

Are we going the same way? American and European perspectives in fighting corruption

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Sažetak

U ovom radu autori ispituju različite načine sprječavanja i borbe protiv korupcije u nekoliko pravnih sustava. Također daju informacije o međunarodnim instrumentima s kojima su usklađene unutarnje politike i zakonodavstva država. Razmatrajući dva velika pravna sustava Europsku uniju i SAD, autori daju uvid u dva načina borbe protiv korupcije. Premda ne postoji određena razlika u zakonodavnom pristupu Europske unije s jedne strane i SAD-a i Kanade s druge strane, postoje razlike u praksi. Razlike su na operativnom i institucionalnom nivou, ali ne i u javnim politikama. Posebna je pozornost u ovome članku poklonjena pravnim osobama kao nositeljima kaznene odgovornosti što je posljedica različitih teoretskih pristupa prihvaćenih u određenim sustavima pod kojima se pravna osoba smatra kazneno odgovornom. Dok je u SAD-u vrlo lako proglasiti pravnu osobu kazneno odgovornom, u Velikoj Britaniji, Kanadi i nekim drugim zemljama Europske unije to je povezano s određivanjem odgovorne osobe na višim razinama u strukturi pravnih osoba.

Ključne riječi: korupcija, međunarodni pravni instrumenti, kaznena odgovornost pravnih osoba, korupcija kod pravnih osoba

Introduction

Corruption is a serious economic, social, political and moral problem. It is becoming an international phenomenon in scope, substance and consequences and that is why there has been a growth of international efforts to tackle the problem of corruption.

Economic consequences of corruption are well known: it discourages productive investments, especially foreign; it leads to inefficient use of resources; it erodes the standard of living; it destabilizes national budgets; makes the tax system less efficient.¹ The social and political effects of corruption are also warning: it undermines the rule of law and

¹ According to World Bank reports, more than 1 trillion US\$ is paid in bribes a year, available at <http://web.worldbank.org>, 20.1.2011. According to Asian Development Bank reports, costs of corruption up to 17% GDP, available at <http://beta.adb.org/documents/series/adb-annual-reports>, 20.1.2011.

democracy and distorts the public perception of the role of law in the society; corruption threatens fundamental human rights, as well as subverts the institutions that guarantee stability, security, and sustainable development. Drug trafficking, human trafficking and terrorist activities are among the most threatening activities causing trouble to corrupt countries. One of many examples of this can be seen in West Africa where security institutions of fragile states like Cote d'Ivoire, Guinea Bissau, and Sierra Leone are hampered by corruption making their borders easily penetrable by cocaine traffickers and the like, threatening thus the security of the entire region.

The main development typical for the period from the 90's onwards is economic globalization. Countries, i.e. economies have become more and more interdependent. This process, in part facilitated by technological and design developments, led to increasing power of multinational corporations that were able to thrive in a world with fading borders. It was noted that globalization led to a larger amount of corruption, since competition for profitable contracts has risen.² This is particularly true in the context of Central and Eastern Europe after the end of the Cold War. With the fall of the Berlin Wall and the collapse of the Soviet Union, democracy spread and societies became more open. But it is during this period that corruption was widespread in this region. Corporations thus encountered widespread corruption and both companies and governments became aware of its costs and distortive effects. Also related to the end of the Cold War is the diminished incentive for the governments to sponsor corrupt dictators in developing countries, such as those in Africa. Another factor that contributed to the rise of anti-corruption regime was the sentiments of the general public due to a number of corruption scandals that took place in several Western European countries. Furthermore, it has been noted that the character of the present anti-corruption regime is more normative (based upon harmonized behavior) than moral (based upon intrinsic commitment to shared values).³

Apparently, the legal regimes within countries have not been able to curb corruption in an efficient manner. Therefore, it is interesting to look at the legal initiatives that were taken at the international level especially at the level of European Union, an economic and political union of 27 member states and the United States of America considering their significance in international relations.

Over the last years, as the connection between corruption and security has become increasingly clear, the international community has slowly started to respond. The devastating effect of corruption on global security emphasizes the importance and urgency of anticorruption efforts. Fighting corruption requires not only national, but also regional and international strategies rooted in global cooperation.

United States of America

Prior to mid-nineties, no international or regional legal instruments existed on the topic of corruption. Corruption was primarily seen as an issue of domestic rather than international concern. Therefore, most countries did have national legislation prohibiting certain corrupt acts within their territories, particularly the bribery of domestic public officials. Legislation which prohibits the active bribery of foreign public officials was lacking.

² George, Barbara Crutchfield, Lacey, Kathleen A., A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives, *Cornell International Law Journal*, Vol. 33, No. 3, 2000., p. 547., available at SSRN: <http://ssrn.com/abstract=1431269>, 13.2.2011.

³ Windsor, Duane, Getz, Kathleen A., Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values; 33 *Cornell Int'l L.J.* 731, 2000, p. 752.

The only exception was the United States Foreign Corrupt Practices Act (FCPA)⁴ which came into existence in 1977 in the wake of the Lockheed scandal⁵ and a report from the Securities and Exchange Commission in 1976. This report revealed that questionable or illegal payments to foreign officials and politicians were a widespread phenomenon in the US corporate sector and included companies from chemical, aerospace and oil and gas sectors.⁶ The Act aims to prevent active bribery of foreign public officials by US corporations and citizens. To this end, the FCPA contains both anti-bribery provisions and accounting and recordkeeping provisions. Violators of the FCPA provisions can face criminal and civil penalties. For each violation of the anti-bribery provisions, corporations and other business entities risk criminal fines to \$2 million, as well as a civil penalty up to \$10,000. Individuals are subject to criminal fines up to \$100,000 and/or a prison sentence with a maximum of 5 years. They are also subject to a civil penalty up to \$10,000.⁷

The misconduct of well-known corporations such as Lockheed, Exxon, Gulf Oil and Mobil Oil received large media coverage and led to public outcry. The FCPA aimed to restore the confidence of both the American public and foreign relations in US businesses. Moreover, scandals of US corporations involved in bribery of officials in foreign states could endanger the relations with these states. US trade interests were important. Bribery was seen as a barrier to trade and it distorts competition by favoring the corporation that is willing to provide the largest bribe. However, FCPA has received several critics, particularly from the business side. Some authors emphasized that it had led to a competitive disadvantage of US corporations since they were not allowed to pay bribes abroad, while non-US corporations were not hindered to do so by any law. This gives us reason to think that unification or at least harmonization of anti-bribery laws would be an important step for social and economic development, since less bribery is inducing stronger competition and its pertaining microeconomics effects.⁸

Enforcement of the FCPA is in the hands of the US Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). The DOJ takes care of all criminal enforcement, while civil enforcement is divided between the DOJ and SEC. The SEC has civil enforcement authority over issuers, their officers, directors, employees, agents and stockholders acting on their behalf. The DOJ has competence over all other civil enforcement.

