Legal regulation of combating corruption. Report of the LSGL's Research Group.

I. Introduction

Corruption is a serious institutional dysfunction. The lenient view of corruption as the "grease of the wheels of development" is no longer accepted[1]. Much on the other hand, graft is currently understood as the "sand of the wheels"[2]. As one of the main factors hindering economic and social development, the combat of corruption has become a top priority in the agendas of public and private actors, including academia.

The Law School Global League has joined such efforts. It has created a group formed by scholars from several countries, including Brazil, Germany, Italy, Russia, South Africa, United Kingdom and Turkey[3], and organized academic conferences on the topic. This report was prepared as a contribution to the creation of a comparative critical mass regarding such serious crime. The purpose is to contribute to the dissemination of knowledge and to expand awareness of the applicable regulation and of the related institutions, mechanisms and instruments. The report based on legal regulations and judicial practice of the above countries.

The second chapter addresses the general aspects of corruption. The third chapter deals with prevention of corruption in the public sector. Chapter four is dedicated to anti-corruption compliance in companies. Chapter five tackles the criminal liability for corruption. Chapter six deals with transnational enforcement of anti-corruption norms and the creation of property rights.

II. Corruption and Development

If one searches for the word "corruption" on Google, the answer is an astonishing 41 million entries. Anyone could argue, however, that this is not a so impressive number. For example, the word "business" leads to 1.8 billion entries, while "law" leads to 433 million entries, and "government" leads to 414 million entries. In fact, a simple comparison of these numbers may give the impression that corruption is not as important as are business, or law, or government. But this is not necessarily a correct analysis. The magnitude of Google entries does not reflect the relative importance of each term, since they cannot be compared among themselves. Just as a matter of single comparison, the nature of the word *corruption* is not the same as the nature of the word *business*. Although some entries in a Google search for the words *business* or *law* or *government* may carry negative aspects for each entity or concept, most of the entries obtained show how the world is a better place for having a set of laws, or an organized business structure, or any acting government.

Conversely, entries for the word "corruption" carry almost inevitably a negative tone. If one breaks down on Google the word corruption, it will be found that there are 1.4 million entries for the term "police corruption", or 776 thousand entries for "public corruption", or 580 thousand

[1] The "grease of the wheels" hypothesis was put forward by serious scholars, mainly political scientists. In summary, it argued that when regulatory burden was high and governance was low, corruption could increase efficiency. Corruption could compensate bad policies and bureaucracy as it would have the strength to mitigate or circumvent such distortions. In this perspective, corruption would be a positive contribution for growth and development. For instance, Nathaniel H. Leff argued that "(...) if the government has erred in its decision, the course made possible by corruption may well be the better one". LEFF, Nathaniel H. 'Economic development through bureaucratic corruption". American Behavioral Scientist 8:11-22, p. 11. Samuel P. Hutington asserted that "(...) in terms of economic growth, the only thing worse than a society with rigid, over-centralized, dishonest burocracy is one with a rigid, over-centralized and honest bureaucracy"). HUTINGTON, Samuel. **Political order in changing societies**. New Haven: Yale, 1968, p. 386.

[2] The "sand of the wheels" hypothesis was first asserted by MYRDAL, Gunard. **Asian drama: an inquiry into the poverty of nations**. New York: Pantheon Books, 1968.

[3] See Annex 1 (List of Group's members)

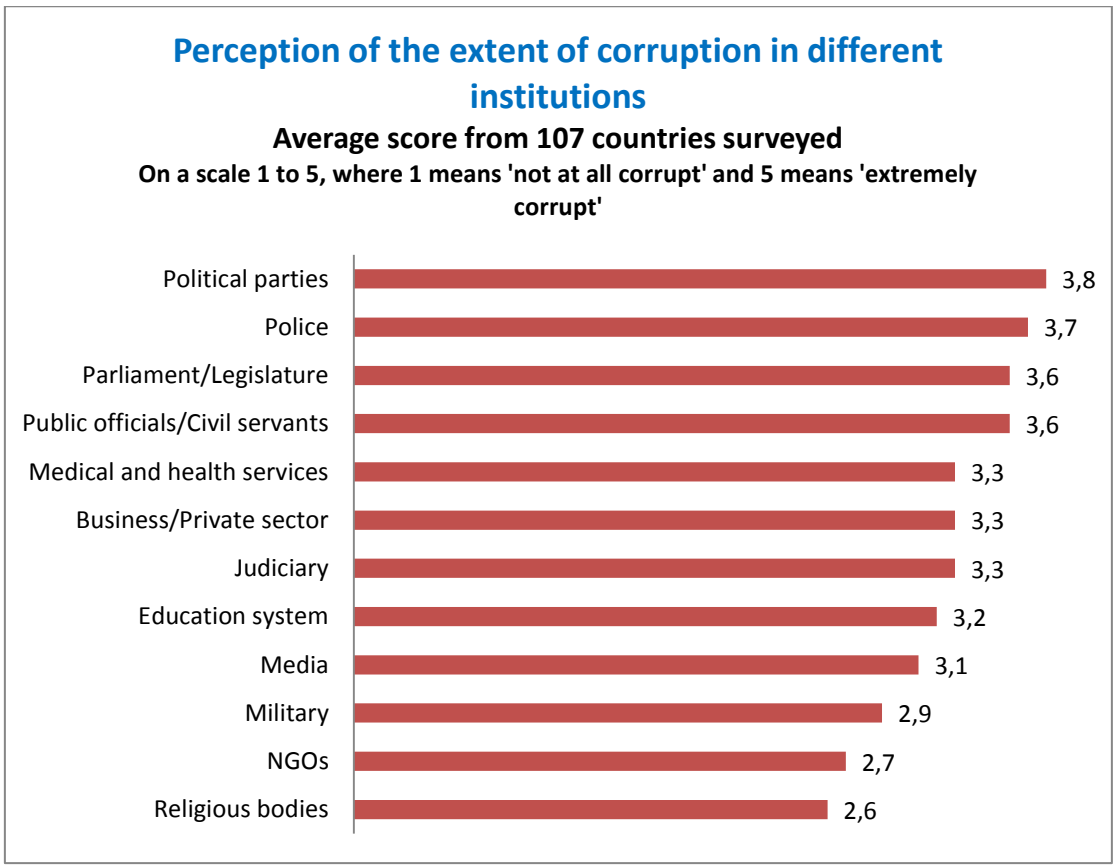
entries for "political corruption". In a flash of hope, the term "fighting corruption" has 677 thousand entries, and this is not for sure a bad start.
So it seems that corruption is something that everyone would like to get rid of (with exception of the corruptors and the corrupted, of course). At least publicly, no one defends corruption. Every politician or public servant or members of the judiciary or even the police force say publicly that they are frontally against any type of corruption. But this is not the perception of the population worldwide about this subject.
A recently published survey made by the European Commission - Special Barometer 397, February 2014 - in all of its State Members shows that:

- 76% of respondents think that corruption is widespread in their own country.
- 26% think that it is acceptable to do a favor in return for something that they want from the public administration or public services.
- 59% believe that bribery and the abuse of positions of power for personal gain are widespread among political parties.
- 26% agree they are personally affected by corruption in their daily lives.
- 56% think the level of corruption in their country has increased over the past three years.
- 73% agree that bribery and the use of connections is often the easiest way of obtaining some public services in their country.

If these numbers are so dramatic for a highly developed region of the globe, what can be expected if the analysis included all the countries in the world?
The Global Corruption Barometer 2013 published by Transparency International shows the results of a survey made with more than 110,000 respondents in 107 countries. Some of the key findings of this survey are the following:

- Bribery is widespread: 27% of the respondents report having paid a bribe in the last 12 months when interacting with public institutions and services.
- Public institutions entrusted to protect people suffer the worst level of bribery: 31% of people who came in contact with the police report having paid a bribe; for those interacting with the judiciary, the share is 24%.
- Governments are not thought to be doing enough to hold the corrupt into account.
- The democratic pillars of societies are viewed as the most corrupt: around the world, congress and the political parties, the driving force of democracies, are perceived to be the most corrupt institution.
- Powerful groups rather than public good are judged to be driving government actions.
- Hopefully, the survey shows that people state they are ready to change this *status-quo*.

The same survey shows the perception people have about the level of corruption in different institutions in each of the countries surveyed. Again, the results are quite amazing. Political parties, police, parliament and public officials are viewed as the most corrupt institutions worldwide. To make things worse, both political parties and parliament are considered as the pillars of a democratic society.



Source: Transparency International - Global Corruption Barometer - 2013

But the effects of corruption are not only a matter of low national esteem, or lack of ethical standards, or even a "cultural shame". The most devastating effect of corruption is its cost to the population of every single country in the world. Resources that should be used to improve the quality of life of the population are embezzled, in a criminal way, from the poor ones who need desperately for such funds.

How could we estimate the cost of corruption? Of course, there is not any easy answer to this question. Generally speaking, corrupt people do not sign receipts acknowledging that they stole money from companies; and normally, these companies are state-owned ones. For obvious reasons, the level of corruption is traditionally much higher in state-owned entities than in the private sector. The lack of an individual owner who has invested his/her own money to establish and manage a company is a crucial factor to explain why the level of corruption is so high in state-owned entities. The owner is "the government" who is not a specific person. It is an amorphous entity, which delegates to some individuals - normally for a short period of time - the task of managing a company. What is much worse, quite often these "managers" are appointed by the "government" with the main purpose of stealing money from these state-owned entities. The lack of perceived confidence in public officials or civil servants (as shown in the table above) is an obvious portrait of how people feel about these persons and their respective governments.

Although difficult to measure, some studies made in Brazil suggest that the cost of corruption may reach between 1.35 % of GDP (FIESP 2006) to 5% of GDP (*Época* 2008)[4]. Regardless of the real scale, these numbers indicate that corruption may reach amazing figures. For a GDP of US$ 2.2 trillion (2012), the cost of corruption could be estimated between US$ 30 billion to US$ 110 billion.

[4] POWER, Timothy J.; TAYLOR, Matthew M., "Introduction: Accountability Institutions and Political Corruption in Brazil" In **Corruption and Democracy in Brazil: The Struggle for Accountability**, POWER, Timothy J.; TAYLOR, Matthew M. (eds.), Notre Dame: University of Notre Dame Press, 2011, p. 1.

If one compares the annual expenditures made in education or health in Brazil, for example, it is easy to understand the significance of the estimated amount of the money stolen from public vaults. The expenditures made in health represent 3.5% of the Brazilian GDP in 2013, while the direct expenditures made by the central government in education represent only 1.0 % of the Brazilian GDP.
The more dramatic consequence of the corruption is not the amount of money which is embezzled or diverted by a small number of public servants or congressmen. The real cost of corruption is to place the population of a country in a hopeless fight against poverty and ignorance. The case of education in Brazil is again a typical example of the government indifference to the real needs of the population: in the recently published Learning Curve Study made by The Economist Intelligence Unit and Pearson International (2014), among 40 countries researched, Brazil is ranked number 38, ahead only of Mexico (ranked 39) and Indonesia (ranked 40). This report, in the own words of its publishers, is part of a wide-ranging program seeking to distil some of the major lessons on the links between education and skill development, retention and use. If one analyses the Learning Curve Study and the Corruption Index published by International Transparency, probably would find that it is not a simple coincidence that the countries ranked higher in the Learning Curve Study are the ones which are also perceived as the less corrupt countries according to the Transparency International Corruption Index (CPI).
The signals are very clear: the higher the perceived level of public sector corruption in a specific country, the lower its degree of development, and the lower public expenditures are destined to improve the well-being of its citizens. This is the perverse cost of corruption.

III. Prevention of Corruption in Public Sector

As far as the prevention of corruption in public sector is concerned, the national reports do show a variety of patterns, both under the point of view of the legislation and of the operational counter-corruption measures.
According to this very introductive distinction, it is suitable to follow two different paths: first of all, it is worth to analyze the **legislative aspects**; secondly, **operational patterns** will be considered.
At a glance, the impression raising from a comparative view on the reports, shows that the Countries have different legislative approaches to the matter of corruption in public sector. Some of them have a more "comprehensive" approach – it is to say that the legislation tends to cover all the social phenomenon in which corruption can occur – while others have less comprehensive tools.
In the **South African** system, there is a lack of a general normative definition of corruption. The most relevant sources are represented by the 2003 African Union Convention on preventing and combating corruption, and by the 2004 Prevention and Combating of Corruption Activities act n. 12, in which many corruptive misconducts are provided. The 12/2004 Act seems to deal with the corruptive phenomenon both under the point of view of the private (commercial) and of the public sector. In particular, Section 3 seems to state that an individual must be considered guilty of corruption when he/she accepts or offers to accept a gratification from any other individual, or gives or agrees to give, gratification, in order to accomplish his duty. In the public sector, the potential perpetrators of such a misconduct are the "public officers", whom are defined under the 2004 Act itself and under the 1994 Public Service Act.
Another normative tool to prevent corruption, both in pubic and in private sector is the protection of whistleblowers, in order to encourage disclosure and to protect against reprisals all those individuals who give informations (see Protected Disclosures Act, 2000).
Section no. 28 of the 2004 Act pays particular attention to corruption in public procurements. Private and public companies and bodies, being convicted for corruption in public procurements,

can be mentioned in the Register for Tender Defaulters. Unfortunately, this tool does not seem to work at its best, as only two registrations were made since 2004…

In **Russia,** corruption is not defined as an offense under the Criminal Code of Russian Federation, while in that very same code, many misconducts are provided, that are generally considered "corruptive offenses" (art. 201, Abuse of authority; art. 204, Bribery in profit-making organization; art. 285 Abuse of official power; art. 290 Bribe-taking; 291 Bribe-giving). By the way, the 2008 Federal Law of Russian Federation no. 273-FZ on Combating Corruption, introduced a specific definition of corruption. That new definition pays wide attention to the public sector. In fact, the 2008 Fed. Law provides also the definition of all the duties of the public servants: these are servants of the Federal Government, regional and municipal Agencies, Central bank, Pension Fund, Social Insurance Fund, Federal Mandatory Medical insurance Fund, and the State owned corporations. All those individuals are potential perpetrators of the «abuse of public office». Furthermore, the 2013 Decree of the President of the Russian Federation (no. 309) provides that a wide number of Authorities can gather information from tax administration, in order to check the individuals' declarations on incomes and assets: this should allow to discover officers who unduly receive corruptive money or benefits. Suspicious transactions can be compared with personal income declaration, in order to point out corruptive phenomenon.

