CHAPTER 1 - LEGAL FRAMEWORK

Participation in a criminal organization is penalized under Art. 328 of the Criminal Code of the Republic of Croatia (hereinafter: CC), through which Article 2 of Council Framework Decision 2008/841/JHA has been implemented. The CC imposes a requirement that a criminal organization be made up of three or more persons acting in concert with the aim of committing one or more criminal offenses punishable with at least 3 years of imprisonment, excluding an association randomly formed for the immediate commission of one criminal offense. Organizing or directing a criminal organization – as of entry into force of the new CC on 1 January 2013 referred to as a criminal association – is punishable with a prison term of between 6 months and 5 years, notwithstanding whether a crime for commission of which an organization was established has been committed or not. On the other hand, participation in a criminal organization, excluding organizing and directing of such an organization, shall be punished only if a crime within the criminal organization has not yet been committed. This normative solution is in line with a general consensus that has been reached in both the Croatian legal academia and the judicature that conviction for these two offenses cannot be cumulated, as committing a crime within the criminal organization is deemed to absorb a mere participation in an organization established with an aim of committing such a crime.

Committing a crime within the criminal organization constitutes a distinct criminal offence criminalized under Art. 329 of the CC, with a significantly more severe punishment being set forth for such a crime than for an offense not committed through membership in a criminal organization. Less severe punishment is envisaged for participating in a criminal organization without having committed any criminal offense for such an organization, as well as for carrying out an act not constituting a criminal offense as such but with knowledge that such an act furthers the goal of an organization, and for financially or otherwise abetting a criminal organization. The CC provides for a noteworthy possibility of having the punishment remitted if the perpetrator by timely disclosing a criminal organization prevents the commission of any of the criminal offences, with the aim of committing of which an organization has been formed, or if the member of a criminal organization

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2 Official Gazette” Nos. 125/11, 144/12, 56/15 and 61/15-correction
organization discloses an organization before committing, whether as its member or on its behalf, any of the abovementioned crimes. While in such an event a verdict of guilty shall be passed, no punishment shall be imposed, rendering this normative solution as an effective incentive to prevent commission of the crime for which an organization has been established.³

**Corruption.** While the term corruption as such is not recognized in the CC, Croatian criminal legislation can be deemed to provide an effective tool for redressing corruption crimes. The corruptive behavior can be subsumed under provisions of the following criminal offenses through the phenomenon of corruption most commonly manifests:

- article 252 Receiving Bribes in Business Dealings,
- article 253. Giving Bribes in Business Dealings,
- article 254. Abuse in the public procurement procedure
- article 291 Abuse of Position and Authority,
- article 292 Unlawful Favoritism,
- article 293 Taking a Bribe,
- article 294 Giving a Bribe,
- article 295 Trading in Influence,
- article 296 Giving a Bribe for Trading in Influence.

As is evident from Ministry of the Interior’s police statistics, corruption criminal offenses account for a significant share of all criminal offences committed as part of a criminal organization. In 2013, corruption crimes were surpassed only by Unauthorized production and trafficking of drugs (Art. 190). Of all recorded crimes committed through a criminal organization, 20,5% were related to Abuse of position and powers (Art. 291), while the share of Passive bribery (Art. 293) was 17,5%. Noticeable is discrepancy between the number of cases of Passive and Active bribery; while 92 cases of Passive bribery were recorded, there were only 2 instances of Giving bribers. This disparity might to some extent be attributable to the focus on passive corruption. The number of recorded offenses committed within the criminal organization significantly decreased from 525 in 2013 to 156 in 2014, the most remarkable decrease being reported for corruption crimes, namely Abuse of position and powers (108 in 2013, 6 in 2014) and Passive bribery (92 in 2013, 8 in 2014).

³ The logic behind this solution aligns readily with provisions of Croatian Code of Criminal Procedure providing for quite a lenient treatment of the perpetrator willing to cooperate with the State Attorney’s office on prosecution of co-perpetrators.
Case law on corruption is somewhat limited, as the new CC entered into force in 2013. Therefore, majority of criminal proceedings are still being conducted under the CC of 1997. (e.g. Fimi media Sander case, see below). Moreover, it was not until the most recent criminal law reform of 2011, that some of these offenses were separated between crimes against business dealings and official duty, as opposed to the former solution where they were considered offenses against official duty (therefore, distinction has been made between crimes against business dealings, and crimes against official duty). The most notable case of high profile corruption has been that of so called “Fimi medica case” involving Mr. Ivo Sanader (the former Prime Minister of the Republic of Croatia, Croatian Democratic Union at the time ruling party in Croatia), corporation Fimi Media, and several high-ranking officials. All were indicted of and convicted by a trial court (the County Court in Zagreb) for associating for the purpose of committing criminal offences (Art. 333 of the CC 97; count 1 of the verdict) and abuse of office and official authority (Art. 337 of the CC 97; count 2 of the verdict). The incriminated acts were related to public procurement. The Supreme Court struck down the judgment and remanded the case for retrial on procedural grounds, and the case is currently being heard by a court of first instance. It was established that the defendants belonged to the criminal group and that each of them undertook acts in order to achieve the criminal It was established that Ivo Sanader was the organizer of the group who acted on two levels – one as the president of the Croatian democratic union and second as the prime minister of Republic of Croatia, which functions are inextricably linked. It was also established the way through which the contracts were given to company Fimi media d.o.o., including that the company issued invoices for services they didn’t provide. From the conducted financial investigation it was established and proven through material and personal evidence before the court just how much money was illegally gained, by who and how it was spent.