Nowadays, there is a trend towards more aggressive investigations and enforcement proceedings by the DOJ and the SEC. The number of proceedings targeting individuals has risen as well. Moreover, punishment has become more severe. For example, in April 2007, the oilfield services company, Barker Hughes agreed to pay US \$44 million, the largest FCPA fine ever.⁹

The next example considering US efforts in combating corruption to be mentioned is its participation in Organization of American States. To quote Secretary General, J.M. Insulza: „We must understand that crime is no longer a single country phenomenon. It

⁴ Available at <http://www.justice.gov/criminal/fraud/fcpa/>, 13.2.2011.

⁵ The US Company, Lockheed, had made illegal payments to government officials in various countries (including Japan, Netherlands, Italy) to secure contracts for the sale of aeroplanes. The Lockheed scandal in Japan resulted in the prosecution of various officials including Kakuei Tanaka (Prime Minister in office from 1972-74). In the Netherlands Prince Bernhardt resigned when inquiries into allegations that he had received \$1 million from Lockheed were initiated. For more on this see Markovits A.S. & M. Silverstein 'The Politics of Scandal' (Holmes & Meier: New York, 1988); Mitchell, R. H. Political Bribery in Japan (University of Hawaii Press: Honolulu, 1996).

⁶ Carr, Indira, Outhwaite, Opi, The OECD Anty-Bribery Convention Ten Years On, available at <http://epubs.surrey.ac.uk/578/1/fulltext.pdf>, p.32., 10.11.2010.

⁷ FCPA, (G) Penalties.

⁸ Op. cit. at 5, p. 6.

⁹ See <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1186089409370>, 27.2.2011.

is a transnational problem and its magnitude is increasing on continental scale¹⁰. Participation in different organizations is very important if we confess corruption is global phenomenon not only in its scope, but also in its consequences. An important legal instrument designed to address corruption is the Inter-American Convention against Corruption (IACAC)¹¹, which was adopted on 29 March 1996 and entered into force on 6 March 1997. This Convention does not provide a definition of corruption but it refers to certain 'acts of corruption' in the public sector. First, the Convention contains a wide list of preventive measures such as adoption of conduct for public officials and enforcement mechanisms,¹² instructions to government personnel,¹³ registration and disclosure of the income of public officials¹⁴ and many others. Although the list of preventive measures is extensive, the adoption is optional for State parties, since they merely have to 'consider' their applicability.¹⁵ Secondly, the IACAC obliges State Parties to criminalize certain 'acts of corruption'. This Convention separates three groups of corrupt offences, to which a different level of obligation applies. Third, the instrument contains provisions in respect of cooperation and post-corruption measures. The Convention contains a provision on extradition.¹⁶ Also, States have to afford one another the widest measure of mutual assistance in the investigation and prosecution, as well as technical cooperation in prevention, detection, investigation and punishment of acts of corruption.¹⁷

Although the IACAC itself does not provide a monitoring mechanism, a Follow-up Mechanism MESICIC (MESICIC is the acronym of its Spanish name)¹⁸ was established in 2001. The Follow-up Mechanism consists of a process of peer review, the main structure of which is contained in the Report of Buenos Aires.¹⁹ It is composed of two bodies: the Conference of State Parties and the Committee of Experts. The purposes of the Follow-up Mechanism are the promotion of the implementation of IACAC, the follow-up of commitments of the State Parties and the study of their implementation and the facilitation of technical cooperation.

It is difficult to determine precisely how effective the IACAC has been in combating corruption in the State Parties. A study conducted by Guatemala, Honduras, Jamaica and Trinidad & Tobago seems to indicate that although the Convention has led to adoption of new anti-corruption legislation in these countries, this has neither led to an improvement in corruption perception (as measured by CPI), nor to a lower level of corruption risks.²⁰

A very sensitive area that is always subject to loud debates is the financing of campaigns which is closely linked to the question of corruption in politics. The United States Supreme Court has been quite active and sometimes bitterly divided. Some authors argue that trends in public perception of corruption may have little with campaign finance system, they emphasize that the campaign finance system contributes to corruption in

¹⁰ See http://wmoas.shss.cofc.edu/2010_white_paper.pdf, 18.1.1011.

¹¹ Available at <http://www.oas.org/juridico/english/treaties/b-58.html>, 27.2.2011.

¹² Article III (1) and (2) IACAC.

¹³ Article III (3) IACAC.

¹⁴ Article III (4) IACAC.

¹⁵ Altamirano, Giorleny, D., *The Impact of the Inter-American Convention against Corruption*, The University of Miami Inter-American Law Review, Vol. 38, No. 3, 2007, p. 487-547, published by Joe Christensen, Inc., available at <http://www.jstor.org/stable/40176742>, p. 490., 17.1.2011.

¹⁶ Article XIII IACAC.

¹⁷ Article XIV IACAC.

¹⁸ *Mechanismo de Seguimiento de la Implementación de la Convención Interamericana contra la Corrupción*.

¹⁹ Organization of American States, *Report of Buenos Aires on the Mechanism for Follow-up on the implementation of the Inter-American Convention against Corruption*, May 2001, available at http://www.oas.org/juridico/english/doc_buenos_aires_en.pdf, 17.11.2010.