In **India**, the combating corruption approach does deepen its roots in the British domination period. In fact, a first anti-bribery intervention was taken already at the end of the XIX Cent. in order to face the high risk of corruption in the management of the East India Company. As a consequence, various measures were introduced, even before the independence, to detect, prevent and punish corruptive misconducts, especially in public sector. The 1860 Penal Code already provided for a definition both of public servants and of the offenses being considered "corruptive". During the 40s of the XX Cent. a «Special Police Establishment» was introduced, to investigate and check bribery and corruption in various supplying departments. That body – after changing its name into Dehli Special Police Establishment (DSPE) – carried on its aim, in the areas submitted to its "jurisdiction".

Even after the independence, combating corruption went on being considered as a main goal of the public administration and of legislation. The DPSE jurisdiction was enlarged to the Union, with regard also to the private sector. In 1963 a Central Bureau of Investigation was settled in order to investigate also cases of bribery and corruption: it drew its powers from DSPE. In 1964 a Central Vigilance Commission was established with the major aim to focus on corruptive misconducts, cooperating with CBI, that has the direct power to investigate. In 2003 CVC received an advisory function towards the Union Government, about all matters pertaining to the maintenance of integrity in administration. It also hold the power of vigilance administration on various Ministries and other organizations of the Union Government.

In 1988, The Prevention of Corruption Act consolidated the provisions of the 1947 Prevention of Corruption Act, and of the 1952 Criminal Law Amendment Act. It also amended the sections 161 to 165 of the Indian Penal Code (as it will be explained under point 4, the Penal Code provides for many offenses having corruptive nature). The 1988 Act also introduced the concept of «public duty», which means a duty in the discharge of which the State, the public or the community at large has an interest, and proscribed minimum penalty of 6 months for all the corruptive offenses already provided by law.

Reading through the report on **Turkey**, it is possible to appreciate the existence of a range of legislative acts dealing with the various fields in which corruptive misconducts can take place. A certain weight in this normative attitude was played by international covenants and conventions, to which Turkey is part. As far as the prevention in the public sector is concerned, some important Acts must be singled out.

First of all, the Political Parties Law no. 2820/1983, provided for inspection of the accounts of political parties by the Constitutional Court - but this supervision seems to remain superficial, owing to lack of time and staff. The Political Parties Law introduced strict monitoring of the incomes and expenditure of political parties, as well as penal sanctions for individuals. The

incomes and expenditure of political parties must be set out in annual draft budgets drawn up, firstly, on a regional basis (including districts) and, secondly, on a national basis. Their operations must be based on these draft budgets. All receipts and expenditure must be to the name of the party as a legal entity. The party may only obtain income from one of the ten sources indicated in the Law, and there are particularly strict rules on donations. Thus, political parties may not accept donations from institutions and public bodies, or establishments of which the latter are shareholders, public banks, professional and trade union organisations, foreign states, international organisations, foreign nationals and associations, and groupings or associations based in other countries. Individuals or legal persons to whom these prohibitions do not apply may only make donations not exceeding a certain annual amount per party, and amounts in excess of this limit are paid into the Public Treasury. Public aid accounts for a substantial part of the political parties' incomes. Parties must receive a certain minimum percentage of the vote (7 %) to qualify for it. However, aid may be used only to cover expenses or fund party activities. Moreover, political parties must balance their budgets, and are not allowed to borrow or lend funds. The Law does not, however, establish any maximum limit for election expenditure. Expenditures and incomes of political parties are monitored by the Constitutional Court.

Recently, the 2012 Law on presidential election also introduced strict rules on transparency of financing for candidates during presidential elections.

Secondly, Law no. 3628/1990 on Declaration of Assets and the Fight against Corruption and Fraud introduced a potential tool to prevent corruption. Generally speaking, the annual statement of incomes and assets is mandatory only for politicians and civil servants, not for private citizens. By the way it is important to define civil servants, for the specific aims of the law on assets declaration. Those concerned are, firstly, central, regional and government officials, and, secondly elected public office holders (MPs, elected ministers, mayors, municipal councillors, regional councillors), ministers who are not MPs, and presidents of political parties. The same obligation applies, inter alia, to administrators of public institutions, professional organisations and foundations, presidents and administrators of co-operatives and unions, company inspectors, administrators and auditors of public interest associations, newspaper owners (individuals or, in the case of corporations, members of boards of management and auditors) and also newspaper editors and journalists.

In the two last decades, many important acts were adopted to establish transparency in public administration. The law on Public Procurements (2002) and the one on Public Procurements Contracts are very important examples of this trend. Also the law on Public Financial Administration and Control (2002) has a strategic relevance under the point of view of transparency. Furthermore, the 2006 Law on the Prevention of the Laundering of Crime Proceeds can be considered as a form of prevention of corruption, also in the public sector. In fact, establishing the Presidency on Inquiring Financial Crimes and the Coordination Board, this law settled a tool to face the risk of money-laundering also through public procurements: at this extent, it can be considered a part of the measures to prevent corruption in public sector.

Setting aside the Assets and Incomes Declaration Law, the civil servants are defined under the Turkish Penal Code. The new Penal Code adopted a new approach which resulted in the extension of the category of persons qualifying as public officials. The new criterion is whether the activity performed by the perpetrator bears a "public" nature or not. Hence, those participating to the performance of any public service now qualify as public officials, insofar as those services are ran according to administrative law principles. Hence, services offered through private law instruments, such as contractors hired through tenders, do not qualify as public officials. As it will be specified under sect. 4 of this generale report, all those individuals are considered by the Turkish law as potential perpetrators of the corruptive misconducts: we will see furtheron (§ 2.2) that they are subject to the control of the Civil Servants Ethical Board.

Another tool to prevent corruption in public sector is a system of mandatory auditing. The Law no. 5018 provides for detail internal auditing (see below): such an instrument has a very deep

preventive effect, as far as it grants a control on efficiency and on propriety of the financial and economical managment of a public agency. As an extrema ratio, the Court of Accounts leads a control on the bare lawfulness on the managment of these insititutions.

Through the **Brazil** report, a strong influence of the federal system emerges. Reading the national report it seems clear that a wide and historically-rooted system (since 1830) of legislation is adopted against corruption. Those normative interventions are mostly penal, as they tend to criminalize corruptive misconducts. At the beginning of the 90s of the XX Cent. many laws were adopted at this aim: e.g. the 1992 Administrative Improbity Law; the 1993 Public Procurement Law, regulating public procurement and the execution of contracts regarding works and services at Governmental level, but also introducing new offences, that can be included in a wider concept of corruption; the 1998 Anti money-laundering Law. Besides, a new season of normative interventions seems to start: beside the criminalization tool, some truly preventive initiatives were adopted. The very same 1998 Anti money-laundering law also introduced the Council for Oversight of financial activities. The 2001 Provisional measure n. 2, 143-31, introduced the Federal Office of Controller General. At the same time, the inquiring powers of the Federal Police, of the Federal Revenue Service, and the Public Prosecutor service were expanded with regard to the corruptive phenomenon.

As corruption evolves through decades, in 2002 a partial reform of the Penal Code was approved, which criminalized active bribery and trafficking of influence in international transactions, according to the 1997 OCDE Anti Bribery Convention. Then in 2003, penalties for active and passive corruption were increased. Finally, in 2013 the Anti-corruption law (no. 12, 846) ascribed strict administrative and civil liability to bribery acts.

In particular, severe administrative penalties were introduced against corrupted entities themselves, which can be proportional to the seriousness of the offence, the benefit obtained or intended by the perpetrator, to the losses caused by the wrongful act, the economic strength of the offender, the contract amount with the harmed public entity, potential cooperation with the investigation and the existence of internal mechanisms of integrity, audit and incentive for the reporting of irregularities, as well as the enforcement of codes of ethics and conduct. Although, leniency agreements are permitted, limited to once each 3 years. The execution of such an agreement may reduce the application of the administrative fine by up to two thirds, exempting the convicted company from the obligation to publish the condemnatory conviction in newspapers and from the prohibition to receive incentives, subsidies, grants and loans of public funds.

However, the execution of the leniency agreement does not eliminate the need to fully indemnify the harm caused by the wrongful act.

In addition to administrative and judicial penalties, the convicted company's name shall be included in registries that prevent them from participating in public bids and contracting with the government, namely, the National Registry of Punished Companies ("Cadastro Nacional de Empresas Punidas – CNEP") and the National Registry of Inapt and Suspended Companies ("Cadastro Nacional de Empresas Inidôneas e Suspensas – CEIS"). The relevance of the misconduct under other provisions, like the public procurement law, does not prevent the application of accountability and sanctions provided by the new law.

So, nowadays, we can say that the Brazilian preventive system against corruption is strongly rooted on a double path structure. On one side, the individual criminal liability of the offender, co-offender, or participant to the offence (see point 4). On the other side, the legal liability of the entities, which is a strong similarity to the Italian system (see below).

Furthermore, some complementary act was approved in order to strengthen transparency: Law 135/2010 banned individuals convicted for certain crimes (also corruption) from running to local or federal seats (for 8 years); Law 12,527/2011, on access to information, established a form of monitoring government actions and expenditures, helping to prevent corruption.

The **Italian** report shows, as the Brazilian one, a double way system to prevent corruption in public sector. A first tool is represented by a wide legislation, covering both the criminal liability

aspect and the administrative regulation of public procurements and calls for tenders. A second instrument is represented by some recently adopted operational measures, that will be deal in the second part of this paragraph.
As far as its normative relevance is concerned, the nature of corruption is strictly related to the structure of the public function. It is possible to define public function as the activity held by public authority in order to achieve a general benefit. This benefit is pursued by authoritative measures being the expression of a balance between private interest and public interest: the duty of public function is to point out that balance. The enormous range of areas related to the public function is the reason of the wide consistence of corruptive misconducts. The Italian legislator took measures against bribery. Certainly, the most important is the 190/2012 Anti-Corruption Act that reformed the settlement of the penal code in terms of criminal liability and punishments (see § 4). The Anti-Corruption Act requires each Public Administration to put in place specific measures to prevent corruption or bribery. The aforementioned tools include: 1) the adoption of an anti-corruption plan; 2) the appointment of a compliance officer; 3) the adoption of a code of conduct for employees.
Therefore, the reform intervenes both on criminal liability and on specific tools to prevent misconducts, that can be defined "soft law" (see § 2.2).
Besides, a new national anti-corruption authority was established by the 190/2012 Act. It is the "*Commissione Nazionale per la Valutazione, la Trasparenza e l'Integrità delle Amministrazioni Pubbliche*" or CIVIT. One of the main aims of CIVIT is to approve a National Anti-Corruption Plan, which will be drafted by the Ministry of Public Administration, the "*Dipartimento della Funzione Pubblica"*. Then, each Public Administration must implement its own anti-corruption document on the basis of this National Anti-Corruption Plan and use their own compliance model as a continuous assessment tool to check their level of exposure to bribery risks. The plan must point out all activities that entail a degree of risk and set out what arrangements have been made (or will be made) to prevent the occurrence of corruption in these areas. The compliance officer, in each Public Administration, will: 1) monitor the level of the plan implementation; 2) assess its sustainability over time; 3) amend the plan to make sure that it complies with any change in anti-corruption legislation or with the internal protocols of the Public Administration. In addition, each Public Administration will be required to adopt a tailored code of conduct for employees, which will have to follow precise criteria and models laid down by CIVIT. Infringement by any employee of any part of the code will result in disciplinary sanctions. New provisions also deal with "whistle-blowing". Public employees who report acts of misconduct in the workplace should not suffer dismissal, sanctions or discrimination as a result of their action. Each Public Administration will adopt an internal mechanism to protect any whistleblower and will keep his/her identity secret, unless he/she gave prior consent to its disclosure.
Finally, it is important to underline the links between corruption and organized crime in Italy. These links are obvious in public procurement and they harm Italian economic system. The domestic legislation drafts a specific measure that undermine the advantages of corruptive misconducts: it is the confiscation (see under point 5).
According to the very complex social reality underlying the corruptive phenomenon, the Italian Authority has to set forth a wide range of counter-corruption tools, addressing to the several forms of possible misconducts and to the various areas of the economic fields that might be affected by it.
As far as the **operational tools** are concerned, some Countries already established interesting examples.
In **Russia,** one of the new tendencies in combating corruption is an active participation of Financial Intelligence Unit (FIU). Russian FIU was established at 1 of November 2001 as the Financial Monitoring Committee (FMC) by a Presidential Decree No. 1263, now called the Federal Financial Monitoring Service (Rosfinmonitoring). Rosfinmonitoring is the central authority for combating ML and TF in the Russian Federation, the administrative-type FIU. In 2012, Rosfinmonitoring was placed directly under the authority of the President of Russian

Federation, though Rosfinmonitoring still enjoys full operational autonomy. The structure of Rosfinmonitoring includes Central office and interregional offices in the eight federal districts of the Russian Federation.

