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Liability of legal persons for foreign bribery

This chapter analyses the main elements of Croatia's Act on the Responsibility of Legal Persons for Criminal Offences to determine whether these are in line with the OECD standards for establishing the liability of legal persons for the bribery of a foreign public official.

The liability of legal persons is the second criterion for acceding to the Anti-Bribery Convention that is related to legal and enforcement framework for fighting foreign bribery. The OECD Working Group on Bribery assesses an accession candidate's corporate liability framework against Convention Article 2 and 2009 Recommendation Annex I.

5.1. OECD standards on corporate liability

Art. 2 of the Convention requires countries to create the liability of legal persons for foreign bribery:

Article 2

Responsibility of Legal Persons

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Additional guidance is in Commentary 20 of the Convention, and Annex I.B and I.C of the 2009 Anti-Bribery Recommendation.

5.2. Croatia's corporate liability framework

In Croatia, corporate liability for criminal offences is set out in the Act on the Responsibility of Legal Persons for Criminal Offences (Corporate Liability Law, CLL). The CLL was enacted in 2003 and last amended in 2012.¹ It establishes criminal responsibility of legal entities for any criminal offence – including foreign bribery – under Croatian law (CLL Art. 3(2)).

The CLL determines the preconditions of liability, sanctions and confiscation, as well as criminal procedure rules for legal entities (CLL Art. 1(1)). Unless the CLL prescribes otherwise, the provisions of the Criminal Act, the Criminal Procedure Act and the Law on the Office for the Prevention of Corruption and Organised Crime apply to legal entities (CLL Art. 2).

5.3. Legal entities subject to liability, including successor liability

Any entity that possesses legal personality under Croatian law can be found liable under the CLL. In addition, CLL Art. 1(2) explicitly applies the CLL to foreign entities that are considered as legal persons under Croatian law. The only exceptions are the Republic of Croatia, and units of local and regional self-government when acting in the exercise of their public authority (CLL Art. 6). The CLL also covers state-owned and/or controlled enterprises, according to Croatian authorities. However, in 2015-2019 USKOK did not investigate any state-owned and/or controlled enterprises. Croatian authorities were also unable to provide an example of past prosecutions against such enterprises.

CLL Art. 7 provides for successor liability. If a legal person ceases to exist “before the criminal proceedings have ended” or “after the final completion of the criminal proceedings”, then sanctions or other measures can be imposed on the entity's “general legal successor”. Croatian authorities explain that the “general legal successor” is an entity resulting from forms of corporate reorganisation governed by Croatia's Companies Act and other legislation on legal persons.² CLL Art. 7 further provides that legal persons subject to bankruptcy proceedings shall be punished for criminal offences committed both before and during such proceedings.

5.4. Level of authority of the natural person whose acts lead to corporate liability

The Anti-Bribery Convention requires countries to ensure that legal persons are held liable for foreign bribery committed by not only senior corporate officers but also lower-level employees. The 2009 Anti-Bribery Recommendation Annex I.B therefore requires systems for the liability of legal persons to take one of the following alternative approaches:

- a the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons; or
- b the approach is functionally equivalent to the foregoing even though it is only triggered by acts of persons with the highest level managerial authority, because the following cases are covered:
 - i. A person with the highest level managerial authority offers, promises or gives a bribe to a foreign public official;
 - ii. A person with the highest level managerial authority directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official; and
 - iii. A person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

In Croatia, corporate liability is triggered by the acts of “a responsible person” of the legal person, according to CLL Art. 3:

Article 3

(1) A legal person shall be punished for the criminal offence of a responsible person if it violates a duty of a legal person or with which the legal person has achieved or should have achieved an illegal property gain for itself or another.

(2) Under the conditions referred to in paragraph 1 of this Article, a legal person shall be punished for criminal offences prescribed by the Criminal Act and other laws in which criminal offences are prescribed.

A “responsible person” is defined in CLL Art. 4:

Article 4

The responsible person in the sense of this Act is a natural person who manages the affairs of a legal person or is entrusted with the performance of activities in the field of activity of a legal person.

Foreign bribery committed by a senior corporate officer may thus result in corporate liability under the CLL. The definition of a “responsible person” includes “a natural person who manages the affairs of a legal person”. This should cover a “person with the highest level managerial authority” within the meaning of 2009 Anti-Bribery Recommendation. As explained in Section 4.4, a senior corporate officer who authorises or directs a lower-level person to bribe a foreign public official is guilty of complicity or incitement under CA Art. 36 or 37.

