



ICLG

The International Comparative Legal Guide to:

Business Crime 2013

3rd Edition

A practical cross-border insight into business crime

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Serbia

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1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

Business crimes are generally prosecuted by the Public Prosecutor's office. As Serbia does not have a federal system, there is only one public prosecuting authority, composed of a Basic, Higher, Appellate, Republic and Special Public Prosecutor's office. The Special Public Prosecutor's office handles organised crime cases, a substantial number of which are business crimes.

1.2 If there are more than one set of enforcement agencies, please describe how decisions on which body will investigate and prosecute a matter are made.

In Serbia, some business crimes are also prosecuted by Penal Administrative Courts. However, these crimes are not crimes *stricto sensu*. For example, customs offences and offences related to foreign exchange transactions are prosecuted by the Penal Administrative Court.

In addition, in cases of breaches of the Protection of Competition Act (Official Gazette of the Republic of Serbia, no. 51/09) (*Zakon o zaštiti konkurencije*) (the "Competition Act"), the Commission for the Protection of Competition (the "Competition Commission") can impose monetary fines of up to 10% of the total annual income of the respective undertaking.

1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

In general, there is no such possibility.

However, the Corporate Criminal Liability Act (Official Gazette of the Republic of Serbia, no. 97/08) (*Zakon o odgovornosti pravnih lica za krivična dela*), (the "CCLA") prescribes that following a motion from the public prosecutor, a court can impose an interim measure if the future confiscation of the material gain derived from a crime would be difficult. On the other hand, the Competition Commission can determine and impose fines directly, all in the same procedure. These fines are enforced by the Tax Authority.

2 Organisation of the Courts

2.1 How are the criminal courts in Serbia structured? Are there specialised criminal courts for particular crimes?

The structure of the criminal courts in Serbia corresponds to the severity of a sentence prescribed for each crime. For example, basic courts have jurisdiction over crimes punishable by a monetary fine or a sentence not exceeding 10 years, and higher courts have jurisdiction for crimes with sentences exceeding 10 years.

In addition, the higher court also has jurisdiction over organised crime cases, including business crime. According to the wording of the new Criminal Procedure Act (Official Gazette of the Republic of Serbia, no. 72/2011, 101/2011) (*Zakonik o krivičnom postupku*) (the "CPA"), which is to fully enter into force on 15 January 2013, an organised crime group is a group of 3 or more persons who jointly consented to commit crimes, the minimum sentence for which is 4 years of imprisonment, in order to directly or indirectly obtain material gains.

2.2 Is there a right to a jury in business-crime trials?

There is no right to a jury in Serbia.

3 Particular Statutes and Crimes

3.1 Please describe any statutes that are commonly used in Serbia to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

o Fraud and Misrepresentation in connection with Sales of Securities

There is no specific crime of fraud and misrepresentation in connection with the sale of securities. However, in this case the general rules on fraud under the Criminal Code (Official Gazette of the Republic of Serbia, no. 111/09) (*Krivični zakonik*) (the "CC") would apply, namely whoever with intent to acquire unlawful material gain for himself or another by false representation or concealment of facts deceives another or maintains such deception and thus induces such person to act detrimentally to his or another's property, shall be held liable.

As stated above, the requisite *mens rea* state is intent.

o Accounting Fraud

The specific crime of accounting fraud is not prescribed for under Serbian legislation. However, this crime would be classed as common fraud, meaning that the general rules on fraud would apply.

o Insider Trading

Holders of non-public sensitive information have a duty not to disclose such information to third persons. In case a person discloses such information with **intent** to make a material gain or to cause detriment to another, they shall be held accountable, pursuant to the newly enacted Capital Markets Act (Official Gazette of the Republic of Serbia, no. 31/11) (*Zakon o tržištu kapitala*).

o Embezzlement

Embezzlement is the unlawful gain of movables entrusted to a person who holds an official position in a government or in a company.