²⁰ Altamirano, Giorleny D., *The impact of the Inter-American Convention against Corruption*, The University of Miami Inter-American Law Review, 2007, 38 U. Miami Inter-Am. L. Rev. 487, p. 541.

government.²¹ The court's majority in *Citizens United v. Federal Election Commission*, January 2010, swept aside a century old doctrine in election law, ruling that the campaign finance restriction violated the First Amendment's free speech principles. It is an extraordinary decision ruled that the government may not ban political spending by corporations in candidate elections.²² This ruling overruled two precedents: *Austin v. Michigan Chamber of Commerce*, a 1990 decision that upheld restrictions on corporate spending to support or oppose political candidates and *McConnell v. Federal Election Commission*, a 2003 decision that upheld the part of the Bipartisan Campaign Reform Act of 2002 that restricted campaign spending by corporations and unions. The ruling represented a sharp doctrinal shift and it will have major political and practical consequences.²³ Critics of the court's decision say that deep pocket interests, for example the oil, electricity, and telecommunication businesses have been given a dangerous level of influence over election outcomes. Lawrence Lessig, a professor of law at Harvard Law School thinks that the point is that the political system should be the one that people can trust, that the decisions Congress makes are decisions based on the merits on what makes sense or what people want and not what the funders demand. He emphasized that there should be a system that does not lead people think that money rather than sense is producing a political decision.²⁴ On the other side, it is obvious that reformers have tried hard to take money out of politics, to protect democracy from the corrupting influence of money, but money has not been taken out of politics because donors simply find new, less transparent ways of influencing the politics.

Another issue closely tied to corruption is lobbying with the arising question of institutional corruption. This is often explained as some kind of influence that has a certain effect: it weakens the effectiveness of an institution; it weakens especially the public trust of an institution. According to Robert G. Kaiser in his book *So damn much Money- the triumph of lobbying and the corrosion of American Government*,²⁵ the American Government has changed a lot, especially when talking about lobbying which he describes as a certain kind of 'economy' inside Washington. They support their political campaigns and all indicators reveal that the cost of campaign has arisen extremely so Members became even more dependent on those who pay. Kaiser says: „Money has been part of American politics forever- in the Gilded Age or the Harding administration for example- much more blatantly than recently...But the scale of it has just gotten way out of hand...the money may have come in brown paper bags in earlier eras, but the politicians needed, and took much less of it than they take trough much more formal channels today“.²⁶ Kaiser also stressed that Members of the Congress are focused on their lives after their mandate. The pattern that he describes could be shown through some examples. John Campbell is a Congressman from California; he is a landlord to 6 used car dealers from whom he gets \$600,000 to \$6,000,000 a year, they also financially supported his campaign with more than \$170,000. It was very interesting when he introduced the amendment for Consumer

²¹ Persily, Nathaniel, Lammie, Kelli, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 2004., U of Penn, Inst for Law & Econ Research Paper 04-22; U of Penn Law School, Public Law Working Paper 53., available at SSRN: <http://ssrn.com/abstract=595721> or doi:10.2139/ssrn.59572, p. 13., **3.1.2011.**

²² Bebchuk, Lucian A. and Jackson, Robert J., *Corporate Political Speech: Who Decides?* (September 1, 2010). *Harvard Law Review*, Vol. 124, pp. 83-117, 2010.; *Harvard Law and Economics Discussion Paper No. 676*. Available at SSRN: <http://ssrn.com/abstract=1670085>.

²³ *Ibid.* p. 116.

²⁴ See <http://bostonreview.net/BR35.5/lessig.php>, 17.12.2010.

²⁵ Kaiser, Robert, *So damn much Money- the Triumph of lobbying and the Corrosion of American Government*, First vintage books edition, 2010.

²⁶ *Ibid.* p.23.

Financial Protection Agency Act²⁷ of 2009 that would exclude car dealerships from oversight as outlined in the bill - including six tenants that paid Campbell between \$600,000 and \$6 million in rent, according to the congressman's own personal financial disclosure forms. As Kaiser mentions in his book: „In earlier generations enterprising young men came to Washington looking for power and political adventure, often with ambitious to save or reform the country or the world...in the last fourth of the twentieth century such aspirations were supplanted by another familiar American yearning: to get rich“.²⁸

A criticism has always been essential prerequisite for development. In the US the problem of corruption is not under the veil of secret. It is a well known phenomenon and a lot has been done upon this issue. Corruption Perception Index indicates that USA is on the 22nd place.²⁹ As it was previously mentioned, corruption is a problem that should be monitored on an international level and according to that, most efforts should be taken on that level, but always starting from individuals. The problem is when corruptive behavior becomes a routine and then it is no longer only a political or economic question but rather a moral one.

The European Union

The end of the Cold War resulted in the opening of borders, and especially the creation of a Single European Market within the European Union (EU). It has created many positive economic and political benefits across Europe. However, these same processes have increased opportunities for organized crime and its international expansion. A new term, 'transnational organized crime' has been created to describe this new phenomenon:

„With relation to the development of crime, transnational and organized become two corresponding concepts: the transnational development of crime requires organization in order to face the difficulties related to cross-border action and criminal organizations move transnationally as part of their development in order to maximize opportunities and minimize the risk of being caught and disrupted“.³⁰

The European Union's first and most important task, ever since its establishment in the 1950's, has been to safeguard competition and ensure open and free markets for goods, services, people and capital. It is clear from any angle that the phenomenon of corruption is in contradiction to main EU principles. Corruption is contrary to the proper functioning of the internal market, it damages the financial interests of the European Communities and it also damages internal trade. It is contrary to good governance and the rule of law, established as foundations of the Union in the Treaty of Maastricht. Although it has taken time for the EU institutions to react, they have been active in certain fields, especially when it comes to the protection of financial interests of Member States. Legislative efforts against corruption in European Union are aimed at reducing all forms of corruption, at every level, not only in EU countries and institutions, but also outside the EU.

²⁷ Consumer Financial Protection Agency (CFPA) takes certain consumer regulatory responsibilities of financial products from seven other agencies and centralizes it in one office. It has the authority and accountability to supervise, examine and enforce consumer financial protection laws. The idea for a CFPA was spoken out by Elisabeth Warren, who holds the position of the Chair of Congressional Oversight Panel overseeing the US banking bailout. Today CFPA is in place and is also led by the same Professor Warren.

