Warsaw, 31 August 2023
Opinion-Nr.: CRIM-UZB/470/2023 [NR]

OPINION ON THE DRAFT AMENDMENTS RELATING TO CORPORATE CRIMINAL LIABILITY

UZBEKISTAN

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Based on an informal English translation of the Draft amendments commissioned by the OSCE Office for Democratic Institutions and Human Rights.

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EXECUTIVE SUMMARY AND KEY RECOMMENDATIONS

The Draft Law with proposed amendments to the Criminal Code, Criminal Procedure Code and Criminal Enforcement Code ("Draft Law") intends to regulate corporate criminal liability in Uzbekistan. The draft amendments define the scope and attribution for criminal liability, the scope of liability, the actors who could be held liable, the applicable sanctions as well as the rules and procedures governing investigation, prosecution and trial.

It is welcome that efforts have been undertaken to introduce corporate criminal liability in the Criminal Code, which reflects the emerging approach for addressing corporate liability in international and regional instruments and should help address more effectively the impunity gap when legal entities are involve in the commission of criminal offences, including serious human rights abuses. Corporate criminal liability is not a concept defined in international law and standards. The manner in which corporate criminal liability is approached differs amongst OSCE participating States, from the type of offences for which corporate criminal liability may be incurred, to the grounds for such liability and applicable sanctions. Therefore, the Opinion primarily approaches this matter from the perspective of the right to a fair trial and rule of law standards, in particular criminal law principles such as legal certainty and foreseeability, as well as right to an effective remedy for victims of business-related human rights abuses.

The Opinion observes that from the manner in which the proposed amendments are drafted, it is unclear whether all the fair trial guarantees and protections offered to individuals are applicable to legal entities. In addition, the personal scope for attributing criminal liability to a legal person is not very clearly regulated which is not in line with the principle of legal certainty and foreseeability of criminal legislation. The scope of criminal offences for which the liability of legal persons may be incurred, which is limited to corruption-related offences should be broadened, to also cover the criminal offences mentioned in the UN Convention against Transnational Organized Crime as well as trafficking in persons, and other gross human rights abuses. A number of adjustments should also be considered to enhance the effectiveness of the legal framework, including with respect to interim measures, contemplated sanctions and to ensure the extra-territorial application to criminal offences committed abroad.

More specifically, and in addition to what is stated above, ODIHR makes the following recommendations to further enhance the regulatory framework for corporate criminal liability:

A. With respect to the scope and basis of liability:

1. To remove the reference to the results of the criminal offence from draft Article 961 of the Criminal Code by simply mentioning that the acts are to be committed in the interests of the legal entity; [par 25]

2. To clarify the personal scope for attributing criminal liability to a legal person by including a clear definition and specify the persons that could fall under the scope of corporate criminal liability including (i) the person acting in the name

of or on the behalf of the legal entity, (ii) the person in a management or supervisory position using his/her authority, (iii) by directors, officers, employees or agents of the legal entity when the lack of adequate control or supervision by a person in a leading position or the legal entity more generally rendered the commission of the criminal offence possible (lack of due diligence or mechanisms to prevent the commission of crimes); [par 26]

3. To consider broadening the scope of criminal offences for which the liability of legal persons may be incurred, at least to cover those organized crimes mentioned in the UN Convention against Transnational Organized Crime as well as trafficking in persons, and other gross human rights abuses and violations of international criminal law and international humanitarian law; [par 30]

B. With respect to penalties:

   1. To consider including additional sanctions in the Criminal Code such as subjecting the activities of the legal entity to supervision or confiscation of assets derived from or used in the commission of the offence; [par 41]

   2. To specify, in case of deprivation of rights, which activities of the legal entity can be subjected to prohibition or restriction; [par 44]

   3. To clarify the draft amendments in Special Part Section Eight which would extend the definition of “other measure of legal influence” to include “criminal sanctions applicable to legal entities” or to reconsider its inclusion; [par 47]

C. To reflect clearly that legal entities are to be in the same position as any other suspect or defendant and benefit from the same protections and rights and guarantees; [par 52]

D. With respect to the role of the investigator and prosecutor;

1. To specify some criteria governing the grant or refusal of consent by a prosecutor on initiating or dropping criminal proceedings against a legal entity, which should be linked to the extent of the evidence of an offence and the public interest in a prosecution; [par 55]

2. To clarify the types of investigative measures that may be used against legal entities while ensuring that adequate safeguards and fair trial guarantees are in place, and that the legal entity is entitled to fair and impartial treatment throughout the investigation, and that any evidence obtained unlawfully or in violation of the legal entity's rights shall be inadmissible in court; [pars 58-59]

E. To clarify draft Article 591^4 to ensure that it does not prevent - or give the impression that it is preventing - legal entities from having the benefit of the full trial process under the Criminal Procedure Code for the purpose of determining whether they are criminally liable on the grounds specified in Article 961 of the Criminal Code, while ensuring full consolidation of the proceedings against a legal entity with those against the individual defendant; [par 67]

These and additional Recommendations, are included throughout the text of this Opinion, highlighted in bold.

As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 11 April 2023, the OSCE Project Co-ordinator in Uzbekistan forwarded to the OSCE Office for Democratic Institutions and Human Rights (hereinafter "ODIHR") a request from the General Prosecutor's Office of Uzbekistan for a legal review of the Draft Law on Amendments related to the Application of Criminal Sanctions to Legal Entities, to the Criminal Code, Criminal Procedure Code and Code on the Execution of Criminal Punishments of the Republic of Uzbekistan (hereinafter "the Draft Law").
2. On 17 April 2023, ODIHR responded to this request, confirming the Office's readiness to prepare a legal opinion on the compliance of this Draft Law with international human rights standards and OSCE human dimension commitments.
3. This Opinion was prepared in response to the above request. ODIHR conducted this assessment within its general mandate to assist the OSCE participating States in the implementation of their OSCE human dimension commitments.[1]

II. SCOPE OF THE OPINION

4. The scope of this Opinion covers only the draft amendments to the Criminal Code, Criminal Procedure Code and Criminal Enforcement Code pertaining to corporate criminal liability, as submitted for review. Thus, limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework regulating corporate liability in Uzbekistan.
5. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, it focuses more on those provisions that require amendments or improvements than on the positive aspects of the Draft Law. The ensuing legal analysis is based on international and regional human rights and rule of law standards, norms and recommendations as well as relevant OSCE human dimension commitments. The Opinion also highlights, as appropriate, good practices from other OSCE participating States in this field. When referring to national legislation, ODIHR does not advocate for any specific country model; it rather focuses on providing clear information about applicable international standards while illustrating how they are implemented in practice in certain national laws. Any country example should always be approached with caution since it cannot necessarily be replicated in another country and has always to be considered in light of the broader national institutional and legal framework, as well as country context and political culture.

1 See especially OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area (2008), point 4, where the Ministerial Council *"[e]ncourages participating States, with the assistance, where appropriate, of relevant OSCE executive structures in accordance with their mandates and within existing resources, to continue and to enhance their efforts to share information and best practices and to strengthen the rule of law [on the issue of] independence of the judiciary, effective administration of justice, right to a fair trial, access to court, accountability of state institutions and officials, respect for the rule of law in public administration, the right to legal assistance and respect for the human rights of persons in detention […]*". See also *Final Document of the Eleventh Meeting of the OSCE Ministerial Council*, Maastricht, (2003), which states: "*We agree to make the elimination of all forms of corruption a priority. We will consider accession to, encourage ratification of, and support full implementation of, international conventions and other instruments in the field of combating corruption, in particular those developed by the Council of Europe and the Organisation for Economic Co-operation and Development (OECD). We welcome the adoption of the UN Convention against corruption and look forward to its early signature, ratification and entry into force*." (para. 2.2.7).

6. Moreover, in accordance with the Convention on the Elimination of All Forms of Discrimination against Women[2] (hereinafter "CEDAW") and the 2004 OSCE Action Plan for the Promotion of Gender Equality[3] and commitments to mainstream gender into OSCE activities, programmes and projects, the Opinion integrates, as appropriate, a gender and diversity perspective.

7. This Opinion is based on an English translation of the Draft Law commissioned by ODIHR, which is attached to this document as an Annex. Errors from translation may result. Should the Opinion be translated in another language, the English version shall prevail.

8. In view of the above, ODIHR would like to stress that this Opinion does not prevent ODIHR from formulating additional written or oral recommendations or comments on relevant subject matters in Uzbekistan in the future.

III. LEGAL ANALYSIS AND RECOMMENDATIONS

1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

1.1. General Remarks on Corporate Criminal Liability

9. Corporate criminal liability is not a legal concept defined in international law and standards. There is, however, an increasing number of international and regional instruments, primarily relating to anti-corruption, organized crime, the environment and investments, that include provisions envisaging the criminal liability of legal persons.[4] In particular, the Republic of Uzbekistan is a State Party to the UN Convention against Transnational Organized Crime,[5] in which Article 10 requires States Parties to "*adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with the Convention itself*". At the same time, there is no obligation to establish corporate criminal liability, if that is inconsistent with a State's legal principles, in which cases, a form of civil or administrative liability is deemed sufficient to meet the requirement. Article 26 of the United Nations Convention against

2 UN Convention on the Elimination of All Forms of Discrimination against Women (hereinafter "CEDAW"), adopted by General Assembly resolution 34/180 on 18 December 1979. Uzbekistan acceded to this Convention on 19 July 1995.

3 See OSCE Action Plan for the Promotion of Gender Equality, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), para. 32.

4 See e.g., Article 10 of the UN Convention against Transnational Organized Crime, adopted by the UN General Assembly resolution 55/25 of 15 November 2000 and which was ratified by Uzbekistan on 9 December 2003; Article 26 of the UN Convention against Corruption, adopted by the UN General Assembly resolution 58/4 of 31 October 2003, to which Uzbekistan acceded on 29 July 2008. Although not ratified by Uzbekistan, see also for comparison, Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), Article 2.