The main powers and duties of Rosfinmonitoring are:

- collecting, processing and analyzing the information about transactions which are subject to monitoring by designated reporting entities, and requesting further information about these transactions;
- creation of a uniform information system and administering and maintaining the federal AML/CFT database, in line with data protection and secrecy provisions;
- referring relevant information to the various law enforcement bodies when there is a suspicion of ML or TF. This happens upon request of the law enforcement authorities as well as upon the own initiative of Rosfinmonitoring;
- carrying out co-operation and exchange of information with competent authorities of other countries in the AML/CFT sphere in accordance with international agreements of Russia;
- representing Russia in international organizations on issues of combating money laundering and financing of terrorism.

Rosfinmonitoring is responsible for financial investigations of money laundering cases related to corrupted offences. In accordance with Federal Law dated 3 December 2012 No. 231- FZ came into force on 1 January 2013 Rosfinmonitorig (the Russian FIU) should also provide information about transactions of state and municipal servants by written requests of Federal ministers, heads of subjects of the Russian Federation and Head of the Central Bank of the Russian Federation for purposes of control of incomes and costs of state and municipal servants.

In **India,** the coordination between CVC and CBI should represent an operational resource to fight corruption at all levels. By the way, from the national report, it is possible to understand that such a cooperation has a lack of effectiveness. It seems, somehow, to depend also on the fact of the Administrative control of CBI by the central government: it makes the body vulnerable to the criticism that the agency often compromises its corruption investigations of government officials.

In **Turkey** important initiatives were taken under the operational point of view. The Supervisory Board Presidency (Teftiş Kurulu Başkanlığı), which is an organ attached to the Prime Ministry, has been designated as the organ to provide coordination with OLAF. The same organ also serves as « anti-fraud coordination service » (AFCOS), which is supposed to be an operationally **independent national** authority responsible for protecting the EU's financial interests from fraud.

The establishment of a Civil Servants Ethical Board in 2004, attached to the Prime Ministry, also deserves mention. However, all 11 members of the Board are directly appointed by the Committee of Ministers, ie, the Government

Then, also in the banking field, some interesting bodies, having independent nature, were introduced: the Banking Regulation and Supervision Agency (Bankacılık Düzenleme ve Denetleme Kurumu) was established by the Bank Law No. 4389 of 18 June 1999; the Savings Deposit Insurance Fund (Tasarruf Mevduatı Sigorta Fonu), regulated by the Art. 63 of the current Banking Law.

In **Brazil,** as it was mentioned here above, the Federal Office of the Comptroller General (“Controladoria Geral da União - CGU”) - created in 2001 and remodeled in 2003 - the Federal Police, the Federal Revenue Service and the Public Prosecutorial Service (“Ministério Público”) , share the operational aspect of the counter-corruption policies. In fact, they are involved both in active control, detection and investigation of situations in which a corruptive misconduct can occur.

In **Italy,** a new field of intervention has been growing up during the past few years. Soft law tools, that are not legislative instruments, do represent this new path. They are, for instance,

cooperation agreements, Memoranda of Understanding and legality pacts, and they reflect a social attitude. Italian institutions increasingly adopt them, as a precious asset for preventing criminal infiltration phenomenon. These new preventive tools play a subsidiary role in respect to the norms both to select subjects allowed to compete in public procurements and to guarantee fair modalities of public works execution. In fact, the soft law instruments prevent companies that do not reach the legal standards, to take part to call for tenders.

- The Memoranda of Understanding/legality pacts

These kind of agreements are voluntary settled by all stakeholders. In Italy, they were used for the first time in 1998. This kind of documents were originally agreements dealing with urban security, set forth by the State and local authorities. Nowadays, they involve an increasing number of subjects (such as trade unions), and are used in various sectors, in particular in criminal infiltration risk areas.

Currently, these kind of pacts are compulsory for each major public work, as established by the Inter-Ministerial Committee for Economic Planning (C.I.P.E.) on 3 August 2011. In that vary same date, the CIPE also approved the guidelines for the National Authority of Control on Major Public Works (CCASGO): those guidelines determine the contents of the agreements that must be adopted by all the stakeholders in a public procurement (such as local authorities, corporations, trade unions, NGOs).

These kind of agreements are settled after the call for tenders.

Moreover, the Italian prevention system of corruption applies other kind of documents, such as: (a) the *operating protocols*, monitoring the financial matters of public works; (b) the *cooperation agreements*, signed by various authorities, in order to cooperate against infiltration by organized crime, corruption and to grant security. These agreements are based on various actions: the information exchange, the collaboration and the activities coordination.

- The White Lists (WLs)

The WLs are a peculiar instrument against organized crime. They can be used as a selective criterion for call for tenders. Then, the white lists can work as a pre-selection condition to choose companies that can take part in a public procurement. In Italy, WLs were used for the first time in April 2009, after the earthquake in Abruzzo, as a tool to choose the eligible firms for rebuilding. At the beginning, the WLs were optional. As a result, the contracting parts of each public procurement can decide to apply it or not. Since their introduction, WLs have been applied in many situations. Then, the WLs were transformed into a mandatory tool, by 190/2012 Act. Currently, it is not yet possible to affirm that they are now completely successful.

The Anti-Mafia Database (banca dati Antimafia), among various prevention instruments, has been provided and made mandatory in 2011. This combined use of different norms and tools prove that Italian anti-corruption legislation is integrated with Italian anti-mafia legislation. This normative approach is based on the awareness that the main source of corruption and criminal infiltration is represented by organized crime.

Finally, trying to give a general overview on the theme of the prevention of corruption in public sector, we can certainly assume that, all over the world – or at least, in the Countries taking part to this research – the normative tool still represents the most relevant instrument in counter-corruption policies. Even in the Countries in which new tools, like soft-law instruments, were adopted, they tend to be driven under a normative shield. Non mandatory schemes, like the Italian White Lists, were finally adopted as legislative duties, in the most recent laws. Generally speaking, normative solutions, even not only under the Criminal point of view, are felt as the most effective reaction to a dangerous social phenomenon, like corruption. The main trend that we can perceive by reading the national reports is a kind of "shifting" of the legislative attention: having provided, since a long, a wide range of Criminal offences, the most recent interventions by domestic legislators take care of other aspects, like compliance practices, also in the public sector. Auditing schemes, self-discipline or ethical guide-lines, administrative penalties affecting companies, both private and public, represent new instruments in preventive policies. Beside this very important trend, recent interventions on the existing penal code offences can be singled out

in several Countries. It seems to depend from the fact that corruption, being a social phenomenon, evolves during the decades. It means that frequent interventions of up-dating the Criminal offences are required. Indeed, even in Countries in which a very recent law was adopted, amending the penal code, further interventions are under discussion: such a trend is encouraged by the action of international organizations, that frequently deal with the matter of corruption, especially at a macro-regional level.

IV. Anti – corruption Compliance in Companies.

General regulation. Eestablishing obligations and restrictions for public officials as well as law enforcement measures have traditionally been the main directions of combating corruption. Creating a system of anti-corruption compliance control in companies is a relatively new direction of combating corruption for many countries.

Anti-corruption compliance in companies develops under the influence of international law and various guidelines of international organizations, national laws, foreign laws, first of all UK Bribery Act 2010 and FCPA, and initiatives of business associations.

International standards on combating money laundering, the financing of terrorism and proliferation (the FATF Recommendations) of 2012 as well as several other FATF documents should be also taken into account.

The developing system of anti-corruption compliance in companies is very close to the system of AML/CFT compliance. At the same time the FATF Recommendations regulate in details main obligations of financial institutions and designated non-financial businesses and professions to prevent money laundering and financing of terrorism. These Recommendations are recognized as international standards. We cannot say that several OECD guidance in the field of anti-corruption compliance have the same influence on national laws and anti-corruption policies of companies. We can rather talk about so-called transnational standards of anti-corruption compliance control.

Companies develop anti-corruption policies taking into account:

- OECD Guidelines;
- National law which has transnational application (FCPA, UK Bribery Act, Canadian law);
- National laws of countries of residence;
- Recommendations of business associations;
- Anti-corruption policies of transnational corporations.

Countries have different approaches to regulation of obligations of companies to prevent corruption. In recent years, Brazil and Russia adopted significant amendments to anti-corruption law, including obligations of companies to prevent corruption.

In December 2012 Russia enacted amendments to Federal Law "On combating corruption", which came into force on January 1, 2013. This Law established obligations for all companies in the Russian Federation to have anti-corruption policies and take measures to prevent corruption.

Brazil enacted the Law No. 12,846, of August 1, 2013, known as the "Anti-corruption Law"[5], which came into force on January 29, 2014. The Anti-corruption Law introduced strict administrative and civil liability of legal entities for certain bribery and bribery related practices. The existence of a compliance program may mitigate liability under the Anti-corruption Law and, therefore, may also foster adoption of programs by a wider range of companies.

In South Africa the Protected Disclosures Act (2000) requires public companies to encourage and facilitate disclosure and also provides for protection against any reprisals as a result of such disclosure[6]. Under The Regulation of the Companies Act certain companies are obliged to establish "social and ethics" committee, which should monitor the company's activities, including the company's standing in terms of the OECD recommendations regarding corruption.

[5] The law was published on August 2, 2013.

[6] Preamble of Protected Disclosures Act, 2000

Such requirement of establishment special committee refers to state owned entities, every listed public company and any other company that has, in any two of the previous five years, scored 500 points in terms of regulation 26 (2) which relates to "public interest scoring"[7]. The Prevention and Combating of Corrupt Activities Act[8] makes provision for offences in respect of corrupt activities relating to procuring and withdrawal of tenders.[9] According to the Section 28 (1) (a) a court may add to imposing general penalties an order that the particulars of the person, the conviction and sentence, and any other order of the court consequent thereon be endorsed on the Register for Tender Defaulters[10]. There are two grounds for such order: commission of offences in respect of corrupt activities relating to contracts and perpetration of offences in respect of corrupt activities relating to procuring and withdrawal of tenders[11]. Moreover if a person is involved in corrupt activities in order to improperly influence the promotion, execution or procurement of any contract not only with public body but also with private organization, corporate body or any other organization or institution is also endorsed on the Register[12].

A court may issue the same order in case of the person so convicted is an enterprise. However particulars, which will be endorsed on the Register, concern the enterprise and any partner, manager, director or other person, who wholly or partly exercises or may exercise control over that enterprise and who was involved in the offence concerned or who knows or ought reasonably to have known or suspected the enterprise committed the offence concerned[13]. Moreover, the court may order the endorsement on the Register in respect of any other enterprise owned or controlled by the person so convicted or even particulars of any partner, manager, director or other person in case of involvement in the offence or knowledge or suspicion of involvement[14].

An endorsement on the Register for Tender Defaulters also applies to every enterprise which will be established in the future and which will be wholly or partly controlled or owned by the convicted or endorsed person or enterprise[15].

In Turkey there is no specific regulation which governs anti-corruption compliance control in companies. Corruption is a matter of personal criminal liability, outside the exceptions indicated above, if the actions result in crimes defined under the Turkish Penal Code. The Code of Obligations, and the Labor Law require workers/employees not to engage in any action which would harm the owners of work/employers. Accordingly, these laws indirectly oblige employees to refrain from corrupted actions while performing their work, or to take precautions against corruption to the extent they are or can be aware of it. In this respect, at the moment, anti-corruption compliance control in Turkish companies rather relies on individual initiative than a solid system formed to comply with certain rules or regulations.

There is no official statistical data, how many companies in different countries have already anti-corruption compliance. Anti-corruption policies were first of all adopted by big companies, which do international business in various jurisdictions. Even, if there is no direct obligation under national law to have anti-corruption policies, companies can adopt it under the influence of foreign partners from United States, Canada, United Kingdom or other EU member - states

Companies have various motivations to have anti-corruption compliance:

- Obligations under national anti-corruption law (Russia, UK);
- Possible application of foreign anti-corruption law (China, India, Russia, Turkey);

[7] Section 72 (4) of the Companies Act, 2008 and Regulation 43 (2)

[8] Prevention and Combating of corrupt activities act 12 of 2004 enacted by the Parliament of South Africa http://www.justice.gov.za/legislation/acts/2004-012.pdf

[9] Section 12 and 13 Of Act 12 of 2004

[10] Ibid.

[11] Ibid.

[12] Section 12.

[13] Section 28 (b)

[14] Section 28 (c)

[15] Section 28 (d)

- Protection from criminal or administrative liability (Brazil, Chili, UK) ;
- Anti-corruption clause as an obligatory element in contracts of their partners;
- Participation in tenders (South Africa).