²⁸ *Op. cit.* Kaiser, 24., p.48.

²⁹ See <http://www.reuters.com/article/2010/10/26/us-corruption-transparency-idUSTRE69P0X620101026>, 17.2.2011.

³⁰ Ian Davis, Chrissie Hirst, Bernardo Mariani: Organised crime, corruption and illicit arms trafficking in an enlarged EU (December 2001), available at: <http://www.saferworld.org.uk/downloads/pubdocs/Organised%20crime.pdf>, p.7., 4.1.2011.

The EU has produced many documents on fighting corruption. Firstly, Article 29 of the Treaty on European Union³¹ which mentions preventing and combating corruption as one of the ways of achieving the objective of creating and maintaining an European area of freedom, security and justice. In 1997 the action programme on organized crime was established based on preventive measures. The Council's Vienna Action Plan³² and the Tampere European Council in 1999³³ also identified corruption as an important area. The EU has also established its own instruments to tackle corruption: the two conventions on the protection of the European Communities' financial interests and the fight against corruption involving officials of the European Communities or officials of the EU Member States. Since corruption is often an integral part of organized crime and mostly transnational in nature, from the aforementioned legislative work and action plans, it appears that efforts in curbing corruption at a national level are inadequate. Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on a comprehensive EU policy against corruption was enforced in 2003.³⁴ The Communication adopts the definition of corruption used by the United Nations' Global Programme against Corruption³⁵ and in its conclusion it sets out the principle elements of a future EU anti-corruption policy. We mention only a few: „the implementation of existing anti-corruption instruments should be closely monitored and strengthened. The Commission recommends that the European Community should adhere to the Council of Europe's conventions on corruption and participate in its monitoring mechanism, GRECO (Group of States against Corruption). The Communication also points out the need to develop an anti-corruption culture in the EU institutions; it reviews the steps taken by the Commission in this field, particularly the creation of the European Anti-Fraud Office (OLAF) which was established in 1999 and it combats fraud and other illegal activities which are harmful to the Community's interests. It has independent investigative powers. The EU special report on the work of OLAF was very critical based on the argument that it had no standard system under which proceedings were opened, pursued and concluded. It also refers to the guide to sound financial management and other internal measures taken by the Commission.³⁶ The next important issue according to the Communication is police and judicial cooperation and there have been several advances. EUROJUST is the judicial cooperation network that was set up in 2002 and it deals with fraud, corruption and money laundering. It helps Member States when they are dealing with serious cross-border crime.

³¹ *Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.*

That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:

- closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with the provisions of Articles 30 and 32,

- closer cooperation between judicial and other competent authorities of the Member States including cooperation through the European Judicial Cooperation Unit ("Eurojust"), in accordance with the provisions of Articles 31 and 32,

- approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e).

³² Available at http://europa.eu/legislation_summaries/other/l33080_en.htm, 17.2.2011.

³³ Available at http://www.europarl.europa.eu/summits/tam_en.htm, 17.2.2011.

³⁴ Available at http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_corruption/l33301_en.htm, 17.2.2011.

³⁵ Abuse of power for private gain.

³⁶ See http://europa.bg/upload/docs/OLAF_report.pdf, 3.2.2011.

The Commission suggested appointing a European Financial Prosecutor to deal with corruption affecting the financial interests of the Community. The Framework Decision on the European Arrest Warrant, applicable since 1 January 2004 is the key factor in the fight against corruption because it makes it easier for offenders to surrender to the judicial authorities of the requesting State. The second Money Laundering Directive adopted in 2001³⁷ classifies corruption as a serious offence and thus increases the obligations on the Member States to tackle it.

The other EU instrument in the battle against corruption is Convention on the Fight Against Corruption Involving Official of the European Communities or Officials of EU Member States³⁸ which was adopted in 1997 and entered into force on 27 September 2005. This Convention deals with corruption involving EU officials or national officials of Member States of the EU. Corruption is only defined in terms of active and passive bribery which is a quite limited approach. Each Member State must take measures to ensure that a conduct consisting of an act of passive or active corruption by officials is a punishable criminal offence. Furthermore, judicial cooperation is an important element of the Convention. In case officials are involved in active or passive corruption which concerns at least two Member States, those States have to cooperate in an efficient manner in the investigation, prosecution and enforcement of the penalties. This Convention is a positive development in tackling corruption involving officials, but it is left to the judicial system of Member States to prosecute corrupt public officials. There is no specific monitoring mechanism attached to the Convention, but the European Court of Justice has the competence to interpret the Convention and the rule in disputes which may arise.³⁹ The most recently expressed program is the Stockholm Programme.⁴⁰ It is a five-year plan for deepening the cooperation in the field of justice and home affairs and it contains clear indications as to what the Commission should deliver in the field of anti-corruption measures.

However, some key problems were detected: despite the existing EU legislation and monitoring mechanisms corruption remains a serious problem in the EU. Levels and forms of corruption vary from one country to another but the conclusion is that there is no corruption free zone in Europe. What is even worse, all evidence suggest that corruption is on rise or at best stagnating.⁴¹ This was also confirmed by the Commission's 2009 Eurobarometer survey.⁴² More than 75% of interviewed Europeans stated that corruption was a major problem for their country. The strong connection between the organized crime and corruption within European Union was manifest. What is also important to stress, corruption carries high costs for the economy- it causes harm to the state budget and eventually to tax payers.⁴³ However, the most serious problem is that anti-corruption poli-

³⁷ See http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi:celexplus!prod!CELEXnumdoc&numdoc=32001L0097&lg=EN 21.2.2011.

³⁸ Available at http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_corruption/l33027_en.htm, 20.1.2011.

³⁹ Ferola, Lara, Anti Bribery Measures in the European Union: A comparison with the Italian Legal Order, *International Journal of Legal Info*, p. 527, 2000.

⁴⁰ Available at http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/jl0034_en.htm, 18.2.2011.