5 UN Convention against Transnational Organized Crime, adopted by the UN General Assembly resolution 55/25 of 15 November 2000 and which was ratified by Uzbekistan on 9 December 2003.

Corruption (UNCAC),[6] also legally binding on Uzbekistan, includes a similar provision with respect to the liability of legal persons for offences covered by the UNCAC.[7]

10. Other international soft law instruments and guiding principles can also influence the development and implementation of the legal framework governing corporate criminal liability. For example, the *UN Guiding Principles on Business and Human Rights* (UNGPs)[8] outline the responsibility of corporations to respect human rights and address the issue of corporate responsibility, including criminal. The UNGPs require States to protect against human rights abuse by business enterprises, by *"taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication*".[9] Specifically, the UNGPs refer, as one of the State approaches to regulate the extraterritorial activities of businesses, to "*criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs*".[10] Illegal acts by legal entities may be criminalized in international humanitarian law,[11] anti-trafficking legislation, environmental laws, consumer safety legislation, workplace safety laws or labour legislation, but also for the lack of due diligence to prevent violence against women[12] and other human rights abuses.

11. While Uzbekistan is not a Member State of the Council of Europe or of the European Union, documents adopted by the Council of Europe and the EU can provide useful guidance and a comparative perspective regarding the regulation of corporate criminal liability.[13] For instance, *the CoE Recommendation CM/Rec(2016)3 of the Committee of*

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6 United Nations Convention against Corruption (hereinafter "UNCAC"), adopted by the UN General Assembly resolution 58/4 of 31 October 2003, which entered into force 14 December 2005, GAOR 58th Session Supp 49 vol 1, 4. Uzbekistan acceded to the Convention on 29 July 2008. Standards on anti-corruption are also contained, reiterated and expanded in a number of soft-law standards, including the United Nations *Declaration against Corruption and Bribery in International Commercial Transactions*, A/RES/51/191, 86th plenary meeting 16 December 1996; *UN General Assembly Resolution 51/59 on Action against Corruption*, A/RES/51/59, adopted on 12 December 1996. At the CoE level, the following documents are also of relevance from a comparative perspective: CoE Committee of Ministers, *Resolution (97) 24 on the Twenty Guiding Principles for the Fight Against Corruption* of 6 November 1997; CoE Committee of Ministers, *Recommendation CM/Rec(2017)2 on the legal regulation of lobbying activities in the context of public decision making* of 22 March 2017; as well as CoE Committee of Ministers, *Recommendation (2000)10 of the Committee of Ministers to Member states on codes of conduct for public official* and Appendix (Model Code of Conduct for Public Officials). At the OSCE level, the fight against corruption is an integral part of the commitments undertaken by OSCE participating States, as underlined, for example, by the *OSCE Final Document of the Eleventh Meeting of the OSCE Ministerial Council, Maastricht* (2003) (Maastricht Document of 2003), the Istanbul Document of 2009, and most recently, in the *2012 OSCE Ministerial Council's Declaration on Strengthening Good Governance and Combating Corruption, Money-Laundering and the Financing of Terrorism*. See also OECD, *Liability of Legal Persons for Corruption in Eastern Europe and Central Asia*, 2015, pp. 13-17.

7 Article 26 of the UNCAC states: "*1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention. 2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative […]*".

8 UN, *Guiding Principles on Business and Human Rights : Implementing the United Nations 'Protect, Respect and Remedy' Framework*, as endorsed by the UN Human Rights Council in its resolution 17/4 of 16 June 2011 (hereinafter "2011 UN Guiding Principles on Business and Human Rights").

9 *2011 UN Guiding Principles on Business and Human Rights*, Principle 1.

10 *2011 UN Guiding Principles on Business and Human Rights*, Principle 2 Commentary.

11 See e.g., International Committee of the Red Cross, *Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law* (2006).

12 See UN Working Group on the issue of human rights and transnational corporations and other business enterprises, *"Gender guidance for the Guiding Principles on Business sand Human Rights"* (2019).

13 For instance, the criminal liability of legal persons is envisaged e.g., in Council of Europe (CoE) *Criminal Law Convention on Corruption*, Article 18; Article 10 of the *CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism*, adopted on 8 November 1990; Article 9 of the Convention on the Protection of the Environment through Criminal Law (1998), which stipulates that criminal or administrative sanctions or measures could be imposed to hold corporate entities accountable; Article 22 of the CoE Council of Europe Convention on Action against Trafficking in Human Beings CETS 197, which states that "*Each Party shall adopt such legislative and other measures as may be necessary to ensure that a legal person can be held liable for a criminal offence established in accordance with this Convention, committed for its benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; (c) an authority to exercise control within the legal person. Apart from the cases already provided for in paragraph 1, each Party shall take the measures necessary to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of a criminal offence established in accordance with this Convention for the benefit of that legal person by a natural person acting under its authority*." In addition, a regional approach is found in the European Union (EU), which has directives and regulations related to corporate criminal liability, such as the EU Anti-Money Laundering Directive (AMLDs), which are issued periodically by the European Parliament to be implemented by Member States as part of domestic legislation; in July 2021, the European Commission presented a package of legislative proposals to strengthen the EU's anti-money laundering and countering the financing of terrorism (AML/CFT) rules (see <Anti-money laundering and countering the financing of terrorism legislative package (europa.eu)>).

Ministers to member States on human rights and business[14] specifically addresses the issue of criminal or equivalent liability for business-related human rights abuses.

12. The OSCE has adopted several commitments and principles that, while not explicitly addressing corporate criminal liability, provide a framework that can be applied to corporate behaviour and may serve as a basis for legal systems to hold corporations accountable for criminal acts. The OSCE emphasizes the importance of the rule of law in its participating States and highlights it as a cross-dimensional issue and stresses the importance of the observation of rule of law standards and practices in the criminal justice system[15] (see also Sub-Section 1.3 below). Where criminal law reforms aim to extend the scope of application beyond individuals, such as private entities, such rule of law standards should be applied equally to the latter to avoid two different protection regimes in practice. Though going beyond the scope of this legal review, it is noted that within the economic and environmental dimension, the OSCE acknowledges the importance of economic co-operation and sustainable development. This dimension has commitments related to corporate social responsibility, including transparency, accountability, and respect for human rights, which also indirectly touch upon the issue of corporate criminal liability.[16]

13. Other useful reference documents of a non-binding nature are also relevant to the issue of corporate criminal liability, as they contain a higher level of practical details including, among others:

- the Model Criminal Code and Model Code of Criminal Procedure (2008) developed by the United States Institute of Peace (USIP) in co-operation with the Irish Centre for Human Rights (ICHR), the Office of the UN High Commissioner for Human Rights (UN OHCHR), and the UN Office on Drugs and Crime (UNODC);[17]
- UNODC Legislative Guides for the implementation of the UNOTC and of the UNCAC, as they relate to the articles governing corporate responsibility;[18]
- the publications of the UN, including the Working Group on Business and Human Rights;[19]
- the explanatory reports to the CoE Conventions that specifically address corporate liability;[20]
- the *Legislative Toolkit on Liability of Legal Persons* (2016) developed under the CoE/EU Project "Fight against Corruption and Fostering Good Governance/Fight against money-laundering",[21] among others.

14 See CoE *Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business*, Appendix, paras. 44-46.
15 OSCE Decision No. 7/08 Further Strengthening the Rule of Law in the OSCE Area (2008), Preamble and para 4.
16 See e.g., OSCE, *A Best Practice Guide on Corporate Social Responsibility* (2022).
17 See the Model Criminal Code (2008), especially Section 8 on the Criminal Responsibility of Legal Persons; and the Model Code of Criminal Procedure (2008), especially Chapter 6 on Criminal Proceedings against a Legal Person, both developed by the United States Institute of Peace in co-operation with the Irish Centre for Human Rights (ICHR), the Office of the UN High Commissioner for Human Rights (UN OHCHR), and the UN Office on Drugs and Crime (UNODC) (hereinafter 2008 USIP-ICHR-OHCHR-UNODC Model Criminal Code and Model Code of Criminal Procedure).
18 UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (2nd. edition, 2012); and *Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2017).
19 See <Working Group on Business and Human Rights | OHCHR>.
20 See e.g., CoE, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings* (2005), paras. 247-251, regarding Article 22 "Corporate Liability".
21 Available at: <http://tilman-hoppe.de/TP_ECCU-PCF-REG_42016_LegPersons_Toolkit_FIN.pdf>.

1.2. The Right to a Fair Trial in Criminal Proceedings

14. More generally, key international standards applicable in the Republic of Uzbekistan in the area of criminal law and procedure are also of relevance to this Opinion and the issue of corporate criminal liability. They are found in the International Covenant on Civil and Political Rights (hereinafter "ICCPR"),[22] especially its Article 14 on the right to a fair trial. General Comment 32 of the UN Human Rights Committee (hereinafter "UN HRCttee") on the right to equality before courts and tribunals and to a fair trial[23] also provides additional guidance on fair trial guarantees provided by Article 14 of the ICCPR. Such a right also expressly features among the fundamental rights in the vast majority of constitutions from the OSCE region.

15. Although Uzbekistan is not a Member State of the Council of Europe, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the ECHR"), other Council of Europe's instruments and caselaw of the European Court of Human Rights (hereinafter "the ECtHR")[24] also constitute useful and persuasive reference documents from a comparative perspective.

16. At the OSCE level, participating States have committed to upholding human rights and the rule of law in criminal justice systems.[25] Specific OSCE commitments pertaining to criminal procedure emphasize the importance of the independence of the judiciary and of legal practitioners,[26] as well as guarantees related to the right to liberty (Moscow 1991, para. 23).[27] The right to a fair trial is also an integral component of OSCE commitments, such as Copenhagen 1990 and Vienna 1989 (Questions relating to Security),[28] in which OSCE participating States committed to organize their legal systems in order to protect the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice; the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. Moreover, OSCE commitments also contain principles concerning the prosecution service in particular, such as the 1990 Copenhagen Document, which provides that "*the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution*".