Many small companies have luck of information and even motivation for drafting codes of business ethic and anti – corruption policies.

For example, all the Russian companies have to establish a system of anti – corruption compliance, which includes appointment of special officers or units, responsible for the countering corruption in a company; adoption of a code of business ethics or corporate conduct; adoption of an anti-corruption policy (standards and procedures). At the same time, there is no special liability under Russian law for not having anti – corruption policy in company. The use of anti – corruption policy for protection company from administrative liability for bribe under Art. 19.28 of the Code of Administrative Offences of the Russian Federation is not regulated in Russian law. It depends on judge in each particular case, whether anti – corruption policy will be taken into account.

A serious problem for many middle-size and small companies is lack of regulation. In the field of AML/CFT compliance policies and procedures are regulated in details in legal acts and/or recommendations of supervisory bodies. In the field of anti-corruption compliance such regulation does not exist in many countries. Big companies can order drafts of anti-corruption policies by leading law firms but for many small companies it can be to expansive.

In this regard recommendations of business associations and unions, various collective actions can be of significant importance.

So, the Russian Union of Industrialists and Entrepreneurs, the Chamber of Commerce and Industry of the Russian Federation, the all-Russian Public Organization "Delovaya Rossiya" (Business Russia) and the all-Russian Public Organization of Small and Medium Business "Opora Russia" adopted Anti – corruption Charta of Russian Business. Parties to the Charta declared main principles of preventing and countering corruption: corporate governance based on anti-corruption programs; monitoring and evaluation of anti-corruption program implementation; effective financial control; personnel training and supervision; collective efforts and publicity of anti-corruption measures; rejection of illegally obtained benefits; partner and counterparty relationships based on anti-corruption policy principles; transparent and open procurement procedures; the use of information to counter corruption; cooperation with the government; promotion of justice and respect to the rule of law; combating bribery of foreign public officials and officials of international public organizations. The Charta is open for participation for Russian and foreign companies doing business in Russia.

The place of anti-corruption compliance control in a business structure of companies. There are no special provisions in national laws regarding place of anti – corruption compliance in organizational structure of company. Companies usually choose between three possible solutions. They can establish special compliance unit or department, include anti – corruption compliance in the list of functions of legal department or security department. Each decision has own reasons. On one hand, there is a lot of legal questions related to anti – corruption compliance, on the other hand security department have more experience in cooperation with law enforcement bodies and can be more effective if a real case of bribery will take place in company.

Anti – corruption compliance officer usually has right to report directly to head of company, board of directors or audit committee of the board of directors. At the moment there are no special qualification's requirements for anti-corruption compliance officers under Russian law.

Codes of business ethics or corporate conduct. Main parts of codes. Companies adopt special codes of corporate conduct for anti – corruption purposes or include anti – corruption provisions in general codes of business ethic or corporate conduct. Anti – corruption provisions are more or less similar. They include main ethical principles of a company and staff, zero – level of

tolerance, involvement of senior managers and board of directors in anti – corruption measures, rules regulating conflict of interests in company.

Anti-corruption policies. Anti -corruption policies of companies include as a rule following main parts:

- organization of internal procedures for prevention of corruption;
- interaction with affiliates, subsidiaries and affiliated companies;
- gifts and hospitality;
- promotion;
- charity;
- financial support of political parties;
- anti-corruption clause in contracts of a company;
- due diligence;
- procedure and criteria of risk assessment;
- procedure of control of transactions for a possible connection with corruption;
- conduct of a company in case of bribery;
- anti-corruption procedures in recruitment;
- staff training program;
- audit of anti – corruption policy.

In the development of anti – corruption policies companies take into account related norms from other fields of law. For example, the Civil Code of the Russian Federation regulates value of gifts to state and municipal employees, as well as between commercial organizations. In accordance with Art. 575 the maximum value is three thousands Rubles.

The serious problem is an identification of beneficial owners of counterparty. In anti-corruption compliance policies companies have different approaches to identification of beneficial owners. As a minimum standard, companies ask their clients to provide only information about beneficial owner – physical person owned a last company in the chain. Some companies ask their counterparts to provide documents of all companies in the chain and explain the full structure of business.

Anti-corruption clause. Companies have two main approaches to use of anti – corruption clause in contracts. They include clause in all contracts or depending on the amount of contract. Very few companies use anti-corruption clause depending on risk – assessment.

Clause can include:

- The disclosure of final beneficiaries;
- Obligation to inform on any cases of corruption;
- Answers to requests that are required to implement anti-corruption programs, within the agreed time;
- The right to audit the anti-corruption procedures of a partner;
- A detailed justification of prices;
- The rejection of incentives for staff of partner in their own interests;
- The conditions to assure confidentiality of anti-corruption procedures and to prevent the negative consequences for individuals reporting of corruption.

Breach of obligations under anti – corruption clause as a rule may entail termination of the contract. Very seldom companies include penalties in anti – corruption clause.

Risk assessment before establishing business relations. Companies usually use the three levels – scale for assessment of counterparty risk. Result of risk assessment is of significant importance for procedure of concluding the contract. Many companies use the following approach: When the level of risk is low, contract can be signed by the head of sales or other department. When the level of risk is medium, contract should be approved by anti-corruption compliance officer.

Contract with counterparty, who has high level of risk, should be approved by group of senior managers, which can include head of company, anti-corruption compliance officer, head of legal, sales and security departments.
Companies use several main groups of risk for risk assessment.

Group of regional risks includes:

- countries with high level of corruption;
- non-cooperative countries and territories (FATF assessment);
- countries under sanctions in accordance with the resolutions of the UN Security Council;
- countries included in national sanction lists;
- off-shore zones;
- other specific regional risks.

Risks related to particular types of counterparty:

- state-owned companies;
- companies, doing business with state;
- non-profit organizations;
- shell companies;
- others.

Risks of businesses with high level of corruption (depends on country).
Risks of business partnership (Relation with PEP's, state officials).
Risks of project (long chain of intermediaries; not clear, who is a final beneficiary).
Internal risks (lack of anti-corruption program, staff training).

So could "Shell companies" are often used by criminals in various schemes of money laundering, tax evasion and corrupted payments. For purposes of identification such companies the following list of "red flags" can be recommended:

- One person is an owner and director of significant number of companies;
- One person is an owner, director and accountant of a company;
- The owners and directors of a company are persons under 20 years or over 60 years old;
- The company is registered at the address at which registered a large number of companies;
- The apparent discrepancy between turnover on the accounts and the amounts of tax payments;
- The value of contracts of a company exceeds many times net assets and equity;
- The company concludes mainly framework contracts which do not contain information about the range, prices of goods, delivery dates and other terms and conditions;
- The company concludes mainly contracts with offshore companies and use bank accounts in the offshore banks.

Assessment of a transaction's risk. Assessment of a transaction's risk is based on list of indicators ("red flags"). Such lists usually include the following suspicious transactions:

- payments to government officials and their relatives, in particular payment of grants;
- payments of state-owned companies (companies with state participation) in offshore territories, payments through offshore bank accounts;
- charitable or political contributions;
- allocation of funds by state-owned companies (companies with state participation) in the securities market with the subsequent transfer of funds to third parties on behalf of the senior managers of companies;

- payments of state-owned companies (companies with state participation) to shell companies;
- risk insurance under the overestimated insurance rates with the subsequent removal of cash or reinsurance in offshore "reinsurance" companies;
- too high amount of commission, which can include corrupt payment;
- purchase of the property by governmental official at an inflated price (hidden bribe).

Internal investigations.

The primary purpose of internal investigations is to gather facts regarding a possible misconduct of employees or executives of a firm in order to allow for the management to make informed decisions, take remedial action or develop a strategy for adequate reaction if authorities are or will likely be involved.[16] The initiation of an internal investigation can be motivated by external or internal factors. Common Internal factors are the avoidance of further liabilities or damages towards third parties, the identification of efficiency issues, or the preparation of labor-law related sanctions against employees up to the termination of the respective contracts.[17] Amongst others, external factors are the prerequisites of legal compliance such as mandatory reporting obligations, compliance with the code of conduct, etc. External factors can, however, also be expectations of criminal or regulatory bodies, which, if ignored or not fully satisfied, may lead to severe sanctions against the firm.[18]

Apart from potentially immense penal fees under certain jurisdictions (especially in the United States, where corporations can be held criminally liable)[19], remedies and damages, the reputational harm of an investigation alone may well lead to market-shifts, up to the extent of the termination of business. Just how severe such damage can *de facto* be, becomes apparent when taking a look at former global players such as *Enron* or *Arthur Andersen & Co.*[20]

Especially in the United States, internal investigations have been common practice for decades.[21] The *Securities and Exchange Commission (SEC)* as well as the *United States Department of Justice (DOJ)* and the *U.S. Commodities Futures Trading Commission (CFTC)* today formally grant a reduction of fees or even a *Deferred Prosecution Agreement* (a form of settlement between the authorities and the corporation) upon the extent of a corporation's cooperation in the production of relevant facts and evidence.[22]

Thus, when a company receives a grand jury subpoena or it is otherwise notified that it has become the subject of official investigations, due to the incentives given in the *Sentencing Guidelines* described above, it is highly likely that it will initiate an internal investigation in order to demonstrate its willingness for full cooperation.[23]

The paper at hand will discuss in brief the common practices of internal investigations and present the current main issues and conflicts therein. An emphasis will be put on the analysis of the conflicts that may arise in individual employee's rights and the best interest of the company, especially regarding interviews and data collected in the light of an internally conducted investigation. The paper will lead to several conclusions and ultimately call for an enhanced

[16] Cp. 47 Prac. Law. 23, 24 (2001), "CONDUCTING INTERNAL INVESTIGATIONS AND PRESERVING THE ATTORNEY.-CLIENT-PRIVILEGE".

[17] Cp. 47 Prac. Law. 23, 24 (2001); more in-depth: 54 B.C.L. Rev. 73 89 2013, „UNREGULATED INTERNAL INVESTIGATIONS: ACHIEVING FAIRNESS FOR CORPORATE CONSTITUENTS".

[18] Cp. 54 B.C.L. Rev. 73 89 2013; Nestler in Knierim/Rübenstahl/Tsambikakis, Internal Investigations, C.F. Müller, 2013, Pg. 5.

[19] See below.

[20] Being charged and convicted of willful accounting fraud, *Enron* itself went bankrupt; *Arthur Andersen & Co.*, while technically still existent, did never recover from the reputational harm caused by their involvement in the *Enron* case as the firm's accountant.

[21] Cp. Nestler in Knierim/Rübenstahl/Tsambikakis, Internal Investigations, C.F. Müller, 2013, Pg. 4.

[22] Cp. Nestler in Knierim/Rübenstahl/Tsambikakis, Internal Investigations, C.F. Müller, 2013, Pg. 5; Cp. *Sentencing Guidelines* of the DOJ (*Principles of Federal Prosecution of Business Organizations*), http://www.justice.gov/opa/documents/corp-charging-guidelines.pdf.

[23] Cp. 54 B.C.L. Rev. 73 89 2013.

protection of the individual's right to a fair trial in such scenarios, where significant portions of investigational measures regarding a public prosecution are conducted by a non-public entity.
As with all investigations, the basic elements of the fact finding process of an internal investigation are document review and witness interviews; witness, in this case, usually means a strong focus on the firm's employees.[24]

Generally speaking, an internal investigation will start off by the appointment of an attorney to conduct the investigation. Only by having an attorney conduct the investigation, evidentiary privileges can be preserved under U.S. law. Namely, the attorney-client-privilege and the attorney-work-product-privilege have to be retained. In order to be entitled, the engagement letter between the company and the counsel should explicitly state that the internal investigation is being conducted for the purpose of advising management and the board.[25] The attorney-work-product doctrine, as the name suggests, applies to materials created by the attorney, with limitation to such material created in anticipation of litigation or for use at trial.[26] In most cases, outside counsel will be the preferable choice when it comes to choosing an attorney. The reasons are, amongst others, that outside counsel do enjoy more independence from the firm itself and the witnesses in particular. With an outside counsel, personal ties to individual employees will not become an issue, also, the outside counsel does not depend on the company, nor does he have any personal interest in the outcome of the investigation, whereas an inside counsel – while still able to assert the aforementioned privileges – will be part of the company's hierarchy and as such may be subject to pressure by the various competing groups of the corporate management. Usually, outside counsel will also have more experience with internal investigations. The outside counsel chosen should, if possible, not be among the lead counsel of the firm, in order to avoid conflicts of interests.[27]
Once an attorney is mandated to conduct the internal investigation, the usually course of action is – likely in cooperation with in-house counsel – to start the investigation with a document review. Relevant documents will have to be produced, analyzed and archived. Once the first round of document review is done, the witness interviews will start. Depending on the results of the interviews – especially when new facts are discovered during the interview process – another round of document review might prove to be necessary.[28]
In the U.S., individuals as well as corporate entities, according to the *United States Sentencing Guidelines* issued by the DOJ, may be held criminally liable for violations of certain statutes of criminal law.[29] The *Foreign Corrupt Practices Act (FCPA)*, which seeks to incriminate violations of books and records as well as bribery, is such a criminal law. The FCPA applies to any corporation (and their officers, directors, employees, agents and shareholders) who is either "Issuer", "Domestic Concern" or "acting while in the territory of the United States".[30] The scope of application of the FCPA thus is so broad, that basically any larger entity which operates within the U.S., especially those companies who have domestic subsidiaries or are listed on U.S. stock exchanges, finds itself within the FCPA's scope of application.[31] The DOJ guidelines, of course, also apply to the SEC's scope of operation. In consequence, non-U.S. entities which operate in the U.S. face the risk of criminal prosecution by SEC and DOJ agents.[32]

[24] Cp. 54 B.C.L. Rev. 73 87 2013.
[25] 46 Prac. Law. 23, 26 (2001); 40 Seton Hall L. Rev. 136 138 2010.
[26] For a definition of „anticipation of litigation", see *United States v, Adlman*, 134 F.3d 1194 (2nd Cir. 1998).
[27] For a more in-depth analysis of the advantages of mandating outside counsel, see 46 Prac. Law. 23, 26 (2001).
[28] 46 Prac. Law. 23, 25 (2001).
[29] Cp. Behrens, RIW 2009, 22, 26, who deducts the relevance of internal investigations for German corporations from the various criminal statutes applicable to corporations under U.S. law.
[30] „A Resource Guide to the FCPA", pg. 10, accessible at http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.
[31] Cp. Behrens, RIW 2009, 22, 26; Wehnert, NJW 2009, 1190 ff.
[32] Cp. Jahn, StV 2009, 41 ff. on the example of the Siemens v. SEC case mentioned below; Behrens, RIW 2009, 22, 26; Wehnert, NJW 2009, 1190 ff.