⁴¹ Transparency International's 2009 corruption index, which measures perceived levels of public-sector corruption. Eight EU members of 27 are scoring only 5 points or less. This is an indication of widespread corruption. The EU average is 27.

⁴² Available at http://www.enothe.eu/cop/docs/eurobarometer_poverty.pdf, 23.1.2011.

⁴³ A systematic and reliable calculation of the harm caused by corruption in the EU as a whole does not exist yet in Italy, a 2008 report of the Court of Auditors pointed out that the total costs of corruption for citizens amount 60 billion euro each year. A study undertaken by Transparency International in Greece indicates that the costs of petty corruption in the year 2009 were 787 million euro (both in the public and private sector), which is an increase of 39 million euro since 2008.

The question of EU real power in fighting corruption is maybe more important nowadays than ever. Recent corruption scandals⁵⁰ in the EU show that there is room for more work in the area of anti-corruption measures. Between the members of the Court of Auditors it has been alleged that EU institutions conceal the real truth about the extent of fraud within the EU and maybe that is the reason why EU-citizens do not have enough confidence in EU institutions.⁵¹ It is obvious that EU is trying to make a comprehensive policy against corruption, but what is not sure is its effectiveness. All conventions and protocols are not subject to a specific review mechanism. The Commission aims for the European Community to become a Member of Group of States against Corruption, GRECO, the anti-corruption mechanism of the Council of Europe. The Commission is currently negotiating with GRECO about overcoming legal obstacles to its accession. If GRECO membership will not be possible, the Commission would consider to set up a separate EU mutual evaluation and monitoring mechanism. It is not surprising that public expectations for more EU action in the field of corruption are high- 88% of citizens consulted requested more from the EU in the fight against corruption, making it the most supported policy in area of freedom, security and justice. Currently there is no comprehensive EU mechanism to assess anti-corruption efforts of Member States. If we consider Member States, EU is still not unique in its approach, but it is trying through legislative efforts, different bodies and standards to minimize the corruption problem. Although the scope of the current instruments is relatively narrow, this might be understandable given the fact that other organizations within Europe such as the Council of Europe are already dealing with the issue and many EU Member States are party to other anti-corruption treaties. What is also important, European Union, by its structure is only here to help Member States to develop their own efficient anti-corruption strategies giving them clear direction they need to follow.

American vs. European approach

The European Union, as an economic and political union of twenty seven states operates through a hybrid system of supranational independent institutions and intergovernmentally made decisions negotiated by the member states. Corruption is a phenomenon that is, although in different extent, present in every country. Transparency International Corruption Perception Index⁵² in 2010 indicates that Denmark, Finland and Sweden are perceived as the least corrupt countries and Bulgaria and Romania have only 3.6 and 3.7 scores on the list of 2010 Corruption Perception Index. Efficiently dealing with corruption problem is one of the basic prerequisites for joining the EU, but after joining, the question remains over the real impact of EU institutions in solving corruption problems in each Member State and European Union as a whole. Some say that the Lisbon Treaty, which came into force in 2009 made some changes because after its entry into force, Freedom, Security and Justice became part of the EU's common policy and EU has extended powers. As it was previously mentioned, the EU gives Member States only the framework (Stockholm Programme) and each Member State must develop its own strategy. On one hand, it is reasonable since each Member State has a special situation and the corruption level is not the same, but they should tend to the same direction. Different international organizations play a significant role in dealing with the corruption problem. Since corruption is a polyvalent phenomenon, the approach should be also multidimensional. By this

⁵⁰ Fraud in the European Carbon Market.

⁵¹ See http://ec.europa.eu/public_opinion/archives/eb/eb69/eb69_hu_exe.pdf, 2.2.2011.

⁵² See http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results, 17.12.2010.

we mean that measures should be taken on every level, starting from effective anticorruption strategies within each country, participation in different organizations, monitoring mechanisms and business standards. The approach of EU member states is not unique. An important role play different conventions such as United Nations Convention against Corruption which entered into force in 2005 and has become most widely accepted international authority in the battle against global corruption in its eight chapters and 71 articles. This Convention is global (by global we mean the entire scope of modes of corruptive behavior) in both its approach to the subject and its geographical application. It obliges the State Parties to implement a wide and detailed range of anti-corruption measures affecting their laws, institutions and practices. These measures aim to promote the prevention, detection and sanctioning of corruption, as well as the cooperation between State Parties on these matters. Although this Convention, since its entry into force, gained a worldwide recognition, Czech Republic, Germany and Ireland have not ratified it yet. The fight against corruption is also emphasized as a priority for the Council of Europe. Considering corruption, the Council of Europe decided to approach this still growing problem multidisciplinary. This includes settings of European norms and standards, monitoring of compliance and capacity building offered to individual countries and regions through technical cooperation programme. The Council of Europe has developed legal instruments dealing with matters such as the criminalization of corruption in the public and private sectors, liability and compensation for damage caused by corruption, conduct of public officials and the financing of political parties. These instruments are aimed at improving the capacity of States to fight corruption domestically as well as at international level. The monitoring of compliance with these standards is entrusted to the Group of States against Corruption, GRECO. The Commission aims for the European Community to become a Member of GRECO, but they are still negotiating. Another issue that should be mentioned considering non-unified approach to the corruption problem of EU member states is the other instrument dealing with corruption: it is Civil Law Convention on Corruption⁵³ which came into force in 1999 and has received ratifications from 34 countries. EU member states that signed but not ratified this Convention are Denmark (signed in 1999), Germany (signed in 1999), Ireland (signed in 1999), Italy (signed in 1999), Luxembourg (signed in 1999), UK (signed in 2000) while Portugal did not sign nor ratify it. The Organisation for Economic Cooperation and Development (OECD) created Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. EU member states that have not signed nor ratified this Convention so far are Cyprus, Latvia, Lithuania, Malta and Romania. All above mentioned examples show us that there is still a variety in approach to the corruption problem in EU member states. It is possible to have non-unique approach since the founding treaties state that all member states are indivisibly sovereign and of equal value. In contrast to other organizations, the EU's style of integration has "become a highly developed system for mutual interference in each other's domestic affairs".⁵⁴ On the other side the United States of America is a federal constitutional republic comprising fifty states and a federal district. It is the fourth largest country by total area, and the third largest both by area and population. The US economy is the world's largest national economy with an estimated 2009 GDP of \$14.3 trillion (24% of nominal global and 20% of global GDP at purchasing power parity).^{55, 56} Considering its participation in different international organizations it is important to mention that the US signed in 2003 and ratified in 2006 the United Nations Convention again-

⁵³ Available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=174&CL=ENG>, 2.2.2011.