17. The right to a fair trial contains a number of institutional and procedural guarantees, certain applicable to both civil and criminal proceedings while others apply exclusively in the context of criminal proceedings.[29] It encompasses the right to access to justice and equality before the court, the right to independent and impartial court established by law, the right to a public hearing, the right to be presumed innocent, the right to equality of arms and right to a fair hearing, the right to a public, timely and reasoned judgment and the right to appeal.

18. The personal scope of these provisions varies: while the applicability of the ECHR to legal persons is evident from the ECHR's wording as well as the ECtHR's case-law, this

22 UN International Covenant on Civil and Political Rights (hereinafter "ICCPR"), adopted by the UN General Assembly by resolution 2200A (XXI) of 16 December 1966. The Republic of Uzbekistan ratified the ICCPR on 28 September 1995.
23 UN Human Rights Committee, General Comment No. 32 on the right to equality before courts and tribunals and to a fair trial, 23 August 2007.
24 See e.g. *Guide on Article 6 of the ECHR, criminal limb* and *Guide on Article 6 of the ECHR, civil limb*.
25 See OSCE< Ministerial Council Decisions No. 12/05 on upholding human rights and the rule of law in criminal justice systems (Ljubljana, 2005).
26 See OSCE Copenhagen Document (1990), para. 5; and OSCE Moscow Document (1991), paras. 19-20.
27 See OSCE Moscow Document (1991), para. 23. See also the *OSCE Brussels Declaration on Criminal Justice Systems*, MC.DOC/4/06 of 5 December 2006.
28 OSCE/ODIHR, OSCE Commitment relating to the Right to a Fair Trial, available at <https://www.osce.org/files/f/documents/b/0/40046.pdf>.
29 See ODIHR, *Legal Digest of International Fair Trial Rights* (2012).

is not as evident from other major international human rights instruments, including the ICCPR. In its General Comment 31, the UN HRCttee observed that the beneficiaries of the ICCPR rights are individuals.[30] At the same time, as criminal sanctions usually have serious negative impacts on those who are convicted, the imposition of criminal sanctions should be accompanied by certain procedural guarantees, such as the presumption of innocence, the right to present a defence, the guarantee against self-incrimination, etc. The right to a fair trial should be guaranteed during all phases of the procedure, meaning from the very beginning of proceedings to the final court judgment of the highest instance.

19. The regulation of corporate criminal liability is also intrinsically linked to the right of any victim of corporate-related human rights abuses to receive a fair and effective remedy, including the expectation that the legal person or persons responsible will be held accountable by judicial means, which is guaranteed by Article 2(3) of the ICCPR.

1.3. National Practices and General Principles on Corporate Criminal Liability

20. Of note, not every national jurisdiction recognizes criminal liability for legal persons, including companies. In many countries, companies may only incur administrative or civil liability. In practice, however, the process of enforcement and sanctions may be similar in effect to criminal proceedings. A comparison of the different criminal justice systems within the OSCE reveals a significant diversity in the legal frameworks governing corporate criminal liability. While the specific principles can vary across the jurisdictions of OSCE participating States, there are several key principles commonly applied to establish corporate criminal liability:

- *Basis for liability*: In some jurisdictions, a company's liability for criminal wrongdoing results from specific statutes or provisions in the jurisdiction's criminal code. Where a jurisdiction's criminal law is founded on common law principles, liability may arise more generally through the doctrines of attribution, vicarious liability and/or the identification principle.[31] These doctrines will require conduct by a person or body in control of the company's affairs, or by someone who was associated with the company and who committed the criminal act intending to obtain a benefit for the company. Other models are the expanded identification model where the liability of a legal person can also be triggered by management's failure to supervise its employees ("lack of supervision rule") and the organizational model where the liability of a legal person is established through deficiencies in its corporate culture.
- *Corporate v. individual liability*: There are major differences in how individual liability translates to corporate liability. In some jurisdictions, it will be necessary to determine who was responsible for the wrongdoing to hold a company criminally liable. In others, it is not even necessary to identify an individual wrongdoer before the company may be held to account.
- *Collective Knowledge and Intent*: Corporate criminal liability may be established when it can be shown that a group of employees or agents collectively had the knowledge and intent to commit a crime on behalf of the corporation. This principle

30 UN Human Rights Committee, on the nature of the general legal obligation imposed on States Parties to the Covenant, *General comment no. 31 on the nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, par para. 9.

31 Under the vicarious liability principle, a corporation can be held criminally liable for the actions of its employees or agents if those individuals commit crimes within the scope of their employment or agency. It implies that the acts of employees can be attributed to the corporation. The identification doctrine focuses on the involvement of high-level individuals within the corporation. It holds that a corporation can be held criminally liable if the actions of senior officers, directors, or management can be attributed to the corporation. It requires proving that those individuals represent the 'directing mind and will' of the corporation.

recognizes that a corporation can be held accountable when a group of individuals acts together in furtherance of illegal activities.

- *Failure to Prevent*: Some jurisdictions, for example the United Kingdom as further detailed below, impose corporate criminal liability for a failure to prevent certain crimes. Under this principle, a corporation can be held responsible if it fails to take reasonable steps to prevent criminal acts by its employees, agents, or subsidiaries, even if the corporation itself did not directly commit the crime.
- *Corporate Culture and Negligence*: Corporate criminal liability can be established if a corporation has fostered a culture of non-compliance or if it acts negligently in fulfilling its legal obligations. This principle recognizes that corporations have a duty to maintain ethical and legal standards within their operations and can be held liable for their failure to do so.
- *Extra-territoriality*: Some domestic criminal legislation allows for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. In some cases, extraterritorial jurisdiction also applies in relation to certain specific offences (e.g., bribery).
- *Foreign companies*: Criminal liability does not only concern domestic companies but may also extend to foreign companies, especially in circumstances where a nexus to the wrongdoing alleged can be established.

21. Criminal liability is currently imposed on legal entities in more than 70 countries worldwide, including several OSCE participating States, although according to very different modalities in terms of typology of legal persons that can be held liable, in the attribution mechanisms and in the criminal offences for which legal persons can be held criminally liable.[32]

22. The applicability of procedural guarantees should nevertheless be upheld to not fall short of rule of law standards and is further supported by practices in countries that regulate

32 For example, in the **United States,** while different States have different rules, generally, corporations can be held criminally responsible for the actions of their employees if those actions are taken within the scope of their employment and for the benefit of the corporation; the US Department of Justice provides guidance on evaluating the effectiveness of corporate compliance programmes, which encourages corporations to establish strong compliance measures and internal controls; in the **United Kingdom,** corporate criminal liability is fully reflected in the UK Companies Act 1989 (the 'identification doctrine' holds that a corporation can be held liable if the criminal act is attributable to a senior officer who represents the 'directing mind and will' of the corporation); the UK Bribery Act 2010 provides for strict liability offenses related to bribery, encouraging companies to implement anti-bribery procedures and preventive measures; where a company has been dissolved, company officers may be prosecuted or alternatively, a prosecutor may apply to the court to declare the dissolution void so that the company is restored to the Companies Register and can then be prosecuted with the leave of the court; serious crime prevention orders (SCPOs) under Part 1 of the Serious Crime Act 2007 can be made against corporates, to prevent e.g., bribery, fraud, money laundering and failing to prevent the facilitation of tax evasion (where individuals are prosecuted, this does not preclude the corporate being prosecuted and vice versa, where the corporate is to be prosecuted, individuals may also be charged); Section 54 of the UK Modern Slavery Act 2015 requires certain organisations to develop a slavery and human trafficking statement every year; in June 2022, the UK Law Commission published the *Options Paper on Corporate Criminal Liability*, which detailed possible options for the reform of corporate criminal liability in England and Wales (the project, which started in 2020, focussed primarily on economic crime, such as fraud, tax evasion, bribery, or money laundering, with the Law Commission noting that these types of offences are particularly likely to be committed in a corporate context); in **Germany,** according to the principle of corporate criminal liability known as '*unternehmensstrafrecht*', corporations can be held liable for offenses committed by their representatives or employees in the interest of the corporation (German law also emphasizes the importance of effective compliance management systems and encourages companies to establish and maintain such systems to prevent criminal conduct); **Italian** law recognizes the principle of corporate criminal liability, according to which corporations can be held liable for certain offenses committed by their representatives or employees in the interest or advantage of the company (the Italian legal framework also encourages the adoption of compliance programs and self-regulatory measures by corporations and companies that have implemented effective compliance programs may benefit from reduced penalties or exemptions); in **France,** the 'Sapin II' law adopted in 2016 reinforces measures against corruption and imposes obligations on companies, including the implementation of compliance programs; French law provides for deferred prosecution agreements (*convention judiciaire d'intérêt public*) that allow companies to avoid trial by co-operating with authorities, implementing compliance measures, and paying fines (a few criminal cases have been brough against corporations for international crimes, e.g., the ongoing criminal case initiated in 2016 before French courts against Lafarge, a cement company, for alleged complicity in war crimes, crimes against humanity, financing of a terrorist enterprise, and forced labour committed in Syria by its subsidiary); in November 2021, the **Swedish** public prosecutor, formally charged the chief executive of Lundin Energy (formerly Lundin Petroleum) and the chairperson of the Board for aiding and abetting war crimes that occurred between 1999 and 2003 in Sudan, now South Sudan; the **Austrian** Criminal Code does not explicitly provide for legal entities' criminal liability – although if a legal entity illegally makes profit because of a crime committed by an individual, '*the legal entity is subject to a fine in the amount of the illegally enriched one'*. A similar approach is followed in **Albania**, **Latvia**, and **Spain** - although a legal entity cannot be the perpetrator of a crime, criminal sanctions can be imposed on legal entities.

corporate liability, including criminal liability, as is evident from a 2015 OECD study of countries in Eastern Europe and Central Asia.[33]

2. SCOPE OF CORPORATE CRIMINAL LIABILITY AND CONSTITUTIVE ELEMENTS OF THE OFFENCES

23. Current Article 17 of the Criminal Code addresses the 'Liability of Individuals'. A new Article 17[1] is proposed to be added on the 'Liability of a Legal Entity'. Criminal liability of legal entities would be incurred '*when a crime is committed in the interests of a legal entity'*. In addition, a new Section 8 on the Criminal Sanctions Applicable to Legal Entities is proposed to be added to the General Part of the Criminal Code.