Croatian criminal legislation may be said to be in full compliance with relevant provisions of European Union law. Council Framework Decision 2003/568/JHA has been transposed in the CC (Art. 252 – Receiving Bribes in Business Dealings and Art. 253 – Giving Bribes in Business Dealings) and Act on the Responsibility of Legal Persons for Criminal Offences, the latter providing for prosecution of legal persons, such as corporations and political parties, for corruption criminal offenses. Furthermore, Art. 3 of the Convention on the fight against corruption involving officials of the European Communities or officials of Member

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\(^4\) No: K-Us-8/12, 11 March 2014.
\(^5\) No: II Kž 343/15-4, 30 September 2015.
\(^6\) Official Gazette" Nos. 151/03, 110/07, 45/11 and 143/12.
States of the European Union is implemented in the CC by expanding the definition of the official person (Art. 87 of the CC) so as to encompass officials of the European Communities and officials of Member States of the European Union."

The Procurement Directive 2014/24/EU has not yet been fully transposed in national law. The Bill through which the Directive is to be transposed law is currently being prepared by the Ministry of the Economy (as of August 2015). However, even prior to the adoption of the Directive was the Public Procurement Act amended (2013), resulting in further improvements in control and the introduction of some provisions that were only later through the Directive 2014/24/EU accepted as European standards (Podumljak Munir and Elizabeth David-Barrett, 2015, p. 14-15). Therefore the existing legal framework sets high standards and includes a number of provisions which constrain the opportunities for private companies to seek to distort the competitive process. As the Head of the Department for Infrastructure and Construction Works in the Central Finance and Contracting Agency for the EU Programs and Projects (CFCA) explained, the Croatian legislation is "very strict and I do not see any opportunities for favoritism. It is so strict in some areas that it limits the logic and the structure of the process." But in Croatia still challenges remain regarding the implementation of the law.

Croatia has not yet fully implemented integrity pacts or any other soft law instruments aiming at enhancing transparency and accountability in the public procurement process, although some initial steps have been introduced also by the Transparency International and by the Croatian NGO Partnership for Social Development (Hečimović A., M. Podumljak, 2014).

CHAPTER 2 – VULNERABILITY OF PUBLIC PROCUREMENTS

The overall vulnerability of public procurements for corruption and criminal infiltration in Croatia can be estimated as medium high (7/10) although there are not many court proceedings to confirm this statement. According to this report, the pre-tender stage, tender stage and the post-award phase are all at the high risk for exposure of corruption and infiltration of organized crime. Moreover, according to EC (2014) 645 of Croatian Business Companies believes that corruption is extremely high in the public procurement proceedings, especially if led by local governments (Vuk Vuković, 2014).

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7 Official Gazette, Nos. 90/11, 83/13, 143/13, 13/14.
The threshold for public bidding procedures is set at 200,000 kn for the procurement of services and for the procurement of work to do 500,000.00 kn. In calculating the estimated value of procurement, the authority must take into account the total value of the purchase, which includes all options and possible renewal of the contract. Below mentioned threshold, contracts can be signed without any public bidding procedure based on the regulations set by entity itself. One must mention that, unlike other some other EU countries, public procurement average amounted 12,08% of the GDP (data for 2013). As analyzed by Hećimović and Podumljak: From 1 January 2012 to present, in the Republic of Croatia was signed a total of 26,192 contracts, including framework agreements. Their total value exceeds 38 billion and 414 million KN, and these contracts were concluded by 2003 contracting authorities. The total number of tenderers who were awarded a contract is 4684, which means that on average each signed five contracts. The ratio between the contracting authorities and tenderers is 1-per-2.3; which means that on average there are two tenderers per 1 contracting authority in all public procurement contracts. According to the Central Bureau of Statistics data, in March 2014 in the Republic of Croatia were active 159,764 legal persons and 83,426 economic operators in the field of trades, crafts and free professions. Only 4684 of them took part in public procurement, i.e. only 1.9%. As in other jurisdictions, the construction business is considered to be at the highest risk for corruption and infiltration of organized crime groups (Podumljak M. and David-Barrett E., 2015). This is also due to the fact that according to the value and the number of contracts, construction works far exceed other areas in Croatia. Moreover, one can state that favoritism and corruption are among weaknesses of the public procurement system in Croatia, together with the dominance of the lowest price only award criteria, although new Directive recommend most economically advantageous tender. In Croatia this preferred criterion was applied, according to available data, in only 15 of the cases (Hećimović A., M. Podumljak, 2014, p. 9). Moreover, usage of e-procurement, i.e. electronic auction, has yet to come.