⁵⁴ Cooper, Robert, 7 April 2002, Why we still need empire, available at <http://observer.guardian.co.uk/worldview/story/0,11581,68011700.html>, 28.11.2010.

⁵⁵ International Monetary Fund.

⁵⁶ The European Union has a larger collective economy, but is not a single nation.

st Corruption. In addition it is also a member of Organization for Economic Cooperation and Development and signed its Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. It is not appropriate to compare US and EU in structure since they are too different, but what is often very interesting about EU and US is the question of who has the world's biggest economy. Different sources offer different information. For example, according to Bernd Debusmann, the World Affairs columnist, EU produces an economy almost as large as the United States and China. He criticizes US media because of portraying EU as a region in perpetual crisis with standard of living lower than American's.⁵⁷ The economists Joseph Stiglitz and Paul Krugman, both Nobel Prize winners, also have positive outlooks for Europe. In a recent column in the New York Times, Krugman said that Europe is often held up as evidence that higher taxes for the rich and benefits for the less well-off kill economic progress. Not so, he argued. The European experience demonstrates the opposite: social justice and progress can go hand in hand.⁵⁸ As Drago Kos, the president of the Council of Europe's GRECO said: „the consequences of corruption reach far beyond individuals“, and that is the reason for international anticorruption measures.⁵⁹ Since EU and United States are especially interested when it comes to the protection of their financial interests, international business standards and corporation's culture are important area considering corruption. Multinational companies because of their international characteristic have a significant role when thinking about corruption as an international phenomenon. Some authors think that the main problem of wrongful conduct is the corporation's culture and the deterrence in the monetary fines can only be a partial response to this problem.⁶⁰ Organizational culture and legal standards are very important if we observe the corruption problem inside the companies. There is an obvious problem that many corporate managers believe that they need to pay bribes to conduct business in some countries. For example a KPMG survey found that 11 % of employees working in regulatory affairs functions for their organizations observed others „making improper payments or bribes to foreign officials“⁶¹, also 44% of managers believed they lost contract due to bribery in the last five years.⁶² These managers are not optimistic that this situation will reverse any time soon. It is obvious that companies whose policies and practices fail to meet high ethical standards, or take a relaxed attitude to compliance with laws, are exposed to serious reputational risks. Often it is enough to be accused of malpractice for reputation to be damaged even if a court subsequently determines that they have not been involved in corrupt practices. It is of critical importance for a company to be able to quickly quash any unfounded allegations by demonstrating that it acts in a transparent manner and has in place policies and procedures designed to prevent corruption. The argument that although what they may have done may have been against the law or international standards, it was simply the way business was done in a particular country is not an acceptable excuse. Nor is it good enough to claim that other companies and competitors have engaged in similar practices.

⁵⁷ See <http://blogs.reuters.com/great-debate/2010/02/12/who-wins-in-u-s-vs-europe-contest/>, 17.2.2011.

⁵⁸ See <http://www.nytimes.com/2010/01/11/opinion/11krugman.html?ref=paulkrugman>, 23.2.2011.

⁵⁹ See [http://www.coe.int/t/dghl/monitoring/greco/news/news\(2010\)209international-anti-corruption-day_EN.asp](http://www.coe.int/t/dghl/monitoring/greco/news/news(2010)209international-anti-corruption-day_EN.asp), 12.2.2011.

⁶⁰ Hess, David W., Ford, Cristie, L., Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem, Cornell International Law Journal, Forthcoming, available at SSRN: <http://ssrn.com/abstract=1029849>, 15.12.2010., 27.12.2010.

⁶¹ KPMG FORENSIC, INTEGRITY SURVEY 2005-2006; the survey asked employees whether they had 'personally seen' or had 'firsthand knowledge' of misconduct within their organisations, available at http://legacy.bentley.edu/cbe/documents/KPMG_Forensic_Integrity_Survey_2005_-_2006.pdf, 14.12.2010.

⁶² *Ibid.* 14.12.2010.

In the past years, within different international instruments against corruption the same standards of ethical behavior are set.⁶³ They are not different considering private sector of public officials, but the main role in implementing those standards play multinational organizations. To make them effective it is important to understand specific situation of each regulated entity and allow them to play an active role in determining its strategies. This approach is quite different than the situation when government sets definitive rules and punishes their noncompliance because it is important to have some main goals that must be achieved but corporations must be directly involved in attaining those goals. Efforts at enforcing anti-corruption instruments will not be effective if they do not address the issue of standards and corporate ethical culture. Over time, the use of improper payments to win a contract can become corporation's routine,⁶⁴ which should be fought against. In business sector, organizational actors treat payments of bribes solely as economic issues and not as legal or ethical. The main roles are played by multinational companies that need to adopt effective compliance programs and retain independent monitoring systems. It would be the case with European as well as with American companies.

Specific issue: treating corporate corruption in Europe, United States of America and Canada

One of the most critical issues in fighting corruption on the World scale is one connected with corporate corruption and corporate crime and mechanisms in which state can control corporate activities. We live in the World in which real power lies in the hands of big and powerful corporate sector and therefore real struggle is and it will be with those powerful entities which have "no soul to be damned and no body to be kicked"⁶⁵. In various legal systems the fight against corporate corruption faces different obstacles depending on national laws and policy issues but it is to be said that it has been detected as one of the most serious tasks which states' have to perform.