24. This is a welcome addition to the corporate civil liability, since generally the effectiveness of civil or administrative liability of legal entities (only) is often questioned.[34] This is also in line with current developments across different OSCE jurisdictions and international standards as outlined above. For example, the UN Guiding Principles on Business and Human Rights require States to regulate business in relation to human rights not only in civil and administrative law, but also to explore "*criminal liability for enterprises domiciled or operating in their territory*".[35] At the same time, under the proposed new Section 8, draft Article 96[1] of the Criminal Code, which concerns the grounds for applying criminal sanctions to legal entities, specifies that a crime is considered committed in the "*interests of a legal entity'*, but also crimes that have '*been committed for the benefit of a legal entity*' when it resulted in: "*a) gaining pecuniary advantage; b) evasion of pecuniary or other liability envisaged by the law; c) obtaining property rights or exemption from property-related obligations or other unlawful privileges"*. This appears to be problematic in several respects.

25. First, it does not seem consistent with the general approaches followed by states in attributing liability to a legal entity as a result of the acts or omissions of natural persons. Rather, the concern of the draft amendments is with the result of the crime, i.e., the legal entity gaining pecuniary advantage, evading pecuniary or other liability envisaged by law or obtaining property rights or exemption from property-related obligations or other unlawful privileges. Undoubtedly, such results could be the motivation for the natural person to act or omit to do so, as well as the lack of care by the legal entity in supervising that person or having in place preventive mechanisms. At the same time, criminalization of conducts is generally irrespective of the actual result, as shown for instance when looking at inchoate offences. In addition, the definition of "interests of the legal entity" as it stands would also appear unduly limited and may not necessarily encompass all the possible benefits for a legal entity, including indirect benefits. It is recommended **to remove the reference to the results of the criminal offence from draft Article 96[1] of the Criminal Code, for instance by simply mentioning that the criminal acts as well as inchoate offences are to be committed in the interests of the legal entity, while also considering a broader wording in terms of the direct and indirect benefits contemplated**.

26. As for the personal scope, the natural person committing the offence is identified in Article 96[1] as "*the legal entity's official, founder, employee or by any other person"*. Generally, the emerging approach for addressing corporate liability in international and regional instruments is, beyond the requirement to act *for the benefit of the legal entity*, to have the criminal offence being committed either (i) by a person acting in the name of or on the behalf of the legal entity, or (ii) by a person in a management or supervisory position using

33 OECD, Liability of Legal Persons for Corruption in Eastern Europe and Central Asia, 2015, pp. 13-17.
34 See e.g., 2008 USIP-ICHR-OHCHR-UNODC Model Criminal Code, p. 73.
35 *2011 UN Guiding Principles on Business and Human Rights*, p. 10.

his/her authority, or (iii) by directors, officers, employees or agents of the legal entity when the lack of adequate control or supervision by a person in a leading position or the legal entity more generally rendered the commission of the criminal offence possible (lack of due diligence or mechanisms to prevent the commission of crimes).[36] **The provision could better differentiate between these different circumstances, while ensuring that criminal actions or omissions by a director, officer, employee or agent that are a consequence of the legal entity's failure to implement adequate compliance measures to prevent criminal offences are also covered**. **The reference in draft Article 96[1] to "*any other person*" is overly broad and vague and should be either clarified/defined or removed from draft Article 96[1]. If the purpose is to also cover natural persons who exercise the ultimate legal or effective control over the legal person without falling within the above categories, this should be clarified.** Moreover, the fact that someone was a founder does not necessarily mean that s/he has a continuing interest – financial or otherwise – in the legal entity; **it is therefore recommended to remove the reference to "founder" in draft Article 96[1].**

27. The offences for which criminal sanctions could be applied to a legal entity are those in Articles 192[9], 192[10], 211, 212, 213 and 243 of the Criminal Code, namely, commercial bribery, bribery, mediation in bribery, bribery of an employee of a state body, an organization with state participation or a citizens' self-governance body and legalization of the proceeds of these crimes.

28. As such, the specified offences are the ones for which the UN Convention against Corruption, which has been ratified by the Republic of Uzbekistan,[37]and the OECD Convention on Combating Bribery of Foreign Public Officials, require corporate liability to be imposed on legal persons. They are certainly ones for which legal entities can be held criminally liable in many States.

29. While some states may establish liability of legal persons only for the specific offences required under the UNCAC or other international instruments, it may be advisable to address the liability of legal persons more broadly within their respective legal system. Establishing the liability of legal persons for a broader range of offences would facilitate the addressing of issues of liability, criminal procedure and sanctions and would also help avoid a patchwork of liability and sanctions and the need to update criminal legislation as new offences are created.[38] As similar obligations on liability of legal persons are found in various international instruments, establishing the liability for legal persons for a broader range of offences may therefore facilitate compliance by states with a range of international obligations, rather than addressing them on a case-by-case basis.[39] **It is recommended to the legal drafters to consider establishing the criminal liability of legal persons for a broader range of offences or in a general manner, for any criminal offence that can factually be committed by/in the name of a legal entity**.

30. It is noted that Article 10 of the UN Convention against Transnational Organized Crime, to which the Republic of Uzbekistan is a State Party, also requires establishing some forms of liability of legal persons for serious crimes[40] involving an organized criminal group and for the offences established in accordance with Articles 5 (participation in an organized group), 6 (laundering of proceeds of crime), 8 (corruption) and 23 (obstruction to justice) of the Convention, as well as offences included in the Protocols to which the State is a party. The

36 See e.g., 2008 USIP-ICHR-OHCHR-UNODC Model Criminal Code, p. 72. See also *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings* (2005), paras. 247-251.
37 Ratification date: 29 July 2008.
38 See the *UNODC Legislative Guide for the Implementation of UN Convention against Transnational Organized Crime* (2017), para. 294.
39 *Ibid.* para. 294.
40 Defined in Article 2 (b) of the Convention to mean offences punishable by deprivation of liberty of at least four years or a more serious crime.

Republic of Uzbekistan is a State Party to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereinafter "the Palermo Protocol").[41] Hence, **the legal drafters should consider broadening the scope of criminal offences for which the liability of legal persons may be incurred to cover those organized crimes mentioned in the UN Convention against Transnational Organized Crime as well as trafficking in persons and other gross human rights abuses and violations of international criminal law and international humanitarian law**.

31. More generally, based on international regulatory trends in the field of corporate criminal liability, the legal drafters could also consider the inclusion of even wider grounds for criminal liability or refer to the relevant provisions if these are regulated elsewhere. In particular, the UNGPs recommend exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses. This could involve aiding, abetting or complicity in the commission of crimes under international criminal law,[42] international humanitarian law,[43] or other gross human rights violations, including sexual and gender-based violence, which is especially prevalent during times of armed conflict. Other offences generally encompassed within the scope of corporate criminal liability include, for example: i) fraudulent activities, including but not limited to, embezzlement, forgery, money laundering, insider trading, false accounting, or any other acts aimed at deceiving or misleading others for financial gain; ii) environmental crimes, such as illegal waste disposal, pollution, or other activities that cause significant harm to the environment or public health; iii) offences related to product safety or consumer protection, such as manufacturing, distributing, or selling unsafe or counterfeit products, or engaging in deceptive trade practices; iv) offences against intellectual property rights, including copyright infringement, trademark counterfeiting, or trade secret theft; v) forced labour and trafficking.

32. It is welcome that draft Article 96^1 (3) explicitly states that the application of criminal sanctions to a legal entity shall not exclude criminal liability of an individual who committed the crime or somehow participated in its commission, which is in line with international recommendations relating to corporate criminal liability. This means that individuals who represent or act on behalf of an entity, including directors, officers, employees, and agents, may be held personally liable for their involvement in the commission of a criminal offence, in accordance with the applicable laws. In such cases, the liability of entity representatives and employees shall be determined based on their individual actions, knowledge, intent, or negligence.

33. The sixth paragraph of draft Article 96^1 specifies that a legal entity shall not be subject to criminal sanctions "*if the person involved in the case as a suspect or accused has committed the crime not for the benefit or interests of the legal entity or if criminal charges have been dropped*". This is consistent with the requirement of attribution more generally, since a legal entity should not be criminally liable if the individual committing the relevant act or omission is not also criminally liable. However, the provision does not address the situation

41 The *Protocol to the UN Convention against Transnational Organized Crime to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* was ratified by the Republic of Uzbekistan on 12 August 2008. It has signed on 28 June 2001, but not ratified, the Protocol against the Smuggling of Migrants by Land, Sea and Air. The Republic of Uzbekistan has not signed nor ratified the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.

42 As indicated in the commentary to the UNGPs, the weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is "*knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime*", including genocide (acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group), crimes against humanity (widespread and systematic attacks against civilians that include murder, enslavement, torture, rape, discriminatory persecution, etc.), war crimes (as defined by international humanitarian law) and the crime of aggression.; see <FAQ_PrinciplesBussinessHR.pdf (ohchr.org)>, p. 42.

43 For instance, when providing practical assistance, moral support or encouragement that has a substantial effect on the commission of a war crime; see e.g., International Committee of the Red Cross, *Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law* (2006).

of the individual being prosecuted and then acquitted. Such an outcome should also lead to the acquittal of the legal entity and it would be more appropriate for this to be expressly stated (on the issue of dropping a case, see also Sub-Section 3.1 below).