The following case gives a good example of the far reaching effects of U.S. law and prosecution practice:
In the late 1990's *Siemens AG* made an offer for gas turbines to an Italian energy corporation. During that process, an employee of the Italian firm offered to "influence" the process in favor of Siemens. Considering, that facilitation payments were not prosecutable under German law at the time, a top manager of Siemens paid millions of bribe money. An investigation in Germany triggered a SEC inquiry concerning compliance standards in 2007. In consequence, Siemens paid about 650 million Euros to *Debevois & Plimton* to conduct an internal investigation, faced a SEC fine of 350 million USD and a DOJ fine of 400 million USD. The total costs of the events that unfolded after the SEC inquiry are estimated to be around 2.5 billion Euros. [33]
While these effects of U.S. law obviously are intended, it has been widely criticized in non-U.S. legal literature.[34] Be it just or unjust that foreign entities are subject to U.S. law, the sheer fact constitutes a necessity for international corporations to deal with the common practice of internal investigations under U.S. law.[35]
Due to the fact that corporate internal investigations are privately structured, lacking regulatory oversight and for the most part are not directly addressed in law, a variety of conflicts may arise when an internal investigation is conducted. [36] Individuals involved in the investigation, especially those being subject to interviews, often believe, that the lawyers mandated with the internal investigation are acting on behalf of their constitutional and other interests. [37] Unfortunately, on a broad scale, that is not the case. On the contrary, the attorneys conducting the investigation may use the element of surprise or will be coercive in order to protect the best interest of their client – the corporation.[38] Corporate internal investigations are not subject to the rules of criminal procedure, they are a private matter – regarded as part of private employment law – in which the authority has no part. Thus, they are essentially unregulated by legal protections and unmonitored by courts as they occur.[39]
With the most frequent setting for internal investigations being one where the company is, or soon will be, the aim of a DOJ or SEC investigation, the authorities become an *indirect* participant of the internal investigation.[40] Individual employees, however, may not be able to effectively contribute to the internal investigation without jeopardizing their personal best interest.[41] Commonly, they run the risk of self-incrimination during an interview regarding sensitive matters of misconduct. Any statements they make during the investigation may end up disclosed to the government and lead to prosecution of the individual. Typically, the authorities will pressure the company to release all relevant information for the sake of efficiency of the prosecution.[42] They may also condition a settlement upon receiving information about the misconduct of individuals – and the company, given such incentive, may well be ready to sacrifice a pawn for the greater good of the entity. Employees may, in such and similar scenarios, receive immense pressure by their employer to support the internal investigation. Under labor-law, employees are obliged to report all relevant information regarding their work to their employer, if asked to do so. Thus, the key issue in the conflicting spheres of the individual's

[33] For an in-depth coverage of the Siemens v. SEC case in Jahn, StV 2009, 41 ff.
[34] In Germany, for example: Wehnert, NJW Kommentar 17/2009, 1191 ff; Jahn StV 1/2009, 41 ff.; Westpfahl in: Verhandlungen des 67. Deutschen Juristentages 2008, Bd. 11/2.
[35] Cp. Behrens, RIW 2009, 22, 26; Wehnert, NJW 2009, 1190 ff.
[36] Cp. 54 B.C.L. Rev. 73 74 2013.
[37] Cp. for an in-depth analysis of the conflict between attorney ethics and the role as corporate counsel in internal investigations: Columbus. L. Rev. 859 2003.
[38] Cp. the proposed course of action for internal investigations in "A LITIGATOR'S APPROACH TO INTERVIEWING
WITNESSES IN INTERNAL INVESTIGATIONS", Health Law. 8 2005;
[39] Cp. 54 B.C.L. Rev. 73 77 2013.
[40] Cp. 54 B.C.L. Rev. 73 78 2013; Columbus. L. Rev. 859 2003.
[41] Cp. U.S. v. Stein, 440 F. Supp. 2d 315 (S.D.N.Y. 2006).
[42] Cp. U.S. v. Stein, 440 F. Supp. 2d 315 (S.D.N.Y. 2006).

rights, the corporation's interest and the authorities' interest to an efficient criminal prosecution are the employee-interviews and the protocols created during these interviews.

Interviews and Employee's Rights: The Employee's Dilemma.

In an externally motivated internal investigation, where the authorities are *indirectly* involved (e.g. the *Siemens Case* mentioned above), employees' may stand absolutely unprotected. The employee facing a question during an interview relating to such an internal investigation may run into a situation where he can either chose to (1) answer and risk self-incrimination or (2) not answer and risk termination of his work contract. A classic dilemma. Under employment law, he will likely be obliged to answer the question, if it is related to his work.[43] A Fifth Amendment or otherwise constituted right to a *fair trial* or to invoke the principle of *nemo tenetur* does not exist due to the private nature of the investigation.[44]

Once an answer is given during an internal investigation, the corporation owns the information obtained and may exchange it for a favorable disposition from the government authorities. Attorney-Client-Privileges apply only in the relationship between the attorney and the corporation, as does the Work-Product-Doctrine. Neither does the Attorney- Client-Privilege extend onto employees who are threatened by prosecution (which, naturally, is a different case in itself) nor do the ethical guidelines relating to law practitioners, such as the *Restatement of Law Governing Lawyers*, require that the attorney does protect the individual's interest.[45] Albeit the attorney conducting the interview will generally inform the employee that he is not protected by the Attorney-Client privilege - as the attorney is not the individual's counsel - most employees who are not legally trained will likely miss the significance of the point being made.[46] Common practice is to use forms, where employees are being informed before the interviews happen. These warnings, referred to as *Upjohn Warnings*, fail to negate the fact that the corporation will still try to secure information from its employees that may ultimately be harmful to them, personally.[47]

In consequence, the firm – as the beneficiary – may waive the privilege.[48] If that happens, the individual employee in question has lost twice: He has lost the confidentiality of his statement *and* the opportunity to use the information to barter with the government.[49]

In 2006, the District Court of the Southern District of New York ruled in *Stein v. United States*, that under certain circumstances, information gathered during an interview that is part of an internal investigation, may be protected by the Fifth Amendment Right.[50] In the case, some of the employees who had given information to *KPMG* during interview sessions relating to an internal investigation which took place after a SEC inquiry regarding tax shelters at KPMG, were absolved due to lack of evidence, as the court ruled, that the statements made during the interview could not be used for prosecution.[51]

According to the court, the "*pressure that was exerted on the Moving Defendants was a product of intentional government action. The government […] threatened to indict KPMG. […] It*

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[43] This should be the case in most jurisdictions.

[44] *Miranda* rights do not apply, cp. *Miranda*, 384 U.S. at 444 (no law enforcement officers acting); termination risk under U.S. law: Campbell & Beaudette, *The Way Forward: A Primer on Conducting an Independent Investigation*, DIRECTOR NOTES, 1, 1 (Feb. 2012), note 9, at 5 http://www.conference-board.org/retrievefile.cfm?filename=TCB-DN-V4N3-12.pdf&type=subsite.

[45] See generally *Upjohn v. United States, 449 U.S. 383, 386 (1981)*.

[46] For an in-depth overview about the best practice for warnings given by attorneys in internal investigations and the conflicts, cp.: Robert G. Morillo & Robert J. Anello, Beyond "Upjohn": Necessary Warnings in Internal Ivestigations, N.Y.L.J., Oct. 4. 2005, at 3,3.

[47] The situation differs from police authority warnings, as the employee may not even realize the weight of the warning he gets; there may not be any indication, that authorities are indirectly involved in the internal investigation and the employee will likely be used to rely on the corporate counsel defending his individual interest as well as the corporation's interest, as frequently – absent of internal investigations – both interests will be aligned.

[48] Cp. 40 Seton Hall L. Rev. 136 138 2010.

[49] Cp. 54 B.C.L. Rev. 73 88 2013.

[50] U.S. v. Stein, 440 F. Supp. 2d 315 (S.D.N.Y. 2006).

[51] Cp. U.S. v. Stein, 440 F. Supp. 2d 315 (S.D.N.Y. 2006).

offered KPMG the hope of avoiding the fate of Arthur Andersen if KPMG could deliver to the USAO employees who would talk, notwithstanding their constitutional right to remain silent, and strip those employees of economic means of defending themselves."

KPMG had – after being pressured by the authorities – threatened employees that, should they refuse to fully cooperate during the interviews, the firm would cease paying the employee's legal fees and would take steps to let go of the respective employees. The court, however, was strict in its appliance of the Fifth Amendment Rights. Only in two out of a total of nine cases, the defendants were absolved. In the two cases, evidence made it clear, that (1) KPMG was pressured by the authorities – pointing to the *Thompson Memorandum*[52] – that only if they would ensure full cooperation of its employees, there would be a chance for a deferral agreement and (2) the individual employees were pressured in a way that eliminated their free choice regarding the questions they were asked. In short: KPMG coerced the statements and the actions of KPMG in coercing these statements were attributable to the Government.[53]

V. Criminal Liability for Corruption

The extremely severe nature of criminal law penalties, encroaching upon fundamental rights such as the right to liberty and property rights, renders recourse to such measures *ultima ratio* in any democratic state governed by the rule of law. However, the serious repercussions upon national society of corruption have led every modern society to attach penal law consequences to such acts.

Of the five states (Brazil, India, Italy, the Russian Federation, Turkey) surveyed, all but one (Turkey) have chosen to enact compact 'anti-corruption' laws, as well as resorting to provisions of their Penal Code, and specific provions of special or complementary criminal laws,[54] in order to punish the phenomenon.

Brazil has enacted an 'Anti-corruption Law' in August 2013, which provides for both administrative and civil sanctions. Italy has adopted in 2012 an Anti-Corruption Law which determines preventive administrative measures, and modifies the relevant provisions of the Italian Penal Code. The Russian Federation has adopted a Federal Law on Combating Corruption in 2008, and enacted various amendments which entered into force on January 1, 2013. The law is particularly strict in determining the regime applicable to public servants with regard to anti-corruption measures. India enacted its first Prevention of Corruption Act back in 1947, and adopted a new Act (bearing the same title) in 1988. Turkey also has a special law on 'Declaration of Assets and Fight against Bribery and Corruption' which was adopted in 1990, however it is not the primary tool concerning corrupt practices, nor a general law bringing together corruption-related crimes. A comprehensive Law on the Fight against Corruption was drafted in 2004 but it was never adopted.

When it comes to the scope of criminal liability, in other words, to determining the range of acts punishable under corruption-related crimes, there are various divergences. The most important one concerns whether corruption in the private sector is punishable *per se*. Needless to say, acts of corruption committed through ordinary criminal acts, such as forgery in documents, or acts of intimidation, may be punished irrespective of the sector (public or private) of commission. However, acts which would fall under separate and independent corruption-related crimes if committed in the public sphere are seldom punished when committed in the private sector. For example, Brazil does not criminalize private sector corruption. Turkey criminalizes to a certain extent acts of bribery committed in the private sector, but other corruption-related crimes are only applicable to 'public officials'.[55]

This lack of coverage is a major concern, since all national rapporteurs have recognized in their Working Group meeting the importance of criminalizing private law corruption. Although the

[52] Cp. above, footnote 28.

[53] Entire paragraph: Cp. U.S. v. Stein, 440 F. Supp. 2d 315 (S.D.N.Y. 2006).

[54] By 'special' or 'complementary' penal law, I refer to statutes, outside the national Penal Code, which regulate criminal offences, or regulate specific issues by also providing for some criminal provisions.

[55] Although, a draft concerning the reform of the Penal Code criminalizes private sector corruption.

level of corruption is usually much higher in state-owned entities,[56] the Global Corruption Barometer 2013, published by Transparency International, shows that corruption in the business/private sector, or at least, its perception, is as widespread as in many other public sectors.[57]

As for the definition of corruption itself, the Russian Federation stands out as the only state to have actually provided a criminal law definition of the concept in its anti-corruption law of 2008.[58] The other states have not defined the concept at the legislative level, and rely on the various penal provisions concerning corruption-related offences.