Fighting against corporate corruption can be found on the grounds of Europe, United States and Canada (and many other jurisdictions) but United States has more results in fighting it than many others. There are several reasons for that: United States are the most powerful economic market in western civilization, it has very liberal approach to companies and its rules; the number of corporate entities there is enormous and legal regimes are consistent of two important mechanisms. First mechanism is in nature of American Corporate Criminal Law, which is in its essence derivation of Tort Law, where almost every action of any employee can cause prosecution of the company itself-principle of quasi objective responsibility, and second, American system has developed to

⁶³ Council of Europe: Recommendation No. R (2000) 10 of the Committee of Ministers to Member States on codes of conduct for public officials, available at [http://www.coe.int/t/dghl/monitoring/greco/documents/Rec\(2000\)10_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/documents/Rec(2000)10_EN.pdf), 17.12.2010.

⁶⁴ Example: subsidiaries of Schnitzer Steel made improper payments in China and South Korea from 1999-2004, although many of the payments were mostly in small increments from \$3,000 to \$15,000, over the course of those five years those payments totaled over \$1.8 million. In an attempt to hide improper payments, the subsidiaries used schemes to disguise the payments as 'refunds' or recorded payments to government officials as 'sales commissions'. In some cases, the heads to subsidiaries used secret bank accounts to make the payments. The involvement of two subsidiaries, the frequency of the payments, and the attempts to disguise them over an extended period of time, strongly suggest that these practices had become embedded as a routine practice within the corporate culture.

⁶⁵ Edward, First Baron Thurlow (1731.-1806.).

some extent complicated system of safeguards: Sarbanes-Oxley Act and Thompson Memorandum.⁶⁶

When topics of corporate criminal liability are presented, it is also advisable to present them with case(s) one can easily remember and understand. Dramatic case of Transco from Scotland is one of those. In 1999 gas exploded in a house in the village of Larkhall in Scotland which resulted with killing of 4 family members-parents and two children. Although everyone in Scottish Legal Circles agreed that Scots Law recognize criminal liability for juristic persons, at the same time no one knew what would be the right mechanism for prosecuting the Company. Scottish Common Law allows prosecution of Legal Entities for criminal acts, but the rules of establishing the link between criminal act of the physical offender and corporate body are demanding and with lack of clarity. Scottish courts accepted theoretical criminal liability of Transco, but in reality necessary link was not established. Therefore judges allowed an action against Transco on the ground of Health and Safety Act (UK) 1974, which actually means that Transco was prosecuted for misdemeanor. There are still arguments about that. Problem was connected with non possibility to attach criminal behavior to any of Company's high officials and on that guilt build the corporate one. The issue here is that Scots Law needs to establish liability of one or many natural persons within the company and at the same time that person has to be a member of a management of the same.⁶⁷

What is just described here is called Identification Doctrine. This means that corporation can be liable only and just only when it is possible to prove responsibility and guilt of at least one senior official of the company (CEO, member of the board, department director, executive etc.). This is predominant system in England and Scotland as well in some jurisdictions based on English Common Law. On the other hand there are many countries which use so-called Vicarious Doctrine in which any employee can produce liability of corporate entity and even so if senior members of management do not have any knowledge of the act.

Parallel to this, another Doctrine evolved from the common law is called Collective Knowledge Doctrine which evolved from US case *United States v. Bank of New England* which basically treats companies as organisms.⁶⁸ If any of its parts are "infected" organism is "infected" too. That practically means that each employee is potential threat to the security of the company as a whole. This doctrine is used in United States and to some extent in Canada, although Canadian courts developed more balanced regime in approaching to corporate criminal liability which search for middle solution between Identification and Vicarious doctrine and Collective knowledge doctrine on the other side which is based on aggregation of factors which connect company as a complete mechanism.⁶⁹ To go to the case from the beginning: in US or Canada Transco could be liable for

⁶⁶ Sarbanes-Oxley Act from 2002, named after two American senators, one republican: Michael Oxley from Ohio and one democrat Paula Sarbanes from Maryland. By this act American legislator brought strict control of public companies and namely financial books. Intention of doing that was even bigger protection of investors and their investments. This law is popularly also named SOX. See more in: Green, Scott; *Manager's Guide to the Sarbanes-Oxley Act*, John Wiley and Sons, Inc., Hoboken, NJ, 2004. (But, unfortunately even this act did not prevent recent developments concerning fraud in banking and financial sector.) Excellent overview of the famous Enron case which initially caused making of SOX can be found in: Hueston, John C., *Essay-Behind the Scenes of the Enron Trial: Creating the Decisive Moments*, 44. *American Crim. Law Review*, 197, p. 197. et seq., especially p. 199.-200., 2007. For Thompson memorandum see supra note: 72.

⁶⁷ More on this case and Scots Law: Savić, Vanja-Ivan, *Application of the Theoretical Models of Criminal Liability of Juristic Persons in Croatian and Comparative Law (in Croatian)*, dissertation, Faculty of Law, Zagreb, 2011, p. 181. et seq.

⁶⁸ Wells, Celia, *Corporations and Criminal Responsibility*, Second Edition, Oxford University Press, Oxford, England, 2005, p. 134.-135.

⁶⁹ Ferguson, Gerry, *Corruption and Corporate Criminal Liability*, Seminar on New Global and Canadian Standards on Corruption and Bribery in Foreign Business transactions, Vancouver, British Columbia, Canada 1998. and

criminal offence since prosecution would not ask to find responsible director but only an employee.

Criminal liability of corporation is stretched to large extent and now it exist in almost all European countries and very soon it will spread on Asia and Africa. The gap between criminal liability of an individual and criminal behavior of the company which was caused by the perception that only natural persons can be criminally liable was filled with this new models of attribution.

Identification Doctrine - Director

Vicarious Doctrine - Every Employee

Collective knowledge Doctrine (Aggregation) - Every Employee and "Bad" Structure

On the second level now we can talk about corruption and criminal liability of corporations. All those theoretical doctrines and models can be used in discussion on corruption and criminal liability of corporations. Many other will talk about corruption trough pure criminal law. Here we want to raise the question is it true that corruption is especially adequate to be treated trough criminal liability of juristic persons (legal entities or corporations)? On which levels corruption is done and what we actually perceive as a corruption? If we take identification doctrine or model as a role model, in our opinion, perception on the real offender and corporate body will match. It is special question would it be just to treat in the same way small limited liability businesses and big corporations which then can make big faults.