34. The draft amendments to not contemplate the inclusion, under the Section III of the General Part of the Criminal Code, of legal defences that could be specifically applicable to legal persons. It is generally recognized that a defence of due diligence, when a legal person is able to prove that it took all reasonable steps to ensure compliance with the relevant law, should be provided.[44] The precise content of due diligence varies with the nature of the offence, the circumstances of the offence and the nature of the defendant. In practice, such a legal defence of due diligence may also be an incentive to encourage legal persons to introduce robust human rights due diligence processes.[45]

35. Finally, it is noted that the draft amendments do not include a specific definition of the term "legal entity". The forms of legal personality and their status vary considerably between jurisdictions, and careful consideration should be given to the range of entities that may be subject to liability.[46] Draft Article 96[1] (4), specifies that criminal sanctions do not apply to "*state bodies, bodies of local self-government of citizens and international organizations*", an exclusion of liability which is rather common in other countries.[47] In any case, irrespective of the approach taken in defining legal entities, the application of the criminal liability provisions to those entities should be in spirit with the purpose of criminal law and be in a manner that ensures compliance with rule of law standards, and respects and upholds international human rights law, including the freedom of association. In this context it is observed that in some jurisdictions, non-profit organizations are also excluded from corporate criminal liability and this could also be considered.

RECOMMENDATION A.1

To remove the reference to the results of the criminal offence from draft Article 96[1] of the Criminal Code by simply mentioning that the acts are to be committed in the interests of the legal entity.

RECOMMENDATION A.2

To clarify the personal scope for attributing criminal liability to a legal person by including a clear definition and specify the persons that could fall under the scope of corporate criminal liability including (i) the person acting in the name of or on the behalf of the legal entity, (ii) the person in a management or supervisory position using his/her authority, (iii) by directors, officers, employees or agents of the legal entity when the lack of adequate control or supervision by a person in a leading position or the legal entity more generally rendered the commission of the criminal offence possible (lack of due diligence or mechanisms to prevent the commission of crimes).

RECOMMENDATION A.3

To consider broadening the scope of criminal offences for which the liability of legal persons may be incurred, at least to cover those organized crimes

44 See e.g., *UNODC Legislative Guide for the Implementation of UN Convention against Transnational Organized Crime* (2017), paras. 302-303.

45 See UN Working Group on the issue of human rights and transnational corporations and other business enterprises, *Report on Due Diligence* (2018), A/73/163, para. 73(f).

46 See e.g., *UNODC Legislative Guide for the Implementation of UN Convention against Transnational Organized Crime* (2017), para. 295.

47 *Ibid.* para. 297.

mentioned in the UN Convention against Transnational Organized Crime as well as trafficking in persons, and other gross human rights abuses and violations of international criminal law and international humanitarian law.

3. PENALTIES FOR A LEGAL PERSON

36. Draft Article 96^2 of the Criminal Code establishes three types of criminal sanctions applicable to legal entities: fine; deprivation of certain rights; and liquidation. The subsequent draft Articles 96^3, 96^4 and 96^5 respectively define those sanctions.

37. International law does not prescribe the list of sanctions that must be established with regard to legal persons. Only fines and confiscation of the proceeds of the crime (or a monetary sanction with comparable effect) are mentioned as obligatory sanctions in the OECD Convention on Combating Bribery of Foreign Public Officials, the Council of Europe Criminal Law Convention and the UNCAC. The same is true about sentencing principles: these conventions take no position on which factors related to the crime or its perpetrator should determine the severity of the punishment. There is only a general requirement that the sanctions must be effective, proportionate and dissuasive.[48]

38. The UN Guiding Principles on Business and Human Rights establish that '*As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.*'[49] The Guiding Principles clarify that '*Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.*'[50]

39. Article 96^2 states that '*When applying a criminal sanction to a legal entity, consideration may also be given to its active contribution to solving the crime and exposing its participants, active participation in identifying property obtained through the crime, voluntary repair of damages, prevention or elimination of consequences and adoption of corruption control measures within its system, positive circumstances characterizing its activities, and criminal sanctions earlier applied to the legal entity*.' This is a repetition of the same statement under Article 96^1 – it is recommended to include this specification only in Article 96^2 as it refers to the type of sanctions, whereas the former refers to the grounds of liability. **Unless this is a matter of translation, it is recommended to clarify what 'consideration' means, i.e., mitigating factor or an aggravating factor.** In addition, it could be considered to specify these factors to determine the entity liability. This should be established based on the following factors: a) the nature and seriousness of the offense committed by the entity; b) the degree of participation or involvement of the entity in the offense; c) the foreseeability of the offense by the entity, including whether the offense was a result of the entity's policies, practices, or organisational culture; d) the intent or knowledge of the entity's representatives or employees who participated in or authorized the offence; e) the entity's efforts to prevent or mitigate the offence, including the implementation of effective compliance and risk management

48 OECD, Liability of Legal Persons for Corruption in Eastern Europe and Central Asia, 2015, p.35.

49 UN Guiding Principles on Business and Human Rights, Principle 25.

50 UN Guiding Principles on Business and Human Rights, Commentary to Principle 25.

systems; f) the extent of any harm caused by the offence, including economic, environmental, or social consequences; g) the entity's history of compliance with legal obligations.[51]

40. Draft Article 96^2 specifies that the "*liquidation of a legal entity shall be applied as the main measure, fine - as the main and additional measure, and deprivation of certain rights - only as an additional measure*". While the same provision further elaborates the circumstances to be taken into account to determine the criminal sanction to be applied (i.e., the nature and level of public danger of the committed crime, legal entity's financial situation, benefit derived by the legal entity from commission of the crime and size/volume thereof, as well as consequences of the crime), there are no specific limitations regarding the imposition of liquidation, despite the very serious nature of the penalty. These factors are relevant and the requirement to consider them has the potential to ensure that proportionality is observed in the determination of the sanctions to be imposed. It is thus important **to specify the limited cases where such a serious penalty may be imposed, e.g., when the activities of the legal entity were predominantly or entirely used for the execution of criminal offences and the existence of particularly aggravated circumstances**.[52]

41. Draft Article 96^2 to 96^5 of the Criminal Code elaborate on the nature of sanctions that may be imposed on legal entities (i.e., fines, deprivation of certain rights and liquidation). The described sanctions are commonly applicable in respect of offences committed by legal entities. However, it should be noted that an additional sanction sometimes used by States is subjecting the activities of the legal entity to supervision, particularly where the conviction concerned reflects a systemic failure on its part.[53] **Also it appears surprising that the confiscation of property, assets, equipment or other instrumentalities is not envisaged and the legal drafters could consider supplementing the relevant provisions in this respect**. At the same time, such confiscation must also be approached with caution, to ensure respect for the lawful interests of creditors and rights of *bona fide* third parties. Public announcement or publication of the judgment acknowledging the criminal liability of the legal entity can also be envisaged and acts as a disincentive for the legal entity.[54]

42. According to draft Article 96^3 of the Criminal Code a fine would consist of "the compulsory pecuniary penalty imposed by court and withheld in favour of the state in the cases and amount established by this Code". It is also specified in the second paragraph that a fine applied "shall be in the amount of one hundred up to ten thousand minimal monthly wages, and when applied as an additional criminal sanction - in the amount of fifty up to five thousand minimal monthly wages". **It might be sufficient to have only the second paragraph.**

51 For example, in the UK, criminal sentencing of corporate offenders for fraud, bribery and money laundering under the UK Bribery Act 2010 and the UK Fraud Act 2006 consider as factors increasing seriousness: i) previous relevant convictions or subject to previous relevant civil or regulatory enforcement action; ii) corporation or subsidiary set up to commit fraudulent activity; iii) fraudulent activity endemic within corporation; iv) attempts made to conceal misconduct; v) substantial harm (whether financial or otherwise) suffered by victims of offending or by third parties affected by offending; vi) risk of harm greater than actual or intended harm (for example in banking/credit fraud); vii) substantial harm caused to integrity or confidence of markets; viii) substantial harm caused to integrity of local or national governments; ix) serious nature of underlying criminal activity (money laundering offences); and x) offence committed across borders or jurisdictions, and as factors reducing seriousness or reflecting mitigation: i) no previous relevant convictions or previous relevant civil or regulatory enforcement action; ii) victims voluntarily reimbursed/compensated; iii) no actual loss to victims; iv) corporation co-operated with investigation, made early admissions and/or voluntarily reported offending; v) offending committed under previous director(s)/manager(s); vi) little or no actual gain to corporation from offending. See: UK Sentencing Council, Corporate offenders: fraud, bribery, money laundering https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/corporate-offenders-fraud-bribery-and-money-laundering/ .

52 See e.g., 2008 USIP-ICHR-OHCHR-UNODC Model Criminal Code, Section 12, p. 160.

53 T. Hoppe, Legislative Toolkit on Liability of Legal Persons, pp . 18-21.

54 See e.g., *2008 USIP-ICHR-OHCHR-UNODC Model Criminal Code*, Section 12, p. 159.

43. In the event of non-payment of a fine, it is not paid upon expiration of the deferral period, or the instalment payment terms are violated and its timely recovery being impossible due to the legal entity lacking property that could be subject to enforcement, the third paragraph specifies that the court should replace the fine with a criminal sanction in the form of deprivation of a certain right. Although resort to a lesser penalty might be apt where the legal entity has not the means to pay the fine, the draft addition to Article 290 of the Criminal Procedure Code gives the possibility of subjecting the assets to attachment to ensure execution of criminal sanctions, especially where the legal entity is seeking to avoid fulfilling its obligation to pay. **The draft amendments could also envisage other alternatives in case of non-payment, e.g., the possibility for the court to impose another penalty.**[55]

44. A deprivation of a certain right would entail the legal entity being deprived of the right "*to enter into certain contracts and public procurement agreements, to issue shares or other securities, to receive state subsidies or other benefits, including engagement in a certain type of activity*" for a period from one to ten years. Such a sanction seems, in principle, appropriate for a legal entity that has been implicated in some form of bribery offence. However, it would be desirable for there to be more precision than seen in the phrase "other benefits, including engagement in a certain type of activity". For example, this type of sanctions could include the suspension or revocation of licenses, permits, or authorizations necessary for the entity's operations, the prohibition or restriction on engaging in specific activities or industries and the judicial supervision or monitoring of the entity's operations. It is not clear whether the activities that could not be engaged in are ones that are dependent upon state approval, as might be the effect of the preceding reference to "state subsidies". **Whether or not that is the case, it would be clearer to say expressly which kind of activities would be affected.**

45. Liquidation would entail the "*termination of legal entity's activity due to a crime committed in its interests, without transfer of its rights and obligations to other persons by way of legal succession*". Furthermore, the legal entity's entire property should then be confiscated for the benefit of the state or, in the absence of such property, the legal entity should be subject to a fine of three hundred minimum monthly wages.

