**

CA Art. 294(3) sets out “effective regret” to foreign (and domestic) bribery. A briber may be “released from punishment” if he/she pays a bribe in response to the official’s request. He/she must also report the crime either before its discovery, or before learning of its discovery. The offender escapes punishment but is nevertheless prosecuted and a conviction is entered, as a prosecutor at the fact-finding mission points out. CA Art. 50(2) further provides that the briber may receive more lenient sanctions in lieu of a full release from punishment. Croatian authorities state that the policy reason for the provision is to encourage the reporting of bribery. Some prosecutors and judges add that liability would be excluded only if an individual was coerced by an official to pay a bribe. This requirement is not stipulated in the provision, however. Statistics provided by Croatian authorities indicate that this provision has only been used once in 2015-2019. A similar provision applies to legal persons (see Section 5.8).

A key feature of the provision is that it is discretionary and that it does not preclude confiscation of the proceeds of bribery. Fact-finding mission participants state that it is for a judge to decide whether the briber should be released from punishment. In making this decision, the court would consider factors such as the circumstances and impact of the offence, and the personal circumstances of the offender. One judge states that she would not apply the provision if the offence is discovered before the briber’s report. Another judge states that the briber is found guilty and only released from punishment. Confiscation can therefore be imposed, since CA Art. 5 states that “no one may retain the proceeds of an illegal act”.

#### **4.6.3. Defence of necessity**

Commentary 7 states that foreign bribery is an offence irrespective of, *inter alia*, the alleged necessity of the payment in order to obtain or retain business or other improper advantage.

Croatia’s defence of necessity does not apply to foreign bribery. CA Art. 21(2) limits the defence to situations where the commission of an offence is necessary to “repel a simultaneous or imminent unlawful attack from oneself or another”. The provision therefore does not apply to bribery to obtain or retain business or other advantage.

### **4.7. Conclusions on Croatia’s foreign bribery offence**

Croatia’s foreign bribery offence in CA Art. 294 contains many of the essential features required by the OECD Anti-Bribery Convention. The offence broadly applies to any natural person. It explicitly covers the modalities of an offer, promise and giving of a bribe. Bribes can be any undue reward, gift or other property or non-property benefit, regardless of value. Bribes paid to third party beneficiaries are expressly covered. Bribery through intermediaries is covered through the CA provisions on co-perpetration. The trading in influence offence in CA Art. 296 covers some forms of bribery in order that an official act outside official competence. General provisions in the CA provide for complicity and attempted foreign bribery.

To further strengthen its foreign bribery offence, Croatia could consider the following:

- a Take steps to ensure that the offence's intent requirement is sufficiently broad to cover typical foreign bribery transactions, in particular bribery committed through intermediaries
- b Expand the definition of a foreign public official, including to persons who hold legislative office in or who exercise a public function for a foreign country; employees of foreign state-owned or controlled enterprises; and officials of all public international organisations, including those in which Croatia is not a member
- c Ensure that the definition of a foreign public official is autonomous and does not require proof of foreign law
- d Clarify that the definition of a foreign country includes "all levels and subdivisions of government, from national to local", as well as any organised foreign area or entity, such as an autonomous territory or a separate customs territory.

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## Notes

<sup>1</sup> Criminal Act (*Kazneni zakon*), Official Gazette No. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21.

<sup>2</sup> For example, see (OECD, 2015<sup>[4]</sup>), paras. 194-197 and Recommendation 13(a); (OECD, 2017<sup>[5]</sup>), paras. 80-83 and Recommendation 3; (OECD, 2019<sup>[6]</sup>), para. 31 and Recommendation 1(a); (OECD, 2020<sup>[7]</sup>), paras. 197-201 and Recommendation 12(a).

<sup>3</sup> Act on Obligations and Rights of State Officials (*Zakon o obvezama i pravima državnih dužnosnika*), Official Gazette No. 101/98, 135/98, 105/99, 25/00, 73/00, 30/01, 59/01, 114/01, 153/02, 163/03, 16/04, 30/04, 121/05, 151/05, 141/06, 17/07, 34/07, 107/07, 60/08, 38/09, 150/11, 22/13, 102/14, 103/14, 03/15, 93/16, 44/17, 66/19.

<sup>4</sup> For example, see (OECD, 2014<sup>[8]</sup>), para. 26 and Recommendation 1(b); (OECD, 2010<sup>[9]</sup>), paras. 13-17 and Recommendation 1; (OECD, 2020<sup>[10]</sup>), paras. 60-67 and Recommendation 5.

<sup>5</sup> For example, see (OECD, 2005<sup>[11]</sup>), paras. 144-153 and 227; (OECD, 2015<sup>[12]</sup>), para. 40 and Recommendation 2(c); (OECD, 2005<sup>[13]</sup>), paras. 135-141; (OECD, 2012<sup>[14]</sup>), paras. 22-24 and Recommendation 1(b).

<sup>6</sup> For example, see (OECD, 2007<sup>[15]</sup>), para. 134; (OECD, 2013<sup>[16]</sup>), para. 36 and Recommendation 1(b); (OECD, 2014<sup>[8]</sup>), para. 21 and Recommendation 1(a).

<sup>7</sup> For example, see (OECD, 2005<sup>[17]</sup>), paras. 118-122 and 178(k); (OECD, 2004<sup>[18]</sup>), paras. 34-35 and 185(b); (OECD, 2012<sup>[19]</sup>), paras. 24-26 and Recommendation 2(a); (OECD, 2014<sup>[20]</sup>), para. 34 and Recommendation 1(a); (OECD, 2017<sup>[21]</sup>), paras. 43-44 and Recommendation 1(a).





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