The requisite *mens rea* state is intent.

o Bribery of Government Officials

There is no specific crime of bribery of government officials. However, the CC contains certain provisions related to public sector bribery. The offence of bribery and related offences are stipulated in the following articles: (i) Giving Bribes (Article 368); and (ii) Soliciting and Accepting Bribes (Article 367).

All of the offences dealt with below require the intention of the offender (*dolus directus* or *dolus eventualis*) in order to be considered as such.

o Soliciting and Accepting Bribes

Article 367 prohibits officials from directly or indirectly soliciting or accepting gifts or other benefits, or promises of gifts or other benefits, for themselves or others in return for the performance or the omission to perform an official act, which are contrary to their duties. Soliciting and accepting bribes in return for the performance or the omission to perform an official act which forms part of their duties are also sanctioned.

Furthermore, a criminal offence is also considered to have occurred if bribes were solicited or accepted after the performance or the omission to perform an official duty. The highest punishment (up to fifteen years' imprisonment) is prescribed if the soliciting and accepting of bribes occurs in respect of uncovering a criminal offence, investigating or conducting criminal proceedings, or pronouncing or enforcing a criminal sanction.

The CC does not regulate as a separate offence the soliciting and accepting of bribes in the private sector or by a foreign official. Instead, it extends the application of Article 367 to foreign officials and officers-in-charge as possible offenders. The definition of a foreign official includes members of the legislative, executive and judicial bodies of a foreign country, officials or employees of international organisations and bodies, and judges and other officials of international courts. The term officer-in-charge includes owners of companies or other commercial entities, or employees in a company, establishment or other entity who has been charged, based on his function, invested assets or authorities, with specific tasks concerning the management of assets, production or other activity, or supervision thereof, or has been effectively charged with carrying out specific tasks.

■ Giving bribes

Pursuant to Article 368, bribery is defined as the making, offering or promising of a gift or other benefit to an official or other person in return for the official performing an official act within his authority that he is prohibited from performing, or failing to perform an official act that he is obliged to perform, or acting as

intermediary in such bribing of an official. The offence is also considered to have occurred where a bribe was given in return for the performance or omission to perform an official act in accordance with their duties. Using the same legislative technique as with passive bribery, the law provides that the same criminal offence also exists if the bribe is given to a foreign official or an officer-in-charge of a company, institution or other entity.

The CC provides that an offender can be exempted from punishment if he reports the offence prior to becoming aware that it had been uncovered.

■ Criminal anti-competition

Abuse of dominant position

If a person in-charge in a company or a company itself abuses a dominant position or by entering into monopolistic agreements causes disruption to the market and therefore brings one entity into a more favourable position in relation to others and acquires a material gain or causes damage to another business entity, they shall be held accountable.

It should be noted that abuse of a dominant position is a factual question and cannot be determined by a criminal court. Taking this into account, the relevant competition authority must first determine if there was an abuse of dominant position on the relevant market, by taking all relevant factors thereof.

Furthermore, this particular crime can be prosecuted only in cases where the Competition Commission previously found that the perpetrator abused a dominant position and this finding has been confirmed by the Administrative Court. There is a public debate in progress centred around the fact that the CA is not aligned with the provisions of the CC.

o Tax crimes

Tax crimes are covered both in the CC and the Tax Procedure and Administration Act (Official Gazette of Republic of Serbia, no. 53/2010, 101/2011, 2/2012) (*Zakon o poreskom postupku i poreskoj administraciji*), but they all include in some form or another tax evasion or the **intent** to conceal a certain significant fact that could be important in determining one's tax obligation, for the purposes of avoiding tax.

o Government-contracting fraud

The specific crime of government-contracting fraud is not prescribed for under Serbian legislation. However, the general rules on fraud would apply. In addition, if the fraud is connected to government officials, this would certainly be seen by the court as an aggravating circumstance.

o Environmental crimes

For breach of provisions of the Law on Environmental Protection (Official Gazette of Republic of Serbia no. 135/2004, 36/2009, 36/2009, 72/2009 and 43/2011) (*Zakon o zaštiti životne sredine*), both a company and individuals can incur liability. Apart from this civil liability which includes fines, a form of criminal liability can fall upon businesses and private persons. The CC prescribes numerous environmental crimes and sanctions for not respecting environmental laws and/or damaging the environment, can vary from fines to imprisonment for up to 8 years, depending on the severity of the crime.