46. Although liquidation might be an appropriate response, it will be important that due consideration is given to the factors referred to it in the third paragraph of the proposed Article 96^2 concerning the attribution of criminal liability. However, it is unclear why the proposed fine could be expected to be paid in the event of the legal entity having no property that could be confiscated since if it had the three hundred minimum monthly wages needed to pay the fine that would be part of its entire property or indeed the entirety of it.

47. The draft amendments in *Special Part Section Eight* would extend the definition of "other measure of legal influence" to include "criminal sanctions applicable to legal entities". It is not clear that that the proposed addition is appropriate since "other measure of legal influence" is defined as a measure that is not "a penalty" whereas those specified in the proposed Articles 96^2-96^5 are clearly penalties. There is no specification in the draft amendments of any other measures that might be imposed on a legal entity. **There is thus a need to clarify the object of the proposed addition and possibly reconsider its inclusion.**

55 See e.g., *2008 USIP-ICHR-OHCHR-UNODC Model Criminal Code*, Section 12, p. 160.

RECOMMENDATION B.1.

To clarify in Article 96^2 of the Criminal Code what 'consideration' means, i.e., mitigating factor / reduction of criminal sanction or an aggravating factor and specify the factors that are to be considered when determining the entity liability.

RECOMMENDATION B.2.

To consider including additional sanctions in the Criminal Code such as subjecting the activities of the legal entity to supervision or confiscation of assets derived from or used in the commission of the offence.

RECOMMENDATION B.3.

To specify, in case of deprivation of rights, which activities of the legal entity can be subjected to prohibition or restriction.

RECOMMENDATION B.4.

To clarify the draft amendments in Special Part Section Eight which would extend the definition of "other measure of legal influence" to include "criminal sanctions applicable to legal entities" or to reconsider its inclusion.

4. PROCEEDINGS AGAINST LEGAL ENTITIES

48. In most countries, criminal procedure rules generally apply equally to individuals and to legal persons; however, prosecuting and holding a corporate body criminally liable raise a number of procedural questions that need to be addressed in relevant procedural and enforcement rules, for instance the specific sanctions that can be imposed on legal persons or the identification or designation of the persons representing the legal entity during the criminal proceedings.[56] In any case, it is important to highlight that the right to privacy and fair trial guarantees should apply to legal persons and due consideration to the protection of the rights of employees, clients, beneficiaries – if applicable, contractors, service providers of such entities should also be kept in mind. In particular, the right of access to court should be practical and effective, and accordingly, a litigant should not be denied the opportunity to present his or her case effectively before the court and should be able to enjoy equality of arms with the opposing side.[57]

49. **In general the draft amendments would benefit from explicitly referring to legal safeguards that legal entities shall enjoy the right to due process including the right to a fair trial and the right to an impartial and independent tribunal; the right to defence, namely that legal entities shall have the right to be represented by legal**

56 For instance, as regards the identification of the person to be summoned, the question of who shall act on behalf of the legal entity during trial, whether the legal representatives or governing body or employees have the right to remain silent or to refuse testimony or to submit documents that would incriminate the company or themselves, who may deny access to company's premises without a search warrant, which forms of punishment may be imposed, who may enter into a plea-bargaining agreement on behalf of the company, etc.; moreover, certain *interim* measures specifically applicable to legal entities could be adopted by judges such as, as is the case in Romania: a) the suspension of the legal person's winding-up or liquidation procedure; b) the suspension of the legal person's merger, division or reduction of the share capital; c) the prohibition of any specific patrimonial operations that may entail the significant reduction of the patrimonial assets or the legal person's insolvency; d) the prohibition to execute certain legal instruments, established by the legal body; e) the prohibition to perform activities of the same nature as those underway or as those that occurred when the offence was perpetrated. See the *Business Crimes and Compliance Criminal Liability of Companies Survey* (2008) prepared by the Lex Mundi Business Crimes and Compliance Practice Group, available at <https://www.lexmundi.com/images/lexmundi/PDF/Business_Crimes/Criminal_Liability_Survey.pdf>.

57 See e.g., ECtHR, Steel and Morris v. the United Kingdom (Application no. 68416/01, judgment of 15 February 2005), par 59. See also Airey v. Ireland (Application no. 6289/73, judgment of 9 October 1979), par 24.

counsel throughout the criminal proceedings, the right to be informed of the charges, and the opportunity to present evidence and arguments in their defence; that the criminal proceeding against legal entities should be based on the presumption of innocence and the burden of proof shall rest with the prosecuting authority to establish the entity's criminal liability based on the standards of proof defined by the applicable laws and regulations; and that the entities shall have the right to appeal against any criminal sanctions imposed, in accordance with the procedures established by law.

50. The proposed amendments to the Criminal Procedure Code ("CPC") concern provisions on proceedings against legal entities. In particular, a new Chapter 63^1 would be introduced to the CPC comprising six new provisions, namely draft Articles 591^1 to 591^6. These provisions concern fair trial rights. In the first place, the new Article 591^1 would specify that, taking into account the specifics of this chapter's provisions, these proceedings should be based on the general rules in the CPC and that there should be consolidation of the proceedings against a legal entity and the pre-trial investigation of a case against an individual having committed the crimes mentioned under Article 96^1 of the Criminal Code. Thereafter the new provisions would relate to pre-trial proceedings (Article 591^2), a representative and a defender (Article 591^3), the circumstances to be established in the pre-trial proceedings (Article 591^4), the termination of the proceedings (Article 591^5) and a judicial hearing on the application of criminal sanctions (Article 591^6). Other amendments to the CPC supplement existing provisions of the CPC by adding references to the representatives of the legal entity or to a legal entity.

51. While some of the proposed additions might indeed be essential in light of the specificities of criminal proceedings against a legal entity as underlined above, it is not clear why the existing provisions of the CPC would not otherwise be made generally applicable to proceedings against legal entities. This could be achieved through simply specifying that references to "citizens", "defendants" and "suspects" would, where appropriate, apply to legal entities which are the object of proceedings in respect of the offences specified in the proposed Article 96^1 of the Criminal Code. Although the draft Article 591^1 of the CPC proposes that proceedings against legal entities shall – subject to the specifics of Chapter 63^1 – be based on the general rules of the CPC, the repeated distinction made in the proposed additions between a "defendant" and a legal entity makes it very unclear as to what real guarantees the latter has when compared to those enumerated for the former.

52. **There is thus a need for reconsideration as to the way in which the provisions of the CPC are adapted to deal with proceedings in respect of legal entities, with the starting assumption being that they are to be in the same position as any other suspect or defendant** and benefit from the same protections, rights and guarantees – but doing so through its designated representative - except where the specific nature of the proceedings really requires some specific provisions addressed only to legal entities.

53. Of note, the formulation of the second paragraph of Article 591^1 of the CPC, insofar as it refers to "*individuals having committed crimes under Article 96^1 of the Criminal Code*", appears to run counter to the presumption of innocence, since it is only at the end of the proceedings that there can be any determination that any crime has been committed. Article 14 (2) of the ICCPR (as well as Article 6 (2) of the ECHR) provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. In this regard, the ECtHR has said that presumption of innocence means: "*(1) when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; (2) the burden of*

proof is on the prosecution, and (3) any doubt should benefit the accused".[58] There is thus a **need for this paragraph to be recast and to use a phrase such as "accused" or "charged with" such crimes rather than "committed".**

RECOMMENDATION C.

To reflect clearly that legal entities are to be in the same position as any other suspect or defendant and benefit from the same protections and rights and guarantees.

4.1. Role of the Investigator and Prosecutor

54. Amendments to existing Article 36 CPC introduce a possibility for an investigator to decide on initiating or dropping criminal proceedings against a legal entity. This would be in addition to the existing possibility for the investigator to do so but, unlike the existing provision concerned with individuals, such a decision in the case of legal entities would require the prosecutor's consent. Article 382 CPC regarding the powers of the prosecutor is amended with the addition that the prosecutor "*approve[s] the initiation of proceedings for applying criminal sanctions against a legal entity*". The provisions are not aligned as draft Article 36 covers both the initiation and dropping of criminal proceedings against a legal entity, whereas draft Article 382 CPC only refers to the initiation of these proceedings. However, draft Articles 591^2 CPC and 591^5 CPC do seem to indicate that both decisions require the prosecutor's approval. These provisions should be revised to ensure consistency.

55. The criteria governing the decision of a prosecutor to give her/his consent on initiating or dropping criminal proceedings against a legal entity are not specified. This could potentially lead to arbitrary decision-making and could run counter to the apparent objective of tackling the involvement of legal entities in offences relating to any criminal offence. As the Venice Commission has made clear in its Rule of Law Checklist: "*The very essence of the Rule of Law would be called in question if law appeared only in the books but were not duly applied and enforced. The duty to implement the law is threefold, since it implies obedience to the law by individuals, the duty reasonably to enforce the law by the State and the duty of public officials to act within the limits of their conferred powers*".[59] **There is thus a need to specify some criteria governing the grant or refusal of consent by a prosecutor, which should be linked to the extent of the evidence of an offence and the public interest in the prosecution of the said criminal offence.**

56. Furthermore, as with the requirement in the draft Article 591^2 for the investigator's decision to institute proceedings against a legal entity to be reasoned, so should the decision of a prosecutor as regards consenting to their initiation or being dropped. The legal drafters could **consider introducing the right to report for an individual, who has knowledge of a publicly actionable offence, to inform the public prosecution service about the said offence**.