The CLL also provides corporate liability for foreign bribery committed by a lower-level person in the company. A “responsible person” includes someone who is “is entrusted with the performance of activities in the field of activity of a legal person”. The definition does not take into account the seniority of the person in question. During the fact-finding mission, one prosecutor states that a low-ranking individual can be a responsible person “as long as he/she is linked to the activity of the legal person”. A second prosecutor refers to an actual case in which a worker at a warehouse met the definition. An academic agrees that low level employees are covered.

The Ministry of Justice and Public Administration describes a different theory of corporate liability for bribery committed by a lower-level person. Liability arises if the crime was committed as a result of company management's failure to supervise the lower-level employee. Company management, as a "responsible person" who manages the affairs of the legal person under CLL Art. 4, thereby fails to perform its duties which results in an offence of abuse of office and authority under CA Art. 291.³ However, this offence requires proof that failure to perform duties results in an advantage or damage to another person.

5.5. Standard of liability

The Convention Art. 1 covers bribery "in order to obtain or retain business or other improper advantage." Commentaries 4 and 5 clarify that this should constitute an offence whether or not the company concerned was the best qualified bidder for a contract or could otherwise have been awarded the business. They also explain that "other improper advantage" refers to something to which the company concerned was not clearly entitled, such as an operating permit for a factory which fails to meet the statutory requirements.

Under CLL Art. 3(1), not all criminal offences committed by a "responsible person" result in corporate liability. Instead, the legal person's responsibility is triggered only if (i) the offence violates a "duty of the legal person"; or (ii) the crime has or should have achieved an "illegal property gain" for the legal person or a third person. These conditions are not cumulative.

Bribery generally would not lead to liability under the first branch of Art. 3(1), i.e. as a violation of a "duty of the legal person". A prosecutor during the fact-finding mission states plainly that bribery, in and of itself, does not amount to a breach of a "duty of a legal person" under Croatian law. Instead, such duties relate to the reason for which the legal person was established, according to the Ministry of Justice and Public Administration. For example, if a legal person was created with a goal of protecting the environment, then an act causing environmental damage would be a breach of a "duty of the legal person". A Croatian lawyer and an academic take a similar view, stating that the "duties of a legal person" are found in the legal person's documents of incorporation deposited at the corporate registry. The academic adds that there could be additional duties such as to undergo audit or conduct due diligence on business and human rights. A prosecutor also suggests in passing that evading taxes and accounting misconduct might amount to breaches of duties. But no discussant considers that bribery necessarily amounts to a breach of a "duty of a legal person".

Some acts of bribery might also not trigger corporate liability under the second branch of CLL Art. 3(1), i.e. where the offence has or should have achieved an "illegal property gain". All participants at the fact-finding mission explain that an "illegal property gain" equates to "property gain from a criminal offence" defined in CA Art. 87(22). This means that a contract or job opportunity obtained through bribery is not a property but non-property gain, according to two prosecutors. A lawyer adds that a property gain is something that is capable of being expressed in money. Hence, bribery to avoid a safety inspection is a "property gain" only if there is proof that a fine has been avoided.

The *INA/MOL* case vividly illustrates the obstacle posed by the need of an "illegal property gain" for corporate liability. The case involves allegations that a company CEO bribed a former Prime Minister to obtain a stake and board seats in a Croatian state-owned enterprise. Prosecutors at the fact-finding mission elaborate that the purpose of the crime was to acquire controlling shares in the Croatian state-owned enterprise. The bribery thus only "enabled business". It did not produce any wrongful proceeds or "illegal property gain" under CLL Art. 3 that would be necessary to impose liability against the company.

Restricting corporate liability to bribery that produces an "illegal property gain" does not meet the requirements of the Convention. Parties to the Convention must impose liability against legal persons for foreign bribery, which is defined in Art. 1 as bribery to "to obtain or retain business or other improper advantage". This term is interpreted broadly. Non-property gains such as an operating permit for a factory

must be covered, as indicated in Commentary 5. The Working Group has stated that liability should also arise when bribery results in a “property loss”: companies may win an unprofitable contract merely to gain market entry.⁴ The Working Group has therefore criticised limiting liability to bribery that “was aimed at or has resulted in the legal entity gaining financial advantage.” Such a requirement causes “potential difficulties arising from the necessity to prove an intended or actual financial advantage or profit”.⁵

Given this broad interpretation, the foreign bribery offences of Parties to the Convention thus cover bribery to obtain a wide range of advantages. Examples include the processing of official documents, such as visas or work permits; the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunication services, power and water supply, police protection, loading and unloading of cargo, protection of perishable products from deterioration, or the scheduling of inspections related to contract performance or transit of goods; a right of entry into a country; exemption from compliance with regulatory operating conditions; and obtaining the delivery of supplies or false records.⁶

That Croatia’s regime falls below the Convention’s standards can also be seen from its differential treatment of natural and legal person liability for foreign bribery. Art. 2 of the Convention requires corporate liability for all acts of foreign bribery committed by natural persons as defined in Art. 1. That is not the case in Croatia, where foreign bribery that produces a non-property gain leads to liability for natural but not legal persons.