There are not enough efficient and sufficient checks of companies that are giving tenders and participating in public procurement procedure. The same is valid for the review of the origin of the money what represents the risk for money laundering. There exists also a

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9 1 EUR=7,637467 kn.
10 Art. 18 Public Procurement Act
wide assumption that bidding documentation is pre-designed to favor certain companies (see the FIMI Media case) (Budak J. and Edo Rajh, 2014, p.22).

Furthermore, the Commission for Public Procurement acts in cases of an appeal but not otherwise checks the legality of the procedure of public procurement (acts only at the request of tenders or interested tenders and its enquiries are limited to irregularities stipulated by the complainant). As stated in 2010 by Ateljević, Budak, 2010: “The case of Croatia demonstrates that corruption in public procurement has been deeply rooted in the country’s political and institutional structure. Therefore, it would require a long and systematic approach to reduce it. The new public procurement system in Croatia would somewhat reduce opportunities for corruption. However, it is a necessary but not sufficient condition to combat systemic corruption in the Croatian public sector. Croatia is a rather small country with a very close business community network operating in the same market, where public companies are major market operators”.

In the most recent study published on construction works (Munir Podumljak and Elizabeth David-Barrett) there were policy recommendations concerning public procurement in construction. Some of them are the following: the need to reduce the political control over public procurement; the accountability of the public procurement process should be increased by improving the monitoring contract implementation; state audits should include integrity matters rather than simply financial audits, which often fail to identify corruption (like the Netherlands national integrity agency); improve the degree of competition for contracts, not only in Croatia, but at the EU level; the integrity of public procurement is best ensured in systems where there is a high degree of transparency about how public contracts are allocated and how they perform. It is of key importance to improve the collection of data about public procurement and to expand tools which allow for cross-checking among datasets to identify risk factors such as conflict of interest and political connections (pg. 51-52).

CHAPTER 3 - THE PREVENTION MEASURES

The Republic of Croatia, local and regional self-government units, public and private companies have implemented programs to prevent corruption. These measures include, but are not limited to, a code of conduct for public officials and public employees. There are wide variety of learning module/seminars on prevention of corruption in public procurement held also by the State Commission for the Supervision of Public Procurement.

In Croatia there are at least four bodies specifically designed to monitor and/or prevent organised crime infiltration and corruption in public procurement: The State Commission
for the Supervision of Public Procurement; The Directorate for the Public Procurement System; The State Audit Office; The Commission for the Conflict of Interest.

In Croatia there is an indirect approach to banning companies from bidding procedures with no official system of black lists.

Regarding databases, there is a publication of public procurement notices in the Electronic Public Procurement Classifieds (EPPC) giving access to procurement notices to all interested stakeholders. Moreover, in Croatia there is a register of companies held at commercial courts with information on shares, shares capital, business ID, address, personal details of the CEO and the board, information on financial statements and main line on business. There is a system of keeping financial data on companies at the tax authorities (FINA). Data is centralized and easily checked by interested parties.

**CHAPTER 4 – THE CONTROL MEASURES**

The system of control of public procurements as regards criminal infiltration and corruption is diversified and to some extent may be deemed as rather incoherent, and competence conflicts of different bodies are possible. At least four bodies are vested with the authority to control public procurements (the same listed in previous chapter). While entrusted with the authority of *ex post facto* controlling public procurements as regards criminal infiltration and corruption, the Bureau for Combating Corruption and Organized Crime (USKOK) is deemed to have a crucial role in this respect, and is recognized as such in scholarly discourse and public perception. USKOK is a specialized division of the State Attorney’s office specializing in investigations of serious forms of crime related to corruption and organized crime, including in respect to public procurements, with the power to act on reports or indications of criminal acts in public procurement. Whereas the Law on USKOK (Art. 20) refers specifically to criminal organization (Art. 292 of the CC) and corruption crimes, Abuse in the public procurement procedure (Art. 254) is not enumerated in the list of crimes that are within the scope of crimes USKOK is authorized to prosecute (since it is an offence against business dealings and not the offence against public authority). However, if Abuse in the public procurement procedure is committed within the criminal organization, USKOK will not lack the competence to act. USKOK was established in 2001, and since 2009 has had a counterpart in the Criminal Police Directorate - the Police National USKOK, as well as in the judiciary - the Court Departments for Criminal Cases in the Jurisdiction of USKOK. That the USKOK and criminal justice system as such are

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12 Includes also pre-tender phase and the attempt to commit a crime.
perceived as crucial elements in anti-corruption and anti-organized crime machinery is indicative of the serious corruption crimes and organized crimes that have been a constant feature in Croatia since its independence, as well as defects in the work of control and prevention mechanism. The Commission for Conflict of Interest ruled in 30 cases of conflict of interest alleged to have occurred during the public procurement procedure in the period that includes 2010, 2011 and 2013, with sanctions being imposed in only 2 cases. As Podumnjak and David-Barrett indicated, and what can be seen from obtained statistics, since the introduction of the crime of abuse of the public procurement in the CC in 2013, only one case was prosecuted, with allegation having been rejected in 2014.

REFERENCES
Hećimović Ana, Munir Podumljak. 2014. An insight into Croatian public procurement through integrityobservers.eu, Partnership for Social Development.