58 See ECtHR, Barberà, Messegué and Jabardo v. Spain (Application no. 10590/83, judgment of 6 December 1988), par 77, which states that: "Paragraph 2 (art. 6-2) embodies the principle of the presumption of innocence. It requires, inter alia, that when carrying out their duties, the members of a court should not start with the preconceived idea that the accused has committed the offence charged; the burden of proof is on the prosecution, and any doubt should benefit the accused. It also follows that it is for the prosecution to inform the accused of the case that will be made against him, so that he may prepare and present his defence accordingly, and to adduce evidence sufficient to convict him".

59 Venice Commission, Rule of Law Checklist (2016), para. 53.

57. Article 36 CPC provides an overview of the general powers of the investigator, such as detaining and interrogating suspects, and lists the types of investigative activities. Yet due to the additional specific reference to the possibility for an investigator to decide on initiating or dropping criminal proceedings against a legal entity introduced by the draft amendments in Article 36 of the CPC, it becomes unclear whether the other investigative powers listed therein are applicable in relation to a legal entity. **This should be clarified.**

58. **More specifically, the legal drafters could consider the inclusion of the following powers and responsibilities of the investigator with regards to investigation carried out on legal entities, insofar these are not foreseen in the CPC in relation to legal entities:**

- Summoning and questioning individuals who have relevant information or knowledge regarding the case;
- Requesting and obtaining documents, records, or any other evidence necessary for the investigation from the legal entity or any other relevant sources, except for materials or information that benefit from the privilege against self-incrimination or sources that are privileged, such as those between the accused and his/her defence counsel;
- Conducting on-site inspections or searches at the premises of the legal entity, provided that it is based on reasonable grounds and authorized by the competent authority;
- Seizing or temporarily securing assets, documents, or any other items relevant to the investigation, subject to the procedures prescribed by law;
- Requesting assistance from experts or specialists to analyse or evaluate evidence, financial records, or any other relevant information pertaining to the legal entity;
- Monitoring or intercepting electronic communications, subject to the conditions and safeguards established by law and with appropriate judicial authorization or authorization by an independent and impartial body, according to standards of due process and subject to some forms of prompt judicial oversight;[60]
- Obtaining financial or banking information of the legal entity, including transactions, accounts, or any other relevant data, as required for the investigation, subject to the legal procedures and safeguards in place;
- Requesting assistance from other investigative authorities or agencies, both domestic and international, in accordance with the applicable laws and treaties;
- Maintaining accurate records of the actions taken during the investigation of a legal entity, including the reasons, justifications, and results of each investigative measure, and submitting periodic reports to the competent authority, detailing the progress and findings of the investigation. The investigator shall be accountable for any abuse of power, misconduct, or violation of the legal entity's rights during the investigation, and shall be subject to disciplinary or legal measures as prescribed by law.

59. **It is recommended to include legal safeguards related to the investigative phase**, including by stating that any search or seizure of the legal entity's premises or assets shall be conducted in accordance with the procedures established by law and shall be subject to judicial review, that the legal entity shall have the right to challenge the lawfulness of any investigative measure or action taken against it and that any interference with the legal entity's rights to privacy, confidentiality, or data protection (of the legal entity, its clients, its employees, etc.) shall be justified by law and subject to appropriate safeguards. **Furthermore, the legal entity should be entitled to fair and impartial treatment**

60 See ODIHR, *Comments on Certain Legal Acts Regulating Mass Communications, Information Technologies and the Use of the Internet in Uzbekistan* (2019).

throughout the investigation, ensuring equality before the law and any evidence obtained unlawfully or in violation of the legal entity's rights shall be inadmissible in court.

60. Article 591^2 CPC is concerned with the recipient of the reasoned decision on initiating proceedings against a legal entity, the appointment by it of its representative and the entry of evidence collected into the indictment. It is not evident that there is a need for a special provision for entering the evidence collected into the indictment where proceedings in respect of legal entities are involved. Moreover, the specification of a legal entity's founder as one of the persons who could be appointed as its representative in the absence of a failure by it to appoint one will not necessarily be appropriate since, as mentioned above, the founder of a legal entity may no longer have any connection with it. Whilst it does not then preclude the legal entity from appointing someone else, it is recommended to reconsider this provision.

RECOMMENDATION D.1

To specify some criteria governing the grant or refusal of consent by a prosecutor on initiating or dropping criminal proceedings against a legal entity, which should be linked to the extent of the evidence of an offence and the public interest in a prosecution.

RECOMMENDATION D.2

To clarify the types of investigative measures that may be used against legal entities while ensuring that adequate safeguards and fair trial guarantees are in place, and that the legal entity is entitled to fair and impartial treatment throughout the investigation, and that any evidence obtained unlawfully or in violation of the legal entity's rights shall be inadmissible in court.

4.2. Pre-trial Proceedings

61. The proposed addition to Article 364 CPC which deals with the grounds for the suspension of pre-trial investigation[61] would add a reference to the possibility to suspend pre-trial investigations against a legal entity on the same grounds.

62. As the potential criminal liability of a legal entity is dependent upon some act or omission of an individual who could be expected also to be a defendant in the relevant proceedings, the various factors listed that would preclude her/his participation in those proceedings could make it necessary to suspend the proceedings against the legal entity either because her/his absence would preclude the legal entity from examining her/him in connection with its own defence or because this would handicap the prosecution in presenting its case against the legal entity.

63. However, what is unclear from this provision is whether the individual who has purportedly committed the relevant crime in the interests of the legal entity would necessarily be tried in the same proceedings as that legal entity. Requiring this would be appropriate in terms of protecting the interests of the legal entity, particularly as the prior trial of the individual could result in issues which the legal entity might want to challenge, notably as regards whether the individual acted in the interests of the legal entity or had

61 Namely, non-identification of a person to be involved as a defendant, an accused person's whereabouts being unknown, the defendant having left the territory of the Republic of Uzbekistan and it being impossible to secure her/his appearance for investigation and the defendant being unable to participate in the proceedings due to a serious and long, but curable, illness.

any genuine connection with it. If not the case, this would also be problematic if the individual entered into a plea agreement before any trial of the legal entity and was effectively constrained by that agreement to acknowledge that she/he had not sought to act in the interests of the legal entity.[62] It, therefore, appears appropriate that the second paragraph of draft Article 591^1 CPC provides for the consolidation of proceedings against legal entities and those against individuals for crimes under Article 96^1 of the Criminal Code into a single case. However, as the analysis of the draft Articles 591^4 and 591^5 CPC below indicates, it does not seem that a genuine consolidation of the proceedings is contemplated in the draft amendments, which would raise concern as to the legal certainty and foreseeability of the draft amendments.

64. Finally, the proposed addition to Article 364 CPC also refers to the suspension of *criminal sanctions against the legal entity*. This may be the result of inaccurate translation, and it is likely that the legal drafters intended to refer to the suspension of criminal pre-trial *investigations* into legal entities since the application of criminal sanctions may only take place by way of a judgment.

65. Draft Article 591^4 specifies six sets of circumstances to be established in the course of pre-trial proceedings, namely: facts confirming the commission by the legal entity's official, founder, employee or by any other person with their knowledge of a crime in the interests of the legal entity; public danger and consequences of the crime, committed in the interests of the legal entity; the size and nature of the damage caused by the act committed in the interests of the legal entity; the size and nature of the unlawful advantage obtained through the act committed in the interests of the legal entity; financial situation of the legal entity and the circumstances aggravating or mitigating it; and the need for applying criminal sanctions against the legal entity.

66. As such, these are essentially matters relevant to the determination of criminal liability and the circumstances pertinent to its mitigation or aggravation. However, the proposed provision seems to be requiring that these matters should be determined "*during the pre-trial proceedings*", the function of which normally - and indeed under the CPC – is only to determine whether a case shall be sent to trial. It is not clear whether this is the intention of the draft Article 591^4 as the draft Article 591^6 provides for a judicial hearing on the application of criminal sanctions against a legal entity to be conducted in accordance with the Criminal Procedure Code's provisions relating to trials. Moreover, the opaque reference in the third paragraph of the proposed Article 591^6 to applying or refusing sanctions "*based on the results of the judicial hearing*" rather than a conviction or acquittal adds to the confusion as to what is meant in Article 591^4 by establishing the circumstances listed in the proposed provision.

67. There is thus a **need to clarify the aim of draft Article 591^4**. Unless a matter of translation, it is recommended to revise the provision to ensure that it does not prevent - or give the impression that it is preventing - legal entities from having the benefit of the full trial process under the Criminal Procedure Code for the purpose of determining whether they are criminally liable on the grounds specified in Article 96^1 of the Criminal Code.

68. For legal proceedings against legal persons to be effective, it may also be necessary for the legal drafters to contemplate the introduction of certain *interim* measures specifically applicable to legal entities that could be adopted by judges during the course of pre-trial proceedings, such as: a) the suspension of the legal person's winding-up or liquidation procedure; b) the suspension of the legal person's merger, division or reduction of the

62 See, e.g., the finding by the ECtHR of a violation of the right to a fair trial in such circumstances in *Navalnyy and Ofitserov v. Russia*, no. 46632/13, 23 February 2016.

share capital; c) the prohibition of any specific patrimonial operations that may entail the significant reduction of the patrimonial assets or the legal person's insolvency; d) the prohibition to execute certain legal instruments, established by the legal body; e) the prohibition to perform activities of the same nature as those underway or as those that occurred when the offence was perpetrated.[63]

RECOMMENDATION E.