5.6. Bribes paid through intermediaries, including related legal persons

Annex I.C of the 2009 Anti-Bribery Recommendation prescribes that the Parties to the Anti-Bribery Convention should ensure that “a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf.”

Croatian authorities state that legal persons can be liable for using an intermediary such as an agent or contractor to bribe foreign public officials. A person in a company who uses an intermediary to commit foreign bribery is liable for the offence as a principal or co-perpetrator (see Section 4.3.5). If the person who uses the intermediary is also a “responsible person” in the company (see Section 5.4) then the company is also liable for the offence, assuming other requirements in the CLL are met. A prosecutor in the fact-finding mission states that the legal person in this scenario would be liable, even if the intermediary used to commit bribery is not a full-time employee of the company.

The CLL does not provide special rules on corporate liability for bribery committed through a related legal person. The Ministry of Justice and Public Administration states that a parent company would be liable if the CLL requirements are met. This occurs for example, if a “responsible person” of the parent company is guilty of directing or authorising the subsidiary to commit foreign bribery. A prosecutor adds that this would occur only if the individual in the parent company is responsible for overseeing the subsidiary. The bribery would also have to benefit the parent or the corporate group.

5.7. Proceedings against legal persons

The 2009 Anti-Bribery Recommendation Annex I.B states that a country’s system of liability of legal persons “should not restrict the liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted.”

The CLL meets this requirement. Art. 5(1) states that “the liability of a legal person shall be based on the fault of the responsible person.” Art. 5(2) adds that “A legal person shall also be punished for the criminal offence of a responsible person even in the case when the existence of legal or actual obstacles to determining the responsibility of the responsible person is established”. Croatian authorities explain that examples of “legal obstacles” include immunity and amnesty. “Actual obstacles” include the impossibility

of identifying the natural person; the natural person's death or incapacity to stand trial; and if the natural person has absconded or is abroad.

5.8. Effective regret

The principle of effective regret applies to natural persons (see Section 4.6.2) as well as legal persons. Under CLL Art. 12a, “a legal person who reported the criminal offence of a responsible person before its discovery or before learning that the offence has been discovered, may be released from punishment.” As with natural persons, Croatian authorities state that the purpose of this provision is to encourage the reporting of crimes. This release from punishment is a discretionary decision of the court (“*may* be released from punishment”). However, the CLL does not have a provision equivalent to CA Art. 50(2) that allows a court to impose a more lenient punishment as an alternative to release from punishment. Croatia does not have statistics on the application of CLL Art. 12a. Prosecutors at the fact-finding mission are not aware of a case in which CLL Art. 12a was applied. They explain that the provision could apply to a large company whose management discovers and reports offences committed by previous management.

5.9. Conclusions on liability of legal persons for foreign bribery in Croatia

Croatia's CLL provides for the liability of legal persons for foreign bribery and meets many of the standards demanded by the OECD Anti-Bribery Convention. The CLL broadly applies to any entity that possesses legal personality, and expressly covers foreign entities that are considered as legal persons under Croatian law. Liability can result from bribery committed by senior corporate officers, lower-level employees, and intermediaries (including related legal persons). The prosecution or conviction of a natural person is not a prerequisite to corporate liability.

To further strengthen its foreign bribery offence, Croatia could consider taking steps to ensure that liability can result from all acts of foreign bribery, and not only those that result in an “illegal property gain” to the legal person.

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Notes

¹ Act on the Responsibility of Legal Persons for Criminal Offences (*Zakon o odgovornosti pravnih osoba za kaznena djela*), Official Gazette No. 151/03, 110/07, 45/11, 143/12.

² See e.g. Companies Act (*Zakon o trgovačkim društvima*), Official Gazette No. 111/93, 34/99, 121/99, 52/00, 118/03, 107/07, 146/08, 137/09, 125/11, 152/11, 111/12, 68/13, 110/15, 40/19, Arts. 512 and 550a(6).

³ In another evaluation, Croatia also asserted that in these cases company management can be liable for the offence under CA/1997 Art. 339 for a negligent failure to perform supervisory duties resulting in a violation of the rights of third parties or considerable property damage. (Council of Europe Group of States against Corruption, 2005^[1]), para. 65.

⁴ (OECD, 2011^[6]), para. 44.

⁵ (OECD, 2005^[7]), paras. 147-149 and 210(a).

⁶ (OECD, 1999^[2]), p. 6; (OECD, 1999^[3]), p. 7; (OECD, 1999^[4]), p. 5; (OECD, 2002^[5]), p. 8.



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