o Campaign-finance/election law

In accordance with the Law on Financing of Political Parties, both private individuals and local companies are permitted to finance and make contributions to political parties, but a political party may not accept contributions from, for example, foreign companies and foreigners. It is important to note that the legal responsibility lies with the political party if it accepts contributions contrary to the provisions of the law, not the companies or individuals making

contributions. Nevertheless, in accordance with CC, it is a crime to prevent candidates from appearing at the elections, making contributions so as to discourage others from voting or influencing them to vote in a certain way, and others. Sanctions range from fines to a 5-year prison sentence, depending on the type of crime.

o Any other crime of particular interest in Serbia

Trading in influence

Article 366 of the CC sanctions both sides in the “trading”. The offence includes acts by persons (including foreign officials) who solicit or accept a reward or other benefit for themselves or others, directly or through third persons, in return for using their official or social position or actual or perceived influence to intercede in the performance or failure to perform an official act. Trading in influence to intercede in the performance or failure to perform an official act contrary to an official’s duties constitutes an offence even if no reward or other benefit has been received by the offender; however, a higher punishment is prescribed if such benefit is solicited or accepted. Furthermore, a person offering or giving a reward or other benefit to another for trading in influence is also considered a perpetrator of the offence.

Unlawful collection and payment

According to Article 362 of the CC, unlawful collection and payment are defined as acts by an official who collects an amount from a person who is not obliged to pay such amount, or charges a person more than such person is obliged to pay, or who, when paying or handing over items to another, fails to pay, pays less or fails to hand over, or hands over less than the amount/quantity owed.

3.2 Is there liability for inchoate crimes in Serbia? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

Yes, a person can be held liable if he/she commences a premeditated crime, but does not complete it, if such crime is punishable by a term of imprisonment of five years or more, or in cases when the law explicitly provides for punishment of the attempt.

However, if the person voluntarily abandoned the *actus reus*, he/she may be remitted from punishment.

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee’s conduct be imputed to the entity?

Yes, (i) if a person in-charge, acting within their authority, culpably committed a criminal offence with the intention to obtain benefits for the company, or (ii) if a person acting under the control or supervision of the person in-charge was enabled to commit a criminal offence due to a lack of supervision or control of the decision-maker.

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime?

The Serbian system of corporate criminal liability is multi-directional and fault-based. If the persons in-charge of a company are liable, then the entity will be liable as well. In addition, both the company and the persons in charge can be prosecuted. However, conviction of the person-in-charge is not necessary for conviction of the legal entity.

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

Generally, the authorities prosecute both within the same procedure.

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

The statute of limitations period starts when *actus reus* is completed. The period itself is linked to the sentence prescribed for each crime.

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

No. If the absolute limitations period (please see below) has expired, the crime cannot be prosecuted.

5.3 Can the limitations period be tolled? If so, how?

The limitation period can be tolled by every act of the prosecuting authority; however, there is a so-called absolute limitation period, which occurs after double time of the limitation period prescribed for that crime has expired. After the absolute period, no prosecution is possible, regardless of the tolling.

6 Initiation of Investigations

6.1 How are investigations initiated? Are there any rules or guidelines governing the government’s initiation of any investigation? If so, please describe them.

Investigations into minor criminal offences must be initiated by the aggrieved party i.e. the Public Prosecutor does not prosecute minor criminal offences.

On the other hand, the Public Prosecutor has a duty to initiate an investigation into all other crimes i.e. those not deemed to be minor as soon as he/she is in possession of sufficient information concerning such crime.

6.2 Do the criminal authorities have formal and/or informal mechanisms for cooperating with foreign prosecutors? Do they cooperate with foreign prosecutors?

Yes, through numerous conventions of the Council of Europe. However, the system is not as efficient as the one derived from the former Third-Pillar of the EU, relating to judicial cooperation in criminal matters.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

The Public Prosecutor or the police can request that a person voluntarily provides all available information related to the crime.