To clarify draft Article 591[4] to ensure that it does not prevent - or give the impression that it is preventing - legal entities from having the benefit of the full trial process under the Criminal Procedure Code for the purpose of determining whether they are criminally liable on the grounds specified in Article 96[1] of the Criminal Code, while ensuring full consolidation of the proceedings against a legal entity with those against the individual defendant.

4.3. Trial

69. Articles 375, 377, 388, 449 of the CPC concern the trial proceedings and the draft amendments to each of these provisions concern the inclusion of a representative of the legal entity to those in the arrangements under these provisions for dealing with, respectively, the suspension of pre-trial investigation on the grounds provided for in part one of this article, the procedure for filing and disposing of motions, the referral of criminal cases to court and the content and procedure for pleadings. These proposed additions – which are not concerned with legal representation, would enable the legal entity itself to participate in the proceedings. As underlined above, it is worth reiterating that the legal entity should have all the guarantees afforded to a suspect or defendant by the CPC and this should be more clearly stated to ensure certainty.

70. Draft Article 591[5] CPC deals with the termination of proceedings in respect of legal entities in the circumstances envisaged in the sixth paragraph of Article 96[1] of the Criminal Code, appeals against termination and the cancelation of sanctions applied to a legal entity. There is nothing problematic about the first two possibilities. However, the third ground effectively confirms that there will not be a full consolidation of the proceedings against a legal entity with those against the individual defendant who acted in the interest of the legal entity.

71. Draft Article 591[6] requires a judicial hearing in accordance with the provisions in the CPC relating to trials. Given the impression created by the proposed Article 591[4] that the basis of a legal entity's criminal liability is to be determined at the pre-trial stage, this provision may be interpreted as only concerning the determination of the sanction to be imposed in a given case. Such a limited scope of decision of a judge during trial would not be consistent with the right to a fair trial. This impression (or effect) would not arise if Article 591[4] were redrafted as suggested above.

72. The possibility envisaged in the proposed provision of holding a hearing where the representative of a legal entity is repeatedly absent is potentially consistent with the admissibility of holding trials *in absentia*. **However, in practice this should only occur if the court concerned is satisfied that the representative is waiving the right to participate in the proceedings or is seeking to evade them and that would require**

63 See e.g., the *Business Crimes and Compliance Criminal Liability of Companies Survey* (2008) prepared by the Lex Mundi Business Crimes and Compliance Practice Group, available at https://www.lexmundi.com/images/lexmundi/PDF/Business_Crimes/Criminal_Liability_Survey.pdf.

that it is also satisfied that diligent efforts have been made to ensure that the representative was actually notified of the relevant proceedings.

4.4. Judgment

73. Articles 457, 467, 468 and 533 of the CPC concern the content and delivery of judgments and the execution of a sentence. The proposed additions to draft Article 457 of the CPC concern three new factors to be considered by a court while deciding upon a sentence. These new factors are whether: the defendant has committed the crime in the interests of the legal entity; the circumstances provided for in draft Article 591^4 of the CPC are proven as regards the application of criminal sanctions against the legal entity; and if there is a need to apply criminal sanctions to a legal entity, what criminal sanctions should be applied if any. **In addition, there would be a need to resolve whether there are circumstances mitigating or aggravating the responsibility not only of the defendant but also of the legal entity.**

74. The determination of whether an individual has committed the crime in the interests of the legal entity is, of course, a prerequisite for imposing criminal liability on a legal entity. However, the present formulation of that individual as a "defendant" once again suggests that a legal entity against which criminal proceedings are engaged is not treated as a defendant for the purpose of the CPC. The same comments may be made with respect to draft Articles 468 and 533 of the CPC.

5. Other Issues

75. The Draft Amendments do not include provisions related to the potential extraterritorial application of corporate criminal liability for criminal offences committed abroad. The UN Guiding Principles on Business and Human Rights clarifies that "*At present, States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.*"[64] For example, the Committee on Economic, Social, and Cultural Rights has clearly explained the steps that States should take to realise extraterritorial obligations to protect against human rights abuses by business enterprises.[65] In its General Comment No. 24, it is underlined that "*States parties were required to take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction (whether they were incorporated under their laws, or had their statutory seat, central administration or principal place of business on the national territory), without infringing the sovereignty or diminishing the obligations of the host States under the Covenant*".[66] Other OSCE participating States' criminal regimes allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs or when the legal entity has part or all of its business on their territory.[67]**It is recommended to consider including**

64 UNGPs Commentary to Principle 2.

65 UN Committee on Economic, Social and Cultural Rights. *General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities* (2017).

66 *Ibid.* para. 26.

67 For example, in **France**, the territorial reach of French law as regards corruption-related offenses has been recently extended by the Sapin II Law and French authorities can bring charges for corruption occurring outside of France, not only against French nationals, but also against individuals and legal entities having all or part of their business on French territory. In the **US**, legislation, including

an expansion of corporate criminal liability so that legal entities carrying out all or part of their economic activity in Uzbekistan are subject to an extraterritorial application of the criminal provisions included in the amendments for criminal offences allegedly committed abroad.

6. RECOMMENDATIONS RELATED TO THE PROCESS OF PREPARING AND ADOPTING THE DRAFT LAW

76. OSCE participating States have committed to ensure that legislation will be "*adopted at the end of a public procedure, and [that] regulations will be published, that being the condition for their applicability*" (1990 OSCE Copenhagen Document, par 5.8).[68] It is also worth recalling that OSCE commitments require legislation to be adopted "*as the result of an open process reflecting the will of the people, either directly or through their elected representatives*" (Moscow Document of 1991, par 18.1). The Venice Commission's Rule of Law Checklist also emphasizes that the public should have a meaningful opportunity to provide input during the law-making process.[69]

77. For consultations on draft legislation to be effective, they should provide sufficient time to stakeholders to prepare and submit recommendations on draft legislation, while the State should set up an adequate and timely feedback mechanism whereby public authorities should acknowledge and respond to contributions, providing for clear justifications for including or not including certain comments/proposals.[70] To guarantee effective participation, consultation mechanisms must allow for input at an early stage *and throughout the process*,[71] meaning not only when the draft is being prepared but also when it is discussed before Parliament (e.g., through the organization of public hearings). Public discussions and an open and inclusive debate will increase all stakeholders' understanding of the various factors involved and enhance confidence and trust in the adopted legislation and in the institutions in general.[72]

78. Further, given the potential impact of the Draft Law on the exercise and protection of human rights and fundamental freedoms, it is also essential that the development of legislation in this field be preceded by an in-depth regulatory impact assessment, including on human rights compliance, completed with a proper problem analysis using evidence-based techniques to identify the most efficient and effective regulatory option.[73]

79. In light of the foregoing, **ODIHR calls upon the public authorities to ensure that the draft amendments and any legislative initiatives in this sphere, is preceded by an in-depth regulatory impact assessment and is subject to open, inclusive, extensive and effective consultations, including with the general public, entities which may be impacted, or their representative organizations, non-governmental organizations, as well as future implementers from the criminal justice systems, offering equal opportunities for all to participate.** According to the principles stated above, such consultations should take place in a timely manner, at all stages of the law-making

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the *Racketeering Influenced and Corrupt Organizations Act* (RICO), the *Foreign Corrupt Practices Act* (FCPA), as well as *Securities and Exchange Commission* (SEC) regulations and laws have extraterritorial effects and can be applied not only to the persons representing the corporation but also to the corporation itself

68 Available at <http://www.osce.org/fr/odihr/elections/14304http://www.osce.org/fr/odihr/elections/14304>.

69 See Venice Commission, Rule of Law Checklist, CDL-AD(2016)007, Part II.A.5.

70 See e.g., Recommendations on Enhancing the Participation of Associations in Public Decision-Making Processes (from the participants to the Civil Society Forum organized by the OSCE/ODIHR on the margins of the 2015 Supplementary Human Dimension Meeting on Freedoms of Peaceful Assembly and Association), Vienna 15-16 April 2015.

71 See e.g., op. cit. footnote 90, Section II, Sub-Section G on the Right to participate in public affairs (2014 OSCE/ODIHR Guidelines on the Protection of Human Rights Defenders).

72 See e.g., OSCE/ODIHR, Opinion on the Draft Federal Law on the Support to the National Human Rights Institution of Switzerland, Warsaw, Opinion-Nr.: NHRI-CHE/312/2017, 31 October 2017, par 95.

73 See e.g., OSCE/ODIHR, *Preliminary Assessment of the Legislative Process in the Republic of Uzbekistan* (11 December 2019), Recommendations L and M; and Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, Part II.A.5.

process, including when the planned reform and subsequently the draft legislation are discussed, including before the Parliament.

80. Finally, it is noted positively that overall, the draft amendments use gender-neutral terminology. However, several provisions still refer to individuals occupying certain official positions or defendants using only the male form of a term, which would imply that a man occupies the position only or that only a male person can be a defendant. Established international practice requires legislation to be drafted in a gender neutral/sensitive manner.[74] It is recommended that, whenever possible, the reference to post-holders or certain categories of individuals be adapted to use a gender-neutral word, whenever possible. Alternatively, the plural form of the respective noun could be used instead of the singular or it is recommended to use both male and female words.[75]

[END OF TEXT]

74 See e.g., ODIHR, *Comments on the Law on the Assembly and the Rules of Procedure of the Assembly from a Gender and Diversity Perspective* (2020), pars 105-107; and *Making Laws Work for Women and Men: A Practical Guide to Gender-Sensitive Legislation* (2017), page 63. See also the UN Economic and Social Commission for Western Asia (ESCWA), Gender-Sensitive Language (2013); European Parliament, Resolution on Gender Mainstreaming (2019); Council of the European Union, 'General Secretariat, Inclusive Communication in the GSC' (2018); and European Institute for Gender Equality's Toolkit on Gender-sensitive Communication (2018).

75 See e.g., ODIHR, Report on the Assessment of the Assessment of the Legislative Process in the Republic of Armenia (October 2014), pars 47-48.