Criminalization of Corruption-Related Acts

A. Definition of Public Official/Civil Servant

Since some states only, or largely, criminalize corrupt acts in the public sector, the definition of a 'public official' is decisive for the application of the relevant penal provisions. In this regard, states may adopt a variety of positions, ranging from strict definitions, covering only acts which necessitate the use of 'public authority', to wider definitions, covering any act committed to the benefit of the public.

Brazil and Turkey have adopted rather large definitions, based on a functional criterion. In Brazil, anyone performing a public job, position or function is deemed to be a public official (Art. 327 of the Penal Code). In addition, those working for a service-providing company hired or contracted to carry out any typical activity in the public administration are also regarded as public officials. The Turkish Penal Code (Art. 6 (1) (c)) defines a public official (*kamu görevlisi*) as any person who, whether permanently, for a specific period or temporarily, participates to the carrying out of a public activity by virtue of appointment, election or in any other manner. The key to this rather obscure definition is the meaning of 'public activity' (*kamusal faaliyet*). What matters is whether the activity performed by the perpetrator bears a 'public' nature or not. Hence, those participating to the performance of any public service qualify as public officials, insofar as those services are ran according to administrative law principles. Hence, services offered through private law instruments, such as contractors hired through tenders, do not qualify as public officials.[59]

Italy makes a distinction in its Penal Code between 'pubblico ufficiale' (civil servants, Art. 357) and those charged with a public service ('incaricato di pubblico servizio', Art. 358). The former category covers those who perform a legislative, judicial or administrative public function. An administrative function is considered public 'when it is regulated by public law provisions and authority's acts; and when it is featured by the formation and statement of the public administration's will or by its implementation by means of authority and certifying powers'.[60] Hence, this a rather narrow category when compared to the Brazilian and Turkish definitions. A person charged with a public service, on the other hand, is a wider category as it includes anyone who performs a public service for whatever purpose. It suffices that the activity in question is governed in accordance with the same modalities as a public function, even in the absence of the power vested in the latter. However, the performance of simply ordinary tasks and exclusively manual work are excluded. The distinction is important in that certain crimes against the public

[56] See the Brazilian National Report (at 3) for the reasons.

[57] The average score of 3,3 (on a scale 1 to 5, where 1 means 'not at all corrupt' and 5 means 'extremely corrupt') from 107 states surveyed reflects a clear perception of 'uncleanliness'.

[58] According to Art. 1 (a) corruption means 'abuse of public office, giving or receiving bribes, abuse of powers, commercial graft or other illegitimate use by an individual of his/her official status against legal interests of society and the State to receive private gain in the form of money, values, other property or services involving property, and other property rights for himself/herself or for third parties, or illegal provision of such a benefit to the said individual by other individuals', see the Russian Federation National Report at 2.

[59] In addition, some laws regulating specific institutions establish that those who commit crimes against the property of the institution shall be treated as public officials. Other laws determine that those committing certain crimes shall be treated as public officials even if they do not bear the requisite characteristics. Finally, there are laws which indicate that crimes that can normally only be committed by public officials shall apply to certain acts. See Turkish National Report (at 8) for details.

[60] Italian National Report at 9.

administration may only be committed by civil servants as defined in Art. 357 of the Italian Penal Code.

The Indian Penal Code seems to have adopted the most practical approach by listing the following as 'public servants': 'government employees, officers in the military, navy or air force; police, judges, officers of the Court of Justice, and any local authority established by a central or state Act.'[61] However, the Prevention of Corruption Act 1988 defines the term in much broader fashion.[62] What is worth noting is that 'any person who holds an office by virtue of which he is authorised or required to perform any public duty' is categorised as a civil servant. In this context, 'public duty' refers to a duty in the discharge of which the State, the public or the community at large has an interest. As can be seen, this is the most encompassing definition so far.[63]

B. Bribery

The common denominator in all reports is, obviously, that bribery is a criminal offence. However, its precise meaning and scope differs from one state to another.

What can be said is that both 'active'[64] and 'passive'[65] bribery are punished. Brazil, Italy and Turkey provide for the same punishment to active and passive bribery.[66] On the other hand, the Russian Penal Code punishes active bribery (bribe-taking, PC Art. 290) more severely than passive bribery (bribe-giving, PC Art. 291). In addition, in all four states, it does not matter if the undue advantage is received directly or indirectly. In Brazil and Turkey the advantage does not need to be of a pecuniary nature, it can consist of any benefit. The Italian report, on the other hand, refers to 'money or other things of value'[67], although Italian academic writings defend that the advantage does not need to be of a patrimonial nature. On the other hand, the Russian Penal Code specifically mentions 'money, securities, or other assets or property benefits'. In both Brazil and Turkey, the financial value or amount of the advantage is irrelevant; however, insignificant 'courtesy' gifts may fall outside the scope of the crime. In line with the German doctrine, it may be argued that the giving of such gifts is not unlawful because of the 'social adequacy' of such action.

In comparative criminal law a distinction is sometimes made between 'simple' and 'aggravated' bribery (or bribery proper), with the latter describing instances of receiving or requesting an undue advantage in order to perform an act that should not be performed, or to refrain from performing an act that should be performed, by virtue of duty. In other words, in case of bribery proper, there is an action (or inaction/omission) in contravention of the requirements of the duty. Hence, simple bribery would cover undue advantages obtained for the performance of the

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[61] Indian National Report at 2.

[62] Refer to Indian National Report, fn. 14 at p. 14 for the rather large list.

[63] The following, *inter alia*, are also regarded as public servants: (i) Any person in the service or pay of a corporation established by or under a Central, Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956; (ii) Any person who is the President, Secretary or other office bearer of a registered co-operative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central Government or a State Government or from any corporation established by or under a Central, Provincial or State Act, or any authority or body owned or controlled or aided by the Government or a Government company as defined in section 617 of the Companies Act, 1956; (iii) Any person who is a chairman, member or employee of any Service Commission or Board, by whatever name called, or a member of any selection committee appointed by such Commission or Board for the conduct of any examination or making any selection on behalf of such Commission or Board; (iv) Any person who is a Vice-Chancellor or member of any governing body, professor, reader, lecturer or any other teacher or employee, by whatever designation called, of any University and any person whose services have been availed of by a University or any other public authority in connection with holding or conducting examinations; (v) Any person who is an office-bearer or an employee of an educational, scientific, social, cultural or other institution, in whatever manner established, receiving or having received any financial assistance from the Central Government or any State Government, or local or other public authority.

[64] Offering or promising an undue advantage.

[65] Requesting or receiving an undue advantage.

[66] Brazil 2-12 years, Turkey 4-12 years (in both cases, absent aggravating circumstances).

[67] Italian National Report at 10.

function (eg, receiving money to accelerate the performance of an act that should have been performed anyway).

The Brazilian Penal Code punishes both versions of bribery, and provides for an aggravating circumstance (a harsher penalty) in case of aggravated bribery (bribery proper).[68] The same holds true for he Russian Federation. However, interestingly, the Russian Penal Code treats, in terms of the statutory maximum term of imprisonment, passive bribe-giving proper more seriously than active bribe-taking proper. In Turkey, the new Penal Code of 2005 had excluded 'simple' bribery[69] from the scope of the offence of bribery,[70] however, it was reintroduced within the typical definition of bribery in 2012. The Italian Penal Code punishes both versions in subsequent provisions (Arts. 318 and 319), with a more severe punishment for aggravated or 'proper' bribery[71] in Art. 319 (4-8 years instead of 1-5 years). The Italian Penal Code provides for an aggravating circumstance for bribery committed to help or to harm a party in judiciary proceedings, whether criminal, civil or administrative (Art. 319-*ter*). In this case, the punishment is 4-10 years of imprisonment, with aggravating circumstances applying in case someone was unduly sentenced to prison as a result of the crime.[72] The Turkish Penal Code follows the same path in Art. 252 (7).

Overall, of the states surveyed, the Russian Federation[73] and India[74] seem to provide for the lightest statutory punishment for the crime of bribery. The Brazilian Penal Code and the Indian Act of 1988 also provide for the application of a fine in addition to the term of imprisonment for the crime of bribery. The Russian Penal Code provides for alternative sanctions, including deprivation of liberty and fines. The Turkish and Italian Penal Codes only provide for imprisonment terms. However, according to Art. 253 of the Turkish Penal Code, 'security measures' may be imposed on legal entities that have drawn undue advantage from the bribe. This means, in practice, confiscation or revocation of the licence to operate.

On the other hand, becoming a party to international treaties has pushed states to pass national implementing legislation criminalizing acts of corruption in international transactions.

The Brazilian Penal Code (Art. 337-D) defines a 'foreign public official', which is relevant for the offences of active bribery and traffic of influence in international business transactions. It is worthy of note that the Brazilian definition only covers those who 'hold a position, job or a public function' in an organization or enterprise directly or indirectly controlled by the public authorities of the foreign country or in international public organizations (intergovernmental organizations). The relevant Turkish provision seems to be more in tune with the requirements of the 1997 OECD Convention. Art. 252 (9) of the Turkish Penal Code provides for a rather long list of foreign officials who may be bribed.[75] Furthermore, the Penal Code grants Turkish courts

[68] If, as a consequence of receiving or being promised an undue advantage, the public officials delays or omits to practice any of his duties or acts in breach of his functional duties.

[69] Receving or requesting (giving or promising) an undue advantage to the public official in order for him to perform an act that should have been anyway performed, or to refrain to perform an act that should not have been anyway performed.

[70] Such action would have fallen within the scope of another crime – abuse of office. The problem was that only the public official was liable to punishment in that case.

[71] Corruzione per un atto contrario ai doveri d'ufficio.

[72] 5-12 years in case someone was sentenced to up to five years of imprisonment, 6-20 years in case someone was sentenced to more than five years of (or life) imprisonment.

[73] Active and simple bribery (Art. 290 PC): up to 5 years of imprisonment; active and aggravated bribery (bribery proper): 3-7 years of imprisonment. There are, however, aggravating circumstances. For example, in case of 'large scale' bribery, which refers to bribery the value of which exceeds 300 minimum wages or salaries, the term of imprisonment is between 7 to 12 years. Passive and simple bribery (Art. 291 PC): up to 3 years of imprisonment; passive and aggravated bribery (bribery proper): up to 8 years.

[74] Imprisonment of 6 months – 5 years along with a fine.

[75] An elected or appointed public official in a foreign country; a judge, juror or other official performing duties in international or supranational courts or foreign national courts; a member of an international or supranational parliament; any person conducting a public activity for a foreign state; an arbitrator, whether national or foreigner, assigned within the framework of the arbitration procedure applied for the settlement of a legal dispute; the officials or representatives of an international or supranational organization established pursuant to an international treaty.

jurisdiction over bribery offences committed abroad by a foreigner. This will be possible if the bribe concerns a dispute to which Turkey, a public institution in Turkey, a private law legal person established under Turkish laws, or a Turkish national is party, or when the crime has been committed for the performance or non-performance of an act connected with these. (Art. 252 (10) PC). As for Italy, Art. 322-*bis* of the Italian Penal Code punishes bribery offences committed by civil servants of the EU institutions and EU member States, and treats such crimes as if committed by national civil servants. Bribery of civil servants from foreign States and international organizations is punished the same way as bribery of national civil servants, but with two limitations: 1) only the private briber (active corruption) is punished;[76] 2) the act must be committed to obtain an undue advantage in international economic transactions, or with the purpose of obtaining or maintaining an economic or financial activity.

A debate on bribery is whether the undue advantage has to be linked to a specific act or not. In Brazil, case-law has determined that it suffices for the illicit act to arise out of, or to have a relationship with the public official's position. Hence, even if the act to be performed by the public official is not fully determined, the provision on bribery may be applied. In Italy, there is a specific provision in Art. 319-*quater* (*induzione indebita a dare o promettere utilità*) which punishes a civil servant or person in charge of a service of public relevance who, abusing of his quality or powers, induces someone to unduly give or promise, to himself or to a third party, money or any other benefits. This is a lesser offence which requires 3-8 years of imprisonment for the *pubblico ufficiale* or incaricato di *pubblico servizio*, and up to 3 years of imprisonment for the private party. In Turkey there is academic divergence on the qualification of remunerating a public official without requesting him to perform or not to perform a given act. It seems that such an action does not fall within the scope of any criminal offence.

When an undue advantage is requested or offered, but not accepted by the other party, the Italian Penal Code provides for the relevant provisions (Art. 318 or 319) to be applied with a punishment reduction of one-third (Art. 322 – *istigazione alla corruzione*). In the same case, the Turkish Penal Code provides for a reduction of one-half (Art. 252 (4)). The Indian National Report indicates that mere demand of bribe is an offence. However, its relationship in terms of punishment with the completed version of the crime is not mentioned.