If the person is a suspect, then he/she must cooperate.

There is a general obligation under CPA to hand in every object that could serve as evidence in the procedure, which means that the police can collect evidence at the offices of the company, if there is probable cause that such would serve as evidence in the criminal proceedings.

Under the new CPA, the Public Prosecutor is responsible for carrying out the investigation (instead of Investigative Judge).

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

The provisions of the new CPA apply to the CCLA, unless otherwise specified by the latter law. Therefore, it could be inferred that a company under investigation should produce documents to the government which might serve as evidence in the criminal proceedings.

The same goes for the dawn raid of a company. The company must cooperate and allow a search, provided that there is probable cause that a search will lead to evidence of a criminal act or other objects significant to the investigation.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does Serbia recognise any privileges protecting documents prepared by attorneys or communications with attorneys? Do Serbia's labour laws protect personal documents of employees, even if located in company files?

In principle, any communication that could fall into attorney-client privilege cannot be used as evidence in the criminal proceeding.

Personal data of the employees are protected from unauthorised access by third parties, provided that such access is related to labour rights and obligations. Therefore, if an employee is under criminal investigation, he/she could not rely on the foregoing provision of the Labour Act (Official Gazette of the Republic of Serbia, no. 54/09) (*Zakon o radu*).

7.4 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

A similar procedure would apply as in the case of the company. Please see the answer to question 7.2 above.

7.5 Under what circumstances can the government demand that a third person produce documents to the government, or raid the home or office of a third person and seize documents?

Idem.

Questioning of Individuals:

7.6 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

If a person is suspected of having committed a criminal act, he/she may be questioned in relation to such. The usual forum is in a police station, or court.

7.7 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

Idem.

7.8 What protections can a person being questioned by the government assert? Is there a right to refuse to answer the government's questions? Is there a right to be represented by an attorney during questioning?

All protections guaranteed by Article 6 of the European Convention on Human Rights can be invoked during questioning.

Yes, for example if a person was to violate a professional secrecy undertaking or if such an answer was to lead to self-incrimination, he/she can refuse to answer certain questions.

Yes, there is a right to representation by an attorney during questioning.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

Criminal cases are initiated usually on the basis of a demand for an investigation by a government authority or some other basis listed under Art. 7 of the new CPA.

8.2 Are there any rules or guidelines governing the government's decision to charge an entity or individual with a crime? If so, please describe them.

There are no strict rules. However, there should be enough inculpatory evidence in order to indict the suspect.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution are available to dispose of criminal investigations.

Please see the answer to question 14.1.

8.4 In addition to or instead of any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies are appropriate.

In addition to the criminal disposition, the aggrieved person can

also bring a civil claim against the convicted person for damages caused as a result of the crime.

9 Burden of Proof

9.1 For each element of the business crimes identified above, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The burden of proof rests with the prosecution.

9.2 What is the standard of proof that the party with the burden must satisfy?

The court must find that all elements of the crime have been established in order to render a guilty verdict, in accordance with the principle *in dubio pro reo*, meaning that in case of doubt, the court must always render an acquittal.

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

The court is the arbiter of facts. The court must make an objective judgment of the facts presented, in determining those that act as an advantage and/or disadvantage to the accused.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

A person who induces or assists others to commit a crime will be held responsible as an accomplice.

The person must be aware that his/her actions contributed to the overall goal – the perpetration of a crime by the main perpetrator.

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

Yes, the burden of proof is on the Public Prosecutor. However, some crimes are also punishable without intent as the necessary element e.g. causing bankruptcy as provided for under the CC.

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law i.e. that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?

Yes, if the person had no duty to know and could not obtain knowledge that his/her acts constitute a criminal offence, then there is no culpability.

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts i.e. that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?

Yes, a compelling mistake exists where the person was not required or could not avoid a mistake about a particular circumstance that constitutes the criminal offence.

12 Voluntary Disclosure Obligations

12.1 If a person becomes aware that a crime has been committed, must the person report the crime to the government? Can the person be liable for failing to report the crime to the government?