Why we used term big faults? Look at it in two ways: If we take that big corporation trough collective knowledge doctrine (if is not twin brother than is at least sister of vicarious liability), responsibility and therefore liability of big companies will be enormous in quantitative sense. On the other hand when we perceive corporate corruption we do it trough behavior of big corporate entities. In the minds of people, corruption of small company or business enterprise is not regarded as corruption as it is on the big scale and is considered as "petty crime" which have to be sanctioned but with mechanisms reserved for natural persons. Is it so? Economic aspect of the problem pushes us towards the perception that corruption is nested in big and powerful organizations which should therefore be thoroughly examined and controlled. If so, and let's assume that it is complete fact, big companies will be under double pressure: first they will be more exposed to attachment of crime since they have more employees and secondly they will be presumed guilty or (at least) dangerous in advance. When one might say that small enterprises are more exposed it is just conditionally true. While in jurisdictions which adopt identification model it is easier to detect the responsible person in the top management since those companies have less layers, but, in them, control over employees is stronger and that means that in systems which adopt vicarious liability those (small) companies, on contrary, will profit. Also if we take collective knowledge doctrine into effect, small companies will also be in easier control over its work and assets and these far more vulnerable.

What happens with big (more complex) companies in the same situation? In fist case it would be hard to detect company as a criminal since it would be extremely hard to prove responsibility of top management personnel, but in application of vicarious model those companies will be devastated. Therefore and once again it seems that Canadian model, which tend to find a balance between reasonable expected behavior of employees

and result of reasonable and effective control of senior and middle positioned professionals look just and fair. In big companies collective knowledge doctrine produces serious problems for companies although that idea has moral grounds. If company wants to be treated as powerful and successful and also homogenous body on the market, consequences are connected with its perception as (one) organism which have to be responsible for actions of its parts. Equal treatment is argued by many theoreticians.⁷⁰

Reasonable question which arise here is that if we gave quasi conscience to corporations as artificial bodies in order to make them liable for crime, are we obliged to give them mechanisms in which they will be able to treat themselves as persons with conscience? That is provocation of course! In United States US legislator imposed so-called Thompson Memorandum which imposes obligations to companies to treat themselves with self-control and self-punishing mechanisms⁷¹. Basically it means that if they do not cooperate against themselves they risk to be fined. Is it just?

Conclusion

Despite the large scale of international instruments for combating corruption it is still a serious problem. The question remains whether these measures are not efficient and whether available instruments are not enough due to the fact that corruption is still developing as a particular phenomenon? Solving the corruption problem requires that it must be attached simultaneously with a variety of approaches addressing different courses of the problem. Progress in fighting corruption has been made in some areas, but much still needs to be done. The main challenge lies ahead, and will require enormous political resolve, by national governments, the private sector and international bodies. Some country leaders and governments are serious about addressing corruption. Unfortunately, experience showed that criminals have been cooperating much better than states. This is why there should be a better cooperation between states and organizations. Other states must be viewed as partners and not competitors. EU member states have a clear incentive and control through EU Institutions. United States are determined in solving corruption problem at every level, especially when they get a severe impulse from influential experts in that field. On international scene, positive is the worldwide recognition of United Nations Convention against Corruption, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and OAS Inter-American Convention against Corruption. Arbitrary and unfair (as perceived by some authors) enforcement of legal instruments against corruption and other countries anti-corruption laws raise issues of fairness. As established by Tom Talyer's work in social psychology, individuals feel less of moral obligation to follow a law that is applied unfairly; therefore a fight against corruption certainly must start from individuals. Sometimes the rules of individual ethics are not in accordance with professional conducts. Thus, there must be a clear code of ethics that will indicate what is allowed. Politics will also play a significant role in effor-

⁷⁰ Preet, Bharara, Corporations cry Uncle and their Employees cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants; 44 American Criminal Law Review, Georgetown University, Washington DC., 2007, p. 53.

⁷¹ Thompspon memorandum request that company actually imposes self control with elements of self-prosecution. In order to comply with regulations, US companies have to establiih mechanism for self control and form the tool which will give them power to detect criminal within its own structure. This system faces many critiques especially when using 5th Amendment is in stake. (protection from self-incrimination). For more on this it is highly recommended to read: Alschuler, Albert A., Two Ways to think about the Punishment of Corporations, Public Law and Legal Theory Series, No.09-19, Northwestern University, Law School, Chicago, IL, 2009.

ts against corruption because lack of domestic political will, diverse legal systems and varying legal standards often make it difficult to succeed this hard enough battle.

In this article special place was given to treating corporate corruption in various legal jurisdictions. Criminal protection will depend on which theoretical model particular state wishes to build its corporate criminal responsibility. In United states this will be very close to objective liability and prosecution will be much easier than in systems where is necessary to establish the link between the management of the company and criminal action like it is in the United Kingdom. On the other hand many European systems flow between identification and vicarious doctrines. But not to be missed, Canada is probably the most close to just and fair solution in which search for responsible person within the company stops where real powers of decisions stop as well. Still, criminal liability of juristic persons is one of the most complex theoretical concepts of modern law.

The answer to the question form our title is: yes, we are definitely going the same way, but on slightly different roads.

Summary

In this article authors examine different ways in fighting and treating corruption in various legal systems and at the same time they provide information on international mechanisms which follow domestic legislature and politics. By looking into two major legal systems on both sides of the Atlantic Ocean, authors explore area of two ways in fighting corruption. Although there is not any specific difference in determination in which the European States on the one hand and USA and Canada on the other, seek to fight corruption, even using international instruments, there are still different practical approach in which particular systems operate. Differences are on the operational and institutional levels, but not on the policies. Special attention in this article was given to different approaches in treating corporate bodies as criminal offender which is connected to different tools in which a particular system decides if a corporation is to be treated as a criminal. Whereas in the USA it is very easy to put a company into a criminal category, in the United Kingdom, Canada and in some European states it is connected with the possibility of finding a responsible person within the higher levels of the corporate hierarchy.

Keywords: Corruption, International Legal Instruments, Criminal Liability of Legal Persons, Corporate Corruption