On the other hand, there are remorse provisions concerning bribery. In the Russian Federation, there is no criminal responsibility in case the bribe-giver informs of his own volition the body possessing the right to institute criminal proceedings about the bribe. In the same vein, Art. 254 of the Turkish Penal Code regulates 'effective remorse'. If the bribed person returns to the competent investigating authorities the object of the bribe before the crime has come to the attention of official auhtorities, no punishment shall be imposed on that person. Similarly, if a public official who reached a bribe agreement, informs competent authorities of the situation before the crime has come to their attention, he/she shall receive no punishment (Art. 254 (1) PC). The same applies to the bribe-giver or to the person who reached a bribe agreement with a public official, who out of remorse, informs competent authorities of the situation before the crime has come to their attention (Art. 254 (2) PC). Intermediaries may also benefit from their effective remorse under the same conditions (Art. 254 (3) PC). The Turkish Penal Code specifically excludes bribes given to foreign public officials from the scope of this provision (Art. 254 (4) PC). In India, section 24 of the 1988 Act protects bribe-givers from punishment if they make a statement against an accused public servant. However, an amendment bill seeks to remove this provision.

As regards private bribery, the Brazilian Penal Code does not punish it. The Italian Penal Code does not either, however there is a provision in Art. 2635 of the Civil Code punishing private bribery. However, only certain instance of private bribery are covered by Art. 2635. Indeed, the perpetrators of this criminal offence can be managers, general executives, directors, auditors and liquidators of a company (or any employee of a company acting under the direction or

[76] This is different from Art. 252 (9) of the Turkish Penal Code which does not distinguish between active and passive corruption in case of bribery concerning the persons listed in that paragraph.

supervision of any of these persons). Furthermore, only 'bribery proper' is covered (undue advantage given or promised to perform or omit to perform actions, in breach of the duties relating to their office or in breach of the duty of loyalty, to the harm of the company). The Italian Penal Code (Art. 320) provides that the provisions of Arts. 318 and 319 are also applicable when the perpetrator is not a civil servant (as per Art. 357) but 'a private citizen dealing an activity having public relevance'. In this case, a lighter sentence is imposed. Art. 252 of the Turkish Penal Code, as amended in 2012, similarly covers *some* instances of private bribery. The provisions on bribery now also apply to persons acting on behalf of one of the following legal entities: a) companies incorporated by the participation of public institutions or public corporations or public professional institutions, b) foundations operating within the framework of public institutions or public corporations or public professional institutions, c) associations acting in the public interest, d) co-operatives, e) public joint stock companies (Art. 252 (8)). Finally, Art. 204 of the Russian Federation Penal Code criminalizes bribery in a profit-making organization.[77] However, the undue advantage must have been provided to 'a person who discharges the managerial functions' in the organization. The term of imprisonment, on the other hand, is quite mild.[78] While Art. 204 (1) punishes the 'transfer' of the above-mentioned values or the unlawful 'rendering' of property-related services to such persons, Art. 204 (3) punishes, in harsher terms, the 'receipt' of such values or the illegal 'use' of property-related services.

A peculiar provision worth of mention is that of the Indian Prevention of Corruption Act 1988 which accepts that 'a person expecting to be a public servant' may also be bribed.

C. Other crimes

Brazil, Italy, India and Turkey provide for the crime of 'trafficking in (unlawful) influence'. This crime was introduced into Italian Law through the 2012 Anti-corruption Law (Art. 346-*bis* of the Penal Code). In Turkey, although it previously existed in a different form, it assumed its current form in 2012 (PC Art. 255. In both states, the definition of the crime covers, roughly, the procurement of undue advantages by taking advantage of an existing relationship with a civil servant (Italy) or of an even alleged influence over a public official (Turkey). In both cases, the undue advantage is obtained in return of an unlawful action by the civil servant/public official. The punishment is also the same: 1-3 years of imprisonment. The difference between the Italian and the Turkish law is that the latter envisages that the perpetrator can also be a public official, in which case, the punishment is aggravated. In Turkish law, the person who provides the undue advantage with the expectation, or in return, of having a certain act performed, is also punished, albeit with a lighter sentence (1 to 3 years instead of 2 to 5 years). In Turkish Law, it suffices to reach an agreement for full punishment. In case the undue advantage is requested or offered, but not accepted, half of the relevant punishment shall be imposed (TPC Art. 255 (3)). This is a special provision on attempt. There is also a special provision on participation: a person who acts as an intermediary to the commission of this crime shall be treated as a co-perpetrator (TPC Art. 255 (4)), thus receiving full punishment. If a third person indirectly procures an advantage through the crime, he/she will also be treated as a co-perpetrator; the same holds true for authorized representatives of a legal entity who accept the advantage (TPC Art. 255 (5)). Brazil and Turkey amended their laws to punish the traffic of influence in an international business transaction.[79]

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[77] 'The illegal transfer of money, securities, or any other assets to a person who discharges the managerial functions in a profit-making or any other organization, and likewise the unlawful rendering of property-related services to him for the commission of actions (inaction) in the interests of the giver, in connection with the official position held by this person, shall be punishable'.

[78] A fine in the amount of 200 to 500 minimum wages, or in the amount of the wage or salary, or any other income of the convicted person for a period of two to five months, or by disqualification to hold specified offices or to engage in specified activities for a term of up to two years, or by restraint of liberty for a term of up to two years, or by deprivation of liberty for a term of up to two years.

[79] Article 337-C of the Brazilian Penal Code (as amended in 2002), Art. 255 (7) of the Turkish Penal Code (as amended in 2012).

It is only more recenty that money laundering and concealment of assets have been criminalized. This happened in 1998 in Brazil, 2002 in India (Prevention of Money Laundering Act), 1996 in Turkey (Law no. 4208 on the Prevention of Money Laundering, now largely replaced by Art. 282 of the new Penal Code). Within this framework, in Brazil, some private sector entities are under a legal obligation to report certain transactions to the competent authorities. Similarly, in Turkey, transactions exceeding a certain value are automatically reported to a central authority.[80] Furthermore, acts directed at unlawfully influencing the outcome of public tenders or fraudulent acts concerning public contracts are also criminalized.[81]

In addition, 'classical' crimes against the public administration, such as embezzlement and public extorsion are covered by both the Italian and Turkish Penal Codes.[82] The difference in both Italian and Turkish law between bribery and public extorsion is that in the former case there is an agreement based on free will between the person offering or providing the advantage, and the person requesting or receiving it.

Abuse of office is punished by all states surveyed, but the definition of the crime differs significantly. According to the Turkish Penal Code (Art. 257), abuse of office exists when a public official acts in violation of the requirements of his duty (para. 1), or fails to or delays i, performing his duty (para. 2). However, such action (or inaction/omission) is only punished if it causes victimization to individuals, harm to the public, or if it provides an unlawful advantage to individuals. The corresponding provisions of the Italian Penal Code would be Art. 323 (abuse of office) and, partly, Art. 328 (refusing to perform acts of duty). In both states these provisions are of a secondary nature in that they are only applied where the act does not constitute another (in case of Art. 323 of the Italian PC, a 'more serious') crime. Art. 323 also requires the perpetrator to obtain an unjust patrimonial advantage, or to cause unjust damage to another person. The difference between Italy and Turkey is that the unjust advantage or damage concerns the completion ('consumazione') of the crime in the Italian Penal Code, whereas it is regarded as an objective condition for punishment in the Turkish Penal Code. In other words, if there is no such result, there shall be no punishment at all in the Turkish context. The Indian Act of 1988 provides, in sec. 13 (1) (d) for the crime known as 'Abuse of position'. This is a narrower provision in that it only punishes public servants who abuse their official position to obtain any valuable thing or pecuniary advantage (*quid pro quo* is not an essential requirement). So, causing victimization or harm to other persons does not fall within this scope. The Criminal Code of the Russian Federation provides for a sweeping crime of 'abuse of authority' which applies to 'a person discharging managerial functions in a profit-making or any other organization' (Art. 201).[83] It is worthy of note that the provision incorporates a threshold (required minimum level of gravity) for its application: the action must have involved the infliction of substantial damage on the rights and lawful interests of individuals or organizations or on the legally-protected interests of the society or the State.[84] If the action causes 'grave

[80] For example, transactions in cash exceeding a given value have to be reported to MASAK – which is a central board investigating financial crimes. The relevant rules are governed by a regulation passed by the Ministry of Finance.

[81] Through the 2013 Anti-corruption Law in Brazil, through two different provisions (Arts. 235 and 236) of the Penal Code in Turkey.

[82] Embezzlement: peculato in Italian (PC Art. 314), zimmet in Turkish (PC Art. 247); public extorsion: concussione in Italian (PC Art. 317), irtikap in Turkish (PC Art. 250).

[83] 'The use of authority by a person discharging managerial functions in a profit-making or any other organization in defiance of the lawful interests of this organization and for the purpose of deriving benefits and advantages for himself or for other persons or for the purpose of inflicting harm on other persons, if this deed has involved the infliction of substantial damage on the rights and lawful interests of individuals or organizations or on the legally-protected interests of the society or the State'.

[84] It is also striking that the crime may be punished through a variety of alternative sanctions: a fine in the amount of 200 to 500 minimum wages, or in the amount of the wage or salary, or any other income of the convicted person for a period of two to five months, or by compulsory works for a term of 180 to 240 hours, or by corrective labour for a term of one to two years, or by arrest for a term of three to six months, or by deprivation of liberty for a term of up to three years.

consequences' the punishment is increased. As can be seen, this provision bears little resemblance with the similarly named crime of the other states.

India punishes public servants, or any person on their behalf, who are in possession, or who have been in possession of pecuniary resources or property disproportionate to their known source of income, at any time during the period of their office (Sec. 13(1)(e) of the 1988 Act).[85] The punishment is an imprisonment term of 1 to 7 years, along with a fine. Art. 4 of the 1990 Turkish Law provides for a similar crime: personal expenditures which are not commensurate with one's income, and property which cannot be proved to have been obtained in accordance with the law and 'public moral' are considered 'unlawful appropriations', and Art. 13 of the same Law punishes such acts with imprisonment of three to five years, along with a fine. However, if a proposed amendment in India is enacted, the prosecution would bear the burden of proof in showing that the disproportion is on account of 'intentional enrichment by the public servant in an illicit manner'. This, of course, would put the prosecution in a very difficult position. On the other hand, the existing provision in Turkey has been criticised for running counter to the presumption of innocence, which is protected by Art. 38 of the Turkish Constitution. However, it should be borne in mind that the European Court of Human Rights does not find statutory reversals of the burden of proof in violation of the right to a fair trial *per se*. Hence, presumptions of fact and law may operate against the defendant as long as this is kept 'within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence'.[86] This means, in practice, that the defendant must be given a reasonable chance to prove his case.

The Indian Act of 1988 also provides additional punishment for repeat offenders by criminalizing independently 'habitual' bribe-seeking and 'habitual' middlemen or touts (intermediaries).

As a further measure, conviction for certain corrupted-related crimes constitutes in some states a bar to run for office at elections.[87]

As a closing observation, a tendency to increase the punishment for corruption-related offences can be discerned. Whether this is a reflection of stronger political will to fight against the phenomenon, or a mere indication of a desperate hang on criminal law measures against the inability to contrast the problem, is open to debate.

D. Liability of Legal Entities

With regard to the liability of legal entities, in comparative law almost all states do not recognize criminal responsibility for legal persons.[88] This is also true for Brazil, Italy, the Russian Federation and Turkey. However, alternative sanctions have been prescribed for legal persons. Whether these 'alternative', allegedly non-penal sanctions are truly any different from punishment in the criminal law sense shall be discussed further below.

The anti-corruption law of the Russian Federation determines that committing any of the acts indicated in Art. 1 (a)[89] 'on behalf or for the benefit of a legal entity' constitutes corruption (Art. 1 (b)).

The Brazilian 2013 Anti-corruption Law provides for severe administrative penalties in the form of fines ranging from 0.1% up to 20% of the gross revenues,[90] or at least the amount of the undue advantage, if possible to estimate.

In Turkey, a provision in the Misdemeanors Law (Art. 43/A) provides for the imposition of 'administrative fines' in case certain corruption-related crimes, exhaustively listed in the relevant

[85] See Indian National Report (at 9) for proposed amendments to this provision.

[86] Salabiaku v France, judgment of 7 October 1988.

[87] For example, the Brazilian 'Clean Rap Sheet Law' of 2010. The Turkish Constitution (Art. 76 (2)) bars those convicted of certain corruption-related crimes (includind embezzlement, bribery and public extorsion) to stand for general elections, even if such crimes have benefitted from amnesties.

[88] This is based, *inter alia*, on the following grounds: refusal to accept that legal persons have a 'capacity to act', the fact that legal persons cannot be imputed guilt since they lack their own will.

[89] *Supra* note 5.

[90] Alternatively, 6,000,000 – 60,000,000 BRL if the gross revenue cannot be ascertained.

provision, are committed to the benefit of the legal person. Hence, this is an administrative procedure.

In addition, civil sanctions are also applied in many states. For example, in Brazil, under the 2013 Anti-corruption Law, and in Turkey, under the national Penal Code, legal entitites may have their activities suspended,[91] and in Brazil, as an extreme measure, the legal entity may be dissolved through a judicial decision.

In Italy, there is a separate law on the subject: the Administrative Liability of Legal Bodies Law of 2001, which regulates the administrative liability of legal persons, and other entities not having legal personality, with regard to crimes committed by their employees, in the interest of the company itself, or to bring profit to it. The sanctions which can be applied following an administrative trial are the following: fines (26,000 – 1,500,000 Euro); disqualification from signing public contracts, grants and loans; revocation of authorizations, licences or permissions; confiscation; publicity of the Court decision. As in Brazil, disqualifications can be temporary; in Turkey, this is not possible – the licence to operate may be revoked altogether.