In principle, a person must report a crime to the authorities if he/she has knowledge that a crime (only those crimes that can be prosecuted *ex officio*) has or is being committed.

A person having knowledge that another person has committed a crime, punishable under law by thirty to forty years' imprisonment, and deliberately fails to report it before the offence or the perpetrator are uncovered, shall be held liable and punished by imprisonment of up to two years. The sentences are higher if the perpetrator is an official or person in-charge.

13 Cooperation Provisions / Leniency

13.1 If a person voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person, can the person request leniency from the government? If so, what rules or guidelines govern the government's ability to offer leniency in exchange for voluntary disclosures or cooperation?

Yes, under the CPA, a person who is a member of a organised crime group may be granted cooperative witness status, if his/her testimony would lead to the discovery or prevention of other crimes committed by the organised crime group. Cooperative witness status may not be granted to the person purported to be the leader of the crime group.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in Serbia, and describe the favourable treatment generally received.

According to the new CPA, there is no possibility for an entity to benefit from leniency.

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed upon sentence?

In cases where crimes are punishable by a maximum prison sentence of 12 years, the Public Prosecutor and the defendant can reach an agreement and stipulate that a certain sentence will be

imposed if the defendant pleads guilty. However, this agreement is subject to revision by the trial court, which can either reject or accept the proposed agreement.

14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

Idem.

15 Elements of a Corporate Sentence

15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of sentence on the defendant? Please describe the sentencing process.

Once the court determines that a defendant is guilty, the sentence is left to the court's sole discretion and there are no set rules thereto. However, the court may take into account certain mitigating and aggravating circumstances (the consequences of the criminal act, the standing of the defendant during trial, remorse, the defendant's criminal record, if any, etc.).

15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

When imposing a sentence on a corporation, the court may also take into account certain mitigating and aggravating circumstances, such as the level of culpability of the corporation, the number of persons in-charge and especially whether the corporation has adopted any compliance programme in order to prevent the occurrence of the criminal act.

In addition, the corporation can be exempted from the punishment if it (prior to learning of the initiation of the criminal procedure against it) discovers and reports the criminal act. Furthermore, a corporation may be exempted if it voluntarily and without delay takes necessary steps to remove harmful effects or returns unlawfully obtained property.

16 Appeals

16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

Pursuant to the new CPA, both parties are entitled to lodge an appeal, regardless of whether a guilty or non-guilty verdict is rendered.

16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

Yes, both the Public Prosecutor and the defendant can appeal and seek redress from the appellate court for errors made by the trial court. If only the defendant appeals, the principle of *reformatio in peius* will apply, meaning that neither the appellate nor the trial court in a potential new trial may increase the sentence.

16.3 What is the appellate court's standard of review?

The grounds for appeal are listed in the new CPA and relate to both factual errors and errors in law. If any of the grounds are satisfied, the appellate court will quash the judgment of the trial court and order a re-trial. Furthermore, the appellate court can also reverse the judgment and enter into its own judgment.

16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

If it upholds the appeal, the appellate court can quash the judgment and order a retrial. If there were only errors in law by the trial court, it can reverse the judgment by entering its own.

In addition, the defendant can lodge an appeal against the decision of the appellate court in a case where the appellate court reversed the acquittal of the trial court and rendered a guilty verdict. In addition, the defendant can submit a motion for a *trial de novo* and seek to remedy the errors of the trial court. The grounds for *trial de novo* are serious breaches of the procedural rights of the defendant, i.e. the judgment was based on false testimony, new evidence appears which if it had been disclosed in the earlier stages of the proceedings would have led to an acquittal, etc. Furthermore, the public prosecutor can submit a motion for the protection of legality in order to remedy the errors of both the appellate and trial court.



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Moravčević Vojnović Zdravković in cooperation with Schoenherr has been active on the Serbian market since 2001. The firm's practice is client-orientated, with specialised practice groups that provide industry-focused services to meet the demand of a competitive, developing and rapidly changing marketplace.

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