Comparing the requirements for holding a legal entity liable, the Italian approach seems more stringent in that it requires misconduct by an 'employee'. For the Turkish law, it suffices the presence of 'any person who performs a duty in the framework of the activities of the legal person.' Art. 14 (1) of the Federal Law on Combating Corruption in the Russian Federation seems to have the largest scope of applicability: 'If corrupt offences or offences creating conditions for corrupt offences are organized, prepared and committed on behalf or for the benefit of a legal entity, sanctions can be applied to that legal entity in accordance with Russian Federation laws.' Note that Art. 43A of the Turkish Misdemeanours Code provides for a closed list (*numerus clausus*) of the crimes for which the legal entity may be held administratively responsible.[92] Inversely, the clause in the Russian law establishing liability in case of 'offences creating conditions for corrupt offences' expands the scope of the law. In addition, while the Turkish law requires the 'commission' of certain crimes, for the Russian Federal Law the 'organization' or 'preparation' of certain crimes is sufficient to trigger a legal entity's administrative responsibility.

Furthermore, as an outstanding rule, the provisions of Art. 14 of the Russian Federal Law also apply to foreign legal entities in cases provided for by Russian Federation laws.

To evaluate the sanctions provided in the above-laws, it is open to debate, as indicated in the Italian national report, whether such sanctions are in fact any different from criminal law sanctions proper. To rely on the interpretation of the European Court of Human Rights, in determining the meaning of 'criminal charge' under the right to a fair trial (Art. 6 of the European Convention on Human Rights) the Court applies three criteria: a) the classification of the offence in the law of the respondant state; b) the nature of the offence (the purpose must be deterrent and punitive, not compensatory) ; c) the possible punishment (nature, duration or manner of execution must have 'appreciably detrimental' effects). If the proceedings are classified as 'criminal' under national law, Art. 6 will apply. In cases where the offence is not classified as 'criminal' under national law, the second and third criteria (nature of the offence, possible punishment) will come into play; these two criteria are not necessarily cumulative, and may be taken into consideration alternatively.

Under these criteria, taking into the account the amount (or value) of the fines that may be imposed in Brazil, Italy and Turkey, one can immediately note their punitive and retributive nature. In addition, these fines may lead to the collapse of the legal entity in question. In

[91] In Brazil, a partial suspension or interdiction of the legal entity's activities is possible; in Turkey, the licence to operate may be revoked.

[92] See the Turkish National Report at 10 for the list of crimes: Swindling, bid-rigging, fraud during the discharge of contractual obligations with public institutions, bribery, laundering of proceeds deriving from a crime, the crime of embezzlement in Art. 160 of the Banking Law, smuggling crimes defined in the Law no. 5607 on the Fight against Smuggling, the crime described in Add.Art. 5 of the Law no. 5015 on the Petrol Market, the crime of financing terrorism described in Art. 8 of the Anti-Terror Law (no. 3713).

addition, measures like suspension of the entity's activities, revokation of their licences, and, in Brazil, even dissolution of the entity by the court, are capable of producing extremely detrimental effects on the entity concerned. Hence, the Italian report seems to be correct in suggesting that this so-called administrative liabity is, in reality, punishment imposed on legal entities, [93] contrary to the long-standing *societas puniri non potest* principle.

VI. The Transnational Enforcement of Anti-corruption Norms and the Creation of Property Rights

The Interrogation of the Creation of Property Rights

What we seek to do in this section of our report is interrogate the enforcement of anti-corruption norms. We call for a more sceptical approach to the business of enforcement. In this regard, we will focus on certain trends prevalent in the United Kingdom and United States. One aspect of the transnational enforcement of anticorruption norms, which is increasingly coming to the fore, is its effect on property rights. The United States and United Kingdom have been at the forefront of this development.

So in the case of the United Kingdom, where it is established that assets are the proceeds of crime the United Kingdom government has the power, by means of certain proceedings, to destroy existing property rights. These proceedings include confiscation (criminal forfeiture) and civil forfeiture. Confiscation orders are also an integral part of all criminal proceedings and are made upon conviction. In the case of civil forfeiture, it need not be established that the relevant property represents proceeds of crime. A criminal conviction is not necessary for assets to be confiscated. In *United States of America v. Abacha* [2014] EWHC 993 Justice Field stated: "Looking at the substance of the claim, although the claimant's must prove that the pleaded offences were committed before a forfeiture order can be made, the US claim does not involve the prosecution and sentencing of any individual in a criminal court which are the hallmarks of criminal proceedings. Instead, *the US claim is a claim for the vesting in the US government of property* used in or resulting from certain crimes". (Emphasis supplied.) The theft in this case was in the region of two billion dollars. In *Serious Organised Crime Agency v. Agidi*, [2011] EWCA Civ 1350, Lord Justice Rix observed: "No one has suggested that any of the money goes back to Nigeria". (In its earlier civil claim brought under Part 5 of the Proceeds of Crime Act 2002, the Serious Organised Crime Agency (SOCA) had succeeded in obtaining judgement against Mr Agidi (who was never convicted of any offence) to recover property amounting in all to some £1.3 million). This money did not go to the Nigerian taxpayer but instead to the British taxpayer. In the words of Lord Justice Rix, "the British taxpayer enjoys something of a windfall".

Exorbitant extraterritoriality

In seeking this windfall, the United Kingdom and United States have sought to apply their regimes in an exorbitant extraterritorial manner. The UK courts have generally been willing to go along with this approach. The recently overturned decision of the English Court of Appeal decision in *Perry v. Serious Organised Crime Agency* [2011] EWCA Civ 578 is a case in point. In that case, the Court of Appeal held that a Court in England and Wales has the power under Part 5 of the Proceeds of Crime Act 2002 to make a recovery order in favour of the trustee for civil recovery in respect of recoverable property outside the jurisdiction. Mr Israel Perry, a lawyer, was convicted by a Court in Israel of a number of offences arising out of a pension scheme which he set up in Israel in 1983. Mr Perry profited from his fraudulent activities in the amount of some £110,000,000. He was sentenced to a term of imprisonment in Israel. He was also ordered to pay a fine slightly in excess of £3,000,000 in Israel. He paid the fine in 2008. The Israeli authorities took no steps to freeze any of his assets or to bring the Israeli equivalent of recovery proceedings against any assets outside Israel. SOCA however became aware of

[93] The same argument has been advanced in Turkish academic writings.

funds totalling approximately £14,000,000 in two bank accounts in London in which Mr Perry had an interest. So even though there was no breach of English law by Mr Perry and Mr Perry had served his time in Israel, SOCA nevertheless pursued a worldwide property freezing order against Mr Perry – so that property in Israel was now being targeted by SOCA. There was no dispute that, in so far as there is property in England or Wales, SOCA is able to go after such property. However, the question was whether SOCA could go outside the jurisdiction of England and Wales under Part 5 of the Proceeds of Crime Act 2002. The Court of Appeal held that it could. This was blatantly extraterritorial in the most exorbitant manner. It was only when the matter went to the Supreme Court that this view of the law was overturned. The Supreme Court in *Serious Organised Crime Agency v. Perry and Others (Numbers 1 and 2)* [2012] UKSC 35 held that the jurisdiction of the High Court of England and Wales to make a civil recovery order applied only in relation to property within England and Wales; and that, accordingly, the court had no jurisdiction under section 245A to make the worldwide property freezing order.

That the Supreme Court reined in the Court of Appeal in this regard does not diminish the force of the point being made, as the recent case of *United States of America v. Abacha* [2014] EWHC 993 will demonstrate. In that case, Mr Justice Field stated: "I have come to clear view (sic) that it is unquestionably expedient for this Court to render the assistance sought by the claimant in aid of the US claim. Corruption, like other types of fraud, is a global problem and its consequences are only going to be dealt with effectively if there is co-operation and assistance not only between the governments of states but also between the courts of different national jurisdictions."

Enforcement of anticorruption norms as "Stealing from the Poor"

We have now reached the point where these States may be said to be seeking the destruction of existing property rights and creating corresponding property rights *in themselves* partly to augment their state finances. This obscures the place of the victim and it threatens to bring this regime of enforcement into disrepute. It brings the system into disrepute because it denies the real victims of corruption the benefit of these recoveries. The UN Convention against Corruption in Article 57 contemplates that the real victims should be compensated.

Matters become worse because the relevant agencies charged with pursuing these recoveries appear to be "incentivised" to go after these recoveries and therefore this distorts their role. In *Serious Organised Crime Agency v. Agidi*, [2011] EWCA Civ 1350, Lord Justice Rix stated as follows: "It appears that it is possible that the Home Office have a discretion to do what is called "incentivising" agencies such as the referring agency (who may well be the Metropolitan police in this case) or enforcing agency (which is SOCA in this case) *by providing them with a share of proceeds*". (Emphasis supplied.)

It seems reasonable to suggest that the moment the enforcers are given a share in the proceeds we introduce the risk of abuse of process because of the problem of perverse incentives. Furthermore, the destination of the recoveries ends up being countries such as United Kingdom and United States. Lord Justice Rix observed in this case that, outside incentivising payments, the money would end up in general public funds and the British taxpayer will enjoy a windfall.

Consider the recent case of the *United States of America v. Abacha* [2014] EWHC 993. This was an application to continue a freezing Injunction. The foreign proceedings, in aid of which the freezing injunction was sought, were an *in rem* forfeiture claim brought by the United States of America (the claimant) against certain assets held by certain of the defendants. The claimant alleged that these assets are derived from the proceeds of corrupt misappropriations carried out by the former President of Nigeria, General Abacha, and certain of his relatives and associates and that therefore liable to forfeiture under US law (18 USC section 981) by reason of having been involved in money laundering within the United States. The principal allegation of corruption made in the US claim is described as the "security votes fraud", which involved the theft of more than two billion dollars from the Central Bank of Nigeria. This theft was carried out under cover of instructions by General Abacha.

Before the US claim was brought the Federal Republic of Nigeria had itself sought to bring proceedings in the Chancery Division in England asserting a proprietary claim in respect of monies that were alleged to have been corruptly taken from the Central Bank of Nigeria in the course of the "security votes fraud". In the course of this action, a freezing injunction was granted. However, a settlement agreement was later signed on behalf of the Federal Republic of Nigeria and the defendants. The settlement agreement provided for the transfer by the defendant of sums held in variously named accounts for the benefit of the Federal Republic of Nigeria and also for the renouncement by the Federal Republic of Nigeria of any interest whatsoever in certain scheduled assets that will now be held by the defendant free from any claims made by the Federal Republic of Nigeria.

After this settlement, the US government brought the present action in 2013 as part of the US kleptocracy asset recovery initiative. So in this case, the US, was applying for a freezing order under section 25 of the Civil Jurisdiction and Judgements Act 1982. Justice Field was of the view that it is unquestionably expedient for the Court to render the assistance sought by the claimant in aid of the US claim. This is remarkable for many reasons.

First, the link between the United States and the assets was tenuous and best. No US bank was used to hold the relevant sums of money. The principal banks where banks in the United Kingdom. No offence was prosecuted against US law. Furthermore, the Federal Republic of Nigeria, for its own reasons, had reached the settlement with the defendants. Yet, the US government proceeded to bring this action against the property so that the destination of any recovered property would be the United States Treasury. As stated earlier, this obscures the place of the victim – Nigeria remains the moral victim even if it may no longer be the legal victim assuming the settlement agreement is valid – and threatens to bring the forfeiture regime into disrepute. It should be mentioned that the *Strategic Centre of Organised Crime* at the Home Office in the United Kingdom had confirmed that the United Kingdom would seek to enforce any civil forfeiture made in the US claim and would return the money recovered to the US *on confirmation that the US would in principle seek to return it to Nigeria*. This, of course, is not convincing in light of the track record of United Kingdom in keeping these funds and obtaining their windfall for its taxpayer. It would be a travesty if the US authorities were able to use this claim as a way of augmenting its finances.

This is not an isolated problem. The former governor of Delta state in Nigeria, James Ibori, entered a guilty plea to corruption charges in the amount of fifty million pounds. He was sentenced on April 17, 2012 to 13 years imprisonment by Southwark Crown Court. The BBC reported that (http://www.bbc.co.uk/news/world-africa-17739388) after the hearing, Sue Patten, Head of the Crown Prosecution Service Central Fraud Group, said it would seek *to* confiscate the assets Ibori had acquired "at the expense of the some of the poorest people in the world". The real scandal is that this may not be so. When the on-going confiscation proceedings run its full course any proceeds are likely to eventually go to the British taxpayer.

Surely, in enforcing these anti-corruption norms we ought to recognise that the real purpose of these proceedings is to make a corrupt gainer of funds disgorge those funds as opposed to the enforcing authority gaining what appears to be a windfall for the UK or US taxpayer. Where victims of corruption are foreign developing states they often lack the wherewithal to pursue such claims in foreign courts, yet the Serious Organised Crimes Agency (and its replacement body – the National crime agency) benefits from a lower standard of proof, a longer limitation period, and the use of draconian powers and is thus able to obtain a civil recovery whose destination ultimately is the UK Treasury. This phenomenon is set to increase because the enforcing agency is incentivised to pursue such cases by the fact that it stands to gain a percentage of its recoveries.

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